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European Union Committee

22nd Report of Session 2006–07

**Modernising
European Union
labour law: has the
UK anything to
gain?**

Report with Evidence

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FOREWORD—What this report is about

In its Green Paper consultation about the need for labour market reform, the European Commission has argued that the increasing diversity of 21st century working relationships means that existing labour law is no longer adequate to meet the needs of both businesses and workers. This Report brings together the evidence we received from a wide range of experts and representative organisations about these issues as they affect the UK labour market. We found that, for the most part, this evidence did not support the argument put forward by the Commission.

The consensus of opinion is that the relatively light regulation of the UK labour market, in comparison with some other EU Member States, has been advantageous in allowing a flexibility of employment arrangements which has benefited the UK economy. Almost all the evidence in this Report points to the conclusion that problems of social disadvantage and structural unemployment, where these exist in the UK, would be better addressed by measures aimed at tackling poor skills and social inequality than by changing labour law.

We have therefore recommended that efforts at EU level to affect the broad frameworks of labour law within Member States should be planned to promote the sharing of experience and good practice, rather than to introduce new legislation.

The Report considers a number of specific issues relating to the UK labour market and, inter alia, sets out our concerns about the exploitation of vulnerable groups, especially migrant workers. We welcome the action taken by the Government during our Inquiry to consult on the introduction of measures which would help to strengthen the employment protection in the UK of such vulnerable groups of workers.

While the reports we received, of the perception that the UK “gold plates” EC directives relating to employment, are described in the Report, we saw no conclusive evidence to support this view. We have therefore recommended no further action on this matter.

Modernising European Union labour law: has the UK anything to gain?

CHAPTER 1: SETTING THE SCENE

Why we carried out our Inquiry

1. Many factors other than the operation of the labour market can influence the success of a country's economy. However, the way in which its labour market functions can have a major impact on a country's social and economic well being. If the labour market performs well, citizens can benefit from plentiful job opportunities and low unemployment, while employers can benefit from the ready availability of the skilled workforce they need to conduct their business effectively.
2. The European Commission's Green Paper "Modernising labour law to meet the challenges of the 21st century"¹ set out to launch a public debate about how legislation on labour law within the EU is affecting the operation of labour markets in Member States, and about whether this law could benefit from modernisation. In particular, the Commission wished to identify how labour law could evolve to support the Lisbon Strategy's objectives of increasing the competitiveness of the EU economy and creating high levels of employment.
3. Our Inquiry had the aim of assessing whether there could be benefits for the UK in following up some of the suggestions made by the Commission in the Green Paper. We sought views on the extent to which flexibility in the labour market had benefited the UK economy and whether the Green Paper concept of modernised labour law could help it further. We sought also to examine whether existing employment protection measures in the UK, arising both from EU and domestic legislation, were working well and whether any changes were needed in these measures.

What the Commission Green Paper says

4. The Commission's point of view, set out in the Green Paper, is that the modernisation of labour law is a key element of the actions needed to ensure the adaptability of enterprises and workers in the face of the challenges which arise from globalisation and the ageing of the EU's population.² The Commission refer to their 2006 Annual Progress Report on Growth and Jobs³ in support of the view that the current balance between flexibility and

¹ European Commission Green Paper—*Modernising labour law to meet the challenges of the 21st century*, November 2006

² *ibid.* page 3.

³ European Commission 2006 Annual Progress Report on Growth and Jobs—*Time to move up a gear: the new partnership for growth and jobs*, January 2006: page 6.

security in many EU Member States has given rise to increasingly segmented labour markets; and that greater attention should be given to establishing conditions of “flexicurity”.⁴

5. In the Green Paper, the Commission consider the role that labour law might play in advancing a flexicurity agenda. The following objectives for the Green Paper are identified⁵.
 - To identify so far unresolved problems where the existing legal and contractual framework is in conflict with the realities of the world of work;
 - To open a debate across the EU about how labour law can assist in promoting flexibility combined with employment security;
 - To stimulate discussion of how different types of contractual relations, together with employment rights, could help to create jobs, ease labour market transitions, assist life-long learning and foster creativity; and
 - To contribute to the Better Regulation agenda.
6. In describing the current situation in EU labour markets, the Green Paper sets out how the need for increased flexibility has been stimulated by rapid technological progress, increased competition from around the world, changing consumer demand and a significant growth in the service sector. A wider variety of employment contracts has been needed in order to accommodate increasing variations in work organisation, working hours and pay.⁶
7. The Green Paper argues that, faced with these pressures, businesses have tended to seek to remain competitive by using more flexible contractual arrangements to avoid some of the costs of compliance with employment protection rules. As examples, it cites the use of: fixed term contracts; part-time contracts; on-call contracts; zero-hour contracts; contracts for workers hired through temporary employment agencies; and freelance contracts.⁷
8. The Green Paper cites evidence of detrimental effects associated with this increased diversity of working arrangements. It suggests that there is a risk that part of the work force may become trapped in a succession of short-term, low quality jobs with inadequate social protection.⁸ It recognises, however, that such jobs may serve as a helpful stepping-stone enabling some people to get into employment.
9. Conversely, the Green Paper refers to the finding of its 2006 Employment in Europe Report that stringent employment protection legislation tends to

⁴ “Flexicurity” is defined in the Commission’s report to consist of a combination of sufficiently flexible work contracts coupled with effective and active labour market policies to support switches from one job to another, a reliable and responsive lifelong learning system, and adequate social protection.

