FPB response

to

Green Paper by the Commission of the European Communities: Modernising labour law to meet the challenges of the 21\textsuperscript{st} century.

24 January 2007
What is the FPB?

The Forum of Private Business (FPB) was formed in 1977 and is a pressure group fighting on behalf of private businesses. The FPB represents approximately 25,000 UK-based businesses, which employ in excess of 600,000 people.

The FPB is active in the European Commission’s social dialogue and is a representative, in this country and in the European Union, of small and medium-sized businesses. The FPB has a permanent agent in Brussels, who is supported by an all-party group of MEPs.

The FPB also provides a range of business services aimed at increasing member efficiency and profitability.

Business opinion

All of the FPB’s campaigns are based on the views of our members. We talk to our members in various ways. Via surveys, by telephone and face-to-face contact. We also collect data electronically, which enables us to source opinions from hundreds of businesses within a matter of hours.

The FPB works to bring businesses together with their own elected representatives. Members vote in a quarterly Referendum, adding comments for us to send to their MPs, MEPs, MSPs and AMs. Referendum is a tool that business owners have been using since 1977 to make their voices heard.

The FPB has more than 20 years’ worth of experience of accredited research into the small business community. We have been using the Quarterly Survey since 1980 to track business growth, and the rise and fall of key issues, working in partnership with the Small Business Research Trust.

FPB contact details

FPB
Ruskin Chambers
Drury Lane
Knutsford
Cheshire
WA16 6HA

Telephone 0845 130 1722
Facsimile 0870 241 9570
Email info@fpb.org
Website www.fpb.org
Introduction

The Commission has drafted the green paper primarily to initiate a discussion on the ways in which labour law can be adapted to meet the new challenges of the 21st century; specifically low-cost competition from emerging economies, and globalisation.

The FPB welcomes this debate, however we would like to see greater clarity on the part of the Commission regarding the goals of this exercise. There is currently no published plan or timeline likely to follow from the green paper and associated consultation exercise, and no measures highlighted in the Commission’s work programme save for a ‘follow up communication’. Without any specific proposals on the table, it is difficult for the reader to know what they are responding to. Furthermore, as the Commission is preparing separate work on flexicurity, the necessity of 2 separate processes is questionable and confusing.

The paper concentrates to a large degree on the proliferation of non-standard contracts and on an assumed need for labour law to catch up to the evolving labour market. It fairly presents the fact that non-standard working arrangements are used by employers and employees seeking to avail themselves of greater flexibility in order to increase productivity in the face of greater competition – flexibility which cannot be enjoyed through the current standard employment contract, which in many cases has become too costly and burdensome for employers.

However, in general the paper also overstates the negative aspects of non-standard work. For example highlighting the fact that, of workers engaged on non-standard arrangements in 1997, 60% are now in standard employment, with 16% in the same arrangement, and viewing this as a negative aspect, shows that the European Commission (EC) has first (a) assumed that those engaged on non-standard arrangements are actually in such arrangements against their will and would prefer to be standard employees, and (b) given assumption (a), has assumed that 60% is below the failure rate. Both assumptions are questionable. The EC must seek a greater understanding of contracting, self-employed work, freelancing and temporary agency work and that they are popular precisely because it is beneficial to both parties in the relevant transaction, in many cases to provide a transition from unemployment to employment, and in many cases to suit the individual’s and the company’s preferences.

Questions posed by the green paper consultation

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

“Consideration needs to be given to the problems faced especially by SMEs in dealing with the administrative costs imposed by both Community and national legislation.” – green paper, page 4.¹

Central to a reform of labour law is current economic thought that the current labour law environment is restricting economic growth.

The first piece of evidence is from the Organisation for Economic Co-operation and Development (OECD), which, according to the Times, has called on eurozone governments to “...focus on more determined attempts to integrate markets in products and financial services, while scaling back job market regulation that made it tough for companies to hire and fire. Wage negotiations should take place at a company, not a sector, level and be linked to how productive workers were.”²

¹ Modernising labour law to meet the challenges of the 21st century, green paper, page 4
² OECD urges reforms while going is good, http://business.timesonline.co.uk/article/0,,16849-2532016.html
The second piece of evidence is from FPB’s own members. According to a recent survey, 21.4% of micro and small businesses and 20.8% of medium-sized businesses believe that employment regulation is preventing them from hiring more staff.\(^3\)

Given the weight of the evidence that burdensome employment laws are stifling economic growth and preventing employment growth across most of the EU-15, the FPB firmly believes that a meaningful reform would be a downward reform: that is, employment legislation at both member state and Community level needs to be reviewed and reduced.

The important distinction here is that only less regulation will solve the problem. Better regulation is undoubtedly needed, but in itself will not achieve the productivity increases that are needed for Europe to be able to compete in a globalised economy.

