European Commission Green Paper on Modernising Labour Law

Ireland’s Response

1. Background

1.1 Ireland has a comprehensive and strong corpus of current employment rights legislation. The evolution of the main elements of labour law in Ireland relating to employment rights, employment protection and non-discrimination, reflects a strong focus on the enactment of legislation based on clearly identified needs at the national level and arising from wider European Union developments. In the formulation and development of labour law there has been a clear policy focus aimed at finding the appropriate balance between the security which employees require on the one hand, in terms of conditions of employment etc., and the flexibility required by employers on the other, in terms of organisation of work, work practices etc.

1.2 A key characteristic of Ireland’s approach in striking this balance is the close consultation and cooperation pursued under Ireland’s Social Partnership process, which helps ensure that Ireland’s employment rights legislation reflects the changing needs of the economy and society.

2. Economic and Social Policy Context

2.1 The economic benefits of employment security and agreed employment relationships, in terms of co-operative workplace relations, greater internal flexibility, acceptance of technological change, cumulative skills acquisition and greater incentive for investment in human resources are widely recognised and accepted. Employment rights legislation has a valuable role to play in respect of each of these factors as employees who enjoy good working conditions are more likely to be productive and to be willing to embrace change leading to the overall maintenance and/or enhancement of competitiveness.

2.2 As a small open economy Ireland must have in place a range of policy measures which exhibit a flexibility and adaptability to meet global challenges. In this regard, Ireland’s labour market strategies and employment rights framework have been formulated and developed within a strategic and multifaceted policy framework across core cross-cutting areas including from the economic, labour market and social policy perspectives. This strategic approach is fully reflected in the pursuit of the Lisbon strategy to boost growth and employment. Overall, the Irish labour market is currently functioning in an efficient and effective manner. This is best evidenced by our record in relation to employment and unemployment. Ireland’s most recent National Reform Report (NRP) on the delivery of this strategy shows, inter alia, an employment rate for Ireland, of over 69%, very close to the core target employment rate (of 70%) to be achieved by EU Member States, by 2010. Ireland’s unemployment rate, at 4.2%, is amongst the lowest in the EU25 and the long-term unemployment rate has remained consistently low over recent years, at 1.3%.
3. The Key Policy Challenge

Q1. What would you consider to be the priorities for a meaningful labour law reform agenda?

Q2. 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?

Q3. 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?

Q4. 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?

(a) Policy Challenge

3.1 The Commission, at its launch of the Green Paper and subsequent presentations on the thrust of its approach, has emphasised that it is not intended to be a blueprint for a new legal framework. Its primary focus is to engender a debate on the key challenges in modernising labour law and to provide a platform for the exchange of good practice. Ireland fully supports this approach.

3.2 Ireland welcomes consideration of the many issues and aspects raised in the Green Paper. We would wish to see this set within a broader ‘social policy’ analysis, beyond the more narrow, legal, perspective with its focus predominantly on the contractual relationship of the individual, to a more critical analysis, and a more in-depth and wider exploration, of the full range of issues and challenges that arise, from a policy perspective, in modernising labour law.

3.3 This detailed analysis would need to be undertaken within the context of, and with due regard for, the national competence of Member States in promoting and modernising labour (employment) law. Setting a path for the way forward will be challenging, not least because of the significant and specific features of the institutional framework in which labour law has been formulated and developed across twenty-seven EU Member States each with its own customs, traditions and legal characteristics. Significant features of the institutional framework in which labour law has developed and evolved, in Ireland, include the voluntary nature of our industrial relations system and the social dialogue and follow-up actions developed within the Social Partnership framework.
3.4 The most recently negotiated National Social Partnership Agreement- *Towards 2016* - includes explicit reference to the need to promote both labour market flexibility while respecting job security and makes specific commitments to protect working conditions. In particular, the establishment of the National Employment Rights Authority (NERA) together with a proposed threefold increase in the number of labour inspectors represents a key strategic focus in the protection of workers rights. This approach, when coupled with education and awareness programmes, increased penalties and improved access to redress, constitutes fundamental elements of the New Compliance Model (NCM). The delivery of the NCM by the new National Employment Rights Authority will be supported with new Employment Rights Compliance legislation which is in the course of preparation.

3.5 Ireland agrees with the European Commission that modernising labour law does not lend itself to a “one-size fits all” approach, which cannot be realised in a situation of diverse labour markets. As labour markets become more complex it is not possible, nor indeed useful or desirable to seek to legislate to address all potential situations with legal instruments.