⁵ op. cit. page 4.

⁶ op. cit. page 5.

⁷ op. cit. page 7.

⁸ op. cit. page 8.

reduce the dynamism of the labour market, worsening the employment prospects of women, young people and older workers.⁹

10. The theme of the Green Paper is that a system of modernised labour law might be found which provided adequate employment protection for workers in all types of job without damaging the flexibility and competitiveness sought by enterprises. In search of this system, the Commission sought views in the Green Paper on a range of issues related to this theme.

UK labour law as it is now

11. Table 1 at the end of this chapter provides a useful list of the most recently introduced labour law provisions in the UK. It is extracted from Annex B of a report published by the Confederation of British Industry (CBI) which assesses the impact of new employment rights introduced during the period 1998 to 2006.¹⁰
12. Although much of the employment protection currently in place dates from the period since 1998 covered by the CBI table, a number of measures were already in place before that date. Table 2 at the end of this chapter reproduces a table available on the Department of Trade and Industry website which lists those EU employment-related Directives for which the DTI has UK responsibility.¹¹

How we conducted our Inquiry

13. The Members of our Social Policy and Consumer Affairs Sub-Committee (Sub-Committee G) who conducted the Inquiry, showing their declared interests, are listed inside the front cover of the Report.
14. Our Call for Evidence is in Appendix 1. We are most grateful for the evidence that we received in response to this; and we thank, in particular, those witnesses who gave us evidence in person. Those who gave us evidence are listed in Appendix 2, and the evidence is printed with this Report.
15. We acknowledge with considerable thanks the expertise and hard work of our Specialist Adviser for the Inquiry—Professor John Philpott—who played a key role in helping us to prepare this Report.
16. **We recommend this Report to the House for debate.**

⁹ European Commission report *Employment in Europe 2006*: page 81 et seq.

¹⁰ CBI Report *Lightening the load—The need for employment law simplification*: October 2006, Annex B

¹¹ DTI web page under Employment Matters: EU Employment-Related Directives for which the DTI has UK Responsibility,
<http://www.dti.gov.uk/employment/employment-legislation/employment-directives/index.html>

TABLE 1**Labour market regulations introduced in the UK during the period 1998–2006**

Year	Regulation
1998	Working time regulations
1999	National minimum wage regulations
	Reduction in qualifying period for unfair dismissal
	Public Interest Disclosure Act
	Right to take time off for study
	Employment Rights (Increase of limits) Order 1999
	Parental leave regulations
	Maternity leave regulations
	Time off for dependants
2000	European works councils
	NMW adult rate increase
	NMW development rate increase
	WFTC paid through the payroll
	Student loans repayment regulations
	Trade union recognition
	Dismissal of striking workers
	Part-time workers regulations
	Accompaniment for disciplinary/grievance hearings
2001	Sex Discrimination (Indirect discrimination & burden of proof) regulations
	NMW adult and development rate increases
	WTD—amendment to remove 13 week qualifying period
2002	Parental leave regulations—changes to extend entitlement
	NMW adult and development rate increases
	Part-time workers amendment regulations 2002
2003	Placing union learning representatives on a statutory footing
	NMW adult and development rate increases
	Employment Act 2002 a) Paternity leave b) Maternity leave Adoption leave

	Equality (religion or belief) regulations
	Equality (sexual orientation) regulations
	Right to request flexible working
	Amendment of Young Workers Directive: end of UK opt-outs
	WTD—amendment to extend coverage
2004	Prohibiting the blacklisting of trade unionists
	NMW adult and development rate increases and new 16–17yrs rate
	Statutory dispute resolution procedures
	Employment Relations Act—Review of ERA
	Information and consultation regulations
2005	Implementation of Equal Treatment Directive
	NMW adult and development rate increases
2006	TUPE—Revision of 1981 regulations
	Employment Equality (Age) Regulations 2006—introduced on 1 October 2006 to implement the EU Equal Treatment Framework Directive 2000/78/EC
2007	Work and Families Act 2006—introduced on 1 April 2007, this mostly affects statutory maternity pay, maternity leave and also provides carers of elderly or disabled dependents the right to request flexible working

* Increase in holiday entitlement from three weeks to four weeks in November 1999

Source: CBI report *Lightening the load—The need for employment law simplification*: October 2006, Annex B (Note: the last two entries in the table are up-dates of the CBI table added for this Report)

