



## Annexe

### **ETUC position on the European Commission's Green Paper**

### **"Modernising *and strengthening* labour law to meet the challenges of the 21<sup>st</sup> century"**

**COM (2006) 708 final**

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#### **1. Introduction**

On 22 November 2006, the European Commission presented a Green Paper 'to launch a 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.' According to the Commission, 'the modernization of labour law constitutes a key element for the success of the adaptability of workers and enterprises'.

The Green Paper 'looks at the role labour law might play in advancing a "flexicurity" agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive'.

It seeks:

- to identify key challenges reflecting a clear deficit between the existing legal and contractual framework and the realities of the world of work. The focus of this exercise is 'mainly on the personal scope of labour law, rather than on issues of collective labour law';
- to launch a debate on how labour law can assist in promoting flexibility combined with employment security, independently of the form of contract, and thereby contribute to increase employment and reduce unemployment;
- to stimulate discussion on how different types of contractual relations together with employment rights applicable to all workers could facilitate job creation by easing labour market transitions, promoting life long learning and fostering the creativity of the whole workforce;
- to contribute to the Better Regulation agenda by promoting the modernisation of labour law, taking into account the overall benefits and costs involved, and especially the problems SME's may face.

The Commission has started an open public consultation, via a website, and has announced a follow-up Communication, in the context of the wider topic of flexicurity that the Commission is currently developing with the Member States. The Social Partners at European level have also received an invitation to respond to the consultation.

With this document the ETUC is taking a position on the Green Paper.

## 2. The consultation procedure is flawed

But before doing so, the ETUC would like to express its **strong disagreement** with the procedure followed by the Commission.

There is no doubt that the subject of the consultation is clearly in the heart of the 'social policy field' as mentioned in Article 138 of the European Treaty.

According to the Treaty, Social Partners at European level have a particular position when it comes to any initiatives in the social policy field that the Commission wants to take. The obligation to consult the European Social Partners is enshrined in the Treaty for several reasons, related to the recognition that the Social Partners at national and EU level have a special responsibility - in various degrees of cooperation with public authorities - for shaping and negotiating social policy. Social Partners need to be consulted in a different way, and with a different weight, than the wider public, to allow them, at an early stage, to influence the direction of the initiatives to be taken, and to allow them to express their interest to take up the issue themselves for negotiation.

The wider civil society is supposed to be consulted via the Economic and Social Committee and Committee of the Regions, and finally it is the European Parliament that is supposed to represent the European populations.

According to the ETUC, the method of an 'open public consultation' regarding such a complex issue, which is so much a core issue for Social Partners in general, and in particular for the trade union movement since the very beginning of its existence, **cannot be accepted without further conditions.**

First, the Commission must clarify how it will give clear priority and preference, when following up on the consultation, to the opinions and positions of the Social Partners at EU level, and how it will further observe the letter and the spirit of the Treaty.

Secondly, if and in so far as Member States are contributing to the 'public consultation' their contributions can only be taken into account if they have come about in accordance with national rules and regulations regarding social dialogue and/or other forms of consultation of the social partners at national level.

Thirdly, the Commission must clarify how it will process the great variety of replies and responses in an objective and transparent manner.

Finally, the ETUC is very unhappy with the very short timeframe of the consultation. The Commission is addressing in its Green Paper an enormous variety of complex issues, and raising a broad range of questions, which in the ETUC's view need a thorough debate both at national as well as at European level. This is virtually impossible in the given period between the end of November 2006 and the end March 2007.

Therefore, the ETUC has chosen to take a position in more general terms on the most important issues raised in the Green Paper, while also giving its own views on what issues the Commission will need to address in the follow up to this consultation.

The ETUC will develop its positions in more detail in the upcoming months.

### 3. Labour law is firmly rooted in international law and fundamental rights

The Declaration of Philadelphia, concerning the aims and purposes of the International Labour Organisation, adopted in May 1948, reaffirmed the fundamental principles on which the ILO is based, and in particular the fact that **labour is not a commodity**, that freedom of expression and association are essential to sustained progress, and that lasting peace can only be established if it is based on social justice.

It explicitly affirmed that (IIC) 'all national and international policies and measures, and in particular those of an economic and financial character, should be judged in this light and accepted only in so far as they may be held to promote and not to hinder the achievement of this objective'. With these principles, the ILO and all its constituent members, including all the current member states of the EU, placed itself in a logic in which the recognition of fundamental rights and the pursuit of social justice is of a higher hierarchical order than economic and financial policies.

Article 136 of the European Treaty declares that the Community and its Member States 'having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, **improved living and working conditions**, so as to make possible their harmonisation while improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'. With this provision, the EU positions itself firmly in the logic of a process that has to provide its populations with improvement of living and working conditions.

### 4. The Green Paper is lacking ambition.

The ETUC welcomes the **recognition** in the Green Paper **of the need for increased protection** of the growing proportion of workers across the EU in precarious forms of employment. The most vulnerable workers in the EU are increasingly not properly covered, in law or in practice, by labour law and social security, leading to situations of permanent insecurity and social exclusion. This situation is not in line with one of the basic objectives of the European Union, i.e. to improve the living and working conditions of its populations, nor with the Lisbon agenda which is aiming at more and better jobs, a high road to economic growth and employment, and social inclusion, and needs to be urgently addressed.

However, if one compares all these studies and developments with the current text of the Green Paper, which is moreover lacking any concrete proposal, one could say the Commission has reduced its ambitions to a very low level.....

The EU has a long history when it comes to addressing the need to provide 'atypical forms of work' with more and better protection.

Already in the early eighties, the Commission tried to draft Directives aiming at improving the position of part time, fixed term and agency workers, but failed to get majority support for it in the Council. Also the European Parliament took various initiatives in that regard.

The adoption of the 1989 Social Charter, which contained the specific obligation to **harmonize upwards and improve** the living and working conditions of part time, fixed term, agency and seasonal workers led to the taking up in the Social Charter Action Programme, and when the Maastricht Treaty opened the possibility for Social Partners to negotiate binding agreements, it was on that basis that, in the 1990's, framework agreements regulating minimum protection and equal treatment for part time and fixed term work came about.

In the same period, in 1996, the European Commission appointed a group of experts, that was assigned an ambitious task, namely to conduct a prospective and constructive survey on the future of work and labour law within a Community-wide, intercultural and interdisciplinary framework. Under the leadership of *Alain Supiot*, an extensive study "Transformation of labour and future of labour law" was produced and published in 1998.

The report addressed 6 major themes:

1. work and private power
2. work and employment status
3. work and time
4. work and collective organisation
5. work and the state
6. combating gender discrimination.

On the basis of elaborate analyses of the various themes, a series of very interesting guidelines was drawn up that is still today a very important and valuable contribution to the debate.

The ETUC therefore recommends that the Commission position itself more clearly in the follow up to the consultation on the Green Paper with regard to this body of research, to prevent the debate as it were to 'start from scratch'.

This preparatory work led in the summer of 2000 to a modest initiative of the European Commission, which sent a paper to the Social Partners at the European level: "*First Stage Consultation of social partners on modernising **and improving** employment relations*".

