

6 March 2007

GREEN PAPER MODERNISING LABOUR LAW TO MEET THE CHALLENGES OF THE 21ST CENTURY

Summary

1. **BUSINESSEUROPE** supports EU actions to promote labour market flexibility and welcomes the launching of a debate on the modernisation on labour law. However, the competence to modernise labour law lies first and foremost with the Member States. Most of the measures will therefore need to be taken there. The role of the EU should be to organise exchanges of experiences and monitor national reforms using the instruments of the European growth and jobs strategy.
2. European law can prevent the national legislator from introducing reforms in national law. Taking a top-down legislative approach at the EU level would be counter-productive. **BUSINESSEUROPE** would strongly oppose measures aimed at harmonising the definition of “worker” at the EU level.
3. Increased flexibility in traditional standard contracts must be improved. However, there is no one-size-fits-all solution to meet different employers and workers flexibility needs. Ensuring the availability of a variety of contractual arrangements is essential. The green paper presents an unjustified negative picture of flexible forms of work. This is incompatible with the flexicurity approach.
4. Similarly, the green paper does not sufficiently underline the importance of self-employment for the development of the entrepreneurial mindset Europe so badly misses. Having competitive companies is a prerequisite for employment. The development of commercial contractual relations is not a threat to labour law. On the contrary, it is a pre-condition to create jobs in a market economy.
5. Labour law reforms must focus on facilitating the creation of new jobs as opposed to trying to preserve existing ones. Rather than imposing restrictions on possibilities to terminate individual employment contracts, or introducing restrictions on the use of flexible forms of work, reforms should focus on supporting companies and workers efforts to adapt to market changes. Workers protection should become less dependant of labour law instruments and rely more on education and training measures to assist individuals in their career development. In line with the flexicurity approach, work to follow on the green paper must promote flexible labour law.

Introduction

6. On 22 November 2006, the Commission adopted a green paper entitled “modernising labour law to meet the challenges of the 21st century”. The purpose of this document is to launch a public debate on how labour law should evolve to support the European growth and jobs strategy. In the light of the replies received, the Commission will issue a follow-up communication in 2007. This work is part of the wider debate on flexicurity on which the Commission will also prepare a communication setting out common EU principles in June 2007 to help Member states steer reform efforts.
7. BUSINESSEUROPE supports EU actions to promote labour market flexibility across Europe. It welcomes the launching of a Europe-wide debate on the modernisation on labour law. The 2006 annual progress report on growth and jobs rightly underlines that “increasing the responsiveness of European labour markets is crucial to promote economic activity and high productivity” However, the competence to modernise labour law lies first and foremost with the Member States. Most of the 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. BUSINESSEUROPE would strongly oppose measures seeking to harmonise the definition of “worker” at the EU level.
8. The modernisation of labour law must be based on sound analysis. Flexibility in the labour market is crucial to create more jobs. BUSINESSEUROPE fully agrees that increased flexibility in traditional standard contracts must be improved. However, there is no one-size-fits-all solution to meet different employers and workers flexibility needs. Ensuring the availability of a variety of contractual arrangements is essential for effective functioning of labour markets. An unjustified negative picture of flexible forms of work underpins the Commission flawed concept of “insiders” and “outsiders” and is incompatible with the flexicurity approach.
9. Similarly, BUSINESSEUROPE regrets that the green paper does not sufficiently underline the importance of self-employment for the development of the entrepreneurial mindset Europe so badly misses. Having competitive companies is a prerequisite for employment. Bogus self-employment and undeclared work must be combated but the development of commercial contractual relations is not a threat to labour law. On the contrary, it is a pre-condition to create jobs in a market economy.
10. In order to contribute to the debate launched by the green paper, the present position paper sets out BUSINESSEUROPE’s views on how to modernise labour law.

Flexicurity and the modernisation of labour law

11. Research shows that people feel secure because it is relatively easy to find a job rather than because they are safeguarded by employment legislation. Labour law reforms must therefore focus on facilitating the creation of new jobs as opposed to trying to preserve existing ones.

12. The essence of the flexicurity approach is that it does not seek to organise trade-offs between flexibility and security. On the contrary, flexibility is seen as a way to improve employment security. In order to be consistent with this approach, work to follow on the green paper must promote:

- flexible labour law with job protection legislation which does not hamper recruitment under indefinite duration contracts; a choice between various types of flexible employment contracts to answer diversified needs of companies and workers; and a commitment to fight undeclared work which creates insecurity on the labour market and unfair competition for law-abiding companies and workers,
- effective active labour market policies, which requires that the necessary budgetary margins have been created to allow such an investment, and
- employment-friendly social protection system and in particular unemployment insurance which links rights and obligations for the unemployed as opposed to giving unconditional income support.

