Statement on the Green Paper on Labour Law of the EU Commission

Vbw - Vereinigung der Bayerischen Wirtschaft e. V. (The Bavarian Business Association) is the voluntary inter-sector and central representation of interests of Bavarian industry and represents around 80 Bavarian employers and trade associations and 30 retail companies. We represent the employers of over 3.3 million employees who are subject to social security contributions. We give our opinion on the Green Paper presented by the EU Commission “Modernising Labour Law to meet the challenges of the 21st Century” as follows:

With the new alignment of its Lisbon Strategy, the European Union has placed the emphasis on the promotion of growth and employment in Europe. With this, it has already defined the challenges for the 21st Century. The member states of the EU have, compared with other industrial countries, relatively slow growth and a low rate in the growth of jobs. That has to change.

For that reason we welcome it when the EU Commission establishes in its Green Paper that the flexibility of employment relationships has to be strengthened to consolidate and promote European competitiveness. More flexibility helps both the employers and the employees here, for example in entering or re-entering employment. We reject it, however, if the EU Commission wishes to connect the demand for more flexibility with new safety and protective mechanisms. This would mean further regulation and bureaucracy, and would stand in the way of the creation of new jobs.

It is just with respect to their labour market-relevant measures that the EU Commission has to have itself measured by the goals of the Lisbon Strategy. In addition, the EU may not exceed its competences in this respect. In accordance with the subsidiarity principle, it can only become active in as much and as far as the goals cannot be sufficiently achieved on the level of the member states. Decisions basically have to be taken in this respect on the lowest level at which the competence lies. That applies also in respect to the European Court which, due to uncertain legal terms in social policies, sees itself empowered more and more often to the further development of law. The consequence is a reduction in the certainty of law.
Answers to the catalogue of questions

- Concerning political labour market stocktaking:

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

Companies within the EU have to be able to react flexibly to change in international competition. Only in this manner can they subsist in globalised markets and be successful. Overregulated, inflexible labour markets are therefore a serious disadvantage in location. This is shown in Germany to a particular degree. Companies and employees need more flexibility in labour law. This includes a dismissal law which is used to build up employment, and as free as possible structuring of working hours and a reduction in administrative regulations.

Part-time work, limited employment, temporary work have to become more flexible alongside other forms of employment as modern labour relationships. Comprehensive deregulation and debureaucratisation of labour law would lead to more growth and employment in the terms of the Lisbon Strategy. The necessary reforms finally have to be approached therefore on the national level. On the European level, the principles of the better regulation initiative of the EU Commission have to be applied consistently to labour and social-political regulations and projects.

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

The deregulation of national labour law and a transition to more flexible collective agreements are suited to creating employment security and reducing the splitting of labour markets. In Germany, companies could react more flexibly to change in the economic framework conditions after relaxation of the termination laws. Fluctuating order situations could more easily be absorbed through a relaxation of regimentation in the part-time and limitation areas. Through the flexibility gained in this manner, the companies would have the opportunity to breathe. The new engagement of employees in unlimited full-time employment relationships would be the result.

The transition to flexibility may not stop there, however, but has to extend to the concrete structuring of full-time employment relationships and working hours. Only in this manner can work processes be optimised in accordance with the wishes of the employers and the employees.
Any adaptation of the collective agreements can only take place in Germany through the parties to the agreements. Neither the EU nor the national legislator may intervene in the autonomy of the collective agreements legally protected by the constitution. Through statutory opening-up clauses, however, the parties to the agreements are to be enabled agreement deviating from the collective agreement regulations. The flexibility for companies gained in this manner can help within individual sectors to secure existing jobs or to create new ones.

3. Do existing regulations, whether in the form of law and/or collective agreements hinder or stimulate enterprises and employees seeking to avail or opportunities to increase productivity and to 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?

The existing regulations on the European and national level frequently hinder necessary processes of change in companies. Global competition and the mechanisation of the production procedures demand from the companies and employees a high degree of flexibility and mobility. Stringent employment protection laws, above all for special groups of persons, have a contra-productive effect and reduce the necessary dynamics in the labour market. Through this, the appointment chances deteriorate in particular for women, young people and older employees.

