



EUROPEAN PARLIAMENT

DG INTERNAL POLICIES OF THE UNION

Policy Department Economic and Scientific Policy

**Green Paper "Modernising Labour Law to meet
challenges of the 21st century"**

Briefing Note

(IP/A/EMPL/IC/2007-003)

This briefing note was requested by the European Parliament's Employment and Social Affairs Committee (For hearing and exchange of views in the EMPL committee on 21 March 2007)

Only published in English.

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Manuscript completed in March 2007.

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Acknowledgements

In writing this report I am indebted to several people for relevant discussions, including my colleague Sonja Bekker at Tilburg University, the participants of the Tilburg-Louvain University seminar on the Green Paper on Labour Law, organized by Frank Hendrickx, that took place on February 1-2 2007, and the members of the European Expert Group on Flexicurity. Evidently the responsibility for all statements exclusively lies with the author. The structure of the report is based on the questionnaire forwarded by the European Parliament.

1) **How is it possible for Member States to foster flexible labour markets combined with a high level of social security for the unemployed and short transition periods between jobs?**

To be able to simultaneously reach these goals, Member States need to create systems of flexicurity. Flexicurity can be described as a policy strategy to enhance, at the same time and in a deliberate way, the flexibility of labour markets, work organisations and employment relations on the one hand, and security – employment security and social security – on the other.

The goal of any ‘flexicurity’ strategy should be to create a framework that allows flexibility and security to be mutually reinforcing. This approach transcends the simple trade-off between flexibility and security, whereby the former is seen to be in the exclusive interest of the employer and the latter in the interest of the employee. Workers also need flexibility – and contractual diversity – to be able to combine work and private life. At the same time, security, in a dynamic perspective, is about building and preserving people's ability to enter, remain and progress in (sustainable) employment throughout the life-cycle. It is also about the security for firms to preserve and improve their market position, productivity and job creation potential within an increasingly competitive environment.

In general Member States need to have in place three basic conditions.

- a) One condition regards (the development of) a social security system that is accessible to all workers on the labour market and that offers favourable replacement rates during the first period of unemployment. Such a social security benefit system can be based on and paid from a) taxes b) social contributions from employers and/or workers c) specific contributions from firms in the case of dismissals or redundancies (a type of experience rating or dismissal tax). In order to levy these taxes and collect the contributions Member States should successfully combat informal work, which will enable them to find the budget to extend the social security system.
- b) Second, the social security system should also provide the right balance between ‘sticks’ and ‘carrots’: it should make workers feel secure, but also provide them with the right incentives and (further) qualifications to re-enter the labour market as soon as possible. This can only be achieved if modern social security systems are productively connected with active labour market policies.
- c) On the basis of these two preconditions or pillars of a labour market system, more flexibility can be introduced, as a third pillar, either by having more contractual diversity – which should be diversity embedded in social security and equal treatment – or by introducing more flexibility of permanent contracts. The choice

for either of these approaches (normalisation of non-standard work or flexibilisation, to some degree, of normal work) will depend on the situation in the labour market in the Member State and on cultural traditions and preferences. There are many ways that lead to Rome, as the saying goes. Examples in the EU are: Spain, Italy and Denmark (flexibilisation within standard contracts) and the Netherlands (normalisation and equal treatment of non-standard work). The flexibility of permanent contracts could be internal flexibility (e.g. working-time accounts, job rotation) or external flexibility (i.e. certain rights and entitlements are being build up gradually, think of notice periods, severance pay et cetera).

All in all, flexicurity can best be considered, also from an industrial relations and labour law perspective, as a system of joint and mutual risk management by employees and employers. It is important to notice that in modern labour markets risks can not longer be dealt with within the limits and boundaries of a single company (i.e. within the internal labour market), but that they also should be dealt with across company borders (i.e. within the external labour market) in order to guarantee flexibility and security for both workers and employers.

2) Which measures could be taken to increase the security of workers while adapting to the more flexible needs at the labour market, for example minimum income, core labour law, etc.?

