HOPE Position Paper

on the European Commission proposal for a directive on transparent and predictable working conditions in the European Union

June 2018

European Hospital & Healthcare Federation

On 21 December 2017, the European Commission published a proposal for a Directive on transparent and predictable working conditions in the European Union (COM(2017) 797 final).

The proposal follows an evaluation of the Directive 91/533/ECC the so called "Written Statement Directive", that took part within the Commission's Regulatory Fitness and Performance Programme (REFIT). The purpose of REFIT is "*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*".

Considering the "world of work has evolved significantly" since the adoption of the Written Statement Directive, the European Commission proposes this new directive.

The legal basis in the Treaty of the Functioning of the European Union (TFEU) is :

- Article 153(1)(b) "*With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (…) (b) working condition*";

- and 153(2)(b) 2. "*To this end, the European Parliament and the Council: (…) (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings*."

To summarize, the proposal for a Directive is proposing minimum rights which are applied to working conditions for all employees regardless of the form of employment.

HOPE consider inappropriate to introduce in the EU legislation those minimum rights which would apply to working conditions for all employees regardless of the form of employment.

The EU has the legal capacity to revise the Written Statement Directive, but the present proposal completely changes the character of the existing directive.

The proposal contravenes the principles of subsidiarity and proportionality.

It goes not only much beyond the scope of the REFIT evaluation, but it is also going against the purpose of REFIT. As a paradox it goes against the purpose of the directive to create "transparent and predictable working conditions".

The proposal will create unnecessary new costs for hospitals and healthcare services: it would entail a considerable administrative and practical burden for hospital and healthcare services employers.

The proposals concerning working hours and overtime would have serious consequences for vulnerable organisations and entail a tangibly reduced flexibility for employers.

It also creates legal uncertainty. The proposed definitions of who shall be considered an employee, employer and party to the employment contract are confusing and lead to a number of legal issues. They can be presumed controversial. The terms employee and employer be primarily regulated on a national level.

More generally, it jeopardizes the labour market model working with collective agreement regulation and the subsequent balancing of interests with regard to the terms.

The proposal interferes with existing collective agreement regulation with regard to working conditions as well as working hours and the organisation thereof, which in itself entails a lack of respect for the parties' responsibility for working conditions and wage determination.

HOPE even wonders whether the parts of the proposed directive concerning minimum requirements for terms of employment, collective agreements and horizontal provisions on compliance (Articles 7-13) do not contravene International Labour Organisation's conventions on freedom of association and the right to collective bargaining.

As a rule, the European Commission should avoid regulating on issues that are best addressed by national law or collective agreements closer to employers and workers' realities. The European Commission should always consider first if adaptations to the legal framework can be made more efficiently at national level.

The revised directive should leave it to Member States to define the term "worker/employee". Labour market practices differ between countries and the national definitions have been adapted over years in law, collective agreements and jurisprudence. Any EU definition would be less agile and lead to legal uncertainty.

Issues such as probation periods, work scheduling, parallel employment and training provision, are issues best dealt at lower levels, including in collective agreements and national law.

In order for the directive to fully respect the role of the social partners, it should be made clear that existing collective agreements can continue to remain in force and will not need to be renegotiated. The directive should not introduce limits for the social partners. They should be free to agree how best to balance the needs of the companies and employees they represent.

COMMENTS BY ARTICLE

Chapter I – General provisions

Article 1 – Scope

The proposal for a Directive should not establish minimum standards for rights for each employee in the Union in the manner proposed (point 2).

Opportunities to decide on exemptions from the directive's scope are overly limited.

Paragraph 3

"Member States may decide not to apply the obligations in this Directive to workers who have an employment relationship equal to or less than 8 hours in total in a reference period of one month. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that 8-hour period."

Paragraph 4

"Paragraph 3 shall not apply to an employment relationship where no guaranteed amount of paid work is predetermined before the employment starts."

The Commission's limitation of the existing option in Article 1(2)(a) for the exception of *"employment relationships not exceeding one month or if weekly working hours do not exceed 8 hours or for occasional work and / or work of special character"* raises concerns regarding the use of casual workers and on-call workers.

Casual workers and on-call workers falling within the abovementioned article 1(2)(a) have until not been covered by the scope of the directive, as they normally will be employed for less than one month at a time. Casual workers and on-call workers are subject to regional or other agreements, but due to their loose employment, there has not yet been an obligation to draw up a certificate of employment for this group. Casual workers and on-call workers are considered to be employed when they start a shift and as resigned when the shift ends (e.g. after a 7-hour working day). In this context, it will be difficult for the employers to gather the necessary information and draw up a certificate of employment that complies with the provisions of the proposed directive. It will be associated with a large administrative burden.

Casual workers and on-call workers provide the flexibility needed to deliver satisfactory welfare tasks to the citizens, especially in the health care sector. Citizens are dependent on the stability of the services provided and there is therefore a need to use staff with a looser connection in the event of illness and other acute and unpredictable situations.

HOPE therefore considers that there still is a need for exemption, which ensures the flexibility of the regional employers in using casual workers and on-call workers without imposing a disproportionate administrative burden.

Article 2 – Definitions

Paragraph 1(a): "'Worker' means a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration; "

HOPE underlines the inappropriateness of introducing the definitions of employee and employer in order to define employment relationships, etc., as proposed in Article 2.

The proposed definitions referred to would change the existing definitions of these terms, which play an important role within labour law as they define the scope of labour legislation. In these aspects, the term employee has been primarily defined on a national level.

The proposed definitions are unclear; almost confusing, and lead to a number of legal issues which can be presumed controversial. It is unclear for example how "direction" should be understood. HOPE considers inappropriate to raise these matters/definitions on a Community law level.