TABLE 2

EU Employment-Related Directives for which the DTI has UK Responsibility

Subject	Required implementation date for UK (whether yet implemented— Yes, No or Partial)	Relevant UK legislation
Safeguarding employees' rights in transfers of undertakings & businesses (Acquired Rights Directive)	1979 (Yes)	Transfer of Undertakings (Protection of Employment) Regulations 1981
Protection of employees in the event of their employer's insolvency	1983 (Yes)	Employment Rights Act 1996 Pension Schemes Act 1993
Employer's obligation to inform employees of conditions applicable to the contract or employment relationship	1993 (Yes)	Employment Rights Act 1996
Organisation of working time	1996 (Yes)	Working Time Regulations 1998
Horizontal Amending Directive'— Extending the Directive on organisation of working time to excluded sectors and activities (road, rail, air sea, inland waterway and lake transport, sea fishing, offshore work and junior doctors)	2003 and 2004* (No)	The Working Time (Amendment) Regulations 2003
Protection of young people at work	1996 and 2000 (Yes)	Working Time Regulations 1998 Working Time (Amendment) Regulations 2002
Establishment of a European Works Council or a procedure for informing and consulting employees	See below	
Parental leave	See below	
Posting of workers	1999** (Yes)	Employment Relations Act 1999 Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999

Extending to the UK the Directive on establishment of a European Works Council or a procedure for informing and consulting employees	1999 (Yes)	Transnational Information and Consultation of Employees Regulations 1999
Extending to the UK the Directive on parental leave	1999 (Yes)	Maternity and Parental Leave etc. Regulations 1999
Part-time work	2000 (Yes)	Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000
Collective redundancies (NB: This Directive consolidated two earlier directives)	1994 (Yes)	Trade Union and Labour Relations (Consolidation) Act 1992
Fixed-term work	2002 (Yes)	Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
Summer time arrangements	2001 (Yes)	Summer Time Act 1972 Summer Time Order 2002
European Company Statute: Employment Involvement	2004 (No)	The European Public Limited-Liability Company Regulations 2004
Equal treatment in employment and occupation	2003 and 2006 (No)	
National information and consultation of employees	2005 (No)	The Information and Consultation of Employees Regulations 2004
The burden of proof in cases of sex discrimination; and the meaning of indirect discrimination	2001 (Yes)	Sex discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001
Amending the 1976 directive on equal treatment for men and women in employment and vocational training	2005 (No)	

* 2004 for junior doctors

** Other relevant British legislation already covered posted workers, e.g. legislation on the employment of children, on health and safety, the Working Time Regulations 1998 and the National Minimum Wage Act 1998.

Source: DTI website web page under *Employment Matters*,

<http://www.dti.gov.uk/employment/employment-legislation/employment-directives/index.html>

CHAPTER 2: THE DEVELOPMENT OF 21ST CENTURY LABOUR MARKETS

Economic context, technological change and globalisation

17. The broad context for the Green Paper is the major impact of rapid economic and social change on labour markets throughout the EU. This continues to affect the nature and pattern of work, as well as influencing relationships between organisations and the people that work for them either as permanent employees or as temporary employees or self-employed contractors.
18. Advances in technology in recent decades, combined with new patterns of global investment and trade, have transformed how and where in the world goods and services are produced and delivered. Businesses operating in global markets are subject to ever more intense competition. They need to be cost and quality conscious to ensure efficient production, delivery and customer service. This pressure has not been confined to producers of internationally traded goods and services. Businesses operating in non-traded markets also have to meet the requirements of increasingly sophisticated consumers, who as citizens also expect more from public and voluntary sector organisations.
19. Organisations in all sectors of EU economies are therefore engaged in continual restructuring to increase productivity, lower unit production costs and improve product and service quality. Forms of restructuring vary by sector but the overall outcome is greater adoption of advanced technology, the introduction of new working practices and sometimes the transfer of entire production activities or aspects of production to lower cost localities inside and outside the EU.
20. In the labour market demand has shifted in favour of professionally or technically skilled knowledge workers and, especially in the relatively fast growing personalised service sectors, workers with a high degree of “soft” i.e. personal skills. At the same time, demand has fallen for routine manual and white collar labour and unskilled labour.

New working practices

21. Alongside changes in occupational structures, new working practices have altered the pattern and organisation of work, with growth of various forms of what the Green Paper describes as “non-standard work” (as opposed to “standard work” undertaken by employees with permanent employment contracts working full-time for a single employer). This takes various forms, notably part-time and temporary employment and self-employment.
22. As the Green Paper notes¹² “The emergence of just-in-time management, the shortening of the investment horizon for companies, the spread of information and communication technologies, the increasing occurrence of demand shift, have led businesses to organise themselves on a more flexible basis. This is reflected in variations in work organisation, working hours, wages and workforce size at different stages of the production cycle. These changes have created a demand for a wider variety of employment contracts, whether or not explicitly covered by EU and national legislation.”

¹² op. cit. page 5

23. A related tendency has been for large organisations to focus on a core of essential functions and to outsource the remainder, which in conjunction with increased consumer demand for personal services has stimulated considerable growth in small businesses and self-employment. The Green Paper reports¹³ that “the share of total employment taken up by those engaged on working arrangements differing from the standard contractual model as well as those self-employed has increased from over 36% in 2001 to almost 40% of the EU-25 workforce in 2005.” The UK’s Federation of Small Businesses (FSB) informed us that small businesses currently provide around 75 million jobs in the EU.

Economic and employment insecurity

24. Structural change on this scale raises understandable social concerns and, at an individual level, can be a source of considerable personal economic insecurity. Although economists argue that technological advance and globalisation ultimately results in higher employment and living standards, there are inevitably winners and losers in the process of change.
25. People worry that they might suffer prolonged unemployment or have to accept reduced pay and conditions of work. Similarly, while the emergence of new and varied patterns of work often matches the requirement of people who choose to work on a part-time or temporary basis—especially women and older workers, many of whom might otherwise remain outside the labour market—or prefer the relative independence of self-employment, others may fear the prospect of not being able to find a full-time permanent job.
26. One obvious temptation is for societies to protect jobs, either by erecting trade barriers or, as is more common in the EU, by placing legal restrictions on the ability of organisations to restructure. Another temptation is to place restrictions on the ease or ability of employers to hire people on non-standard contracts or to protect people who lose their jobs by providing them instead with generous unconditional welfare benefits.

Responding to change

27. On the basis of the evidence taken as part of this Inquiry, we consider all such responses to be self-defeating counsels of despair that will make the EU both less prosperous and less socially cohesive. We instead share the view—as expressed in the Lisbon Strategy¹⁴ objective of “sustainable growth with more and better jobs”—that EU Member States ought to embrace rather than resist structural change. On this matter we agree entirely with the Department of Trade and Industry (DTI) which in its written evidence to us stated that “Equipping people to manage and take advantage of change, rather than to seek to protect specific sectors or jobs, is the best way to manage the uncertainties and opportunities of globalisation.” (pp 85–96)
28. In doing so, the aim must be to achieve high and stable rates of employment and strong growth in productivity while at the same time maintaining social cohesion by enabling actual or potential losers to adapt to change. Yet

¹³ op. cit. page 7

¹⁴ The “Lisbon Strategy” was adopted by the European Council in March 2000. Its strategic goal is: “to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion”

unfortunately it is evident from high rates of structural unemployment and slow growth in productivity, that the EU overall remains a long way from meeting the Lisbon objective; and that it continues to make slow progress towards meeting it.

Labour market flexibility

29. The current conventional wisdom—shared by the majority, though not all, of those who gave evidence to our Inquiry—is that employment policies that promote labour market flexibility are a necessary pre-requisite for progress. Flexible labour markets enable economies: to sustain a high rate of employment combined with low stable inflation; to maintain a high degree of employment stability over the economic cycle; and to raise the rate of growth of productivity, which is the ultimate source of improvements in material living standards.
30. However, it is important to note that labour market flexibility is a complex phenomenon with several dimensions. The economist Professor Len Shackleton, of Westminster Business School, informed us that economists normally referred to four different types of flexibility (Q 15). These were:
 - numerical flexibility: essentially the ease with which employers can “hire and fire” in response to changing demand;
 - working time flexibility: the ease with which employers can adjust working hours and patterns of work, such as shifts etc.;
 - functional flexibility: the ease with which workers can be redeployed to new tasks or are able to adapt to change, particularly improvements in technology; and
 - wage flexibility: both the ease with which earnings adjust to cyclical fluctuations in demand for labour and the ease with which the earnings of different types of worker adjust to structural shifts in demand.
31. Much public policy debate centres on how combinations of labour laws, employment policies, welfare systems and social institutions currently operating in EU Member States contribute to improving the flexibility of the labour market on each or all of these dimensions.

Different policy “models”

32. In the course of our Inquiry we heard repeated references to a variety of so-called “models” of policy and practice. There is, for example, the European Social Model (a generic name for the systems of legal employment regulation, collective industrial relations, progressive tax funded public services, and generous insurance-based social welfare regimes) that operates in one way or another in many western continental European countries. This is often contrasted with the Anglo-Saxon Model observed in lower taxed, less unionised, and more lightly regulated economies, notably the United States, the UK being the main example in the EU.
33. It is important to recognise that there is no single homogeneous European Social Model. There are marked differences in practices between the strongly collectivist models operating in the Nordic countries and Dutch/Germanic “Rhineland” countries and the more regulatory models found in France and

southern European countries, just as there are between the United States and UK versions of the Anglo-Saxon model.

34. We heard that each of these models has its strengths and weaknesses—none is necessarily superior to the others. Some are considered better at promoting certain dimensions of flexibility rather than others. France, for example, is considered to score poorly on numerical flexibility, working time flexibility and wage flexibility, all of which may account for its relatively high unemployment rate. Yet by the same token France scores higher on skills and functional flexibility and is second only to the United States when the world’s leading economies are ranked according to their levels of hourly labour productivity. The UK, by contrast, has a world beating employment rate and relatively low unemployment but compares poorly on productivity (a matter to which return in Chapter 3). (QQ 13–15)
35. Moreover, each model reflects legal tradition, custom and practice in individual Member States and no model, whatever its merits, should therefore be viewed as offering a blueprint that might be easily applied throughout the EU. Nonetheless, the experience of different models provides useful insights that might inform policy decisions at either EU level or UK and other individual Member State levels. Also, as we heard, important aspects of the Danish version of the Nordic model and of the UK model are implicit in much of what the Green Paper has to say about possible modernisation of labour law at either Member State or EU level.