The then Commission wanted to start a discussion on 'the need to review the essential elements of the system of laws and collective agreements to make sure that they are relevant to a modern organisation of work'.

Two types of action were proposed:

- 1) To establish the principles and a framework for action, among other things a mechanism to review the existing legislative and contractual rules governing employment relationships at all levels (European, national, regional, enterprise), with a view to allowing for adequate coverage of the diversity of new forms of work;
- 2) To take action in specific areas, namely: telework, and economically dependent workers who do not or may not correspond to the traditional notion of 'employee', to ensure adequate protection for these categories of workers.

The ETUC in that period welcomed the initiatives, but employers were very reluctant to discuss the wider issues, and only accepted to talk about telework. The social partners at EU-level concluded in 2002 a framework agreement on *telework*.

On the important issue of the inadequate coverage of new forms of work and especially 'economically dependent workers', a research document was finished already in 2003 on economically dependent workers (the Perrulli study), and an initial discussion that took place during the Dutch presidency in autumn 2004.

On the broader issue of the evolution of labour law another group of experts wrote an expert report for the Commission, published in 2005.<sup>1</sup> This report pointed at the increasing 'Europeanisation' of national legal systems as an undeniable reality. It also drew attention to the fact that in most EU countries there is recourse to wide forms of consultation of the social partners in view of adopting legislation. The study confirmed that as a peculiar feature of European labour law, *all forms of **negotiated legislation**, social pacts and 'concertation' must be referred to as **important resources for the evolution of labour law***.

In its conclusions, the report formulates as important challenges:

- the risk of reducing the enforceability of certain rights or to exclude certain categories of workers from basic entitlements, which should be countered by expansion of fundamental rights coverage and the preservation of the autonomy of labour law;
- the necessary link with social inclusion, which demands an expansion of 'traditional labour law functions', focussing on the protection of groups rather than individuals;
- the importance of constitutional principles, anti-discrimination law, and fundamental rights as the conceptual framework at EU level to construct the new social policy agenda for coming years.

On the level of the ILO, a series of debates between 1997 and 2006 (starting with a discussion on Contract labour which then was adapted to a debate on the scope of the employment relationship, a discussion closely linked to the discussion at EU level on 'economically dependent workers') ended with the adoption of Recommendation 198 on the employment relationship in 2006.

It is unacceptable that the Commission in its Green Paper totally ignores these very relevant debates at ILO level, and does not use this opportunity to promote implementation of Recommendation 198 by EU Member States.

## **5. Challenges for labour law in the 21st century.**

According to the ETUC, there are several reasons for a thorough debate on the need to *modernise and improve* labour law at national as well as at European level.

In many Member States, labour law reforms have been proposed or introduced, often in the framework of a competitiveness agenda, which have not led to qualitative employment opportunities but have promoted a two tier labour market on which increasing amounts of workers – and often the most vulnerable groups of workers, such as women, young workers and migrants - are working under conditions of permanent precarity.

But also so called 'standard' workers have not escaped from the increasing pressure and have faced 'flexibilisation' of working time, wages, and other contractual arrangements.

In many countries, collective bargaining and the coverage of collective agreements are under pressure of erosion, resulting in the precarisation of work and workers.

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<sup>1</sup> The evolution of labour law (1992-2003), written for the European Commission by national experts of the EU-15, under the leadership of Silvana Sciarra

A shift in production methods, work organisation, the spreading of subcontracting and outsourcing, and the way firms are nowadays moving around and financial capital is taking over from enterprise, is creating insecurity not only for the most marginal groups of workers on the periphery but increasingly also for 'standard' workers in core companies.

The increasing cross border mobility of workers, enterprises and services in an enlarging European Union poses serious questions regarding our ability to continue to manage emerging European labour markets in the framework of the single European market with just national labour law.

The ETUC believes that these challenges show the need for urgent action at national and at European level to **strengthen** the capacity of labour law in all its dimensions to cope with the modern world of work while providing for fair and decent working conditions and labour standards to all workers on EU territory.

According to the ETUC, the Commission should present initiatives promoting 'fair and just working conditions' to workers, as laid down in the European Charter of Fundamental Rights, showing the commitment of the European Commission to a Europe that is not only a single market but also the workplace of so many million workers – men and women, young, old and migrant - who keep this market going. They deserve, according to the European Charter of Fundamental Rights, fair and just working conditions.

However, the Commission has now tabled a Green Paper, which is limiting itself to the following issues.

**According to the Commission**, the challenges are the following:

- a) The traditional model of the employment relationship, assuming a permanent full time job, regulated by labour law and dealing with a single entity employer would be outdated, or, in the words of the Green Paper *'may not prove well suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers. Overly protective terms and conditions can deter employers from hiring during economic upturns. Alternative models of contractual relations can enhance the capacity of enterprises to foster the creativity of their whole workforce for increased competitive advantage.'*
- b) 'Since the 1990's, reform of national employment protection legislation (EPL) has focused on easing existing regulation to facilitate more contractual diversity. Reforms tended to increase flexibility 'on the margins', i.e. introducing more flexible forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged job-seekers to the labour market and to allow those who so wished to have more choice over their employment. The outcome has given rise to increasingly segmented labour markets.' The share of total employment in all non-standard forms of employment is now 40 %. Non-standard contracts have allowed businesses to remain competitive, and also workers are given greater choice. But there is evidence of some detrimental effects associated with the increasing diversity of the workforce.

Therefore, 'given the increasing levels of participation in these forms of contracts, the level of flexibility provided under standard contracts may need to be examined to enhance their capacity to facilitate recruitment, retention and the scope for progression within the labour market.'

- c) Stringent EPL tends to reduce the dynamism of the labour market, worsening the prospects of women, youths and older workers. Workers feel better protected by a support system in case of unemployment (unemployment benefits, UB) than by EPL. Potentially vulnerable workers need to have a ladder of opportunity to improve their mobility and achieve successful labour market transitions. 'Legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular employment contracts to explore opportunities for greater flexibility at work.'

In other words, the Commission sees labour law as the key instrument to promote adaptability of workers, sees access of 'outsiders' to (regular) employment on the one hand, and job-to-job transitions for insiders on the other hand as the main challenges, and is of the opinion that labour law needs to be 'flexibilized' to address these challenges.

The ETUC ***strongly disagrees with the analytical framework*** presented by the Commission, and especially not with the suggestion that the problems identified could or should be solved by 'flexibilizing labour law'.

## **6. Modernising 'labour law': restriction to individual contract law is unacceptable**

The Commission in its Green Paper wants to 'identify key challenges which (...) reflect a clear deficit between the existing legal and contractual framework, on the one hand, and the realities of the world of work on the other. *The focus is mainly on the personal scope of labour law rather than on issues of collective labour law.*'

Where collective bargaining in the Green Paper is mentioned, it is mostly as a possible 'instrument' to provide for flexibilisation.

According to the ETUC, this restriction to labour law in terms of individual contractual arrangements and the scope of the employment relationship is a major mistake.