3.6 Modernising labour law cannot be considered a panacea for a sluggish labour market. Individual workers derive a far greater security when they have confidence in their ability to gain alternative employment in a redundancy situation than they do from additional regulation of the labour market. The future development of European labour law must be supportive of increased growth and stability in the jobs market consistent with the European Growth and Jobs Strategy.

3.7 The Green Paper poses the question whether, in the context of an increasingly changing working environment and more diverse working arrangements, rights should be customised and targeted for various categories of worker. This approach carries with it certain inherent risks. Any move towards increased complexity or greater disaggregation in the application of, say, the universal social insurance system might not be beneficial to workers, arising from greater sectoral classification or “pigeonholing” by contract type, with the potential to decrease overall levels of social protection.

3.8 The Green Paper places undue focus on ‘normal’ contracts of employment and underestimates both the variety of atypical working arrangements agreed between workers and employers at enterprise level and their consequent value to the parties concerned. Arguably, the Paper fails to suggest how this flexibility has not already been provided for by legislation such as the Fixed-Term, Part-Time Work and Posted Workers Directives in which there is a baseline of EU protection provided across all member states who have fully transposed such Directives.

3.9 Proposals relating to the modernisation of labour law at EU level must be grounded on empirical evidence in support of the intended approach and strategy. A significant aspect of any such reform programme should be a focus on the impact of employment protection legislation on employment and productivity. Ireland considers it essential that proposals to review, amend, improve or adjust should be subject to a Regulatory Impact Assessment (RIA) within any overall process of modernising EU labour law. The analysis and evaluation undertaken in the context of conducting an RIA would enable examination of the dynamics of EU proposed modernisation of
labour law from the perspective of its impact on the labour market (e.g. job turnover, employment creation) as well as the short-term and longer-term impacts for the beneficiaries and non-beneficiaries of any reforms. The Green Paper is a welcome start in this direction.

3.10 Modernisation of EU labour law by way of amendments, adjustments or improvements to existing legislation must have regard to the need to encourage simplification and improvements in the quality of regulation, as a fundamental goal and priority¹. Heads of State and Government at the European Summit, in March 2007, set an ambitious 25% target for reducing the burden of administration that falls on companies as a result of legislation originating at EU level by 2012. Ireland fully supports this approach. In this regard, it would be useful, for example, to consider ways of minimising the amount of form filling/record keeping associated with compliance while at the same time maintaining the level of protection conferred. In this way, developing a framework for a better understanding of the costs of regulation would provide an agenda for regulatory reform and simplification without jeopardising regulatory goals, thus enabling the achievement of policy objectives while minimising costs to EU economies.

3.11 Ireland welcomes the focus in the Green Paper on reviewing the impact of regulation on Small and Medium Enterprises (SMEs). SMEs, in particular, tend to be concerned with the disproportionate administrative burden that falls on them (compared to larger companies) referring to the cost of paperwork, administration and supplying Government with information.

¹ International benchmarking reports suggest that the regulatory burden in Ireland is relatively light and that Ireland is not as burdened by labour market regulation as other economies with whom we compete for trade and investment. The IMD (International Institute for Management Development) World Competitiveness Yearbook 2006 ranks Ireland 8th out of 61 countries surveyed for the extent to which bureaucracy does not hinder business activity. The World Economic Forum's Global Competitiveness Report 2006-07 ranks Ireland 17th out of 125 countries surveyed for having a low burden of government regulation. The World Bank’s ‘Doing Business’ report for 2006 ranked Ireland 10 out of 175 countries in terms of ease of starting and running a business.

(a) Employment Transitions

**Q5.** 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?

**Q6.** 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?

4.1 The concept of flexicurity is based on the objective of balancing job flexibility and security for workers and contains the following elements –

- Flexible work arrangements, both contractual and non-contractual (working hours, child care);
- Effective active labour marker measures enabling workers to cope with change (rapid transition to a new job after a period of unemployment);
- Education and training (supporting workers’ ability to adapt);
- Social security systems which guarantee income and also facilitate mobility.

The Green Paper essentially looks at the first element- the role of labour law in the overall context of flexicurity. The focus on flexibility concerns the need to ensure that employment legislation does not impede workers access to and participation in training and education. In this way the labour force can respond quickly and effectively to new skill needs. Such an approach would also minimise risks that workers would get trapped in a cycle of short-term, low-skilled jobs while enabling business adapt to the competitive pressures arising from, inter alia, globalisation.

Ireland is viewed as a highly flexible and adaptable labour market. Our approach to labour law is central to this and it is therefore important that while ensuring workers are adequately protected, flexibility around the employment relationship is maintained.

