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Green Paper on Labour Law
DG EMPL/F/2
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Green Paper

Modernising labour law to meet the challenges of the 21st century COM(2006)708final

The EU Treaty and labour law

When discussing the labour law and the EU, it is essential to begin with the EU Treaty.

The Treaty defines what labour law issues fall under the EU competence. Above all, wages, freedom of association and measures to settle labour disputes are - in accordance with Article 137 - excluded from the area of EU competence. These issues are in practice regulated by, inter alia, the Posting Directive, in which the country of destination principle determines which labour law applies to work performed in another country.

At the same time, the Commission is bound in the Treaty to support the social partners and their work, in various ways. As the rights of the social partners are regulated on national level, the EU should not obstruct those rights defined in national rules. The so-called Monti regulation can serve as an example of how important this is. In accordance with this regulation, the free movement of goods must not infringe the trade union rights, as they are defined in national law. Furthermore, the EU has the responsibility for the mainstreaming of gender issues. The equality aspect is central in the whole labour law work. Women are treated unfairly in the working life in many different ways. Therefore, the measures discussed within the Commission must include measures counteracting the unfair treatment of women. The Directives on fixed-term work and part-time work are examples of the measures that have been of great importance for decreasing discrimination against women in the labour market.

Article 138 lays down furthermore that the Commission is - always in labour law issues - obligated to hear the social partners. If they wish to settle the issue through negotiations,

the Commission must wait for a proposal that may come from the social partners in the form of an agreement. This rule means that, in accordance with the Treaty, the Commission is obliged to attach particular importance to the opinions of the social partners. If the Commission later on, as a consequence of the Green Paper, puts forward concrete proposals within labour law, these proposals are to be forwarded to the social partners and first of all regulated by European agreements.

We understand the idea behind the Green Paper as if the Commission wants to bring the whole labour law up for discussion. The descriptions and questions in the Green Paper cause, however, a feeling that employment security and flexicurity should be synonymous with labour law. For an all-embracing discussion about labour law, there should be considerably more issues dealt with in the Green Paper.

Some facts about the Swedish labour market

The Swedish labour market is characterised by strong organisations and the fact that wages and employment conditions are to a great extent regulated by collective agreements, binding under civil law. Approximately 80 per cent of all employees are trade union members. Employers are also highly organised. Conflicts between trade union organisations are very rare. Unlike many other countries, the Swedish labour law is to a high degree regulated by civil law and not by public law.

The Swedish labour market is regulated by laws and collective agreements. There are no laws relating to wages and other remuneration, which are regulated only by collective agreements. The Government takes no responsibility for ensuring that collective agreements apply; it is the trade union organisations who must see to that every individual employer is bound by collective agreement based purely on contractual law. This can be done either when the employer joins an employer organisation that has a collective agreement with a trade union organisation for the work in question or through a direct agreement between the employer and the trade union concerned. Without collective agreement the employer and the employees can agree on any wage they like.

However, if the Swedish law applies to the employment contract, the wages are not allowed to be unreasonably low. In practice, collective agreements are also normative in workplaces without collective agreements.

The Government has thus left it to employees themselves to safeguard their own interests through their trade unions. The primary prerequisite of this is that the trade union organisations are representative and have effective tools to bring employers to sign collective agreements. When a collective agreement is in force, both social partners are obligated to maintain industrial peace. If there is no collective agreement between the social partners, the trade union organisation has full liberty of taking industrial action, including sympathy action, to bring the employer to conclude a collective agreement, whether there are any trade union members in the workplace or not. Even monitoring of the observance of the rules in the labour market is the responsibility of trade union organisations. There is governmental control and supervision in working environment issues only.

Collective agreements/legislation and flexibility

We can notice that the Green Paper is mainly about labour law concerning the individual. It is positive that the EU carries out a review of the legal framework for protection of the individual in the labour market. Yet it is important in this context to observe that the collective labour law and, especially, the role of social partners and their ability to cooperate are of essential importance when it comes to the possibilities of combining flexibility with security for workers. This can be clearly seen in the Nordic labour markets, where the role of social partners and the employers' willingness to negotiate and cooperate are a prerequisite of an efficient labour market model.

The Government has an important role in enacting the fundamental laws in the field of labour legislation but the laws must be mainly formulated so as to serve as a basis. Where there is a need for adaptation to specific conditions, e.g. within different sectors, it must be possible to make such adaptations by means of negotiations and agreements between the social partners. Such a combined system is a powerful instrument in increasing flexibility and adaptation to sectoral and local conditions. However, this is based on the social partners' willingness and ability to solve the problems – a fact that should be given special attention in the efforts to develop labour law at EU level.

Changes in society

When more and more countries open up their economies for market-oriented solutions, trade and investments, the pressure for structural change increases in society. Increased pressure for changes implies also that there will be a greater risk of negative consequences and that their extent will be larger. If the readjusting capacity is low, there will be greater resistance to changes. Increased pressure due to the general contemporary situation requires that the readjusting capacity must be improved. If not, the resistance to changes will increase proportionally. Consequently, the pressure for change, the resistance to change and the readjusting capacity are inter-dependent.

