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**Statement by the Federal Government
on the European Commission's Green Paper:
“Modernising labour law to meet the challenges of the 21st century”**

Preliminary remark

The purpose of the Green Paper on labour law is to launch a public debate on the need for and possibilities offered by the evolution of labour law. The Federal Government welcomes this and agrees with the Commission that flexibility and security must be weighed up against one another in an awareness of the responsibility which this entails. In view of the quickly-changing markets, this balance is also a precondition for employees' employment security. Germany shares the Commission's view that developing the European Social Model is a vital element in the successful implementation of the Lisbon Strategy. This serves to improve the agreed cooperation on social issues, and can hence be regarded as a step to keep the promise made in the German Presidency Programme that “The debate on the European Social Model has to be fleshed out with concrete proposals”. The objective is to achieve sustainable growth with more and better jobs, to ensure social cohesion and in doing so to meet the challenges of competition stemming from global competition. The European Social Model is based on joint normative values which are guaranteed by treaty. Labour law forms part of these values. Citizens must be helped to gain a perception that labour law leads in concrete terms to fair, reasonable working conditions for workers in Europe. This can make a major contribution towards the acceptance of the EU among citizens and to the success of the European Constitution. Consequently, the European Council of 8/9 March 2007 confirmed the significance of the Community's social dimension. With the Green Paper on labour law, the Commission is making a major contribution to the debate on the formation of a social Europe.

Germany underlines the principles of subsidiarity and proportionality. There is an unambiguous division of tasks between the EU and the Member States in the field of employment and social policy. The content of the Community's field of activity is aligned towards supplementing and supporting the Member States by gradually creating minimum European regulations. The national systems of labour law are in principle to be left untouched. The division of tasks set out

in the EC Treaty between the Community and the Member States provides for the Community to act to achieve the goals of the Community, which are set out in Article 136 of the EC Treaty. The Federal Government takes the view that Community regulations in the area of labour law can help to meet the objectives and support the Member States in implementing the goals. This concept ensures that no Member States are overburdened and that the possibility remains to also go beyond the minimum social standards applying to all Member States. This has been incorporated in the creation of European directives on labour law, and has largely served as a guide in creating the content of European regulations. Apart from this, tailored solutions at Member State level take precedence since labour markets differ widely from one region to another.

German labour law is characterised by the autonomy of the social partners and by the particularities of the law on collective bargaining. This is recognised in Articles 137 to 139 of the EC Treaty, and is accepted as a part of the European Social Model. Germany rejects regulations which unreasonably restrict the scope of the social partners. This view is shared by the social partners who were involved in the consultation phase on the Green Paper. The German experience shows that a living social partnership does not pose an obstacle to economic success, but indeed strengthens it. The Member States and the social partners are responsible for ensuring that greater flexibility does not lead to a reduction in workers' social security.

Focussing on labour law aspects must not lead to a situation in which other approaches such as active labour market policies, humanisation of the world of work, fair and reasonable wages, equal opportunities, family-friendliness and concepts of life-long learning are not accommodated. In this sense, the Commission's approach to attach priority to the role of labour law for European labour markets is the subject of criticism. The impact of an individual labour market regulation through amendments to labour law cannot be seriously isolated from other influences on macroeconomic development, and hence on labour market demand. Different institutional frameworks and employment policy concepts can equally lead to a positive employment situation.

Economic development in Germany confirms this. The German economy is clearly on a path towards growth, and the domestic price climate is favourable. The momentum for growth is increasingly coming from within the country. Companies are investing. Unemployment is falling in Germany. A considerable number of jobs subject to obligatory social insurance are being created once more.

The policy of the Federal Government has contributed to this development with profound, far-going reforms. This includes for instance the Acts for Modern Services on the Labour Market

(*Gesetze für moderne Dienstleistungen am Arbeitsmarkt*), the Act on Reforms on the Labour Market (*Gesetz zu Reformen am Arbeitsmarkt*), the reforms for financial stabilisation of statutory health insurance and the health reform, which will enter into force in phases from 1 April 2007 onwards, and also the promotion of the gainful employment of women and men with children through the introduction of the Federal Parental Benefit and Parental Leave Act (*Bundes-elterngeld- und Elternzeitgesetz*). At the same time, comprehensive state promotion of additional private and company care for old age has been created. The mobilisation of private investment through fiscal promotion has been particularly effective for the internal market.

With regard to the Lisbon goal of an employment rate of 70%, an employment rate of 67.7% (women 61.8%, men 73.5%) indicates that there is still unused growth potential lying fallow in Germany (EUROSTAT). The Federal Government will hence be continuing to follow the path of reforms on which it has started in order to facilitate more employment and growth. Along with the reforms are initiatives to make advances in the knowledge society by promoting top research and technology and further education, as well as basic and further training.

A central task of labour law is its protective function for subordinate employees. The fundamental concept of labour law is to strike a fair balance between the interests of employers and those of employees. Good work needs the legal framework provided by labour law. Labour law aims to facilitate, as far as is possible, negotiation on an approximately equal footing for wages and working conditions. Reliable, fair working conditions are a major precondition for other aspects such as planning about life and family.