The security of workers in modern labour markets strongly benefits from the following systems:

- a) A broad-scope, easily accessible unemployment benefit system such as described under Question 1, that does not exclude workers on non-standard contracts;
- b) A comprehensive welfare benefits system (as the ultimate safety net). Not all Member States have such a broad system in place yet, people then depend on the local facilities (provided by municipalities);
- c) A system of parental leave schemes and child care facilities open to all workers;
- d) A system of minimum wages (either stipulated by law or collective agreement);
- e) Responsive and reliable life-long systems that warrant people's adaptability. These systems should not only depend on companies but also be available outside companies (e.g. systems for the Accreditation of Prior Learning – APL)
- f) Systems of transition or change security, which facilitate and support people (also in terms of income support) in making timely and good transitions to another job whenever the necessity arises;
- g) A comprehensive old-age pension system, preferably of a flat rate nature, which offers a sufficient degree security at the end of people's career (the Dutch AOW system is probably the best example in the EU).

It should be added that, currently, job security also provides security to workers outside the context of their job, such as entitlements to social security and access to financial and credit opportunities (such as loans, mortgages). That is the so-called entry-port aspect of standard work. Non-standard workers in many Member States do not have these entry ports but should get these as well. This, however, partly lies outside the scope of labour law.

Moreover, committing employees more long-term to an organisation can be beneficial to the organisation as well, for instance to keep knowledgeable and/or productive workers inside the organisation to be able to meet certain quality standards. Permanent contracts, i.e. of undetermined duration therefore should not be considered obsolete. A majority of the European force works on the basis of such a contract.

In case that regular employment is not a feasible target for some groups of workers, e.g. due to low productivity or skill levels, employment security can be guaranteed by providing subsidies or tax measures to lower the cost of their labour for organisations.

3) Do you believe that the adaptation of labour law could contribute to achieving objectives such as flexibility and security whilst reducing segmentation?

Labour law, including social security law, could indeed under certain conditions contribute to enhanced flexibility and security while reducing segmentation:

- a) First, as mentioned under Question 2, security, in particular employment security (the security to enter into employment, to remain and to progress in employment) should be increased by developing certain aspects of security.
- b) Second, in a number of Member States systems and strategies of flexibility at the margin have emerged over the past two decades: the burden of flexibility has been put almost uniquely on the shoulders of particular groups, such as women, young people and ethnic minorities, while the security has been restricted to the insiders on the labour market (in some Member States this concerns workers in the public sector). This is referred to as a two tier labour market. The groups that work in the margin of the labour market are not only worse off in terms of working conditions and access to social security, they also have limited prospects in making transitions to better jobs with higher productivity levels. This is a cause of segmentation that can be dealt with by labour law to some degree. Although other causes for the increase of segmentation in the labour market may lay outside the scope of labour law, a reduction of segmentation can for instance be accomplished by making labour law and collective labour agreements applicable to all workers, also those who do not have the formal status of employee (e.g. freelancers). Thus the gap between standard and non-standard work can be reduced.
- c) Labour law can also contribute to establishing sound definitions of flexibility and employment security, in order to prevent random interpretation. Fundamental rights like social and economic democracy, the well-being of employees, the improvement of quality of work need to be protected and reconciled with flexibility and employment security. The open method of coordination might give ideas as to how to establish this.
- d) Furthermore, the participation of social partners and other stakeholders should be ensured in the development of these policies – in order to create a common agenda and joint responsibility for change. Social Partners have expert knowledge of the concerns and necessary qualifications in labour markets and must take an active part in promoting acceptance of change and building support for change. Collective agreements and companies can provide conditions for modern work organisations, improving internal quantitative as well as functional flexibility within a secure context.