For this reason, companies, in particular SMEs, should be relieved from the requirements of the dismissal protection law. Furthermore, they should be released from bureaucratic regulations concerning part-time and limitation and be able to handle the working-hours law more flexibly. Together with relief in connection with works co-determination and solution possibilities from the continued and binding effects of the collective agreement, this release in the area of the SMEs could trigger new establishments and result in new jobs. On the company level, the possibilities of deviation from the collective agreement regulations should be possible in addition.

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?

A liberalisation of the time-limit law would be desirable both for companies and for employees as limited employment relationships are an employment engine for the labour market through which those looking for work are offered a way to permanent employment. For this reason, the conditions have to be structured in such a manner that time-limitation is an alternative for employers without unnecessary risk.
To guarantee this, the time-limitation of employment relationships without any material basis, e.g. for up to the duration of five years, could be enabled apart from this, the pre-employment prohibition which leads above all with big companies frequently to undesired employment relationships not limited by time should be replaced with a six-month waiting period until re-appointment. In this manner it would be possible for companies to offer practical training within the company for young people without having to waive a trial period within the framework of subsequent temporary employment for them.

Independent of this, companies have to be able to adapt their number of staff, however, also to product cycles and order situations flexibly without in doing so having to fall back on to the instruments of temporary employment and temporary work. In this respect, dismissal protection has to be relaxed correspondingly as an appointment obstacle. The necessary protection of the employees in the context of such a transition to flexibility is in Germany guaranteed by a closely meshed network of social security systems. A corresponding incentive to take up employment has to follow.

Concerning the alleviation of transition from one employment relationship to another:

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

Comprehensive dismissal protection keeps the employer in boom times from creating full-time permanent jobs. Short product cycles, technical innovations and changing demand require, in addition, a high degree of flexible labour organisation. Therefore, it is no longer meaningful to strive for as great as possible “job security”. Rather, activation measures and the incentive-related social support of employees during the transition periods have to ensure “employment security”.

For a regulation frame of dismissal protection laws and support services for the unemployed, there is no regulation competence on the EU level. Corresponding guidelines cannot be decreed in this respect. In addition, the various labour markets of the member states are hardly comparable.

On the national level, however, such a combination can however, indeed be meaningful. The example Denmark shows that reduced dismissal protection, coupled with investment in training measures and social payments linked to strict conditions, leads to permanent employment. In addition, employees feel better protected through a meaningful support system in the case of unemployment than through employment protection laws.
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?

Existing laws should be examined as to whether they sufficiently support employees in the transition from one employment status to another. By setting financial incentives and relief in taxes or social insurance, the legislator can promote the training and qualification measures of the employer. In addition, regulations and bureaucratic burdens in the transition between different forms of agreements have to be reduced.

However, school-leavers also have to possess the necessary capability for vocational training. In addition, the motivation and the will have to be there to continue training continuously, e.g. even outside working hours. Without these basic prerequisites, it will become increasingly difficult for employees to achieve the goal of a continuously active occupational life.

Regulations for training support can be made on the collective agreement level. In Germany, there are already corresponding structural possibilities which are used in different ways in the individual sectors.

- Concerning minimum standards for economically independent work:

7. Is greater clarity needed in the Member States’ legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

With the employee and employment terms of employment and social law, German law includes differentiation criteria for dependent and non-dependent work. Differentiation is clearly regulated on the national level in this respect. In addition, there is a probate process to establish the status concerned. The person who mainly structures his activities himself and can freely determine his working hours is self-employed. These prerequisites are not fulfilled in the case of integration in an external work organisation and corresponding subjection to instruction.

There is no need for a uniform definition on the European level as it would not make for any further clarity in national law. On the contrary: Criteria such as “economic dependence” or “social protection requirement” would no longer allow correct and legally secure differentiation.

The notion of the employee may never be extended to become a burden on the notion of self-employment. The massive loss of jobs would be the result. Self-employment leads to employment and must therefore be encouraged, not hindered. Instead, the economic causes for employment transitions undertaken with fraudulent intention (e.g. disguised employment) have to be eliminated. This has to take place through providing incentive in the tax and economic policies.
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?