13. It must also be recognised that there is not one single model of flexicurity policies that can be generalised across Europe. Each country has to decide on its own on the sequence of reforms and different components of the policy mix to be put in place.

Insiders and outsiders on the labour market

14. The green paper is based on a flawed concept of “insiders” and outsiders”. It classes as insiders only those who are permanently employed on a full-time basis. In reality, in the flexicurity approach, the “outsiders” are the unemployed. All those legally employed, whether under a full-time indefinite duration contracts, working part-time, under a fixed-term contract, or doing temporary agency work should be considered as “insiders”.

15. The report Employment in Europe 2006 and the 2006 European working conditions survey published by the Dublin foundation provide useful data to understand recent trends on Europe’s labour markets. These documents indicate that

- 80% of workers say that they are satisfied or very satisfied with their working conditions and with their work-life balance.
- With 78% of labour contracts, indefinite duration employment remains the most widespread form of employment in Europe.
- 18.4% of employees in the EU working part-time in 2005, part-time work has risen noticeably over the years but remains low in new Member States. Even if it continues to be predominantly a feature of female employment, working part-time is a choice for 70% of those workers and a useful step to enter the labour market for the remaining 30%. Since part-time workers are protected against discrimination following the framework agreement

negotiated by the European social partners implemented by a European directive, it can not be regarded as “precarious” work.

- The same protection applies to fixed-term work contracts which, after a significant rise since the mid-1980’s, seem to stabilise around 14% of the EU workforce. Fixed-term work has no significant gender dimension but a strong cyclical component. With regard to the share of fixed-term contracts in the labour market, important variations exist within Europe. They represent a higher proportion of the workforce in some countries as a consequence of excessive rigidities in permanent contracts. Hence the importance of removing the rigidities in indefinite duration contracts to address the real causes of this phenomenon rather than further penalising job creation by introducing further restrictions in the use of non-permanent contracts.
- 41% of agency workers are in longer-term employment within a year of their assignment. Far from being a threat, with only around 2% of employment across the EU, temporary agency work remains an underexploited stepping stone into the labour market in most EU countries. Temporary agency work does not necessarily mean temporary employment. Workers will sometimes have a fixed-term work contract with the temporary employment agency and sometimes have a permanent work contract with them.

How to create a flexible and inclusive labour market?

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?

16. The priorities for a meaningful labour law reform agenda are to remove unnecessary rigidities which hamper job creation and to find new ways of providing security in the labour market. Flexibility of labour law has tended to be improved through the introduction of various flexible forms of employment without sufficiently

adapting the traditional standard employment model. Rather than imposing restrictions on possibilities to terminate individual employment contracts, or introducing restrictions on the use of flexible forms of work, reforms should focus on supporting companies and workers efforts to adapt to market changes. Workers protection should become less dependant of labour law instruments and rely more on education and training measures to assist individuals in their career development.

17. Reforms aimed at a simplification of regulatory and administrative procedures will be particularly beneficial for SMEs. Fully applying the Commission's approach of "think small first" by carrying out, before revising existing legislation or taking new initiatives, an in-depth impact assessment especially concerning very small enterprises is essential.
18. However, since the existing rigidities mostly stem from national legislation, the detailed agenda for labour law reforms can only be decided upon at the national level.
19. Depending on their content, labour law and collective agreements can contribute or not to a smooth functioning of labour markets. The relationship between legislation and collective agreements is complex and varies from country to country. The EU level should respect these differences and avoid adverse interferences in national negotiations. Furthermore, European law can prevent the national legislator from introducing reforms in national law, notably due to the fact that EU directives contain non regression clauses.
20. Examples of over prescriptive minimum requirements or badly designed EU legislation which can create difficulties in their implementation are:
 - The rules on defence of rights contained in directives 2000/43 and 2000/78 on non-discrimination can lead to considerable bureaucratisation of human resources management by making it necessary to keep many documents for a long period after a human resources management decision to be able to establish the employers good faith in case of unjustified judicial claims.
 - Article 7 of the transfer of undertakings directive makes an open ended requirement to inform individual employees on the date, reason and implication of the transfer when there are no employees representatives without setting any limits to this requirement. This creates legal uncertainty. Such an opened door to unjustified individual contestations even a long time after the transfer is damaging.
 - The visual display unit directive requires the employer to evaluate technical details of software packages when designing, selecting, acquiring or modifying them to see whether they can be adapted to match the user's level of knowledge and experience. This is very difficult to apply in SMEs. Similarly, the rules governing breaks when working on visual display units should be limited to monotonous activities which genuinely cause a strain.
21. The following examples illustrate how labour law or collective agreements have impacted on the situation of employment in different European countries.