4.2 Ireland supports the Commission’s wish to promote a ‘flexicurity’ approach within the European labour market but is mindful of the ambiguity and multiple connotations which the concept attracts. Given the different socio-economic situation and starting points across the EU, there is broad agreement at EU level that the optimum balance between flexibility and security is a matter for individual Member States. Each Member State must decide on the approach and the pathway most appropriate to their particular situation given their particular labour market characteristics, traditions and customs. The Green Paper cites various initiatives taken by Member States, including the Danish “flexicurity” model. Such models have to have regard to the individual cultural and institutional frameworks in which they
operate and the customs and traditions that guide the success of such models in their country of origin. It has to be recognised however, that these models may not, for a variety of reasons, directly transfer across to other jurisdictions. Alternatively, aspects of such models may already be present or seem destined to be incorporated into existing arrangements in individual Member States including strong social consensus, a relatively flexible employment protection legislation regime, a move towards earlier activation, a greater emphasis on the job search requirement as well as higher rates of social welfare payments. Here again care is needed when applying a ‘one size fits all’ model across different economies.

4.3 In Ireland, measures/initiatives have been introduced across the four elements of flexicurity which focus, in particular, on increasing the incentive to enter and remain in employment, including:

- Increases in the National Minimum Wage;
- Tax/benefit reforms;
- Strong activation of the unemployed and inactive;
- Flexible working arrangements;
- Investment in human resources; particularly lifelong learning.

These various measures ensure that the pathway appropriate to our circumstances is being followed and will enable us to have a flexible labour market, while ensuring that workers are not exploited and an adequate out of work income safety net is available.

4.4 The Green Paper highlights three key goals related to the modernisation of labour law – improving the flexibility of the labour market, enhancing security for countries and individuals and preventing the segmentation of the labour market. While Ireland supports these aspirations, a number of concerns persist.

(i) In relation to flexibility, we would be concerned to ensure that the imposition of labour rules and regulations do not impede the very flexibility they are intended to serve;

(ii) In relation to the Commission’s stated desire of improving flexibility while minimising segmentation, we believe that the proliferation of non-standard working arrangements and contracts is as much evidence of a properly functioning, flexible labour market rather than evidence of a segmented labour market. That said, it is important that security and enforcement are not compromised.

(iii) In terms of reducing segmentation, a legislative approach may not be the most efficient method of ensuring worker mobility. We believe that increasing participation in education and training amongst all workers is one part of the answer – by improving average educational attainment levels in the labour force, individual are empowered and equipped to move between occupations and sectors, thus minimising the risk of segmentation.
4.5 Increased participation in training may best be achieved through a tri-partite arrangement that engages employers, employees and the State as partners in the training process. Employers and employees need to be made aware of the benefits of undertaking continuing education and training – the returns to both the firm and to the individual suggest that investment by both parties, in conjunction with State support for certain vulnerable groups, yields tangible benefits to all. The social partners can play a major role in ensuring that the message about the importance of education and training is disseminated throughout the entire economic system, enhancing awareness amongst employers and employees.

4.6 In relation to employment transitions, cognisance might be taken of provision for workers supplementary pension rights especially in situations where a worker changes jobs frequently and also having regard to the diversity of possible employment relationships. A central objective here is to ensure that there are no supplementary pension related obstacles to the free movement of labour and in that context to create an environment where particularly a mobile worker can continue to make relatively unbroken contributions to the provision of a supplementary pension.
(b) Uncertainty with regard to the law

Q7. 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?

Q8. 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?

5.1 Ireland supports an approach which would bring further clarity without introducing new rigidities. However, Ireland considers that the introduction of further legal definitions of employment status (employee v independent contractor/self-employed), at the EU level, may not be helpful, given the myriad different individual contracts and employment situations that arise in practice. This is an exceptionally complex issue and it would be extremely difficult, given the heterogeneity of the labour markets of twenty-seven Member States, to seek to impose a standard definition that would apply on an EU-wide basis. Evidence of this difficulty can be seen, in the attempts by the International Labour Organisation, on many occasions, to address this matter, finally settling on the preparation and development of a Recommendation (non-binding Guidelines) on this matter, at the 2006 International Labour Conference.

5.2 In Ireland, a Code of Practice on Employment Status (CPES) has been developed which, combined with the corpus of decided case law in this area, provides very useful guidance to all concerned with this issue. The CPES which maintains a good working balance between social welfare, taxation and employment right considerations, sets out criteria on whether an individual is more correctly categorised as a self-employed person. In our most recent Social Partnership Agreement ‘Towards 2016’, a commitment has been given to review the application of the existing Code on employment status with a view to its more effective implementation.