Three concrete examples of a possible role of labour law in achieving the threefold objective are:

- a) Reduce asymmetries in the labour market by integrating non-standard contracts – part-time work, fixed-term work, agency work et cetera – more fully into labour law, collective agreements and social security. These contracts would be treated equally to standard contracts, following the principle of *pro rata temporis*.
- b) Redesign dismissal costs for permanent employees, in cases where they can be considered significantly above-average, to enhance employers' incentives for hiring new staff (especially current outsiders on the labour market). Note: protection against unfair dismissal is not to be put at stake – this is considered, internationally, as a fundamental aspect of workers' protection and decent work.
- c) Bring severance pay, and money now spent on administrative and court procedures, together into personalised transition funds or entitlements (cp. the Austrian severance pay system, see answer to Question 8) that help promote new job opportunities. Make procedures more predictable and transparent to foster adaptability and labour market flexibility without affecting security.

4) What rights, if any, should be guaranteed to "economically dependent" and agency workers in particular to enable them to produce "good work" and employers to provide "good and fair" working conditions and appropriate social protection?

Certain basic rights should apply to all workers, including economically dependent, self-dependent workers and temporary agency workers. These rights should include health and safety at work, equal treatment, anti-discrimination, protection of private life, training entitlements, work-life balance entitlements (such as parental leave and childcare facilities), life course saving systems (i.e. a tax friendly way of saving money to cover or support important transitions in one's life-course) welfare benefits and old age pension. A basic disability benefit scheme could also be offered to these workers. There already exists a list of fundamental social rights (European Union Charter of Fundamental Rights) which could be looked upon in view of the position of the aforementioned groups of workers.

In the case of temporary agency workers the temporary work agency should serve as the legal employer and an agency contract should be considered a normal, legal employment contract in that sense. The approach taken could be that of a tenure track: in the beginning the flexibility to terminate the employment relationship could be relatively large but subsequently the contract should evolve into a fixed-term and open-ended type of contract. Normalization of temporary agency work also includes training and pension rights for these workers. The Dutch system for the regulation of agency work, based on law but in particular on a collective labour agreement for the sector, but also the recent Slovenian reforms in that area, could serve as good examples. It is important for the EU to finalise the debate on a Directive on temporary agency work or at least for Member States to take a joint position by ratifying ILO-Convention no. 181. Regarding the way to further deal with the negotiations on the Directive, the EU might learn from the tripartite setting in which the ILO negotiations were conducted.

The wages of temporary agency workers could be related to the position of the agency worker.

If the employment relationship with the agency has a permanent nature the wages of the worker should be equal to those of the other (permanent) workers of the agency, i.e. in that case the agency could have more freedom in the wage-setting (preferably regulated by collective labour agreement). If the employment relationship with the agency is non-permanent, then the pay should be equal compared to the workers of the user-firm (possibly also regulated by collective agreement) where the agency worker is placed. That way underbidding by deploying temporary agency workers can be avoided.

5) To what extent might simplifications and or reductions in existing labour laws contribute to making it easier for employers to take on new employees?

Basically there are two ways to deal with this challenge.

- a) The first approach, as already argued under Question 2, is to reduce the costs and thus the attractiveness of employees for employers by putting in contributions from the state or social security funds. This should apply only to vulnerable groups of employees with lower productivity levels, such as (formerly or partly) disabled persons. In labour law, notably social security law, the possibility of (temporary) wage subsidies or a no-risk policy can be included. The latter instrument implies that the employer does not have to bear the risks (or costs) of possible, future sickness absenteeism or disability of the employee that is being hired.
- b) The second approach, as already suggested under Question 1, is to create a form of tenure track or unitary form of employment contract in which some aspects of protection are being built up gradually: severance pay, notice periods et cetera. This also reduces the costs of employment during the initial stage. This is the direction currently taken in Spain to make it more attractive for employers to hire employees on a permanent in stead of a fixed-term (i.e. temporary) basis. The contract as such should not be an inferior type of contract and it should not be applied on the basis of age.

6) Highlight the challenges associated with the establishment of a single European definition of 'employee'.