Examples of balanced measures to answer both the employers and employees flexibility needs are set out below:

- In the UK, a right to request working arrangements for parents of young children or with adult caring responsibilities, with employers being able to refuse a request where there is a recognized business reason for doing so. In 90% of the cases, requests have been accepted by the employer or a compromise reached, with little differences in acceptance rates between large and small firms. This indicates the success of the approach which creates benefits for employees without creating undue burdens on companies. Employers have realized improved benefits in terms of improved recruitment and retention of staff, with many reporting increased productivity. 86% of mothers return to work with the same employer meaning that fewer trade down their job in order to combine work and family responsibilities.
- In Spain, collective bargaining plays a crucial role in promoting change in labour relations. National surveys indicate that some elements of flexibility are slowly being developed in relation to working time frameworks (annual period of reference, irregular distribution of working time schemes), classification of workers (using more flexible parameters to group workers), and remuneration systems (the variable part of remuneration gaining weight). Employers and trade union organizations have also been promoting changes in the content of collective bargaining through different national agreements from 2001 onwards. However, these changes are too slow. The regulatory framework does not always facilitate change.
- In the Netherlands, transition from full-time to part-time work and vice versa has successfully been promoted by the social partners and later introduced as a legal right. The employer is able to refuse a request for business reasons. The law on flexibility and security allows deviation by collective agreement from the rule limiting renewal of fixed-term contract to a maximum of three contracts of maximum 2 years each. Finally, the concept of “working smarter” was introduced by employers, in consultation with trade unions, and aims at measures to increase productivity and employment in companies.

Examples of obstacles still to be removed in the Member States are set out below:

- In Germany, the law on protection against dismissals should be amended to open up possibilities for the employer and the employee to agree on severance payment as an alternative to the employee's right to take legal action for wrongful dismissal.
- In Germany, restrictions to the use of fixed-term contracts limiting employers' possibilities to employ a person on a fixed-term contract if this person has been employed by the same employer before should be removed.
- In Spain, more flexibility is needed to allow companies to change working conditions (grouping of workers, tasks and functions, timetables, working time internal frameworks, remuneration systems)

when it is necessary to anticipate change and meet market demands as the regulatory framework only allows it on the basis of too rigid requirements.

- In Spain, the requirement to have an administrative authorization prior to a collective dismissal slows down adjustment to change and distorts negotiations as in practical terms this authorization increases significantly the employment termination cost beyond already high legal provisions (it can even triple this cost). This deters companies from hiring workers for an indefinite duration.
- In Luxembourg, because private employment agencies can only provide temporary work services, a company looking for a permanent position will not be able to use the services and expertise of a temporary work agency to fill this job vacancy. This lack of flexibility creates less work opportunities for job-seekers and prevents them from accessing a further path to enter the labour market.
- In the Czech Republic, employers believe that there is a need for radical labour deregulation to ease the conditions for temporary contracts, lift limitations to their renewal, removing constraints related to the reasons to be given when notifying termination of an employment relation, and having a simpler and faster dispute settlement system.
- In the Netherlands, legislation on dismissals remains complex, rigid, and costly. Prior authorization is required, resulting in long procedures. Moreover, very high compensation costs are imposed on the employer. This deters employers from hiring workers for an indefinite duration.

How to ease labour transitions?

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?
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?