There are ***basic principles of labour law*** as it has developed in Europe over the last 200 years:

- 1) the worker (in a subordinate employment relationship), when concluding a labour contract is in an unequal power relationship to his/her employer, and therefore needs to be protected against having to accept disadvantageous working conditions, because refusing them would mean he endangers his job;
- 2) this protection can be given either by statutory (labour) law provisions, that protect the individual worker by setting norms and standards;
- 3) or by the countervailing power of the collective, i.e. by collective bargaining leading to collective agreements.

In most EU countries labour law has developed in a rich variety of forms, which has led to regions in which collective bargaining is the primary means of regulation, and other regions where legislation has provided the main thrust of protective regulation for workers.

But the majority of countries have mixed systems (with a combination of both law and collective bargaining, sometimes even giving collective agreements the force of law by procedures to make them 'generally binding').

Experience shows that especially in systems that allow ample space for collective bargaining to regulate the world of work, the norms and standards are under constant evaluation and revision and therefore very flexible.

Statutory law by its very nature is more rigid. However, in countries where collective bargaining is not very widespread and collective agreements relatively weak, the role of legislation as a safeguard for workers is much more essential than in countries where the majority of workers are somehow covered by collective arrangements. Therefore, modernising (or: 'flexibilizing') labour law is a tricky exercise, if one does not take account of the overall regulatory framework in the country concerned, and if the role of collective bargaining as an important source of labour law is ignored.

The fact that this dimension is totally missing from the Green Paper leads also to a situation in which some key questions regarding 'non-standard workers' or so called outsiders are not addressed, and thereby the potential role of collective bargaining to reduce the gap between insiders and outsiders is ignored:

For instance:

- do precarious or a-typical workers have enough possibilities – in law or in practice – to exercise their freedom of association, the right to join a union, to collective bargaining and to industrial action? (Example: agency workers, economically dependent workers that encounter barriers in terms of competition law)
- do precarious or a-typical workers count for the thresholds in companies for the establishment of works councils? (agency workers, part time workers, fixed term workers, or workers below a certain age group may find themselves excluded<sup>2</sup>)
- do precarious or a-typical workers have the right to information and consultation in the company that takes decisions regarding their working conditions or employment situation, even if they may not be directly employed by such a company (agency workers in the user enterprise)?

It should be understood, that it is exactly the lack of clarity about (or even total absence of) these rights that is one of the reasons why employers may prefer the recruitment of non-standard workers. This also sheds a different light on the reasons why there is an increasing gap between insiders and outsiders on the labour market.

In our view, the European Commission should, in developing its agenda for modernising labour law, recognize and take into account the double role of collective bargaining and social dialogue, both as an important 'regulatory force' (to regulate contractual and employment relations as well as internal and external flexibility in a broad range of areas, from working time to agency work, etc.), as in its role to provide a democratic and participatory process for modernisation and change.

It should, moreover, recognize that wherever in Europe flexicurity models have been developed, this was not coincidentally in countries with a highly developed social dialogue, where social partners have played an essential role in negotiating

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<sup>2</sup> See ECJ case C385/05 of 18 January 2007 of the 5 French trade union federations against the French government, about the validity of the provisions in the CNE-law, that excluded workers below the age of 26 from counting for the thresholds of establishing a works council. The ECJ decided that these provisions were not in line with Directive 2002/14/CE on information and consultation, nor with Directive 98/59/CE on collective dismissal.



the balance between flexibility and security on the labour market. They played a crucial role in building the necessary trust and confidence that the adaptation of rules and regulations was taking into account workers' and employers' interests in a balanced way, thereby legitimising change.

Therefore, what is urgently needed is the **active support** from national and Community authorities **for modernising and strengthening the role of collective bargaining** and encourage a broadening of its scope, extend the parties covered and tasks involved (as also recommended by the Supiot-report).

## **7. Labour law and level of employment: no clear connection**

The green paper's general tendency seems to be that adapting employment legislation of the member states, in particular the rules governing the indefinite employment contract and employment protection (protection against unfair dismissal, severance pay, notice periods) should be part of the Lisbon strategy. It is supposed that more flexibility and mobility on the labour market is a precondition for enhancing the competitive power of EU-economies. This supposition may be valid in itself, it is however open to serious doubt if the aim of more flexibility and mobility on the labour market should be pursued through adapting the law on employment contracts and employment protection.

The Commission suggests that *'legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular permanent contracts to explore opportunities for greater flexibility at work'*. This phrase totally denies developments in the last decades in most workplaces and work organisations, often supported by collective agreements, in the direction of various forms of internal (functional and numerical, such as working time) flexibility. The simplistic emphasis of the Commission on the level of employment protection (or EPL) as the most decisive element of 'flexibility at work' is in the ETUC's view unacceptable.

Moreover, as research has shown, and has also been recognized in recent times by the OECD, there is **no clear link between the level of EPL and the level of (un)employment**, whereas the decrease of employment protection could affect trust, loyalty and personal investment in the employment relationship, as well as being counterproductive to the innovative strength of companies.

This is increasingly recognized by economists. However, the new argument for relaxing dismissal regulation is, that even if it would not contribute to the reduction of the level of unemployment in general, it would serve another aim namely to enhance the dynamic on the labour market, and thereby help spread the risk of unemployment more evenly over the more and less vulnerable groups on the labour market (i.e. the insiders and outsiders).

The line of argument is as follows: when dismissal is easier, 'insiders' with a permanent job will be under more pressure to change job, this will promote more moving around on the labour market, which will lead to more job opportunities for the outsiders. At the same time, everybody will keep the same job for a shorter time, because their risk of being dismissed will increase.

The important question is, whether the job opportunities for outsiders will really increase by reducing the rights and protection of insiders. Several economists

have recently raised strong doubts about this.<sup>3</sup> In their view, there is more reason to expect the opposite effect. The group of outsiders that everybody is concerned about is mostly young people, women and immigrants, most of them with low qualifications and little work experience. With which 'insiders' will they compete for jobs? Mostly those insiders that have a similarly low level of 'human capital'. By reducing EPL, both groups together will be the new, bigger group at the bottom of the ladder. Together, they will be faced with short term and 'flexible' jobs and periods of unemployment, i.e. with increased insecurity. The 'stronger' ones among them (white males?) will still have the best chances. But all in all the amount of people faced with insecurity about job and income will increase. From an economic point of view, this will be detrimental for consumption. It will also lead to an increase in income-inequality.

In short:

- The ETUC does not agree with the analysis that job opportunities for 'outsiders' will increase by reducing the rights and protection of 'insiders'.
- Reducing EPL/dismissal protection will **increase inequality and increase the amount of outsiders**, while having **negative effects on economic performance** in terms of consumption and labour productivity.
- A sufficient level of job-security is necessary in the interest of the innovative capacity of the economy.
- The economic dynamic is better served with high investment in education, training and life long learning and promoting exits and transformation from 'flexible'/precarious jobs into regular jobs, than by reducing job security of workers with a permanent contract.

The ETUC would welcome a genuine European debate on how a broad variety of measures and policies, including labour law – in its widest sense, i.e. also collective labour law - can evolve to support the Lisbon strategy's objective of achieving sustainable growth with *not only more but also better jobs*. It is important that the Commission and the Member States take concrete initiatives to promote the right balance between competitiveness of businesses and the interests and well-being of standard and non-standard workers, **focussing on improving the quality of jobs**.

