March 30\textsuperscript{th} 2007

Response to the Green Paper on Labour Law

Executive Summary

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<td>A vision for social models in the 21\textsuperscript{st} Century</td>
<td>European societies, including its businesses, face a multitude of challenges in the 21\textsuperscript{st} Century, such as ageing societies, rapid technological changes and an increasingly integrated global economy.</td>
<td>AmCham EU advocates a vision for social renewal to adapt to these challenges: Making labour markets more flexible, while investing in people’s skills and providing basic financial support in times of unemployment.</td>
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<td>Making social innovation strategies locally relevant</td>
<td>Overly rigid employment legislation hinders business from innovating and creating jobs and exacerbates social exclusion. Differences in local markets need to be taken into account when formulating public policy.</td>
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<td>The need for flexible working arrangements</td>
<td>Flexible working arrangements facilitate social inclusion by allowing workers to participate in or to be reintegrated into the labour market. They allow business to adapt rapidly to changes in the market place and to innovate in products and services through improvements to existing operations.</td>
<td>Flexible working arrangements should be actively promoted, e.g. through financial incentives. Member States and Social Partners should adapt labour law and collective agreements to increase the flexibility of the labour market.</td>
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<td>Definition of employment and self-employment</td>
<td>Labour market traditions and definitions of employment relations greatly vary among Member States. This ensures flexibility and allows them to effectively deal with changes in the market place.</td>
<td>Definitions of employment relations should not be adopted at EU level. In addition, extending some of the terms and conditions of traditional employment contracts to all contractual relationships is inappropriate as it would unduly alter the balance of rights and responsibilities and impact negatively on growth and employment.</td>
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Introduction

The American Chamber of Commerce to the EU (AmCham EU) is pleased to have the opportunity to contribute to the consultation on the Green Paper on Labour Law. Before addressing the questions included in the questionnaire, we will briefly outline our general vision of European Social Models in the 21st Century.

AmCham EU’s Vision of 21st Century Social Models

A job is the best safeguard against social exclusion. Unfortunately, persistent and high unemployment remains a key challenge. Labour market performance must be addressed if Europe is to meet the Lisbon strategy employment targets, respond to demographic changes and prevent further social exclusion resulting from high unemployment.

Social models need to facilitate, to a greater extent, the transformation and adaptability of enterprises and workers. This will allow for the production of both services and goods to shift to higher-value added segments of the economy.

Today, employment legislation in some countries, both as a result of EU and national legislation, hinders innovation in business and workforce models. Labour market rigidities impede companies from being innovative and maximising new technology to increase productivity and job growth in competitive sectors.

Governments are faced with the challenge of achieving multiple objectives: promoting growth and jobs while ensuring fairness and opportunity for all. Leveraging a broad flexicurity approach to address the new realities of globalisation and ageing societies while safeguarding common values may be the way to couple economic efficiency with equitable outcomes. AmCham EU argues that these objectives are best achieved by allowing Member States to address the issues, taking their differing contexts and traditions into account.

While strictly adhering to the principles of subsidiarity and proportionality, AmCham EU still believes it is possible and meaningful for Member States to develop a common vision that is able to knit together the different characteristics of European Social Models. This positive vision for social renewal should build on common values and recognise that flexibility and innovation need to be at its core. It has to be made locally relevant by understanding that traditions differ and that each country’s road to success will have its own distinct features.

To be both effective and to lead to relevant action, a vision for social renewal that is based on a broad flexicurity approach should translate into three different types of social innovation strategies, including:

- Accelerating the reform of employment legislation
- Investing in education, research and mobility
- Adopting a system that provides basic financial support in times of unemployment

Member States’ different starting points should inform the development and implementation of an appropriate mix of actions that corresponds to national and local circumstances.
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Reform will not only mean making it easier for companies to transform. It also means taking action to improve people’s ability to transform and cope with rapid change. Workers’ capacity to adapt to change must be improved as the industrial age turns into the global age, where a single job for life is a thing of the past. One positive prospect of this modernisation is that more flexibility will be balanced by greater investment in people.

