Report of the Discussion Forum on the Green Paper on
Modernising Labour Law
(Leuven-Tilburg, 1 and 2 February 2007)

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1. On 1 and 2 February 2007 the Instituut voor Arbeidsrecht [Institute for Labour Law] of the Catholic University of Leuven and the Departement Sociaal Recht en Sociale Politiek [Department of Social Law and Social Policy] of the University of Tilburg organised a two-day discussion forum on the Green Paper of the European Commission on Modernising Labour Law (COM 2006/708 of 22 November 2006). Day 1 was held at the Catholic University of Leuven and day 2 at the University of Tilburg.

This forum brought together a group of academics and lawyers from Belgium and the Netherlands, all of whom specialise in labour law and employment relations. The participants were:

Sonja Bekker (UvTilburg), Roger Blanpain (UvTilburg), Jan Buelens (U.Antwerpen), Willem Bouwens (VU Amsterdam), Clara Boonstra (UvAmsterdam), Daniël Cuypers (U.Antwerpen), Filip Dorssenmont (U.Utrecht), Rogier Duk (De Brauw Blackstone Westbroek), Edith Franssen (U.Maastricht), Stijn Gryp (KULeuven), Antoine Jacobs (UvTilburg), Frank Hendrickx (UvTilburg, KULeuven), Mijke Houwerzijl (U.Nijmegen), Ceciel Rayer (UvAmsterdam), Frans Pennings (UvAmsterdam), Willem Plessen (UvTilburg), Heleen Pool (U.Nijmegen), Wilfried Rauws (VUBrussel), Saskia Ravesloot (VUBrussel), Bianca Schmahl (U.Maastricht), Maxime Stroobant (VUBrussel), Othmar Vanachter (KULeuven), Pieter Vanden Heede (Kabinet Vlaams Minister van Werk) (KULeuven), François Vandamme (FOD Werkgelegenheid, Arbeid, Sociaal Overleg), Wim Vandeputte (KULeuven), Yvonne van Djick (ABU), Harry van Drongelen (UvTilburg), Fred van Haastereen (Randstad Holding), Aukje van Hoek (UvTilburg), Mathieu van Putten (KULeuven), André van Rijs (UvTilburg), Evert Verhulp (UvAmsterdam), Herman Voogsgeerd (U.Groningen), Ton Wilthagen (UvTilburg), Wijnand Zondag (U.Groningen).

The purpose of the discussion forum was to exchange ideas about the Green Paper and the questions posed by it. This exchange of ideas is summarised below as objectively as possible. This report is open for inspection and has been compiled for submission to the European Commission Directorate General of Employment, Social Affairs and Equal Opportunities.

The discussion was organised as far as possible according to the chronology of the questions posed by the Green Paper to ensure that the document fits in with the structure and communication strategy on which the Paper is based. However, it is preceded by an introductory discussion of preliminary observations, such as the method and general orientation of the Green Paper, and concludes with a section on questions that are not addressed in the Green Paper, but which cannot be avoided in the modernisation of labour law.

I. METHOD AND ORIENTATION

A. Orientation

2. The Green Paper is entitled ‘Modernising labour law to meet the challenges of the 21st century’. The Paper broaches this subject in the context of the Lisbon Strategy, to which the notions of flexibility, security and the challenges of the European labour market are central. What emerges from the discussion is that the call for modernisation of labour law is certainly opportune, although a flexicurity approach may not be the only, or even the most preferable, approach to take to this enquiry into labour law. Moreover the concrete formulation of the questions posed generally permits a broader perspective, so it is not absolutely necessary to subscribe to the objectives of the Lisbon agenda to answer them.
3. Of course it is necessary to turn one's hand to many things. An observation shared in the forum is that a number of the questions formulated in the Green Paper assume a response that goes beyond the strict discipline of labour law. Legally, they very often require social security law to be taken into consideration as well. In many cases they also demand a multi-disciplinary approach: they can only be answered fully if politological, economical, sociological, psychological etc. perspectives are taken into account. Most of the participants in this forum specialise primarily in labour law and to a lesser extent in social security law. It is important to bear this in mind when reading this report.