Labour law is not the only affected by the distinctions between employee, contractor and self-employed and definitions of employer and employment relationships. Other legal areas such as social insurance and tax law, which are the Member States' areas of responsibility, are also affected.

Chapter II - Information on the employment relationship – Articles 3-6

The initiative should be limited to an overview of the part of the current Written Statement Directive which applies to chapter II. In addition, there is no need for a rights directive concerning employment contracts and working conditions which supersede national law.

Article 3 – Obligation to provide information

Paragraph 2(g): *"The information referred to in paragraph 1 shall include: g) any training entitlement provided by the employer"*

The wording of this provision should be clarified in accordance with the European Commission's comments on the proposal and Article 11 of the proposed directive on training. Accordingly, it should be stated that only those cases where employers are "*required under EU / national legislation or relevant collective agreements"* to provide the employee with an education.

Paragraph 2(l) : *"The information referred to in paragraph 1 shall include:*

l) if the work schedule is entirely or mostly variable, the principle that the work schedule is variable, the amount of guaranteed paid hours, the remuneration of work performed in addition to the guaranteed hours and, if the work schedule is entirely or mostly determined, by the employer:
(i) the reference hours and days within which the worker may be required to work;
(ii) the minimum advance notice the worker shall receive before the start of a work assignment"

In several Member states this would be stated in a collective agreement and working time agreement, the regional employers should be able to refer only to the agreement.

Chapter III Minimum requirements relating to working conditions

HOPE considers that the matters regulated in Articles 7 to 11 are not of EU competence but primarily national competence.

It is not appropriate, or even possible, to implement at EU level in-depth regulation of the proposal due to the various systems, traditions and conditions prevailing between the Member States.

Article 7 Maximum duration of any probationary period

The consequences for existing collective agreements are very extensive.

Article 8 - Employment in parallel

Article 9 – Minimum predictability of work

The whole article 9 provides for concern.

"Member States shall ensure that where a worker's work schedule is entirely or mostly variable and entirely or mostly determined by the employer, the worker may be required to work by the employer only:
(a) if work takes place within predetermined reference hours and reference days, established in writing at the start of the employment relationship, in accordance with Article 3(2)(l)(i), and
(b) if the worker is informed by their employer of a work assignment a reasonable period in advance, in accordance with Article 3(2)(l)(ii)."

It is unclear what the Commission and the European Court of Justice will consider for a "reasonable" period. The understanding and case-law for this varies between the Member states. HOPE is worried that an EU pre-interpretation of a "reasonable" period may be inconsistent with the provisions in the collective agreements in individual Member states. A more precise definition of what is a reasonable period is also an intervention in the employer´s right to direct and allocate work , where notification rules are not regulated in a collective agreement.

Article 10 – Transition in another form of employment

There are already adequate regulations concerning this in several Member states.. They would need to be amended based on the proposal for the directive.

Article 11 – Training

"Member States shall ensure that where employers are required by Union or national legislation or relevant collective agreements to provide training to workers to carry out the work for which they are employed, such training shall be provided cost-free to the worker."

This article directly interferes with existing collective agreements. HOPE considers that this matter be handled on a national level, as it is linked to the education system, financing of studies, legislation on leave and matters of conditions. HOPE also sees considerable new costs for employers with a right to paid training being established in an EU directive.

This provision represents a new minimum right. Questions about training in some countries are regulated by the social partners. Whether an employer should pay the training should according to HOPE not be regulated by a directive at EU level.

It is very important that it is clear that: 1) what type of training is involved, this only including training which the employer is obliged to offer and thus not training which is individually agreed on with the employee, as well as 2) what or "free" implies.

Chapter IV - Collective agreements

Article 12- Collective agreements

HOPE considers that the matters in Articles 12- are not EU competence but primarily national competence.

"Member States may allow social partners to conclude collective agreements, in conformity with the national law or practice, which, while respecting the overall protection of workers, establish arrangements concerning the working conditions of workers which differ from those referred to in Articles 7 to 11."

Article 12 which entails, among other things, that collective agreements and all individual agreements shall be “reviewed” and declared invalid or amended if they are not deemed to be in line with the provisions of the proposed directive. Such regulation jeopardises labour market model, in which social partners handle these issues through collective agreements, and the subsequent balancing of interests with regard to the terms.

Chapter V - Horizontal provisions

Article 13 - Compliance

Articles 13, which entails, among other things, that collective agreements and all individual agreements shall be "reviewed" and declared invalid or amended if they are not deemed to be in line with the provisions of the proposed directive. Such regulation jeopardises labour market model, in which social partners handle these issues through collective agreements, and the subsequent balancing of interests with regard to the terms.

HOPE considers that the matters regulated in Article 13 are in essence not of EU competence but primarily of national competence.

Article 14 - Legal presumption and early settlement mechanism

In this article, the Commission has made an abstruse and unsuitable proposal.

Point (a) and how to deal with missing information would virtually entail rectification and damages by default. The proposal that missing information could lead to a presumption of an open-ended relationship, etc., in accordance with the article is a national matter and is not appropriate within the scope of the directive. The proposed directive regulation entails that the employment contract is characterised by contractual formalities, which would be inappropriate.

The proposal under point (b) is also alien to systems from a labour law perspective, where an authority is to regulate employment contracts and their contents.

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HOPE is the acronym of the European Hospital and Healthcare Federation, an international non-profit organisation, created in 1966. It represents national public and private hospitals and healthcare associations, national federations of local and regional authorities and national health services from 30 European countries. It covers more or less 80% of hospital activities in the European Union.

HOPE mission is to promote improvements in the health of citizens throughout Europe, high standard of hospital care and to foster efficiency with humanity in the organisation and operation of hospital and healthcare services.