Hotrec Hospitality Europe

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HOTREC position on the proposal for a Directive on Transparent and Predictable Working Conditions in the EU

Trilogue phase

HOTREC has very carefully followed the General approach reached by the Council and the vote of the European Parliament (EMPL committee) on the proposal for a Directive on Transparent and Predictable Working Conditions in the EU (COM (2017) 797 final).

We understand the need to ensure that all workers, including those in atypical contracts, benefit from more predictability and clarity as regards their working conditions.

However, HOTREC sees huge challenges in the application of the proposal of Directive in its sector, formed by 1.9 million SMEs, from which 90% are micro-enterprises, and working with a full schedule of 24 hrs / 7 days a week. The unpredictability of its activities (e.g. a catering buffet that needs to be organised in a very short notice) shall make it difficult for the sector to deliver written statements to all employees within a short period of time.

HOTREC's priorities are the following:

- **Definitions**: subsidiarity should prevail on the definition of worker. Self-employed should be excluded from the scope;
- **Exception regime**: a reasonable exception regime (workable) should be fixed, in order to avoid additional administrative and economic burdens to micro-enterprises;
- **Information to be provided**: notice periods need to be flexible;
- **Minimum predictability of work:**
  - The EU does not have competence to regulate employment contracts;
  - Subsidiarity and proportionality should prevail;
- **Transition to another form of employment:** Member States should be able to limit the frequency of the employees requests;
- **Collective agreements**: should not need to be renegotiated with the entry into force of the Directive;
- **Legal presumptions**: proportionality, subsidiarity and the free will of the employer should prevail.

In view of the upcoming trilogue negotiations, HOTREC would like to put forward its main priorities.

Definition and scope

HOTREC supports the position of the Council on the matter:

- The definition of worker should be established in accordance with each country's national legislation and practices;
- Self-employed should not fall under the scope of the Directive.

Justification:

Subsidiarity should prevail:

- Every country has specific national legislation with regard to the definition of worker. 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;
- It was the Commission intention not to include the self-employed in the Directive. This provision should be made clear in the text. Self-employed provide services as part of a B2B contract and therefore should not fall within the scope of this Directive;
- 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 consequences 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 contradict 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.

Exception regime

HOTREC demands that the current exception regime of Council Directive (91/533/EEC) is kept.

But in order to try to find a compromise for the trilogue discussion, HOTREC supports the following position:

- Member States may not apply the obligations in this Directive to workers who have an employment relationship equal to or less than 5 hours per week on average in a reference period of four weeks (result of Council outcome);
- Civil servants should not be excluded – any other option would imply discrimination when compared to the private sector (outcome of the European Parliament discussions).

Justification:

- Even though very few employees would fall under the exception regime, it is better than not having an exception at all due to administrative burdens and financial costs;

- As already explained, 90% 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. Therefore, it will be an administrative burden for the companies to produce a written statement to every single worker;
- The Commission 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].

Information to be provided by employers

HOTREC would have preferred that the information would be transmitted orally on the first day of work and that all information in writing would need to be provided within a two weeks deadline.

Nevertheless, and in order to find a compromise for the trilogue discussion, HOTREC supports the following:

From the Council's side:

- The information to be provided by the employer should follow art. 3 of the Council general approach;
- Most relevant information to be provided on the first day of work, with the possibility of providing the rest of the information within one month period;
- Standard working day or week should be the expression to be used, instead of "mostly or partly variable schedules";

From the European Parliament's side:

- Micro-enterprises can have more time to provide the basic information (7 extra days).

Justification:

- This approach would bring less administrative burdens to the sector, when compared to the solution brought by the Parliament (where more information is to be provided to the employee – e.g.: proof of registration with the social security institutions);
- It is to note, one more time, that 91% of the 1.8 million companies in the sector are micro-entreprises with a lot of specificities (work for occasional circumstances – e.g. cook being replaced last minute; seasonality; full schedule of 24 hrs/7 days a week). Therefore, flexibility is welcome;
- The expression "standard working day" brings more clarity to the text.

