

World Bank Group *Consultation for the Business Enabling Environment Project*

Submission by:

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QUESTION; ARE THE ISSUES INCLUDED IN THE BEE PROJECT RELEVANT FOR PRIVATE SECTOR DEVELOPMENT AND IS THE OVERALL DESIGN ADEQUATE?

My focus in this submission is on the labour dimension of the BEE project. My comments draw in part on a series of research papers that evaluated the BEE's predecessor, the Doing Business Employing Workers Index (see 'References' below).

My overarching observation is that it is surprising how constrained the Pre-Concept Note is in its engagement with the forceful criticisms and lengthy debates on the Doing Business project. It appears that a limited amount has been learnt from the substantial research and advocacy efforts that ultimately led to the Employing Workers Index being removed from the Doing Business aggregate rankings.

In relation to the overall design of the BEE project, it is worth returning to some of the central criticisms of the Employing Workers Index to reconsider them in light of the Pre-Concept Note for the BEE project.

THE OBJECTIVES AND EFFECTS OF LABOUR REGULATION

The Doing Business Employing Workers Index was used to contend that rigid regulation of employment conditions is significantly responsible for aspects of poor labour market performance, namely low productivity and high unemployment and informal employment (e.g. *Doing Business 2005* (World Bank 2004); see Lee and McCann 2008). As a result, the Bank's assessment of labour regulations, in developing countries in particular, was, at least initially, overwhelmingly negative.

The BEE project suggests a similar conceptual imbalance. In particular, the Pre-Concept Note's section on 'Labor' (Section D. pp 22-25) opens by exclusively referencing studies that point to the association between 'rigid' labor market regulation and higher levels of unemployment. It does not refer to the substantial literature that explores the benefits of labour regulation,

including by the World Bank itself (e.g. the World Development Report 2013 (World Bank 2012)). This approach to the research cannot capture the social objectives of labour market regulation e.g. ensuring justice, protecting workers' wellbeing and security, improving quality of life for workers and their families (Lee McCann and Torm 2008). Nor can it recognise that labour regulations can generate positive economic outcomes or underpin a rigorous exploration of the features of effective and protective labour regulations in specific contexts. The risk in designing legal regulation indicators is that the benefits of labour market institutions are not clearly recognised, while labour markets with very limited regulation are assumed to be ideal (Lee and McCann 2008).

THE DE FACTO EFFECTS OF LABOUR REGULATION

In the Doing Business literature, the distinction between *de jure* and *de facto* regulation was frequently alluded to without any proper analysis of the influence of laws on working life. It was highlighted at the time that the relationship between statutory provisions on actual working hours cannot be assumed. The relationship between labour regulations, income, and the observance of legal measures is not clear-cut, primarily an empirical question and, especially in low-income countries, often very complex (Lee and McCann 2008).

The Employing Workers Index and the Doing Business literature implicitly assumed that a legal standard is comprehensively applied and then further assumed the kinds of impacts the legislation would have on working life. The methodology outlined in the Pre-Concept Note does not suggest a radical change of approach (see further below).

INTERNATIONAL LABOUR STANDARDS

The Doing Business Employing Workers Index initially neglected the International Labour Organization (ILO) International Labour Standards with the exception of the core standards identified in the ILO's 1999 Declaration on Fundamental Principles and Rights at Work.

It is not clear that the BEE project will take the range of ILO standards into account. The Pre-Concept Note states that it will 'build on' relevant ILO International Labour Standards (p 23). The only reference, however, is to the ILO's 1999 Declaration on Fundamental Principles and Rights at Work, rather than to the range of International Labour Standards that align with the broader set of workers' rights that will be covered by the BEE Labor indicators. This suggests a worrying degree of uncertainty about the content and relevance of the International Labour Standards.

PROMOTING LEGAL REFORM

Doing Business was not exclusively a research project. It had a significant influence on labour market policy and laws, especially in developing and transition economies. A particular

concern about the Employing Workers Index was its use to guide legal reform, in which the Index was adopted as a benchmark against which to measure progress.