4. It was commented that the organisation of the Green Paper raises questions about the powers of the European Union over labour law and social policy. As will be seen, there is a view in the discussion forum that it is imperative to expand the EU’s powers in the matters in question. To appear effectual, it is recommended that article 137 EC Treaty be rewritten and that fundamental social rights be made binding. In spite of this there is a prevailing view that, even without a reinforcement of EU powers, a debate on modernising labour law is meaningful in the context of the employment strategy and in the light of experiences with the Open Method of Coordination. A further effort to develop the mechanisms of soft law may offer added value to social policy.

B. Method

The method of the Green Paper is not new. The European Commission has already published green papers on social policy and other matters. It was observed that the principle of open consultation on the modernisation of labour law can be accepted only on the following conditions:

- The social consultation procedures and authorities as provided for in national and EU regulation and legal principles must be respected;
- The objectiveness of the enquiry must be ensured;
- The responses must be handled in an objective, properly-considered and transparent way.

II. CLUSTER 1: MODERNISING AND INCREASING THE FLEXIBILITY OF LABOUR LAW

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

There are many challenges for labour law in a European context. They relate both to the essential components of labour law and to peripheral matters, particularly labour market law, enforcement law and the distribution of powers.

In the discussion forum, attention to the enforcement of existing rules emerged as one of the main priorities. After all, little can be expected either of present or future law if it is not enforced. The discussion examined ways of optimising the enforcement of the rules of labour law, including the cluster concerning the mobility of workers and that concerning enforcement issues and undeclared work. One of the suggestions made most frequently in the discussion forum is that simple, transparent regulation should be the objective.

A second priority for labour law emerges, connected in part to the desire for simple and transparent labour law regulation: it was suggested that within a unified European market it is appropriate for the basic rules of labour law at a European level to be developed as regulatory measures that are directly applicable in the Member States. An effort should therefore be made, as already stated above, to expand the powers of European law over labour law. However,
for some members of the forum, this suggestion went too far: they felt that it would be preferable to aim to promote the connection between national systems of labour law and that some thought should be given to the role of European authorities.

In spite of a slight disagreement about the optimum distribution of powers relating to labour law within Europe, all participants in the discussion forum agreed that current developments necessitate a fundamental investigation of the basic principles so that the essential components of labour law can be updated. That is a third priority for labour law. Without losing sight of the fact that the social impact of labour law is purely relative, participants share the conviction that it affects the quality of life of a large proportion of the European population. Although this must still be outlined in more detail on the basis of further study, a number of points of reference for such an investigation of the foundations can already be identified:

- Labour law has its own (legal) system of values and cannot be subjected to an economic or any other rationale either in hard law or in soft law at the risk of destroying the system;
- Central to the value system of labour law is attention to the quality of the work. This is ensured by enforceable fundamental social rights and the application of conventional human rights to employment relations. Particular attention is paid to gender mainstreaming and diversity on the one hand and the employee’s citizenship in the business on the other;
- Throughout the twentieth century, special protection for the employee seemed sufficient to protect the quality of work. At the beginning of the twenty-first century, it is clear that at least a number of core themes from labour law must be expanded to include workers who are not employees;
- The right to work plays a key role in any system of labour law.

A fundamental investigation of foundations and the accompanying proposals for updating them will take time. Circumstances are arising on the labour market that necessitate a more extensive overhaul of current labour law in the shorter term. That is the fourth priority for labour law. The following elements at least must be taken into consideration for this:

- Efforts must be made to humanise all temporary employment relations. To achieve this, the concept of job security must be developed in general, a change must be made in the laws on dismissal, the various forms of flexible working must be clearly defined and segmented members of the labour market must be better integrated into the social security regulations;
- Gender mainstreaming produces dual-income families. Within dual-income families the balance between work and private life is under increasing pressure. Employment law must incorporate the transition between various spheres of life into its system;
- Trust between social partners must be restored and the social dialogue must be given a clear place in discussions of the choice between flexibility and security;
- At a European level, particularly, attention still needs to be paid to cross-border aspects of labour and problems concerning working hours must be resolved.

6. Flexibility, employment security and a reduction in labour market segmentation—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 initial observation on the question of whether the adaptation of labour law and collective agreements can contribute to a reduction in labour market segmentation was that labour market segmentation is probably a consequence of laws other than judicial laws. There is not necessarily a
causal link between labour law and these other laws, although there is a correlation. Precisely what this correlation is has yet to be clarified. Nevertheless it can already be noted that the judicial consequences of labour market segmentation can be restricted by increasingly allowing labour law to apply to all workers at the lower end of the labour market, including those who do not have the status of employees.

