CEEP response to the consultation on the Green Paper on Labour Law

Introduction

1. CEEP welcomes the Green Paper. It opens a necessary debate on the purpose of labour law, the balance between EU and national law and how labour law interacts with social dialogue, with policies on employment, education and training, social security and taxation; and with other measures which affect the organisation of the labour market.

2. This debate should not be rushed and, in some ways, the specific questions in the Green Paper may be premature. The stakeholders, including the social partners, first need to discuss together the overall picture. Such a discussion needs to include considerations of Better Regulation; the competing claims of convergence and subsidiarity; and how labour law contributes to, or detracts from, the achievement of the Lisbon goals.

3. CEEP considers that the Open Method of Coordination by sharing best practices between Member States and social partners, rather than additional regulation, could contribute to convergence of employment provisions in Europe.

4. CEEP’s response to the Green Paper is from the perspective of major employers providing essential public services which underpin Europe’s economy and distinctive social model. Such services are generally labour-intensive, often operate 24/7 and always rely for their quality on the quality of the staff employed and the way in which they are managed. Labour law is obviously an important factor in these considerations.

5. Our preliminary replies to the questions in the Green Paper follow a discussion of the underlying issues in the next section. In the meantime, we summarise here our key messages.

In summary,

- **CEEP welcomes** the opportunity given by the Green Paper to review the European labour law framework from first principles.
- **CEEP emphasises** that labour law is just part of a range of legal and policy measures designed to ensure a good balance between labour market efficiency and fairness to workers.
- **CEEP advises** that, because of the complexity of national employment and social protection systems, one-size-fits-all solutions are often counter-productive. Therefore more emphasis needs to be given to allowing sufficient flexibility in EU rules for national social partners and governments to adjust the detailed application of general European principles to fit their own circumstances and without fear of being overridden on points of detail by the European Court of Justice.
- **CEEP considers** that the emphasis of the Green Paper is
disproportionately placed on the perceived negative impact of the use of non-standard employment relationships. We would have welcomed more discussion on the areas of regulation and policy making where greater convergence or joint action would improve the operation of the labour market, for example in relation to enhancing mobility.

- **CEEP requests** that any new employment legislation is introduced at European level only after first having been rigorously and independently conducted assessment of all the likely impacts.
- **CEEP recommends** that the Commission continues to invest in comprehensive research into the impact of labour law on employment levels, productivity and competitiveness at three levels: EU law; national implementation of EU law; and national law.
- **CEEP asks** the Commission to fully take into account the specific role of the social partners when issuing the follow up Communication to the Green paper. The European social partners in particular should be involved in that follow up, considering their current work on a joint labour market analysis and their contribution to the flexicurity debate.

### Discussion

In our view, the first question asked by the Green Paper is far too general to be answered in a meaningful way without a discussion of the full range of policies which can contribute to the achievement of the Lisbon goals. Instead of answering this question, we would therefore like to offer the following considerations.

The Green Paper asserts that the purpose of labour law has traditionally been to address the inherent imbalance of power between employers and workers in order to guarantee a minimum standard of health and safety and a floor of rights. We would argue that within the modern context of a well established floor of rights, this definition is too limited. Labour law is only one important element in a policy framework aimed at achieving a balance in the labour market which, within the context of national and transnational socio-economic conditions, can serve to promote economic growth and the creation of sustainable employment. From the outset, CEEP therefore asserts that it needs to be clear that any discussion on the future of labour law can only be meaningful in the context of a wider policy debate on how best to achieve the Lisbon goals within the parameters the challenges facing European economies today (globalisation, technological and demographic change).

Within the framework of this wider policy analysis the impact of labour legislation on job creation, economic performance and social cohesion must be fully understood. CEEP acknowledges that labour law should, and indeed already does, reflect changes in society, the economy and the labour market, which necessitate adjustments to ensure an appropriate balance between flexibility and security. Consideration must equally be given to the question at what level changes are necessary and therefore where any changes are most suitably implemented.

In relation to these considerations, the following points should be recognised.