If the methods to face the increased pressure from the general situation entail worsened conditions for the individual and impaired job protection, then we can be sure that there will be greater resistance to change. The political trends indicate that the same workers who are mostly affected by the effects of the change will be the ones to bear most of the costs as well. Such a policy will lead to increased resistance.

A situation of transition in the labour market implies a shared responsibility for the parties involved: the Government, the employer, the workers' organisation and the individual. These are the ones who have the joint task to remove the resistance to changes that are needed in order to facilitate the necessary structural changes. But a prerequisite of the willingness and capacity to accept changes and readjustment is improved knowledge, insight, influence and security for the individual.

Replies by LO-Sweden to the questions put in the Green Paper

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

The EU should concentrate on measures to increase the protection for workers with precarious work and to adopt the Directive on temporary employment agencies. The possibility of choosing between laws and collective agreements must always be included in the EU labour law. As regards concrete priorities, we also refer to our further answers below.

The Green Paper concentrates on individual labour law. We would also like to see more discussion and proposals on collective labour law. As the collective agreement is a method making it possible to combine security and flexibility, the Commission should also recognise how enhanced collective labour law can be a means to improve flexicurity.

An important element of strengthening collective labour law is to increase the involvement of trade unions in information, consultation and participation. This can be done by upward harmonization of existing EU rules so that workers' influence will be more equal in different situations and in different kinds of enterprises. There are currently several Directives that deal with workers' participation in different ways. A coordination of these rules would contribute to strengthening as well as simplifying the collective labour law as regards workers' participation.

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?

Yes, in the combination with laws and collective agreements. General rules can be set by the laws and a necessary adaptation to specific situations in different sectors etc can be achieved by collective agreements. For collective agreements, the possibility to use semi-mandatory rules is a necessity.

By using minimum levels in the EU Directives, the situation in Member States without an adequate protection can be improved. In proposals for directives, the Commission should push for such a development but always in combination with the possibilities for better provisions nationally. Before actual proposals, negotiations are mandatory, according to the Treaty rules on Social Dialogue. If there is initially a pressure from the Commission for Directives, the Social Dialogue is the best way of implementing the proposals.

Flexibility as a concept is mostly based on efforts to make things easier for companies. If this is done by means other than deteriorated security for the employees, this approach is uncontroversial. But the analyses in the Green Paper mainly deal with fields where conflicts may exist between the two goals: flexibility / security, and aiming at more flexible conditions for companies is precisely what these analyses are based on.

However, flexibility can also be seen from the employee's perspective. It can concern, inter alia, being able to choose flexible working hours, or adjusted employment

conditions for parents, for students and for those who will soon retire. This includes conditions available on the labour market as well as the facilities provided by Society as regards, e.g., child care. These different aspects of flexibility seen from the employee's point of view are clearly absent from the Green Paper.

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?

Specific characteristics of both laws and collective agreements must be possible to reconsider according to the economic development. It is impossible to find an answer to this question common to 27 Member States. By creating semi-mandatory labour laws, possibilities are created for solutions adapted to a specific sector and accepted by both social partners.

Concerning the size of the enterprise, labour market regulations in general must be the same, especially concerning employment contracts and the conditions of work for the individual worker, irrespective of the size of the enterprise.

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?

To be exact, recruitment is more related to the need of an active labour market policy, to see to the matching of the demand and supply of different competences in the labour market.

In this context, the EU should launch a discussion on the possibilities for an employee to have a right to take a leave from his/her employment for a certain period to test another employment without losing his/her first employment if he/she, after this period, wants to go back. A system with a right to test new jobs could increase mobility, but it must be done without reductions in the employment security.

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?

Well-designed, generally applicable unemployment insurance is always essential for employment security. It is a national question whether there is a need for changes in the employment security. The starting-point for a discussion on employment security must be that it is not the existing work as such that should be protected but the employee having that work. But for an acceptance of a period of unemployment, a high unemployment benefit combined with a quick and easy way to find the next employment is an absolute necessity. Whether workers accept changes in companies or whole branches of an economy is dependent on the level of economic protection during a period of unemployment and the chances to find new jobs.

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?

A law allowing for educational leave is a first step. The remuneration during such a period, whether in law or in collective agreements, is a second step. Depending on the character of the training or education involved, the division of this remuneration between the employer, the employee and society must differ.

Training that is necessary for the employee to be able to continue to perform one's work must be the responsibility for the employer to pay for. The search for a more general education, not directly linked to the actual employment, must involve acceptance from the employee of a lower remuneration during such a period. A form of general subsidy from the society must be considered if there is a wish to stimulate life-long learning.