With regard to the contribution of labour law and collective agreements to flexibility and employment security, it was observed in the forum that both terms must be defined in more detail and must not be the subject of arbitrary interpretation. Furthermore, labour law must not be subjected automatically to a rationale of flexibility and employment security. Values that do not necessarily coincide with flexibility and employment security work through the various basic rights of employees, such as a consideration of the wellbeing of employees, the realisation of social and economic democracy and the improvement of the quality of the production process. These values must be reconciled with flexibility and employment security. How that is to be achieved has not yet been determined as such. There seems to be no universal solution. However, the Open Method of Coordination can be used to develop and test possible paths.

7. **Hindering or stimulating effect of current regulations** – Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail themselves 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?

Different opinions were expressed on this point during the discussion forum. In the opinion of some participants, existing laws and collective agreements have a stimulating and regulating effect on the adjustment of the enterprise to the present-day position. They are an obvious instrument for a policy aimed at adjustment. Business decisions are also best taken within a regulated and negotiated framework (by sector and at a national, inter-professional level).

Others are of the opinion that current labour laws and collective agreements do not promote an increase in productivity and adjustment of the businesses. Furthermore, the fact that the efforts of employees are converted into the profits of managers and shareholders is seen as a problem. Our legal system should consequently aim to modernise this aspect. In concrete terms, that could be realised by means of a common wage policy, the introduction of a general minimum wage and by giving employees the right of disposal of production resources.

The question of how to improve regulations relevant to the SMEs whilst preserving their objectives was not discussed to any extent.

8. **Simplifying, increasing flexibility, employment security and protection for all** – 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?

Within the discussion forum, it was observed that economic flexibility and employment security, the latter understood to mean permanence of position and permanence of employment, very often conflict with each other. It should not therefore be assumed that they can be reconciled *per se*. Permanence of position remains an important value in labour law and should still be defended. Employment security provides employees with other securities that often lie outside the employment relationship. Moreover, permanence of position is not only in the interests of the employee, but also of the employer, who benefits from being able to bind the majority of employees to his business.
At the same time, there is a perception that in the current labour market permanence of position is not a real possibility for all segments of the labour market.

Some members of the discussion forum believe that the European Union can at best ensure adequate employment security and social protection for all by compelling the Member States to make it easier to employ those who are unemployable or difficult to employ, either by granting subsidies and/or by taxation measures or by officially creating and maintaining jobs and, if the latter solution fails to produce the required work in either quantitative or qualitative terms, by means of an adapted system of social security. For temporary employees, who are not in themselves impossible or difficult to employ, it was suggested that permanence of position be developed within the sector, rather than at company level, in order to guarantee permanence of employment.

The part of the question relating to ways of simplifying the recruitment of personnel was not discussed specifically.

III. CLUSTER 2: PASSIVE AND ACTIVE LABOUR MARKET POLICY, TRAINING

9. Relationship between labour law and social security law – 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?

The forum believes that it may be useful to consider this, although with many reservations and qualifications. It is extremely important to estimate what we hope to gain by asking this question, or what expectations we have of this question. It is not realistic to expect that an active labour market policy will be sufficient in itself to get everyone into work, so the question of how the state should deal with those who have no work in spite of an active labour market policy remains fundamental.

Furthermore, in the context of this question, there appears to be a certain tension in the consideration of protection against dismissal itself. The current rules on protection against dismissal do in fact include financial security components that are as secure as possible, which might permit a trade off with social security laws. Nevertheless they also include components for which such a trade off is not possible. These are components directly linked to the idea of social justice within employment relations, such as the obligation to give grounds for dismissal, dismissal procedures etc. Consequently a qualified consideration of the relationship between the law on dismissal and social security law is required. Of course well-designed support for the unemployed per se is required. The same applies for fair protection against dismissal.

An increase in the flexibility of dismissal protection combined with an improvement in support for the unemployed may be justified, but must be worked out with the necessary caution, certainly given that such an operation is unlikely to ensure full employment.