The consequences of employment protection legislation

36. Both the UK and Denmark, for example, adopt a light approach to employment protection laws governing the ease of hiring and firing (i.e. there are relatively few legal constraints on numerical flexibility). (Q 13) The experience of both countries in this respect is generally viewed favourably. In the Green Paper it is suggested that strict employment protection laws which, in the face of structural change, attempt to protect existing jobs by making it difficult for organisations to restructure, can have the unintended consequence of deterring job creation in general and the creation of permanent jobs in particular¹⁵.
37. The Green Paper suggests that this can result in a higher rate of structural unemployment (especially if the only way employers can easily avoid firing restrictions is to hire staff on short-term contract) or give rise to a two-tier labour market with a stratum of less protected precarious employment that is more prone to the forces of change than protected employment. In some cases both problems may arise.
38. In discussing this possibility, the Green Paper cites the Employment in Europe 2006 report¹⁶ which refers to research showing that stringent employment protection legislation reduces the dynamism of the labour market, has a negative impact on productivity and segments the labour market in favour of so-called employed “insiders” in protected jobs and to the disadvantage of “outsiders” (both those unemployed and precariously employed).
39. In similar vein, Professor Shackleton told us that “cross country analyses indicate that overall employment tends to be lower where employment

¹⁵ op. cit. page 8

¹⁶ op. cit. page 81 et seq.

protection is greater. Similarly, higher degrees of employment protection are associated with higher unemployment of women and young people, with a greater reliance on temporary and other forms of 'atypical' employment and a larger proportion of activity in the informal or black economy". (pp 13–15)

40. This conclusion is not without its critics. The TUC, for example, stated that independent research had found no negative correlation between employment protection legislation and unemployment, employment levels or innovation and productivity. (pp 52–68)
41. However, the consensus of opinion presented to us indicated that stringent employment legislation could hamper job creation and lead to segmentation of the labour market. (QQ 7–9, 39–42, 63, 70) (pp 85–96)
42. The Committee welcomes the Green Paper in opening up a debate on whether and how employment protection legislation might be modernised to assist labour market flexibility within the EU, while at the same time highlighting the need for accompanying measures to help people cope with change and reduce the insecurity they might face in a less protected labour market.
43. However, our conclusions and recommendations on the ideas outlined for discussion in the Green Paper are based not only on the extent to which we consider them to assist the Lisbon objective for the EU as a whole but also, and indeed primarily, upon their specific relevance to the UK economy and labour market.
44. In this latter regard, our evidence has shown that the UK, by contrast with most other EU Member States, has relatively light employment protection legislation. One consequence of this is that relatively fewer UK workers have non-standard contracts of work and, of those that do, the vast majority prefer to have them. Moreover, while there are exceptions, such workers enjoy similar employment rights to employees with standard work contracts, and in several ways these rights have been strengthened in recent years as a result of legislation introduced independently by the UK in addition to those resulting from the implementation of EU directives. (for example: (QQ 12, 41,146)) (pp 119–122, pp 85–96 and pp 37–40)
45. **We conclude that most of the issues raised in the Green Paper are already adequately addressed within UK labour law where the labour market is relatively lightly regulated in comparison with some other Member States.**
46. **In consequence, we recommend that it would not be helpful to introduce new EU wide changes to labour law since this would not meet the specific circumstances of the UK nor of other individual Member States.**
47. **We consider, nevertheless, that the Green Paper provides valuable insights into the role of labour law in promoting labour market flexibility and in enhancing the genuine employment security that comes from helping people to cope with structural change. In addition, we welcome the focus it provides on what individual Member States might learn from the experience of others when deciding what reform of labour law or other employment and welfare policies might best help them to meet the economic and social challenges of the early 21st century.**

CHAPTER 3: LABOUR LAW AND THE UK ECONOMY

48. By way of background to our examination of the issues raised in the Green Paper we took evidence of the role played by labour law in influencing the UK's economic and labour market performance.