In order to address the issue of regulation, the widespread use of Regulatory Impact Assessments (RIAs) must be firmly entrenched in the legislative process with an effective control mechanism. The scope of RIAs should be extended to cover indirect as well as direct costs. For example, RIAs currently only cover the compliance cost of regulations and, possibly, the direct costs to a business of the implications of the regulation: for example the need to hire new workers and action extra non-wage costs to comply with the Working Time Directive. However, there is a cost to the wider economy which is not entirely borne by the individual firm. That is, the lost productivity causes the number of firms sustained under perfect competition in an industry to be less, reducing competition and economy-wide productivity, and therefore economic growth. There are also competitive distortions resulting in misallocation of resources when regulations impact disproportionately on SMEs. All of these effects should be quantified by RIAs in order to assess the full cost.

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?

“Stringent employment protection legislation tends to reduce the dynamism of the labour market, worsening the prospects of women, youths and older workers...Deregulation at the margins while keeping stringent rules for regular contracts largely intact tends to favour the development of segmented labour markets with a negative impact on productivity....workers feel better protected by a support system in case of unemployment than by employment protection legislation.”\(^4\)

The segmentation of the labour market tends to occur when employment relationships become too costly for the employer, who then logically seeks other ways of engaging labour, such as contracting and outsourcing. In reality it is not, as more simplistic analyses using the assumption of employers with limitless resources would conclude, a choice between standard employment and non-standard working arrangements, it is often a choice between a non-standard arrangement and no arrangement at all. This case is well illustrated by an FPB member case study.

Colin Merchant runs MBH Industrial Services in Taunton and has already felt the pinch caused by regulation in this area. He said: “In our business, we go through peaks and troughs, and in the past, we used self employed workers in our busiest periods to help out. What the Government has done now makes this impossible. Now we have to take them onto the books and treat them like full-time employees, it’s ridiculous. From now on, we’ll struggle through with our own workers, subcontracting is not worth the hassle, even if it means turning down work.”

As the green paper sets out, security is more effective, both in terms of worker perception as well as actual protection provided, if it is provided by appropriate welfare, rather than ‘job security’ as understood by a situation where terminating an employment relationship is made difficult. Welfare, provided it does not provide a disincentive

\(^3\) FPB survey findings, http://www.fpb.org/YUIfcRo-NIrW.html
\(^4\) Modernising labour law to meet the challenges of the 21st century, green paper, page 8
to search for work once unemployed, is important as a facilitator of employment transition and search. It is the quid pro quo to more flexible employment law whereby workers can be hired and released more easily to aid the transition between jobs that is vital, in a macroeconomic sense, for supply to respond to stochastic changes in demand. Furthermore, the focus should be on ‘employment security’ as defined by a situation where it is simple to find a job due to macroeconomic success, rather than ‘job security’ as defined by labour market rigidity.

Labour market segmentation can be reduced by removing the incentive, or, rather, necessity, to engage in non-standard forms of labour, that is by reducing the costs of employing standard workers. This applies in so far as ‘segmentation’ is seen as an unwilling relationship and a negative feature: where it results from firms and workers seeking mutually beneficial flexible arrangements, it does not necessarily need addressing.

This requires action at both the member state and the Community level to reduce the body of legislation, and to avoid over-implementation of EU Directives.

The fact that collective agreements are highlighted shows that the mindset of the paper is still very much focused on larger businesses: collective agreements are not really relevant to small businesses, where wages are agreed bilaterally between owner-managers and employees.

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?

Regarding the effect of existing regulations, it is clear from the responses to the first 2 questions that the regulations, even in the UK – one of the least regulated of the EU-15 states, hinder SMEs to a considerable extent.

Regarding improvement whilst achieving objectives, it depends on what the objective is. If the objective is employment security, then an improvement would be a downward revision of current regulations both at member state and Community level. If the objective is to protect workers, then this must be defined more clearly. Protecting insiders while semi-permanently excluding outsiders from employment is a goal that is well served by current legislation, but we doubt that this is the objective of any sensible economic strategy.

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?

Recruitment is best facilitated if regulation is as light as possible, to remove disincentives to hire workers. This includes regulation on redundancy. However, employment security can be provided by a prosperous economy where jobs are created through demand, minimum standards of living can be assured, and the transition from one employment post to another facilitated by appropriate levels of welfare such as unemployment benefit. The appropriate level of benefit is one at which the marginal benefit as seen by facilitating transition and the marginal cost as seen by disincentivising job search are equalised, but below which the marginal benefit at each level exceeds the marginal cost.

This should, though, be the competence of member states, in so far as the implications of the laws and regulations do not apply to cross-border issues.