10. Training – What role might law and/or collective agreements negotiated between the 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?

Laws and collective agreements can play a dual role in promoting access to training: they can develop mechanisms to increase the desire for training and they can regulate the distribution of the financial burdens of training.
However, the discussion forum again expressed a caveat: even if training were perfect, it is unlikely that the transition to other forms of contract with a view to upward mobility over the course of a fully active working life could be guaranteed for all workers.

Measures to promote training do not therefore appear per se to be a substitute for ‘hard’ dismissal protection. One member of the discussion forum commented that dismissal law can be refined only if measures to promote training have proved their usefulness on the labour market. A more tolerant way of thinking is that investments in training should be brought back into the calculation of severance payments.

For the same reasons, it is equally unlikely that such measures per se will prove suitable for inclusion in sanctions policy within a system of unemployment payments. Unemployment regulation must be seen in the light of the job-seeker’s right to work. Unemployment protection can be reduced only on condition that there is a reasonable circuit of employment services that not only offer a reasonable chance of employment but also of suitable work.

One member of the discussion forum places the problem of training within a broader right to career management. There is even less clarity about who should bear the cost of a right to career management than there is for training in particular. ‘Employment cells’ involving both the government and employers operate in this sphere. There are mixed views about this approach, because although it looks likely to produce some practical results, there remains the question of distributive justice and the conclusion that this could create a privileged situation for the newly-unemployed in relation to the long-term unemployed. A general, equitable expansion of the right to career management is urgently needed. It must take account of various fault lines, not only between employed and unemployed, but also younger and older employees, unskilled and highly-skilled, male and female.

Apart from this caveat, the discussion was briefly brought to a halt by the problem of the definition of training, which is of course a fundamental element in the light of the increasing pressure for this. It was commented that on-the-job-training is certainly an important element of training.

As for the distribution of the financial burdens of training, the prevailing view within the forum seemed to be that relationships between the right to training and severance pay should be established in law rather than collective agreements. The question of precisely what training efforts are needed can be established through collective agreements. A few suggestions were briefly made for the latter. Some think it would be useful for collective agreements to make provision for a percentage of wage costs to go to training. Another example relates to particular Dutch collective agreements that provide for a personal development plan. One idea might also be to have the employers draw up an annual training policy plan along the lines of the general prevention plan in occupational safety law, which would have to be approved by the employees’ council or by another consultative body. This obligation could easily be established in a directive. The same applies for the establishment of training clauses or competition conditions.

IV. CLUSTER 3: LEGAL DEFINITION OF THE EMPLOYMENT RELATIONSHIP AND BASIC RIGHTS FOR ALL WORK

11. Definitions of employment and self-employment – 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?

The problem of apparent self-employment seems to lie at the root of this question. It was observed that the true extent of the group of dependent self-employed workers is not entirely clear. But even without
such sociological data, the prevailing opinion seemed to be that the current definitions of employed and self-employed work must be clarified in more detail, leaving aside the question of whether that would permit the facilitation of a bona fide transition from employment to self-employment and vice versa.

It was observed that until now the notion of a contract of employment has not been at all clear. The interpretation of the legal concept of work under an employment contract has been established, and has evolved, historically. The intrinsic notion has expanded. Differing legal and judicial bases apply in the countries of the EU. Of course that is a result of the fact that the concept of the employee is currently defined by each Member State.

At present protection under labour law is built up around the conventional notion of the power relationship. There is some debate about whether economic dependence can play a defined or defining role in this.

In Belgium and the Netherlands, as in most Member States, the notion of power is interpreted entirely on the basis of case law. In the Netherlands the case law of the Supreme Court is now such that economic dependence of a person on a client can lead to a presumption of employment. In Belgium, economic dependence is not considered to be a decisive criterion, in contrast to legal dependence. However, Belgian appeal case law has evolved in such a way that now, far more than before, greater significance is attached to the classification (employed or self-employed) which the parties have given to their agreement. In a recent programme law the legislator has largely adopted this view as well.

This approach has implications beyond the theoretical, for example for the associated problem of proof. This problem often arises in legal practice. Nevertheless civil evidence law often gives precedence to written agreements.

All of this implies that a considerable degree of uncertainty still surrounds the notion of employee and the associated application of employment rights. A case could therefore be made for clarifying the legal definition of the ‘employment relationship’ (this term is used in the question instead of the notion of ‘employed work’).

