Hotrec
Hospitality Europe

POSITION PAPER 18 February 2018

HOTREC position paper on a "Directive on transparent and predictable working conditions in the European Union"

HOTREC takes note of the Commission proposal on "Transparent and predictable working conditions in the European Union" (COM (2017) 478 final). The new proposal complements and modernises existing obligations to inform each worker of his/her working conditions. It also aims at ensuring that all workers, including those in atypical contracts, benefit from more predictability and clarity as regards their working conditions.

In order to explain its concerns, HOTREC would like to present the economic context and the sector specificities.

ECONOMIC CONTEXT

The hospitality industry is composed of 1.8 million enterprises, **91% are micro-sized (i.e. employing less than 10 people)**. The sector, together with the other tourism industries, is the 3rd largest socio-economic activity in Europe and in particular one of the few sectors which still recruits tens of thousands of employees every year, making it therefore critical to Europe's competitiveness as well as economic and social well-being. It directly employs 10.2 million people (4,5% of employment in Europe), and created alone during the last decade, 2.5 million new jobs, an employment growth rate of 29%, compared to 7.1% in the overall economy. Lastly, it is worth mentioning that the hospitality industry employs 33% of workers who are relatively unskilled compared to 20% in the overall economy and 20% aged under 25 years compared to 9% in the overall economy. The hospitality sector is therefore an entry door to the labour market and a facilitator in terms of social inclusion.

SECTOR SPECIFICITIES

One of the biggest challenges faced by tourism SMEs is **seasonality**, the reason why many companies cannot afford to propose permanent contracts. During the peak season the sector makes use, on a regular basis, of casual work. In this sense, it is normal, that hotels, restaurants, cafés hire people to work for a short time period.

Additionally, the hospitality sector also works on the basis of **occasional circumstances** (e.g. buffet for a wedding in an hotel, or birthday party at a restaurant – the catering would need to be assured and served only during a certain day).

Finally, customers expect hospitality businesses to be open outside normal working hours, weekends included, with a **full schedule of 24 hrs/ 7 days a week**. In addition, employees themselves, may look, for specific schedules, in order to provide family support or for personal purposes. For all these reasons flexible working time arrangements are needed.

All in all, the hospitality sector is characterised by the **unpredictability of its nature** and this is the reason why it uses casual work.

HOTREC position "vis-à-vis" the Commission proposal

Taking into account the arguments presented above, HOTREC has the following concerns with regard to the following main points:

I - Exception regime:

HOTREC opposes the exception regime proposed by the Commission for the following reasons:

- **Administrative burden**: as explained before, 91% of the 1.8 million companies in the sector are micro-entreprises. Moreover, the sector uses, on a regular basis, casual work (e.g. for certain events - e.g. specific caterings, teams need to be reinforced in terms of staff, sometimes at last minute), due to the unpredictability of work. It would be an administrative burden for the companies to produce a written statement to every single worker, in case this modality is not compulsory at national level;

- **Financial costs:** the Commission impact assessment states that the costs amount to 18-153 EUR per company / per written statement in SME's and that the familiarisation costs would be of 53 EUR (SMEs). These costs are based on average costs, which means that for some sectors and micro companies, the effects can be substantial higher. In fact, the impact assessment recognises that "(…) indirect costs of limitations on flexibility would affect mainly those employers who depend to a relatively extent on on-demand/casual work" and that "(…) direct administrative costs may be relatively higher for smaller companies"[1][2].

[1] Page 71 of the impact assessment (link).

[2] For instance, in Belgium it is usual practice that small hotels or restaurants run by one or two employees use the services of the social secretariats to take care of issues such as the payroll of the employees. Each payroll costs 25 EUR per employer. To this amount one should still add the costs to be paid to the social secretariat. In this way, one can easily estimate that a Written Statement will probably cost more than 18-123EUR per company / per written statement.

In conclusion, for the hospitality sector, the direct consequence of the implementation of the new exception regime would be a loss in competitiveness and job creation, in addition to the increase of red tape, financial costs and administrative burdens. Finally, HOTREC does not consider that obliging companies to produce a written statement in all employment relationships is the successful way to fight undeclared work.[3]

For these reasons, HOTREC would like to propose the EU institutions that the current legal exception of article 1/2 of Council Directive (91/533/EEC) is kept, at least for micro-entreprises and SMEs. In this sense, Member States may provide that the Directive shall not apply to employees having a contract or employment relationship:

- with a total duration not exceeding one month, and/or
- with a working week not exceeding eight hours, or
- of a casual and/or specific nature.

