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AK Position

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AK Position on the Green Paper “Modernising Labour Law to Meet the Challenges of the 21st Century”



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The Problem

The Federal Chamber of Labour (AK) is the umbrella organisation of the nine chambers of labour set up at federal state level. It is a public corporation and as such represents the legal interests of all employed persons in Austria.

As the umbrella organisation, the AK represents a total of around 3 million members on all economic, social and educational policy issues.

The following is an overview of our appraisal of the Green Paper. We then tackle the individual points of the text in more detail. Finally, we answer the questions posed.

The AK Position on the Green Paper “Labour Law”

We welcome the Commission’s initiative to start an open discussion on how to develop labour law further with regard to the Lisbon objectives of “sustainable growth with more and better jobs”.

Social policy considerations as well as economic policy considerations speak for sound working conditions, fair wages, a balance between family life and work, high-quality training and further education and social dialogue at company level as well as beyond the enterprise. These key goals should not be neglected when “modernising labour law”.

Unfortunately, the Green Paper only honours the call for “better jobs” in isolated places (clear position against discrimination of temporary work and against undeclared work, reference to not enough protected employment transitions, call for an increase in administrative cooperation at EU level in order to combat abuse of and circumvention of labour laws).

It is unfortunate that the spread of “non-standard contractual arrangements” being witnessed throughout Europe is described in a very uncritical way in several passages of the Green Paper. If it means for example that “workers are also afforded... increasing career opportunities, a better balance between family life, work and education...”, then it conflicts greatly with the reality, as experienced by very many “atypical

workers” in their everyday working life.

We also consider the growing apart of “standard contractual arrangements” and “alternative forms of work” to be one of the significant challenges facing us. However, we do not believe that a reduction in the security level of standard contractual arrangements would be the right answer to the new challenges. The EU’s goal of social progress and “better jobs” cannot be achieved this way. This method would also be unsuccessful when looking at the economy (as a whole).

Flexicurity is only understood in terms of improved flexibility of business interests and the adaptation of workers to the flexibility requirements of the economy. The flexibility requirements of workers (in particular better balance between family life and work, contractual clauses that hinder mobility) are ignored almost completely.

There are also hardly any attempts to make the security aspect the starting point of the considerations.

The flexibility requirements of workers are almost completely ignored

The 6 Main Challenges

We consider the most important challenges at EU level at present to be as follows:

- Determine minimum working conditions for temporary work
- Limit the admissibility of employment contract clauses that restrict the mobility of workers in an irrelevant way (clauses on the repayment of training costs, clauses governing restrictions on work during and after employment, clauses on the forfeiture of vested rights to company pension commitments etc.)
- Reform the Working Time Directive (end to opting-out, creation of a collective agreement competence for special consideration of times when one is on call)
- Regulations for a better balance between family life and work
- Guarantee fair working conditions for those gainfully employed across national borders
- Review the practical implementation of existing directives.

AK defines 6 main challenges in the field of a new Labour Law

The Main Thrust of the Green Paper and the Purpose of Labour Law

The Green Paper is focused mainly on economic interests. What are their needs and in what way does labour law need to be changed so that these are met? The Green Paper points out that to achieve the desired flexibility for workers, a body of social rights should also be ensured. However, many statements and questions are aimed in the end at diluting labour law provisions with regard to more freedom for enterprises. Such an approach holds the danger that the "modernisation" plan will ultimately lead to a worsening in labour law standards. A modern labour law should not only take modified general economic conditions into account, it should also taken into account new habits and forms of employment as well as general social conditions.

The Green Paper ignores the fact that one of the main functions of labour law is still to even up the structural balance of power between employer and employee. Wordings such as "The original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship" (p. 5) suggest that the Commission no longer attaches considerable importance to this purpose. This viewpoint may hold for a small section of highly skilled workers not limited by family obligations or other circumstances in their arrangements, whose qualifications are in high demand on the labour market. However, this does not apply to the broad majority of employees. Employed persons are increasingly likely to encounter highly specialized HR experts and managers when drafting employment contracts. A few skilled workers in particular are often overtaxed when asserting their interests and claims. This can be seen e.g. from the tendency towards consultations and legal proceedings for workers that has been increasing for years. For example, judicial proceedings filed with the

Chamber of Labour in Vienna have increased by 70% in the last ten years.

This is why balancing economic and social inequalities is now at least just as important as before. Reasons for this include in particular:

- The increasing professional approach of employers in labour law matters already mentioned
- Increased competitive pressure, which is also passed on to workers
- The pressure on wage and working conditions because of the increasing cross-border deployment of workers (see also the answer to questions 12 to 14)
- The increasing importance of so-called alternative forms of employment; in particular atypical employment relationships (see below)
- Easier access for employers to standard forms of contract optimised for them and templates for labour law agreements.