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

The EU must keep its present practice of leaving the definition of worker to the Member States. The primary objective of this definition must be to avoid that "economically dependent" and "subordinated" persons lose the protection, normally awarded to an employee. Several factors have to be considered in order to find a complete assessment. Therefore the definition cannot be established exactly once and for all.

Still the commission text discusses problems relevant to all Member States. The kinds of jobs that include false self-employment and "economically dependent work" constitute real problems. The occurrence of these kinds of jobs must be brought down. How to do this must be discussed nationally and in the EU, in order to find solutions. It is too early to say if there might be common solutions or if all solutions have to be national.

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?

We consider that the ILO Employment Relationship Recommendation (No.198, 2006) is to be the starting-point for analyses carried out in the EU on working conditions in different forms of employment. It proposes to leave the nature and extent of protection given to workers in an employment relationship to be defined by national law and practice.

As regards a "floor of rights", referred to by the Commission in this question, there is already a decision made by the law-making bodies of the EU. We refer especially to the two existing agreements that were made Directives: those on fixed-term employments and part-time employments. They prohibit discrimination, through inferior working conditions, of those with such kinds of employment, compared to full-time open-ended contracts. The problem seems to be to have them fully implemented, applied and monitored.

There is also a “floor” on the global level. In the ILO convention number 158 on Termination of employment, which ought to be ratified by all Member States, it is stated that for a termination of an employment there has to be “a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”. As regards the EU system, the Directive on collective redundancies puts demands only concerning information. There are weighty arguments for why the EU should also establish a minimum level as regards the causes of termination of employment, in this Directive as well as other Directives. Such a minimum level should be based on the above stated ILO Convention. This should be a self-evident element in the future rules for employment security in the EU.

It is important to clearly define in the legislation and in the practice of labour law that minimum levels are minimum levels. There should not be any ambitions to make these levels universally applicable. The analyses in the Green paper contain a tacit question whether it would be possible to find a common level for those with good employment security and for those with precarious employment contracts. Making improvements for those with precarious employment at the sacrifice of security for those who have good employment security can never be an acceptable method. Minimum levels should therefore be a way of improving the situation for those with the poorest security.

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"?

Yes, the principal contractor should have a liability for subcontractors. This is an effective and feasible way to establish the responsibility in the case of sub-contractors. A Directive leading to such a liability seems to be the most efficient way to eradicate many of the misuses of labour in today’s labour market. It does not only increase the protection according to social law and collective agreements but would also improve tax collection and environmental protection.

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

Yes. We are all waiting for a decision on the Directive on temporary employment agencies! In Sweden we have managed to solve this question in a positive way with a clear identification of who is the employer and by concluding collective agreements with temporary employment agencies. The LO trade union agreements are founded on the principles in Article 1 of the proposed Directive, while those of the TCO trade unions have used the possibilities for exceptions given in the amended proposal for a Directive.

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?

The British opt-out is not in accordance with the Treaty and related directives on health and safety. The possibility, given only by collective agreements, of prolonging the period of calculation of the maximum working time to up to one year, shows how the method based on collective agreements can be used to obtain flexibility also as regards the Working time Directive. The method based on making these rules negotiable through collective agreements might be a solution that could be used also for other rules in the Directive.

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?

The answer is partly the same as the one to question 7. The enterprise has to follow the rules according to the labour law in each country where it has an activity and a part of these rules is the definition of worker in that country. The observance of this is a part of the observance of the labour law in total, according to the practice in each country. It is important to guarantee a dividing line between worker and self-employed that does not create any in-between solutions, which can develop into "grey zones". An unambiguous dividing-line is important, not only for labour law but also for the implementation of social and tax legislation.

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?

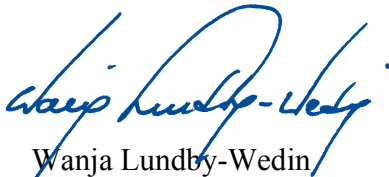
The administrative co-operation must be improved and this concerns national as well as community law. The new common contact points according to the Services Directive can be a way of achieving this. The role of the social partners in implementing community rules differs widely between the Member States. But the tricky question is surveillance. Rules without surveillance risk to become without any effect and, therefore, a greater emphasis has to be put on implementation and monitoring of the rules. Wages and working conditions are especially hard to supervise when there are cross-border activities involved.

Therefore, the co-operation between authorities of course must be improved but each Member State must take the responsibility itself and have the possibility of choosing how this surveillance shall be carried out. Trade unions thereby have an important role and the EU rules must not stop them from doing their work. In some Member States like Sweden and Denmark this surveillance is totally in the hands of the trade unions. Such a system can be more efficient than the one based on authorities and it must, therefore, be supported.

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

Some of the undeclared work could be discovered and changed into declared work via the contact points according to the Services Directive. A strict dividing line according to the answer to question 12 is another tool to detect those who try to evade labour and social legislation. Referring to question 13, it is also easier to transform undeclared work to declared work if the monitoring is in the hands of the trade unions by way of signing collective agreements.

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