22. As indicated above, there is a need for more flexible employment protection legislation and more efficient assistance to the unemployed in a number of countries. However, the role of the European Union in this debate is to encourage Member States to introduce the necessary changes and organise exchanges of experiences so that different countries can learn for each other.
23. With regard to access to training, the experience of countries which instituted a right to training shows that it has little impact for the workers who are most in need: the less qualified. In reality, personal motivation remains the most important driver for the development of life long learning. The key elements to successfully increase participation in life long learning are the following:
- Ensuring that education and training offers are attractive and correspond to labour market needs,
 - Having efficient guidance services to help companies and workers identify courses or programmes which meet their needs,
 - Giving an appetite for learning to individuals from the very early stages of education and supporting them in their efforts to up-grade their skills,
 - Creating the right framework conditions to encourage companies to invest in life long learning,
 - Develop instruments to validate the competencies acquired through informal learning such as on the job-learning.
24. Legislation is not the right instrument to influence learning behaviours. By contrast, agreements between the social partners can play a useful role in promoting a life-long learning culture. The framework of actions on the life-long development of competences and qualifications negotiated by the European social partners and subsequent implementation reports have shown that agreeing on a common approach to life-long learning contributes to changing attitudes. Examples of practical tools developed by social partners to promote life-long learning range from the creation of funds to mutualise training costs incurred by enterprises, systematising the use of individual competencies development plans, designating learning representatives in companies, creating individual learning accounts, concluding collective agreements defining the respective roles and responsibilities of the employer and the employee with regard to life-long learning, etc. However, when developing policies to promote life-long learning, it should be borne in mind that motivation to learn cannot be decreed. The key is to create the conditions that will induce companies and individuals to invest financial resources, time and efforts to up-grade skills. The tools have to be adapted to local specificities and should be defined as close as possible to the end beneficiaries.
25. Concerning legal definitions of self-employment and employment, BUSINESSEUROPE believes that existing national legal definitions are generally sufficiently clear to establish the real status of a worker. There is no general need to clarify legal definitions across Europe.

26. There are important distinctions in the fiscal, social security and legal regimes applied to self-employment and employment. These distinctions correspond to the specific features of a commercial activity versus a labour contract situation and are generally justified. BUSINESSEUROPE is not in favour of establishing a minimum floor of rights regardless of the workers status. Some Member States created an intermediary legal category between employment and self-employment in order to facilitate transitions from one status to the other. Sharing experiences on such national initiatives at the EU level so that Member states can learn from each other could bring added value. However, BUSINESSEUROPE sees no need for the generalisation of new legal categories such as the so-called “economically dependant workers” across Europe and is strongly opposed to measures aimed at explicitly or implicitly harmonising national definitions of employees and self-employed at the EU level.
27. With regard to the establishment of a “floor of rights for workers regardless of the form of their work contract”, existing EU provisions protecting workers against discrimination already do that. It should be borne in mind that
- comparisons must be made between comparable situations on a proportional basis, and
 - differences in treatment justified for objective reasons are not discrimination as foreseen in the social partners agreements on part-time work and on fixed-term contracts.
28. Negotiations of a similar agreement on temporary agency work have failed and the directive proposed by the Commission is currently blocked in Council due to over prescriptive provisions on how to define the application of the principle of non-discrimination in the case of this triangular relationship. This shows that seeking to impose detailed EU provisions on issues which are best dealt with in Member States is neither appropriate nor effective.
29. Generally speaking, BUSINESSEUROPE believes that terms and conditions of employment of workers are best defined by the social partners or the legislator in Member States and that existing EU legislation already amply cover what could be legislated at the EU level. Hence, the need to avoid over-regulation at the EU level.

How to deal with triangular relationships?

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?

30. Temporary agency work does not necessarily mean temporary employment contracts. As indicated above, a distinctive feature of temporary agency work is that

it establishes a triangular relationship where the employer is the agency, with the agency having the obligations of an employer and agency workers protected by applicable legislation. The agency then sends its workers to a user company to perform a task and delegates power to give instructions to this user company.

31. Situations in which an employment agency acts as an interface to put a worker in contact with an employer and for which the employer and worker establish a work contract directly is not temporary agency work.
32. Similarly, sub-contracting, which is essentially a commercial relationship with contractual obligations but no subordination between the client and the service provider, must not be confused with temporary agency work.
33. The specificities of agency workers described-above need to be born in mind to avoid misunderstandings when discussing the issue or comparing experiences at EU level.
34. Furthermore, it should be born in mind that a recent study of the European Foundation for the improvement of living and working conditions underlined that temporary agency work and the employment status of temporary agency workers is comprehensively regulated by national law and collective agreements. Clarifications of the status of temporary agency workers, if any, can only take place in Member States.
35. Subsidiary liability is not an appropriate solution to establish responsibility. All sub-contractors must ensure that they follow relevant labour law when dealing with their employees - contractors and user organisations must therefore be able to expect that sub-contractors are fulfilling their responsibilities. Ensuring their sub-contractors comply with the law is not their responsibility. The subsidiary liability principle would also place a considerable burden on the main contractor. SMEs in particular do not have the administrative resources to make a thorough examination of their subcontractors, let alone situations where there is a chain of subcontractors. In any event, the main contractor is not in a position to control compliance in practice. BUSINESSEUROPE is therefore opposed to it.