This goal of labour law applies regardless of the type of employment contract and the flexibility model selected. Rather, the core question always arises of how the interests of employers and employees can be suitably balanced by applying labour law.

It should be taken into account when evolving the European Social Model in the context of the implementation of the Lisbon Strategy that a "one-size-fits-all solution" cannot work, but that the different starting situations in the Member States (with regard to labour markets/economic structure/fiscal/further training and labour law systems, etc.) require differentiated solutions and approaches.

External flexibility makes it possible to adjust the number of employees by hiring and firing or through fixed-term employment and temporary work. Internal flexibility facilitates the required adjustments in employment through flexible working hours, part-time work, time accounts, further training or indeed saving clauses in collective agreements. The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO Council) found on 22 February 2007 that the internal and external components should reinforce one another.

“Flexicurity” signifies a balance between flexibility and security. Flexibility and security are not opposites, but rather two sides of a coin. Economic success and social justice belong together. It is virtually impossible for workers to assert their justified interests without security. Employees' freedom in employment is determined to a considerable degree by the amount of employment security which they have, in particular when it comes to protection against losing their jobs. Any changes which need to take place should generally be effected within employment. The balance between flexibility and security in employment is also important for employers. There is a close correlation between job quality, job satisfaction and employment security in standard employment relationships, and work productivity.

Striking a fair balance between flexibility and security includes fair, reasonable wages. The majority of EU Member States use the instrument of a minimum wage. The balance between flexibility and security also entails participation rights via collective interest representations, security and health protection at work, retaining employees' employability through life-long learning mainly by means of vocational further training, family-friendly work organisation as a contribution towards equal opportunities and to overcome demographic developments, as well as equality of women and men at work. In this sense, the European Council of 8/9 March 2007 emphasises the importance of suitable working conditions and the principles on which they are based (i.e. employees' rights and employee participation, equal opportunities, security and health protection at work, as well as family-friendly work organisation) in view of the positive trends on the Member States' labour markets. Over and above this, the European Council finds that greater attention should attach to the active involvement of employees, i.e. ensuring a suitable minimum income for all, in conjunction with the principle that work must be worthwhile.

The Green Paper on labour law distinguishes between “standard employment relationships” and “alternative forms of employment”. The standard employment relationship is labelled by contractually-based, permanent full-time employment with one single employer with protection rights under labour and social law. By contrast, the new atypical (“alternative”) employment relationships diverge from these standards to a greater or lesser degree. This means for workers in many cases much lower income and fewer workers' rights.

Germany emphasises that regular employment relationships are indispensable because they provide security, form the foundation for the systems of social security and sustainably strengthen competitiveness. New work arrangements are indispensable for employers as a flexible reaction to economic conditions and challenges. The flexicurity debate however aims to find a sensible combination of flexibility and security. Employees in such new employment relationships should not be the object of discrimination, nor should they be eliminated from rights or marginalised.

The Federal Government considers that the protection of employees in these employment relationships in Germany is not inadequate. The Act on Part-Time Work and Fixed-Term Work (*Teilzeit- und Befristungsgesetz*) ensures that fixed-term or part-time workers are not placed at a disadvantage. The Act on the Commercial Provision of Labour (*Arbeitnehmerüberlassungsgesetz*) ensures the rights of agency workers. Central significance attaches to the importance of recognising atypical, flexible forms of employment for the economy, whilst ensuring that employees in atypical, flexible employment relationships are protected against discrimination and that abuse of atypical employment contracts is prevented. Having said that, it is necessary to keep an eye on the group-specific spread of the flexibility risks. In terms of trends, the less-qualified are more affected than the well-qualified, women more than men, and the young more than older workers.

Question 1

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

People in Europe deserve fair, reasonable working conditions. The Commission correctly recognises that the burden on enterprises should be eased by reducing bureaucracy and that more flexibility is necessary in view of technical progress and of the increasingly serious threat from competition introduced by globalisation. For this reason, in the German view, there is a central challenge to guarantee a flexible, inclusive labour market. It should be observed here that employees should not be prevented from assuming responsibility by bombarding them with new regulations, but in contrast that they should take on greater responsibility. Improving labour law and social security by means of minimum standards, as well as creating the necessary flexibility for enterprises, takes on very high priority. Major successes have already been achieved by these means. People's expectations and the challenges of global competition provoke further and greater efforts. Faced with demographic change, Europe can only maintain and expand its prosperity if people are trained into old age and remain innovative. Europe can only stand up to global competition by offering high-quality services and products, by having well-trained employees and through secure and health-promoting jobs. In the view of the Federal Government, the subject of the quality of employment therefore deserves particular attention in Europe within the discussion of the Green Paper's topics. This corresponds to the goal of the Lisbon Strategy of increasing job quality. Importance attaches to fair, reasonable working conditions and to the principles upon which these are based, that is employees' rights and employee participation, equal opportunities, security and health protection at work, as well as family-friendly work organisation.