The challenges associated with the establishment of a single European definition of 'employee' include the following:

- a) If the aim really is to develop a competitive European labour market, where competition is based on the quality of goods and services and not on working conditions and labour rights, a definition at the right level, which would mean the European level, seems inevitable. If the game has changed, the rules of the game should also change.
- b) An important question is whether 'Europe' has sufficient competences in developing such a definition, or whether these competences need to be extended.
- c) A European definition is specifically required in trans-national situations or dimensions of employment.
- d) Generally, the point of departure should be that workers that need protection do get protection. A line of thinking could be developed in view of the ILO Recommendation concerning the Employment Relationship of 15 June 2006. This Recommendation could possibly provide a framework for the definition of workers to be protected.

- e) A major issue is whether a form of harmonisation should aim for a minimum level of protection or a higher level of protection.
- f) Apart from ‘hard law’ the potentials of soft law should also be investigated, including the open method of coordination. The role for the Social Dialogue and the social partners in this area should also be explored further.
- g) It is important to more carefully study whether and to what degree the issue of quasi-self-employed workers represents the background for this question. The size of this group of workers is not entirely clear.
- h) Current (national) definitions of employment and self-employment should be reviewed urgently. The notion of the employment contract has to be clarified, especially the way that the aspect of subordination has evolved historically. Among EU Member States significant diversity exists regarding the legal assumptions underlying the concept of subordination (as based on law and case-law). One of the key questions in the present discussion relates to the notion of economic dependence and the question whether this notion could be used as a new decisive principle for defining employment relationships. Labour lawyers do not agree here. Major implications can be envisaged for the type of legal proof and evidence that will be thought acceptable.

7) How can labour law be reformed to tackle undeclared work, encouraging employers and employees into the legitimate labour market? Are there examples in particular countries where reform is having an impact in this regard?

The main solution to tackle undeclared work is to provide more and better employment for workers. An example of successful development is Spain. In many Eastern and Southern Member States undeclared work is still around or even well-above 15 percent of GDP.

Labour law can contribute to finding solutions by offering to replace the flexibility inherent to informal work by ‘regulated flexibility’ that still provides flexibility to the employers, that does not sharply raise the costs of employing workers but that at the same time offers more security, especially social security, to the workers involved. As noted under Question 1 social security budgets need to be funded by taxes and social premium contributions. Employers thus should be expected to pay these taxes and social premiums. For countries which face a large informal economy and therefore have not enough tax income to finance a high level of social security, it might be beneficial to offer a skills development perspective to branches that are currently operating in the informal economy, aimed at increasing productivity. This way, these branches are supported in return for inevitable (but maybe reduced) taxes and social contributions. This includes entitlements for workers that provide training opportunities. Income tax and social contributions revenues can be used for this. Another challenge from a labour law perspective is to increase labour inspections in the informal sector. In some Member States fairly adequate legal provisions exist but enforcement and control systems are not operating adequately.

Some specific measures (some of which are being mentioned already by the European Commission) that are relevant are the following:

- a) Reduce the tax burden on low-wage earners to make work pay.
- b) Review employment contract regulations to strike a proper balance between flexibility and security (the general theme of this report)
- c) Redesign and re-regulate temporary agency work, as suggested under Question 4, so that temporary agency work can be a more secure alternative or functional equivalent to informal work.
- d) Increase female participation in the workforce (extension of parental leave for fathers, increase of childcare facilities and care facilities for elderly and disabled).
- e) Promote active ageing and reduce early retirement.
- f) Reduce youth unemployment through better vocational training/ apprenticeships.
- g) Reduce the informal economy through better integration of legally resident migrant workers (access to social protection and social services).
- h) Create a good business environment for new firms and small and medium-sized businesses as they are a major source of job creation and growth in Europe.
- i) Improve transport facilities from rural areas to cities, so that workers can afford to commute to areas where employment is growing.

8) Which active labour market policies, defined as policies to get the unemployed back into work, are working in the Member States?