Economic and labour market performance

49. Mr Jim Fitzpatrick MP, Minister for Employment Relations at the DTI, told us that the UK economy had been performing "exceptionally well" (Q 146). In support of this the DTI reported that the UK had a high employment rate of just below 75%, which indicated a strong, healthy labour market, with more people in work than ever before and also a low unemployment rate of 5.5%. The employment rate was the highest in the Group of Eight (G8) leading industrial countries and was already well in excess of the Lisbon target to reach a 70% employment rate for the EU as a whole by 2010. Only 23% of unemployed people in the UK had been jobless for a year or more compared with 46% in the EU25. (pp 85–96)
50. The DTI accepted that labour law was by no means the only reason for this success but contended that the current framework of UK law aided labour market flexibility to the benefit of both employers and workers. As a result, the DTI stated that the UK had "one of the widest range of job types and ways of working available in the world" enabling workers and employers more choice of the type of work that suits them. In highlighting this, the DTI also noted that the OECD's Employment Protection Legislation index showed the UK with the least strict employment protection legislation across Europe.
51. In line with most of the other evidence we received, Mr Nigel Meager, an economist and Director of the independent Institute of Employment Studies (IES), told us: "I could not agree more that the UK economy is in a relatively healthy state and the positive end-of-term reports that we keep getting from the OECD and IMF tend to reinforce that. We have had continuous economic growth and employment growth for well over ten years." (Q 4)
52. Professor Shackleton of Westminster Business School added that the UK's GDP per head had overtaken that of a number of countries which were formerly ahead of us, such as France and Italy, and that inflation was broadly under control. He also stated that in his view the UK's labour market at the moment was in an enviable condition compared with those of many of our continental neighbours: "Employment continues to grow and over 70% of those of working age are actually in employment in the UK, whereas the figure in countries like Italy and Spain is less than 60%" (Q 3).
53. The main economic flaw in the UK economy that Professor Shackleton identified was that labour productivity per hour worked remained lower than in France and Germany (as well as the United States) while, by comparison with other EU Member States, the UK suffered greater earnings inequality and poverty. (Q 3) Standardised comparative figures for the G7 countries published by the Office for National Statistics show that UK labour productivity per hour worked in 2005 (the latest year for which these figures

are currently available) was 19% lower than that of France, 16% lower than the United States and 15% lower than Germany.¹⁷

Labour law and the labour market

54. A question we sought to answer was the extent to which these economic outcomes, both positive and negative, could be attributed to the effects of labour law as opposed to other factors. On this matter the views presented to us were mixed.
55. Some of those providing evidence attributed the UK's strong employment performance to the fact that the labour market is relatively lightly regulated by EU standards. However, many of those taking this view also expressed concern that this advantage was being eroded by an increasing burden of additional regulation which was reducing labour market flexibility and adding to the cost and complexity of employing staff.
56. The CBI provided us with a copy of its 2006 report *Lightening the Load*¹⁸, which makes the case for simplifying employment law. This listed some 30 new pieces of employment legislation introduced between 1996 and 2006 alone, excluding some more recent legislation on age discrimination in employment and the rights of working carers (see table 1 at the end of Chapter 1 above). Many of these regulations, notably the National Minimum Wage and the right of parents with young or disabled children to request that their employers allow them to work flexible hours, are the result of independent decisions by the UK government. Others are regulations transposed into UK law to meet the terms of Directives that apply to all Member States of the EU. The flow of such regulations into the UK has increased in the past decade since the UK agreed to the incorporation of the Social Chapter of the Maastricht Treaty into the EC Treaty.¹⁹ This ended the effect of the previous decision to opt out in order to avoid implementing EU employment regulations deemed not to be in the UK's national interest.
57. On the whole, the UK employers' organisations from which we took evidence appeared sanguine about the effects of this new domestically and EU inspired legislation, but most highlighted the resulting cost to businesses while also emphasising the importance of ensuring that the UK maintains its current degree of labour market flexibility, high rate of employment and low unemployment.
58. Ms Susan Anderson, Director of Human Resources Policy at the CBI, reported to us the CBI's estimate of the cumulative cost of employment legislation introduced between 1998 and 2006, based on the Government's own regulatory impact assessments: "If you put all those costs together the total cost was a shade over £37 billion. That is quite a considerable cost." (Q 39) It is important to note, however, that this cost is not necessarily borne by employers in the form of reduced profits. They may, alternatively, choose to pass on the cost to customers, in the form of higher prices, or to their employees, in the form of lower wages. The precise outcome will depend upon the prevailing market conditions²⁰.

¹⁷ Office for National Statistics:

http://www.statistics.gov.uk/downloads/theme_economy/feb07_ICP_HeadlineTables.xls

¹⁸ CBI Report, *Lightening the Load—The need for employment law simplification*, October 2006

¹⁹ This incorporation was achieved by the Treaty of Amsterdam

²⁰ Nickell S J and Quintini G: *The recent performance of the UK labour market*, Bank of England, August 2001

