

# UEAPME position on a proposal for a directive on transparent and predictable working conditions in the European Union COM (2017) 797

## Key messages

UEAPME is strongly concerned with the current proposal, which will increase SME administrative work, reduce flexibility and, at the end, jeopardise the development of new jobs.

This is especially the case with the strong formalisation of the possibility to request for changing the form of employment and the obligation for the employer to provide a justified written reply despite the introduction of some specific SME rules.

The current proposal, by creating new rights, is changing the nature and objectives of the Written Statement Directive, which was focusing on information on working conditions.

UEAPME appreciates that the new directive does not cover self-employed, who are their own employers.

The European definition of workers, employers and employment relationship proposed by the European Commission does not respect the subsidiarity principle and therefore will make its application at national level difficult.

The compliance clause goes strongly against the subsidiarity principle and the autonomy of social partners at all levels. Such interference in national labour laws is not acceptable.

## Introduction:

The European Commission decided to replace the Written Statement directive by a new directive focusing more on transparency and predictability of working conditions for all workers except self-employed which is fully justified as they are not in a employment relationship. The European Commission proposal is placed in the context of the European Pillar of Social Rights, justifying the need to update and modernise existing rules as adopted in 1991 in the Written Statement Directive.

## Comments on the new standards proposed for all workers

UEAPME agrees with the need to modernise the legislative framework in order to take into account the evolution in the world of work during the last 25 years but **has serious concerns with the current legal proposal**.

The introduction of worker's rights is fully changing the nature and objective of the directive. In addition, it contradicts the REFIT approach, which is to improve the legislation, make it simpler and reduce burdens particularly for SMEs as well as to facilitate its implementation through more transparency. This is confirmed by the Impact Assessment, which shows that the financial burden will be relatively heavier for SMEs.

Furthermore, the fact that more workers will be covered by the information package and certain minimum conditions, does not guarantee better opportunities for employment. On the contrary, the increase of administrative work and the reduction of flexibility might jeopardise the development of new jobs including new forms of work by small businesses.

## **Chapter I – General provisions**

### **Article 1: purpose, subject matter and scope**

UEAPME agrees with the coverage of all workers (such as temporary agency workers, on demand workers, intermittent workers, platform workers etc.) **as long as the definition remains at national level.**

Concerning platform workers, the directive should clarify that platform work is a form of work and not a status nor a specific form of a work contract. There is a large variety of platforms, used by workers as well as by self-employed persons, who work in a fully independent manner.

**Consequently the issue of platform workers' status needs to be clarified at national level,** according to national criteria and rules.

**Self-employed using or working on platforms, should also be excluded from the scope of this directive.**

#### **Art. 1 (2)**

UEAPME is against laying down minimum rights in the framework of this directive and therefore considers it necessary to delete this article.

#### **Art. 1 (3)**

The EC foresees only one possibility for Member States to apply exemptions, for contracts not exceeding 8 hours per month. Taking into account the current proposal, UEAPME also would like that Member States and/or social partners through agreements **should be able to apply a lighter regime** for short employment relationships **not exceeding one month and/or working weeks not exceeding 8 hours**, to cover casual work and at the same time better reply to employers' needs in sectors such as HORECA, construction, tourism, etc..

## **Article 2 - Definitions**

**UEAPME disagrees with applying the European Court of Justice's definition for workers in this directive on working conditions.**

The definition of workers should remain at national level. It evolved in each Member State and is still evolving according to new developments on the labour markets. Since the national definition will continue to apply in different labour laws independent from this directive, a European definition would create a lot of confusion. The same person might be considered as worker or not according to the different national legislation. In order to prevent such possible conflicts and as the concept of worker varies in the Member States, **the national definitions should apply.**

**The European Commission rightly avoided the application of the directive to self-employed, since self-employed do not have an employment relationship with an employer.** Self-employed are bound by a B2B relationship with their contractors. However, applying the European Court of Justice's definition in this directive could interfere in the distinction at national level between "a worker" as an employee and a self-employed person.