These goals should head the agenda. The concrete form which these goals should take cannot be prescribed uniformly at European level. There is a need to take account of and respect the different cultures and structures of labour law in the individual Member States. This means that the Member States' regulations are to be primarily taken as a basis in order to achieve goals, albeit the national models demonstrate a number of common features here. The Green Paper rightly provides an impetus to discuss these commonalities. It is vital to treat as being of equal relevance the policy areas of labour, economics, environment and social affairs and to suitably interlink them.

Question 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?

The law on employment contracts and the law on collective agreements contain shaping elements to strike a balance between the necessary flexibility and the security of employees on the labour market. European labour law aims to improve working and living conditions, for which it can however only provide a framework. It is then a matter for the Member States and the social partners to strike a suitable balance in their regulations between flexibility and security. This framework may not unnecessarily restrict the scope for negotiation open to the collective bargaining parties. The social partners which the Federal Government has included in the consultation phase support this position.

Germany has defined the limits on the scope for negotiation such that the interests of labour and collective bargaining parties, as well as of enterprise partners, are suitably taken into account:

German labour law is based on fundamental freedom to contract for employers and employees, otherwise restricting itself to a small number of statutory instruments. This basis constitutes elementary protection for employees' rights in order to compensate for their structural inferiority.

In other respects, German labour law leaves it to the collective bargaining parties, as well as to the employers and the employees' representatives, to strike a balance between the necessary flexibility and the security of employees in determining working conditions. This enables employers and employees to take diverse circumstances into account within the framework of the law as it stands. For instance, the requirements as to reconciling work and family have increased. It has equally become clear that life-long learning has become necessary for employees. This applies not only if a change of job or profession is necessary. Even within the same job, the requirements are, as a rule, different today than five or ten years ago. Employees

have become more interested in taking time-limited leave from work, for instance in order to take care of sick children, for the long-term care of close relatives or for vocational further training. This can be done whilst remaining in employment. Here, state support is quite conceivable and useful.

The collective agreements play a major role in adapting German labour law. They can particularly accommodate the specific flexibility and security interests of the sectors in question. Collective bargaining practice shows by its differentiated regulations that the collective bargaining parties actively work together to bring about the necessary changes. Saving clauses in collective agreements enable enterprise partners to suspend collective wage increases, to reduce the collectively-agreed wage, to differentiate, or to create lower starting rates for special groups of employees, or indeed to award employees higher pay in individual establishments, for instance through profit-sharing as a flexible supplement to wage agreements. Within defined ranges, such saving clauses permit enterprise partners to agree fewer or more than the standard number of working hours in the establishment, or to spread them on a variable basis within working hours accounts.

The German model of flexicurity in labour law also facilitates a rapid adjustment of working conditions to changed market conditions and technical innovation. The existing forms of employment offer a large number of possibilities for flexibility, in particular when using models which provide for flexible working hours.

Question 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?

For Germany: German labour law, as a rule, only defines statutory regulations to protect employees in the form of minimum standards, which in turn are frequently aligned with European legal norms. German labour law makes it possible for employers and employees to exceed the minimum standards through an individual contractual or collective agreement, thereby creating more favourable working conditions for employees. Employers, employees and, at the collective level, the parties who participate in collective agreements, hence have considerable latitude to agree regulations which do justice to the practical interests of employees and enterprises. In this way, labour and collective bargaining norms provide

compensation between the competitiveness of enterprises and protection for employees. Labour law hence sets the framework for flexible, modern work organisation. The German system makes it possible to constantly re-adjust the necessary balance between enterprises' competitiveness and employee protection in line with changes in work.

This also applies to employment protection. Insofar as general employment protection applies in enterprises, it aims not to prohibit dismissal, but to protect employees against losing their jobs in a manner which is arbitrary and socially unfair. In fact, employment protection does not prevent the termination of employment relationships. Between 10% and 13% of employment relationships are terminated in Germany every year, in most instances rapidly, without conflict and with no further costs. Of all employment relationships which are terminated in a year, only roughly 6% are taken before the labour courts.

Other provisions, such as the Act on Working Hours (*Arbeitszeitgesetz*), the Act on Part-Time Work and Fixed-Term Work, and the Act on the Commercial Provision of Labour, afford employees and employers the greatest possible latitude, coupled with suitable social security. For instance, working hours models may facilitate reduced working hours either on a regular daily basis or on an irregular weekly/monthly basis, or there are block time models, working hours accounts and sabbaticals, as well as on-call work and job sharing, or temporary work. Labour law permits short- or long-term introduction of flexible working hours in the interest of reconciling working and private life. Practical experience has shown that employers, as well as the employees in question, avail themselves of the legal latitude in many ways.

The motivating factors that lead to improved performance are a secure job, as well as fair, suitable working conditions, vocational further training and commitment to the enterprise. Employees have a considerable interest in this aspect. A representative survey which was commissioned in Germany by the Federal Institute for Occupational Safety and Health, investigating which of the main aspects result in good working conditions for employees, produced the following results in order of their significance:

- Aspects of income and employment security: a fixed, reliable income (92% of respondents in subordinate employment), employment security (88%) and permanent employment (83%) take first place.
- Purpose-related and creative aspects: enjoying work (85%), work should be regarded as having a purpose (73%).
- Social aspects: being primarily regarded by the boss as a person (84%), cooperative climate between colleagues (76%).