Clearly, any welfare programme that aspires to reduce long-term unemployment and inactivity will have to link active labour market programmes with access to basic financial security in times of unemployment. Welfare programmes need to be customised to meet individual needs; and the offer of unemployment benefits, counselling and retraining should be envisioned as a common package.

To build such integrated “flexicurity” strategies, Member States need to improve their capacity to learn from each other. Replicating individual measures is a complex exercise. To be meaningful, they must relate to national circumstances, but these should not be used as an excuse not to learn from other Member States’ best practices.

Therefore, AmCham EU firmly believes that this vision for social renewal will succeed in adapting European labour markets to the challenges of the 21st Century.
Response to the Questionnaire

1. What would you consider to be the priorities for a meaningful labour law reform agenda?

Much of the current debate focuses on how Europe can succeed economically and socially in the face of new realities, which include ageing populations, rapid technological change, as well as the emergence of a global economy. To meet these challenges, Europe’s labour markets need to be made more, rather than less, flexible to encourage economic dynamism, innovation and employment for all.

A meaningful labour law reform agenda should aim to encourage new approaches to job security, which focus on giving people the skills they need to remain adaptable throughout their working life, instead of protecting individual jobs. Europe needs to foster an environment where legal frameworks do not protect labour market insiders at the expense of the real outsiders – the unemployed. This light touch approach should be developed in line with the principles for Better Regulation.

AmCham EU regrets the fact that a negative perception of modern flexible working arrangements continues to undermine the Lisbon process. These working arrangements (e.g. independent contractors, outsourcing, agency work, subcontracting etc.) allow people more flexibility, help them to improve their work-life balance, facilitate career breaks or career changes, and help older workers to remain in the labour market. At the same time, these ‘atypical’ forms of work help firms respond to the market place’s accelerating pace of change. To address the demographic challenge and make the European economy more competitive, these legitimate types of work should be facilitated rather than discouraged.

Firms do not make use of these types of contractual relationships in order to evade their obligations under labour law. Their presence reflects innovation in economic life in general and commercial arrangements in particular. Their significance has increased alongside with continuous markets developments, growing specialisation and diversity in business and workforce models based on technological change and increasing levels of education.

As for identifying the appropriate level to take action, it is essential that the Commission take into account the principles of subsidiarity and proportionality. The Commission’s competencies in regulating labour markets are clearly set out in the Treaty: the Commission may only support and complement actions taken by Member States.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?

Quality and flexibility are very often two sides of the same coin. Alternative contractual relationships offer considerable opportunities for all workers. In a knowledge-based economy, people are looking for jobs that offer meaning, autonomy, motivation, learning opportunities and work arrangements that allow them to reconcile work and private life.

In particular, new flexible working arrangements should also be assessed in terms of equal opportunities. Such forms of work can empower workers to participate in the labour market and can therefore help reconcile work, private life and family life, e.g. by allowing
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more time for taking care of children or relatives. Therefore, AmCham EU supports the European Commission’s assessment in its roadmap for equality between women and men (2006 - 2010): “Flexible working arrangements boost productivity, enhance employee satisfaction and employer reputation”. There is significant evidence to suggest that strict employment protection legislation reduces the dynamism of the labour market and worsens the prospects of women, youth and older workers.

It is sometimes contended that new forms of contractual relationships have negative side effects, as workers on such contracts are believed to be in a “precarious” position due to lower levels of employment and social protection. Some argue that workers enter into non-standard contractual relationships for lack of anything better, because they cannot find a full-time permanent employment contract.