5.3 Ireland considers that a well developed information system on employment rights and compliance would be a significant building block, particularly in situations where national instruments (i.e. Code of Practice) are, in place. With experience this might be further built upon. This could be combined with redress mechanisms which should be readily and easily accessible. A key aspect to this approach is the need to develop the necessary synergies between relevant competent authorities (in Ireland’s case, between Departments with responsibility for social welfare, taxation and employment rights) to ensure maximum effectiveness of the instruments in place.
5.4 There is a sense that the Green Paper underplays the value of being self-employed, seeing it almost solely as a form of economically dependent work. This does not and will not encourage the entrepreneurial spirit that Europe should foster given the objective of encouraging the development of micro enterprise and SME’s. The public policy approach has been to acknowledge the changing realities of a dynamic EU economy.

5.5 Regarding the need for a “floor of rights” dealing with the working conditions of all workers, a relevant “floor of rights” is already in place through existing legislation dealing with the working conditions of all workers regardless of the form of their work contract. We are not aware of any serious deficiency in this respect and in present circumstances we do not see any compelling reason to seek to add to what is already in place. Our present emphasis is on greater public awareness and enforcement.

5.6 We note that the Green Paper does not present compelling arguments for seeking to extend a ‘floor of employment rights’ to genuine independent contractors. This is possibly because, to do so would effectively eliminate the distinction between employees and independent contractors possibly giving the latter group all of the advantages of employment status while they continue to enjoy the benefits of self-employment/independent contractor status. Such a development would clearly lead to unintended consequences.

5.7 In relation to the concept of *economically dependent work* as considered in the paper, current legislation in relation to self-employment and social insurance is based on whether a contract for service, or a contract of service, exists. The requirement for the introduction of an additional status is not established in the Green Paper and would be seriously problematic in an Irish context given the current basis of the social insurance system.
c. Three Way Relationship (Questions 9 & 10)

**Q9.** 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"?

**Q10.** Is there a need to clarify the employment status of temporary agency workers?

6.1 Responsibilities within multiple employment relationships should be clear and this would contribute to employee protection. Measures should be formulated in a manner that provides this clarity, is simple to administer and that it does not add to the administrative burdens of employers. In Ireland, our present legal framework provides for the wide diversity of employment relationships, the different levels of responsibility and the associated rights of the parties in employment relationships.

6.2 The current national partnership agreement in Ireland (see par 3.4 above) provides for a range of measures designed to enhance employment rights compliance, including mechanisms which will help contribute to the maintenance of employment standards and norms.

6.3 Irish employment rights legislation applies to temporary workers including those with a contract of service with an employment agency or a user undertaking in which the agency worker is placed. The responsibility for employment rights purposes in a situation where an employee is placed with a user undertaking by an employment agency rests with whoever pays the wages of that employee, whether it be the employment agency or end-user undertaking. An exception to this rule are the Unfair Dismissals Acts which provide that for the purposes of those Acts the user undertaking is always the employer and therefore, is responsible under those Acts. An examination of the full range of relevant legislation enables identification of the locus of responsibility in relation to the relative responsibilities of the parties concerned.

6.4 Emerging three-way relationships may pose challenges in specific instances. In Ireland, in the context of updating and strengthening of legislation in the area of employment agencies, efforts are ongoing to bring the greatest clarity to the locus of responsibility for employment rights purposes. This should assist, enforcement of the relevant legislation in situations where there is a wide variety of contractual arrangements and employment categories including, for instance, fixed-term, part-time or posted workers.
d. Organisation of working time (Question 11)

**Q11. 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?**

7.1 This seems an intriguing question to ask in this context, given the ongoing Review of the Working Time Directive and the deadlock in relation to the “opt-out” from the 48 hour working week. This is particularly the case in view of the fact that the EU Commission has sought the “observations” of Member States in their transposition of the Working Time Directive, having regard to recent ECJ rulings.

7.2 Ireland did not avail of the provisions of the ‘opt-out’ at the time of the transposition of the Working Time Directive into national legislation by means of the Organisation of Working Time Act 1997, and has made it abundantly clear at all times in the recent years that we have no plans to avail of the ‘opt-out’ in the future regardless of the outcome of the EU Council on this matter.

7.3 Ireland has played a constructive role at recent EU Councils endeavouring to assist EU Presidency initiatives to facilitate a compromise with fair and balanced proposals. Ireland was very disappointed that the initiative by Finland failed to get the necessary support and, in particular, regards the outcome of the EU Council, in November 2006, as a missed opportunity.

