Green Paper: "Modernising labour law to meet the challenges of the 21st century"

Personal Data

Do you consent to the publication of your personal data/data relating to your organisation with the publication of your replies to the consultation? (compulsory)

Yes

No, references to the personal data should remain anonymous

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Which sector(s) do you operate in / do you represent? (compulsory)

Agriculture, Forestry, Fishing, Mining
Manufacturing
Electricity, Gas and Water Supply
Construction
Retail and Wholesale Trade
Hotels, Cafes and Restaurants
Transport and Storage
Communication Services / Postal Services
Online services (e-Commerce/distant selling)
Finance and Insurance
Property and Business Services
Education
Health and Community Services, Personal and Other Services
Cultural and Recreational Services
Other

Are you replying as an individual or an organisation? (compulsory)

Individual
Organisation
On behalf of which of the following are you replying? (compulsory)

National authority
Regional or local authority
European Parliament
Committee of the Regions
Economic and Social Committee
European NGO
National NGO

European trade union
European employers’ organisation
National employers’ organisation
Individual company
Academic institution/think tank
Other

Please specify the name of your organisation or institution (compulsory)

Institut International Pour les Etudes Comparatives (IIPEC)

Country where your organisation is based (compulsory)

FR - France
**INTRODUCTION**

This contribution to the debate on the Green Paper “Modernising labour law to meet the challenges of the 21st century” is the result of the collective work of a European scholars network.

These researchers are lawyers specialised in labour law; economists specialised in employment, labour market, and the economic analysis of Law; as well as sociologists working on the implementation of legal norms within institutions.

They are currently joined together in the research project “Assessment of Labour Law: Problems and Methods” carried out by the Institut International Pour les Etudes Comparatives (IIPEC, ex-Institut International de Paris La Défense) (2005-2007) within the framework of the call for proposals “Economic Analysis of Labour Law” launched by the French Ministry of Employment, Social Cohesion and Housing.

Those from among this group who have contributed to the drafting of this response are:

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– Thierry KIRAT, Researcher in the National Centre for Scientific Research (CNRS), University of Paris 9 Dauphine (France),
– Olivier FAVEREAU, Professor at the University of Paris 10 Nanterre (France),
– Sheldon LEADER, Professor at the University of Essex (United Kingdom).
1. What would you consider to be the priorities for a meaningful labour law reform agenda?

Among the various branches of the legal systems, labour law is the most exposed to the action of external factors. Accordingly, it goes without saying that labour law is required to dynamically adjust itself to changes of the context in which it functions. Before considering the relevance of a strategic approach to the “modernization” of labour law, which is presupposed by the definition of priorities, it is helpful to clarify the conception of labour law the Green Paper is based on.

1.1. Which conception of labour law?

The Green Paper shows an unawareness of the history of labour law which distorts the understanding of its nature, and consequently of its desirable evolution. Thus, the assertion that “from its origin, labour law has been concerned to establish employment status as the main factor around which entitlements would be developed” is not accurate: this situation dates only from the thirties (1930), whereas it was subordinate work (which is not the same as employment) instituted by “industrial legislation” which was previously the criterion for application of regulation. In the same way, the assertion that “the presence of a single entity employer accountable for the obligation placed upon employers” constitutes the “traditional model” is erroneous: it has been a long time that shared responsibilities are admitted, in many European countries, between the formal employer and the user of the workforce.

In both cases, this inaccurate schema leads to wrongfully attributing to labour law two serious defects that it is thought to carry either by its nature or by tradition: the establishment of a bi-univocal relation between employment and protection; and an unduly heavy weight of responsibility on the employer.

Equally deceitful is the presentation of the history of labour law in Europe during the thirty last years. This history is in fact marked by an uninterrupted succession of legislative reforms which all have had the effect of relegating many elements of the “traditional model” to the archaeology of labour law. Evolutions that the Green Paper presents as at the source of the current need for modernization (just-in-time management, the spread of information and communication technologies, increasing attention paid to the demand, etc) have in fact provoked deep reforms ever since the 1970’s (in France), and 1980’s (in Germany and the United Kingdom).

Apart from the various modifications made to the “traditional model”, and independently of the frequency and degree of these changes, the European States have for many years already adapted their institutions and legal structures concerning labour to the changes which have been essential in methods of production and in the functioning of markets. They have been committed to “modernized labour law”.