The question is therefore where this problem is going. It seems that the answer to this question raises the question of who needs social protection. Whether the notion of ‘power’ should play a role here and the extent to which economic dependence is related to this, has not in fact been entirely clarified. This is probably because we are still some way away from a clear definition of these respective notions.

A possible path to pursue is the ILO recommendation of 15 June 2006. A proposal is being put forward to present this in the EU as an instrument for providing a framework for defining the protection of workers. Some participants pointed out that the ILO found it difficult to achieve a consensus on this. However, more importantly, the ILO recommendation relates to the employment relationship and thus excludes self-employed work.

A more balanced solution must nevertheless be given a chance. It may then be a case of looking at which guarantees are connected to economic dependence, which to power and which display other characteristic of relationships.

In the sphere of more legal/technical solutions, situations akin to employee status, and which argue for a broadening of the application of the employee relationship, should be considered in detail. There are various possible ways of approaching this. It could be done on the basis of a number of refutable suppositions or categories of equivalence. However, there are inherent risks in this approach for countries with a constitutional court, such as Belgium, which protects equal treatment and sometimes rejects these solutions. It could also be developed on the basis of social security protection, which
would mean expanding social security rights, without doing the same to specific protection of employment rights (an example is the social status of artists in Belgium).

The question of the relationship between a clearer definition of employed and self-employed work on the one hand, and bona fide transitions between the various types of status on the other, was not discussed in any detail. According to some members of the forum, it seems that the transition should in fact be facilitated particularly by applying a wider notion of the employment relationship and extending the criteria for granting employment rights beyond the power criterion. We refer here to the data from the Nederlands Centraal Planbureau, [Netherlands Central Planning Agency] (November 2006) which demonstrate the difficulty of transferring rights in the context of a bona fide transition to self-employment (loss of pension rights, loss of protection against dismissal, etc).

12. Minimum employment rights – 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 discussion forum believes that basic protection for all workers, including small self-employed workers, is indeed desirable. For some, this exercise includes the removal of the differences in the way the law deals with workers in the public and the private sector.

Not all participants entirely agreed with this latter point, and no consensus was reached about what constitutes the minimum basic rights of workers, although the majority agreed that minimum basic rights for all workers do not imply the creation of a single status. On the contrary, a choice must be made for each subject and universal protection must be restricted to the basic rights. There was a consensus that occupational safety, fair treatment and protection of private life are all basic rights. It should be noted here that basic rights have already been formulated in catalogues of fundamental social rights.

It is important to consider to what level basic rights should be raised and by association, how to deal with the possibilities of ‘contracting away’ the application of basic protection of employment rights. This latter issue relates to a requirement for a semi-compulsory legal interpretation of a number of employment rights (e.g. linked to a level of training, to the wage, etc).

The level of basic rights correlates positively with the importance of these employment rights for employment policy. Another important element that must be taken into account here is basic social security rights. A guaranteed minimum income was declared to be an important basic right in this area.

There was little discussion of the actual impact of the recognition of a number of basic rights for all workers on employment and the protection of workers, partly in view of the participants’ fields of expertise.

V. CLUSTER 4: MULTIPLE EMPLOYMENT RELATIONSHIPS

13. Multi-party relationships: general – 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’?

The questions in this cluster relate to multiple employment relationships. They assume that these relationships are a given. A number of the participants consider such multi-party relationships to be entirely unproblematic. They are a natural phenomenon of the labour market, are positive for
employment and must therefore also be given as much legal support as possible. Other participants observe that this does not mean that the dual relationship is not always preferable: an employer aims to have good personnel and must therefore also take responsibility for this, and that is expressed in a conventional contract of employment.

All participants agree that responsibility for employment rights in multi-party relationships must be clearly defined. Joint and several liability is a method that could be considered for this. A registration system should then be considered and the strengthening of social enforcement is an important component of this. With reference to the case law of the Court of Justice (Lawrence), one participant also points out that the problem of fair treatment will not be adequately resolved without further statutory provisions.

14. **Temporary agency workers** – *Is there a need to clarify the employment status of temporary agency workers?*

It would be a good thing for Europe to finalise its directive on temporary agency workers, or at least to take a clear common position by the ratification of ILO Convention no. 181 by all Member States.

