EU Green Paper

COMPANY RESTRUCTURING

cep**Policy Brief** No. 2012-21 of 14 May 2012

Centrum für Europäische Politik

KEY ISSUES

Objective of the Green Paper: The Commission instigates a debate on the measures that governments could take to support company restructuring.

Parties affected: Companies, employees.

Pros: (1) The Commission's request that all Member States should make use of instruments such as short-time working schemes, working time accounts and corporate work alliances in times of crisis can safeguard jobs.

(2) Tax and benefit schemes should be reformed in such a way that they are able to mitigate the impact of the crisis on the labour market.

Cons: (1) The early involvement of "all relevant stakeholders" in company restructuring leads to uncertainty among suppliers, customers and creditors as to the economic sustainability of the company.

(2) Changes to employment termination regulations cannot improve entrepreneurial flexibility and the social protection of employees at the same time.

(3) The EU does not have the competency to harmonize national insolvency codes.

CONTENT

Title

Green Paper COM(2012) 7 of 17 January 2012: Green Paper on **Restructuring**

Brief Summary

- **General**
  - With the Green Paper, the EU Commission aims to initiate a consultation on successful practices and strategies for company "restructuring". It aims to find ways to better disseminate restructuring processes and thus promote growth and competitiveness.
    - The Commission defines restructuring as a company's adaptation to changing environmental, economic, technological, market and societal challenges.
    - In the field of employment, restructuring means the creation, cutting and above all transformation of jobs.
  - According to the Commission, the competitiveness of the European economy increasingly depends on its capacity to adapt and to be innovative.
  - The Commission differentiates between
    - restructuring as a response to economic crises and
    - restructuring to adapt to economic change.
  - According to the Commission, companies should recognise restructuring needs as early as possible and then prepare for them long-term.

- **Restructuring as a response to economic crises**
  - In the course of the economic crisis companies and their workforces "throughout Europe have, by and large, engaged creatively in restructuring processes that have been constructive, effective and instrumental" (p. 3).
  - According to the Commission, the following measures were decisive in limiting job losses:
    - public funding for short-time workers;
    - working time accounts and
    - corporate work alliances.
  - The Commission calls upon Member States to make use of these instruments in future crises but does at the same time see a risk involved in such job-saving measures: "A belated withdrawal of these schemes may carry substantial costs in terms of locking in labour to declining activities" (p. 8).
  - Despite the measures taken, unemployment rates increased dramatically as of the middle of 2009 in most Member States.
  - Job losses were often mitigated by compensation payments and early retirement schemes.

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- In order to be better able to respond to the consequences of economic crises in future, the Commission propagates reforms in the tax and benefit systems. These are to ensure that:
  - "work pays off" (p. 11);
  - wage developments are consistent with the adjustment needs of the economy;
  - the unemployed are rewarded for going back to work; and
  - employment protection systems balance security with job flexibility.
- The Commission asks to which degree the measures taken during the crisis are appropriate for restructuring and how their application can be encourage where appropriate.

► **Restructuring to adapt to economic change**

- The competitiveness of the European economy increasingly depends on its capacity to be innovative and to adapt to changes in a quick and smooth manner.
  - Companies are forced to adapt constantly, as in the medium-term product life cycles will be shortened through technological progress and innovation.
  - Companies must respond to changes in the international division of labour.
- The EU is to provide innovative and rapidly growing companies with the necessary framework conditions enabling them to contribute to sustainable development and job creation.
- To enable the adjustment measures to be successful, the following is crucial:
  - an early preparation phase, especially to limit job losses and negative regional impacts;
  - "the early involvement of all relevant stakeholders" (p. 4) – i.e. suppliers, customers, employees, their representations, social partners, industry associations, governments, regional and local authorities and banks ;
  - Bankruptcy procedures which do not prevent "honest failed" entrepreneurs from re-entering business, e.g. through
    - an EU-wide limited discharge time and debt settlement (so-called "good conduct" periods) of three years; or
    - the requirement "to complete all legal procedures to wind up the business in the case of non-fraudulent bankruptcy within a year" (p. 13);
  - a more rigid use of existing state aid for investments by viable companies.
- In order to ensure a high employment and social protection level, the Commission wishes to accompany restructuring through "supporting measures". This includes:
  - "changes" in employment protection legislation and
  - training and activation policies facilitating job access for the unemployed.
- Appropriate policy measures are to prevent rigid labour market and skills structures becoming a hindrance to adjustment.
- The Commission proposes strengthening the role of the social partners in restructuring processes.
- The Commission asks which framework conditions are necessary for successful adjustment measures in industry and whether bankruptcy procedures can be improved.

