

BUSINESSEUROPE



POSITION PAPER

Commission proposal for a Directive on transparent and predictable working conditions – BusinessEurope’s views

KEY MESSAGES

- 1 It is in the interest of companies and employees to provide clarity on the employment relationship. Policy makers should support this by modernising the written statement directive. The proposal should also encourage a dialogue between Member States and national social partners on the implementation and coverage of the directive.
- 2 Unfortunately, the Commission’s proposal disrespects the principles of subsidiarity and proportionality:
 - It introduces a number of bureaucratic elements that will create unnecessary costs and fundamental legal uncertainty for companies and employees, as well as undermine national legal structures.
 - The EU should not interfere with Member States’ definitions of the term “worker/employee”. The proposed definition of a ‘worker’ would cover people that are self-employed such as consultants or freelancers. National definitions have been adapted over the years in law, collective agreements and jurisprudence, to take into account new forms of work and changes in national labour law and social security. An EU definition would not be able to capture different situations and would be much more difficult to adapt to future developments. It would lead to more rigidity.
 - Minimum rights proposed by the Commission concern issues that are best dealt with at national, sectoral or company levels, including in collective agreements. Details of work organisation such as probation periods, working time schedules or parallel employment should not be regulated at the EU level. The proposal also fails to take into consideration the specific nature of certain sectors, such as mobile work or the road transport industry.

WHAT DOES BUSINESSEUROPE AIM FOR?

- *A targeted revision of the written statement directive, focused on modernisation and adapting the information framework in line with the principles of subsidiarity and proportionality.*
- *Ensure that the directive continues to apply to employees only and is not broadened to include self-employed people.*
- *Ensure that the sanctions are proportionate to the damage suffered by the employee and that national rules on dismissals are not undermined.*

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I. Introduction

On 21 December 2017 the Commission published a proposal for the Directive on transparent and predictable working conditions in the European Union (COM (2017) 797 final). The proposal is based on Article 153(1) (b) TFEU which provides for adoption of minimum standards at the EU level with respect to “working conditions”. The proposal follows the REFIT evaluation of the written statement directive, which the new directive is intended to replace. With this position paper BusinessEurope would like to offer views on the proposal.

II. General comments

1. The Commission has launched a revision of the written statement 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 fully supports this objective.
2. However, introducing minimum rights completely changes the character of the directive and goes much beyond the scope of the REFIT evaluation. Moreover, a number of elements of the Commission's proposal will create unnecessary new costs for companies and legal uncertainty, going against the purpose of REFIT and the purpose of the directive to create “transparent and predictable working conditions”.
3. 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. We believe issues such as probation periods, work scheduling, parallel employment and training provision, are issues best dealt with at lower levels, including in collective agreements.
4. We believe further EU legislative discussions should be focused solely on modernising the written statement directive, for example giving the possibility to employers to deliver the written statement electronically, encouraging Member States to develop model documents with social partners, as well as updating the deadline to provide information in line with national developments. The proposal should in addition encourage a dialogue between Member States and national social partners on the implementation and coverage of the directive.
5. The revised directive should, as the existing directive, 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. Self-employed should not be covered by the written statement directive as they do not have an employer.

6. Also, the Commission's assumption throughout the proposal that employees all have work schedules, either variable or not variable, needs to be corrected. The fact is that a significant part of employees in Europe do not have work schedules, in particular professionals and managers whose working time cannot be predicted.
7. The proposed minimum rights introduce restrictions that would not be limited to the targeted vulnerable groups, but would in effect have broader implications for labour markets going beyond the Commission's announced intention. The proposal therefore introduces restrictions for often high-paid, high-skilled employees and other key staff for companies, harming the competitiveness of companies.
8. The directive should not challenge the existing national rules on termination of employment. There is no reason why all employees would need special protection in case of dismissal, including the change in the burden of proof. In the Commission's proposal, this protection broadly covers all rights provided in the directive, including in relation to the information employers have to provide on the main aspects of the employment relationship. The proposed burden of proof has so far been and should continue to be restricted to the protection of fundamental rights like equal treatment between women and men and vulnerable groups, including those more likely to suffer from discrimination.
9. We welcome that the Commission's proposal includes a possibility for social partners to conclude collective agreements that differ from the minimum requirements in the directive. However, 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. And the directive must 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.

