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COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS

Outcome of the Public Consultation on the Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century"

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1. INTRODUCTION

By adopting a Green Paper on "Modernising labour law to meet the challenges of the 21st century"[1], the Commission launched a public debate in the EU on how labour law can support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. The Green Paper looked at the role labour law and collective agreements might play in advancing a "flexicurity" agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive. It sought in particular: to identify the key challenges for adapting labour law to the evolving realities of the world of work; to engage all stakeholders in an open debate about how labour law can assist in promoting flexibility and security; to stimulate discussion on how flexible and reliable contractual relations combined with rights can facilitate job creation and promote transitions in the labour market; and to contribute to the Better Regulation agenda.

The public debate on the modernisation of labour law was not expected to pave the way to an easy consensus, or to provide the basis for a blueprint for legislative action. The divergent views expressed in the course of the consultation, while making it difficult to establish major points of consensus, confirm the pertinence and timeliness of a debate that has been common to many Member States, but had yet to reach Community level.

The level and the quality of the debate generated by the publication of the Green Paper fully met the Commission's objectives for this exercise. Over 450 responses were registered by the Commission, encompassing all stakeholders — national governments, regional governments, national parliaments, social partners at EU and national level, NGOs, individual enterprises, academics, legal experts and private individuals. They reflect, for the most part, a deep awareness of the challenges presented by the emerging European labour market — which is being shaped by increased labour mobility and trans-national corporate activity. The debate was also a focus for public opinion and media interest as many governments consulted at national level with social partners, public authorities and independent experts. The discussion conducted within a number of EU sectoral social dialogue committees was a particularly welcome development, resulting in the adoption of several joint positions by employer and trade union representatives[2].

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1 COM (2006) 708 of 22.11.2006.

2 For example in the audio-visual, live-performance and regional and municipal employment sectors.

The EU institutions also contributed actively to the debate. The EU Ministers for Employment and Social Affairs had a preliminary discussion of the Green Paper at the EPSCO Council meeting in Brussels on 1 December 2006. They debated the matter further at a meeting convened in Berlin on 18 January 2007 under the auspices of the German Presidency. The conclusions tabled by the Presidency endorsed the "flexicurity" concept as a useful method but stressed the value of the standard full-time, open-ended contract as the cornerstone of employment relationships in the EU, while allowing for other more flexible forms to cater for specific needs and individual situations[3].

The European Parliament (EP) adopted a Resolution on 11 July 2007[4], which responds positively to the Green Paper by identifying a Community dimension to the labour law issues raised in the Paper. The EP resolution was adopted by a large majority[5], reflecting a remarkable consensus on a report that had been intensely debated at each stage of the procedure.

The European Economic and Social Committee (EESC) adopted an opinion on the Green Paper[6], expressing disagreement with the timing and method of consultation as well some aspects of the underpinning analysis.

Flexible and reliable contractual arrangements through modern labour laws are one of the four key policy components of a broader flexicurity approach alongside life-long learning strategies, active labour market policies and modern social security systems, as spelled out in the Commission's Communication[7] "*Towards Common Principles of Flexicurity: More and better jobs through flexibility and security* " which was adopted on 27 June 2007.

The purpose of this Communication is to present in summary form the outcome of the public consultation launched by the Green Paper, and to identify the key policy issues arising. In presenting an objective summary of the views of respondents, the Commission does not take any position on particular comments or on their factual accuracy. A working document by the Commission services providing a more detailed review of the responses is attached. This Communication, together with the publication of all responses received in the course of the consultation[8], is justified by the need to ensure maximum transparency. It marks the conclusion of the public consultation process on the modernisation of labour law.

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3 Presidency Conclusions, Informal meeting of Ministers for Employment and Social Affairs, Berlin, 19.1.2007.

4 P6_TA-PROV (2007) 0339.

5 479 votes in favour and 61 against, with 54 abstentions.

6 CESE 398/2007 of 30 May 2007. Adopted by a majority vote (140 in favour, 82 against and 4 abstentions). A counter-opinion (submitted by Group I representatives) was appended to the EESC opinion.

7 COM (2007) 359 of 27.6.2007.

8 The responses are published online in the site: http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm See also the full listing of submissions in the annex attached to the Services document SEC.

2. THE POLICY CONTEXT AND THE ANALYTICAL FRAMEWORK INFORMING THE GREEN PAPER

The conduct of the public consultation

For some social partners, primarily trade unions, the consultation should have taken a form of formal consultation of the EU social partners on the basis of Article 138 EC. They perceived the conduct of an open consultation on labour law by means of a Green Paper as a down-grading of the Social Dialogue and of their pivotal role as representatives of employers and workers. The EP and the EESC also expressed reservations about the Commission's recourse to a public consultation. However, a large majority of the Member States and Social NGOs positively welcomed the openness of the consultative process.