- Aspects of health protection: taking into account health and safety issues when specifying a job's activities (74%) is also significant. Here, health and safety, which are highly significant for employees, include the way in which the work is organised, combined with the possibilities for a worker to include their own influence and scope, as well as the style of the leadership culture.

These factors are equally important for enterprises. Stable employment relationships save enterprises the costs of recruitment, familiarisation and dismissal. Stable employment relationships also have future benefits against global competition. Labour law creates a stable legal framework.

As to the question of whether special regulations in labour law should apply to SMEs, it is possible to say that fundamental labour protection regulations, such as the statutory regulations regarding minimum leave, working hours and the continued payment of remuneration in case of illness, are not suited to differentiated regulations. Employees in SMEs cannot be exempt from the application of such minimum provisions regulating security, protection of health and safety and fundamental rights in employment. Employee protection is inalienable. Differing arrangements are however possible in other areas. Threshold values apply in some cases in Germany, above which the respective regulation is applied, and this is in order to protect SMEs against excessive burdens; examples are the Employment Protection Act (*Kündigungsschutzgesetz*), the Civil Code (*Bürgerliches Gesetzbuch*) (notice periods) or the Act on Part-Time Work and Fixed-Term Work (the right to work part-time). In some cases, the interests of SMEs are accommodated, in line with the particular circumstances, by special regulations of solidarity-based equalisation, such as in the Act to Equalise Employers' Expenditure in Continued Payment of Remuneration in Case of Illness and with Maternity Benefits (*Gesetz zum Ausgleich der Arbeitgeberaufwendungen bei der Entgeltfortzahlung im Krankheitsfall und bei Mutterschaftsleistungen*). SMEs also particularly benefit from the flexibility facilitated by the provisions of labour law (for instance in remuneration, in working hours models, and in the availability of part-time work).

Question 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?

The Federal Government appreciates the fact that the Community has created security in atypical employment relationships via labour law regulations such as Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work, and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work. These approaches can certainly be expanded to cover other atypical contracts if such a step is recognised by the Member States as being correct. In contrast, it is not convincing if the Commission strives to reduce the general protection regulations under labour law with regard to atypical forms of employment contract.

In analytical terms, it is necessary to distinguish between the different atypical contracts. Part-time employment is chosen by employees in order to better reconcile work and family or in order to implement further training wishes. Most employees entering into fixed-term contracts are interested in permanent employment, and frequently only accept fixed-term employment because there is no alternative.

Germany has transposed the Directive concerning part-time work in national law, along with all requirements for the permissibility of fixed-term employment contracts, by means of the Act on Part-Time Work and Fixed-Term Work. The provisions on fixed-term employment contracts provide enterprises with a broad spectrum for the flexible deployment of employees. Newly-recruited employees can be employed on a fixed-term basis, giving no factual reason, for up to two years. Start-up businesses can employ fixed-term workers for up to four years with no factual reason for the limit. Over and above this, the German Federal Parliament has adopted an amendment to the Act on Part-Time Work and Fixed-Term Work which permits the employment contract of an employee to be placed on a fixed-term basis without a factual reason for up to five years, provided that the employee has reached the age of 52 at the beginning of the fixed-term employment relationship and that the employee was unemployed for at least four months directly prior to the beginning of the fixed-term employment relationship, and has drawn transfer short-time allowance or attended a publicly-promoted employment measure. An initial short fixed-term employment contract can be extended several times within the maximum five-year fixed-term period.

An employee may always be employed on a fixed-term basis if there is a factual reason for the time limit.

The fact that the share of fixed-term contracts has been stable at 9% for a number of years shows that fixed-term employment is clearly the exception in Germany and that permanent employment has remained the norm. It is not possible to speak of segmentation on the labour market due to fixed-term employment relationships.

Question 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?

The protection of employees against unfair dismissal is a social fundamental right as recognised in the Community (Article 30 of the Charter of Fundamental Rights, Article II-90 of the EU Constitution). Protection against dismissal, as well as unemployment insurance, perform a variety of functions. The protection provided by unemployment insurance only comes into effect when dismissal becomes effective. Unemployment insurance is hence not a substitute for the protection against unfair dismissal which is necessary under European law.

The Federal Government has moreover already stressed that there is no standard flexicurity model fitting all Member States of the European Union because of the different institutional, economic and cultural circumstances. The Commission furthermore does not devote sufficient attention to the issue of responsibility, that is which level would be responsible for possible measures. This leads to a risk of an “asymmetric” approach with potentially far-reaching financial consequences: Binding requirements under EU law relating to labour law arrangements the consequences of which the social systems of the Member States – in the absence of EU responsibility – would have to deal with in regulatory and financial terms. The Federal Government calls on the Commission to also make a statement on the matter of responsibility and financial impact in the Communication on flexicurity which it has announced.