III. Specific comments

Chapter I. General provisions

Scope (Article 1)

10. The Commission proposes to limit the exemptions from the application of the directive. Member States would be allowed not to apply the provisions of the directive to an employment relationship of up to 8 hours per month.
11. While BusinessEurope does not see in practice any significant gaps in coverage of the directive that could not be dealt with in a dialogue with Member States, it may indeed be possible to look into simplification of the exemptions under Article 1(3) to better align the directive with national practices across the EU. However, we assess that the Commission proposal is far too restrictive. A wider exemption is needed in order not to place a disproportionate burden on employers. This is especially important in sectors, for example hotel and restaurants, where demand varies greatly



and there is a need to adapt work supply quickly. A lot of short-term employees with a limited number of hours are used in these situations. Flexibility can have particular importance for micro and small enterprises. Therefore, short-term contracts of up to one month should in any case continue to be exempted from the scope of the directive.

Definitions (Article 2)

12. The Commission suggests to align the notion of worker to the case-law of the European Court of Justice (ECJ). It proposes that for the purpose of the application of the directive a “worker” should be defined as *a natural person who for a certain period of time performs services for and under the direction of another person in return for remuneration.*
13. BusinessEurope is strongly against introducing a broad EU definition of a “worker”, basically leaving it to the ECJ to define the application. It must remain a political decision in Member States to define in national legislation who is an employee and who is self-employed, and for the social partners to decide when it concerns collective agreements.
14. The definition used so far by the ECJ in concrete cases is broad and extensive. It fails to adequately address the complex nature of the issue of who is an employee and who is self-employed.
15. National definitions used for the purpose of the application of labour law or social security provisions are more precise. For example, in Austria, subjection to personal instructions is only one of six elements of personal dependency (in addition to integration in the company organization, compliance with regulations, control subjectivity, disciplinary responsibility and personal duty to work), which in turn is a prerequisite for the existence of an employment relationship. In Belgium, the intention of the parties has to be taken into consideration in any assessment. In Ireland, the legal tests developed over time take account of factors such as control, mutuality of obligation, level of enterprise or entrepreneurship and integration into the business. The definition proposed by the Commission fails to address many of these factors.
16. National 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 work organisation practices. National definitions are adjusted 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” forever EU definition would not be agile and therefore harmful for the creation of well-functioning labour markets and social security systems adapted to future developments.
17. The Commission states that the self-employed will not be covered by the directive. However, there is a risk that the use of the definition of a “worker” proposed by the Commission would lead to a very wide application of the directive, covering people that are in most cases classified as self-employed such as consultants or freelancers.



In the existing written statement directive, the term employee is applied, which is more accurate to use in particular in this directive, which concerns exclusively persons in an employment relationship. The term worker/working is defined in Member States, covering broader situations than employment relationships.

18. Introducing the EU definition of a “worker” would lead to legal uncertainty. Any EU definition would necessarily create clarification issues. It would trigger EU jurisprudence over the coming years, e.g. on how to interpret being “under the direction”. The interpretations developed in national case law on which companies rely could become irrelevant.
19. Moreover, while the Commission states that the impact of the EU definition of a “worker” will be limited to the application of the proposed directive, we assess that there could be wider implications on classification of work relationships in general. This is because giving someone a written statement (especially with detailed information regarding work schedules, notice period, social security payments etc.) may be seen as an indication of a subordinate work relationship and lead to classification of a person as an employee for other labour law and social security purposes.
20. The Commission also proposes to define the term “*employer*” as *one or more natural or legal person(s) who is or are directly or indirectly party to an employment relationship with a worker*. BusinessEurope is against developing such a definition. The proposal is unclear and will raise doubts in practice. For example, the notion of being “indirectly party to an employment relationship” is not known and would lead to legal uncertainty and numerous court cases. The proposed definition could thus cover the relationship between a host company and a temporary worker, which is already ruled by Directive 2008/104/EC and national regulations. It could also lead to wrongly categorise as work the subcontracting relationship between a contractor and the subcontractor when the latter’s employees are involved in service provision.
21. Having several parties to an employment relationship blurs who the responsible employer is, which is also to the detriment of the employees.