Standard contract versus atypical employment

The Commission's approach, which involves viewing "standard contracts" as the co-party responsible for the increased proliferation of atypical forms of employment (in particular page 7), is questionable. Alternative forms of work have developed for the most part because the legal scope for manoeuvre or freedom were used. In many cases, it is based on the employer's intention to circumvent the labour law protection provisions as much as possible. There is often also

... this leads to **unjustified competitive advantages** in the social security system...

...an Austrian study revealed that **70% of the quasi-freelancers surveyed were working self-employed involuntarily.**

the inclination to not want to pay social security contributions. This leads to unjustified competitive advantages to the detriment of rivals and those employed there and to the detriment of the social security system. If the Lisbon objective of creating "better" jobs is taken seriously, it cannot be about reconciling "normal" employment relationships with atypical forms of employment. More emphasis should be placed on atypical employment relationships, particularly where apparent self-employed persons or quasi-subordinate employment are involved, in order to provide better labour law and social law protection and therefore also eliminate irrelevant cost advantages for employers when choosing these forms of employment.

Also questionable is the statement in the Green Paper that self-employment reflects in many cases a free choice to work independently despite lower levels of social protection in exchange for more direct control over employment conditions and terms of remuneration (page 8). This is certainly true in many cases on the strength of the large number of new self-employed – if viewed in absolute terms. However, relative figures are more meaningful and on this matter, an Austrian study for example (Schönbauer/Laburda, Atypical employment – emblematic for the future of work, 2003) revealed that 70% of the quasi-freelancers surveyed (in European jargon, comparable for instance with so-called freelancers) were working in this employment form involuntarily. The reference to the optional nature of working as a self-employed person is misleading and disguises the real facts.

The statement in which the phenomenon of self-employment is a growing feature of the construction and personal services sectors

associated with outsourcing, subcontracting and project based work also needs to be expanded upon (page 8). One reason for the increase is also the fact that certain gainful employment like building work or cleaning services, which were performed up to now in the form of employment relationships, are increasingly being performed "independently". This involves as a rule an "actual shifting of the worker concept" and pushing the workers in question into (bogus) self-employed work. This is why we need to reform the concept of "worker" (for more detail, see the answers to questions 7 and 12).

The statement in which non-standard as well as flexible contractual arrangements enable businesses to respond quicker to different circumstances and workers are afforded greater choice, increasing career opportunities, a better balance between family life, work and education as well as more individual responsibility is one-sided and misleading (page 8). Firstly, this is actually only the case for a part of these contracts. Secondly, reference should also be made to the disadvantages **often involved with them, in particular poorer labour and social law protection, tougher access to training and further education and weaker organisational integration in the business. Thirdly, it is largely undisputed that key aspects of employment like motivation, further training, communication and employee codetermination are most likely guaranteed as part of standard contracts.**

Aside from social policy considerations, "normal" contracts drawn up permanently are therefore advantageous and very important particularly for a European economy based on sustainability and high human capital.

Flexicurity, Protection Against Dismissal and Flexible Labour Market

The Green Paper mentions – both expressly and implicitly – the flexicurity concept several times, i.e. the intention to combine improved flexibility with the greatest possible security. However, this concept, in itself value-free, is unfortunately examined mainly from the viewpoint of “improved flexibility” (for the economy).

“Flexibility” in the Green Paper is taken to mean in general flexibility only in the sense of business interests and the adaptation of workers to the flexibility requirements of the economy. The flexibility requirements of workers, in particular for a better balance between family life and work, are almost completely ignored (see the answer to question 11). Flexibility restrictions on workers e.g. via contractual clauses that hinder mobility are also ignored (see the answers to questions 2 and 4).

On top of that, there are scarcely any attempts to make the security part the starting point of considerations. However, new habits, forms of employment as well as basic social conditions make this necessary. Specific examples of these are forms of atypical employment relationships (see above and the answer to question 10), patchwork families (e.g. in connection with care duties) and more complicated possibilities to control cross-border employment (see the answers to questions 7, 9 and 12). It is also important to clarify that the security aspect not only includes employment security and social protection, but also in particular fair working conditions, fair remuneration and the right to protect one’s interests and codetermination.

The topic protection against dismissal is also regularly looked at only from one viewpoint. The Green Paper only tries to portray negative sides to stringent employment protection legislation (page

9 onwards); positive aspects of protection against dismissal are ignored. The latter includes among other things higher motivation and attachment of workers to their enterprise, higher investments in training and further education as well as health protection, a reduction in transaction costs (costs for personnel search and school enrolment), protection against arbitrariness and social ruin, protecting the effectiveness of labour law (workers that can be given notice at any time naturally feel inhibited about demanding their rights) and employment security of persons that warrant protection in particular (see also the answer to question 6).

