Position

Direct Selling Europe (DSE) on the EU Green Paper “Modernising labour law to meet the challenges of the 21st century” of 22.11.2006

A. General remarks

With this Green Paper, the EU Commission wants to set in motion a process which is aimed at putting into practice the objectives of the Lisbon Strategy of continuous growth with the simultaneous creation of more and better jobs through the further development and adaptation of labour law to the needs of the market, which are constantly changing as a result of globalisation.

As the new head association for direct selling, DSE welcomes the principle chosen in the Green Paper of making labour markets more transparent and jobs more secure through flexibility.

1. We would mention, however, that labour legislation has developed very differently in the different Member States and is closely linked to their national social security systems and employment market policies and social relationships, which also differ widely. Even a harmonisation of labour law only in terms of its framework would, because of the considerable differences in the systems, lead to an unreasonable distortion of competition and thus be contrary to the objectives of the Lisbon Strategy. The interlocking of national social regulations with the taxation system in the individual Member States would reinforce this effect.

2. It must also be noted that the regulatory competence of the Community is subject to the principle of subsidiarity and proportionality. Thus the Community should take on only those tasks that the Member States can no longer undertake satisfactorily for themselves at their various levels of decision-making. But this is not the case, particularly in labour law. Many Member States have closely regulated or even over-regulated in the area, for example, of protection for employees. A harmonised European labour law and the creation of yet more regulations would disadvantage these Member States in particular against those with less strict regulations. In our opinion, therefore, the principle of subsidiarity speaks against any regulations in the area of labour law, not least because of the consequences referred to in 1.

3. It should also be mentioned that the objectives and content of the Green Paper vary greatly from one another. The flexibility of the labour market as an objective meets with our agreement because flexibility creates the conditions required for security.

As far as the securing of those involved in the labour market through labour law is concerned, we have the impression that the Green Paper describes an “infelt” situation which disregards the actual legal position today. Because there is already a maximum of protective legislation at European and national levels.
And the Green Paper does not adequately reflect the grounds that have lead to the suppression of so called standard contracts of employment (full-time and unlimited) in favour of a multitude of other types of contract.

In fact, it is the over-regulation of contracts of employment and the burden of excessive taxation and social security contributions that are responsible for the so-called standard contract of employment losing significance in recent years.

- Because of the over-regulation of contracts of employment, enterprises have had to seek more flexible and needs-oriented alternative contractual frameworks in order to be able to meet the challenge of global competition.
- The burden of excessive charges also encourages both employers and employees to favour other forms of contract.
- Not least, this excessive burden leads to growth in the shadow economy.

Only a reduction in the burden will have a positive effect on the labour market because it will lead to the readiness to recruit new employees.

4. An extension of the term employee to all economically-dependent self-employed workers is, in our opinion, a capital error, as it would create an abyss in which jobs would be destroyed. In Germany, for example, this discussion led to a law against so-called sham or fictitious self-employment in 1999. The negative effects of this legislation, especially on smaller enterprises, were so serious that, in 2003, the German parliament had to repeal the relevant regulation which introduced the presumption of dependency. The Perulli study in October 2002 on behalf of the EU Commission on economically dependent/parasubordinate employment provided specific examples of the negative effects:
Excerpt from Perulli study (p.84; emphasis added)

A report drawn up in Germany by a group of associations operating in the commercial sector and the Chambers of Commerce Association\(^1\) has suggested that the introduction of these amendments has had negative effects and that they brought about the sudden termination of many self-employment contracts or jeopardised their extension. The report includes the following examples to illustrate this situation:

a) **Commercial agent in the capital goods sector** A commercial agent had worked for a medium-sized mechanical engineering company for many years. In 1999, in the wake of the legislative reform, the engineering company terminated the representative’s contract for fear that it would have to pay his social security contributions. This stemmed from the fact that the agent had been working very closely with the company; he had even rented a small office on company premises from which he managed his principal’s whole distribution system. The agent had explicitly requested this close cooperation so that he could deal more effectively with customers’ enquiries. With his further qualification as a mechanical engineer he was even able to take account of customers’ requests in planning.

b) **Direct selling** The regulations concerning what is termed “false self-employment” led to considerable uncertainty among the sales representatives of the Federal Direct Selling Association’s member companies, causing a significant decline in turnover. For instance, a large family business, employing sales representatives to distribute cleaning equipment and fully fitted kitchens, even had to cut back its production as a result of losing many of its sales representatives due to the climate of uncertainty. Although amended several times, the after-effects of these reforms are still being felt.

c) **Non-distribution sectors** Self-employed persons in the building, construction and advertising sectors, freelance contributors to the media and data processing experts complained about the withdrawal or cancellation of orders and the failure to extend contracts. So great was the principals’ fear of the contractual relationships being classed as false self-employment and that they would be liable to pay large social security contributions, they terminated the relationships, despite the fact that there was a good chance these would not be classified as false self-employment. However, there was considerable uncertainty regarding the legal position.