Chapter II. Information on the employment relationship

Obligation to provide information (Article 3)

22. The Commission proposes to enlarge the list of items to include information on e.g.: probationary period, training entitlement, any arrangements for overtime and its remuneration, reference hours and days when the worker may be required to work and minimum advance notice before the start of work assignment in case of variable schedules entirely or mostly determined by the employer, and social security institution(s) receiving social contributions attached to the employment relationship.
23. In principle, it is important not to multiply information obligations or to impose on employers an obligation to inform on issues for which they are not fully responsible.



24. Information about probation period is usually already included in the written statement, so this could be reflected in the revised directive as proposed in paragraph 2 (f).
25. Including information about “training entitlement” as proposed in paragraph 2(g) would not always be practicable. In many cases training is decided during the course of the employment relationship depending on the needs of the company and the employee. Therefore, providing advance information can be misleading for an employee - there may be no formal right to training, but the training will usually take place. If the proposal was maintained, it would be important to clarify that this paragraph is about the entitlements for training, if any, that the employer is required to provide under the applicable law or collective agreement.
26. Paragraph 2 (k) and (l) concerning information about work schedules as well as the linked minimum requirements in Article 8 and 9 need further consideration as it seems to assume that all employees have a work schedule. Work schedule is defined in Article 2 (d) as determining hours and days on which performance of work starts and ends. Many, in particular high skilled, high paid employees do not have a work schedule.
27. For those who have a variable work schedule, the proposed information obligations as well as the proposed new minimum requirements in terms of notice would make planning and changing the work schedule significantly more difficult and hinder the use and availability of employees. Many employers will simply not be in a position to provide particulars of the “reference hours and days within which the worker may be required to work”. This affects sectors broadly and will create even more problems for some specific sectors such as healthcare, social care, retail and hospitality.
28. Moreover, many terms used in the proposal, such as work schedules “mostly variable” or “mostly determined by the employer” are totally unclear and will lead to legal uncertainty and endless court cases. Another example is paragraph 2 where (k) includes work schedules **mostly not variable** and (l) includes work schedules **mostly variable**. This makes it difficult to decide who falls into which category.
29. The problems with defining and applying the term work schedules in an EU directive illustrates that such details are best defined and applied at Member State and social partner level. In contrast, in the existing directive the obligation is simple and practical: “the length of the employee’s normal working day or week”.
30. As for the information on the social security institution(s) receiving the social contributions attached to the employment relationship - as suggested in paragraph 2 (n) - this is usually not indicated in the written statement for good reasons. Paragraph 2 (n) should thus be deleted.
31. For example, in Finland the occupational pensions are pillar I pensions, unemployment insurance is taken up by the employee and many other parts of social security are universal. It would be ill-fitted to require employers to provide information on this.



32. Another example is Luxembourg where it will often not be feasible for companies to give advance information about social security affiliation, as the majority of employees are non-residents. Their affiliation often changes during the course of their employment if they happen to work more than 25% in their home country or in a third country e.g. due to telework or professional travel. In other cases, the employer has no control over the affiliation and may not even know that the affiliation should change. For example, when an employee who is under a part-time contract with employer A in Luxembourg, takes up another part-time employment with employer B in his country of residence the affiliation might change without employer A even knowing about it.
33. In paragraph j) the Commission proposes to add information about the “*method of payment of the remuneration to which the worker is entitled*”. Such an information remains unclear and would create legal uncertainty. It is unclear whether what is meant with “method of payment” is the way the remuneration is paid (i.e. transfer, cash, check), or that the worker should be informed about how the employer pays social contributions and declares elements of remuneration to the competent authorities.
34. Finally, the scope of Article 3.3 is not broad enough. Employers should be allowed to refer not only to laws, regulations, administrative provisions and collective agreements but also to internal company rules. Moreover, companies should be allowed to refer to these sources not only in paragraph 2 (f) to (k) and (n) but also in paragraph 2(l) concerning variable work schedules. This is because there are many collective agreements that regulate work schedules.