The analytic framework put forward in the Green Paper

For a number of Member States, trade unions, social NGO stakeholders and academic respondents, labour law reform should be considered from the outset within the framework of fundamental rights, in particular the Charter of Fundamental Rights of the European Union.[9] In their view, such a framework would provide the basis for a more assertive approach by the Commission to using its right of initiative in the interests of "Social Europe". Some trade union, social NGO and academic respondents questioned the Green Paper's focus on the contribution that labour law, as a component of employment and social policy, could make to economic growth and competitiveness. Employer stakeholders and several Member States stressed, however, the significance of an appropriate labour law framework for promoting jobs, growth and competitiveness.

Trade union stakeholders, a number of Member States and academic experts, warned against viewing the standard, indefinite employment contract as somehow obsolete, or as an obstacle to the creation of jobs. In their view, the Green Paper could be interpreted as expressing a preference for more diverse contractual forms and for the introduction of weaker employment laws. Many respondents, including the EP, EESC and Member States, stressed the stability and security offered by the standard work contract. Conversely, employer stakeholders, together with some Member States, considered that flexible work contracts had not been treated in a sufficiently positive light. There was no agreement on the application of the concept of "insiders" and "outsiders" to segmented labour markets. In the view of employers, the only real "outsiders" are the unemployed and the "insiders" are all those legally employed. Trade unions maintain that the gap between "insiders" and "outsiders" can only be eliminated by improving the protection of precarious workers.

The scope of the Green Paper

Some Member States, together with the trade union stakeholders, and most academic experts would have preferred a wider scope for the Green Paper — integrating collective labour law aspects, rather than focussing on the individual employment relationship. Only such an approach could capture, in their view, the complex

[9] As proclaimed in Nice on 7 December 2000, by the presidents of the European Parliament, the Council and the Commission.

interplay between the overall regulatory framework in each country and the role of collective bargaining in regulating the world of work. The EP and the EESC urged that the modernisation of labour law should be considered within the framework of a wider flexicurity-based approach. The Commission, in its Communication on Flexicurity, endorses the need for an integrated strategy that can, at the same time, enhance flexibility and security in the labour market.

Many business submissions, recalling the limitation of EU competences, called for labour law reform to be pursued exclusively within a *national* context.

Social NGOs focused on the role of labour law in guaranteeing fair and adequate remuneration, in particular through the minimum wage. In their view labour law, in conjunction with social protection systems, should contribute to combating poverty and should be all-inclusive in its personal scope so as to avoid creating further segmented labour markets. Reforms should aim to improve rights for those in precarious employment, without reducing existing rights.

Subsidiarity

Most Member States, the EP and the EESC, national parliaments and the EU social partners recalled the division of responsibilities between EU and Member States. The development of labour law within the EU is generally viewed as falling within the competence of the Member States and the social partners, with the role of the Community *acquis* being to complement the actions of the Member States. Some respondents stress the importance of minimum standards that take account of diverse forms of national practices and the need to maintain the competitiveness of the Community economy.

National reform agendas were paramount for some Member States, national parliaments and employer stakeholders. A more structured exchange of experience on particular developments in labour law and contractual arrangements was thus viewed positively. Some national employer confederations called for urgent action at national level to ease individual and collective dismissal regulations and to facilitate greater recourse to new forms of contracts (i.e. alternatives to the standard, indefinite, full-time employment contract). However, they did not see the need for further legislative initiatives at Community level in this field.

EU-level activity on key issues of employment rights should not be confined to the open method of coordination (OMC), in the view of trade union stakeholders, academics, and several other Member States. Trade unions emphasised that emerging European labour markets can no longer be managed by relying on national rules in the social sphere as internal market and competition rules are being accorded primacy over national social policy provisions.

The Better Regulation Agenda

The EP highlighted the immense influence that labour law has on the behaviour of undertakings and how their decisions to create more and better jobs depend on stable, clear and sound legal provisions. A number of Member States see reform of their labour codes or the codification of fragmented legislation as an opportunity to reduce administrative burdens without jeopardising fundamental objectives. The

development of the OMC is also seen as a means of promoting better regulation in the field of labour law.

Several Member States acknowledged the relevance to labour law reform of a range of measures associated with the Better Regulation agenda, e.g. consultations with stakeholders, impact assessments, evaluation of the alternatives to regulation, simplification and clarification of laws, awareness campaigns regarding employment law, etc. While Member States are generally agreed that regulations to protect employees must, in principle, apply equally to large corporations and small businesses, most of them consider that there is some scope in particular cases to tailor measures to the special circumstances of SMEs.

3. THE THEMES OF THE CONSULTATION

A Flexible and Inclusive Labour Market

Member States considered that the means of achieving a balance between security and flexibility, the level at which it might be established and the exact form it should take are likely to vary between Member States and to be susceptible to change over time. However, they welcomed a more in-depth exchange of experience, involving in particular the social partners, in order to develop a clearer understanding of common challenges affecting the regulation of contractual arrangements.