B. Comments on some of the questions posed by the European Commission

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

   - **Flexibility in labour legislation is required as a matter of urgency.**
     Employers and employees need more contractual freedom rather than new regulations in order to be competitive in the global market. In this respect, the self-reliance of those involved, whether as employees or self-employed plays a key role. Strengthening this responsibility should be at the centre of any effort, with the objective of making the transition between forms of employment easier. Appropriate reforms of labour law, with the objective of removing unnecessary bureaucratic obstacles and creating lean, transparent legal structures should be taken in hand by each Member State on its own behalf. Because these are matters of national concern.

   - **The reduction of excessive bureaucracy is required as a matter of urgency.**

   - Here, we recommend the examination of existing directives with the objective of freeing the regulatory framework from unnecessary bureaucracy or to repeal the directives altogether.

   - **Deregulation is required as a matter of urgency.**
     Existing obstacles for enterprises must be removed so that they can react more flexibly to change. The means of deregulation must be used more powerfully towards the end of allowing especially smaller and medium-size enterprises first to implement the directives in practice and thus to be able to implement restructuring measures more rapidly and more cost-effectively. The Member States should also implement directives only to the extent necessary and not apply them over-strictly, as was the case in Germany, for example, with the implementation of the anti-discrimination directives in the German General Equal Treatment Act.

     The dynamism of the labour market must be restored with the aid of deregulation.
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*?**

We consider that greater clarity in Member States’ legal definitions of employment and self-employment are not required. There are tailor-made solutions in all Member States to distinguish between employment and self-employment, whether through legal definition or on the basis of legal decisions. Thus the category into which an activity falls can be judged in each individual case.

The implementation of a standard definition throughout Europe in the form, for example, of a catalogue of criteria would make just decisions in individual cases impossible and have a harmful effect on the creation of new enterprises and the existence of small independent enterprises.

In particular we would like to stress the importance of learning the lessons of the experiment carried out by the German Red-Green Coalition in 1999 – 2002 with the Self-employment Promotion Act (Gesetz zur Förderung der Selbständigkeit) of December 20, 1999. This Act introduced a legal presumption that a self-employed person is an employee if three of the following five criteria were fulfilled: no own employees; working regularly only for one principal; carries out work typical for employees; no visibility of the entrepreneurial activities in the market; carries out identical work for his employer as previously, but on a self-employed basis.

The impact on the German unemployment rates was considerable. The result was that individuals were deterred from setting up their own business or working in a freelance capacity (see 4. above for the practical experience report) and the legislation was subsequently repealed.

Given the importance of job creation to Europe’s competitiveness, similar errors implicitly must be avoided at European level.

The definitions of employment and self-employment are of great significance not only for labour law, but for social security and taxation law as well. Both social security and taxation law are structured very differently in each of the EU Member States and are linked very closely to the national definitions of employment and self-employment. A Europe-wide definition of the terms would inevitably lead to conflicts with the relevant national regulations.

The European legislators also lack the competence to regulate under the principle of subsidiarity (see A.2 and A.3 above).
Companies in direct selling, which is one form of retail trade, traditionally work in cooperation with self-employed direct sellers. The status of independence as a commercial agent, distributors or any other legal form is, however, not the outcome of competitively-driven restructuring measures, including out-sourcing, restructuring and re-engineering.

Rather, categories such as “independence” and “self-employment” have been part of the portfolio of this sales channel since its beginnings.

In the year 2005, only the direct selling companies which are members of national associations generated sales of more than € 8 billion through more than 3 million independent full and part-time direct sellers.

A standard European solution in terms of a Europe-wide definition of employment and self-employment would bring about a drastic reduction in the number of those self-employed and cause life-threatening damage to direct selling in all its organisational forms.

In the study “Socio-Economic Impact of the Direct Selling Industry in the European Union”, which was conducted by PriceWaterhouseCoopers (PWC) and submitted some years ago, it is ascertained that the direct selling economy in the EU provides 3.8 million jobs directly and indirectly and that between 70% and 85% of the distributed products are manufactured in the EU. The tax revenue in the EU produced by the direct selling economy is over 40 billion € according to PWC calculations. According to further conclusions of the study, the typical sales representative is female, self-employed and in part-time employment. The reasons for becoming self-employed in direct selling are various: (extra-) income, flexibility in choice of working hours, low costs, low risk. Over 90 % of the interviewed sales representatives stated their satisfaction with self-employment.

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?