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

Probation period

HOTREC defends that **subsidiarity** should prevail on the matter.

But in order to find a compromise, HOTREC would support the following:

- Probation period shall not exceed 6 months (Council and Parliament)
- This period can be extended to 9 months in some circumstances (European Parliament's position)
- HOTREC is against the limitation of 25% of the length of the contract in case of fixed term contracts (text introduced by the European Parliament).

Minimum predictability of work

- HOTREC is totally against this principle due to the unpredictability of the work in the sector (e.g.: dinner catering ordered at last minute);
- In order to find a compromise, HOTREC supports the Council position on the matter, including the possibility for Member States to lay down modalities for the application, in accordance with national law, collective agreement and/or practice;
- HOTREC is strongly against the European Parliament position on the matter, namely:
    - Prohibition of any employment relationship where there is not a minimum guaranteed amount of paid hours predetermined (zero hour contract);
    - Obligation for employers to provide reasons to issue certain contracts;
    - Rebuttable presumption of the existence of an employment contract under certain circumstances.

Justification:

- Subsidiarity shall prevail. There is no competence from the EU side to prohibit the use of certain contracts;
- The specificity of the sector needs to be taken into account (seasonality; necessity to work on occasional circumstances (e.g. buffet for a birthday that needs to be prepared last minute); full work schedule (24 hrs/7 days a week);
- Companies need flexibility to adapt to different business models;

Transition to another form of employment

HOTREC opposes this right namely because:

- The contractual freedom of the parties is not respected;
- The unpredictability of the work in the sector is constant;
- The nature of a non-permanent contract or a part-time contract is different and needs to be adapted to the employer's needs.

But in order to find a compromise, HOTREC would support the Council approach, as it foresees the possibility of the written reply of the employer to be extended for the period of three months for micro-entreprises and SMEs. This would help companies in the sector to comply with the legal requirement.

Collective Agreements

HOTREC welcomes the possibility of social partners to conclude collective agreements in conformity with national law or practice and that trade-offs are possible. But we wish to ensure that art. 12 in conjunction with art. 13 do not mean that collective agreements need to be renegotiated.

Therefore, we very much welcome the Council text – art. 13 was deleted[2]

HOTREC supports both the wording of the European Parliament and of the Council but welcomes further improvements to the text, namely the suppression of the expression "Member States may allow".

Justification:

- Subsidiarity must prevail. Any other option will lead to interference on national labour law.

Horizontal provisions

1 - Legal presumption

HOTREC supports the position of the Council with regard to art. 14, namely that in case information is missing:

- If the worker shall benefit from favourable presumptions defined by Member States, employers shall have the possibility to rebut the presumptions; **or**
- The employee might submit a complaint;
- The employer should be notified of the points stated above and given the opportunity to rectify any omission in the information provided (the Parliament also agrees with this view, but provides a specific deadline of 15 days).

Justification:

- Subsidiarity prevails;
- Positive that before a legal procedure begins, the employer has a certain period to rectify any omission of the information;
- A favourable presumption for an open-ended full-time employment relationship without a probationary period, as defended by the Parliament, would be unproportioned and against the principal of subsidiarity;
- To make it compulsory for the worker to, at the same time, be able to submit a complaint and to enjoy from favourable presumptions is not proportionate for the employers.

[2] Art. 13 as per the Commission proposal states the following: "Member States shall take all necessary measures to ensure that provisions contrary to this Directive in individual and 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 of this Directive".

2 - Reversal of the burden of proof

HOTREC does not agree with the reversal of the burden of proof, as it is not proportionate and constitutes a significant administrative burden to the employer (especially micro-entreprises and SMEs).

In order to find a compromise, HOTREC would support the Council position as it is.
The right of reinstatement as defended by the European Parliament would not be proportionate, it would again be against the subsidiarity principle and the free will of the employer to recruit someone or not.

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