II - Obligation to provide information:

- **Training entitlements provided by the employer** (art.3/2/g) – the word "any" should be added in the end of the sentence[4]. Only training entitlements that are mandatory by law or collective agreements should be included in the written statement. In addition, HOTREC would like to mention that in many cases training is discussed between employer and employee depending on the needs of both entities. It is impossible to include information about training at the outset. Providing information such in advance could in fact be misleading for an employee.

- **Variable work schedule** (art. 3/2/l)

  - **Information on working time for workers with variable schedules:** due to the **unpredictability of the work** done in the sector (as explained before –e.g. events organised last minute), it is not proportionate for the employers to specify in the written statement:
    - The reference hours and days within which the worker may be required to work;
    - The minimum advance notice the worker shall receive before the start of a work assignment.

    In addition, even though there are countries where these rights are already mandatory[5], a one fits all solution cannot be the preferred option. In fact:

[3] HOTREC believes that there are other ways to avoid undeclared work, namely:
- Member States to continue with tax and social security system reforms, and thus reduce the burden of taxation on the workforce;
- Member States to consider improving incentives for regular work, which may include increasing the tax-free income band and, for employers, reducing the non-wage costs associated with legal employment;
- Exchange of best practices – HOTREC considers that the Platform of Undeclared Work is a lead example of how good practices can influence the different stakeholders.

[4] Art 3/2/g should read: "training entitlement provided by the employer, **if any**".
[5] Example of Austria

- Subsidiarity should prevail (based on national law or collective agreements in place);
- Circumstances also change and it might occur that the employee himself might be interested in changing his working schedule system. If this is the case, it might be more difficult to change a pre-established agreement and to put it in accordance with the employee's willingness and the employer needs;
- It would be too burdensome for micro-entreprises (91% of the 1.8 million companies in the sector) to have this level of detail in the written statement.

These are also the reasons why HOTREC opposes the right to a minimum predictability of work (art.9), as stated below.

- **Amount of guaranteed paid hours and the remuneration of work performed in addition to the guaranteed paid hours (overtime)**: it should be mentioned that overtime is already regulated in the Working Time Directive (2003/88/EC). Moreover, the information is easily available in the internet. Therefore, a simple reference to the national law, collective agreement or EU legislation should be acceptable. In addition, also in this case, it would be difficult for micro-entreprises to have this degree of detail in a Written Statement.

HOTREC would, therefore, suggest that art.3/2/l is covered by art. 3/3 of the proposed Directive[6]. Art. 3/3 should also cover "internal company rules".

III) Timing of information (art. 4/1)

The hospitality sector would be ready to provide to each worker the written statement on the first day of the employment relationship if the exception regime as stated in article 1/2 of Council Directive (91/533/EEC) is accepted by the EU institutions - please see HOTREC's arguments under the point "exception regime" of this paper. If not, then the deadline of one month after the employment relationship starts is the favoured option. Again, due to the unpredictability of the workload in the sector and the fact that 91% of the 1,8 million companies are micro-entreprises it would be unfeasible to have a document ready on the first day of the employment relationship for every single worker. The administrative burden that this measure would imply would lead again to competition loss and decrease in job creation.

[6] Art. 3/3 stipulates that "The information (…) may be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points".

IV) Means of information (art. 4/2)

HOTREC agrees with the fact that Member States or social partners shall develop templates and models for the written statement (which can be sent electronically). HOTREC understands that in the spirit of the legislator, these models should not be mandatory and should be adaptable to the companies' different needs.
This should be confirmed in the text of the Directive.

V) - Minimum requirements relating to working conditions

- **Right of minimum predictability of work** (art. 9) – HOTREC opposes this right for the same reasons explained before (please see "**variable work schedule / Information on working time for workers with variable schedules** (art. 3/2/l)". The unpredictability of work would not make it feasible for the hospitality sector to cope with this right (example of a cook that is called last minute to replace a colleague in a restaurant).