- The EU already has a comprehensive set of common standards for labour law developed over the years as part of an ongoing adaptation to labour market changes.

Such changes include the greater participation of women on the labour market as well as demographic changes, requiring families to be able to balance work and private life better.
Such changes have been acknowledged through the framework agreements between the European social partners on issues such as parental leave, part-time work and other initiatives such as the framework of actions on gender equality. Technological advances have brought with them the need for workers and enterprises to be ever more adaptable and ensure their skills are regularly updated. Such technological and business trends have been taken on board in social partner agreements and actions such as the framework agreement on telework and the framework of actions on lifelong learning and continue to be discussed as part of the autonomous social dialogue between the social partners. The need for greater labour market flexibility called for by the Kok Report, as well as by Commission President Barroso in his message to the Spring Summit 2007, has in some countries led to the increasing use of so-called non-standard forms of employment contracts. This has led to concerns over workers becoming trapped in lower quality jobs. However much of the available evidence suggests that despite these trends the standard employment relationship remains the norm and most individuals move on from precarious employment into higher quality jobs within a relatively short space of time. Indeed, the European social partners have already acted to ensure equal (pro rata) rights for workers on part-time and fixed-term contracts, taking account of these changes in the labour market. Similarly, greater expectations for equality and diversity in the workplace and the drive towards greater labour market mobility have been addressed through EU legislation and policy initiatives demonstrating the continuous evolution of the EU legislative and policy framework. This does not always imply the need for legislative changes, but can be accomplished by different means.

• Existing regulation is already reviewed on a regular basis to take account of changes in the labour market as well as relevant case law.

As CEEP has repeatedly emphasised, the revision of the Working Time Directive is one such case is point, which has suffered from what we consider to be a misinterpretation of the original intentions of the Directive regarding the definition of inactive on-call time. This is a matter which urgently requires a resolution as it endangers the operation of many public services based on 24/7 operations.

• In accordance with the Commission’s own Better Regulation framework, an assessment should be made whether any of the existing legislation prevents the development of greater productivity and employment. This test should also be applied if considering any new legislative initiatives. It must be borne in mind that legislation must always be proportionate to the issue it seeks to address.

The objectives of labour law should be to balance the free movement of labour; efficient labour markets; fairness within all types of employment relationship, including equality at work and healthy and safe workplaces; the ability for employees to develop their careers; competitive economies which promote employment growth; and basic collective rights for employees to belong to and participate in free trade unions.

• Labour law is not sufficient for the full achievement of the above objectives. Other instruments, including social dialogue, government and employer policies, social security and taxation arrangements also play a key role, as has been shown in existing European social partner framework agreements.

A comprehensive debate is needed on the best policy mix required to achieve the best possible baseline for economic and employment growth, which is at the heart of the European social model. National circumstances must be fully understood and taken into account. This is best achieved by giving primacy to the principle of subsidiarity unless the desired results cannot be achieved by Member States acting individually. This includes giving precedence to collective bargaining in certain countries in line with their national traditions and practices, respecting
the autonomy of the social partners. Labour law needs to be sufficiently flexible to take account of the very different national baseline conditions of the Member States.

Response to questions 2 to 14 in the Green Paper

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

The adaptation of labour law and collective agreements clearly already contribute to improve flexibility and employment security. For example, the European social partner agreements on part-time and fixed-term work, while creating greater opportunities for flexible working, also enshrined the principle of equal treatment with full time workers. Indeed much of the EU regulatory framework and the autonomous social partner agreements contribute to a flexicurity approach. Other relevant agreements include the framework agreement on telework and the frameworks of action on lifelong learning and gender equality.

Research presented in the 2006 Employment in Europe Report shows that strict employment protection legislation has two demonstrable effects: it lengthens job tenure but at the same time also increases the time spent in unemployment as employers are more reluctant to recruit. What is critical is that the report argues that strict employment protection legislation can act as a barrier to entry to the labour market for the most vulnerable groups, which must be a concern.