In the discussion it was assumed that a temporary agency worker is bound by a contract of employment with the temporary employment agency and not with the user company. One of the most important elements of the employment status of temporary agency workers is the wage they should receive: should that wage be determined by the wage of the employees of the user company or the wage of the agency’s other temporary agency workers? On this subject it was commented that the question of whether the temporary agency worker is bound by a permanent or temporary contract of employment with the temporary employment agency is an important factor. In the former case there is more likely to be equal treatment on pay conditions amongst the employees of the temporary employment agency and in the latter between the temporary agency worker and the employees of the user company. But it was observed that even in the latter case, the situation should be monitored to ensure that the principle of equality is not expanded too far. The equal treatment obligation is connected to full employer status: it must be possible to demonstrate a responsible legal entity. However, the user company is specifically not granted full employer status, so flexibility and security must be organised in a cross-company way. Opinions differed about the relationship between the wage of the temporary agency employee and that of the employee of the user company, who is employed in a comparable function. Some felt that the option to use the wage at the user company as a yardstick should remain central. Others also stressed that there can be a claim to a user-company wage only where the temporary agency employee is gradually integrated into the user company.

One member of the forum commented also that the structure of the consultation at a European level is an important reason for the failure of the various proposals already tabled on this subject in the EU. If the social consultation in Europe were organised on a tripartite basis, like that of the ILO, the proposals for directives concerning workers would not be blocked.

VI. **Cluster 5: Working Hours**

15. *How could the minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for 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 question of working time appears in some ways to be out of place in the green paper. That does not mean that it is not an important issue. The protection of working hours is a minimum level of protection that should be granted to every worker who does not freely choose his work.

Whilst the green paper is concerned primarily with contractual flexibility, flexibility has long been a matter of increasing the flexibility of the rules on working hours. That has led to a particularly complex amalgam of rules which many specialists have put up with, in spite of the fact that the average employer and employee can get out of them. One of the first priorities for working hours is therefore to simplify the rules on working hours and it is suggested that this should be done by building them up on the basis of compulsory rest periods rather than restricted work periods.

It was commented that an important issue for contractual flexibility is to establish the ultimate basis for working hours: are working hours part of work protection or part of working conditions? In the former case there is little scope for increasing the flexibility of working hours on an individual basis, but in the latter there is more. Within the EU Treaty, Europe based its directive on the health and safety of employees, and thus on employment protection. Moreover, there is already quite a lot of scope for flexible employment rules within the system of the directive. The conclusion remains that deregulation, rather than an increase in flexibility, is the first priority for working hours. However, if there is a desire for still greater flexibility on working hours, the Belgian system of temporary unemployment would appear to be a useful instrument for internal flexibility, on condition that the system is universally applicable. If not there is a risk that it will be classified as a prohibited form of state support.

VII. CLUSTER 6: TRANSNATIONAL CONTRACTUAL RELATIONS AND THE COMMUNITY CONCEPT OF EMPLOYER

16. 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?

♦ WORKERS OPERATING IN A TRANSNATIONAL CONTEXT – Before considering how to ensure the employment rights of workers operating in a transnational context, the question of which definition of employment rights should be applied to the persons in question must be addressed. Some members of the forum believe that the definition of employment rights applying in the place in which the worker operates, i.e. the country of employment, should in principle be applied to the transnational worker within the current context of power over employment rights. In the system of current international private law that is not entirely the case. On the one hand, this refers to the country of ‘normal employment’. According to this, there is scope for the parties to choose which law applies and international employment may be affected by other factors, such as the country in which the employer has its registered office. Other forum members defend current international private law. They do not see any added value for the employees in the application of the principle of the country of employment to all employment relations. Indeed, that principle creates far too many practical problems and in this view, the international posting of employees should not be subjected to restrictions too frequently, although to some degree this may entail a race to the bottom on working conditions.

Whatever the applicable labour law, it is essential to ensure that it is also effectively applied. For this it is important that the laws are formulated in a transparent way and are accessible. Enforcement must
also be ensured, partly by making sure that the supervisory authorities are kept informed of situations in which transnational workers are operating, that resources are available for implementing controls, that proportional and appropriate sanctions are in place for non-compliance, and that these are also applied effectively.