In general tailor-made systems that activate and motivate people by re-qualifying them where needed and at the same time preserving the relationship with the labour market, also with the former employer(s), work best. The Danish activation policies are a good practice here. There are also good and recent practices of preventive approaches where the aim is to prevent workers from becoming (long-term) unemployed. Examples of these policies are the following:

- a) Austria – securing mobility in the labour market

With the new regulations of severance pay law in Austria in principle every employee (with an employment contract extending to over one month) is entitled to severance pay upon termination of an employment relationship. Commencing with the start of the employment relationship, the employer is obliged to pay a contribution amounting to 1.53% of monthly pay, such that the claim increases progressively. Severance pay claims are shifted to and enforceable vis-à-vis so-called employee provision funds (*Mitarbeitervorsorgekassen*). Within the new severance pay system, remittances become more transparent and predictable for businesses. Further, the new system eliminates the mobility-discouraging effect of severance pay and therefore is supposed to increase mobility of employees. Instead of losing claim to severance payment in case of self-termination, employees now can carry over the balance to the new employment relationship.

b) France – securing re-employment

The French Contrat de transition professionnelle (CTP) is offered to workers who face redundancy due to economic reasons and for whom the employer does not have a legal duty to contribute to their re-employment. The contract, which has duration of maximum 12 months, is signed between the jobseeker and the National Association for Professional Education of Adults (ANFP). The contract aims to offer a sequence of supporting measures tailored to the jobseeker's needs such as training and traineeships with public and private enterprises. In the months, during which the worker does not perform paid work, he or she is paid a salary of 80% of previous gross wage. In many cases, temporary work agencies are involved in the implementation of the CTP.

c) Sweden – supporting labour market transitions

In Sweden so called Career Transition Agreements are established as part of collective agreements whereby employers are given greater responsibility for employees' adjustment in case of redundancies. This is especially the case when older workers and people with a low level of education are concerned. Career Transition Agreements help workers who become redundant due to lack of work to find new jobs and can thus be seen as a complement to the Public Employment Service.

d) Finland – developing change security

Recently the concept of change security was introduced in Finland, providing dismissed workers with greater financial security during the stage of transition between jobs and fostering more efficient cooperation between employers, employees and labour authorities. Change security applies to workers who are in the process of dismissal due to economic reasons and have worked for the same employer or different employers for 3 years. Change security consists of paid time off during the notice period for the purpose of job seeking, an employment programme, employer's increased obligation to inform and negotiate and more effective employment office services.

e) Lithuania – extending coverage of ALMP

In 2006 Lithuania reviewed its active labour market policy and extended its coverage to more vulnerable groups and the inactive population. New measures were also introduced, such as job rotation schemes, where the unemployed act as temporary substitutes for up to 12 months for an individual taking a leave.

9) Identify key elements or policies that characterises the positive impact of Active Labour Market Policies.

See also the answers under Question 8.

In addition, the following elements and policies are key:

- a) Training and education within active labour market policies should be tailor-made and fit the level, needs and goals of the individual in order to reach maximum results.
- b) Training within active labour market policies should be strengthened to support upward mobility. Cooperation should be developed with enterprises, trade unions and local municipalities to ensure upward transitions that actually improve workers'

positions in terms of job quality, contractual conditions, sustainability and pay. The focus of ALMPs should move from ‘after care’ to ‘pre care’ and prevention of unemployment.

- c) A good balance of stick and carrots should be created, among other things in the form of availability criteria.
- d) The content of active labour market policies should be made more relevant to the demands of the labour market.
- e) Active labour market policy is not just about spending a lot of money; it is about spending it and organizing the policies the right way. Effective coordination of these policies is crucial; in some Member States ALMP agencies seem to compete against each other. Therefore governments should insist on better cooperation between labour and welfare related institutions, especially when they share the common target population (e.g. the unemployed welfare recipients).

10) How important is it for a successful Active Labour Market Policy to promote lifelong learning/vocational training, and if so, what policy tools are best suited to this end?

