EBU COMMENTS ON THE GREEN PAPER

Modernizing labour law to meet the challenges of the 21st century

Introduction

The EBU welcomes the publication of a Green Paper on modernizing labour law for the new Europe and appreciates the opportunity to participate in the debate. The EBU represents, in particular, public service broadcasters in the 27 European Union countries.

The broadcasting industry is only part of the audiovisual industry, which is not homogeneous. It is a diverse sector characterized by a number of different sub-sectors, such as public service broadcasting, private broadcasting, radio, television, and film production. Contracts and relationships between employers and workers differ from one sub-sector to another, and the EBU therefore considers that it would be premature to raise, and try to solve, certain specific questions at this stage.

Moreover, the EBU would recall that public service broadcasting provides for standard and secure working conditions. However, in the context of programming and production non-standard work is also common in the public service broadcasting sector, as it is in the whole audiovisual industry in many countries. Such non-standard work corresponds to the requirement of flexibility which exists in any creative industry. Such flexibility enables workers to find employment quickly and allows employers to adapt to rapidly-changing circumstances resulting from technological developments.

The member organizations of the Social Dialogue Committee in the audiovisual sector acknowledged in their Declaration of Warsaw 2006 that the audiovisual sector is undergoing constant change. This is particularly true for the public service broadcasting sector, where the fulfilment of the public service mandate requires the broadcasters to be adaptable to a wide range of tasks, needs and requirements. National labour law has taken account of this need for flexibility. Collective bargaining in public service broadcasting has led, in many countries, to a socially and economically balanced system covering employees as well as, in many cases, self-employed persons who are similar to employees. Care must be taken not to make drastic changes to these systems which have taken many years to construct.

In any exercise of this kind the EBU considers it of fundamental importance for the Commission to take into consideration the special characteristics of public service broadcasting and, in particular, the important role it plays in job creation. The public service broadcasting sector in Europe employs more than 200,000 people.
1. What would you consider to be the priorities for a meaningful labour law reform agenda?

There may be a need for clarity as regards legal definitions of employment and self-employment in certain countries, but it is not for the European Union to strive to achieve it through amendments to European labour law. Moreover, the crucial questions raised by the Green Paper relate to the status of workers, and it would seem difficult to resolve such a complex issue through labour law, given that, in every European State, that status depends on tax and security systems which also vary from one Member State to another.

It is helpful that the Green Paper instigates a discussion on employment regulation in Europe. On the other hand, deep-rooted changes to current labour law in Europe or excessively sudden adaptation would not be advisable. At this stage it would unquestionably be premature to go beyond trying to prepare a "photograph" of problems which may exist, and in any case the project should not be a horizontal one but should be carried out, if appropriate, on the basis of a sectoral study.

On the other hand, one possibility would be to highlight social dialogue and collective bargaining, which offer all the necessary flexibility for adaptation to technological and economic developments, which is not the case with State legislation. As stressed by the 2006 Warsaw Declaration of the member organizations of the Social Dialogue Committee in the audiovisual sector, effective social dialogue within the European Union at, as appropriate, the national, regional, local and/or company level is important in all matters related to the workforce, including training. It should be encouraged by the European Union as well as by the Member States.

In view of technological developments, transition periods between two posts should be used to adapt employees' skills to enable them to find a new job quickly and so that employers in the sector are able to find highly-qualified persons.

The question that arises is at what level changes, adaptations or mere adjustments are necessary, assuming that such a need exists, before any possible amendments are implemented at a European level.

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?

Labour law allows employers to supervise employees' activities, protect employees in their subordinate position and guarantee respect for their individual rights. Collective bargaining allows the law to be adapted to the needs of those who apply it and of those to whom the law is supposed to apply. There is thus a need for according full importance to collective bargaining.

Consequently, the EBU does not consider that an adaptation of labour law could, by itself, improve flexibility and employment security. Instead, the EBU believes that collective bargaining is the more appropriate way of achieving these objectives. Excessive focus on the
role of the law in employment protection could lead to two kind of pitfalls: a longer stay in a given job, leading to a longer transition period because employers are then more reluctant to recruit. This is particularly demonstrable concerning the most vulnerable groups of employees.

In short, collective bargaining could be encouraged and favoured by EU legislation, whilst full account is taken of different national cultures and traditions.