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?
Yes. Employment protection legislation should be highly flexible, and assistance designed to bring the unemployed back into an employment-ready state as soon as possible. As such, it is necessary to ensure adequate skills and training such that the number of unskilled and largely unemployable workers is reduced. ‘Active labour market policies’ are not very well defined here, so this question is difficult to answer. However, if the meaning is intervention in the relationship between employers and employees, then this would not be helpful. If the meaning is policies to promote employment readiness, then these are positive. Again, this should be a matter for the member states.

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?

It is in the interests of companies to train their workers and ensure their skills are adequate to perform their functions, no law or collective agreement is needed here. In the case of training to facilitate transitions and upward mobility, this is an activity which is only in the interests of the employee, as it usually means mobility to a different job. Collective agreements through social partner negotiations are not conducive to sustaining a mobile working life. It is up to the individual to ensure that their skills are adequately matched to their aspirations, and, moreover, it is in their interest to ensure that this is the case. Persuading an individual to take this step is made more difficult when responsibility seems to be abrogated to collective agreements. Unfortunately, this process does not seem to be functioning well, as there is a large discrepancy between the skills provided by sections of the workforce and those demanded by employers. If rational, risk-neutral behaviour were predominant on all sides, employees would realise that it is in their interest to improve their skills base, skills providers would provide the training, and financial institutions the finance – which workers would take out knowing that the cost is likely to repay itself many times over. This seems to work in part in the UK through Career Development Loans, but coverage is by no means perfect. What would be helpful would be a cultural change whereby individuals saw skills as their own responsibility, and the market for all aspects of skills provision were to function better, through whichever means were deemed appropriate.

If skills provision to perform a specific function is in the joint interest and therefore joint responsibility of the employee and the employer, and skills provision to facilitate upward mobility in general is in the sole interest and therefore responsibility of the individual, then the grey area is the case where general skills provision is given to ensure a skilled, employment-ready workforce. This is also in the interest of employers. While the benefits are not necessarily transparent, employers are able to identify them. However, the question of employer participation in the provision of skills to the general workforce is slightly preempted: it will not happen until school and university curricula are made relevant to business. The FPB skills survey recently found that “...school-leavers certainly lack the basic skills, but they also lack basic work ethics and the confidence or will to apply the knowledge in a work-based environment.”

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 green paper has already concluded that combating disguised employment and false self-employment should be the competence of the member states. The definitions of employment and self-employment should also be dealt with by the member states, as different working traditions exist in each. If the regulations in a particular member state are over-burdensome and have the effect of excluding market entrants from other member states, then they should be dealt with by the screening process under the auspices of the Services Directive.

However, ‘clarity’ is a secondary issue. The fact that the law is clear is of no use if it is clear that the law is unworkable or unhelpful to enterprise. Clarity is needed but only in conjunction with flexibility. The case of Mr Merchant, highlighted in the response to question 2, is an illustration of this.

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?

The impact of making the working conditions of all workers the same would be to increase unemployment and decrease productivity. This is clearly highlighted by the FPB member case study in question 2, whereby contractors had to be treated as employees and it became too costly to hire them, resulting in work being turned away. Having to treat all workers the same as employees would bring the same results on a much larger scale. Employers turn to non-standard arrangements because standard employment is too costly and burdensome. The greater flexibility provided by non-standard arrangements is therefore vital. Furthermore, contractors do not even wish to have the rights, as they forfeit them in a trade-off in return for self-reliance, greater freedom and, in some cases, a more manageable tax status. In the UK the main trade body representing contractors and freelancers is against any extension of ‘employee’ style rights to their members, as it would lead to this freedom, as well as competitive advantage, being lost.⁶

9 Do you think the responsibilities of the 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?”

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

In the case of the UK, which has the highest number of temporary agency workers, it is usually indisputably clear that the worker is an employee of the agency. Temporary recruitment agencies have responded to any lack of clarity by clarifying the issue themselves in order to enable them to hire more workers. In short, markets solved the problem. If this has not happened in other countries, it may be because the markets are not as extensively developed as in the UK, where temporary agency workers have long been an established feature. This should be the responsibility of the member states.

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?

The Working Time Directive is particularly anachronistic in the era of global competition. It is somewhat perverse for the EU to aspire to become the most competitive and dynamic knowledge-based economy in the world, and yet simultaneously forbid the hard work that is necessary to achieve that goal. Therefore, the greatest priority should be given to the repeal of the Working Time Directive. However, if this is not achievable, then a more manageable interpretation of the effects of on-call time should be a matter of priority, as should the interpretation of an employer’s duty to ensure adequate rest is taken by employees. It should not be up to the employer to ensure the rest is taken, just to ensure that it can be taken. This would be an appropriate balance of responsibilities.

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 discretion in this matter?

Member states should retain discretion in so far as the issues concern domestic workers: other workers are covered by the provisions of the Posting of Workers Directive, therefore further Community action is not necessary in this area.