Such a differentiation should be clear from the beginning and has to be decided on a case by case basis. The same is also valid for the definition of employers and of an employment relationship which are too vague and too broad.

The "employer" definition might end up with unattended consequences, where several people, including potential clients, could be regarded as employers without even being aware of this. This is particularly the case with the notion of being "indirectly party" of an employment relationship without any "employer authority" towards workers and this is not acceptable.

**The definitions of "worker, employer and employment relationship" should definitively refer to the national level.**

## Chapter II – Information on the employment relationship

### **Article 3 - Obligations to provide information**

The Commission proposes an extended information package which will be very burdensome for small and micro-enterprises.

#### **Art 3 (2) g**

The EC foresees that the employer will be obliged to provide information on training entitlement. According to UEAPME such information should be given only if training is part of the employment contract, in accordance with national law and/or collective agreements. **It should be clear that such an information does not create a right to training.**

#### **Art 3 (2) i**

Even if we can accept the obligation to provide information on the length of the notice period, as foreseen in the current Written Statement Directive, we reject the obligation to provide information on the method for determining such period of notice. **Such a procedure has nothing to do with information.**

#### **Art 3 (2) n**

We consider this information obligation as superfluous since social security contributions are fully part of the pay slip for all legally declared workers. It will only create additional administrative burdens for the employer in particular for small and micro-enterprises without any real benefits for workers. **Such obligation should be removed.**

#### **Art 3 (3)**

It refers to the information related to duration and conditions of probationary period, training entitlements, paid leave, notice period, remuneration, work schedule and overtime, and social security institutions, which may be governed by laws, regulations, administrative or statutory provisions or collective agreements that are accessible to the public.

In such a case, the employer should only provide a reference to the publicly available information and to add information strictly related to his/her company where the employer has a specific power to adapt working conditions.

### **Art 4 - Timing and means of information**

#### **Art 4.1**

On timing of information, **there should be no obligation of handing the information package at the latest on the first day of the employment relationship. Some flexibility should be foreseen.** Employers should be able to provide the full batch of information **within 2 weeks** after the start of work, at least for contracts of longer duration.

On the form of information, UEAPME agrees that different kinds of written documents could be used by the employer to respect his/her information obligation. Concerning written statement models or templates for employment contracts, they could indeed be useful for small and micro-enterprise to simplify the information obligations. The possibility to transmit information by digital means is a right way forward since more and more workers use digital devices.

#### **Art 4.2**

However the templates and/or statement models, referred to in article 4(2), should be **developed in close cooperation with or by business organisations, including SME organisations, as well as social partners** in order to be fully adapted to sectoral specificities and consistent with existing collective agreements.

#### **Art 4.3**

It is essential that the information on laws, regulations and administrative or statutory provisions or even collective agreements applicable to work contracts are all easily accessible, clear and **regularly updated.**

If small and micro-enterprises in particular, could not rely on such official accurate information, this new information obligation will create heavy red tape and this should be avoided.

### **Art 5 - Modification of the employment relationship**

The interaction between this article and Article 3(3) which applies to information governed by laws, regulations and administrative or statutory provisions or even collective agreements, might have huge negative consequences for employers. In fact, it means that employers will have to provide all workers with information, at the latest on the day it takes effect, any time there are changes to these sources of law. This will create massive red tape in particular for SMEs.

In order to further reduce red tape, UEAPME requests that in case of internal transfer of workers within the same Member State, which lasts shorter than 4 weeks, the obligation to provide all information according to Art. 3(3) shall not apply as foreseen in Art 6(4) for posted workers abroad.

### **Art 6 - Additional information for workers posted or sent abroad**

UEAPME considers essential to concentrate on “posted workers” as defined in the directive 96/71/CE. The possibility for Member States not to apply this clause to posted workers with less than four weeks is essential to avoid unnecessary burdens for employers for short-term period abroad.

