

MBB Position Paper

The Malta Business Bureau is the EU-Business advisory office of the Malta Chamber of Commerce, Enterprise and Industry, and the Malta Hotels and Restaurants Association.

Directive on transparent and predictable working conditions in the European Union 2017/0355(COD)

In December 2017, the European Commission presented a new legislative initiative on transparent and predictable working conditions and repealing the Written Statement Directive. We would like to express our views on the most relevant issues of the proposal.

Key messages

- **The MBB acknowledges the importance of clarity between an employer and employee at the start of a working relationship**
- **Supports modernizing the written statement directive to meet digital realities, to have more transparency and provide relevant information in written form, in line with the principles of subsidiarity and proportionality**
- **Is concerned that the introduction of new EU minimum rights do not allow dynamic sectors the flexibility required by a modern labour market**
- **Believes that micro, small and medium enterprises will face additional burdens to meet the obligations imposed by this directive**
- **Is against an EU definition of worker as this is best defined at member state level and through social dialogue**
- **The narrowing of exemptions and stricter deadlines to provide a written statement do not reflect the operational reality of many micro, small and medium enterprises**

General preliminary remarks

The proposal for a directive on transparent and predictable working conditions is an action emanating from the EU's Pillar of Social Rights (PSR); a strategy endorsed and proclaimed in a joint statement by the European Parliament, the Council of the EU, and the European Commission at the Gothenburg Summit in November 2017. It contributes to Principles 5 and 7 of the PSR, to 'secure and adaptable employment' as well as 'information about employment conditions and protection in case of dismissals'.

The Malta Business Bureau supports the objectives of modernizing the written statement directive to meet digital aspirations, to have more transparency and provide relevant information in written form, in line with the principles of subsidiarity and proportionality. These objectives would ensure that both employers and employees have a clear understanding on the nature of their working relationship. It has concerns however, as is further explained in this position paper, that the introduction of new minimum rights goes beyond the objectives outlined above, and do not respect the flexibility required by dynamic sectors in a modern labour market. Furthermore, we are concerned that contrary to the Refit principle that is supposed to make simpler and less costly legislation, this proposal adds substantial burdens particularly to micro, small and medium enterprises (MSMEs).

The MBB is also against the introduction of an EU definition of worker, as this risk incorporating other segments of the labour market such as the self-employed and freelancers. It believes that it is more suitable for the term to be defined at member state level according to national practices and social partner agreements.

While acknowledging that the current 2-month deadline to submit a written contract to an employee could be revised, the Commission's proposal to make it available on the first day of employment makes it operationally difficult, if not impossible, for many MSMEs. Furthermore, the exceptions provided in the current directive to provide a written statement have been

restricted way too far, consequently excluding many companies operating in sectors characterised by unpredictable work and depending on casual work.

Specific remarks:

Article. 1 on exemptions

The current directive allows an exemption from the obligation of providing a written statement where an employee works for less than 8 hours a week or for a period that does not exceed 1 month in total. The new proposal restricts the exemption only to where an employee works for less than 8 hours in a month.

Clearly, this provides a huge burden on companies operating in sectors characterised by seasonality, whereby they can only meet the productivity required through the engagement of casual workers to help in events that only increase in intensity during peak seasons. The MBB believes that the provisions for exemptions indicated in the current directive are reasonable and proportionate.

Article. 2 on definition of worker

The European Commission is proposing a new definition of worker based on the case-law of the European Court of Justice (ECJ).

The MBB considers that this definition does not reflect the wider diversity and interpretation of what defines a worker in member states, at times also at sectoral level and/or collective agreements. For this reason, it prefers the use of the word 'employee' rather than 'worker', as this eliminates the risk of a legal interpretation classifying the self-employed under this definition, despite the Commission declaring its intention to exclude the self-employed from the scope of the directive.

Article. 3 on obligation to provide information

The obligation in *Article 3g* to refer to any training entitlements could be problematic because this could be required during the employment relationship, but not yet clear at the beginning. This clause would be more appropriate if it makes reference to list any training that the employer is obliged to provide to the employee by law.

The obligation in *Article 31* to provide the amount of guaranteed paid hours is not realistic because companies that operate in unpredictable sectors and rely on on-demand requests are unable to make such commitments. Possibly there can be an indication of what could be the number of paid hours, however companies should not be held accountable or face financial obligations if the number of hours indicated are not met.

The MBB believes that predictability could be beneficial for employees especially for employees in non-standard employment. While a reference could be made to the operational hours of a given company in a written statement to indicate the hours during which an employee could be expected to work as proposed in *Article 3(1)(i)*, this may become problematic should for operational reasons, a company may require changing the hours during which time it is in production. By way of example this could be a manufacturing company deciding to extend its operational activity from 18-hours to 24-hours a day; a retail company obtaining permit to open shop on a Sunday or a public holiday; or a service

company (such as but not limited to call centres) extending customer service hours to meet the demand of international clients located in a different time zone.

An EU right for a minimum advanced notice to a worker prior to the start of a work assignment as referred to in *Article 3(1)(ii)* is also unrealistic. At times companies are required to call in workers to solve operational issues such as to replace other workers calling sick at the last minute. Another instance could be a factory that received a late stock due to bad weather and requires to step-up production to meet a deadline at short notice.

Article. 4 on timing and means of information

The MBB supports that the written statement could be provided electronically as this reflects a modern labour market driven by digitalization. It also welcomes that member states will develop standard templates and models to serve as a basis for an employer to populate a written statement.

Nevertheless, while acknowledging that the current 2-month deadline to provide a written statement to a new employee can be reviewed, it is against the restrictive obligation of providing a written statement by the first day of employment. This will create an excessive burden on MSMEs, particularly those lacking a human resources department, and companies subject to peak levels of operations due to seasonality.

It cannot be assumed that all MSMEs, self-employed and start-ups would be aware of the template developed and made available by member states, and therefore they should not be put in a position of infringing the law unless they provide a written contract by the first day.

The MBB believes that a 1-month deadline would be more reasonable.

Article. 7 on probation period

The MBB believes that the length of probationary period would be best decided at member state level or through collective bargaining. It is concerned that the justifications listed in *Recital 19* and *Article 7(2)* are not sufficient. Aside from the nature

of employment such as managerial positions, employers may also require longer periods of probation for employees holding certain technical, executive and administrative posts. These should also be included in the scope of the Directive.

Article. 8 on parallel employment

Through this directive the European Commission wishes to limit an employers' objection for an employee to take up parallel employment, unless there are specific circumstances such as risk of disclosure of business secrets or conflicts of interest. The MBB is against this provision as it believes there could be other instances whereby an employer should be able to object for employees to take up parallel employment. This could be related to health and safety issues for instance whereby an employee is required to have sufficient rest in-between shifts, or when parallel employment increases stress levels on an employee that would otherwise not allow them to perform to the level expected by the employer at their main place of work.

Article. 9 on minimum predictability of work

On predetermined reference hours and days (*Article 9a*) and minimum advanced notice (*Article 9b*), see comments on *Article 31 (i) and (ii)*.

We believe that a new sub-article 9c should be introduced stating the following:

If the worker has been informed of any modifications in the aspects of the

employment relationship referred to in Article 3(2)(l)(i) and (ii).

Article. 17 on protection from dismissal and burden of proof

We consider that protection from dismissal should be in place in instances related to fundamental rights such as equal treatment. The scope of this directive does not justify additional protection than what is already provided under Articles 15 and 16.

ENDS

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