The fact that previous studies – in particular relevant studies by the OECD from recent years – have shown that employment protection provisions should not just be automatically viewed as obstacles to employment and have no clear effects on unemployment and employment is also ignored.

Other forms of deregulation for creating a more flexible labour market, such as watering down the centralized wage bargaining system, making working hours more flexible and reducing transfer income, have also not produced the desired employment policy effects that were put forward originally by their supporters. This is demonstrated e.g. by Hartmut Seifert using the German deregulation policy as an example (Seifert, Was hat die Flexibilisierung des Arbeitsmarktes gebracht?, WSI monthly journal, 11/2006). These findings led the German President of the Federal Labour Court to make the following statement: “Some people believe that labour market minus labour law leads to full employment. This serves to distract us from the actual problems on the labour market. There are in fact empirical studies that prove that

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easing protection against dismissal has not led to greater employment since 1984. Labour law has no significant influence on the increase or decrease in unemployment figures" (Federal Labour Court President Schmidt, in: Der Tagesspiegel newspaper, 13.6.2005).

This connection also cannot be established in Denmark, as shown by a scientific investigation by labour law experts from the WSI at the Hans Böckler Foundation: the sharp drop in unemployment in Denmark during the 1990s cannot be put down to "slimmed-down" Protection against Dismissal Acts, for the same protection against dismissal regulations now apply in Denmark as those in 1993, when the unemployment rate was still 10.2%.

The Green Paper and the Lisbon Strategy

“The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy’s objective of achieving sustainable growth with more and better jobs. The modernization of labour law constitutes a key element for the success of the adaptability of workers and enterprises. This objective needs to be pursued in the light of the Community’s objectives of full employment, labour productivity and social cohesion” (page 3).

Unfortunately, further statements made in the Green Paper only live up to these introductory words in part. On the contrary: the impression is that preference is given to so-called flexible employment relationships – the list specifies fixed term contracts, on-call contracts, zero-hour contracts, temporary agency worker contracts, freelancer contracts – over normal relationships or standard contracts. This even though it is recognised that atypical employment relationships often do not offer good working conditions, and motivation and further training of workers as well as employee communication and codetermination are most likely guaranteed within the framework of the standard contract.

That is why we would like to recall the conclusions of the Stockholm European Council in March 2001: “Regaining full employment not only involves focusing on more jobs, but also on better jobs. Increased efforts should be made to promote a good working environment for all including equal opportunities for the disabled, gender equality, good and flexible work organisation permitting better reconciliation of working and personal life, lifelong learning, health and safety at work, employee involvement and diversity in working life”.

We also recall the Commission statement from 2003: “Quality in work goes hand in hand with progress towards full employment, higher productivity growth and better social cohesion” (COM (2003) 728, 26.11.2003: “Improving quality in work: a review of recent progress”).

The employment policy guidelines contain a similar position: “Implement employment policies serving at achieving full employment, improving quality and productivity at work, and strengthening social and territorial cohesion... The quality of jobs, including pay and benefits, working conditions, employment security, access to lifelong learning and career prospects is crucial, as are support and incentives stemming from social protection systems” (Guidelines for the employment policies of the Member States 2005-2008, No. 17).

These aspects are of vital importance for a European economy geared to high-quality work, a high level of motivation and sustainability. Social policy and economic policy do not contradict each other. The considerations mentioned in the documents cited must also be considered when developing European and national labour law further.

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Q&A Concerning the Green Paper

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

The EU should focus on developing minimum European standards and checking the implementation of existing directives.

Further development calls for the creation of new minimum standards and an improvement in existing standards. The Commission should take the initiative in particular on the following topics:

- Contractual clauses that hinder mobility (see also question 4)
- Minimum standards for temporary work (see also question 10)
- Creation of an EU-wide worker concept in the sense of a minimum standard (see also question 12)
- Balance between family life and work (see also question 11)
- So-called on-call and zero-hour contracts (see also question 11)
- Company pensions (portability directive)
- Modernisation of worker protection legislation (taking into account new scientific findings, protection for jobs in the open air, minimum standards with regard to prevention protection, training guidelines/directives for security specialists, occupational physicians and others)

An improvement in existing minimum standards is needed above all in the following areas:

- Works council directive
- Parental leave directive (extending the period of three months)
- Collective redundancies directive (social countervailing measures in the sense of a social plan)
- Working time directive (end to opting-out, collective agreement competence in order to take on-call hours into account).