- **Transition to another form of employment** (art.10)

  HOTREC opposes this right for the following reasons:

  - The contractual freedom of the employer is not respected;
  - As already explained, the unpredictability of the work-load is constant: employers in the hospitality sector use non-permanent contracts, usually, due to seasonality and due to the specificity of the sector (e.g. organisation of a catering for special occasion);
  - The nature of a non-permanent contract or a part-time contract is different and needs to be adapted to the employer's needs;
  - If employers do not provide permanent contracts it is because they do not have either the need, or because they are unable to find an employee with the right skills (problem of skills mismatch in the sector);
  - If employers want that the contract becomes permanent, they will ask the employees if they would like that their contract is changed. And if they do that, is because the employee proved his capacity to achieve his mission properly. Not because he/she is a senior in the position;
  - A written reply would also constitute an administrative burden to the companies (even taking into account the exception regime of art. 10/2 for SMEs and micro companies);

VI) - Collective agreements (art.12)

HOTREC welcomes the possibility for social partners to conclude collective agreements, in conformity with the national law or practice. HOTREC fully supports the idea that trade-offs are possible, if the overall protection of workers is respected (article 12). Nevertheless, HOTREC wishes to ensure that article 12, in conjunction with article 13, do not mean that collective agreements need to be renegotiated, point on which HOTREC strongly disagrees. Therefore, HOTREC calls on the EU institutions to clarify the wording to avoid any misinterpretation, as subsidiarity should prevail. Any other option would mean an interference in national labor law. Consequently, HOTREC calls for the suppression of article 13.

VII – Horizontal provisions

HOTREC is of the opinion that such a heavy regime for horizontal provisions is not needed. In fact, there is no evidence that suggests that there are problems in compliance with the Written Statement Directive that would justify the need to strengthening sanctions. On the contrary, the REFIT study prepared by the Commission has assessed the level of compliance as high. Where sanctions can be imposed even if there is no damage to employees, this can encourage litigation for even small technical breaches of the Written Statement Directive, which might not be proportionate.

Nevertheless, as per the recommendation of the REFIT study, HOTREC agrees with the notification mechanism of art 14/b[7]. In fact, Member States should be encouraged to implement this Article of the Directive as it would help to avoid punishing employers for minor technical breaches. It would also afford employers an opportunity to correct the situation upon request.

In addition, HOTREC would propose that art.17/1 would read: “Member States shall take the necessary measures to prohibit the dismissal or its equivalent of workers, on the grounds that they exercised the rights provided for in this Directive”: the expression “all preparations for dismissal of workers” is not clear and might lead to legal uncertainty.

Finally, HOTREC believes that the burden of proof as asked for in art. 17/2 is not proportionate and constitutes a significant administrative burden to the employer (especially micro-entreprises and SMEs).

[7] http://ec.europa.eu/social/BlobServlet?docId=16660&langId=en (page IX)

VIII – Definition of worker

With regard to the definition of worker HOTREC has the following comments:

- **Subsidiarity should prevail**: HOTREC does not agree that the proposal for Directive adopts the definition of worker as provided by the EU Court of Justice. In fact, every country has specific national legislation on the topic. For instance, in Germany and Ireland, the definition of worker is provided by different court cases, whereas in other countries it depends on the different collective agreements and the different sectors. Legal uncertainty can be installed otherwise, as the interpretations developed by national case law or agreed by collective agreements could become contradictory;

- HOTREC welcomes the fact that the European Commission **excludes the self-employed from the definition of worker**. Nevertheless, this idea should be clearly stated in the proposal of Directive. Moreover, when stating (…) performs services for and under the direction of another person (…), in certain cases and in certain countries, self-employed could eventually fall under the scope of this definition, which clearly shall not be the case;

- HOTREC is concerned that the impact of a possible EU definition on worker would in fact not be limited to the application of the Written Statement Directive. There could be wider implications on classification of work relationships in general. To give someone a written statement may be seen as an indication of a subordinate work relationship and lead to classification of a person as an employee e.g. for social security purposes. Moreover, the definition developed for the purpose of the application of the Written Statement Directive could conflict with the provisions of other Directives such as on Working time, Temporary Agency Work or fixed term work or part-time work. In the cases of fixed term work and part-time work, when concluding the agreements that the Directives 97/81/EC and 99/70/EC implement, the European Social Partners agreed to leave the matter to be defined at national level, including by the social partners.

*

* *