
Answer to the second-phase social partner consultation

Possible revision of the Written Statement Directive 91/533/EEC

Introductory Remarks

As laid out in its response to the first phase of the consultation,¹ CESI reiterates its support for a revision of the Written Statement Directive 91/533/EEC as one component to build fairer labour markets and more equal societies. Untamed globalisation and digitalisation have meant that labour markets are increasingly fragmentising in space and time: More and more people are economically active outside traditional, stable work patterns and in so-called new and atypical forms of employment or new digital work models. This increasingly leads to more self- and bogus self-employment. As a result of this rapid evolution, labour legislation has in many cases not been adjusted accordingly. An increasing numbers of people work therefore outside the scope of core labour law and social protection and work under precarious conditions.

In combination with the European Commission's ongoing initiative for social protection for all, CESI considers the revision of the Directive very important for an effective realisation of the new European Pillar of Social Rights which could bring concrete and tangible improvements to workers. A revision the Directive could set ambitious and binding standards for more secure employment (principle 5) and for more comprehensive information about employment conditions and protection in case of dismissals (principle 7).

In line with an eventual general definition of the term 'employment relationship' in the Directive (see below), CESI calls for a 're-branding' or re-naming of the Directive to turn it into an EU legislative centrepiece which other EU employment legislation can refer to. This is of central importance to give the increasing number of persons active in so far largely unregulated new and atypical forms of employment and new digital work models (and very often as self-employed) essential rights as employees (especially in cases of bogus self-employment) beyond those addressed in the Directive itself.² This could be a second option to make up for a lacking overarching framework directive for decent work which CESI has called for.³

¹ Available at http://www.cesi.org/wp-content/uploads/2014/03/CESI-Consultation-Written-Statement-Directive-review_final.pdf

² This relates, for instance, to non-discrimination at work, health and safety at work, consultation and information rights, and the explicit freedom and right of association and representation, collective bargaining and collective action.

³ CESI's contribution to the first phase of the consultation available at http://www.cesi.org/wp-content/uploads/2014/03/CESI-Consultation-Written-Statement-Directive-review_final.pdf

1. What are your views on the possible avenues for EU action and the elements set out in section 5 of the consultation document C(2017) 6121 final?

CESI generally agrees with the stated definitions of the problem and with the analyses and the described challenges and objectives brought forward in the second phase consultation document. This applies especially to the section on inadequate regulation and legal loopholes for people in new forms of employment (pp.2-3), costs of over-reliance on non-standard forms of work for employers (p. 3) and the aim to give all workers new minimum rights to reduce precariousness in employment relationships (p.3). CESI also agrees that non-standard jobs are “*not a voluntary choice*” for most people engaging in them (pp.6-7) with exceptions among, for instance, nomad workers, and that new forms of work can have, when left unregulated, detrimental effects on labour markets and society at large through deepened labour market segmentation (p.8). CESI underlines that damaging effects on the society can also flow from a lack of social security coverage and a general reduction of tax contributions of those active in new forms of employment. The need for action in this field at the level of the EU (p.9) is clearly established.

The **introductory statement to section 5** (p.10) notes that the European Commission reviewed possible avenues for a revision of the Directive in the light of the obligation under the Treaties to avoid imposing administrative, financial and legal constraints “*in a way which would hold back the creation and development of small and medium-sized undertakings.*” According to CESI, firms and businesses, including SMEs, are generally doing well (again) after the crisis and this should be more reflected in better employment and working conditions as well. CESI believes that it is high time to put the social element of European integration on a same footing as the economic ones and the four freedoms. Worker rights should not only be considered if there is no economic cost attached to them.

Scope of application of a revised Directive (section 5.1): The current Article 1(1)⁴ of the Directive provides too many loopholes to exempt groups of economically active people from the scope of it. As laid out in its response to the first phase of the consultation,⁵ CESI welcomes a regulation of the personal scope of a revised Directive in line the Court of Justice of the EU (CJEU) case C-66/85 which identified an employment relationship as “*a certain period of time [during which] a person performs services for and under the direction of another person in return for which he receives remuneration.*”⁶

This definition could also be an important tool to reach out to the bogus self-employed as employees and treat them accordingly, providing them with essential labour and social protection. It is central that this group of persons is included in the list of groups of workers that should explicitly benefit from this definition. Forcing people to perform de-facto dependent work activities under ‘independent’ self-employment conditions is one of the most important loopholes for employers to circumvent key labour rights. CESI believes that a European Labour Authority, recently proposed by European Commission President Jean-Claude Juncker, could play an important role in monitoring and fighting abuses of EU labour and social legislation based on a new shared definition of an employment relationship.

Post-education traineeships should also be considered by a revised Directive. The current Council Recommendation on a Quality Framework for Apprenticeships from March 2014 only makes legally non-binding recommendations for Member States, and their effectiveness is questionable. The Directive should really reach out to *all* those in de facto dependent work relationships.

⁴ Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31991L0533&from=EN>

⁵ Available at http://www.cesi.org/wp-content/uploads/2014/03/CESI-Consultation-Written-Statement-Directive-review_final.pdf

⁶ Judgment available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93767&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=666128>

CESI agrees with stricter limitations of exclusions in Article 1(2).

Rights to information on applicable working conditions (section 5.2): CESI wonders about the rationale of including a right to information on *“the principle that there is no guaranteed paid hours.”*

New right to predictability of work (section 5.3.1): While the intention of this section is welcome, the provision for employers and workers to *“agree before the employment relationship starts on reference hours and reference days in which work may be performed”* may in practice not work out easily for workers. Often, employers could probably dictate terms and conditions to the workers, which tend to be in weak bargaining situations before the signature of a contract. Unambiguous and clear wordings would be needed in a revised Directive to prevent such situations.

The *“certain”* period after which workers in on-demand employment could start benefiting from a minimum number of guaranteed hours would need to be clearly fixed.

Exclusivity clauses can only be justified for full-time employment relationships and should otherwise be forbidden.

New right to request another form of employment after a long period of non-standard employment (section 5.3.2): Excessively long periods of work in non-permanent employment contracts are hard to accept for workers, and they should be given a general right to have their status converted to permanent employment. While restrictive exceptions to this could be discussed, the proposed mere right to request a conversion (and to receive a written reply to this) will not deliver for workers in practice. A tougher approach is required.

Abusive practices of successive fixed-term contracts by employers without credible justifications are not limited to the private sector. One example from the public sector relates to teachers in Germany which are more and more often employed on a fixed-term basis, dismissed each year for the duration of the summer break, only to receive a new fixed-term contract thereafter for the new academic year. Similar practices have been reported from employees in certain public authorities. According to CESI, a revised Directive should prevent such situations to the best extent possible.

New right to a maximum duration of probation period (section 5.3.3): CESI welcomes a maximum duration of probation periods at a length which is adequate for workers.

2. Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?

CESI is always in favour of social partner dialogue under Article 155 TFEU. This also applies to topics related to this consultation. However, if/when social dialogue reaches its limits and no adequate improvements can be achieved for workers, CESI calls on the legislator to act where possible