Collective agreements can clearly also contribute to a flexicurity approach. EU legislation should therefore be about general principles, implemented at national level in a manner which suits national circumstances and reflects national traditions.

However, labour legislation and collective bargaining are only part of the mix of measures which contribute to a flexicurity approach and should therefore not be treated in isolation. Other important measures involving other policy actors include active labour market policy, social security and taxation policy and education and training policy as well as locally agreed solutions. CEEP would like to see the Commission continue its work in assessing good practice in the combination of such measures to achieve a balance between flexibility and security which contributes to economic and employment growth and higher quality jobs. As is acknowledged in the article presented in Employment in Europe, there can be no “one size fits all” in this respect because of the different economic, social, political and cultural traditions of each country. Because of the need to look at many measures and policies in context, it is difficult to create a “flexicurity index” or to easily transfer approaches which are successful in one country to another.

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?

This is a difficult question to answer globally for all countries of the European Union, as some regulations pose greater problems in the policy and legislative context of some countries than in others. In general, reforms aimed at reducing the administrative burden on companies will be particularly beneficial for SMEs. For public employers, among the most difficult
regulations have possibly been those in relation to working time and the transfer of undertakings in the context of public services restructuring, which have been the single most costly pieces of legislation and have therefore reduced the ability to recruit additional staff (and in the case of working time affected the scope and quality of services). Achieving pay equality between jobs that are different but of equal value has posed immense difficulties for large, multi-occupational, organisations in some countries. For all employers, it is crucial that new labour regulations undergo a rigorous test (RIA) of economic and employment impact. This is particularly true for SMEs, who could be provided with additional assistance or longer transition periods to implement measures. The costs associated with some existing regulations serve to demonstrate the importance of concentrating EU level action on key principles leaving room for manoeuvre at the national level through customary channels including collective bargaining. However, this does not rule out the need for more detailed regulations at sectoral level to ensure high quality provision and a level playing field for providers in the EU.

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?

Employers would generally favour measures which make it easier to hire and fire staff as this reduces the cost of recruitment and therefore facilitates the conclusion of new employment relationships. At the same time it is crucial that the same health and safety and general employment standards apply to all staff, including equal access to education and training whether by law or by collective agreement. It is our view that work experience and ongoing education and training (not employment protection regulations) are the best guarantors of employability and adaptability. This view is underpinned by evidence that there are fewer and fewer “jobs for life” and that the pace of change means that all employees and employers need to be more adaptable and take shared responsibility for the regular updating of their own skills and capacities. This is best achieved through a mix of flexible employment regulation, a commitment to on the job training, strong active labour market policy, a high quality education and training system and a social protection system which favours early activation.

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 and active labour market policies?

The answers given to questions 2, 3 and 4 also apply to this question. Successful active labour market policies are a key ingredient to achieving high levels of employment and employability and need to be combined with tax and social security measures focused on “making work pay” without unjustly penalising those genuinely unable to work.

Today, there already exists a significant floor of EU level regulation which has continuously adapted taking account of changes in the labour market. This regulation applies regardless of employment status. It is sufficiently flexible to adapt to the requirements of different situations, which is key to the successful management of the labour market.

Legislation and collective bargaining on employment protection and labour market measures are interconnected. Flexicurity is a broad concept, aiming at organisational flexibility and employment security. It covers many areas of policy including labour law, social dialogue, active labour market policy, education and taxation. These questions are the responsibility of the Member States and the EU has only limited or no competence in these areas. Flexicurity also covers issues and systems which differ significantly from country to country and are adapted to their specific circumstances. Hence, challenges to adapt might differ significantly.
6) What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between contractual forms for upward mobility over the course of a full active working life?