Social NGOs stressed the need for better coordination between labour law and employment policies on the one hand and social protection systems on the other hand. Social protection and minimum income should enable citizens to choose between employment, training and socially meaningful activity. Periods of maternity, paternity and parental leave, career breaks and part-time employment (in particular in order to fulfil caring responsibilities for dependent people) should be taken into account in the calculation of pension and insurance entitlements.

Facilitating employment transitions

Employers stressed the impact that an easing of employment protection law could have on employment levels and on the employment prospects of vulnerable categories. In their view a meaningful labour law reform agenda should focus more on giving people the skills they need to remain adaptable throughout their working lives, rather than on protecting individual jobs. Trade unions rejected any assumption that a more flexible employment protection law would facilitate labour market transitions.

Trade unions and legal experts called for the development of new regulations to promote the transition from fixed-term and part-time contracts into full-time work. They urged measures to promote greater worker mobility by enabling workers to carry rights forward in the event of changes in employment. Among employers, UEAPME[10] urged investigation at national level as to how the continuity of social protection rights could facilitate the transitions between employment and self-employment.

[10] European Association of Craft, Small and Medium-Sized Enterprises.

Some Member States and social partner stakeholders considered that both labour law and collective agreements could contribute to promoting access to training and facilitating the transition between different contractual forms for upward mobility over the course of a working life. BusinessEurope[11], however, had reservations about whether legislation was an appropriate instrument to influence learning behaviour. In its view, the experience in Member States implementing a "right to training" demonstrated little impact for the workers who are most in need – the least qualified. Some social partner respondents emphasised their experience of negotiating collective agreements to promote access to training, improved in-service training and smoother transitions into employment from education and apprenticeships. Social NGOs, in particular, stressed the contribution labour law should make to ensuring equal access to training and life-long learning for all.

Uncertainty with regard to the definition of the employment relationship

The EP's recognition of the complexity of defining what are workers and self-employed persons under Community law was echoed by the majority of Member States. This complexity was acknowledged to have increased as a consequence of the cross-border provision of services. Most Member States wanted to rely upon national law and well-tested legal procedures to resolve such problems. Together with many social partner organisations they favour the position whereby the definition of worker under most labour law directives remains at the discretion of the Member States. While employer interests at EU and national levels generally dismissed the need for more convergent national definitions, social partner interests in the service, entertainment, media and retail sectors considered that the definitions used in different Member States to define the status of those referred to as *freelancers, casual or independent workers* might be listed and explained to facilitate a better understanding of the employment status of the persons concerned.

The EP called for an initiative towards convergence in the national definitions of worker status to ensure a more coherent and efficient implementation of the Community *acquis.* It urged the Member States to promote the implementation of the 2006 ILO Recommendation on the employment relationship.[12] Some Member States also suggested that the Recommendation be used as a basis for discussion among the Member States and social partners about how to cope better at a European level with the phenomenon of concealed employment relationships.

Most Member States and social partners are opposed to the introduction of any third intermediary category, such as the so-called "economically dependent worker", alongside those of dependent workers and independent self-employed workers. Even in Member States where such a concept already exists in national law, such as Italy, there were reservations about whether an unequivocal definition could be devised at European level. BusinessEurope accepts, however, that some added value could be gained by sharing experience on the impact of such measures so that Member States might learn from each other. Trade unions favour re-focusing the scope of labour law

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11 The Confederation of European Business.

12 ILO Recommendation 198 on the Employment Relationship adopted at the 95th session of the International Labour Conference in June 2006.

through national reforms to extend the protection associated with the standard employment contract to all workers.

ETUC[13] calls upon the EU Institutions, together with the Social Partners at EU level, to develop an EU-wide supportive legal framework, consisting of a combination of EU 'rules of the game' and certain EU minimum-standards to establish a "core of rights" while ensuring respect for national social policies and industrial relations. Social NGOs also support the idea of a common set of rights, linked to a commonly agreed definition of "worker" established under Community law, in order to underpin the principle of freedom of movement.

Three-Way Relationships

The Member States and the social partners reiterated their established positions on the merits of the proposed directive on temporary agency work. A number of Member States called for its adoption as a priority for labour law reform. Trade unions called for the proposed directive to be adopted as a complement to the Posting of Workers Directive and the Services Directive. Employer organisations, however, considered the status of temporary workers to be sufficiently well-defined in national law.

The EP highlighted the need to regulate joint and several liability for principal undertakings to deal with abuses in subcontracting and outsourcing in the interests of ensuring a level playing field for companies in a transparent and competitive market. Some Member States also favour establishing a principle of subsidiary liability to ensure compliance with employment rights throughout the EU. Other Member States, however, are satisfied with the provisions on secondary liability for sub-contracting relationships in their national labour laws.

