Response to EC Green Paper on modernizing labour law

Introduction

1. In November 2006, the Commission published a Green Paper entitled “Modernising labour law to meet the challenges of the 21st Century”. The purpose of this Green Paper is to launch a public debate on how labour law should evolve to support the Lisbon Principles based European growth and jobs strategy. In the light of the replies received, the Commission will issue a follow-up communication in 2007. This Green Paper is part of the wider debate on flexicurity, on which the Commission will also prepare a Communication setting out common EU principles later in 2007 to help Member States steer reform efforts. This paper reflects the views of the Member Companies of the European Study Group (www.esg.eu.com).

2. We support EU actions to promote labour market flexibility across Europe. We welcome the launching of a Europe-wide debate on the modernisation of labour law. However, we believe that the competence to modernise labour law lies first and foremost with the Member States. Most of any necessary measures will therefore need to be taken in the Member States. The role of the EU should be to organise exchanges of experiences between Member States and monitor national reforms using the instruments of the European growth and jobs strategy. Taking a top-down legislative approach at the EU level would be counter-productive for national reforms. Indeed, a bottom up approach will be more appropriate and beneficial, given the sizeable differences, customs, practices economic situations and needs of the different Member States. We would strongly oppose any measures seeking to harmonise the definition of “worker” at the EU level.

3. The US Government estimates that in excess of 600,000 jobs were lost in that country in 2006 as a result of the pressures of globalization and the movement of jobs to substantially lower cost countries, mostly in Asia. Where those people who lost such jobs in the US were able to find alternative work, this was almost exclusively in lower paid and lower skills jobs. No similar statistic exists for the EU Member States; anecdotal evidence indicates that the problem is as severe in the EU, possibly even proportionately higher. There are well in excess of 20 million unemployed in the EU, with approaching a similar number of Member State funded “make work” jobs as well. This is a damning indictment of the EU’s social policy, so this debate is not only timeous, but much needed.

4. We note that the Green Paper does not sufficiently underline the importance of self-employment for the development of the entrepreneurial mindset which Europe so badly misses. The genuine creation of real new jobs is completely static in many EU Member
States and has been for too many years. Entrepreneurship is the real secret of growth, but we should all reflect on the fact that entrepreneurs can choose where they wish to operate now. The EU level institutions should concentrate much more effort and resources on fostering and encouraging entrepreneurship, particularly amongst SMEs, where the product of such efforts will be more successful.

5. We believe that the EU should recognize that its most helpful role should be that of creating an enabling environment, rather than a regulating one, as has been the case in the past. In looking at how we can responsibly help our fellow European citizens, we believe that efforts will be much helped by recognizing the speed of change in the world of work – it should be noted that hardly any jobs exist now which existed at the beginning of the 20th Century – and that technologically the speed of change has been greater in the past 10 years than at any time in the previous 100. We further believe that lessons should be learned from how other parts of the world have reacted to such challenges, in particular in Australia, where the changes which have been introduced by the present government to combat the obvious threats of globalization have been so successful.

The idea of “Flexicurity” as a major basis for future labour law

6. The Green Paper talks of “advancing a flexicurity agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive”. These are worthy aims, which deserve energetic support, but we question whether the concept of “flexicurity” is the solution. At the basis of the concept of “flexicurity” is the idea of a mix of flexibility and security. That is an inherently dangerous place at which to start to build such a concept, because flexibility and security are inherently contradictory. To try to square that particular circle is going to be impossible. The in-built history of Social Europe makes such a proposition even harder, because those who espouse yet more regulation and restriction – usually in a one-size-fits-all manner – cannot find common ground with the more “liberal” viewpoint who wish to see the rolling back of regulation and the advocacy of a freer market environment.

7. Flexicurity is often described anecdotally as the Danish model, whereby it is the individual, as opposed to the job, which is protected, via substantial financial support from the State in the event of job loss. This is coupled to a relatively short time frame for such payments, with a high degree of pressure on the individual to find another job. In general, this is a better approach than one which seeks to protect the job, and if it does not, fails to solve the subsequent problem of long term and often structural unemployment. However there are two major drawbacks for this model; first, it is very, very expensive and requires levels of funding which most EU taxpayers would find unacceptable to bear; second, it presupposes an economy which is rigorous enough to continue to be able to deliver sufficient new jobs to employ those who need them, year on year.
8. We welcome the fact that the Green Paper recognises that “Overly protective terms and conditions can deter employers from hiring during economic upturns”.

How to create a flexible and inclusive labour market?

Green Paper Questions:

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

9. We would certainly not advocate any more regulation. That would make the labour markets even more “sticky” and would further hinder enterprise. We would not advocate any more rights, without reflecting very clearly and transparently the concomitant burdens on society, as rights are never free. We would avoid such contradictions as “more responsive regulatory framework”, because experience has clearly shown that regulation means less flexibility; the aim of flexibility should be to reduce burdens, not increase them. We are concerned that the expression “more clarity” is code for less flexibility and more circumspection. We believe that the EU institutions’ role and duty is to create the environment which materially helps to create and sustain jobs.

