

ETUC position on the draft Transparent and Predictable Working Conditions Directive

Adopted at the Executive Committee Meeting of 7-8 March 2018

Introduction

The proposal for a Directive on Transparent and Predictable Working Conditions in the European Union stems from the commitments in the European Pillar of Social Rights and the revision of the current Written Statement Directive. The Written Statement Directive has existed since 1991 and gives certain 'employees' starting a new job the right to be notified in writing of the essential aspects of their employment relationship. When adopted the new Directive on Transparent and Predictable Working Conditions will replace the Written Statement Directive.

The proposal was published by the European Commission on the 20/12/2017 following two stages of formal consultation with the European Social Partners. The ETUC took position in both stages of the consultation, those positions remain valid.

General assessment

The ETUC welcomes the updating of the Written Statement Directive and the overall objective to give effect to the rights in the European Pillar of Social Rights by bringing forward legislation to make the rights real for all workers.

When adopted the Directive will provide important protection especially for vulnerable workers in precarious and atypical working relationships. But the ETUC is of the opinion that the text needs to be significantly amended in order to actually achieve those aims. There are numerous and obvious loopholes that if left unamended will allow employers to evade their obligations and leave workers without the much-needed protection.

The ETUC is positive about broadening the scope of protection from „employee” to „worker” but we are seeking amendments to protect the situation in Member States that have a better definition than that proposed in the draft Directive and to ensure the Directive will be 'future proof'.

It is particularly welcome that the written document will, in the future, need to be provided from day one, the current Directive only requires employers to provide it after two months although there is a strong argument that it should be provided at the start of the employment relationship, i.e. before the worker begins work.

The prohibition and limitation of certain unfair terms such as charging workers for their training, excessive probation periods and unfair restrictions on taking up other employment is a welcome addition to the Directive.

The protection of workplace trade union reps who represent workers seeking to use their rights under the Directive is essential and the draft provisions while welcome, are in need of some amendment to secure this much needed protection.

The ETUC has concerns that the proposals as currently drafted are not robust enough to give necessary protection to workers with precarious and atypical working arrangements, for example as 0hour workers, platform workers and self-employed workers. We are particularly concerned about the failure to ban zero-hour practices or provide a guaranteed pathway through which workers can convert their insecure contracts into another form of employment.

The ETUC welcomes the inclusion in the draft of a non-regression clause as well as the protection of collective agreements and the autonomy of social partners.

The ETUC overall analysis is that the draft Directive is valuable and that when amended will provide a significant improvement for workers throughout the EU. We set out more detailed assessment and areas for amendment below.

Detailed assessment

Purpose and scope of the Directive Article 1

The purpose of the Directive as set out for the moment is twofold: promotion of more secure and predictable employment and ensuring labour market adaptability. For the ETUC the only purpose of the Directive is protection of the worker it is not an instrument ensuring flexibility of the worker.

The ETUC does not support the inclusion of any exceptions in the Directive, as the scope should be the broadest possible. The exception provided for employment relationships equal or less than 8 hours a month should be deleted.

The other exception relating to work performed in households is very unclear, if this is covering domestic work, as set out in ILO Convention 189, it should be deleted, as all Member States should ratify and be in conformity with the ILO Convention.

For sake of legal clarity, where Member States provide that several persons can carry obligations as an employer, then it is essential to ensure joint and several liability of the employers in the Directive.

For the ETUC it goes without saying that this Directive applies in the private and the public sector, but it may be helpful to state that in the Directive to avoid any confusion.

The situation for self-employed workers is left largely unresolved. Although self-employed are clearly not excluded in practice it may be very difficult to bring self-employed under the scope and the expected provisions to give a right to equal pay and treatment for self-employed workers has not been provided.

Definitions Article 2

Member States must be able to determine who falls into the scope of “worker” but this must be interpreted in the light of the purpose of the Directive, which is to provide protection for the widest categories of workers and in particular the most vulnerable workers. The CJEU has highlighted (see for example Case C-393/10, O’Brien) that Member States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.

The ETUC will furthermore lobby for the deletion of the certain exemptions for “small enterprise” and “medium-sized enterprise” in the definitions as we consider it not justified treating workers differently on the basis of the size of the enterprise they are working in.

Obligation to provide information Article 3

It needs to be ensured that the list established in Article 3 on the information requirements is an open list, this is the case in the current Directive. Otherwise there is danger of future interpretations that prohibit Member States from going beyond the requirements set out in the Directive.

In the information package the provision concerning remuneration needs amending in order to ensure that all kinds of payments are clearly set out in the written document.

An additional amendment is needed concerning the work schedule/reference hours in order to ensure that the work schedule has some limits and cannot stretch over 7 days a week and 24 hours a day and provide for rest and break periods.

Just as importantly the Directive must make the hours that are worked over the amount of guaranteed hours, qualify for a premium rate. This in order to decrease the benefit to employers in understating hours to the detriment to workers and to ensure that the working hours will be properly stated in a realistic manner from the beginning.

Advanced notice to be given to the worker concerning its working hours shall be "reasonable". The meaning of "reasonable" should be established by the social partners at the appropriate level. It needs to be avoided, that employers can claim to comply with the Directive when they give information at short notice when greater predictability is – or should have been - available.