► **Anticipation of restructuring needs**

- According to the Commission, restructuring processes in the EU "are sometimes reactive rather than anticipative" (p. 15). "External entities" are often involved too late in order to minimize their social impact (p. 15).
- Therefore the Commission favours the approach of "anticipating restructuring processes" (p. 15). Of crucial relevance here are:
  - long-term strategic planning in companies which anticipate changes and
  - "mechanisms" for forward-looking planning of employment and skills.
- According to the Commission, authorities should facilitate the "coordination between outside stakeholders and companies" in order to support restructuring processes.
- Anticipatory processes and long-term strategic planning should also be applied to restructuring processes in the public sector.
- Early preparation of education and training systems for future skills requirements.
  - Involvement of the social partners in this process.
  - "Investments in digital literacy" is imperative, as the demand for workforces with "eSkills" (p. 14) will increase.
- The Commission wishes to examine the "role of the regions" in promoting "smart specialisation" (p. 6).
- The Commission asks whether and how it is possible to recognise restructuring needs at an early stage and thus plan in the long term.

Statement on Subsidiarity by the Commission

The Commission does not address the issue of subsidiarity.

Policy Context

Originally, the Commission wanted to carry out a hearing of the social partners at European level. However, it carried out a public consultation instead. The results of the consultation are to be integrated into the Commission's Flexicurity Strategy (see CEP Policy Brief).
If and under which conditions an undertaking will be eligible for subsidies has already been legally defined. For instance there are "Guidelines for state aid for rescuing and restructuring firms in difficulty (C 244 of 1 October 2004). In addition, in response to the economic crisis, the Commission published a "Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis" (C 16/3 of 22 January 2009).

Options for Influencing the Political Process

Leading Directorate General: DG Employment, Social Affairs and Inclusion

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The Commission recognises the importance of restructuring for EU competitiveness. It is equally aware of the negative economic effects, in particular for employment, and is searching for ways to limit these. The Commission is right to differentiate between the causes for restructuring; economic change and crises both cause restructuring processes but require different reactions.
With regard to restructuring in response to a crisis, the following holds true: Emergency measures such as **short-time working schemes, working time accounts and corporate work alliances can safeguard jobs,** as the economic crisis especially in Belgium, Germany and Luxemburg showed in many sectors. **Therefore, the Commission is right in calling upon Member States to use these instruments in future crises**.
According to the Commission, **the tax and benefit systems** of Member States **are to be reformed in order to mitigate the impacts of the crisis on the labour market**. Stronger incentives for labour access and appropriate wage developments are suitable tools to foster employment growth. However, these are general demands made of a stable labour market and economic policy which would have led to positive growth and employment effects in many Member States even before the economic crisis. On the other hand, with regard to restructuring due to economic change, most of the considered emergency measures in response to economic crisis are not appropriate. The Commission is aware of this and therefore calls for a series of further measures which are to promote restructuring on the basis of economic change. Comprehensive, binding EU-wide rules regarding restructuring, however, are not target-oriented, as very complex processes which differ widely from case to case are involved in restructuring . For instance, regional characteristics, such as the sector concerned, the volume of the company and markets play a decisive role.
The call for an early involvement of all "relevant stakeholders" into the restructuring process, in particular in the case of economic difficulties, ignores the entrepreneurial reality. This merely **leads to incertainty among suppliers, customers and creditors as to the economic sustainability of the company**.
The Commission recognises the necessity for transparent and rapid bankruptcy procedures that allow "honest failed" entrepreneurs to establish new companies soon or to continue their insolvent but sustainable businesses. However, the advantage of a short discharge time and debt settlement conflicts with the disadvantages for the creditors in terms of their protection. Short "good conduct" periods increase the creditors' risk of having to waive a larger part of their claims in the case of insolvency and can lead to either less credits being granted or higher credit costs.
In order to ensure a high level of employment and social protection, the Commission calls for "changes" to employment protection rules without actually declaring whether or not such changes will relax or tighten these rules. There is a trade-off between a high employment rate and a high level of social protection. **A tightening of employment protection would have a negative impact on the necessary flexibility of companies in restructuring processes and should therefore be rejected. While relaxing employment protection runs counter to the target of high social protection on the one hand, it can help promote the creation of jobs on the other hand**.
The propagated public funding of education and training systems is limited to the unemployed and those about to become unemployed in order to avoid deadweight effects; in-house training measures must not be funded by tax monies.
The Commission's ideas and demands regarding anticipating restructuring needs and future staffing requirements in companies ignore reality. The restructuring and planning of requirements in terms of personnel and skills are part of the everyday business of companies and therefore anyway in the interest of each company. State intervention should therefore be avoided, since the state is not the better entrepreneur – even more so due to its lack of insight into the specific situation. However, the call for an early adjustment of education and training schemes to changed needs is justified.