Timing and means of information (Article 4)

35. The Commission proposes that the information should be provided at the latest on the first day of the employment relationship. BusinessEurope believes that a deadline of 1 month, currently used in the majority of Member States, or a deadline in line with national developments seems more appropriate, as also indicated in the REFIT study. Any deadline which is shorter could lead to problems.
36. While in most cases the contract is signed before the work starts, sometimes the negotiations between an employer and employee or internal procedures take more time. In Belgium for example it is quite common in case of mobile staff to agree first on a “letter of intent” containing the most important terms and conditions, and sign a full employment contract at a later stage. In Poland, an employment contract signed at the start of employment relationships includes only the most important information, while complementary information can be delivered within 7 days.
37. In any case it should be foreseen that a “reasonable delay” is allowed in case of legitimate reasons e.g. due to sickness of the relevant HR staff, if an employee has been recruited at short notice due to urgent business needs or if negotiations are still ongoing in respect of certain terms for example during a probation period.
38. Article 4.1 explicitly allows for information to be provided in electronic form, easily accessible by the worker. BusinessEurope welcomes this provision. However it is out



of touch with future developments to detail that easily accessible means that “it can be stored and printed”. It also seems too detailed that the information has to be transmitted in the form of a document. The information could also be provided through an online portal or any other future means of communication.

39. Article 4.2 obliges Member States to develop templates and models for the written statement/employment contract and make them available for employers and workers. BusinessEurope believes that such templates could be helpful, especially for SMEs, if Member States and national social partners agree. However, it is important that such templates are developed taking into account, if need be, diverse requirements in different sectors or regions.
40. Article 4.3 obliges Member States that information governing the legal framework applicable is to be communicated by the employer to inform workers on the employment relationship. It is important to clarify that, as regards collective agreements, it is often for the social partners to communicate, not the Member States or the individual employer. And when it concerns internal company work rules this is for the company to communicate, and the information does not concern any outsider. Therefore, it would not be appropriate to include such information on online portals for Union citizens or businesses, as proposed.

Modification of employment relationship (Article 5)

41. The Commission proposes that any change in the aspects of the employment relationship referred to in Article 3(2) and to the additional information for workers posted or sent abroad in Article 6 shall be provided in the form of a document by the employer to the worker at the latest on the day it takes effect.
42. To avoid excessive administrative burdens, it should be clarified that changes resulting from modifications in applicable law, regulations and administrative provisions or collective agreements do not need to be individually communicated by the company as in many Member States this is communicated by the legislator and the social partners. This is also what applies in the existing directive.
43. Information that concerns changes made by the employer should be allowed to be provided with a “reasonable delay” in case of legitimate reasons and also collectively for example regarding changes in internal company work rules.

Additional information for workers posted and sent abroad (Article 6)

44. The posting directive 96/71/EC is currently being revised. It is unclear when the revised directive will come into force. The revised directive obliges Member States to include information on remuneration applicable to posted workers on a single national website. The notion of remuneration remains however unclear and the single national websites have not been finalised. The Commission proposal should not oblige employers to provide information which – according to the posting directive – should be provided by national authorities. Paragraph 2 (a) should thus be deleted. An obligation to provide a link to the information on a national website as provided in point 2 (b) should be sufficient.



45. Finally the scope of Article 6.3 is not broad enough. Employers should be allowed to refer not only to laws, regulations, administrative provisions and collective agreements but also to internal company rules. Moreover companies should be allowed to refer to these sources not only in paragraph 1(b) but also 1(c) benefits and 1 (d) conditions governing repatriation.

Chapter III. Minimum requirements related to working conditions

46. The proposal introduces a number of substantive minimum rights for all “workers” as defined in the directive. Article 7 provides for a maximum duration of probation period of 6 months (longer if justified). Article 8 provides that an employer cannot prohibit workers from taking up employment with other employers outside the work schedule established with that employer - any restrictions to employment in parallel have to be justified by legitimate reasons. Article 9 provides the right to predictability of work schedule - in case of variable schedules established entirely or mostly by an employer, work can only be required on indicated reference days and hours and only if “reasonable” advance notice is provided. Article 10 provides the right to the worker to request another form of work contract and the obligation for the employer to reply in writing. Article 11 provides that mandatory training necessary to carry out work should be provided free of charge to the worker.