The alternative is not only between collective bargaining and law. Other instruments could be referred to, as in other fields of law, such as social security and taxation law. National social policy and, especially, an active labour market policy (through, for example, education and training policy) can bring about the dynamism and flexibility required by a sector such as broadcasting.

In any case, a more appropriate approach could be a combination of measures taking into account both the specificity of the audiovisual sector and national cultures and traditions, as well as the specific economic context of individual countries. Regarding the public audiovisual sector, there are considerable differences on the various national markets in Europe. The sector is quite different in the smaller countries from the larger ones, and Eastern European countries are still going through a transitional phase. These differences prevent flexibility and employment security from being attained via a change to, or even a mere adaptation of, labour law at the European level.

4. and 5. 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? 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?

With particular regard to the audiovisual sector, it is essential, firstly, to take account of the particular characteristics of the sector and especially the types of job involved. There cannot be one single reply in terms of the type of contracts or working relations without consideration of the characteristics of each profession. In the audiovisual sector some professions may not be compatible with permanent employment and may, by definition, be temporary posts related to specific tasks.

That said, the structure of professional life has changed greatly in recent years. Jobs for life are increasingly rare and are no longer suitable for the economic conditions in a context of permanent technological evolution. New professions are developed and other skills become obsolete. The employer needs to be able to manage his workforce and adapt it to the needs of his company. Consequently, he must be able to develop the profile of an existing post, as well as the qualifications required, and particularly through continuous training and permanent education. However, the employer must also have a certain degree of flexibility for recruiting and dismissing staff in his employ.
There thus needs to be a combination of flexibility in recruitment and dismissal, a high level of education and access to continuous training, as well as an effective system of social indemnities for the transition periods. In the EBU’s view, these measures would be a way of ensuring a high level of employment.

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?

Collective bargaining has an important role to play in access to training and the transition periods between different contractual forms of employment. It helps, and should help, ensure that all employees, and particularly those with insecure positions, have access to certain social provisions, regardless of the size of the company.

There are numerous examples within the public broadcasting sector in a number of Member States where collective bargaining agreements deal with questions of transition in a way which safeguards the needs for flexibility of the broadcaster on the one hand and, on the other, takes due account of the need for social protection of the employed person.

On the basis of a genuine collective bargaining process, national legislation and collective agreements, it is possible to promote:

- access to continuous professional training or skills training for employees with insecure contracts to help ensure versatility and adaptation to new technological developments;

- schemes to recognize workers’ skills, qualifications and training and help employees during transition periods, maximizing their future career prospects.

However, education and life-long training are not matters for the social partners alone. The Members States have to work together closely on these matters.

Some countries have special financial contribution schemes (from employers or from employers and unions). Helpful as they are, such systems must remain completely voluntary because they are not suited to every national model, and here again the different national cultures and traditions need to be acknowledged and respected by the EU.

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 EU proposals suggest that a "one-size-fits-all" solution is neither possible nor desirable. As mentioned earlier, the audiovisual sector and sub-sectors feature the full range of contractual and working arrangements which legitimately vary from one Member State to another. These differences, as well as the powers of the Member States to develop the concepts of employee and self-employed person, need to be understood and acknowledged.
Nevertheless, it seems to the EBU that in some Member States there is a need for greater clarity in their legal definitions of employment and self-employment and in the difference between them. Such clarification, where needed, should be introduced by the Member States themselves.

In the public broadcasting sector different employment relationships exist. Persons may be engaged as employees, workers, freelancers, self-employed and from agencies. They may work on permanent contracts or fixed-term contracts, and on a full-time, part-time or casual basis.

The meanings of the above terms vary from one country to another. There is no common terminology for these words, which means that the context and meaning must be specified when they are referred to.

The definitions of these employment and contractual terms are also relevant to other fields of law, such as taxation and social security, which mainly determine the legal status of the employees, workers and freelancers. That status too varies from one Member State to another. The social security and tax-law systems of each country are not a matter for the EBU to comment upon, but they are crucial to the debate because the position of those who work in each country is dependent upon the nature of the systems.

Employees, workers and freelancers have different income tax and social security schemes in the various Member States. In some countries, for example, there is separate labour legislation for employees, so-called workers and freelancers.

Before consideration is given to the future of labour law, it would therefore be necessary to describe the position occupied by labour law and the current employment rights and obligations of each working group within these other fields of law.