In this context, some participants in the forum commented on the need for a thorough evaluation of the posting directive.

♦ THE COMMUNITY CONCEPT OF THE EMPLOYEE – In principle it must be supposed that EU directives on employment rights are a translation of fundamental social rights such as those referred to in the social chapter of the EC Treaty. In this sense, a community concept of the employee is therefore appropriate. After all, even the application of the country of employment principle to the employment rights of transnational workers is not in itself sufficient to actually prevent competition on working conditions in the European internal market. That principle only prevents competition on employment rights in the national market. If we really wish to arrive at a competitive European market based on competition between the quality of goods and services and not on competition on employment rights and working conditions, a number of participants in the discussion forum made a case for creating the applicable labour legislation in principle at a level corresponding to the level of the economic market, so that there is no difference in the definition of employment rights within the market. In theory, this implies that Europe must have more power to develop standards on employment rights within the European internal market and thus that the Member States give up their sovereignty on this point.

It was pointed out that this does not mean that a degree of caution should not be employed on the principle of subsidiarity. For some members, the principle of subsidiarity itself implies that there is no reason to shift power over employment rights to European level.

However, most members of the forum agreed that, as far as possible, labour law should be regulated at a European level. This certainly applies to aspects that affect cross-border situations or dimensions of labour law. The more the subject is regulated at a European level, the more scope there will be for a Community concept of the employee.

European action on employment rights is currently fragmented and is implemented through directives. On this point, some participants in the forum expressed the opinion that there is no general need for more uniform definitions of the concept of an employee in the EU Directives relating to employment rights. This is precisely because the EU Directives only affect a limited area of labour law. There is a risk that introducing a Community concept of the employee for these limited matters, in combination with a national concept of the employee for other matters, will produce an excessively complex tangle of hybrid statutes in which people are sometimes employees and sometimes not, depending on the matter in question. Furthermore, a European concept of the employee will bring with it problems of interpretation in European directives, which must then be clarified by the Court. The comment was made that, besides these associated problems, it is not clear what problems would be solved by introducing a Community concept of the employee into Directives relating to employment rights. In other words, at a more technical level, there are reasons to reject a Community concept of the employee in directives.

That does not mean that, as stated above, more uniform European definitions of the concept of the employee are not needed, but rather that these should be formulated in EU Regulations in a context of absolute EU powers over employment rights.

In anticipation of such an expansion of European powers, albeit not achievable in the short term, legal means other than the introduction of a Community concept of the employee into directives might produce broader EU action in matters relating to employment rights. In the context of a hard law
approach, the question remains whether there will be an effort to harmonise standards on employment rights at present. In relation to this, it should be debated whether this harmonisation should be achieved at a minimum level (which appears to be the choice at present) or a higher level. This question remains unanswered as yet but deserves closer scrutiny. Considerable significance is also attached to soft law, of which the mechanism of the Open Method of Coordination is an example. Finally the possible role of the social partners and social dialogue is emphasised. Improved legal framing of the freedom of association and the social dialogue at an EU level should be considered here.

Finally it was commented that, whilst considering the need for uniform definitions of the term employee, we must not forget that the labour law cannot be updated purely by making a distinction between self-employed and employed work.

VIII. CLUSTER 7: ENFORCEMENT AND UNDECLARED WORK

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

Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

Initially the only response to these questions is a positive one. The debate will follow.

As far as the first question is concerned, it was observed that official enforcement is only one form of enforcement. Enforcement through civil law and criminal law also offers important instruments for enforcing Community labour law more efficiently.

With regard to official enforcement itself, it was observed that more efficient cooperation between the work inspectorates, the social security agencies and the tax authorities is needed within the Member States. Closer cooperation between competent authorities on the basis of bilateral agreements is not an efficient means of official cooperation between the competent authorities of the Member States. A European social inspectorate would appear to be a more efficient means, although the Commission does not wish to take the initiative on this point, and the precise role of such an inspectorate would still have to be clearly defined: could this be any more than a European register of bad employers?