Probation period (Article 7)

47. BusinessEurope believes it is not appropriate for the EU to interfere in the setting of probation periods in national law, collective agreements and agreements between the employer and the employee. Notwithstanding this general concern, we are of the view that the 6-month period chosen is too short even if many Member States provide for such a period. National legislation and collective agreements need to be able to change in line with changing labour markets requirements.
48. In any case, while we note that there is provision for probation periods to be extended in certain circumstances, it is unbalanced as it only says that it can be extended when it is in the interest of the worker. The employer can also have a need to see whether an employee is up to the job. This can in particular be the case for high-skilled, high-paid employees. The proposal does provide as a reason for extension “the nature of the employment”, which the Commission states in the explanatory memorandum and whereas 19 can cover managerial positions. However it has to be clear and made broader in the directive itself as a reason to extend.
49. Furthermore, there is a risk of unintended consequences for employees. Employers sometimes extend probation periods to allow employees further time to prove themselves in a position including to find out if they can fulfill the job through training or support. Restricting the probation period to 6 months in most circumstances would only serve to discourage employers from providing this additional time to employees.
50. It is also of great concern that the proposed EU rule on a maximum of 6 month probation will interfere in national unfair dismissal policies and the qualifying periods for right to protection against unfair dismissal.



Parallel employment (Article 8)

51. Many Member States have specific laws, collective agreements and practice, including at sectoral level, on legitimate restrictions to parallel employment. This can in particular concern high-skilled, high paid employees from managers to IT persons. This is particularly challenging for key personnel across these categories, i.e. those employees who are essential for the running of the company. Since they are key personnel, they often do not have a work schedule or the work schedule is very flexible. The Commission, however proposes a right to parallel employment “outside the work schedule established with the employer” which seems to assume that all have or shall have a work schedule.
52. Such a broad right for parallel employment will be harmful for the employer in particular for key personnel, as such employees cannot at the same time be available for several employers.
53. The Commission proposes that employers may restrict access to parallel employment if justified by legitimate reasons such as protection of business secrets or avoidance of conflicts of interest. Recital 20 specifies that such *Incompatibility clauses, understood as a restriction on working for specific categories of employers, may be necessary for objective reasons, such as the protection of business secrets or the avoidance of conflicts of interests*. Limiting restrictions to “working for specific categories of employers” seems to not allow necessary restrictions for key personnel in particular, no matter which other category of employer they would like to work for.
54. The Commission’s impact assessment only mentions that the proposal will allow some 90,000 – 360,000 on-demand workers to seek additional work. There is no mentioning of all the other groups affected by the proposal. Article 8 therefore seems to go much further than intended.
55. Finally Recital 20, linked to Article 8, risks interpreting the Working Time Directive 2003/88/EC. It may give the impression that the employer will be required to monitor total working time of a person (rather than working time per specific contract), also in case this person works for several employers. This would bring employers in a very difficult situation, in particular in sectors with strict working time rules and variable situations like road transport. In any case, an obligation of the employee to notify the employer must therefore be provided for.
56. There is no need for EU intervention in the area of parallel employment. On the contrary, EU provisions may interfere with well-functioning rules at national level. Article 8 should thus be deleted.
57. Furthermore, due to the specific character of road transport (uneven distribution of orders, unpredictability of road conditions/traffic situation, weather situation, unpredictability of loading and unloading times, etc.), it is very often not possible to specify and plan the work schedule in advance.



Minimum predictability of work (Article 9)

58. 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 well regulated through collective agreements or legislation. 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.
59. Paragraph 9a) specifies that work may be required only if it takes place within reference hours and days specified "at the start of the employment relationship". Such a strict provision does not leave the necessary space for changes to the reference hours and days to occur during the employment relationship. The employee's obligation to work only in announced reference hours and days would make planning and changing the work schedule difficult and hinder the use and availability of employees. Such changes may be necessary and beneficial for an employee (e.g. a student whose class schedule changes in a new semester) or a company (e.g. when the demand pattern changes).
60. Article 9 includes employment relationships where the workers' schedule is entirely variable or entirely decided by the employer. Therefore, as for Article 8 it seems that the proposal will also affect high-paid key personnel for companies, who since they are key for the running of the company often have no time schedule. If so, it would seriously affect the competitiveness of companies.
61. Furthermore, in the Commission's explanatory memorandum it is stated that article 9 applies "if a worker has a variable work schedule where the employer, rather than the worker, determines the timing of the assignments". The only restriction to the application of the provision is "where the employer sets a task to be achieved, but the worker is free to determine the time schedule within which he or she performs a task". Many if not most key, often high-paid employees, for whom the employer or a customer determines the timing of the assignment, seem to be included under article 9.