## **8. Promoting transitions on the labour market: a wide range of policies is necessary**

A general element in the Commission's approach is the 'slogan', in recent times often quoted, from Commissioner Spidla, saying that if a ship is sinking it is much more logical to save the people on board the ship and not the ship itself, leading to the assumption that modern labour law should focus on the employability of the worker instead of protecting him/her against losing his/her job.

It is in this context that the Danish model is always quoted as best practice, showing high levels of unemployment benefits (UB) and active labour market policies (ALMP), instead of 'strict' dismissal protection (EPL).

However, there are several important comments to make on this approach:

a) **also in the Danish model, workers are protected against dismissal** for economic reasons, because they have rather long notice-periods, to give them time to find another job before losing the previous one. Secondly, they are

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<sup>3</sup> Vergeer en Dekker, University of Delft, see Dutch magazine Economische en Statistische Berichten ESB 23-2-07; idem Veenman, University of Rotterdam

clearly protected against unfair dismissal (for other reasons). Thirdly, the Danish model is developed in a long historic process (which started in 1898!), where the 'light touch' protection is part of a strong social partnership model, primacy of collective bargaining and strong trade unions, a combination of elements that not every EU Member State is ready to adopt or promote!

b) the slogan of Spidla totally overlooks the fact that **most companies that dismiss workers for economic reasons are not necessarily sinking ships.....** There is no reason to exempt capital and business from a certain societal responsibility for employment creation and retention, nor from paying a certain price for making workers redundant. At the same time, the fact that this is done in various different ways in different Member States can of course lead to comparisons about more and less effective, costly and fair procedures and outcomes. With increased mobility of workers and enterprises cross border such differences may lead to distortion of competition, and may become push or pull factors for relocation.

However, to which extent this is really the case is not only dependent on dismissal protection, length of notice periods etc., but on the total of regulations and cost factors that are in place in a certain country (social security, taxes, etc.), and how companies are charged (direct on labour, indirect via VAT or other taxes, etc.). A genuine shift from dismissal protection to unemployment benefits and ALMP would not necessarily mean that all in all there are fewer costs involved; however, there may be shifts from costs for businesses to cost for states or costs for workers. The first question is if such a genuine shift is what the Commission is seeking, the second question is who they want to bear the burden.

It currently seems as if they want to make the total outcome cheaper indeed, with less dismissal protection, less benefits, and a little ALMP, shifting the burden of adjustment to the individual worker.

c) the approach of the Commission reduces the debate about modernising labour law to a debate about dismissal law, and reduces dismissal protection to protection against dismissal for economic reasons. It is very **important to reclaim the autonomy, basic principles and intrinsic values of labour law** in the widest sense, showing also that a proper protection against unfair dismissal is the basis for the ability of the worker to complain about bad working conditions, raise his or her voice against the employer's arbitrary or unreasonable behaviour, organise in a trade union etc. It is precisely the fact that fixed term and precarious workers are **not** protected in the same way, that is mentioned by many ETUC affiliates as a reason for those workers being more easily exploitable, falling trade union membership and difficulties in representing the interests of those workers.

The ETUC and its members are very interested in further developing arrangements that strengthen the position of workers in situations of job-to-job transitions in the labour market, and agree that it is worth investigating which models in EU Member States have the best results in that regard.

They could support more emphasis on ALMP as long as it is combined with adequate unemployment benefit systems, promoting reintegration.

There is also good reason to call for a better adaptation of social security and pension systems to a variety of labour market transitions (from job to job, from agency work to working directly for the user enterprise, from full time to part time and vice versa, from work to leave and vice versa, from employment to self-employment and vice versa).

However, the ETUC wants to stress again, that it does **not believe that the incentives for such a transitional labour market should be sought in 'flexibilizing' labour law**, or more precisely EPL.

In the ETUC's view, the coming about of a 'transitional' (job-to-job) labour market should rather be advanced through positive measures of a facilitating, enabling nature regarding for instance education, work-to-work and reintegration arrangements, measures to improve the reconciliation of work and private life and adapting social security to transitions. This could provide **security throughout working lives and careers** ('securiser le parcours professionnelle').

### **9. Two-tier labour markets: reducing the gap by improving the protection of 'outsiders'.**

Another general element in the Commission's analysis is the insider-outsider paradigm, the argument being that the employment protection of 'normal/standard' indefinite employment contracts (kept in place by 'protectionist' trade unions), is an obstacle to the access to employment of vulnerable groups of workers.

The ETUC welcomes a debate on the need to address the fact that groups of especially vulnerable workers are increasingly falling, either in law or in practice, outside the scope and protection of labour law (and/or social security!).

We strongly agree with the concerns expressed in the Green Paper about the increasing segmentation and precarity and the two-tier labour markets everywhere. We also admit that this is an issue that urgently needs to be addressed by trade unions themselves, in terms of recruiting and organising the workers concerned. However, we strongly disagree with the analysis of the causes in the Green Paper, and therefore also with the proposed solutions.

There is a persistent red line through the analytical paragraphs which is very problematic and prejudicial, which is that standard workers/employment contracts have too much protection, and *therefore* there is recourse to flexible contracts which offer too little protection, and *therefore* there is segmentation on the labour market.

We have great problems with the seemingly 'factual' statements around rigidities in employment protection being the cause of flexibilisation of contracts.

First of all, it is not true for most EU countries that standard workers have not been bearing already quite a heavy burden in terms of adaptation to restructuring, changes in employment protection and social security, not to mention increasing internal flexibility (with regard to working hours etc). Secondly, even although it is true that vulnerable groups of workers are bearing an even higher burden, which in our view is very problematic and will indeed have to be addressed, there is no logic in expecting that lowering the level of protection of 'standard' workers will have a rebalancing effect.

In that situation, the 'fittest' will have even more scope for survival at the expense of the weak, and therefore the more vulnerable groups of workers will be even worse off! Moreover, if the problem is the gap between the various segments, one does not necessarily offer the best solution when **generalising a state of precariousness** and lack of protection to all workers. Insecure employment conditions will generate low training, low productivity, low innovation for all workers, not only for the atypical ones.

Thirdly, there is a too easy and one sided analysis of why companies resort to 'flexible contracts'. From all the various experiences in Europe we can learn that

it is more a combination of lower costs and no protection than 'flexibility' as such that they are seeking. And as the water is always goes to the lowest point, the more possibilities there are for avoiding and evading costs of labour protection, social security coverage etc., the more they will be used especially for vulnerable groups who have little choice. When the exit option is near and easy, every employer will use it.....

An important part of the Commission's analysis focuses on the development (by deliberate policy reforms, often under the pressure of OECD reports, or international financial institutions requiring structural change programmes!) of flexibility 'on the margins', introducing more contractual diversity to accommodate perceived needs of business to hire workers at lower cost with less protection against dismissal (fixed term, agency work, etc.), or to promote the entry of newcomers and disadvantaged jobseekers, or to be able to only hire workers when needed (on call, part time work).

In the Commission's analysis, rather than concluding that this development has gone too far or has not been properly accompanied by 'updating' labour law, the argument is that this did unfortunately not touch the '*overly protective terms and conditions*' of the standard workers, and that it is high time to evaluate if '*the traditional model of the employment relationship may not prove well suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers*'. '*Alternative models of contractual relations*' should therefore be developed.