ETUC and its sectoral affiliates considered that a Community initiative is required in the form of an instrument to regulate the "chain responsibility" of user enterprises and intermediaries in the case of agency work and sub-contracting. Employer organisations doubted whether a proposal to establish for a principle of subsidiary liability would prove effective. Rather, user enterprises should be able to rely on the fact that sub-contractors have to fulfil their labour law responsibilities.

Organisation of Working Time

The EP called for working time arrangements to be sufficiently flexible to meet the needs of employers and employees and to enable people to better balance work and family life, so as to safeguard competitiveness and improve the employment situation. A number of Member States identified the revision of the Working Time Directive as a key priority at EU level.

ETUC and its affiliates recalled the positions they had taken since the first and second stages of consultation of the EU social partners on the revision of the Working Time Directive in 2004. They want an unambiguous recognition of inactive on-call time as working time, without any opt-outs. BusinessEurope and most of its

[13] European Trade Union Confederation.

affiliates consider EU regulation in this area to have been misconceived in its original form. Employers, however, urge the adoption of proposals to revise the Working Time Directive to solve the problems created for healthcare and the private economy as a consequence of the European Court of Justice judgment in the Simap/Jaeger case. They wish to see the opt-out provision retained as a way of ensuring greater labour market flexibility.

Enforcement of employment rights and combating undeclared work

The EP stressed that labour legislation is only efficient, fair and strong if it is implemented by all Member States, applied equally to all actors and enforced on a regular basis and in an efficient manner. There was general support for better cooperation at EU level and a better exchange of information and good practices. Member States supported action at EU level to combat undeclared work, given the increasing supranational aspects of the problem. The type of action advocated varies, however, from declaratory instruments such as Council resolutions, to exchanges of good practice and multi-lateral and bi-lateral forms of administrative co-operation.

The establishment of cooperative links between relevant agencies at EU level (e.g. labour inspectorates, tax offices, social security bodies) was proposed by some Member States. The social partners reveal mixed views, reflecting their sectoral diversity as well as the differences in the way their organisations assist the authorities in enforcing employment rights and combating undeclared work. ETUC and some EU sectoral federations called for the establishment of a permanent European coordination structure to ensure enforcement of Community law, while employers viewed this as primarily a matter for the national authorities. Employers also highlighted initiatives taken under EU technical assistance programmes to help build the capacity of social partner organisations in the new Member States.

4. THE NEXT STEPS

The Commission concludes that the public consultation has achieved its purpose in generating debate at EU and national level on the need to improve labour law to meet the challenges of the 21st century. The responses provide useful information on current developments in the labour law and industrial relations systems of the Member States — many of which correspond to themes addressed in the Green Paper.

The debate has highlighted the extent to which labour law is an important tool, not only in dealing with the management of the workforce, but also in providing a sense of security to workers and citizens in a world of rapid change and high mobility of capital and technology. The debate has also shown the extent to which reforms of labour law, social security and training systems are closely interwoven. Through the Green Paper on labour law and the Communication on Flexicurity, the Commission launched an open debate about matters that are of key importance for the future of labour markets and social cohesion in Europe. The message was understood by the main stakeholders, whatever their views about the directions for reform. The Commission will work with the Member States with a view to conclusions on

common principles of flexicurity being adopted at the European Council in December 2007[14]. The Commission will also follow the joint analysis of the social partners on the key challenges facing European labour markets[15] in order to frame an agenda designed to advance an integrated approach to implementing flexicurity-based principles. It encourages social partners to engage in negotiations, in particular on life-long learning.

The Commission will, accordingly, take the necessary steps in 2008 to pursue the issues raised in this Communication in the wider "flexicurity" context. Despite a difference of views on the extent and nature of EU action, the consultation has identified a demand for improved cooperation, more clarity, or just more and better information and analysis, in a number of areas, such as:

- The prevention and combating of undeclared work, especially in cross-border situations[16],
- The promotion, development and implementation of training and life-long learning to ensure greater employment security over the life cycle;
- The interaction between labour law and social protection rules in support of effective employment transitions and sustainable social protection systems;
- The clarification of the nature of the employment relationship to promote greater understanding and facilitate cooperation across the EU;
- The clarification of the rights and obligations of the parties involved in sub-contracting chains, to avoid depriving workers of their ability to make effective use of their rights.

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14 The EPSCO Council is expected to adopt conclusions on flexicurity on 5 December 2007. The ECOFIN Council already adopted conclusions on flexicurity on 9 October 2007.

15 Presented at the Informal Tripartite Social Summit on 18 October 2007.

16 See Commission's Commmunication "Stepping up the fight against undeclared work" COM(2007) xxx of 24.10.2007: