THE LITHUANIAN DRAFT LABOUR CODE: AN INITIAL ASSESSMENT

1. The European Labour Market Policy Context

The employment performance of European labour markets has, for a long time, been demonstrably linked to the institutional arrangements of labour market organization embodied in domestic labour codes (Ashiagbor, 2005). Since the Treaty of Amsterdam, all EU Member States have formally signed up to a *"coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change"* (art. 145 TFEU): the **European Employment Strategy** (EES). Against this backdrop, the EU has developed pan-European employment policy guidelines.

Since 2007, the employment policy guidelines have been contextualized in the broader strategy of so-called **Flexicurity**. Flexicurity is *"an integrated strategy to enhance, at the same time, flexibility and security in the labour market"*. Flexicurity is about striking the right balance between flexible job arrangements and secure transitions between jobs so that more and better jobs can be created.

Flexibility is about developing flexible work organisations where people can combine their work and private responsibilities, where they can keep their training up-to-date and potentially have flexible working hours. It is also about giving both employers and employees a more flexible environment for changing jobs. *Security* means 'employment security' – to provide people with the training they need to keep their skills up-to-date and to develop their talent as well as providing them with adequate unemployment benefits if they were to lose their job for a period of time (European Commission, 2007).

The European Commission (2007) characterizes flexicurity policies broadly as follows: moderate Employment Protection Legislation (EPL), high participation in lifelong learning, high spending on labour market policies (both passive and active), generous unemployment benefit systems balancing rights and duties, broad coverage of social security systems, and high trade union coverage (see also OECD, 2006; Eriksson, 2012). Active involvement of social partners is essential to ensure that flexicurity delivers to all.

The 2010 **"Europe 2020"** agenda zooms in further, advocating the following priorities (European Commission, 2010):

- Member States should introduce a combination of flexible and reliable employment contracts, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure professional transitions accompanied by clear rights and responsibilities for the unemployed to actively seek work.

- Step up social dialogue and tackle labour market segmentation with measures addressing temporary and precarious employment, underemployment and undeclared work. Professional mobility should be rewarded. The quality of jobs and employment conditions should be addressed by fighting low-wages and by ensuring adequate social security also for those on fixed contracts and the self-employed.

- Member States should increase labour force participation through policies to promote active ageing, gender equality and equal pay and labour market integration of young people, disabled, legal migrants and other vulnerable groups. Work-life balance policies with the provision of affordable care and innovation in work organisation should be geared to raising employment rates, particularly among youth, older workers and women.

While the crisis period was a challenging testing ground for employment policy a broad European consensus has thus, over the years, emerged that labour market policy by Member States should, duly taking into account domestic differences and path dependencies, prioritize along the following axes (Wilthagen, 2014):

- **Flexible and reliable contractual arrangements** (FCA): to support 'outsiders' who are employed on short-term or irregular contracts or are unemployed to find work and to move into more stable contractual arrangements and sustainable careers – and to support 'insiders', employed on open-ended contracts, prepare themselves for job changes and new labour market demands.

- **Responsive and comprehensive lifelong learning strategies** (LLL): to ensure that EU citizens have the opportunity to obtain a high quality initial education, develop a broad range of key skills and acquire new skills and to be able to upgrade existing skills throughout their working lives.

- **Effective active labour market policies** (ALMP): to help unemployed people back to work through job placement services and labour market programmes, such as job search guidance and intensive courses.

- **Modern social security systems** (MSS): EU governments need to provide adequate unemployment benefits to act as a safety net when people are changing jobs and offer healthcare benefits in case they fall ill as well as pensions for when they retire.

2. Priorities for Lithuanian Labour Law

The EU's country-specific employment policy recommendations for Lithuania connect the principles above to Lithuania's overall macroeconomic and demographic realities (Council Recommendation 2014/C 247/13). They emphasize:

- Better active labour market policy measures for **low-skilled and long-term unemployed**.

- Improved coverage and adequacy of **unemployment benefits and linking them to activation**.

- Addressing persistent skills mismatches by improving the labour-market relevance of education inter alia based on skills forecast systems and **promoting life-long learning**.

- In order to increase the employability of young people, prioritising offering quality **apprenticeships, other forms of work-based learning**, and strengthen partnership with the private sector.

- Reviewing the appropriateness of labour legislation, in particular with regard to the **framework for labour contracts and for working-time arrangements**, in consultation with social partners.

3. Nature of this Assessment

While not all of the above priorities and recommendations can find an appropriate outlet in a labour code, we will use them and the overall Flexicurity and Europe 2020 policy orientations as our touchstone for an initial assessment of the draft Lithuanian Labour Code.

It should be stressed that this review concerns mostly but not only the conceptual policy side of the labour code, and deals not with the technical formulation of its rules. Our goal is also to offer quick and direct "side-line" comments that may help finalize the process of writing and adoption.

In our review, we were limited to contents of the English-language "Summary of the Draft Labour Code" (hereinafter: Summary). We have not consulted any Lithuanian actors or parties. We were not involved in the process of labour code drafting. Our assessment has been prepared in total independence.

The nature of any review is essentially critical. The mainstay of this text is offer constructive criticism. But I should state at the outset that my overall assessment of the draft labour code is overwhelmingly positive. The Summary breaths clarity, purpose, and modernity. This is a code that can serve its country well. I hope that this paper can help it to serve even better.

4. Goals and General Provisions

Lithuania is late in overhauling its historic core labour legislation. This comparative disadvantage can be turned into a distinct advantage if the new labour code succeeds in embracing the right principles and in following the best practices. There is certainly ample evidence of this in the Summary. From the outset, the basic motivations offered to justify the necessity of a new labour code chime well with the overarching European principles (Summary, section I). Lithuania is to be applauded for forcefully internalizing the European logic and for translating its orientations into the framing of its new labour code.

From a technical point of view, it makes a lot of sense to establish a **common core of general provisions** that overarch the inevitably diverse realities of employment in today's and tomorrow's economy. Avoiding insider/outsider traps is also linked to ensuring a common level playing field.

As regards the **definition of the employment relationship**, due attention should be given to two important trends in employment: the increasingly blurred distinction between subordinated employment and self-employment, on the one hand, and the increasingly triangular nature of employment constructions that involve multiple parties beyond the mere employer-employee dichotomy. Both these trends are well documented and often create boundary issues in older labour codes. Lithuania could take advantage of its new labour code to offer an encompassing scope that could also offer different layers of employee rights to different types of dependent economic activity (see Part II, Chapter II of the Summary).

The overlap of domestic, European, and international **employment rules** is a challenge for all employers and labour practitioners. Since the new labour code intends to list all norms determining the employment relationship, it could be useful to state a formal pyramidal hierarchy between these potentially overlapping norms, allowing for swift and clear clarification and supremacy in case of conflict, particularly since the code will also introduce a new type of agreement between employers

and representatives. Such a hierarchical construction can, of course, be provided or be present outside the labour code as such.

Lithuania is to be congratulated on abolishing the **concept of seniority** in the code, since it will help to boost employability throughout careers and avoid making more experienced or older workers by definition more expensive than younger workers. If Lithuania also seeks to weed out this pervasive distinction in human resources, it should be careful in codifying this into its non-discrimination provisions.

It makes a lot of sense, from an economic growth and employment promotion perspective, to differentiate the degree of labour law penetration in relation to the **size of a company's workforce**, as is the intention. This also connects with the overall EU-goal, explicitly stated in the TFEU, to avoid regulatory overload for small and medium-size enterprises. Various EU member states have experimented with thus segmenting the scope of labour law. Invariably, from a legal perspective, this generates the risk of manipulating and side-stepping thresholds through company chains and other contractual arrangements. This can perhaps be anticipated to some degree in the drafting. At the same time, the degree of differentiation in the scope of labour protection tied to the size of the company's workforce, as described in the Summary, goes further than most and may run the risk of a discrimination claim by employees who feel deprived of rights deemed more tied to their person than to their employer's size.