High priority should also be afforded to checking that existing directives have been implemented properly. Previous investigations have shown that there are quite a few problems, gaps and weak points in implementing directives. This goes not only for implementing them in national law, but also for implementing them in practice. This can be put down in part to the lack of resources available to control authorities. It would be desirable if the European Commission would act here at least in almost the same offensive way as it does with business exemptions (freedom of establishment, freedom to provide services). Investigations on the practical implementation of directives need to be carried out systematically and corresponding steps taken and called for if need be. At any rate, the individual Member States should not only have sole responsibility for practical implementation.

With the Posting of Workers Directive in particular, deficiencies in its practical implementation were found in investigations. Responsibility for this unsatisfactory situation is still shunted back and forth sometimes between the national and

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European level. However, a joint course of action is needed in order to gain effective control of the problem. At any rate, suitable basic conditions need to be created for cross-border cooperation among authorities (commitment to effective information exchange; delivery of documents; taking of evidence on commission; enforcement of decisions) and effective controls are permissible (see also the answer to question 12). There is also a particular need for action in connection with the directive on employee information (see the answer to question 9).

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?

Improved flexibility could be achieved through a ban or at least the legal restriction on clauses in contracts that hinder mobility. This means in particular the prohibition of employment arising more and more frequently during and after the employment relationship has ended, clauses on the repayment of training costs and forfeiture clauses to rights to company pension commitments (see also the answer to question 4).

Improved flexibility can also be achieved through better in-house training of workers. Well trained workers can be deployed as a rule more flexibly.

However, improved flexibility should be achieved above all through changes in labour law with regard to the balance between family life and work. The flexibility needed for this must however

be geared primarily to the needs of parents – flexibilisation geared purely to employer interests is diametrically opposed to the balance between family life and work also called for time and again in EU documents.

Flexible forms of employment should be rejected if they are at the expense of the balance between family life and work, employment security, working conditions or social security. Unfortunately, this is often the case with atypical employment relationships.

Unlike how it is explained in the Green Paper, in many cases these atypical forms of employment are not based primarily on the employers' desire for flexibility, but on their desire to minimise costs (to the detriment of workers). A common method is e.g. to force dependent employees into apparent self-employment (no right to work, no collective agreement, no social security contributions from the employer). This is a burden not only on those directly affected, but also leads to unjustified competitive advantages to the detriment of rivals and the workers employed there, and is detrimental to the social security system. One of the big challenges is to stop such practices.

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?

The question here is already tendentious, with the importance of labour law underestimated. It is assumed that labour law would always need to be reformed if it gets in the way of a short-term productivity increase etc. in an enterprise. In connection with this, the Green Paper ignores the fact that the primary function of labour law is to even up the structural balance of power between employer and employee (at least in part) and ensure the fairest conditions possible in the working world. However, it also ignores the fact that that which enables higher productivity in the short term in a single enterprise often has a tense relationship with the aim of a sustainable increase in general economic productivity. If the balance between family life and work is undermined e.g. by “flexible” working hours for workers that cannot be planned, then the negative effects (low birth rates, shortage of workers in the long run etc.) will not make a significant difference to the enterprise’s cost accounting. However, such behaviour ultimately brings with it negative consequences for the economic as a whole. Something similar holds for health protection in the workplace etc.

Similarly frivolous questions and a similar course of action were also chosen when working on the services directive (report on the status of the single market for services from 1992). Surveying enterprises on their difficulties with cross-border services also served as the starting point at the time for the proposal for a directive, without taking into account other interests. It would be similarly one-sided and make little sense to make changes to the Highway Code based purely on a survey of road users with regard to possible obstructions caused by road signs. It is to be hoped that the answers to this question are not used to worsen

minimum labour law standards.

An increase in productivity could be achieved through better training of managers, better internal communication and by extending the participation rights of workers and employee representatives. Studies by the Proudfoot consultancy have revealed that the lack of leadership among managers and poor internal communication between management and employees are the main reasons for a lack of productivity.

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?

There is undoubtedly a considerable need for action – at national as well as European level – with regard to contractual clauses that hinder mobility (see also the answer to question 2). Changing jobs and taking up employment relationships again could be made easier via a statutory ban or at least greater restrictions on such contractual clauses.

In addition, we should ensure that no disadvantages arise in terms of social security benefits and crediting against the number of previous years of service if somebody changes employer or the way in which gainful employment is performed in general. This is largely guaranteed in many sectors. However, there are still cases and areas (e.g. company pensions, temporary agency

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workers, free service contracts) where there is a need for action.