No, as only the variety of established contract structured enables companies to react flexibly to the requirements of the market. In addition, the existing permeability of the labour market would be reduced from other forms of employment up to the permanent full-time employment agreement.

The subjection of self-employed workers and flexible forms of employment to the strict regiment of labour law would mean a massive competitive disadvantage for European companies. Economic areas, which, in fact flourish, would also be affected because the forms of employment prevailing there are not subject to the strict rules of labour law in particular the dismissal protection. The goal of creating new jobs would be thwarted.

The negative effects presented can be seen by the German legislation for fighting disguised employment of 1998/1999 as a result of which many of the smallest companies had to give up. They no longer received orders through the fear of protective norms and the accusations of disguised employment. Independent of this, the EU Commission has, in the question of comprehensive minimum regulations for all employees, no adequate competence to intervene in national labour law.

- Concerning employee protection in triangular employment relationships:

9. Do you think that 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”?

No further regulations are necessary for adequate employee protection in three-way employment relationships. In Germany, the responsibility of the labour supplier and the hirer of labour are clearly regulated. The companies supplying labour bear the responsibility for the social protection of their employees. In addition, there is a subsidiary liability for the hirers of labour. Any new order of the liability risks would lead to legal insecurity and bureaucracy.

In principle, temporary work may not be regarded as undesirable. For the person seeking work, it is a good start in the labour market and more and more frequently also a first step towards permanent full-time employment. For this reason, the demand for temporary work through special incentives for the supplier companies has to be increased.
Also in the use of sub-contractors, there are clear responsibilities and adequate social protection regulations in Germany. No subordinate liability of the hirer may ensue here. The fact that the hirer has nothing to do with the external company people and has no influence on them speaks against any subordinate liability.

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

No, the status of temporary agency workers is conclusively clarified in Germany. The Federal Agency for Employment has decreed execution instruction for the Temporary Employment Act in which is lists the individual differentiation criteria accessible for anyone. There is neither necessity nor competence for European regulation.

- **Concerning minimum requirements for the temporary employment agencies:**

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?

Companies require a high degree of flexibility in structuring working hours. Only in this way can fluctuation in the order situation in particular be correspondingly compensated. Lifting the limitation of the maximum daily working hours valid in Germany to ten hours contrary to the EU requirements would be an important step.

On the European level, revision of the working time directive may not lead to a counterproductive restriction of the requirements. The directive has to have a flexible and debureaucratisation effect. For this reason, the opt-out regulation for deviation from the maximum weekly working hours must be retained at all costs. In addition, there is need on the European level for a new assessment of the inactive period or standby service as rest time. The regulations competence of the EU only affects the social protection aspect and not the organisation of the working hours on the company level. The EU has to restrict itself to the regulations of minimum conditions.
Concerning definition of a uniform EU employee term:

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 in which they work? Or do you believe that Member States should retain their discretion in this matter?

The alleviation of border-crossing employment within the EU is primarily a question of the social insurance law without any relation to the employee notion. There is no need for a uniform definition on the European level as it would not make for any further clarity for the national law. In view of the different national legal codes, the attempt at a definition would be condemned to failure. Uniformity of the employee notion would bring together what did not belong together. Such an undertaking would, in addition, contradict the subsidiarity principle.

Concerning law enforcement and illicit work:

13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

Stronger border-crossing administrative co-operation of the authorities is to be welcomed inasmuch as it does not increase the bureaucratic work of the companies. Otherwise it is a matter for the national legislator to implement the European requirements for which he also bears the responsibility. Control shall then take place through the national authorities and courts.

In Germany the social partners are already very closely integrated in the assertion of labour law on a national level; there is no need for an extension to their competence.
14. Do you consider that further initiatives are needed at an EU level to support action by the member states to combat undeclared work?

The struggle against illegal employment is an important political-social task. In Germany comprehensive measures were introduced in past years against undeclared work. The successes up to now show that the effects of illicit work can be effectively combated on the national level. Greater official exchange of information can be helpful there.

Alongside this, however, the deeper-reaching causes for illegal employment have to be eliminated. For example, measures for deregulation and a transition to flexibility on the labour market can make a decisive contribution to the existing incentives for black work being reduced and it thus becoming less interesting for those concerned.

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