According to the ETUC, the current situation in many countries, where an increasing number of workers are working in precarious conditions under a whole range of contractual forms is indeed very worrying. This is not only threatening the workers involved, but also the 'standard' workforce, the coverage of collective agreements and the strength of trade unions. It is therefore high time to take appropriate action at various levels, but instead of reducing the protection of so called standard workers these actions should focus on extending protection to precarious workers

### ***Rebalancing and refocusing the scope of labour law***

It should be recognized that a lot of these contractual forms do not serve 'flexibility' needs, but are mainly developed to provide employers with a low cost and low risk workforce. Several of them are moreover 'sham' contracts, meant to contract away or hide a different reality (zero-hour contracts are never meant, neither by the employer nor by the worker, to really mean that there will be no hours worked! many so called self employed workers are in reality working in situations of great dependency and subordination; in a lot of situations workers are hired via chains of subcontractors to avoid tax or other obligations, or evade collective agreements).

To address this situation, we need first of all to address the fact that not all non-standard contracts are acceptable contractual arrangements, as their terms and conditions may be totally out of balance, putting the full burden of risks on the worker, which is against the basic principles of labour law. This is why in many countries, mechanisms have been developed to 'look through' the formal contractual arrangements, and decide in favour of the worker for instance that a so called zero hour contract is in fact a part time contract. Therefore, the Commission should clarify its position on this issue, and not too simplistically advocate that all forms of contracts should be possible.

Secondly, we need the political will to invest in better enforcement, and to develop and implement mechanisms to refocus labour law, such as proposed by the ILO in its recent recommendation. (NB: Such a proposal was already part of the Commission's consultation document in 2000!)

For this, existing labour law as such, which in most countries is geared towards judging the facts as more important than the form of the contract, is already 'flexible and modern' enough. However, it may be necessary to develop better procedures and mechanisms (such as presumptions of law, that have been introduced in some Member States to reverse the burden of proof, presuming that a worker has employment status unless the employer proves otherwise, etc.). Such an approach should clearly be distinguished from the legal distinction in the UK between 'employees' who qualify for all employment protections and 'workers' who are entitled to very limited rights, which has contributed to increased labour market segmentation with the most vulnerable workers to be found in the group of 'workers' or not even qualifying as workers.

***Address real causes for segmentation, such as gender patterns and lacking policies to support work-life balance***

To prevent confusion, it is important to state that 'non-standard' forms of work are not necessarily precarious forms of work, and some may well be framed in the form of a 'standard/permanent contract'. A good example is part time work, that in some Member States is still synonymous with precarious work, whereas in other Member States it has evolved to a form of work that is embedded in 'standard' labour law and social security regulation, and largely taking place in mainstream employment under normal indefinite employment contracts. The Commission too easily adds up every kind of non-standard work, arguing that the total percentage is now so enormous, that *therefore* the level of flexibility under standard contracts needs to be addressed. In our view this approach is turning the world upside down. Moreover, this approach is not in line with more than a decade of activity by the Commission and the European Social Partners in Directives and Framework Agreements, aiming at providing these forms of work with equal treatment and protection.

At the same time, it is clear that there are persistent problems with regard to the sectoral and professional segmentation linked to the gender dimension of part time work. Rather than blaming contract law for this situation, it is high time to address the real causes for this segmentation, and develop measures and policies to support reconciliation of work and family life for men and women also in standard employment, which is a totally different dimension of flexibility. The ETUC has recently responded to the Commission's Consultation of the European Social Partners on the Reconciliation of Professional, Private and Family life.

In this position it has indicated that there are a number of areas in which action at EU level by EU institutions and/or Social Partners would be beneficial for working men and women as well as economies and societies at large, and would contribute to reducing segmentation in the labour market.<sup>4</sup>

One of the challenges is, to increase possibilities for influence and control over the organisation of work and working time, i.e. 'active' flexibility for workers, as has also been demanded by the ETUC and supported by the European Parliament with regard to the revision of the Working Time Directive.

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<sup>4</sup> ETUC position of December 2006 on Reconciliation of work and private and family life.

### ***Extend protection to new forms of (dependent) work***

Where there are genuine new working realities, which are difficult to grasp in the concept of the employment contract, it may be necessary to develop additional forms of protection. 'Economically dependent workers', freelancers and self-employed workers may greatly benefit from extension of social security protection and other forms of protection and rights. This could also contribute to diminishing the gap between workers with an employment contract and self-employed workers, thereby taking away some of the incentives for employers to manipulate with fraudulent self-employment. (This should however not be confused with the introduction of a 'third category of worker' between employees and self-employed workers, which is something the ETUC is not at all in favour of.)

Certain forms of protection are already now afforded to 'working people' in a broader sense which is not necessarily linked to the civil law status of the contract. When it comes to health and safety in the workplace, in several countries the obligations of the employer extend to everybody who is working on his working site, being either directly employed by him, or sent by an agency, or self-employed. Similar debates are taking place with regard to the coverage of working time regulation (see the Directive on working time for truck drivers, in which the EP succeeded to include the obligation to extend the regulations to self-employed truck drivers).

The challenge is, to develop not so much a 'floor' of rights' but a 'core' of rights (in French a 'socle de droits'), which is offering all working people regardless of their precise employment status a set of essential rights, such as the right to organise in trade unions, health and safety protection, social security coverage, maternity protection and parental rights, a right to life long learning, etc. (see similar ideas developed in the Supiot report). Such an approach should clearly be distinguished from the legal distinction in the UK between 'employees' who qualify for all employment protections and 'workers' who are entitled to very limited rights, which has contributed to increased labour market segmentation with the most vulnerable workers to be found in the group of 'workers' or not even qualifying as workers.

### **10. The indefinite contract: a modern and adequate concept**

In the view of the Commission, the 'traditional' regulation of the employment contract, based on the assumptions of a 'permanent full time contract between a single employer and worker, regulated by labour law', is outdated and no longer suitable for the modern world of work. It is argued that there is a need for an 'alternative model of contractual relations', although the Green Paper does not explain what kind of alternative model is envisaged.

In recent times, the European Court of Justice (ECJ) has been called upon several times to judge cases in which national labour market policy regarding 'flexible forms of work' was at stake. In those cases, ***the ECJ explicitly referred to the right to enjoy an indefinite contract of employment*** and the principle of equal treatment as principles of European workers' protection, that limit the autonomous scope of Member States to flexibilize their labour markets and labour law.

For the ECJ, the importance of job-security and the protection of the permanent contract are not outdated at all.

In the *Adeneler* case (ECJ 4 July 2006, about fixed term work in the Greek public sector) the ECJ had to interpret the aims of the Directive on Fixed Term work, based on a framework agreement of the Social Partners at EU level. According to the ECJ, Member States are obliged to guarantee the effect as envisaged by the Directive. This effect is that permanent contracts are the regular situation, and that fixed term contracts are the exception. The regulations to limit the consecutive use of fixed term contracts must therefore be interpreted as means to prevent fixed term contracts being used for permanent needs. And the measures taken by the Member State in this regard must be effective to reach that result.