5. Individual Employment Relationships: Chapters I-II

The new code will do away with many old-school concepts and distinctions that have no place in today's market economy and are equally absent in the domestic employment law of most EU member states.

As regards the common **principles that govern individual employment relationships**, an important contemporary question is to what extent plain principles of general contract law govern the employment contract too. Many civil-code countries have seen a re-emergence of civil law as the natural common law for employment contracts. This is, however, not without controversy since some claim a partial "autonomy" of employment law versus plain contract law. At the very least, a new labour code has the opportunity to explicitly include or to explicitly exclude those general contract law norms it deems applicable or inapplicable to the employment contract.

Lithuania is to be commended for including **non-discrimination and privacy protection** in the core roles of the employment contract. However, since both principles are determined by directly applicable international law principles open to ongoing interpretation and development by international courts, the domestic legislator should avoid becoming too specific in detailing their implications, to avoid the risk of becoming outdated soon.

The attention to **work-life balance** as an employer duty is modern and bold. However, the Lithuanian legislator should be careful to determine the extent and the limits of this accommodation duty for employers. If flexibility is one-directional, it can become a hurdle to employment and job creation. Moreover, family policy always works best if the cost and responsibilities are at least partially shared by the employee too, leading to both empowerment and responsibility. Several EU member states have thus experimented with some form of time saving or career planning account, particularly Austria, Germany, and France.

In focusing on **training and skill development** Lithuania directly responds to a European recommendation. In constructing it as an employer obligation, due attention should be given, not only to the extent, cost and the format of the obligation – as for the work-life balance duty – but also to the distinction between formal and informal (on the job) training. It is advisable to determine criteria clearly to ensure a cross-sector level playing field and to avoid fruitless discussions between unions emphasizing formal training and employers preferring informal training.

The attention to **whistle-blowing and mobbing** is commendable. Lithuania will posit itself at the European forefront by codifying this. In rendering these principles operational and in order to avoid complaint culture, particularly as regards mobbing, it is advisable to develop a standard internal company procedure that aims first at reconciliation with a trusted third party mediator, rather than fuelling detrimental litigation.

The Summary indicates that the new labour code seeks to boost **working time flexibility**, in particular as regards part-time work and the switch between part-time and full-time work. This is a clear manifestation of the European Flexicurity principles. For an outsider, it is quite remarkable that turning from part-time to full-time or vice versa is partly created as an employee entitlement and will thus generate additional labour costs. Here too, it can perhaps be recommended to share responsibilities between employer and employee through such tools as a working time savings account or a career account. This will enable a collaborative culture of flexibility while partly internalizing the cost of flexibility towards both parties. Employee rights to personal flexibility have the tendency, once vested, to proliferate and be seen as a burden, rather than as the win-win they can be.

6. Individual Employment Relationships: Chapters III-V

Since the new labour code seeks to distinguish between **essential and non-essential conditions** in relation to the possibility of change without consent (*ius variandi*), it will be vital to address whether the plain contract law principle of *pacta sunt servanda* plays in the context of employment law or not (cfr. supra). Legal certainty will be served by codifying the procedure for addressing illegal unilateral change in employment conditions. The status of the employee pending such procedure, particularly as regards discrimination or dismissal, may perhaps be worthy of rules too.

In modernizing the institute of **suspension of the employment contract**, attention could again be paid to instruments that provide a broad scope for personal flexibility while guaranteeing responsibility and common funding, such as the above mentioned career account. Such a tool expresses the desire of Flexicurity, as it provides a platform that will both enhance personal flexibility and employability. From the latter's perspective, the state may sometimes have an interest in co-funding certain types of suspension, for instance in an economic downturn, to avoid permanent lay-offs and ensure reintegration in the labour market (see Wilthagen, 2014).

Lithuania is right in embracing distance work – a broader category than **telework** – as an integral part of the normal employment relationship. Given the increasingly blurred boundaries between office time and free time, due to the advance of communication technology, it is advisable to adopt a clear definition to distinguish formal telework from informal distance work.

The **law of termination of employment** typically has deep historical and cultural roots nationally. Within Europe huge differences exist, ranging from de facto employment at will to heavily regulated and restricted practices with external control. We touch here upon a core component of Europe

flexible EPL recommendation. Coming – as does the reviewer – from a domestic background of liberal but expensive dismissal law, the proposed structure of authorized termination grounds in the Summary reads still as complex and litigation-prone. The experience of many European countries who thus codify and restrict the grounds for termination is that employers will in any case choose to terminate when they feel they have to, preferring to pay additional fines instead of following restrictions. Unless Lithuania can ensure a very effective and quick dispute resolution mechanism for individual dismissal, the layered construct of legal termination grounds risks becoming more of an additional dismissal cost than a genuine dismissal restriction. Moreover, from the European angle of ALMP, it is advisable to make at least part of the dismissal procedure active rather than passive: outplacement support, rather than redundancy payment.

The protection of **pregnant women** against dismissal reads as absolute, leaving no room for dismissal wholly unrelated to pregnancy. If so, then this risks hurting the employment opportunities of young women.

The Summary does not specify the procedure or payments for **collective dismissal** nor the limitation, if any, of justifiable dismissal grounds in case of collective dismissal. These are obviously key issues, also from a perspective of labour market functioning and ALMP. It is highly advisable to ensure that specific redundancy costs in case of collective dismissal are geared towards reemployment services rather than cash payments on the way to the door.

7. Individual Employment Relationships: Chapters VI-XI

The Summary indicates a greater variety of **contract types**. This is a positive sign that Lithuania is ready to lower the threshold for formal employment in its labour market, thus addressing the need of increasing employment opportunities for outsiders on the labour market. I find notable the (limited) possibility introduced to use **fixed-term contracts** without formal reason of temporality, including a possibility of termination during the term of employment, since this is indeed likely to lower the barrier for job creation and hiring. This ties into the overall European policy aim to boost employment opportunities for low-skilled and long-term unemployed.

At the same time, the introduction of these new employment formats can have supply effects and draw employment creation into sub-standard or precarious conditions, creating the unintended side-effect of new outsiders. Drawing from the experience in other countries, such as Germany with the Mini-Jobs, due attention should be given to avoid long-term segmentation and polarization (see, e.g. Eichhorst and Tobsch, 2014). A middle-ground can be found between boosting access to employment and avoiding entrenchment by limits and provisions for transiting into regular work: it is all a question of modalities and conditions.

For instance, unless the target group is clearly defined and distinct from the average job seeker, **training and apprenticeship contracts** can become a standard gateway into regular employment, basically crowding out standard new employment. In the same vein, the relationship between **on-call contracts** and standard working time regulation should be clearly defined, lest this new type of contract will serve as the standard contract's by-pass.

Overall, the variety of contracts offered reflects a modern approach to employment that is highly promising. At the same time, however, Lithuania must be careful to ensure a common core of rights and duties, to avoid manipulation and discrimination. Moreover, since Lithuania has the once-in-its-

history chance to rewrite the statute book, one may wonder if it should not go further still: why maintain the distinction between self-employed and employees? Why not go for one all-in status for collaborative economic activity irrespective of parties, duration, and time? Perhaps the consequences in social security law might be too complex, but from a labour law angle less could definitely be more, even though there may still be different layers of protection necessary in accordance with ILO-standards.