10. We have taken careful notice of the developments of the Workplace Reform changes in the labour laws of Australia. In that country, which interestingly is effectively a federal one, with reasonable degrees of freedom for the individual States to operate, there has been the progressive removal of almost all labour legislation for people working in SMEs. It was introduced first for those with up to 20 employees, and has proved so successful that the threshold has been increased to 100 employees. The Australian government, spurred on by their close geographic proximity to the Asian tiger economies, realised that they had to free up their smaller business to be able to compete on a more level playing field with their Asian competitors. The result of these changes has been the lowest levels of unemployment in over 30 years and substantial rises in the levels of real income for most Australians. Even if it is not so obvious, the threats from globalisation are just as serious for us in Europe as they are down under. So rather than react in horror, as some people in France did, who said that “no job is better than an insecure job”, we
should consider each and every option to free up SMEs to take more people on. There are some 18 – 20 million SMEs in the EU. If just a third of them each took on one new person, it would have a stunningly dynamic impact for the good on the EU’s economy.

11. Question 4 asks how different types of contract might be facilitated either by law or collective agreement. The answer is that this is not an area for EU level intervention. If individual EU Member States wish to adopt whatever approach they do, that is their choice. In most instances they are best placed to make such judgments. The EU has absolutely no ability to add value by getting involved. Given the economic differences and diversity across the EU this can never be a level playing field area, so the answer is that the question was wrong in the first place.

Questions:

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?

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?

12. The answer to Question 5. has to be yes, but with two major caveats: first, yes, but at what costs? There is no point designing an approach that most societies cannot afford; second, not only should such an approach be explored at a purely national level, but it should also be done on an industry by industry, or sector, basis as sensibly there will be differences which cannot be ironed out on a central type of approach. Again, if the economic benefits outweigh the downside, do it. Otherwise, don’t do it that way.

13. Question 6. raises an important issue which deserves comment. The present construct of EU level (and indeed more junior) social partners is unelected, unrepresentative and often the propagators of ideologies and mindsets which can get in the way of progress. They do not enjoy the proper level of respect which their potential powers should command. This Green Paper based debate is the right forum to reconsider who should have the powers to take decisions on laws which govern the social aspects of the EU. It is our belief that any powers presently enjoyed by the social partners should be passed to those people who are properly elected to represent the peoples of Europe, namely MEPs. The bodies who seek to represent the views of employers, trade unions, etc., should be listened to carefully, and with respect as advisory voices, but nothing more.

Questions:

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?

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?

14. In general principle, lack of clarity is inherently bad. However, we fear that expressions like “more clarity” are code for less flexibility and more circumscription. Certainly, were lack of clarity to result in “workers” in the UK having the same rights as “employees” (they are currently entirely different relationships) it would strike wholly illogically at the UK’s global competitiveness. Clarity is good if it means that things are clear, but if it arrives with added and unexpected baggage, it is bad.

15. The concept of a “floor of rights” should be a matter for individual Member States to decide; it certainly has no added value at EU level. Were the EU to intervene in such an area, there is a real fear that it would result in substantial labour cost increases in Member States. Many industries have enough of a struggle to survive in the context of lower cost pressures from elsewhere, that such an idea would most unwelcome. The Australian success story is in itself instructive. Had Australia been an EU Member State, they would not and could not have done what they have done so successfully.

Questions:

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"?

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

16. The commentary in the text of the Green Paper and these questions indicate that the authors do not really understand the rationale behind the existence of temporary agencies and why many people chose to get their work through them. Temporary agencies provide an opportunity for flexibility in the lives of people, frequently in such areas as IT and work for the second earner in the family – normally the primary carer – which gives the freedom to live in such a way as best suits their lifestyle and responsibilities to, for example, their children. The temptation to regulate such bodies should be resisted, because if they were to be regulated to the point where there was little difference between permanent and temporary work, the result would be that new forms of temporary work would spring up.

17. As far as clarity is concerned, the points relating to that made above apply equally to Question 10.

Question:

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?

18. This is just not an area which justifies EU level involvement, as is amply illustrated by the current QMV blocking minority at both ends of this argument. Not only is it a matter which should be left to the competence and powers of the individual Member State, but the fact that it was first introduced under the guise of Health and Safety, damages the inherent responsibilities of and respect for what should properly be H&S matters.

19. If a sensible solution is needed, then it would be wise to withdraw the present Working Time Directive and replace it with something which genuinely addressed the questions of both health and of safety. We would contend that Rest Time, rather than Working Time, would be a better approach. However, this would need to be sensitively and carefully introduced, developed and administered. There is no blanket “one size fits all” solution; each job category would need an individual solution, as is illustrated by the differences in the needs and responsibilities of e.g. junior hospital doctors, compared with seasonable agricultural workers. It would need not only full delegation to each Member State, but also to each industry, trade, etc.

Question:

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?

20. We welcome and support the contention that the definition of “worker” should be left to the discretion of the Member State. We recognise that there is an ever growing level of mobility within the EU, which should be encouraged for the good of the Community. This aspect of EU citizenship is absolutely essential to the prosperity of the EU. The level of mobility in the EU, compared with the US is poor; we need to encourage mobility, not regulate it. The employment laws of the country where the substantive duties are performed should where possible be applied, but care should be taken as far as pension and other retirement provision matters are concerned. Cross border workers are by definition working “on the margin”. As with the matter of Temporary Workers, over regulation would not work.

Questions:

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?
14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?
21. Patently, the boundaries, duties and competencies of the respective official bodies, be they taxation, labour, immigration or civil police need to be much clearer. It would appear that as undeclared work is a problem which can never be eradicated, the best contribution which EU level bodies can make is clearer definitions than currently appear to exist, coupled with creating the enabling environment and support for cross border cooperation between official bodies within the Member States.

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