How to promote mobility of workers?

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?

36. The labour relation of frontier workers who are living in one country but working in a neighbouring state are subject to the national law and collective agreements of the country of employment. In the case of workers temporarily posted to another Member State, the posting of workers directive defines which matters are subject to the law or collectively agreed provisions of the host country and which issues

remain subject to the laws of the country of origin. BUSINESSEUROPE sees no need for a more convergent definition of worker in EU directives and would strongly oppose moves seeking to indirectly harmonise existing national definitions.

How to improve enforcement of labour law and combat undeclared 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?

37. Effective enforcement of existing Community labour law as transposed into national legislation lies up and foremost in the hands of national authorities. However, the EU can play a useful role by organising exchanges of experiences between national labour inspectorates as is already done. Furthermore, technical assistance and cooperation between Member States to help new Member states efforts to enforce the EU legislative acquis can also be useful. We welcome the fact that the ESF foresees the possibility to grant financial support for activities of capacity building with regard to the enforcement of legislation in convergence regions.

38. Enforcement is not limited to sanctioning non-compliance. It also involves prevention and awareness raising of the legal rights and obligations of companies and workers. Social partners can therefore also play a useful role. Initiatives such as twinning programmes between national employers' federations to assist in the development, in the new Member states, of strong business organisations able to provide services to their members and advise them on how to respect their legal obligations are important in this respect. Similarly joint social partners initiatives such as the joint integrated programme of the EU social dialogue developed by BUSINESSEUROPE, UEAPME, CEEP and ETUC contribute to reaching that objective.

39. With regard to prevention, the reasons lying behind the development of undeclared work, which can vary from country to country, have to be identified and addressed. Removing unnecessarily restrictive or bureaucratic employment related requirements is part of the answer.

40. Furthermore, in case of cross-border posting of workers, improving administrative cooperation between relevant national authorities is essential to ensure effective implementation of the posting of workers directive.

41. In addition, steps should be taken to improve information for companies wishing to post workers in another Member State to help them complying with their legal obligations.

42. With regard to combating undeclared work, real actions to do so can only be taken in the Member States. The EU level can play a useful role by promoting exchanges of national experiences and encouraging Member States to act. Here also, social

partners can make a useful contribution. A seminar to examine national social partners' initiatives to combat undeclared work was held in 2005. Further discussions on how to prevent and combat undeclared work is foreseen in the context of the EU social dialogue work programme 2006-2008. As explained earlier on, combating undeclared work is essential in the context of a flexicurity approach. UNICE and its member federations therefore attach the greatest importance to contributing to making progress in this field.

How to revise the working time directive?

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?

43. The working time directive is a perfect example of what should not be regulated at EU level. Rules governing working time should be defined in the Member States and not at EU level for several reasons:

- Companies and workers needs vary a lot across Europe and there are many ways to organise working time to meet both the employer's and the worker's wishes.
- Opinions about what should be defined by national legislation, what should be left to autonomous negotiations between social partners at national, sector or company level and what should be agreed directly between individual workers and their employer also varies a lot from country to country.
- Negotiations on working time are closely linked to pay considerations and interference from the EU level into national pay negotiations must be avoided.

44. However, the fact is that the EU did adopt a directive on working time in 1994 and ECJ jurisprudence way beyond what the EU legislator intended has developed as a consequence. Amending the working time directive to solve the problems created by European jurisprudence on on-call time is urgent. The EU institutions have a joint responsibility to do so. BUSINESSEUROPE would like to make clear that any revision of the working time directive to solve the problems caused by the Simap and Jaeger judgements must retain the opt-out, which is a vital labour market flexibility.



Conclusion

45. The 2006 annual progress report on growth and jobs rightly underlines that “increasing the responsiveness of European labour markets is crucial to promote economic activity and high productivity”. However, the competence to modernise labour law lies first and foremost with the Member States. Most of the measures will therefore need to be taken by national players. 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 counterproductive for national reforms.
46. EU initiatives to encourage the modernisation of labour law through appropriate national actions must be part of the broader flexicurity agenda. BUSINESSEUROPE counts on the EU Commission to ensure that initiatives following on the green paper are fully in line with this approach.
47. BUSINESSEUROPE and its member federations for their part will continue to promote the necessary modernisation of labour law throughout Europe, including through joint initiatives such as the joint analysis of key labour market challenges foreseen in the EU social dialogue work programme 2006-2008.