Thus the general topic of the Green Paper, which is related to the “modernization of labour law”, does not do justice to the reality of the European law. It claims to rewrite its history, of which it provides a biased reading.

Finally, this presentation is not only historically tendentious. While focusing on a vision of labour law as “rigid”, seen as an obstacle to growth; to the curbing of unemployment, and, inadequate to coping with the changes in and source of costs; it does not account for the coordination function of labour law. It is with regard to this coordination function that a critical assessment in terms of more or less efficiency in the system should be made.

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1 If we consider that English laws of 1980, 1982 and 1984 affected employment, what seems hardly debatable.
1.2. The place of labour law in European employment policy

In addition, one can be concerned about the relevance of a strategic approach aimed at the “modernization” of labour law in the context of European employment policy. Isn’t this approach inconsistent with the emphasis put, since the Lisbon European Council of 2000, on the open method of coordination (OMC) in the field of employment policies?

In the early days of European construction, coordination was presented as one of the means by which internal diversity could be reduced: alongside and eventually in competition with other means, such as unification, standardization and harmonization.

The distinction between coordination and harmonization has acquired a normative status, since Article 129 of EC Treaty, in specifying the outcome that is expected to be achieved by the coordinated employment strategy, states: “Those measures shall not include harmonization of the laws and regulations of the Member States”.

According to some scholars, the OMC is a reflection of the present incapacity of the Community authorities to take action in the social sphere, as well as signifying a significant dilution of social policy goals. The OMC marks the subordination of social policy to the general provisions of economic policy, including flexibility of the labour market and cuts in public spending.

According to another view, the OMC should be understood by reference to a wider set of changes which have affected the mechanisms of public or governmental action. Thus the case of the OMC has a certain exemplary value. It draws attention to several issues including the plurality of levels of the elaboration of norms and the complexity of their articulation.

In this context, it seems regrettable that the Green Paper, opening a public debate on the evolution of labour law in accordance with the “Lisbon Strategy”, never gets onto the question of the role given to legal norms in the implementation of this strategy.
2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation?

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?

This theme is the core point of the Green Paper objective. In conformity with the “Lisbon Strategy”\(^2\), the “modernization of labour law” aimed by the Green Paper includes a set of measures which aim simultaneously at promoting flexibility and employment security and at reducing labour market segmentation. Such an objective implicitly rests on some assumptions which invite a critical analysis. The main objections relate to the relationships between the terms of the couple flexibility/security.

2.1. Conceptual objections

‘Flexibility’, a key-word in the Green Paper, is never precisely defined. This is annoying, since ambiguity authorizes permanent slippage between flexibility at the level of market adjustments (price and quantity variability); flexibilization of employment contracts (cf. infra, question 4); and the flexibility of firms understood as organisational adaptation capacity (cf. infra, question 3).

If one keeps for the moment to labour market flexibility, the reasoning of the Green Paper is based on assumptions of the mainstream in economics, according to which the employment protection measures are analyzed as pure exogenous constraints and thus as barriers to the optimal functioning of the labour market.

Theoretical economic models connecting flexibility, unemployment decrease and reduction in segmentation do exist, which come to the conclusion that it is necessary to flexibilize (the word “modernisation” is then used in this precise sense) labour law. Even so these models are disputed. One can reproach their simplification and the lack of realism in the Stock-Flow approach to the labour market on which they rest. One can also criticize the fact that they ignore the phenomena of collective learning and the adaptation capacities of the firms which employment protection measures allow, and even promote (cf. infra, question 3). One can highlight the fact that they do not demonstrate that increasing flows between employment and unemployment would reduce segmentation, since mobility can remain concentrated on certain categories of employment and workers. Lastly, security is generally exogenous to these models, sent back to social policies (it is then likely to be denounced as a disincentive to seeking work); when some economists try to internalize security in the model, its weight falls to the employers, which is once again not very realistic.