In the *Mangold* case (ECJ 22 November 2005, about a specific regulation for older workers in the Hartz package in Germany) the Court decided that a regulation which allowed employers to give workers over 52 years old an unlimited series of fixed term contracts constituted discrimination on the grounds of age, and was against the principle of equal treatment, as laid down in the Framework Directive on equal treatment in employment (2002/78/EG), and as guaranteed by a variety of international instruments and national constitutional traditions. According to the Court, making an exception to the principle of equal treatment demanded strict proportionality, and the simple setting of an age-threshold was not sufficient. The policy measure would have as an effect that a substantial part of the working population would be excluded for a considerable part of their working life from the right to enjoy a permanent job.

In a very recent case, *CGT a.o. v French Prime Minister* (ECJ 18 January 2007), regarding the exclusion of young workers under 26 years of the right to information and consultation in SME's, in the framework of measures said to promote their employment opportunities, the Court decided that the Directives on information and consultation and on collective dismissal do not allow for an exception to the personal scope.

These cases confirm the fact that there are principles in European law and jurisprudence, which limit the scope for Member States to reduce the job protection of certain groups of workers in order to improve their chances of labour market access.

The ETUC welcomes this jurisprudence. It is those policies that have increased segmentation on the labour market, leading to traps and ghettos of precarious jobs for vulnerable groups of workers, rather than providing them with genuine quality job opportunities.

***No need for an 'alternative model of contractual relations'***

The world of work, even in the globalised 21st century, can be managed very well with a limited amount of contract forms, which are regulated in a transparent and enforceable manner, and countries should be stimulated to go in that direction. It would be worthwhile to investigate good practices in different countries in this regard. The 'indefinite' employment contract may well turn out to be a very modern and flexible concept, capable of offering the most adequate contractual framework to employers and workers.

The ETUC is therefore strongly against any suggested 'alternative model of contractual relations' as suggested (without any further explanation.....) by the Commission.



## 11. Labour law and flexicurity: the aim is more *and better* jobs

The Commission is looking at the role of labour law in 'advancing a flexicurity agenda'. Although in a footnote (!) it is recognized that labour law is not the only relevant factor in this context, it is amazing how the Commission reduces the flexicurity agenda in this Green Paper to a matter of labour law, and reduces labour law to the issue of external contractual flexibility, i.e. dismissal regulation and non-standard contractual arrangements.

It focuses on the need for 'more flexible employment protection', i.e. relaxing the 'overly protective terms and conditions' linked to the traditional employment relationship, such as dismissal regulation, as a panacea for all diseases, i.e. to ease transitions for standard workers from one job to another job, and to ease access for outsiders/non-standard workers to more regular employment.

The argument – with Denmark as the guiding example – is that 'unemployment benefit systems and active labour market policies are better insurances against labour market risks' than EPL.

The Commission's Green Paper uses a very limited notion of flexibility (mainly focussing on contractual flexibility, i.e. external/numerical flexibility) and also a very limited notion of security (focussing on increasing employability by training, active labour market policies etc.).

According to the ETUC 'flexicurity', if taken seriously, is **not** about **one** model of labour market regulation and organisation, nor one recipe for economic performance, and not about a simple trade off between job protection and policies to support the employability of the worker. If anything, it is about finding a balance between the – sometimes conflicting – needs and interests of enterprises/workplaces and workers with regard to both flexibility and security, with the long term objective of contributing to a high performing and sustainable EU both from an economic, a social and an environmental perspective.

Looking at the objectives for the labour market and the role of labour law, it is about the objective of **both more and better jobs**.

This would mean that 'flexicurity' is also about the balance between flexibility and security within all the constituting elements of flexicurity, as defined by the Commission in various documents: employment protection legislation (EPL), unemployment benefits and social security (UB), active labour market policy (ALMP) and training and lifelong learning (LLL).

Labour contracts need to provide the worker with both flexibility and security. A sufficient level of job protection and protection against arbitrary behaviour of the employer, allowing the worker and his representatives to have influence on the workplace and the organisation of work and negotiate about his/her needs for flexibility and security, is part and parcel of that, taking into account that the EU has as one of its essential obligations to strive for fair and just working conditions.

Therefore, and in line with the 1989 Social Charter, the first objective of any 'flexicurity' agenda should be to improve living and working conditions as regards non-standard forms of work, and **reduce the level of precarity and lack of rights and protection** in those contracts. Ensuring more and better implementation and enforcement of existing labour regulations and standards, clarifying the employment status of those contracts, reduce the imbalance inherent in some of these contracts between the parties to the contract, extending labour law protection and equal treatment, are among the policies and measures to be taken urgently.

As argued in previous paragraphs of this document, this objective is not served with reducing the level of employment protection in regular/standard employment.

The second objective is to **improve the quality of jobs** in terms of work organisation and the **level of flexibility available for workers**. Many workers experience a rigid, controlled working life, where their knowledge and capacities are not used or developed, where they have little or no influence on the direction or organisation of their work, and have no possibilities to adjust working times and schedules – that are increasingly geared towards the flexibility needs of employers - to their own needs.

Increasing options for life long learning - for both standard and non-standard workers - is an important element, including the need to develop work organisations towards more sustainable learning workplaces. Enhancing positive and active flexibility for workers is in the interest of both workers and companies, as it contributes to the motivation, loyalty and productivity of workers.

The third objective is to **improve social welfare systems** to support and facilitate increased labour market flexibility and transitions. Focussing on employability is not enough. If the focus is too much on a trade off that reduces job protection while giving the worker some vague promises of employability when he/she invests in her own level of education and is subject to some activation policies, this puts the burden of adjustment and adaptation in an unacceptable way on the individual and increases the level of insecurity especially for the more vulnerable groups on the labour market.

There is strong evidence that a high level of ALMP combined with high levels of social security benefits encourage labour market participation and the dynamic on the labour market. Those groups that are most exposed to the increasing insecurity that is accompanying globalization and the many changes on the labour market should especially be properly be covered by the social security system.

The fourth objective is to **safeguard the principle of job protection** and protection against unfair dismissal as a basic principle of national and international law, and the **autonomy of labour law** as not being a mere function and instrument to economic and market rationales.

Whereas there may be valid discussions possible about the design of employment protection regulations, which may be more or less geared towards supporting workers in coping with transitions and change, there is clear evidence that only systems that provide workers with strong support in terms of ALMP and high levels of unemployment benefits, in a framework of high trade union density and/or a highly developed social dialogue, allow workers and their representatives to be confident enough to accept a different design of EPL, taking into account that they have been actively participating in negotiating the modalities of the changes.

Experiences in several Member States show that social partners are increasingly taking up the challenge of negotiating forward-looking packages of measures promoting 'security in change'.

A top-down and simplistic attack on the level of EPL itself will cause enormous unrest and – if promoted by the EU institutions – be seen as another signal of the failure of the EU to address the concerns of its citizens.