Impact on Growth and Employment

Reducing rigid labour market structures to improve adaptability can help set incentives for growth and employment. The same holds true for timely training measures for the unemployed who lost their jobs due to restructuring measures and whose skills are not in demand on the labour market. In the case of macro-economic declining demand situations, measures such as short-time working schemes can help keep employment stable. But if the changes in demand are of a structural nature, short-time working schemes can contribute to the wrong allocation of labour forces, which would have a negative impact on growth and employment in the long run.

Impact on Europe as a Business Location

The impact on Europe as a business location cannot be clearly foreseen. This mainly results from changes to employment protection. Tightening this will reduce the quality of Europe as a business location; relaxing it will improve it.

Legal Assessment

Competency

The EU has the power to adopt rules on the social safety and social protection of employees (Art. 153 (1) lit. c TFEU) and measures on the protection of employees upon the termination of their working agreements (Art. 153 (1) lit. d TFEU). However, such decisions are subject to unanimity in the Council.

With regard to the harmonisation of parts of the insolvency code, in particular of the good conduct periods, the EU does not have competency. At best it could be based on Art. 114 TFEU (completion of the internal market). A precondition would be, however, that the existing national statutory rules impede the functioning of the internal market. This is not the case here, as the Regulation on insolvency proceedings (VO (EC) No. 1348/2000) takes account of these differences.

The legal framework for state aid granted to companies is subject to the exclusive competency of the EU (Art. 108, 109 TFEU in conjunction with Art. 3 TFEU). With regard to the called for adjustment of the training systems to necessary future skills, the EU has no competency. Instead it is obliged to "fully" respect "the responsibility of the Member States for the content and organisation of vocational training" (Art. 166 (1) TFEU).

Subsidiarity

EU-wide rules on most of the measures discussed by the Commission would be inconsistent with the principle of subsidiarity, as they cannot achieve better results than national rules. For instance, a harmonised tax and benefit scheme would not take account of different national designs of the competitive order and the principle of the welfare state. In-house measures such as working accounts and corporate work alliances can anyway be better agreed upon by the social partners in a quicker and more appropriate manner.

Proportionality

Currently not assessable.

Compatibility with EU Law

The demand for less rigid labour market rules can be partly satisfied by the Commission itself. For instance, they could facilitate employment promotion for older people through more flexible possibilities for limiting employment agreements, which has been dramatically aggravated by the ECJ in reference to age discrimination [Mangold; ECJ, C-144/04; s. CEP Analysis]. Likewise, increased flexibility could be achieved through opening clauses to the benefit of the social partners in the Working Time Directive (RL 2003/88/EC) (s. CEP Policy Brief).

Compatibility with German Law

The public funds for short-time working schemes and training measures proposed by the Commission in order to facilitate the return of the unemployed to the labour market already exists in Germany. These are in particular the short-time work wages, seasonal short-time work wages, the transfer short-time work wages and the promotion of the participation in transfer measures (SGB 3, §§ 169 et sqq.).

Conclusion

It is right to call upon all Member States to make use of instruments such as short-time working schemes, working time accounts and corporate work alliances during times of crisis, as they are suitable for safeguarding jobs. Tax and benefit schemes are to be reformed in order to minimize the impact of the crisis on the labour market. An early involvement of "all relevant stakeholders" leads to uncertainty among suppliers, customers and creditors as to the economic sustainability of the company. Changes to employment termination rules cannot improve entrepreneurial flexibility and the social protection of employees at the same time. The EU does not have the competency to harmonize national insolvency codes.