**AmCham EU argues that a job is the best safeguard against social exclusion.** In that sense, the real outsiders are those with slim or no chances to enter or re-enter the labour market because of poor access to training and education and because of rigid employment protection legislation for regular contracts which deters employers from hiring. Such lack of opportunity in combination with over-regulation is driving the real segmentation of labour markets. **New flexible working arrangements are key to reintegrating the groups that are currently excluded from the labour market.**

Accordingly, AmCham EU takes the view that the adaptation of labour law and collective agreements can contribute to improved flexibility and employment security and a reduction in labour market segmentation. This can be achieved, for example, by providing financial incentives for flexible working arrangements. In addition, employment protection legislation for regular contracts should be relaxed in those countries where it hinders the adjustment to permanent shocks, and especially where it has led to a dual labour market. **Responsive labour markets best serve growth and productivity.**

3. **Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?**

**The only sustainable means of raising productivity is innovation.** Therefore, new products and services give rise to fast-growing new businesses, but importantly also to new ways of organising work. In the knowledge economy, innovation is also about transforming business processes and exploring new business models. This is especially true in the service sector. The changing nature of innovation has made organisational agility a key component of competitiveness.

**Business model innovation requires flexibility, which is necessary to structural change.** Change is more readily introduced if there is economic flexibility and scope for changes in the location, organisation, inputs and outputs of enterprises.

AmCham EU argues that existing labour regulations, resulting both from EU and national initiatives, delay beneficial transformation and increase employment costs to the point where it hampers productivity growth. **Europe would gain a larger productivity payoff and invest more in new technology if it were more successful at reorganising its economic activity.**
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In some Member States, for example in Italy, national bargaining agreements are applicable across entire sectors (which can both include multi-nationals and SMEs) with the consequence that they are too far removed from “local” business realities and local business needs. A review of national negotiation arrangements could focus on decentralisation, with applicable provisions depending on the size of the company.

4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

There are obstacles that need to be overcome in the areas of legislation, education and public awareness to increasing firms’ incentives to hire and promote the use of innovative forms of work. In the area of labour law the challenge is to provide opportunity and acceptable standards, while ensuring that the rationale to create resilient and responsive organisations is not undermined.

The starting point for a debate on the future of labour law must be that in a global environment, job security will not come from protecting individual jobs but from giving people the skills they need to remain adaptable throughout their working life. Whereas investment in people’s skills needs to be increased and better targeted, laws and regulations must at the same time be able to accommodate rapid economic, social and technological change.

To this end, AmCham EU urges the European Institutions and national governments to implement the recommendations made by Wim Kok’s 2003 Employment Task Force to alter, where standard contracts are overly rigid, the level of flexibility provided in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of unfair dismissal. As regards fixed-term contracts, an option would be to allow contracts of e.g. 2-5 years, which would provide employees with a level of security while enabling European companies to conduct short-to-medium term projects. For example, in France, it is not legally possible to recruit temporary workers for more than 18 months and only under very restricted conditions, whereas manufacturing projects for launching a new product usually last 2-3 years.

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

Europe needs a strong and positive agenda for social renewal to earn people’s support. While aligning with a shared vision and common values, this agenda has to be made locally relevant by allowing for and understanding that each country’s road to success will have its unique features. This acknowledgement is important as nearly all the tasks fall on national governments, not the EU.

To be both effective and practical, an agenda for renewal should balance three different types of social innovation strategies. These include a reform of the regulatory environment (bringing more flexibility to labour legislation), investment in active labour market policies, education and research as well as mobility (human capital development) and
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adopting a system that provides basic financial support in times of unemployment (social protection). When we equip people for the future, investing in new skills, flexibility and greater fairness should go hand in hand.

More flexible labour law will encourage companies to hire and encourage people to work. In particular, a toolkit of various kinds of flexible employment contracts types is necessary to meet the diversified needs of companies and workers, thereby recognising the positive contribution and legitimacy of all options. At the same time, undeclared work should be fought to protect the competitiveness of law-abiding businesses and workers.