As for lawyers, they generally refuse to reduce labour law to a pure instrument in the service of economic efficiency, or to a set of constraints which would block the actors’ freedom. They also refuse to see it as a tool aimed overwhelmingly at reform, as if the rule of law mechanically produced such effects. In a more complex way, they point out the pluralism of labour law’s objectives, and at how it is difficult to isolate the specific effects of a rule, whose deployment by the relevant actors escapes its authors’ intentions. To come to a conclusion about the results of such modification of the law requires relinquishing a deterministic scheme, and calls for prudently analysing the empirical data. It would be a fortiori unrealistic to give a general opinion about the effects of “the adaptation of labour law and collective agreements”.

Moreover, one can point to the same tension between these two sources of inspiration in the conception of the Green Paper. The section entitled “The key policy challenge – A flexible and inclu-

\(^2\) And subject to the question raised supra in § 1.2.
sive labour market” is obviously inspired by the standard economic theories which have been referred to above. Then, the section entitled “Modernizing labour law – Issues for debate” puts substantial proposals for discussion; the list, which is itself interesting, raises questions of legal technicality, evoking the complexity of each question, without any ambition to define an employment strategy policy.

2.2. Empirical objections

Several empirical arguments demonstrate that far from being harmoniously combined, the objective of employment regulation flexibilization is contradictory with the objectives of reduction of precariousness and labour market segmentation.

During the last three decades, the deep changes brought about in labour regulations have rendered inactive a great number of the traditional employment guarantees to the detriment of a large fraction, quantitatively and qualitatively speaking, of the European workforce. In most of the European countries, more flexible forms of employment have led to a deteriorated level of protection. At the present time, some 40% of European workers are precariously employed3.

In the Member States taken as models, as regards the reform of employment regulation, especially the United Kingdom and the Scandinavian countries, it is notable that the successes announced regarding the decrease in unemployment were obtained by increasing the labour market segmentation. Thus, in the United Kingdom, the number of the less-qualified industry workers was reduced by converting more than one million of them into beneficiaries of disability compensation. As for the Scandinavian countries (Denmark, Sweden, but also Norway), one often omits to mention the weight of public employment, whose rate is definitely higher than elsewhere within the European Union.

This data demonstrates the link between more flexibility and the precariousness and the increase in labour market segmentation. In the short and medium term, the solution does certainly not consist in continuing this trend, but – and this is something quite different – in adopting measures aiming, at restoring the lost security on the one hand, and at redistributing newly introduced flexibility on the other.

Instead of being used as argument to increase flexibility, globalization should on the contrary make clear that the pursuit of more flexibility as an element of competitiveness is inane. The economic system of the European States faces other systems that are incomparably more flexible. Therefore, globalization requires emphasising other decisive competitiveness factors, such as innovation and quality.

Finally, the concept of “combination” (between more flexible employment protection, income compensation and active labour market policies) is a political compromise which does not come under the heading of “modernization of labour law”. The last section of the Green Paper presents proposals which are directly or indirectly related to workers’ protection (greater clarity in legal definitions of employment and self-employment, “floor of rights” for all workers, imputation of responsibility to the principals and users in the case of subcontracting and workforce handover, clarification of the employment status of temporary agency workers, clearer definition of ‘worker’, labour law enforcement). These proposals concern the political and social agenda and refer to negotiation between social partners.

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3 Percentage evaluated from various parameters, such as job stability, remuneration or the framework of social protection.
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?

In its current meaning, flexibility is the capacity of organizations to manage the workforce so as to face changing market conditions, by combining a varied set of measures which range from the adjustment of the size of the workforce to the organization of the firm, and include as well geographical mobility; remuneration; the organization of working time, etc. Flexibility is not limited to the facilities for employers to engage and dismiss but, on the contrary, can be based on many other methods.

Most of the reforms carried out in the various European countries since the eighties privileged measures of “external” or “quantitative” flexibility, aiming at adapting workforce volume. They thus not only contributed to segment the labour markets and to reduce employment protection for certain categories of workers (cf. answer to question 2 above), but also caused the “banalization” of human resources management. This one is often reduced to implementing routine operations like making and breaking non-standards contracts, instead of supporting the search for innovating solutions. “Modernizing” labour law while still increasing contracts’ flexibility would only accentuate this tendency. It would be likely to discourage firms from searching for the adaptation of means favouring internal evolution; continued training; learning capacities; the emphasizing of employees’ know-how, etc.