An important factor in any job search or change of employer is qualifications. In the process, a key function is assigned to training and further education during the employment relationship. As is known, training and further education by enterprises is however offered more often than not only to employees with "standard contracts". Against this background, it is not very consistent if the Green Paper (as in many other EU documents) on the one hand underlines the vital importance of training and further education whilst on the other depicts the apparent shift away from "standard contracts" and avoids value judgments – even positive ones in part – without e.g. addressing the negative implications for training and further education. In our opinion, training and further education in the enterprise should be stepped up (minimum right to further education, public promotion etc.; see also the answer to question 6).

Strengthening social security funding would also be sensible. Social security systems in quite a few countries – in Austria too – are funded for the most part by earnings-related contributions. Whilst this type of funding has advantages, it also has disadvantages (in particular high earnings-related ancillary costs). Strengthening funding would enable a reduction in labour costs and therefore counteract the cost advantages of atypical forms of employment such as e.g. apparent self-employment.

In general terms, we should take into consideration the fact that changes / making labour law more flexible also have implications for other sectors.

If changes are made for example to continued remuneration in case of sickness, then this would impact on the corresponding substitute wage payments from social security. This in turn impacts on the financial needs of the social security system and also on the distribution of the social costs associated with carrying out work. Proposals must therefore always be considered and judged in their entirety.

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?

By implication, the question addresses the so-called Danish model. This model is characterised by weak protection against dismissal (tendentiously worded as "light employment protection legislation" in the Green Paper) on the one hand and high financial support and high expenditure for an active labour market policy (in particular further education) on the other.

It certainly makes sense to "think about" such models. However, an overall way of looking at things is also needed here and not just at individual elements. The financing question for example really needs to be considered as well; namely: what does such a model cost vis-à-vis an active and passive labour market policy, and who pays the costs?

In our opinion, shifting costs from trade and industry to public funds should at any rate be rejected. If such a model required higher contributions to be paid to the social security system or the labour market policy, then these costs would need to be borne by the enterprises.

It cannot be that employers save themselves wage payments e.g. thanks to shortened notice periods whilst the public authorities or workers bear the costs for it. It should also not be the case that employers save on costs for training, further education and retraining because atypical workers are deployed and that financing is passed onto others.

Reform of the Austrian Severance Act (Abfertigungsrecht) is cited as a positive example of measures “supportive of employment transitions”. It is right that job mobility is increased with the switch from single payments by the employer if a contract ends (except if the employee gives notice) to regular contribution payments by the employer into an employee benefit provision fund (abolition of high one-off costs for enterprises if a contract ends, abolition of the loss of severance if an employee himself terminates the contract). However, it is also right – and this is unfortunately not mentioned in the Green Paper – that this reform resulted in an extremely high number of “atypical” employment relationships being reintegrated into the Severance Act. The old Severance Act was only applied to employment relationships lasting at least three years with one employer. However, in the new Act employers must pay (severance) contributions to the fund for each employment relationship from the second month of employment, and these may no longer be lost for the employee affected. The

associated extension of severance “to all workers” was one of the key demands of the employee representations – without this crucial plank, they would not have lent their support to the reform. At the same time, it was also important for the employee representations that the new regulation removed an indefensible cost advantage for employers that only opt for short-term employment.

Positive suggestions can also be taken from the Austrian system of apprenticeship training. The so-called dual training system (training at work and technical college) helps to keep youth unemployment relatively low at the beginning of one’s career. In countries in which such a system of vocational training is unavailable as an option to enter a career, youth unemployment is for the most part far higher. There is also the fact that young persons are more likely to enter working life by way of atypical working relationships if such vocational training is unavailable, combined with the danger that those affected are no longer able to gain a foothold on the normal job market.

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 of upward mobility over the course of a fully active working life?

Measures to promote access to training and to make transitions between different contractual forms easier include:

...special protection against dismissal deserves particular mention...

- Attractive forms of training leave (right to take leave of the employment relationship and at the same time right to financial benefits)
- Legal right to a certain number of hours of paid further training per year of work (e.g. 35 hours)
- Provisions that provide for the fact that a certain notional percentage must be invested by the employer in an employee's training and further education based on the employee's pay and that non-compliance is also sanctioned by the government (in the process, the corresponding regulations in Portugal, Spain or Italy could serve as examples)
- Right of job seekers to an individual job plan with further training (like for example in Denmark).

Which specific measures are sensible and in what form should be judged differently from Member State to Member State. Likewise the question as to which level is most suitable (law, collective agreement etc.) to regulate this. However, the education policy paradoxes should at least be taken into consideration. This implies that persons with a low level of education have poorer access to on the job training and that this tends to be focused on younger, well educated men. Measures should therefore pay special attention to poorly trained workers, women, older persons, disabled persons and atypical employees.