Given the diversity of working arrangements within the EU, it is not possible to consider a change to the national definitions involved in the working relationships or simply to examine them without placing them in the national context.

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?

A "floor of rights" for employees already exists and has been established by EU Directives (e.g. the Working Time Directive, the Framework Directive on safety and health, the Directive on equal treatment in employment and occupation, and the Directive on posting of workers). When such rights are not applied it is not a matter of insufficient protection but of shadow employment or undeclared work, which has to be resolved through other means.

It is for the Member State to decide whether such rights need to be extended to "workers" other than employees. The Member State itself can best evaluate whether there is a need for regulation of non-subordinated work, thereby taking due account of the whole framework of law, including national tax law and social security law, as well as collective bargaining traditions.
Mature arrangements concerning rights, obligations and working agreements have developed in the audiovisual sector and in the sub-sectors across the Member States. The EBU does not consider it helpful to have further EU legislation on these matters. The issue is too specific for a sectoral approach to be dealt with at the European level. However, the EBU would find it useful for best practices to be identified and encouraged by the EU, although there is no requirement for further legislation in that field. Such best practices could be appropriately looked at within the Social Dialogue Committee in the audiovisual sector.

Here too the social partners and collective bargaining have a role to play where required.

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"?

In public broadcasting, multiple employment relationships are not a particular factor, except with regard to certain specific, limited professions. In any case, it seems that determining responsibilities among various employers has already been settled by national legislation in various countries and does not require regulatory intervention at the European level.

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

In some public service companies in certain EU countries the use of temporary agency workers plays an important role to fill the gaps in, for example, high-season programme production. Many public service broadcasters find their economy weakened by too many permanent employees, while the legislation makes the use of non-permanent working contracts limited. The temporary agency workers have thus come to play an important role. However, in such countries, the employment status of these workers is not a legal problem and consequently does not need to be clarified.

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?

The revision process of the Working Time Directive was founded on a misinterpretation of the case-law of the European Court of Justice, and the judgments in the SIMAP case (3 October 2000) and the Jaeger case (9 September 2003) involve counting as working time the entire periods when doctors are on call, in accordance with the requirement of physical presence in the medical establishment. Moreover, the revision intended progressively to remove the opt-out provision.
At the end of 2006 the Finnish Presidency made a fresh attempt to achieve a political agreement concerning on-call working time and the opt-out provision, whereby, in particular, the United Kingdom could maintain its opt-out provision regarding the 48-hour limit, whereas there would be a limit of 60 hours for all Member States, without the possibility of an opt-out.

The EBU considered that the Finnish proposal was a good compromise and regrets that no agreement resulted within the Council.

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?

Public service broadcasting is usually limited to work within the national borders. Where employees are employed across the border, it should be borne in mind that the posted workers Directive already covers this matter at least partially, i.e. concerning temporary cross-border workers.

There are forms of protection for employees and workers within each Member State. They work on permanent contracts or fixed-term contracts, and on a full-time, part-time or casual basis. What the public broadcasting sector would find helpful from the EU is clarity on the differences in defining the term "worker" in the Member States. It is, though, for the Member States to define a "worker", and not for the EU. Furthermore, in most countries it is often the social security schemes which define the status of employee or independent worker. This issue of definition cannot therefore be tackled only from the standpoint of labour law. It involves others fields of law too.

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

Undeclared or concealed work is clearly harmful to the European economy and needs to be combated, particularly against the backdrop of an enlarged Europe and increased mobility within the Union's borders.

The public service broadcasting sector does not face this practice, despite a certain degree of transnational mobility. Public service broadcasters are subject to scrutiny, control and supervision by the national public authorities, and this includes control of their accounting and their contracts with third persons or companies. Any infringement of labour law would immediately come to light and would be penalized.
Nevertheless, other sectors of the audiovisual industry are far more exposed to undeclared work, and this creates significant distortion of competition vis-à-vis those parties which comply with labour regulations. The EBU considers that enhanced cooperation could be encouraged between the various European administrations.

Member States' responsibility for combating clandestine work should be stressed. They are fully competent to deal with what is essentially a policing issue. Consequently, even though the social partners, and especially the trade unions, have always played a role at the national level in the fight against undeclared work, they should in no way be given legal responsibility for reporting on illegal actions or given the power to interfere with the activities of undertakings.