In support of this assertion one can quote some economic studies showing that employment protection regulations are not particularly directed against firms’ and workers’ adaptation to the new technologies, against changes linked to international competition, or against the search for productivity-enhancement. They are based on an economic reasoning in terms of employment flows, which is different from reasoning in terms of short-term flows between employment and unemployment. In countries with a high-level of employment protection, firms preferably smooth workforce variation and therefore reduce temporary employment adjustments, but without that affecting the long-term adjustments required by demand transformations or technological changes.⁴ If we consider the sole movements related to increasing or reducing of the firms’ size, the “job turnover” rates are very close in countries with very different levels of employment protection.⁵

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⁴ See for example O. Blanchard, J. Tirole, 2003, Protection de l’emploi et procédures de licenciement, Rapport du Centre d’Analyse Economique, Paris, La Documentation française: “a high level of employment protection does not seem to be systematically associated to a lower degree of employment reallocation” (p.15).

In the same way, T. Philippon, 2007, Un capitalisme d’héritiers: la crise française du travail, Seuil, demonstrates that employment rates are twice more correlated with the co-operative (non-conflicting) nature of the working relationships, that with institutional rigidity of labour markets.

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?

The question of the “flexibility” of employment contracts of employment is put in a recurrent way in the Green Paper. It seems that it relates particularly to non-fixed term employment contracts, also categorized as permanent contracts. The assimilation of non-fixed term contracts with “permanent” contracts is common in international institutions and the academic community. It leads to an inaccurate representation of the reality of subordinate employment.

The non-fixed term contracts are accompanied with procedural protection (fixing by legal or conventional way dismissal reason, notice duration, consultation of workers’ representative institutions, etc). In no state that respects the rule of law can a contract be cancelled without the victim of the breach having any means to go to court.

A conceptual slip, which removes the substance of this procedural protection, is made when the supposed effects of dismissal costs on the employers’ decisions are taken into account: excessively high dismissal costs are said to prevent employers from carrying out efficient employment management. The results are said to maintain economically unjustified employment; a low rate employment of certain categories of workers; and the slowing down of flows between employment and unemployment. Thus, procedural employment protection is regarded as protection that is substantial, which makes it possible to impute bad performances of the labour market to employment protection legislation.

Moreover, the breach of the employment contract supposes not only a procedure, but also means to go to court. In order to carry out valid evaluations and comparisons, it is necessary to take into account the judges’ decisions (a comparison which specifies and standardizes interpretations) and the litigious activity (through various avenues of appeal, with greater or lower intensity). However most of the economic studies of dismissal law are limited to the rules, neglecting these two aspects. It would be essential to develop studies of costs of dismissal which can be disputed in ordinary courts and/or considering the fundamentals rights involved, before coming to a conclusion about the need of more flexibility.
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?

The most convincing part of the Green Paper relates to “economically dependent work”. It is correct to distinguish, as it does, between the misclassification of this category as self-employment, and its classification as formally independent, but economically dependent employment, to be promoted within a framework of guarantees.

These forms of autonomous work call for a sustained attention form the lawmaker and cannot be left to a pure market logic. The concept of para-subordination which is well-known in the Italian legal order has for a long time answered only partially to this requirement: a low level of basic protection, indeed possibly none, together with the possibility – largely realised in use – of instrumentally using the notion of “coordinated and continuous collaboration” (collaborazione coordinata e continuativa) so as to temper the effect of subordinated working relations.

A certain European legal doctrine takes up this approach while improving on it. Instead of strictly contrasting dependent and independent work, it proposes considering these activities in a continuum and to allocate modulated and variable guarantees according to the workers’ degree of dependence. Thus, employment protection could be represented in the shape of concentric circles: a first circle relating to universal social rights, a second circle concerning rights based on non-professional work; a third circle concerning the common rights connected with professional activity - certain bases of which are already present in Community legislation; and finally a fourth circle of rights applicable to subordinated work in a strict sense.6

One can find in Italy a similar approach in the private bill entitled “Charter of workers rights”, which fixes a minimum of general principles universally applicable to any employment contract (right to freedom, dignity, discretion, equal treatment and non-discrimination, security and health at work, protection against sexual harassment, a decent remuneration and protection in case of unjustified breach of contract).

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