Transition to another form of employment (Article 10)

62. 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.
63. The Commission proposal can cause significant additional administrative burden for employers and it may encourage excessive claims by employees in particular when it would provide them with protection from dismissal and a change of the burden of proof (Article 17 in particular). While on paper it may often seem that plenty of working hours are available within the company, these may accumulate on certain days



and/or hours, meaning that no extra hours can be offered to a single person. The employer must have the possibility to make part-time contracts / on-call contracts when needed.

64. Moreover, the Commission states that workers “may request a form of employment with more predictable and secure working conditions”. In recital 25 it states “Where employers have the possibility to offer full-time or open-ended labour contracts to workers in non-standard forms of employment, a transition to more secure forms of employment should be promoted.” To indirectly describe fixed-term contracts and part-time work as unpredictable and insecure is not acceptable and misleading. The EU directives/agreements on part-time work and on fixed-term work have provisions to prevent abuse and discrimination. The directives recognise that fixed-term and part-time work can respond to the needs of employers and employees and obstacles for those forms of work should be eliminated.
65. However, in some Member States overprotection of open-ended contracts may mean that fixed-term work is the only option for people who want to enter the labour market. That however is not the situation in Member States that apply the flexicurity principles. Therefore to promote transitions from fixed-term to open-ended positions what is important is 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.
66. Finally the Commission’s proposal goes much further than what applies according to Directive 1999/70/EC concerning the framework agreement on fixed term work concluded by ETUC, BusinessEurope and CEEP and the Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by BusinessEurope, CEEP and ETUC. And Directive 2008/104/EC on temporary agency work. These directives all include provisions concerning request for transition to another form of employment. Also for that reason the Commission’s proposal is not acceptable.

Training (Article 11)

67. First of all it is unclear how article 11 should be interpreted, e.g. what kind of training is meant in this article and what the content of the term "cost free" is.
68. In some countries there are collective agreements foreseeing that the costs of certain training are shared between the employer and employee. Furthermore, some training is intended e.g. for employee representatives and is organised and financed by the trade unions. This should not be prevented in the directive.
69. If the employer has to bear the costs of mandatory training, the directive should explicitly allow for the introduction of a “reimbursement clause” in case the employee resigns at an early stage after the training. This is important especially in professions where training is very expensive.



Chapter IV. Collective agreements

Collective agreements (Article 12)

70. The Commission proposes that Member States may allow social partners to conclude collective agreements which - while respecting the overall protection of workers - establish arrangements concerning the working conditions which differ from those provided in Chapter III of the directive. In principle, we welcome Article 12. However, it must be made clear that the proposed article fully respects the role of the social partners, as this is also a condition to deliver on the European Pillar of Social Rights, as the Commission intends with this proposal.
71. For example, the condition that social partner agreements must respect “the overall protection of workers” in the directive is quite ambiguous.
72. It is also ambiguous when it is stated in recital 27 “Social partners may consider that in specific sectors or situations different provisions are more appropriate”. And the following mention in the explanatory memorandum is too narrow: “This provision permits modifications of the minimum standards set out in Articles 7 to 11”.
73. Respecting the autonomy and competences of social partners is particularly important in this proposal, which goes into the very heart of collective agreements.
74. In order for the directive to respect the role of the social partners it should be clarified that existing collective agreements can continue to remain in force and will not need to be renegotiated. And that the directive does not introduce limits for the social partners. On the issues covered by the proposed minimum requirements, the social partners must be free to agree how best to balance the needs of the companies and employees they represent, which is the very essence of a collective agreement. It must not be for the ECJ to rule on the role of the social partners.
75. We note that provisions to respect the role of the social partners already exist, e.g. in the directives on national information and consultation, on part-time work, fixed-term work and agency work. On top of this, respecting the role of the social partners is consistent with the normal implementation clause giving the right to social partners to implement a directive, which is the procedure regularly used by some countries for implementing social directives.