7.4 With reference to the collapse at Council level of discussions regarding proposals to amend the Working Time Directive, there are other issues which remain to be resolved at that level: the definitions of ‘at work’ and ‘rest’, particularly in the context of time spent ‘on-call’. Greater flexibility with regard to the issue of ‘reference periods’ for the purposes of the Working Time Directive would also be necessary.

7.5 In Ireland the existing working time legislation gives ample room to provide for the flexibility needs of enterprises without compromising worker health and safety. An approach has been adopted in our national legislation which allows for the modification of the provisions of the Organisation of Working Time Act 1997 by means of collective agreement, with the oversight of the Labour Court. This provides a good example of legislation establishing a framework which can be modified through collective bargaining rights. There are safeguards for workers in that the agreement must be concluded by a trade union and other provisions to ensure that the Directives objectives have been achieved.
e. Mobility of workers (Question 12)

**Q12. 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?**

8.1 Ireland’s comprehensive body of employment rights applies to all workers employed on an employer-employee basis. Thus a person, irrespective of nationality or place of residence, who works in the State under a contract of employment, has the same rights under Irish employment rights legislation as Irish employees. This approach formed the basis of the transposition\(^2\) of the Posted Workers Directive 96/71/EC, which concerns the posting of workers in the framework of the provision of services, into Irish law. No distinction is made in terms of worker nationality or place of residence insofar as the enforcement of employment rights is concerned for which there are comprehensive redress mechanisms in place to enable all workers including workers from overseas pursue cases where they believe they have been denied their entitlements.

8.2 While it is accepted that frontier workers may pose particular challenges, it is not necessarily the case that such challenges necessitate an EU wide change in the regulatory regime. In the circumstances, Member States should retain their discretion regarding the definition of ‘worker’, and there may be room for greater bi-lateral cooperation.

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\(^2\) Section 20 of the Protection of Employees (Part-Time Work) Act 2001 provides that all employee protection legislation on the statute book in the State applies to a person, irrespective of his or her nationality or place of residence, who-
- (i) has entered into a contract of employment that provides for his or her being employed in the State, and
- (ii) works in the State under a contract of employment, or
- (iii) where the employment has ceased, entered into a contract of employment referred to in subparagraph (i) or worked in the State under a contract of employment.
f. Enforcement issues and undeclared work (Questions 13 & 14)

| Q13. 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? |
| Q14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work? |

9.1 Ireland agrees with the emphasis placed in the Green Paper on the importance of national enforcement mechanisms being sufficient to ensure well functioning and adaptable labour markets by preventing infringements of labour law. The Partnership Agreement – Towards 2016 – has as its focus a package of measures aimed at enhancing and strengthening the system of employment rights compliance (see par. 3.4 above) and simplifying the adjudication and redress mechanisms. Key elements of this strategy include, enhancing the effectiveness of cooperation at the national level between different government enforcement agencies, including labour inspectorates, social security administration and taxation authorities. Thus, for example, Joint Investigation Units, which include the Revenue Commissioners (taxation) and the Department of Social and Family Affairs (social welfare benefits), are to be expanded to include officers of the Department of Enterprise, Trade & Employment (labour inspectors) and NERA. Legislation is also in place which will assist in the enhanced exchange of employment information between key Departments so as to facilitate Joint Investigations of employments suspected of contravening the law.

9.2 Re-launching and expanding the membership of the Hidden Economy Working Group (HEWG) represents a further element in the enhancement of the compliance machinery. The HEWG comprises government enforcement agencies including those with responsibility for taxation, social security and employment rights compliance together with representatives of, employers, trade unions and industry. It provides a forum for the exchange of views on the effectiveness of measures introduced in combating the “hidden economy”. “Undeclared work” can frequently be associated with illegal immigration which means that the persons in question are particularly vulnerable to exploitation. There is also room for unscrupulous employers to gain a competitive advantage over compliant employers.

9.3 Ireland agrees with the sentiments expressed in the Green Paper in relation to the need to reinforce administrative co-operation. This, however, would have to take into consideration the difficulties with any such approach given the different labour systems, customs and practices (including enforcement mechanisms) in place across twenty-seven EU Member States. In addition, “undeclared work” can arise for a number of reasons, many of which may be country specific – geographic location, tax structure, economic strength etc. – which may require an individual country-specific response and so the ‘informal labour market’ might be difficult to tackle at the EU level.
9.4 In circumstances where there are common interests, such as in the area of migrant workers, EU Member States may wish to cooperate with others on say a bilateral, or indeed wider, basis. The EU can provide opportunities to assist in, and foster, such arrangements including, the sharing of experience and the exchange of best practice.