The proliferation of **peculiar employment relationships** may undoubtedly respond to certain economic or societal needs. But the downside of differentiation is complexity and segmentation. There is a trade-off between catering to specific needs through specific employment statuses and enabling a level playing field that will boost job mobility and career development. From the European recommendations, mobility appears to be a concern for Lithuania. It should therefore be careful not to carve up its labour market in small niches with different rules: they will keep people from moving. Why should athletic, artistic, pedagogic and managerial employees be any different from other employees? Certainly Lithuania should avoid being slave to its traditions and certainly flexibility could be attempted in a flexible way across the board, rather than in separate batches per employment type? It is just an innocent thought in complete detachment from political realities that escape the reviewer.

As regards **working time**, the Summary provides a modern structure of familiar working time components. Given the importance of working time for a work-life balance, long-term employability, and access to employment, it is advisable for Lithuania to offer the maximum of flexibility. The future is services and the service economy means flexibility. The more employers, employees and unions embrace flexibility, the better off they will all be. Again, the format of a time savings account can ensure the long-term win-win for all involved: making the employee more master of its time priorities throughout different career phases and giving the employer more leeway for flexible work. Similarly, the provision of **educational leave** – while definitely a step in the right direction – would be a more potent talent and employment tool as part of a managed time account that can be tapped when wanted or needed, rather than as a standard right at fixed intervals. Tailor-made solutions beat standardized rights.

I understand the section on **compensation of damages** to imply that employees are liable, as their employers are too, for any damage caused by any fault, i.e. that the notion of 'fault' is *not* qualified for the employee. This is quite remarkable in a comparative perspective. Employee liability is often limited to specific faults since it is the employer's work organisation which often creates the context that induces employee errors. By making the employee plainly liable, one transfers part of the risk of organizing a company from the employer to the employee.

The introduction of **punitive damages** – "non-property damages" in the Summary's lingo – to discourage future labour law violations obviously raises the question of limits. The American experience teaches us that such punitive damages, if left open-ended and unchecked, can stimulate counter-productive litigation culture and impose additional bureaucracy and transactions costs upon the overall economy, effectively serving as a complementary business tax. Lithuania should therefore be careful to delineate its scope. This also includes a reflection on the possibility or desirability of class action.

8. Collective Employment Relationships

Information, consultation, and collective bargaining – the "social partners" – are an important part of the functioning or malfunctioning of a labour market. When they work, they enable a stable business environment, allow more HR investment, and generally produce inclusive growth. When they fail, they lead to standstill, stifle innovation, avoid necessary adjustments and generally suppress economic potential. For them to work, **institutions must match culture**. The Scandinavian consensus model works because there is a societal consensus. Adopting consensual institutions à la Scandinavia without the culture will gridlock the labour market. The choice that Lithuania faces is therefore critical: are its social partners ready, able, and willing, for the ambitious institutional partnership model its labour code has in mind?

It is a question the reviewer can only ask rhetorically, but it will be the key question in real life. The collective labour law ambitions of Lithuania are very high: it seeks to emulate both the hierarchical centralized model of collective bargaining of some European countries and add to that a German layer of co-management at company board level. I know of no country – with the possible exception of Austria – that combines both these partnership models into one unified system. It is ambitious indeed.

The **dualistic system** of employee representation now proposed by the draft code resembles that of some Western-European countries. The main concerns will be to avoid an inflation of representation fora, to avoid an artificial inflation of protected and shielded employees, and to ensure a smooth coordination of the various levels towards efficient labour market and HR management. In this regard it is indeed useful, as the Summary suggests, to assign enterprise-level union representation to enterprise employees. This enables the enterprise reality, rather than any political agenda, to be first and foremost among attitudes within the enterprise.