The notion of “sent workers” is unclear and mostly refers to self-employed. There should be no ambiguity about the fact that self-employed are out of the scope of the directive and therefore **“sent workers” should be out of this directive.**

## **Chapter III - Minimum requirements relating to working conditions**

### **Art 7 – Maximum duration of any probationary period**

Art 7(2) which foresees the possibility for Member States to provide for longer than six months probationary periods is essential. UEAPME insists that such flexibility has to be maintained as regards the nature of employment but also in case of long-term illness or some types of leave.

### **Art 8 – Employment in parallel**

Art 8 (1) which provides that no worker may be prevented by his/her employer from taking up another employment is too strict. Art 8 (1) which provides that no worker may be prevented by his/her employer from taking up another employment is too strict. In case of a permanent full-time job, the fact that an employer cannot anymore prohibit two employment contracts at the same time, bears the risk of not respecting the maximum amount of allowed working time and the necessary rest time, in accordance with the working time directive. This will be of particular concern for the responsibility of employers in general and even more notably in Member States, where the working time is calculated by worker and not by contract.

If the worker can easily accept two fulltime jobs without informing his/her employer, the various obligations and responsibility of the employer towards a worker is put into question. Such a provision should be amended.

The worker should ask his/her employer for permission, or at least inform his/her employer before taking-up a job with another employer. In any case, as foreseen in Art 8(2) the employer cannot refuse without legitimate reasons such as avoiding conflicts of interest like taking-up a job with a direct competitor.

### **Art 9 - Minimum predictability of work**

Since all types of work contracts are falling under the scope of this directive, Article 9 should be broad enough and encompass employers and workers needs for flexibility and predictability. Therefore, the two clauses proposed by the European Commission have to be preserved in order to take into account different circumstances.

### **Art 10 – Transition to another form of employment**

Despite the noticeable efforts of the European Commission to introduce less strict obligations for SMEs, **UEAPME is particularly concerned with this new clause.**

Every worker can always ask for another job without creating a formal right to a more predictable and secure working conditions. In addition, the notions of “more predictable and secure” working conditions are very broad and can be interpreted in different ways.

UEAPME supports the objective of facilitating transitions from atypical employment towards more permanent contracts. **However, the excessive formalisation of such requests is not adequate nor proportionate.**

It will create considerable red tape and unnecessary administrative burdens for small and micro-companies.

**The obligation for the employer to give a justified reply in writing form within one month, possibly three months, is very burdensome for small and micro-enterprises** and does not correspond to the normal practice in such businesses. This part of the relationship between an employer and a worker, needs to be agreed at company level where the work organisation takes place.

The clause provided for in the Directives on “Part-Time Work” and “Fixed-term Contracts” based on social partners’ agreements would be more appropriate. It states “*as far as possible, employers should give consideration to requests by workers to change their work modalities or their working time should the opportunity arise*”.

It also foresees “*provision of timely information on the availability of vacancies in the company*”.

## **Chapter V – Horizontal provisions**

### **Article 13 – Compliance**

The clause contained in this article represents a clear interference in national labour law, be it within existing collective agreements or company agreements. It goes against the autonomy of social partners at all levels and does not respect the subsidiarity principle. Therefore, **UEAPME is strongly against this article and calls for its deletion.**

### **Article 14 – Legal presumption and early settlement mechanism**

This provision is disproportionate to the possible failure of the employer. Therefore, **UEAPME calls for its deletion.** The provisions contained in the current Written Statement Directive under article 8(1) are sufficient and adequate: “*Member States shall introduce into their national legal systems such measures as are necessary to enable all employees who consider themselves wronged by failure to comply with the obligations arising from the Directive to pursue their claims by judicial process after possible recourse to other competent authorities*”.

### **Article 17 – Protection from dismissal and burden of proof**

This article does not appear to be justified in this Directive. A reference to the national legislation would have been sufficient. **This article should be deleted.**

Furthermore, since it refers to the termination of a work contract, the adequate legal basis should be Art 153 (1) d of the TFEU, which relates to the protection of workers where their employment contract is terminated. If such a clause is maintained in the new directive, this legal basis would require unanimity at the Council.

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