The "lifecycle approach to work" mentioned in the Green Paper can definitely promote flexibility if this is seen not only as a "one-way street", i.e. is only detrimental to workers. In connection

with this, special protection against dismissal deserves particular mention. This then applies if workers stay away from their workplace for a certain period whether because of family reasons (pregnancy, child care) or reasons established by law (compulsory military service or alternative civilian service). Employee representatives that safeguard the rights of workers in enterprises are also protected. Finally, there are also regulations like these for persons with disabilities.

The everyday experience with advice on labour law shows how important such regulations are. A lot of these persons are given notice at the earliest possible moment because their capacity to work cannot be used in the best possible way by the employer. A lifestyle approach to work must include the protection of such phases of life and conditions – such situations are part of the lifestyle of a large part of workers and in particular female workers. Protection afforded by unemployment benefit cannot replace protection as part of an employment relationship.

A lifestyle approach to work also demands in particular that learning phases are integrated into working life. Trade and industry in particular propagates time and again that jobs can only be preserved with lifelong learning. However, activities also need to be set for this, not least on the part of trade and industry.

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 demarcation between self-employment and employment plays a key role even if those affected are not always fully aware of it. Labour law, collective agreements, rights of codetermination, on the job training etc. only exist for employment as part of an employment relationship. There are also significant differences in social protection.

Against this background, it is very important that we stop forcing employees out of the status of “worker” and into the status of “self-employed”, which is happening more and more often in practice. We need to ensure that new forms of employment are treated as such and prevent the spread of apparent self-employment.

The Austrian worker concept is in need of reform in so far as the element of economic dependence should be taken into account more in view of the ever greater real undermining of the criterion of personal dependence in employment relations. In addition, there should be – like for example in Sweden – a rule where one should start from the status as worker in principle if in doubt. An interesting approach is also the rule of presumption in the Netherlands mentioned in FN 28, whereby the presumption speaks for an employment relationship if certain criteria exist.

In connection with this, a legal stipulation is essential – already in place in Austria – which states that it is not the external form of the contract that is crucial for the evaluation, but the content and the actual performance of the activity (evaluation based on the so-called “real economic content”).

The Commission’s position on the subject

of apparent self-employment / disguised employment is ambiguous. On the one hand, the Green Paper states that fraudulent acts are involved in order to circumvent national law and it cites examples of national regulations that check these apparent forms of employment (in particular the legal rule of presumption in the Netherlands). On the other, infringement proceedings were / are currently being taken against Member States that have established similar rules of presumption (infringement proceedings against France ECJ 15.06.2006, case C-255/04 and against Austria, no. 2004/2204).

The European Commission’s approach to fighting apparent self-employment is incomprehensible also in connection with the Posting of Workers Directive and the circumvention of transitional provisions on the free movement of workers with the new Member States. As this naturally involves cross-border circumstances, cooperation at government level between two Member States or a partial procedure by electronic means in another Member State is often indispensable (delivery of documents by an authority, hearing of witnesses, enforcement of administrative penalties etc). In addition, as only the authority in the Member State in which the infringement existed or is presumed has an interest in pursuing the matter, effective action calls for Europe-wide measures, otherwise prosecutions will sooner or later come to nothing. Although the European Commission has been aware of this problem for years, it “stresses” that these problems should be dealt with primarily by Member States (page 11, paragraph 1). In contrast, the Commission acts in a much more offensive manner on the freedom to provide services. For this, infringement proceedings are instituted,

in-depth investigations carried out, initiatives launched, seminars held etc., and a proposal for a directive (services directive) was submitted that would have fundamentally altered the legal structure in Europe in its original form and triggered a race involving the lowering of legal standards.

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?

Labour law should be applied equally to all workers. Splitting workers up into different categories vis-à-vis their protection tends to have the effect of forcing those that are financially weakest, in particular those with low qualifications, young persons, women with care responsibilities and migrants into poorer labour law. This would diametrically oppose the protective purpose of labour law and at the same time also the Lisbon objective of “better jobs”.

However, selective exceptions can be made if there is relevant justification for it and there is no danger of the protective purpose being undermined. An example of this would be for example the deviations for senior executives in the law on working hours (see in particular Art 17 of the Working Time Directive).

However, the minimum requirements addressed in the question in terms of minimum protection standards should be created for a group that should not be assigned to workers in the

narrower sense. With regard to a comprehensive definition of workers that meets the conditions of the modern world of work (cf the comments on question 7), there will also still be self-employed persons that require contract law and social law protection owing to certain dependencies on their employers. Minimum standards, which should also be afforded to such dependent contractors, include in particular the right to health protection, to the possibility of collective negotiations on fees, to social security in the event of sickness and unemployment, to terms of protection in the event of contracts being terminated and reduction in compensation in the event of damage caused by slight negligence in connection with completing the contract.