One is struck how the **workplace level** is not a priori labelled a partnership level, whereas the sector and the nation are (Chapter I). This *seems* to go against the grain of Flexicurity and the overall labour market recommendations of the OECD. Decentralisation, rather than centralisation, is key when labour markets must be "responsive to economic change". Firm level flexibility in setting labour conditions is now seen as an important tool to quickly address shifting economic realities and reduce layoffs in time of economic transitions (see, e.g., Wilthagen, 2014). At the very least, it is advisable that Lithuania ensures a degree of freedom of action at the enterprise level, even within the confines of sectorial or national collective bargaining. This requires delineating the possible hierarchy between enterprise-level bargaining and more centralized bargaining, or protecting the position of the in-house works council vis-à-vis sectorial or national collective bargaining.

Any institutional infrastructure for collective bargaining must also decide **which unions** or **employer organisations** are allowed to use it, given the human rights reality of union plurality. I find no reference to criteria or procedures in this regard in the Summary, but they will be necessary and will have to comply with the international standards guaranteeing freedom of association and non-discrimination. In the same vein, if Lithuania wants to give an institutional role to **sectorial bargaining**, it will need to identify and chose sectors (if it has not done so yet). Any choice will run the risk of becoming outdated as the economy innovates and progresses: a symptom well-known to other countries with a dualist institutional make-up. Redrawing the sector map will be very hard: all the more reason to make sure the enterprise level has room to manoeuver independently.

Since Lithuania will either organise or allow various **overlapping levels of bargaining**, it will have to decide on a legal hierarchy among collective bargaining agreements or on a clear-cut division of tasks between the levels, or on both.

Finally, even though the Summary elaborates extensively on collective bargaining and unions, there is no reference to adopting or keeping a state-run system of **extending collective bargaining agreements *erga omnes***. Such extension procedures are typical of continental European social partnership models. They are no prerequisite but typify the close relationship between unions and the state in such consensus models. When and where they are used will depend on the nature of the social partnership model and the role of the state in it. This is a relevant reflection to make at the stage of a lbour code overhaul.

Overall, the uninformed reader senses from the text of the Summary how important and far-reaching the ambitions of the new labour code are in relation to collective labour law, but misses some key institutional design choices that are needed to make it operational. Perhaps these choices have already been made and are taken for granted. If not, they warrant careful reflection.

9. Settlement of Collective Labour Disputes

It is right and important to provide for a comprehensive and well-oiled machinery for dispute resolution as the *pendant* of any social partnership model. It will help to avoid complete stalemate when consensus is failing. The system envisaged by the draft code is intricate, perhaps even too intricate. The outside observer wonders what profound difference lies behind the distinction between a conciliation commission and a mediated negotiation. Would it not be equally efficient to merge the two into one?

The logic of not separating collective labour disputes over **rights** from those over **interests** can be politically powerful in enabling a genuine consensus model. From a legal perspective, however, legal conflicts engender the human right to a fair trial and thus enable access to a "court" (art. 6 ECHR). The Summary does not provide enough detail to allow verification of this "access to justice" requirement, but it is important to acknowledge its inevitability in constructing and activating the new labour code.

The success of settling collective labour disputes by **arbitration** will first and foremost depend on the willingness of all sides to trust and respect the arbitration process. In this regard, it may perhaps be desirable to include appointed permanent employee and employer representatives in the process, albeit in an advisory position to the actual arbitrators.

The Summary seems to suggest that **strikes or other collective action** can only be contemplated after the dispute resolution mechanism has unsuccessfully run its course. While this can be the institutional platform for organized strikes, it must be stated that – in the current state of the law – the right to strike is recognized by the European Court of Human Rights as an individual right that can in principle be exercised – albeit collectively – regardless of such dispute resolution procedures. An individual human right is never absolute and can therefore be subject to restrictions, but these will have to be justified on a case-by-case basis, taking into consideration the aim, effectiveness and proportionality of the restriction.

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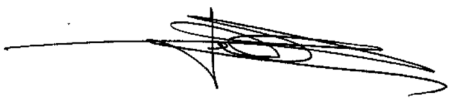

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