An extension of the protection under labour law to those who are economically-dependent self-employed is not appropriate and would neither lead to more flexibility nor contribute to job security. The customer of a self-employed person clearly has no influence on the latter’s working conditions.
8.1 As a result, such a floor of rights would mean the extension of the term employee to all economically-dependent self-employed so that more than 3 million full and part-time direct sellers would become employees practically overnight. The differentiation between dependent employment and independent activity should not, in our opinion, be based on economic dependence or the need for social protection, because both criteria do not allow an objective differentiation between commercial law and labour law. Equally, the application of these criteria to individual cases would not achieve the objective.

- For example, would a person who benefits from an inheritance and does not depend on earning an income be excepted from protection and no longer be an employee?

- Does the protection under labour laws not apply to a second-income earner whose economic existence is guaranteed by a partner?

- Must any principal, before cooperating with a self-employed person who works alone, be convinced by the submission of a schedule of assets that there is no need for social protection?

8.2 We do not consider that even the common description of economically-dependent self-employed person as a person similar to employees can be objective. Rather, it should be replaced by the term “Self-employed person with a single principal” in order to clarify the definition and to reflect the fact that self-employed persons with a single customer are not only formally, as the Green Paper wrongly states on page 13, but to the fullest extent also materially independent if they can design their method of working largely for themselves and define their own working hours freely.

That is confirmed by directive 86/653/EEC on self-employed commercial agents. In it, according to article 1 paragraph 2, a commercial agent is a “self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, hereinafter called the ‘principal’, or to negotiate and conclude such transactions on behalf of and in the name of that principal”.

The directive thus recognises that a commercial agent, in order to be self-employed in the all-embracing meaning of the term, need not have more than one principal. This must apply correspondingly, to all self-employed persons who perform their self-employed activities in another legal form of self-employment, such as distributors, franchisees and the like.
8.3 As the Commission itself refers to the directive on commercial agents in order to document how the single market legislation can come very close to labour law in certain aspects, we would mention that the 1986 directive is largely based on the then-current German law on commercial agents in §§ 84ff. HGB (Kindler: *Neues deutsches Handelsvertreterrecht aufgrund der EG-Richtlinie“ in RIW 1990, S. 358 ff.) and that its regulations on the right to commission, termination of the contract and the right to compensation are based exclusively on the typical activities of a commercial agent and have nothing to do with aspects of labour law.

8.4 Directive 2002/92/EC on insurance mediation of December 9, 02 also demonstrates in article 2 number 3 paragraph 2 in conjunction with number 7 that the European legislator classifies contractually-bound (one customer) insurance intermediaries as wholly and completely independent despite their economic dependence.

8.5 Answering “Yes” to the initial question also brings the following risks:

Conditions of employment which are appropriate to one form of employment may prove to be counter-productive for another. The question of what is appropriate frequently depends on the sector concerned.

The introduction of a floor of rights could, therefore, prove to be hindrance to some sectors and business channels which, in turn, could have a negative effect on the development of enterprises and thus the creation of jobs.

There would be a specific risk to the direct selling industry which we represent that companies could close markets and thousands of well-paid self-employed job opportunities, particularly in the part-time area, could be lost.

Instead, much more encouragement should be afforded to the culture of independence even for the smallest of enterprises.

Equally, we see a danger that, with the establishment of a floor of protective regulations, elements of foreign legal systems may be introduced into other national legal frameworks. The consequences would be more bureaucracy and less flexibility.

8.6 Finally, we want to underline that we also strictly reject the creation of a new category of employment relationship lying somewhere between employment and self-employment, first, because we do not need it and second, as this would lead to a number of legal problems (e.g. the classification of the relationship) and social risks through the undermining of non-independent employment.
Summary

I. A Europe-wide labour law would lead to conflicts with national social security and taxations systems.

II. The principle of subsidiarity forbids a Commission regulation of a European labour law.

III. The Green Paper gives too little significance to existing legal protective measures at European and national levels.

IV. The Green Paper allows too little freedom for flexibility in the labour legislation and the reduction of bureaucracy and the effects of deregulation.

V. The direct selling sector has worked with independent direct sellers since its beginnings. The status of commercial agents and distributors as self-employed has not been the outcome of competition-driven restructuring.

VI. A Europe-wide legal definition of employment and self-employment would cause life-threatening damage to direct selling in all its organisational forms.

VII. A Europe-wide labour law would bring about employment and economic distortions and would damage Europe as a base for operations.

We demand, therefore:

(1) more flexibility in labour law, but reject an extension of protective measures;

(2) no standardised European definition of the term employee under which it would be extended to independent direct sellers in direct selling in all its organisational forms;

(3) no extension of employee protection legislation to the self-employed in direct selling.

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