59. In its evidence, the EEF (the manufacturers' organisation) stated: "The view of our members is that the UK's labour market is relatively flexible when compared with other Member States. Overall, EEF member companies are not demanding significant reform of existing UK law in order to achieve more flexibility. However, they are concerned to ensure that the current level of flexibility is preserved." (pp 144–156)
60. Particular concern was raised by the Federation of Small Businesses (FSB). Alan Tyrrell QC, Chairman of the Federation's European Law Policy Unit, while emphasising the FSB's support in principle for the national minimum wage (though not the rate at which it has been increased) and existing law on unfair dismissals and redundancy pay, referred to the results of a survey of its members conducted in August 2006. Miss Lucie Goodman of the FSB, describing the results of the survey said, "of the total sample, 65% had employees while 35% did not. When the FSB asked why they did not employ, 44% of that group of respondents said that the reason was the volume of employment legislation, the complexity of employment legislation and the overall burden of red tape and the fact that employees are considered too great a business risk. In other words, they would create more jobs, if they did not feel threatened by regulation." (Q 64)
61. The TUC disputed this. TUC economist Mr Richard Exell told us: "In the 1980s and 1990s when we were leading the world on labour market deregulation our record on job creation was consistently either much the same as or worse than the EU average. If you look at our record on unemployment, our record was much the same as or worse than the rest of Europe. When we started to get an improvement from the mid-1990s onwards, it was around the about the time we started partially re-regulating our labour market with the minimum wage, rights to union recognition, maternity rights, rights to time off work, age discrimination, enhanced disability discrimination legislation—none of which has been responsible for any reduction in employment." (Q 120)
62. In similar vein Mr Meager of the IES commented: "There is a common argument that the UK's relative success, in labour market terms, is due to its rather de-regulated and loose employment protection regime and its rather light-touch labour law. I really do not buy this argument at all." (Q 4) Mr Meager's point was that the UK had always had a relatively lightly regulated labour market, and that whatever the overall merit of this, it did not explain the relatively recent turnaround in the UK's economic fortunes. Indeed, it might be noted, for example, that UK employment protection legislation, while still relatively light, was strengthened in 1999 by way of a reduction from two years to one year in the qualifying period for entitlement to legal protection against unfair dismissal.
63. He went on: "If we go back to the 1970s and 1980s when the UK by any measure of labour market performance was seriously the sick man of Europe, we had the highest unemployment rate of the large economies, very poor growth, recession and all the rest of it, but we also had a de-regulated labour market then. If anything labour regulation has got slightly tighter since that time; it is still low but it has not got looser, so it is very difficult to argue that the improved labour market performance is a result of changes in labour law." (Q 4)
64. Mr Meager stressed in his evidence that he was not suggesting that labour market regulation was irrelevant to labour market performance. He accepted that there comes a point at which tightening of labour law would have a

negative effect, but he believed that recent improvements in the UK's economic performance were not the result of changes in labour law.

65. These observations are not, however, necessarily inconsistent with the alternative view that light labour market regulation is a factor in explaining UK economic performance. It is generally accepted that the relatively poor performance of the 1970s and 1980s was primarily a consequence of macroeconomic instability caused in particular by failures of monetary and fiscal policy under successive governments. This may have submerged the benefits of a liberal regulatory regime which have only been fully realised in the more stable macroeconomic conditions enjoyed since the mid-1990s. It is also possible, as some of those who gave evidence to us contended, for example (QQ 41, 70), that those benefits may have since been partially eroded, though we have received no conclusive evidence to support this contention.

The effects of labour law on productivity

66. We also heard from small businesses that the red tape associated with employment regulations diverts management time from running their organisations and prevents employers from giving priority to improving productivity. Mr Tyrrell from the FSB told us of a huge increase in the number of calls on labour law issues made to the Federation's helpline and that the average business owner now spends 28 hours per month filling in government forms: "All these regulations require administering. Time is money. The time spent on administration is reducing the productivity of the business. It reduces expansion and development, all the other activities that go into making a business successful take second place." (Q 63)
67. According to Professor Shackleton, determining any link between labour law and measured productivity in the UK is complicated by the fact that light regulation that encourages high employment of people, who in other countries might remain jobless, drags down overall productivity: "The most commonly quoted measure is labour productivity and one of the effects of having more people in work is that the average productivity tends to fall because you are taking in workers who in a different context would not get taken on". (Q 5) It should be noted, however, that while this is obviously true arithmetically there is no necessary trade-off between high employment and high labour productivity, as the experience, for example, of the United States and some of the Nordic countries attests (as we consider above).
68. The FSB nonetheless believed that the increasing burden of labour law was having a fundamental negative effect on productivity. As Mr Tyrrell stated "Our members feel that if they had the opportunity to devote all their working time to developing their business then that would certainly increase the productivity of the business. We do not have any figures that show that; indeed it is almost impossible to prove but it is widely believed in the small business world." (Q 70) Ms Anderson from the CBI also reported the results of a survey of its members in which three quarters of employers said that they were spending more time on administrative compliance, with smaller firms in particular having to devote valued senior management time to the issue. (Q 41)
69. The trade union Amicus (recently merged with the Transport and General Workers Union to form the new union UNITE) in written evidence to us argued that, contrary to the view of UK business, light employment protection legislation—by making it easier to dismiss workers—meant it was more likely that businesses took a short-term approach to investment which hindered productivity.