The fifth objective is to **improve the capacity of social dialogue and collective bargaining** to negotiate modalities of adaptability, flexibility and change. Where in Europe flexicurity models have come about, they all were in one way or the other based on negotiations between social partners at various

levels (see not only Denmark, but also Netherlands, Austria, Spain, etc.). Social partners in principle are best placed to discuss and negotiate balanced approaches, in line with the industrial relations traditions in their country and sectors. Where in Member States social dialogue is inadequate, social partners weak, and collective bargaining not well developed, this reduces the ability of Member States to adapt to change in a way that is accepted by their populations. Therefore, promoting social dialogue and collective bargaining, and strengthening the capacity of social partners at various levels to represent the interests of all working people (insiders and outsiders) and all kinds of business (multinationals as well as SME's) is of key importance to pursue a flexicurity agenda.

## **12. The EU must support mobility and change by a proper legal framework**

The ETUC would like to use this Green Paper as an opportunity to discuss the need to re-balance in several countries the over-emphasis on flexibility and deregulation<sup>5</sup>, partly legitimized by previous rounds of OECD and EU recommendations and guidelines, and have a genuine and open debate on flexibility needs, not only of employers but also of workers, and on the security dimension of flexibility. Many of the questions raised in the Green Paper contain openings for such debate.

However, it is significant that the Commission in the Green Paper does not come up with any concrete proposals or even ideas on what should or could be done, and only refers in a footnote to the recent ILO recommendations that were adopted in 2006 on the scope of the employment relationship<sup>6</sup>

So, it remains to be seen if there is a genuine political will of the Commission to take any meaningful actions on the basis of the consultation...

The purpose of the Green Paper, as expressed by the Commission, 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 Commission sees its initiative in the context of a range of initiatives on the wider topic of flexicurity, that the Commission is developing in collaboration with Member States, 'to help steer their reform efforts'.

This means that the Commission is mainly acting within the scope of employment policy and guidelines etc. However, this can become a very far reaching political activity, providing Member States with arguments for certain kinds of reform. The ETUC has therefore major questions as to what kind of guidance can or cannot be seen as appropriate, taking into account the limited competence of the EU with regard to labour law and social security, and the need to respect the autonomy of national social partners.

Moreover, real 'modernisation' and genuine and balanced 'flexicurity' models, wherever these have come about in Europe, have always been the outcome of negotiations between social partners at various levels, and cannot and should not be introduced 'top-down' from the EU level.

At the same time, the ETUC is of the opinion that there is an urgent need for a debate about if and how the capacity of labour law in all its dimensions should be

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<sup>5</sup> example: Spain, where recently a tripartite agreement was reached, to limit the use of fixed term contracts as being harmful for the qualitative development of the Spanish economy

<sup>6</sup> ILO Recommendation 198, 2006

strengthened to cope with the modern world of work while providing for fair and decent working conditions and labour standards to all workers on EU territory.

According to the European Treaties, the Social Charter and the Charter of Fundamental Rights, the EU has a whole range of obligations and competences to act, such as:

- it should work towards the upward harmonisation of living and working conditions of non-standard workers;
- it should provide for fair and just working conditions to all EU workers;
- it should adopt minimum rules and regulation to safeguard the health and safety of workers including in the area of working time, and ensure that there is no unfair competition in the EU at the expense of the health and safety of workers;
- it should guarantee equal pay and treatment between men and women, and ensure non-discrimination in employment and other areas on grounds of race and ethnic origin, religion, age, handicap and sexual orientation;
- it should ensure proper implementation and enforcement of existing EU rules and regulations;
- it should guarantee free movement of workers, services, goods and capital, in a framework of equal treatment and fair competition;
- it should develop employment and other policies to promote more and better jobs;
- it should promote social dialogue.

The ETUC and its affiliates are increasingly aware that the 'emerging European labour market(s)' cannot be managed, with regard to the social field, by relying on national rules alone, while in the meantime internal market and competition rules are increasingly interfering with national autonomy in the social field. Therefore, we have recently made the case for a ***combination of some EU 'rules of the game', certain EU minimum standards, and respect for national social policy and industrial relations.***<sup>7</sup>

In the ETUC's view, the European Commission, supported by the Council, and where appropriate in cooperation with the European Parliament, and in consultation with the Social Partners, should further develop an EU-wide supportive legal framework supporting the emerging EU labour market(s) and cross border mobility of workers (both in the framework of free movement of services and free movement of workers).

Such a supportive framework should consist of:

- a set of minimum standards established at EU level, as a bottom in competition (regarding for instance working time and the protection of non-standard forms of work such as agency work);
- guidelines and mechanisms to clarify who is covered by the European standards: who qualifies as a worker; in which cases also self-employed workers are covered;
- the establishment of clear principles of equal treatment in wages and working conditions applying to the place where the work is done,
- equal access to social support systems;
- providing for a better shield for national labour law and social protection systems against disruptive invasion by EU market and competition rules

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<sup>7</sup> See ETUC position December 2005 on transitional measures for free movement.

- the obligation to respect the host country's industrial relations systems, i.e. the rules and regulations with regard to collective bargaining and industrial action;
- mechanisms and instruments, including liability of principal contractors, for cross border monitoring and enforcement of working conditions and labour standards;
- more proactive and rational migration policies, which focus on combating labour exploitation instead of deportation of irregular migrants, providing those workers with protection of their human rights and bridges out of illegality;
- embedding free trade in wider social values, through the development of European social policy and rights;
- developing forms of countervailing power of organized labour at transnational level.

### **13. On the questions raised in the Green Paper: other areas for EU action**

Only in a few areas does the Commission mention possible Community action: temporary agency work (mentioning the deadlock on the Draft Directive), the organisation of working time (trying to get new guidance on how to get out of the deadlock on the revision), mobility of workers, and undeclared work. Furthermore, the question is raised concerning if and how to take action on new forms of work that are not covered clearly, in law or in practice, by labour law, such as disguised employment relationships, economically dependent workers and self-employment.

#### ***Temporary agency work***

With regard to temporary agency work, the ETUC is already for many years making a clear case for a strong Temporary Agency Directive providing for European minimum standards with regard to agency work, to complement the Posting Directive (which only regulates which law applies in case of cross border agency work, namely the law of the host country).

In the meantime, in most EU countries equal pay with the user enterprise (including the possibility to derogate by collective agreement) is part of the legal framework. The ETUC therefore insists that this should remain an essential part of the Directive.

Clarifying the employment status of the agency worker (especially important for the UK and Ireland where agency workers are still not having unambiguous employee-status) should be incorporated in the next phases of this debate.

Also, in recent times we have argued in favour of a European instrument regulating joint and several liability (or 'chain-responsibility') of user enterprise and intermediary in case of agency work and subcontracting, not only for the payment of taxes and social security contributions, but also for wages (see the ETUC position on the Posting Directive as adopted in March 2006<sup>8</sup>).

The European Commission should encourage the Member States that have not yet done so to take initiatives to introduce so called systems of 'client liability', 'chain responsibility' or 'joint and several liability', bring together the various practices in Member States, and consider the proposal of a Community initiative on this matter.

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<sup>8</sup> ETUC position Posting Directive 2006, and recent letter on implementation

## **Working Time**

With regard to working time, it is surprising and also worrying that the Commission has inserted this issue in the Green Paper, with an ambiguous question that gives the impression as if the Commission wants to start a new debate about the need for having any Working Time Directive at all. For the ETUC, this is not acceptable. ETUC refers to all its positions about the Working Time Directive adopted since 2003<sup>9</sup>, and reiterates its support for the outcomes of the first reading in the European Parliament, which voted with a convincing majority in favour of the Cercas report.