9. Do you think that 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”?

Especially with three-way relationships – in particular temporary agency worker contracts – great demands on transparency exist with regard to the validity of the working conditions. There is a need for action here at national and European level.

In Austria, there is a lack of clarification in particular with regard to the validity of works agreements (which works agreements from the employer and which works agreements from the leaser or firm hiring out temporary workers apply to temporary agency workers).

With the exception of a few regulations in the law on worker protection, there is a lack of minimum standards for temporary agency workers at European level. Previous initiatives unfortunately enjoyed little success.

Basic transparency is often missing in practice in the building sector as it is often not clearly discernible at all who the employer is by contract owing to the usual sub-contractor chains and the provision of services in the form of work associations of several contractors. Background to these uncertainties sometimes include specific strategies by employers to elude demands from workers, social security or the tax authorities or to postpone it until “controlled” insolvency. Subsidiary liability for wages or general contractor liability would improve this situation – partly because of the general preventative effect.

The introduction of general contractor liability for the social security contributions of employers is provided for in the Austrian government programme for 2007.

General contractor liability is of great importance also in connection with postings or the hiring of workers from abroad as prosecutions in these cases are associated with a high cost risk for individual workers and it is in any case extremely slow and costly.

There is also a need for improvement in connection with the directive on employee information. This provides for certain information obligations on the part of the employer concerning the working conditions. The Austrian system provides for the issuance of a statement of terms and conditions. This statement of terms and conditions can contribute considerably to the transparency of working conditions and therefore to the avoidance of disputes – whatever the type – between workers and employers not least also in “three-way” relationships. Unfortunately, the issuance of statements of terms and conditions is in practice scarce especially in industries in which there are often labour law conflicts (catering, construction industry). This obligation is completely ignored in part. Unfortunately, there is a lack of practical enforceability on the issuance of statements of terms and conditions – there is also no provision for checks to be made by authorities. As it may be supposed that the situation is similar in other Member States, there is a need for action not only at national level but also at European level. An effective obligation to issue the corresponding document would be in keeping with the goal of “better jobs” and would improve the situation of many workers.

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

The question is a little unclear. However, it should be agreed whether special labour law regulation requirements are needed for temporary agency workers. This should be approved of without a doubt. The Austrian law on temporary agency workers (Arbeitskräfteüberlassungsgesetz)

The balance between family life and work is of great importance.

contains for example specific legal provisions with regard to transparency (obligations to provide and furnish information), division of employer obligations, rights to remuneration, prohibited contractual clauses etc.

However, it would also be necessary to incorporate the principle of non-discrimination of temporary agency workers in a legally binding way throughout the EU, also for areas in which it leads de facto to discrimination of temporary agency workers. Access to further training measures and organizational integration and representation in the enterprise in particular would therefore be addressed. Adoption of the EU temporary agency worker directive, which has been planned for a long time, would mean an important step forwards.

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?

Worker protection is not only about the health and safety of workers, but also about the protection of private life and family life. The balance between family life and work in particular is of great importance. Against the background of increasing (above all psychological) pressures among a high number of workers and the simultaneous objective of staying employed longer, the health policy components of working time protection are

however also gaining in importance again.

The main objective of changes in the law on working time made recently was always to increase flexibility for employers, i.e. to be able to deploy workers as flexibly as possible depending on the workload. However, a form of flexibility like this is not compatible with the goal of striking a balance between family life and work. Parents need working hours that can be planned and flexible arrangements if particular incidents (child suddenly falls ill etc.) make this necessary. With regard to the balance between family life and work and with it also the increase in the female participation rate, we therefore need to move the flexibility of the employer into the centre of our considerations vis-à-vis the needs of parents.

In addition, there is also a need for action in connection with the so-called "opt-out", with on-call contracts and with zero-hour contracts (see Green Paper, page 7). Provisions should be created that ensure that no use can be made of these legal forms or possibilities or at most in a socially justifiable form whilst integrating the social partners.

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?

Parents need working hours that can be planned...

**There is an increasing tendency towards cross-border competition at the expense of working conditions and wages...
[...] We need to take clear steps against such trends.**

This question addresses a central problem associated with enterprises with increasing transnational activities. There is an increasing tendency towards cross-border competition at the expense of working conditions and wages, in particular due to EU enlargement and the large wage differential. The cases of Vaxholm / Laval and Partner (C-341/05) and Viking (C-438/05) currently pending with the European Court of Justice are classic examples of this, although they are undoubtedly just the tip of the iceberg. We need to take clear steps against such trends.