Chapter V. Horizontal provisions

76. The Commission introduces a number of articles aimed at compliance, dispute settlement, protection against adverse treatment as well as dismissal and transitional arrangements.

Compliance (Article 13)

77. The Commission proposes that Member States shall take all necessary measures to ensure that provisions contrary to this directive in individual or collective agreements, internal rules of undertakings, or any other arrangements shall be declared null and



void or are amended in order to bring them into line with the provisions in this directive.

78. Member States as well as social partners have well established procedures to guarantee compliance when implementing directives. That Member States and social partners with this directive should be obliged for example to declare collective agreements and/or internal company rules null and void or amend them is not in line with practice in most Member States. Furthermore it does not respect the role of the social partners and would also mean that the legislator has to intrude into the internal life of companies and their employees.
79. Such wide-ranging obligations for Member States have so far only been used in very few directives that concern equal treatment (non-discrimination) linked to a person's racial or ethnic origin as well as a person's religion, disability, gender, sexual orientation etc. The proposed directive is completely different as it concerns information about working conditions and certain minimum requirements.

Legal presumption and early settlement mechanism (Article 14)

80. Generally, BusinessEurope underlines that there is no evidence that there are any major problems in compliance with the written statement directive that would justify strengthening the sanctions. On the contrary, the REFIT study prepared for the Commission assesses the level of compliance as high. 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 directive.
81. The Commission proposes that when a worker has not received in due time all or part of the information required, employers would have 15 days to rectify any such omission after its notification. BusinessEurope supports such a provision.
82. Article 14 (a) allows Member States, as one of two options in an early settlement system, to introduce a presumption that the worker has an open-ended employment relationship, full-time employment and no probationary period if the employee has not received in due time full information on the employment relationship. This is not a settlement provision but a sanction that furthermore is extreme, taking into account the matter in question. It should be left to Member States to decide on appropriate sanctions. Furthermore, it assumes that full-time and open-ended contracts is what the worker and the employer want, implying that part-time or fixed-term contracts are insecure.

Protection from dismissal and burden of proof (Article 17)

83. The Commission states that similar provisions have already been introduced in Directive 2006/54/EC (equal treatment of men and women), Directive 2000/43/EC (equal treatment irrespective of racial or ethnic origin) and Directive 2000/78/EC (general equal treatment directive). There is however a considerable difference between the nature of these directives and that of the current Commission proposal.



Contrary to the equal treatment directives, the proposal does not include any fundamental rights of the employees that would justify special protection and is not focused on protecting specific vulnerable groups that could face discrimination. There is no reason why all employees would need special protection in case of dismissal, including a change of the burden of proof. Such a proposal would go against many established national rules on dismissals.

84. Furthermore, the Commission proposes that the worker can request from the employer to provide duly substantiated grounds for the dismissal or its equivalent. The employer shall provide those grounds in writing. This proposal goes much further both compared to existing EU directives and rules in law and collective agreements in general in Member States and interferes in national judicial systems concerning dismissal procedures.
85. BusinessEurope is therefore strongly against Article 17, and believes Article 15 and 16 provide sufficient levels of protection. As rules and procedures on dismissals are very much a competence of Member States, Article 153 (1) (d) of TFEU provides that the Council shall act unanimously if adopting EU directives concerning “protection of workers where their employment contract is terminated”. The Commission proposal does not respect this as it is based only on Article 153 (1) (b) and 2(b) (qualified majority voting in Council).

Transitional arrangements (Article 21)

86. The Commission proposes that the rights and obligations should apply to existing employment relationships. However, for information rights, the directive would apply only if requested by the worker.
87. Even if the Commission limits the application of the new information rights to those situations in which the employee explicitly requests the provision of information, the additional bureaucracy and administrative workload for companies could be substantial, especially for SMEs. Furthermore, companies would face great uncertainty as to whether or not additional requests will occur. It is therefore important to introduce a general protection of existing work relationships.
88. Furthermore, to apply the minimum requirements even to existing employment relationships is for companies a very costly and unacceptable intrusion into an employment relationship where the conditions are already agreed between the employer and the employee. In case the Commission’s proposed minimum requirements were to be adopted this would in many cases add substantial costs for companies, including administrative costs.