In the context of its model of flexicurity, Germany will further optimise the instruments of active labour market policy to promote a responsive, inclusive labour market within the meaning of a policy mix. Hence, the Acts for Modern Services on the Labour Market have been subject to a fundamental review. The Federal Government will use the results to refine the instruments of active labour market policy in the framework of its policy concept to promote employment. This will aim to guarantee the efficiency and the effectiveness of the labour market instruments. Those concerned must be supported by a balanced system to promote measures within the meaning of an enabling labour market policy, above all if they are at risk of or suffering from unemployment. The principle is known as “support and empowerment”. Labour market policy should be aligned towards reducing the duration of unemployment, and ideally not to let unemployment arise at all. To this end, it is necessary for the labour markets to give greater

consideration to the social issues affecting employees, for instance with regard to employees with disabilities or those whose health is restricted, or workers with family duties.

Question 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?

Working conditions that facilitate employees' life-long learning, as well as the health of the workers and family-friendly work organisation, are key to enterprises' competitiveness and workers' employability in the framework of the Lisbon Strategy. Statutes and above all collective agreements can contribute a framework for such working conditions or help to improve these working conditions. Hence, employees are helped to cope with changes in employment, as well as with periods of unemployment, and with the transition to new employment. As the European Council of 8/9 March 2007 emphasised, there is a need for a life cycle-orientated approach in order to improve access to labour markets and to promote the mobility of employees during their entire working lives, and hence to help to spread out the "rush hour" of life and to increase employability into old age.

Society requires constant further training to respond to the global, economic, social and ecological challenges of the knowledge-based society, as well as to permanently develop the knowledge acquired during the initial phase of training. In future, further training and adult education must be taken as an increasingly important part of life-long learning. From the German point of view, therefore, systems meeting the need for life-long learning and for an active labour market policy are indispensable for employees. By way of an example, the Federal Government points to the following elements in their policy concept, which are intended to help create working conditions that promote learning and improve possibilities for vocational further training, as well as for general and civil education.

The Federation and the *Länder* have adopted a joint strategy for "life-long learning" in Germany. The strategy shows what is needed to ensure successful life-long learning, beginning with the nurturing of children, and continuing up to and including retirement age. It portrays how learning can be suggested and supported for all citizens, in all life phases and areas of life, in various learning venues and in multifarious forms.

Vocational further training is a decisive precondition for Germany as a location for innovation. It is the declared goal of the Federal Government to considerably increase participation in further training in Germany. As an additional contribution, the introduction of saving for further training

is planned so that the measures of vocational further training can be funded in order to conserve the employability for instance of older employees, those with disabilities, as well as the poorly-qualified. A major aspect here will also be appropriate advice on skill-building. It is possible to overcome a lack of specialist workers by improving skill-building and vocational skills. The promotion of training, education and further training of people with a migration background is a further element of the Federal Government's policy in this context in order to improve the social integration of this group of individuals. In addition, promoting improvements in the ability to reconcile family and work, and on one hand providing incentives for a quick return to vocational work after a family-related interruption, whilst on the other hand encouraging more active fathers, are among the measures that can help to conserve and gain skills and to effectively counter the shortage of specialist workers.

The collective bargaining parties have developed a variety of solutions for the transition from completed training to employment. Above all in the metal and electrical industries, and in the printing industry, the collective bargaining parties have adopted collective agreements which provide a transfer into an employment relationship limited to twelve months following on from training. The collective bargaining parties can also promote workers remaining in employment by adequate measures, such as agreements on skill-building, on sabbaticals and by transfer social plan concepts. The Federal Government supports this approach of the social partners, which provides flexible structures for transitions between various work arrangements, and hence facilitates the mobility of employees. The approach does justice to the central role of the social partners in achieving the Lisbon goals, which also is underlined by the European Council of 8/9 March 2007.

Calls within the EU for a family-friendly policy were met by Council Directives 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work, and 96/34/EC of 3 June 1996 on the framework agreement on parental leave. The reconcilability of family and work have for some years formed a major element of labour, economic and social policy decisions in Germany. The above EC directives were transposed into national law by the Act on Part-Time Work and Fixed-Term Work, as well as by a modification of the Federal Child-Raising Allowance Act (*Bundeserziehungsgeldgesetz*) which was already in place at that time; this accommodated the concept of the further development of a family-centred policy. The Federal Parental Benefit and Parental Leave Act, which came into force on 1 January 2007, made a further contribution towards the reconciliation of family and work. Furthermore, thought is being given in Germany to how long-term care for close relatives can be better reconciled with work.

In consistent application of this legal framework, in the view of the Federal Government all measures intended to promote flexibility and mobility are, at the same time, to aim to offer equal

development opportunities to both women and men, for instance by improving the reconcilability of family and work. A balance between flexibility and security can only be achieved if fundamental preconditions of equality and family policy are met at the same time. Here, policy must be aligned to realities, to women's and men's plans and to the needs of children. This means that it is also necessary to have the necessary, flexible offers of kindergarten care, support for relatives in need of long-term care and a sound family-relevant infrastructure in the local environment. This concurs with the statements of the Employment Council, which stressed at the spring meeting of the European Council on 8/9 March 2007 that greater effort is necessary to promote reconciling family and work for both women and men.