Life-long learning and vocational training represent a key requirement for workers to operate on modern labour markets, as they add value to workers’ human capital. They ensure workers’ productivity, adaptability, employability and, thus, their employment security. Life-long learning and vocational training are key as well to job satisfaction and self-fulfilment. Important policy tools are the following:

- a) Spread chances of education and training equally among employees. Currently some groups, such as older employees and low skilled, have less access to training.
- b) Facilitate combinations of working and learning as much as possible. This stimulates both a longer working life and lifelong learning. Consider whether the responsibilities of government and social partners are suitable to reach this goal. Moreover, functional flexibility is poorly used by organisations, whereas this type of flexibilisation improves workers capacities and gives organisations more flexibility and employees more job and employment security.
- c) Make sure that life-long learning is not limited to workers employed by companies. New entrants to the labour market, unemployed and inactive persons, as well as self-employed persons should also have access to life-long systems. Facilities can be offered by companies, but also supported and funded by the government, regions or municipalities.
- h) Provide low-threshold systems for the Accreditation of Prior Learning (APL) and make sure that skills and education certificates are ‘portable’ across national and sector borders.
- d) Create training and education accounts for everyone in the working age and make the government responsible for facilitating such accounts. Review incentives for workers and enterprises (including Temporary Work Agencies) and the education system to enhance participation in lifelong learning by financial contributions for firms, tax credits to firms and workers.

- e) Support the establishment by social partners of joint training funds at branch or regional level, e.g. regulated by collective labour agreement. Employees should have access to such funds. These funds also have to allow for training for cross-sector mobility and mobility between professions. At the same time workers should be made more responsible for investing in a life-time career by means of training efforts, e.g. by agreeing on this in individual employment contracts. Under-investment in training could be considered a breach of contract, for either of the parties.
- f) Combat the problem of early school leavers. Pay special attention to people that are at risk, while still at school, the potential early school-leavers. They can benefit from four types of measures: more timely intervention, more tailor-made approaches, a better infrastructure to support career guidance throughout the life course and better combinations of working and training to avoid total school drop-out.
- g) Develop a legal right to career guidance.
- h) Facilitate and promote the use of leave schemes for training.
- i) Develop training targeted to the low-skilled. Use dual learning and other productive combinations of work and training, especially for the low-skilled. Recognise and validate informal learning and organise low-threshold, easy access language and computer training in and outside the workplace.

11) What measures are needed to promote a life-cycle approach to work?

A life-cycle approach should facilitate people in two ways. First it should enable them to 'synchronize' paid work and with other activities and responsibilities in life. Second, it should help in the diachronization, i.e. the synchronization through time, of different life-phases and help avoid that choices and behaviour in earlier life-phases negatively affect opportunities and choices in future life-phases (a problem of path dependence). A life-cycle approach to work is also needed to adequately address the different flexibility and security needs that employees have throughout their life-course. As already indicate under Question 1, security, in a dynamic perspective, is about building and preserving people's ability to enter, remain and progress in employment throughout the life-cycle. Measures that support such a life-cycle approach include:

- a) The right package (and mix) of leave and saving schemes to enable people to make good, socially-productive transitions to, on and from the labour. These schemes specifically allow for the adjustment of working hours (in view of care duties, but also for part-time, gradual retirement from the labour market at the end of the working age) and for the (life-long) investment in training and education.
- b) These packages can be provided by law, by means of legal rights to leave, by fiscal measures (tax friendly saving schemes) and also by collective labour agreements (i.e. if the coverage of the agreements is sufficiently broad so no large numbers of workers are excluded). Good examples are: the Scandinavian rights to leave, the Belgian time credit (*tijdskrediet*) system, the Dutch Life Course Savings scheme (*levensloopregeling*) and the systems of working-time self-rostering and working-time accounts that have been introduced in e.g. Swedish, British, Dutch and German firms. As underlined already under Question 10, a right to career guidance should also be considered essential. Finally, it is important that leave schemes regarding the care of children apply to both parents.

- c) The European social partners might agree on a general, European ‘right to transitional employment’, i.e. the right for workers not to be discriminated against or to be disfavoured in any other way when making good transitions and combinations in the labour market, including transitions and combinations related to work and care, work and training, work and part-time retirement and transitions from one job to a new job (either in the same firm or to another firm). Such a right might limit the ‘risk of risk-taking’ in the labour market and endorse the message that social dynamism is valued in Europe.