However, reform will not only mean making it easier for companies to transform, but it also means taking action to improve people’s ability to transform and cope with rapid change. An integral part of a positive agenda for social renewal is therefore the idea that to balance more flexibility in labour law, we invest more in people. This clearly raises issues of optimal training and the responsibility for skill enhancement – individuals, government and companies should ideally all play a role.

Active labour market policies should ensure that people gain the skills they need to remain adaptable throughout their working lives, rather than by defensively protecting individual jobs. Improving education, training, and mobility is essential.

Clearly, any welfare programme that aspires to reduce long-term unemployment and inactivity will have to link flexible labour markets and active labour market programmes with access to basic financial security in times of unemployment. It is key to link rights and obligations for the unemployed as opposed to giving unconditional income support: Welfare programmes should be customised to meet individual needs and the offer of unemployment benefits, counselling and retraining should be looked at as a package.

As noted in the Green Paper, evidence from the Member State level suggests that workers feel better protected by well designed unemployment benefit systems with active policies to promote access to the labour market, rather than by strict employment protection. Such systems ‘perform better as an insurance against labour market risks’. AmCham EU strongly endorses that view and calls on the Commission to actively pursue this approach in close collaboration with Member States.

To build such integrated “flexicurity” strategies, Member States need to improve their capacity to learn from each other. Replicating individual measures is a complex exercise. To be meaningful in the end, national specificities have to be taken into account but not used as an excuse for ignoring good practice.

6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

Lifelong learning is a core element of the Lisbon strategy, because of the direct correlation to employability and competitiveness. Member States currently have different approaches in promoting lifelong learning, tailored to their national situations and traditions.

The Social Partners can play a leading role in helping to promote and influence the life-long learning culture. Rather than additional legislation, active labour market policies, coordinated
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with education and training policies, are central to facilitate and promote the lifelong access to training and continuous education, especially during the transition periods of a working life. Progress on the European Qualifications Framework (EQF) would also facilitate the transfer and recognition of qualifications, and thus the mobility and employability of EU workers both at national and sectoral levels.

7. Is greater clarity needed in Member States’ legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

AmCham EU does not believe that the clarification or harmonisation of definitions at EU level is necessary. Labour market models and traditions differ significantly across the EU and a European-wide statutory definition of "employment relationship" would not adequately address the many variants of modern working life. Furthermore, AmCham EU does not share the view expressed in the Green Paper, that different national definitions or interpretations of “employment” make it more difficult to achieve the objective of reconciling the promotion of flexibility while maintaining security.

For good reasons, almost all Member States have left it to their courts to define what makes an employee – thereby enabling appropriate consideration and flexibility to consider all aspects and make appropriate decisions on a case-by-case basis. Removing this flexibility would seriously undermine governments’ abilities to deal with labour market shocks and to innovate to increase competitiveness.

Furthermore, the role that such definitions could play in facilitating the transition from employee to self-employed is minimal. Disincentives to such transitions result from the associated costs of setting up a business, inflexible social security systems that disadvantage the self-employed, overly strict labour laws and, more importantly, a lack of entrepreneurial acumen and understanding of business practices.

8. Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

Encouraging an entrepreneurial spirit is one of the key aims of the Lisbon process and the backbone of growth for Europe. In a growing number of emerging sectors the flexibility associated with self-employment is proving attractive to both parties. The self-employed appreciate their right to organise their work as they see fit (often helping to reconcile work, family, and lifelong learning) and the ability to maximise income from a number of sources. In return employers are pleased to benefit from added flexibility, higher skill levels, and associated cost savings. Such mutually beneficial relationships are crucial to stimulating the innovation culture required to meet the Lisbon competitiveness goals.

The growing diversity in types of work and work relationships in today’s knowledge-based economy would make the introduction of a common floor of rights problematic.

