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REPORT

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| From: | Presidency |
| To: | Permanent Representatives Committee (Part 1) |
| No. Cion doc.: | 16018/17 + ADD1-ADD 2 - COM(2017) 797 final |
| Subject: | Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on transparent and predictable working conditions in the European Union - Preparation for the trilogue |

I INTRODUCTION

In December 2017, the Commission published a proposal for a Directive on transparent and predictable working conditions (TPWC) in the European Union which, once adopted, would modernise employers' existing obligations to inform all workers of their working conditions and create new minimum standards. The European Parliament, the Council and the Commission aim to conclude negotiations on the file before the end of the Parliament's term.

In June 2018, the Council adopted its general approach¹. On 15 November 2018, the European Parliament adopted its first-reading negotiation mandate².

¹ 10299/18.

² The rapporteur for the lead committee (EMPL) Enrique CALVET CHAMBON (ALDE - ES). The rapporteur for the JURI Committee is Kostas CHRYSOGONOS (GUE/NGL - EL). The rapporteur for the FEMM Committee is Maria ARENA (S&D - BE).

II STATE OF PLAY

The trilogues started in November 2018, once the mandate of the European Parliament had been adopted. Five trilogues have taken place – three under the Austrian Presidency and two under the Romanian Presidency. In addition, several technical meetings have been held. Another three trilogues are scheduled.

Provisional agreement has been reached on a number of issues. However, the main political issues are still outstanding; please see Section III below. At last week's trilogue, the technical level were tasked to consider all other issues and suggest solutions to the trilogue level.

Based on the discussions at the first five trilogues, the Presidency has drafted a set of compromise suggestions on the main political issues. The Presidency believes that these proposals maintain the essential position of the Council's general approach but also include a number of concessions to the Parliament, which should allow an overall compromise to be reached.

III. PRESIDENCY SUGGESTIONS

(a) Scope of application

In its proposal, the Commission included definitions of worker and employer (Article 2(1)(a) and (b)), with it being possible not to apply this Directive to a work relationship equal to or less than eight hours per month. The proposal left scope for Member States to exclude households acting as employers and to apply, for certain provisions, sector-specific directives to seafarers and sea fishermen (Article 1(6) and (7)).

The Council deleted the definitions of worker, employer and employment relationship in its general approach, considering that it was a national prerogative to define such terms, while recognising in a recital the relevance of the case-law of the Court of Justice of the European Union. The limit for application of the Directive was raised to an average of five hours per week for four consecutive weeks (i.e. up from eight to 20 hours per month). Furthermore, the Council reinforced the possibility to exclude households, seafarers and sea fishermen, as well as adding that civil servants and other categories of public service employee (judges, prosecutors, investigators and other law enforcement services) could be excluded by Member States on objective grounds (Article 1(5a)).

The Parliament also deleted the definitions of worker and employer. It removed the minimum threshold from which the Directive would apply. It provided for the exclusion of households and emergency services, while sticking to the Commission proposal for seafarers and sea fishermen. However, the exclusion of households is only partial ('adapt' the provisions), and the exclusion of the armed forces, police authorities and other emergency services is limited and does not provide for the more general case of civil servants. Specifically, on the exemption of public services, the Council stressed that this is only a 'may' clause and Member States wishing to exclude any groups of workers from the scope of the Directive would have to provide 'objective grounds'.

In the light of these arguments, the Parliament showed flexibility towards the Council's approach regarding the exclusion of certain categories of civil servants, but insists that this would need to be limited to employees in the public sector who have either a specific status or specific functions. The Parliament also showed openness to a minimum hours threshold, provided that it excluded as few workers as possible from the scope of the Directive³.

Within this context, the Presidency considers that agreement on the remaining major issues regarding the scope could be reached on the basis of the drafting in the Annex.

(b) Deadlines for providing information to workers

The Commission proposal provides that information should be made available to workers at the latest on *the first day* of the employment relationship. It also allows some of the information to be provided by way of a reference to the laws governing particular points. The Council divided the information to be provided into two categories: some information to be given within *seven days* and the rest within *a month*. These deadlines should be calculated from *the first working day*, and not from the beginning of the employment relationship. The Council considers that some information can be provided by a *reference to laws*, as this would be a way to reduce the burden on employers.

³ The Commission indicated that the Council threshold of five hours per week would exclude roughly 2.5 million workers, while the Commission threshold of eight hours per month would exclude only around 1 million workers from the scope of the Directive.

The Parliament also created a two-step approach to the deadline. However, instead of one week and one month, its deadlines are one day and one week. During the negotiations, both the Parliament and the Commission insisted that the first day should be the deadline for providing essential information, while some flexibility has been shown as regards when information concerning social security and training entitlements should be provided. The deadline of "*first day*" is important for these institutions.

The Parliament has agreed that *updates may be given* by way of reference to laws (and not accompanied by a reference as in its original amendment). However, it considers that any initial information *could be given* by way of a reference for points (g), (i), (k) and (n) only. The Presidency considers that as a counter-concession, the Council could accept the Commission's original proposal, i.e. references *could not be used* for points (l) and (m)⁴.

The Presidency considers that, as part of an overall package, the Parliament could accept a reference to the first *working* day for information that *is available* on that day and at the latest seven days from the first working day, and the rest one month after the first working day as suggested in the Annex.

(c) Minimum predictability of work and complementary measures on on-demand contracts, including zero-hour contracts

Protecting workers in a vulnerable position in the case of unpredictable working conditions is a key issue for the Parliament, whose amendments would considerably extend the protection provided by the Commission proposal. In its view, zero-hour contracts should be restricted as much as possible and it therefore suggests introducing an anti-abuse clause in the operative part. The Parliament has also introduced a deadline for cancelling work assignments. In order to prevent employers from repeatedly and abusively cancelling work, the Parliament insists that workers should receive compensation in the event of cancellation at short notice.

⁴ (g) training, (i) notice period, (k) work schedule, (l) variability of work, (m) (names of) collective agreements governing the work, (n) social security institutions.

The Parliament stresses that its agreement to the compromise on the scope (see point (a) above) would depend on a compromise being reached on Article 9 on on-demand work. Therefore, the Presidency invites the Member States to consider the new Presidency drafting of Article 9 as presented in the Annex. The proposed text took inspiration from other *directives*⁵. The aim of the proposed text is to balance the EP amendments, offering the needed protection to workers in vulnerable employment conditions while maintaining a level of flexibility for the Member States to implement the provisions according to their national law and/or practice.

(d) Social partners

In its proposal, the Commission drew inspiration from other directives regarding the *involvement* of social partners and the possibility of *differing* from the provisions of the Directive in collective agreements, provided that the general level of protection is kept. The Parliament wants to reinforce social dialogue *in general*, in particular at national level, including the obligation to involve social partners in the implementation of the Directive and to provide them with the necessary means for their involvement to be effective.

As part of an overall compromise, the Parliament has indicated that all references to the social partners throughout the text could be replaced by a single *horizontal reference* to their role with a view to the implementation of the Directive. The Parliament may be open to the possibility of social partners *modifying* conditions in this Directive in their collective agreements, provided that the general level of protection is maintained.

The Presidency considers that agreement could be reached on drafting along the lines of the text in the Annex. In order to keep close to the spirit of the general approach, the proposed text refers to *national laws and practices*, which will allow the Member States to adapt the provisions to their specific contexts. At the same time, the reference is limited to the current Directive and would not affect the general framework for social dialogue in the Member States. The proposed text is also inspired by other *directives*⁶.

⁵ E.g. Directive 1999/70/EC on fixed-term work, Directive 2003/88/EC on working time.

⁶ Directive 2006/54/EC on equal opportunities and equal treatment of women and men in employment, Directive 2000/43/EC on equal treatment irrespective of racial or ethnic origin and Directive 2000/78/EC on equal treatment in employment.

IV CONCLUSION

The Committee of Permanent Representatives is invited to:

- examine the Presidency's compromise suggestions as set out in the Annex to this note;
and
 - agree on an updated Presidency negotiation mandate for future informal trilogues, the next of which will take place on 28 January.
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Presidency drafting suggestions

(a) Scope of application

Article 1(2) – row 55 - scope

"This Directive lays down minimum rights that apply to all workers who have an employment contract or employment relationships as defined by law, collective agreements or practice in force in each Member State, taking into account the case law of the Court of Justice of the European Union."

Article 1(3) – row 56 - minimum hours

"Member States may decide not to apply the obligations in this Directive to workers with anticipated and actual working time equal to or less than 3 hours per week on average in a reference period of four weeks. Time worked with all employers forming or belonging to the same enterprise, group or entity shall count towards that 3 hours average."

(b) Deadlines for providing information

Article 4(1) – row 91

"The information referred to in Article 3(2) a, b, c, d, e, f, j, k and l shall be provided individually to the worker in writing on the first working day, where available, and no later than 7 days from the first working day."

The other information referred to in Article 3(2) shall be provided individually to the worker in writing within one month from the first working day."

Article 3(3) – row 89 - information by reference (original Commission proposal)

"The information referred to in paragraph 2 (f) to (k) and (n) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points."

- (c) Minimum predictability of work and complementary measures on "on-demand" contracts, including zero-hours contracts.

New paragraph in Article 9 - new row 117a

Member states shall take the necessary measures to ensure that:

- a) *The worker shall receive a minimum reasonable advance notice before the start of a work assignment,*
- b) *The employer shall be able to cancel that work assignment within a deadline set in accordance with paragraph (X),*
- c) *Where the employer cancels the work assignment after the deadline referred to above, the employee shall be entitled to compensation.*

(X) Member States may lay down the arrangements for the application of this article at the most appropriate level and in accordance with national law and/or practice, including collective agreements.

New paragraph in Article 9 - new row 117a bis (replacing EP amendments in row 117d-h)

Member States shall take appropriate measures, in accordance with national law and/or practice, with a view to preventing abuse of on-demand or similar employment contracts. They shall inform the Commission about such measures.

Where there are no such measures in place, Member States shall introduce one or more of the following measures:

- a. *Limitations to the use and duration of on-demand or similar contracts,*
- b. *A rebuttable presumption on the existence of an employment contract with a minimum amount of paid hours based on the average worked hours during a given period,*
- c. *Other equivalent measure(s) in accordance with their national law and/or practice."*

(d) Social partners

Article 20 (2b) – row 154 b – replacing EP amendments on the social partners on rows 153a, 58b, 59, 89b, 92, 110, 113, 117, 117c, 117f, 125, 20, 27, 30, 34a, 43a, 48:

"Member States shall, in accordance with their national law and practice, take adequate measures to ensure the effective involvement of social partners and promote and enhance social dialogue with a view to implementing the provisions of this Directive."