In the ETUC's view, the EP adopted a clear 'flexicurity approach' to the revision. It strongly supported the principle that health and safety protection cannot just be understood as an individual interest, but is in the interest of society in general: in a limited sense, to ensure that it also protects third parties that may suffer from the bad health and safety of others (exhausted drivers in traffic causing accidents, tired doctors making mistakes etc.); and in a wider sense, to ensure that a healthy workforce and a healthy population are able to reproduce themselves and bring up healthy new generations of workers and citizens. Allowing individuals to opt-out from health and safety regulations is therefore fundamentally wrong, and should never have been accepted as a provision in the Working Time Directive.

When the EP had to take a position on the very weak proposals of the Commission, against the background of severe pressure from Member States to keep the opt-out in place and to find a way out of the Simap and Jaeger judgements, it chose, with the support of the ETUC, to be strong about principles and flexible about solutions.

It was strong about principles, by saying:

- every and any form of opting out is not acceptable
- ECJ judgements, i.e. the Community acquis, must be respected, including the recognition of inactive on-call time as working time

It was flexible about solutions, by accepting:

- there can be a transitional period in which the opt-out can be gradually 'phased -out'
- it would be allowed to deal in a flexible way with how to count inactive hours.

In developing the package of revisions, the EP took into explicit account that the basic principles of labour law (as mentioned above in this position) had to be respected. It therefore developed the following approach to the issue of derogations from standards.

When the protection is not in the standard itself (maximum amount of working hours, minimum amount of rest hours, etc) then the protection must be in the process (countervailing power by collective bargaining, or at least information and consultation of workers and their representatives).

Therefore, with regard to the issue of lengthening the reference period for counting the 48 hours (up to 12 months) it only allowed this by collective bargaining or after proper information and consultation of workers and their representatives.

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<sup>9</sup> First and second stage consultation etc.

Finally, when seeing that the new provisions offering flexibility to firms would entail a high potential risk for increased irregularity and unpredictability of working hours for workers, it decided that workers – especially modern workers, being increasingly men and women with family and care responsibilities - needed also at individual level a 'counter-right' to flexibility, to accommodate their needs. Therefore, an obligation on employers to inform workers well in advance of any change in their working time pattern was introduced, and the worker was accorded the right to request changes in his/her working pattern.

All in all, one could call the package an excellent example of a 'flexicurity approach', offering flexibility and security to both employers and workers. Therefore, the ETUC is calling on the Commission and Member States to take the EP's position into full account when working towards a compromise on the revision of the Working Time Directive.

### ***Towards an EU definition of a worker?***

The Commission asks if there is a need for more convergent definitions of 'worker' in EU Directives.

In the current situation, EU Directives leave the definition of worker or employee to the Member States. However, at least when it comes to the implementation and application of EU labour law and labour standards, it should not be possible for there to be a wide divergence or scope for manipulation with regard to which categories of workers are covered or not covered,

In its recent position on the Commission's Guidelines with regard to the implementation of the Posting Directive<sup>10</sup> the ETUC has pointed to the fact that there are currently major problems with the proper implementation and application of the Posting Directive, related to lack of clarity with regard to the concept of the posted worker. According to the Directive, 'a posted worker means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'. Not only does this definition lead to many interpretation problems at national level, also in many Member States employers and service providers are abusing the 'self-employment' status to circumvent the applicability of the Posting Directive.

The ETUC has therefore argued, that it would be very useful if the Commission developed clear guidelines with regard to such issues, to promote more coherence and effectiveness in the implementation and enforcement of the Posting Directive,

taking into account that the definition as such of the employment relationship as distinguished from independent and self employed work should be left to national law and practice.

Such guidelines would also fit very well in an approach as recommended by the ILO in its 2006 Recommendations on the Scope of the Employment Relationship, which also recommends a set of guidelines and criteria to determine the existence of an employment relationship.

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<sup>10</sup> Letter ETUC to Commission of 1 March 2007

### ***Combating undeclared work***

With regard to undeclared work, the ETUC has expressed on several occasions, especially when discussing the Posting Directive, that there is a clear need for **more and better enforcement** of existing labour law and labour standards. We also want to stress the need to develop a stronger role for the EU in promoting more and better cooperation and coordination between national labour and social inspectorates, and have suggested establishing some kind of European 'Socio-Pol'.

In addition, ETUC wants to address the issue of the growing informal economy and especially the **labour exploitation** of undocumented migrant workers, demanding that there be more focus on instruments and mechanisms to tackle exploitation, including the recognition and enforcement of fundamental human and labour rights of irregular migrants, instead of repression and deportation. ETUC is currently developing more concrete suggestions for the Commission to take into account when taking initiatives in the area of irregular migration, such as:

- ensure that the competences and activities of labour inspectorates are kept separate from immigration policing duties
- provide for possibilities to complain anonymously about exploitative working conditions
- separate labour rights from immigration rights (i.e. ensure that hours worked will always have to be paid, regardless of immigration status)
- clarify that irregular migrants have the fundamental right to organize in trade unions, and that providing them with support to get their human rights and human dignity recognized is not to be seen as 'facilitating irregular migration' (which is criminalized under EU law.....)

### ***Increasing certainty with regard to labour law***

The ETUC is clearly in favour of clarifying the employment status of temporary agency workers (see above).

Furthermore, as has been argued above in paragraph 5 of this position, the ETUC is in favour of developing mechanisms and policies to rebalance and refocus labour law, with a view to ensuring that labour law in its widest sense covers all workers that are working in the framework of a subordinate employment relationship. It should not be possible – as is now often the case – for the most vulnerable workers to be at the same time the ones not covered, in law or in practice, by labour law. In our view, the Commission should therefore first of all promote the implementation by Member States of the ILO Recommendation 198 as adopted by the ILC in 2006.

In addition, the Commission could develop guidelines, based on jurisprudence and good practice examples in Member States (for instance the introduction of a presumption of law in some Member States regarding employment status, which has led to a reduction of bogus self employment and precarious contracts), and on how to improve better enforcement of labour law in situations of non-standard employment



### ***A 'core of rights' to cover all workers***

The ETUC is in favour of, by developing a core of rights (to be clearly distinguished from a 'floor of rights' ) applicable to a wide circle of working citizens, including new forms of (dependent) work. This could provide security throughout working lives and careers.

It should clearly include the right to freedom of association regardless of employment status and the right to collective bargaining, which would have to be safeguarded against national and European competition law as far as it is aiming at improving the living and working conditions of the workers concerned.

The ETUC has not been able to elaborate a detailed position on this issue in the short time available for this consultation, but would be ready to contribute to the debate on this issue in the follow up to this Green Paper.

### **14. Conclusion**

The ETUC highly recommends that the Commission in its Communication later this year, following up on this Green Paper, revises its analytical framework and responds to ETUC's positions about all the above mentioned issues with a view to modernise ***and strengthen*** labour law to meet the challenges of the 21st Century.

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