A traditional employment contract implies responsibilities as well as rights, including on hours worked and when and where the work is performed etc. A general floor of rights for all workers would be inappropriate as it would impose unreasonable obligations on employers without any equivalent benefits such as supervision and management control.
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The introduction of employee-like rights for self-employed/freelance workers would undermine competition between self-employed contractors for business, damage productivity, increase costs and reduce European competitiveness in the global market.

For example, it would not make sense to provide minimum notice periods for freelancers who are hired only for a certain job and whose contract then - naturally - ends with the completion of the assigned task. Furthermore, as an independent contractor is not exclusively bound to one company, it is not fair to put that company under a set of employer-like obligations with respect to such a contractor.

The Green Paper (p. 12) cites the Commercial Agents Directive as an example “how Internal Market rules can closely resemble aspects of labour law”. AmCham EU believes that the Directive is an example of a workable solution in the B2B dealings between a commercial agent and a principal. It is not a matter of labour law.

AmCham EU cannot therefore support the idea of introducing a “floor of rights” dealing with the working conditions of all workers.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

There should be a clear distinction between temporary agency personnel and subcontractors. They are not the same and should not be categorised as such, e.g. while temporary agency workers are deployed in the business organisation of the user enterprise, employees of the subcontractor are not.

Subcontracting, micro-enterprises development, temporary work agencies and outsourcing all have legal frameworks that function effectively and are critical components of the modern labour market. The reason companies make use of temporary agency personnel is a commercial one, not an employment one. Companies reach a commercial arrangement with an employment agency whereby the employment relationship rests with the agency.

10. Is there a need to clarify the employment status of temporary agency workers?

No. Divergences in the labour markets of the 27 EU Member States and the instruments employed by governments to manage them would make the introduction of harmonised definitions difficult.

In all Member States the present definitions of employed and self-employed persons have been developed over time by national courts to respond to local circumstances (cultural, economic, and political). Removing this flexibility would seriously undermine governments’ abilities to deal with labour market shocks and to innovate to increase competitiveness.

11. How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers’ health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?
AmCham EU underlines its firm belief that flexible European rules for working time – while ensuring the protection of worker’s health and safety – are of high importance for the competitiveness of European business.

The judgments in the SIMAP and Jaeger cases (on-call time to be treated as working time) have highlighted how crucial it is to retain an opt-out to maintain flexibility in the labour market. European provisions on working time should clearly state that the opt-out can be granted either by collective agreement or by consent of an individual worker. AmCham EU supports the need to ensure that the opt-out is not subject to abuse, but calls for an approach which will not add unnecessary administrative burdens on firms. Member States need flexibility for sectors where the organisation of working time is determined by on-call time and workplace specific requirements.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

AmCham EU believes that Member States should retain their discretion in this matter as divergences in the labour markets of the 27 EU Member States and the instruments employed by governments to manage them would make the introduction of harmonised definitions difficult.

In all Member States the present definitions of employed and self-employed persons have been developed over time by national courts to respond to local circumstances (cultural, economic, and political). Removing this flexibility would seriously undermine governments’ abilities to deal with labour market shocks and to innovate to increase competitiveness.

13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

Enforcement of Community law is a matter for national authorities. However, it could be useful for the EU to provide a forum in which national enforcement agencies can share experiences and best practices.

It is also important that both companies and workers are aware of their legal rights and obligations. This is where the Social Partners can play a role.

14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

Undeclared work undermines the competitiveness and existence of legitimate businesses. Therefore, AmCham EU supports moves by national administrations to stamp out such practices whilst at the same time supporting their competence in fiscal and social security
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matters. However, AmCham EU does not see the need for further action at EU level; the fight against undeclared work should be tackled at Member State level.

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The American Chamber of Commerce to the European Union (AmCham EU) is the voice of companies of American parentage committed to Europe towards the institutions and governments of the European Union. It aims to ensure a growth oriented business and investment climate in Europe. AmCham EU facilitates the resolution of EU – US issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Total US investment in Europe amounts to €702 billion, and currently supports over 4.1 million jobs.

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