The Federal Government has set up broad-based social alliances for family-friendly work in the shape of the "Alliance for the Family", the enterprise programme "Family as a factor for success – Bringing companies on board", as well as the "Local Alliances for the Family" initiative. The Association of German Chambers of Industry and Commerce set up a service-orientated network office in 2007 which supports small and medium-sized enterprises in their efforts to become more family-friendly.

Over and above this, the available specialist potential possessed by, in particular, the younger women's generations should be consistently used at all levels of the hierarchy at work and also conserved in the long term. A major step in this direction has been taken with the "Agreement of the Federal Government and the national associations of German industry to promote the equal opportunities of women and men in private industry" adopted in 2001, which is regularly reviewed.

For all employees in the federal administration and in the courts of the Federation, the Federal Equality Act (*Bundesgleichstellungsgesetz*) contains special regulations on the reconcilability of family and gainful employment. Employees with family duties for instance have a right to part-time employment or leave unless opposed by urgent operational interests. As permitted by operational possibilities, they are also to be offered teleworking posts or special working hours models, such as sabbaticals or working hours accounts.

Over and above this, Germany is in favour of reliable framework conditions, within the meaning of the above concept, which also make it possible for young people to take an active part in economic and working life. Young people need security for vocational development to provide prospects for their own future and to start a family. They need clear conditions for a good vocational start. Against this background, the Federal Government has formed an alliance with industry in the "National Pact for Training and Young Skilled Staff in Germany" (*Nationaler Pakt*

für Ausbildung und Fachkräftenachwuchs in Deutschland) to focus on training young people. What is more, the Federal Government favours joint standards for fair treatment of graduates and trainees in particular.

Question 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?

German labour law covers those persons who are regarded as being in need of protection. As to the question of which individuals are in need of protection, there is agreement that the boundary runs between those in subordinate employment and the self-employed. Whether work legally is to be regarded as self-employment, or whether a person works on a subordinate basis, is determined by the definition of "employee". German law does not have a statutory definition of the term "employee". According to the relevant case-law of the Federal Labour Court, an employee is anyone who carries out subordinate work in the service of another (employer) on the basis of a contract under private law (employment contract). This is less about contractual wording and more about the actual structure and implementation of the contractual relationship. The relevant case-law relates to the right of the employer to issue instructions and to the incorporation of the person concerned in the establishment.

It is up to the labour courts in Germany to decide bindingly on the question of whether an individual is in subordinate employment as an employee. This also applies to the clarification of "disguised" employment relationships. In certain cases, in order to combat undeclared employment, the legal status of those concerned is clarified in Germany by the clearing house of German old-age pensions insurance, the competent health insurance funds as collecting agencies for the overall social insurance contribution, the inspection service of the German old-age pensions insurance or the directorate-general responsible for financial control of undeclared work. Against this background, the Federal Government shares the view expressed by the Commission in the Green Paper that the problem of disguised employment relationships must be solved primarily by the Member States themselves. This position is supported by the social partners who were consulted with regard to the Green Paper.

In the view of the Federal Government, however, it does make sense to discuss whether and how the Member States can support one another in defining the necessary boundaries between subordinate employment and self-employed activity in order to better do justice to the

phenomenon of undesired disguised employment relationships at European level. Even with all the differences in the way the national legal systems distinguish between subordinate employment and self-employment, there are a number of commonalities which the Member States should work on. A joint stock of possibilities under labour law for defining employment relationships would give more legal certainty to enterprises and employees in Europe in this respect, and would make transitions between work arrangements easier, and hence improve the Europe-wide mobility of employees.

The Recommendation concerning the Employment Relationship (No. 198), which the International Labour Organisation adopted in June 2006, could be helpful here. The recommendation is to make it easier for the member countries of the ILO to determine when employment is constituted. The Recommendation was supported by the overwhelming majority of EU Member States. It could also form the foundation for a corresponding exchange of experience at Community level, with the goal of providing the Member States with a mutual standard which could be used to solve questions of distinguishing between forms of employment. This could make a contribution towards the fight against disguised employment relationships in the Community.

Question 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?

Labour law and the law on occupational safety and health apply to all employees in Germany, regardless of whether they are employed in a standard employment relationship, in other words in permanent full-time employment, or in non-standard employment (such as part-time or fixed-term employment). What is relevant is only whether the individual in question carries out subordinate work, in other words whether he or she is an employee.

The German legislation does not provide for a legal interim form between being self-employed and being an employee. Some labour laws have the term “employee-like” worker. “Employee-like” workers are however not a third group. They are individuals who because of their lack of integration into a company organisation, and because they are largely free to dispose of their working time, are not as personally subordinate as employees. They act on an independent basis. Some labour law protection provisions apply to them because of their economic dependence on one client and their need for social security comparable to that of an employee. The German legislature decides on a case-by-case basis according to factual points of view which provisions apply to the group of individuals of “employee-like” workers. Examples of this

are access to the labour courts, the possibility to conclude collective agreements, the right to minimum leave, and the application of the Occupational Safety and Health Act (*Arbeitsschutzgesetz*). Here, it is a matter for the labour courts to determine whether those who act on an independent basis are “employee-like” workers, with the consequence that the above labour law regulations apply to them.