A role is in any case reserved for the social partners. They are traditionally better able to combat infringements of labour law than individual employees and that applies also for Community labour law. This could take the form of (i) institutional representation in social security agencies or in bodies authorised to recognise employers within specific sectors such as the temporary agency workers sector or the construction sector and (ii) a possibility of taking legal action to protect the interests of their members. On the other hand it does not appear particularly effective for the social partners themselves to be responsible for the official enforcement of rules in collective agreements, as has been tried in certain sectors in the Netherlands. That does not work well in itself, and is entirely ineffective for employment within the context of the free movement of services as collective agreements are unable to regulate the most relevant relationship.

Undeclared work remains a serious problem and additional European measures are certainly needed, in particular for undeclared cross-border work. A number of measures could also be proposed here in addition to official cooperation and a role for social partners:
- In civil law: on infringement of the rules, a person is deemed to have entered into a conventional contract of employment for an indefinite period, where necessary with several employers (with the method of joint and several liability);
- In procedural law:
  - access to the court in the actual country of work;
  - flexible rules of evidence for the victims and supervisory authorities;
- On the flow of information: an effort must be made to obtain as much information as possible about cross-border work situations. That is the first prerequisite for implementing control. The advance reporting obligation appears to be a good method for this. A second method would be a European reporting point for undeclared employees and a third element would be a flow of information in light of the official cooperation between Member States referred to above;
- At a regulatory level: impact studies of enforcement measures and a reporting obligation on Member States, followed by legal action for breach at a European level if the enforcement mechanisms do not appear sufficient;
- In soft law: working with ESF funds to support campaigns against undeclared work by representative employee organisations;

Comments may be made about each of the measures, but that does not mean that, constructively speaking, efforts to introduce measures should not be preferred to an absence of measures. In hard law, the most benefit can probably be expected from measures under procedural and criminal law, given that these are practices in the criminal sphere and civil measures have little effect on them. As hard law measures do not always achieve their aim, primarily because employees themselves are not always able to go to court or have an interest themselves in the practice of undeclared work, measures to promote awareness of the values contained in the regulations are extremely important.

IX. CLUSTER 8: QUESTIONS NOT ASKED

18. Limited attention to collective labour law – During the discussion forum it was commented that collective labour law is left very much in the background in the Green Paper. It is not completely absent, as frequent references are made to the collective agreement. These references seem to characterise the collective agreement on the one hand as an obstacle to increasing flexibility and on the other as the best possible instrument for promoting flexibility.

It should not be forgotten here that collective agreements are the result of the freedom of collective debate. In the past there has been intervention in collective agreements in the light of non-discrimination, which appears permissible in one assessment of fundamental rights. However, care must be taken to ensure that the collective debate is not too often cut short. It is important not to forget that the modern trade union movement aims to expand the group of insiders as far as possible. That is clear from the fact that the representative employee organisations are attempting to remedy the shortfall in protection for temporary work situations, particularly at a European level, as can be seen from the framework agreements on short-term employment contracts, parental leave and tele-working.

That does mean that there are important questions on this subject that were not asked, for example:

- Do temporary or atypical employees (legal or economic subordination) have sufficient legal and actual opportunity to exercise the freedom to join a union and to participate in collective bargaining, and the right to take strike action?
- Do temporary workers count in the business in which they work towards the personnel thresholds that must be achieved in order to set up representative bodies?
- Can temporary employees participate actively or passively in the consultative bodies in which business decisions are debated that affect their interests? (This is particularly important in triangular relationships).
- Is the structure of the current workers’ movement that is based on a career as a worker within the same industry or for a sufficiently long period to make membership of a professional association meaningful, sufficiently adapted to the new world of work? How can the workers’ movement represent these employees adequately?

The fact that little emphasis is placed on collective labour law at a European level is not surprising, in view of the fact that (i) the achievements of social debate at a European level have hitherto been relatively limited and the traditions of social debate between the various Member States are particularly diverse and (ii) in spite of its broad title, the core of the Green Paper deals with the need for the government to take on a facilitating role in the labour market. This does not mean that the questions posed are not extremely important for national labour law and that a harmonised European response to them may not be appropriate. However, this demands a basic investigation of the relationship between the autonomous path of regulation and contractual relations and the Treaty Establishing the European Community.

19. **Attention to the environment** – The Green Paper pays no attention to the relationship between capitalism, socialism and ecology. This problem should probably also be considered in the modernisation of labour law.

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