Collective bargaining has an important role to play in promoting access to training and transitions between contractual forms. As pointed out above, this is already demonstrated by European social partner framework agreements on fixed-term and part-time work and the framework of actions on lifelong learning. In relation to the latter in particular, three annual implementation reports and one evaluation report have shown the breadth of initiatives taken by social partners at national level to promote a lifelong learning approach. At the same time, it must be borne in mind that education and training is an issue for employers and workers as well as for governments and training institutions. All actors must work closely together to ensure that training provided is relevant and of high quality to meet the requirements of today’s labour markets. Particular emphasis needs to be placed on the delivery of core skills in schools and reducing early drop out rates. The high level of unemployment among young people, particularly those with no or low levels of achievement from compulsory education, is a particular concern for CEEP.

Apart from this “voluntary” approach, some countries have taken steps to place training levies on employers. Significant evaluations of such systems are still lacking and more needs to be done to assess the potential and actual impact of such measures. Based on existing evidence, CEEP would favour a voluntary approach which allows for solutions to be designed at local level to meet the specific training requirements of individual employers and localities. Such a system must be backed up with high quality provision. There have been indications in the public services that as the trend towards competition increases (partly on the back of EU regulation), the availability of funding for training is reduced. Such aspects should also be taken into account when framing regulation, for example on the internal market. Specific public assistance measures should be available to particular sectors or employers facing large scale restructuring and all partners need to work together in such cases to ensure future employment opportunities.

Statistics from the European Foundation show that most individuals in so called “precarious” employment relationships move on to open ended employment within 5 years, demonstrating that such jobs more often than not act as stepping stones to higher quality employment. It therefore appears reasonable to assume that, in the 16% of cases where individuals are in the same position five years later, specialist individual training intervention may be a better approach than an across the board reduction in labour market flexibility to encourage the conclusion of more open ended contracts.

Particular attention also needs to be given to the transferability of qualifications in the European Union and the recognition of prior learning. Social partners should be fully involved in the drawing up and/or implementation of initiatives such as EQF (European Qualification Framework) and ECVET (European Credit System for Vocational Education and Training) and the Lifelong Learning Programme.

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?

The definition of self-employment should be clear at Member State level based on the interpretations of the European Court of Justice. Action to combat the use of so-called “shadow self employment” requires policy interventions going beyond labour legislation and is linked to taxation, social security and active labour market policy. We see no need for
further EU regulation in this area, as it is suggested in the Green Paper, as appropriate
definitions are set out at Member State level and are adapted to the requirements of national
situations. Restricting the interpretation of self-employment may indeed reduce flexibility and
have a negative impact on employment.

8) Is there a need for a “floor of rights” dealing with the working conditions of all workers
regardless of the form of the 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?

European social partners agreements for example on part-time work and fixed-term contract
work and the rest of the EU labour law directives including those on equal treatment, have
contributed significantly to creating a “floor of rights” for all employees regardless of their
contract of employment. Most of those forms of employment which do not currently benefit
from such a floor of rights are indeed illegal (e.g. undeclared work). As stated below, a
holistic approach must be used to combat their use. There is insufficient evidence to indicate
the extent of legal employment relationships currently not covered by such a floor of rights
and thus to reach any conclusions as to whether further action is required.

We therefore observe that there already are rights for bona fide workers regardless of their
contract of employment. The difficulties described by the European Commission in the Green
Paper relate to social security and tax regimes which lie within the remit of each Member
State. The Commission, under the Better Regulation Agenda, is also required to ensure that
any further regulation in this area would not limit labour market flexibility and lead to a
reduction in employment.

There are, however, clearly a number of areas where greater co-operation, transparency and
mutual learning would be of benefit, for example to ensure the greater mobility of workers
across borders. Indeed, the Open Method of Coordination could identify which components of
employment provision could be useful for the existing labour market framework.
CEEP believes that the Green Paper is too focussed in its approach on the perceived problems
of workers on non-standard contracts while giving scant attention to other areas of co-
operation, policy and peer learning which would improve the operation of European labour
markets. This includes in particular education and vocational training policy which are critical
to the adaptability of enterprises and the achievement of the Lisbon goals.

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?