By contrast, Germany rejects standard minimum requirements for all workers, regardless of their contractual form. Such a general expansion of protective provisions to also cover the self-employed is not expedient.

Question 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"?

Question 10

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

Questions 9 and 10 are answered together because their content is related.

Statutory provisions already exist in Germany to regulate the responsibilities of the contractual parties in three-way employment relationships. The most important example of this is the commercial provision of labour, in which an employer (temporary employment business) assigns its employee (agency worker) to work for a third party (user enterprise). Commercial provision of labour is subject to authorisation because of the specific requirement to protect agency workers. The temporary employment business is the contractual employer of the agency worker, with all concomitant obligations (payment of remuneration, payment of social insurance contributions and taxes, etc.). In principle the temporary employment business must grant to agency workers relevant working conditions equal to those provided in the operation of the user enterprise for a comparable worker of the user enterprise, including remuneration (principle of equality) for the duration of the provision of labour. Exceptions from the principle of equality can be made when recruiting persons for a maximum of six weeks who have previously been unemployed, or if a collective agreement applies. The right under the employment contract to give instructions is partly transferred from the temporary employment business to the user enterprise. The user enterprise assumes additional obligations under the employment contract,

as well as public law occupational safety and health obligations (regardless of the continuing obligations incumbent on the temporary employment business under occupational safety and health law).

If the temporary employment business does not have the necessary authorisation for the commercial provision of labour, the contract between the temporary employment business and the user enterprise, as well as between the temporary employment business and agency worker, is ineffective. An employment relationship is then considered to have come about between the user enterprise and the agency worker. The statutory construction makes it clear that suitable protection of employees is guaranteed in three-way employment relationships. The employment status of agency workers is clarified in Germany.

Germany has so far welcomed in principle the efforts at European level to determine minimum standards for the working conditions of agency workers in the shape of a directive. Germany has always stressed that the directive is to be adopted in a consensus shared by all Member States, and that it should facilitate the conservation of the different labour market concepts in the individual Member States.

Subsidiary liability is always expedient where there is a need for social security. The ordering of subsidiary liability for outsourcing is only prescribed in German labour law to guarantee certain working conditions contained in collective agreements, adherence to which is prescribed by the Posted Workers Act (*Arbeitnehmer-Entsendegesetz*). According to the case-law of the Federal Labour Court, this form of special social security for employees, which experience to date shows has a clearly preventive impact, is compatible with national constitutional law and, according to the case-law of the European Court of Justice, conforms to Community law.

Question 11

How could minimum requirements concerning the organization 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 organization of working time should be tackled as a matter of priority by the Community?

Germany would welcome it if the Commission were to submit a new proposal for an amendment to the Working Time Directive on the basis of the statements from the consultation process. The Working Time Directive is a major building block for social Europe. Minimum conditions for working time help to guarantee the security and health protection of workers in the entire EU. They also prevent distortions of competition. For health protection and competition reasons, all

Member States must start with the same conditions. As minimum European conditions to protect worker health and safety, the requirements of the Working Time Directive can only apply per employee and not per employment contract. Employment of employees in several employment relationships over and above the maximum working hours cannot be tolerated.

The Federal Government welcomes the fact that the Commission has included the question of amending the Working Time Directive in the Green Paper. Following the efforts, which have so far been in vain, to reach a compromise in the Employment Council for an amendment to the directive, the consultation process on the Green Paper offers an opportunity for new directions.

Germany attaches particular importance to the flexibility of the European requirements on working hours with regard to the security and competitiveness of industry and with a view to improving the employment situation in Europe. In the German view, it is desirable to give more consideration to improving the reconcilability of family and work, and in doing so to include its significance for increasing the productivity of enterprises, worker satisfaction and competitiveness. The protection of the health and safety of workers is equally important from the German point of view. Germany favours solutions that take account of the Member States' social traditions. Any solutions must guarantee long-term legal and planning security in all Member States in the practical implementation of the directive, and solutions must also be implementable and useable for all Member States. The Member States have a particular need for latitude in sectors of employment in which the organisation of working hours is typified by being on call, or which are subject to the special activity-specific requirements imposed on working hours.

Question 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?

The rights of frontier workers are guaranteed by the European Posting of Workers Directive and the respective national statutes to transpose this directive. Posted workers are thus protected by the labour law provisions applicable in the Member State in which the work is carried out (workplace principle). Posted workers can file for their rights, in principle, in the accepting state, even if they have returned to work in the posting Member State. In line with its structure as a

conflict-of-laws rule, the Posting of Workers Directive consistently assumes in the definition of 'worker' that the law of the Member State is to apply whose working conditions are to be adhered to (Article 2). In this respect, the Posting of Workers Directive constitutes a coherent, balanced arrangement for the question of the cross-border employment of posted workers. For frontier workers, i.e. for employees who live in one Member State – near to the border – and are employed by an employer based in a neighbouring country – near to the border – in accordance with the principles of international private law, as a rule the labour law applicable is that of the State in which they are habitually employed – both with regard to working conditions and to the basic definition of 'worker'. The cross-border momentum of these circumstances does not require any uniform regulation on the term 'worker'.