In connection with this, it is important that cooperation between the authorities and the social security institutions works well. This has not been the case hitherto. Many infringements are not even pursued as the authorities that carry out checks know that they will not receive the necessary information from the authorities abroad or social security institutions, or if they do it is delayed for months. As no improvement is in sight, there is a tremendous need for action at national as well as European level. Up until now, the only aim in essence was to make it easier and quicker to form enterprises, restructure them and trade across national borders. However, this should not be at the expense of keeping to legal provisions or workers' rights and ultimately to the detriment of the European Social Model. However, this is currently the case owing to the limited options available to authorities in terms of working on cross-border affairs, and the difficulties of cross-border prosecutions. If a fundamental rethink is not effected quickly and corresponding measures are not taken, a dumping competition involving social and labour law standards is to be expected. It is foreseeable that the widely held scepticism that already exists in the EU will continue to rise.

There is also a need for action in connection with the European social security card. This should make it easier to use health services especially when on holiday and business trips. However, numerous complaints in Austria prove that these cards are often not accepted by doctors in other Member States and that patients are asked to pay in cash. The Commission should exert greater influence on the health insurance funds and health authorities so that they oblige their panel doctors to treat foreign patients like nationals.

In addition, there is a need for an EU-wide convergent definition of the term "worker". Viewed realistically, it will only be possible in terms of or in the form of a minimum European standard as a European agreement on a convergent worker concept will not be easy to achieve. The starting point should be the legal precedent set by the European Court of Justice on the definition of "worker" within the meaning of Art 39 EC Treaty. A certain level of European standardisation is needed not only in connection with the labour law directives, but also above all with regard to increasing cross-border employment. If differences exist between the Member States when distinguishing between subordinate employment and independent self-employment, then this leads inevitably to problems vis-à-vis cross-border work. At the same time, we should also think about e.g. the transitional arrangements set out in the accession treaties with regard to free movement of workers and controlling worker protection provisions. Problems will increase further in the near future due to the abolition of permits from authorities for cross-border work as part of the freedom to provide services on the basis of the directive on the recognition of professional qualifications.

The social partners can play a role in enforcing labour law (information, legal protection of those concerned, drawing the attention of authorities to violations of the law etc.).

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

Reinforced cooperation between authorities and social security institutions is undoubtedly needed (see question 12). Whilst enterprises have been working in a transnational context for years with no fundamental restrictions, authorities cannot even serve abroad a document in many areas. The difficulties are enormous and favour unfair competition, criminal practices and social dumping. Although this fact has been known for years and it is also evident that coordinated action is needed, one has remained largely inactive up to now at European level. Responsibility for the requisite measures is regularly shifted onto the individual Member States, although all the experiences gathered up to now show that without action being taken by the EU institutions, the prevailing inadequacies in the actual implementation of EU law in cross-border contexts cannot be removed (see also the answer above to question 7).

It should be taken into consideration that, besides efficient cooperation between the authorities, effective law enforcement also requires minimum obligations to register and keep records and the obligation to submit company documents. The provision of security / bonds is also required for effective enforcement. This applies even more so if cooperation does not occur to the relevant extent.

In this context, another important point concerns the integration or networking of certain basic data from the social security institutions throughout

Europe. Only then can the control authorities check without too much bureaucracy whether and how the relevant worker in the country of origin is covered by social insurance. The submission of forms (in particular the E101 certificate of posting) is not enough as this only certifies that social insurance existed at the date of issue and the form's accuracy can also only be checked with an excessive amount of time needed.

In connection with the payment of social security contributions, one possibility of misuse also exists as a result of the fundamental commitment of authorities to the E101 certificate of posting, and it is also used in practice (see for example http://www.labournet.de/diskussion/eu/sopo/bolke_ak.html, in German). A change to the legal provisions is therefore urgently needed.

The social partners can undoubtedly play a role in enforcing labour law (information, legal protection of those concerned, drawing the attention of authorities to violations of the law etc.). However, the effects are limited and in many cases depend on the fact that cooperation between the authorities works and that prosecution and the assertion of claims is possible without disproportionately high costs and delays.

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

Particularly serious forms of illegal employment, social security fraud, exploitation and wage dumping occur across the national borders. It takes place in a very deliberate way in order to

a) Take advantage of the most favourable provision depending on the legal situation (this phenomenon can currently be observed above all in inland navigation and long distance road transport)

b) Be more difficult to be caught by the authorities (e.g. companies established in the building industry in order to commit social security fraud)

c) Take advantage of the slowness and limited possibilities of administrative cooperation between several countries and play "cat and mouse" with them (in particular with the posting of workers and long distance road transport).

In order to be able to resolve these key problems, support from the Member States at EU level is indispensable – this is one of the big challenges facing us in the coming years.



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