Some of the existing information requirements have been modified, for example the obligation to give information on the normal working week has been changed into standard working week; as well as the fact that the draft text is speaking about "length of period of notice" should the employment relationship be terminated in singular instead of plural. This would put the notice period of the worker and the employer at the same length. The ETUC is seeking to have key information rights in the original wording of the Directive returned.

Timing and means of information Article 4

The information as provided to the worker shall at the same moment in time be provided to the responsible social protection authorities and the labour inspector should have easy access to the written document.

The templates should be developed by the Member States, but the Directive should require this to be done in consultation with the social partners. In some Member States only generally applicable collective agreements are public. The condition that collective agreements should be made available in a clear, transparent, comprehensive and easily accessible way must be without prejudice to national social partners autonomy, in particular regarding how collective agreements are concluded and formulated.

Additional information for posted workers Article 6

The link with the Directive 96/71/EC is welcome, but paragraphs 3 and 4 need deletion. The notification of the posted worker of the official national website is not sufficient; the posted worker needs to be informed about the applicable rules by the employer in the posted workers mother tongue.

Probation period Article 7

The ETUC is concerned that this article is badly worded. Probation period can mean different things in different Member States. It should at least be ensured that a probation period is only possible in the case of open-ended contracts; any dismissal must be justified, and the purpose of the probation period taken into account.

Employment in parallel Article 8

The idea to ensure that employers cannot prohibit workers from taking up employment with another employer is welcome especially having platform work in mind. It should nevertheless be included in the text that the open-ended contract is the norm. Paragraph 2 should be deleted.

Predictability of work Article 9

The ETUC demands that the prohibition of zero-hour contracts is included in the text.

The article on predictability needs to ensure that in case a worker has been given notice for work and comes to work but is not provided with work or all the work announced, that he/she is paid for the work as announced. Furthermore, employers should be required to pay a premium for hours above the guaranteed hours, as set out above. A further crucial point is that after three months the actual hours worked shall become the guaranteed hours for the worker.

Transition to another form of employment Article 10

It needs to be ensured that this Article sets out a right to convert into a more secure type of contract, if so desired by the worker. The employer needs to be obliged to genuinely consider the conversion and permitted to refuse only if based on certain and limited objective business needs. Should the employer not reply to the worker the conversion should be presumed to be accepted.

Training Article 11

The addition of a prohibition on employers charging workers for their training is a very important one, but it needs some amendment to provide that the worker remains entitled to remuneration, as if he/she would have been working and that the training shall take place during working hours. It would be desirable to prevent employers from making other unfair deductions such as for uniforms and in respect of online platforms that charge the worker a percentage of their pay, this type of practice is already unlawful under the Agency Work Directive.

Prohibition of discrimination

The ETUC is calling for the inclusion of a provision to prohibit discrimination in pay and terms and conditions based on the employment status.

Collective agreement Article 12

The ETUC is concerned about the way this provision is worded. Protecting collective agreements is essential, but the provision is so badly worded that it may in fact do the opposite. It needs to be amended to protect collective agreements from interference. There are a number of ways in which interference can become a problem depending on the level at which collective bargaining takes place and the direction that is provided in the Directive for the CJEU. The Directive should not prejudice the right of autonomous national social partners to conclude, at the appropriate level, agreements adapting and/or complementing the provisions of the Directive. The autonomy of national social partners, and the contents of such partners' collective agreements should also be protected.

Compliance Article 13

Article 13 provides that provisions contrary to this Directive in individual or collective agreements, internal rules of undertakings, or any other arrangements are null and void and amended in order to bring them at least into line with the provisions of this Directive. This article needs to be amended to protect and bring it in line with Article 12 and respect for EU Charter Rights.

Legal presumption Article 14

The legal presumption is crucial to the ETUC it cannot be optional to the Member States.

Protection from dismissal Article 15

The ETUC supports the idea of worker protection from dismissal but the protection needs to be broadened to other detriments and less favourable treatment. Furthermore, an amendment is needed to introduce the right to reinstatement and compensation and the legal consequence that dismissals on the ground that workers exercised the rights provided for in the Directive are null and void.

Protection against adverse treatment or consequences Article 16

We are also seeking amendment to ensure that the protection against adverse treatment when exercising the rights provided in the Directive explicitly includes workplace trade union representatives.

More favourable provisions Article 19

The non-regression clause should be more precise and ensure that the process of implementation of the Directive and areas regulated by this Directive are covered.

ETUC action

Since the beginning of the year the ETUC has engaged in a major lobbying of all Permanent Representations to the EU on the European Pillar of Social Rights and specifically the three legislative initiatives currently on the table (Posting, Work life balance and Working Conditions). The ETUC will keep up the dialogue with the Member States while the Working Conditions Directive is discussed in Council. A general approach of the Council is foreseen by the Bulgarian presidency for June.

The European Parliament does not yet have a timetable for discussion of the draft. The rapporteur is Enrique Calvet Chambon from ALDE and the shadow rapporteur from S&D is Javi Lopez. The ETUC will be extremely active towards the Rapporteur and the MEPs in order to achieve our amendments and ensure that the Directive meets the needs of working people.

The trade unions success on amending this Directive will depend on our joint lobbying towards the Member States and the MEPs based on this position and on more detailed amendments prepared by the ETUC.

Ends.