Given the limitations of the Employing Workers Index, and the concerns that emerged about the incentive for governments to weaken protective laws in order to ascend the Doing Business rankings, it is worrying that ‘advocating for policy reform’ is identified as a central objective of the BEE project (Pre-Concept Note, p 4). The Pre-Concept Note states that ‘the hype around aggregate rankings will be avoided.’ Yet how the BEE indicators will be designed to produce aggregate scores is ‘yet to be decided’ (p 6). A repeat of the experience of Doing Business would be very unfortunate.

REFERENCES

Sangheon Lee and Deirdre McCann (2008) ‘Measuring Labour Market Institutions: Conceptual and Methodological Questions on “Working Hours Rigidity”’ in Janine Berg and David Kucera, (eds.) *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (Geneva: ILO and Palgrave MacMillan).

Sangheon Lee, Deirdre McCann and Nina Torm (2008) ‘The World Bank’s Employing Workers’ Index: Findings and Critiques - A Review of Recent Evidence’ 147(4) *International Labour Review* 416-432.

McCann, Deirdre (2015) ‘Labour Law on the Plateau: Towards Regulatory Policy for Endogenous Norms’ in Alan Bogg, Ann Davies and Jeremiah Prassl (eds) *The Autonomy of Labour Law* (Oxford: Hart).

McCann, Deirdre (2019) ‘Informalisation in International Labour Regulation Policy: Profiles of an Unravelling’ in Diamond Ashiagbor (ed) *Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart), 77-98.

QUESTION: DO YOU HAVE ANY FEEDBACK REGARDING THE INDICATORS INCLUDED IN EACH SPECIFIC TOPIC (PLEASE INDICATE THE TOPIC)?

The following comments relate to the Labor indicators (Pre-Concept Note, Section II.D, pp 22-25).

The Note indicates that a set of indicators – on ‘Quality of Labor Regulations’–will measure labour market regulations in relation to (1) ‘Workers’ Protection’ and (2) ‘restrictions on hiring, working hours and redundancy’ (‘Employment Restrictions’) (p 23).

EMPLOYEE PROTECTIONS V EMPLOYMENT RESTRICTIONS

The workers' protection indicator is most promising for capturing the social objectives of labour regulation. This indicator will measure regulations that require 'employee protection and decent working conditions in accordance with international labour standards.' It will cover the right to a minimum wage, equal remuneration for work of equal value, non-discrimination, rights to organise and collective bargaining, safe and healthy working conditions, and rights to annual leave and family leave (p 23). This indicator appears to be inspired by the more sophisticated approach to labour market regulation elaborated in the World Development Report 2013 (World Bank 2012; see McCann 2019), even if tentative in its grasp of the range of pertinent International Labour Standards (see above).

Yet the BEE's vision of the objectives and function of labour laws remains constrained. Centrally, the second indicator – Employment Restrictions - artificially bifurcates the labour law corpus. The language of 'Employment Restrictions' treats the related legal instruments as distinct from the social objectives of labour laws. This point can be illustrated by considering the sub-indices on working time, which can also be used as an illustration of how the BEE Labor indicators risk missing key functions and features of labour regulation regimes.

THE WORKING TIME SUB-INDICES

Working time regulations are included under the Employment Restrictions indicator. Yet working time protections are essential social rights that serve crucial social objectives: supporting workers' health and safety, sustaining family life, preserving community time etc. They are therefore more suited for inclusion among the Worker Protection indicators.