It is our view that the responsibilities of the various parties involved in triangular or multiple
employment relationships should be clear. Achieving such clarity should be in the remit of
national governments through regulation and/or social partner organisations through
collective agreements where appropriate. Indeed, such contractual clarity is already achieved
by national regulation and no further intervention is required at EU level. Where any
remaining uncertainty persists, this should be addressed at national level.

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

The issue of the rights of temporary agency workers has been the subject of social partner
negotiations under Article 138, which failed to reach a conclusion, as well as a Commission
draft Directive, which similarly failed to be adopted in Council. This is largely due to the fact
that the rights of agency workers and most importantly the comparator for terms and
conditions varies between Member States as a result of different provisions on contractual arrangements for agency workers. Because of these national peculiarities, it is sensible that these issues remain within the remit of each Member State. Access to temporary agency work is vital for employers to meet peaks and troughs in demand. At the same time it must be ensured that such contracts are not abused.

In certain countries steps must be taken to create greater flexibility for “standard” employment relationships to make these more attractive to employers thus reducing the need to use temporary agency work and fixed term contract arrangements. Generally labour law should be designed in a manner not to hamper the conclusion of open ended contracts.

11) How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers’ health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?

CEEP has repeatedly made clear its position regarding what it sees to be the misinterpretation of the Working Time Directive by the ECJ in the SIMAP and Jaeger judgements. We believe that is critical that the inactive part of working time is not counted towards working time limits and compensatory rest periods. In line with this argument, it is critical that employers have clarity and certainty over working time limits. This clarity has been undermined by the judgements of the ECJ thus creating uncertainty, costing jobs and undermining 24 hour service provision. Similarly, we have previously stated that we consider it important to retain the opt-out provisions to provide the necessary flexibility to employers to respond to cyclical demands. Our proposals regarding the revision of the working time directive showed support for the strengthening of safeguards regarding the use of the opt out and are largely in line with the compromise text proposed by the Finnish presidency. We deeply regret that the Council was unable to reach agreement on this issue and we stress that the resolution of this issue continues to be an urgent priority.

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?

It is our belief that Member States and social partners should retain discretion in this matter through regulation or collective agreement.

As far as the rights of temporary cross border workers are concerned, these are already covered by the posted workers Directive and its national implementation. The improvement of factors for cross border mobility is mainly within the remit of social security and education and vocational training policy, where there already is a significant degree of regulation and collaboration at EU level.

However, further clarification of the rights of permanently mobile workers might be required, as they currently rely on the provisions of the Rome convention. The Rome convention should not preclude the application by Member States, in compliance with the Treaty, to national undertakings of the other States, on a basis of equality of treatment, of terms and conditions of employment laid down in national social legislation and regulation, the collective agreements or arbitration. Further exploration in this area could help to resolve this issue.
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 the social partners in such co-operation?

The social partners already play a role in monitoring the implementation of agreements reached under Article 138. They are also consulted by the Commission in processes monitoring the implementation of other labour legislation. Both social partners and the Commission have well defined roles in monitoring the implementation of agreements under the current Treaty and we do not see the need for these processes to be strengthened further. There is, however a greater need for ex-ante impact assessments of any proposed additional regulation, which must fully involve social partner organisations.

Greater co-operation between bodies responsible for the implementation of labour law is to be supported as long as it does not increase administrative burdens on employers.

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

Undeclared work is an important problem and is particularly significant for certain Member States. In general, it is harmful both to the economy of the country (through reduced tax and social security receipts and increased social protection expenditure), as well as for workers engaged in it (as they are uninsured and not protected against the risk of unemployment). Definitions and the scope of undeclared work vary from Member State to Member State and it is an option which continues to be chosen by many individuals to increase their earning potential. Labour market regulation is insufficient and potentially unsuitable to address this challenge which requires a more holistic policy approach combining awareness raising, Active Labour Market Policies (ALMP) and tax and social security measures as well as enforcement. EU level initiatives can be significant in exchanging information regarding good practice in policies aimed at combating undeclared work. However, effective policy action is best taken at national level and this may indeed need to include greater labour market flexibility to reduce incentives to engage in undeclared work.