In the view of the Federal Government, it is however conceivable for the Member States to support one another in the required delimitation between subordinate employment and self-employment in the interest of an ongoing dialogue and exchange of experience in the light of the ILO Recommendation concerning the Employment Relationship (cf. answer to Question 7). For instance, the Recommendation emphasises that it is important in the context of the cross-border provision of services to determine who in employment is to be regarded as a worker, and which rights the worker has and who is the employer.

With regard to the increase in the cross-border deployment of workers promoted by the enlargement of the EU and also to be anticipated as a consequence of the Service Directive, as well as to the increase in cross-border commercial provision of labour and the concomitant debate at European level, it must however be ensured that no unacceptable frictions occur on the national labour market. The Federal Government and the social partners (national associations and sector level) agree that the Communication from the Commission of 4 April 2006 - Guidance on the posting of workers in the framework of the provision of services should not restrict the current level of control open to state authorities which are responsible for the examination of the working conditions which are relevant according to the law on the posting of workers in accordance with the national legislation of the Member State. For this reason – also in the view of the German Federal Council - the Guidance on the posting of workers of workers should be reviewed in the context of the provision of services.

Question 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?

The cross-border activity of workers is continually increasing. This leads to a need for the administration both to improve networking at national level interfaces and to improve cross-border cooperation. This is also the view of the social partners which have been consulted on the Green Paper.

Germany has undertaken considerable effort at national level to intensify administrative cooperation. For instance, the Act to Combat Undeclared Employment (*Schwarzarbeitsbekämpfungsgesetz*) explicitly obliges the federal-level authorities of the customs administration which are responsible for controls in connection with the fight against undeclared employment, as well as those other authorities and agencies which support them, to inform and cooperate with one another. The concomitant improved, coordinated cooperation has led to more effective, more efficient activity on the part of the various control authorities in the Federation and the *Länder*. The Federal Government determines the principles of cooperation using concrete cooperation agreements.

The Federal Government points out that the social partners act with a constitutive effect in the context of the Social Dialogue in accordance with Article 138 and 139 of the EC Treaty. The tasks of the social partners do not include making sure that the law is enforced. This sovereign task is a matter for the state agencies. Nonetheless, the social partners may play a role in the fight against undeclared and illegal employment. Hence, economic associations and trade unions in Germany are involved through action alliances in the fight against undeclared employment. Action alliances have been formed to date in the area of the construction industry and in the haulage, transport and logistics sectors. This means that the fight against undeclared and illegal employment is perceived by the public not only as a sovereign, but also as a societal task. Further associations are in preparation.

Germany is also maintaining efforts to increase bilateral administrative cooperation to fight undeclared employment in the international field. Since May 2001, there has been a German-French cooperation agreement to combat cross-border undeclared and illegal employment. Cross-border cooperation takes place amongst other things through bilateral talks and in cooperation in individual administrative procedures. Germany has drafted a model for a cooperation agreement to fight cross-border undeclared and illegal employment, and has already contacted many EU Member States and carried out initial negotiations to conclude corresponding bilateral agreements. The draft agreement pursues the goal of a comprehensive

flow of information, of intensified cooperation and of a more effective cross-border fight against undeclared and illegal employment. The first agreements are expected to be concluded this year.

All forms of cross-border cooperation between the national control authorities should however serve first and foremost to further increase the efficiency of the control work done overall, and in doing so to compensate for, amongst other things, shortcomings emerging by virtue of the fact that national state authorities can only exercise their powers on the territory of their own Member State. Cooperation may not lead to a situation in which powers of national authorities to control foreign enterprises are restricted by referring to the fact that they could instead avail themselves of administrative cooperation with the authorities in the enterprise's respective country of origin. The national control authorities must also be able to continue to require a foreign enterprise to keep specific documents that are necessary for the control of the relevant working conditions in the state whose working conditions are applicable during cross-border posting. It is not permissible to indicate to the control authorities of this country that the examination of these documents is controlled by the authorities at the foreign headquarters of the enterprise. This would not be compatible with the requirements of efficient control, as the European Parliament also said in its statement of 26 October 2006 on the Communication from the Commission already mentioned in the answer to Question 12.

Question 14

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

Cooperation between the competent authorities of the EU Member States is particularly important in order to effectively combat cross-border undeclared and illegal employment. The EU's code of conduct of the Council and the representatives of the Governments of the Member States, meeting within the Council, of 22 April 1999, on a for improved cooperation between authorities of the Member States concerning the combating of transnational social security benefit and contribution fraud and undeclared work, and concerning the transnational hiring-out of workers already requires an improvement in cooperation between Member States in cross-border employment. Hence, disadvantageous impacts on the protection of workers and on the proper functioning of the labour market are to be avoided.

Germany therefore welcomes measures at EU level to step up cooperation between the Member States. At the same time, one should however point out that – as also stated in the

answer to Question 13 – this intensification may not lead to narrowing the existing control powers and control possibilities of the national control authorities.

There is a need to combat the causes of undeclared and illegal employment. The policy of the Federal Government is hence also designed to shape the economic framework such that undeclared and illegal employment loses its incentive for the employers and workers in question.