On a technical level, the sub-indices for working hours are identified as 'working hours per day/week, restrictions, and premiums for work during irregular working hours, such as night work or work on rest days' (p 24). To assess the likely outcomes of these (and other) sub-indices, more information is needed on how they will be scored. The proposed sub-indicators, however, are strikingly similar to the working time indicators in the initial version of the Doing Business Employing Workers Index (the 'Rigidity of Hours' index). As observed at the time, the Index conflicted with the international standards and trends in country-level working time laws (Lee and McCann 2008, p 44). It is notable that the International Labour Standards are not explicitly mentioned in relation to the new Employment Restrictions indicator. It is unclear, then, whether the scoring on the sub-indices will take account of the demands of the international working time standards. Even if that is the case, it appears that it could be open for the index to integrate the requirements of the international standards as a maximum level of protection, penalising countries that provide for a higher standard of working time protection.

Neither do the working time sub-indices appear, as was the case in the Doing Business Employment Workers Index, to adequately capture the complex relationship between the different components and functions of working time regimes (see further Lee and McCann 2008, pp 43-45). In particular, the modes in which working time laws support ‘flexibility’ is much more complex than can be captured by these indicators (the use of hours averaging mechanisms, for example; or the broader ‘incentive’ function of working time laws, in which limiting recourse to long hours can, in carefully designed legislative frameworks, encourage managerial and organisational innovation).

INFORMALITY AND NON-STANDARD WORK

As in the Doing Business literature, ‘rigid’ labour regulations are identified in the Pre-Concept Note as the primary driver of informality (p 22; see McCann 2019, p 88). Informality is not recognised as spanning a continuum and regulatory conduits to informalisation are overlooked. The Labour indices do not appear to be designed to capture how legal frameworks channel informalisation. The indicators appear, for example, to be oriented towards substantive standards, missing the ‘procedural’ drivers of exclusion from labour law protections such as the ‘personal scope’ of legal measures (coverage of workers, including the ostensibly self-employed.)

The indicators appear also unable to capture the crucial role of non-standard work regulation in propelling workers towards the continuum of informality. There is little detail, for example, on how the indicators will treat fixed-term contracts, although it is notable that in the Doing Business Hiring sub-index, even in its more sophisticated incarnations, the benefits of using fixed-term contracts was assumed and there was little recognition of the risks of short-term work or any attempt to quantify and compare protections for fixed-term workers (McCann 2019).

The World Development Report 2013 and the Bank’s 2015 report on *Balancing Regulations to Promote Jobs* (Kuddo, Robalino and Weber 2015) have a more refined and expansive grasp of the regulatory dynamics of informalisation (McCann 2015). The World Development Report, for example, recognised the de jure routes to informality by including features of legal frameworks that preclude protected status: exclusions of domestic workers, small enterprises, and export zones; the complexities of regulating multilateral working relationships; and limited access to adjudication mechanisms. The *Balancing Regulations* report also recognised the significance of nonstandard work regulation, capturing key regulatory conduits to precarious work and highlighting certain of the measures that are being used to protect non-standard workers: legislation that entitles temporary and part-time workers to protections equivalent to permanent/full-time workers; restrictions on the use of fixed-term contracts (citing ILO Convention No 166 on preventing abusive recourse to fixed-term work); legislation to combat disguised employment, and requirements that employees receive written employment contracts.

WORKER VOICE

For a comprehensive and accurate view of the impact of labour regulations, the experience of workers is critical.

The Pre-Concept Note states that, in contrast to the Doing Business Employing Workers Index, BEE will 'consider more explicitly the perspective of employees' (p 23). Yet consultation with workers is not an element of the methodology outlined in the Note in relation to the 'de facto indicators' on labour (p 25). Survey questions on working hours, non-wage costs and labour inspections will be addressed to firms (p 25). Data on discrimination, hiring and dismissals, and public employment services will be derived through consultation with labour lawyers (p 25). These respondents, however, cannot effectively convey the experience of workers, including in accessing their legal rights, nor elicit robust findings on the de facto influence of legal norms.

QUESTION: DO YOU HAVE OTHER GENERAL FEEDBACK?

Given the concerns outlined in my responses to the above questions, I urge the World Bank Group to remove the 'Labor' topic from the BEE project, at least until it can be substantially reconsidered, including in consultation with the ILO.