(pp 108–110) Ms Hannah Reed, Senior Policy Adviser, at the TUC also said that there were benefits of having people in jobs for a longer period of time: “There are clear benefits for employers in terms of retaining trained staff, not having to experience the cost of re-investing in staff all the time and having staff who are familiar with processes.” (Q 121) Ms Reed went on to say that “Ultimately, we cannot compete in low cost, cheap jobs but we can compete by investing in skills, and by investing in the knowledge base of the workforce.” (Q 121)

70. This view raises the possibility that labour productivity per hour is higher in countries like France and Germany because workers in those countries enjoy better employment protection. Ms Anderson from the CBI, however, told us that this was a faulty conclusion: “They do not have higher productivity because they have more employment law; they have higher productivity because they have a higher skilled workforce.” (Q 43)
71. Mr Exell from the TUC concurred at least to some extent with this view by referring to international studies which “come to the conclusion that the strictness or otherwise of employment protection legislation has very little impact on levels of employment or productivity.” (Q 116) Mr Exell outlined the findings of a joint CBI-TUC working group established in 2000 at the Invitation of the Chancellor of Exchequer. This group concluded that the UK needed to make progress on four fronts to meet the productivity challenge: capital investment; a better skilled workforce; including management skills, innovation; and best practice, including management practices with a high degree of worker involvement. (Q 115)
72. **We accept the evidence that the UK’s relatively light employment protection legislation, by facilitating a high degree of numerical labour market flexibility, has benefited the UK economy (although we recognise that this has not necessarily been a major factor in the improved performance of the economy in recent decades). This has helped the UK to avoid the high unemployment and labour market segmentation witnessed in some other EU Member States, notwithstanding the problems of structural unemployment and social disadvantage suffered by some people in this country.**
73. **We recommend, however, based on evidence to the Inquiry discussed later in this report, that the problems of structural unemployment and social disadvantage in the UK need primarily to be addressed by measures directed at tackling poor skills and social inequality, and by enforcing existing labour law where this is being flouted, rather than by changes to labour law.**
74. **It was clear from our evidence that, whatever the overall success of the economy, there remains a major problem for the UK in relation to labour productivity. Our view is that significant changes in labour law can have either a positive or a negative, but only marginal, effect on productivity. We conclude that, to improve the UK’s productivity performance appreciably, the priority needs are:**
 - **to raise levels of investment in physical capital and in research and development;**
 - **to improve skills at all levels;**
 - **to assist the innovation process; and**
 - **to increase the standard of people management and development in the workplace.**

CHAPTER 4: FLEXIBILITY AND EMPLOYMENT SECURITY— "FLEXICURITY"

75. The Green Paper²¹ addresses how EU Member States might strike an effective balance between labour market flexibility and employment security by reference to the Commission's increasingly favoured concept of "flexicurity." In addition to the issues raised in the Green Paper, at the time when this report was being written, the European Commission was due to publish, towards the end of June 2007, a communication leading to the development of a set of common principles against which Member States can work toward greater "flexicurity" in their labour markets.

What is "flexicurity"?

76. Flexicurity is a rather inelegant (and at first glance oxymoronic) piece of EU policy jargon, the meaning and possible interpretation of which we examined in some detail.
77. According to the Commission²² "flexicurity promotes a combination of flexible labour markets and a high level of employment and income security and it is thus seen to be the answer to the EU's dilemma of how to maintain and improve competitiveness whilst preserving the European Social Model."
78. In an attempt to help us decipher the meaning of this, Mr Meager of the IES told us: "The 'flexicurity' approach, if it means anything, is saying, rather than worrying too much about protecting particular jobs, 'let us try to protect the capacity of the economy to generate new jobs, on the one hand, by having a relatively flexible regime but also the employability and, on the other hand, the kind of support they have between jobs so that it makes it easier to take those jobs when they come up'." (Q 12)

The Danish flexicurity model

79. The term flexicurity is most commonly associated with the Danish version of the Nordic model as mentioned in Chapter 2. Professor Shackleton's evidence to the committee outlined three essential elements of the Danish model: "(a) limited job protection, with very few restrictions on hiring and firing (b) high levels of social security payments for those out of work (c) active labour market policy, with stringent conditions about job search and retraining for those receiving benefit". (pp 13–15) Mr Meager likened these elements to the "three corners of a triangle" with each element requiring the others to be in place in order for the model to operate successfully. (Q 13)
80. In developing this specific Danish example into a more generic concept the Commission has added a fourth element—continuous life long learning to assist the adaptability and productivity of workers—in effect, as Mr Tom Moran, Senior Policy Adviser on Employment, Employee Relations and Diversity at the CBI remarked to us, transforming "the 'flexicurity triangle' into 'a flexicurity quadrilateral' now or something similar." (Q 50)

²¹ op. cit. page 4

²² European Commission Expert Group on flexicurity
http://ec.europa.eu/employment_social/employment_strategy/flex_expert_en.htm

81. Flexicurity has undoubtedly found favour because Denmark exhibits a higher rate of employment, and a lower rate of unemployment, than the UK's Anglo-Saxon economy, but without the accompanying degree of income inequality and poverty. Standardised Eurostat figures show that in 2006 the employment rate of the working age population was 78% in Denmark and 72% in the UK, compared with an average of 65% for the EU25 as a whole. The respective unemployment rates were 3.4%, 5.5% and 7.4%.²³
82. However, although the concept of combining flexibility and security—if not necessarily the term flexicurity itself—was welcomed in general terms by most of those who submitted evidence to us, there was considerable scepticism about the transferability of the Danish experience. There was also some concern that, in promoting common principles drawn from Denmark, the Commission would attempt to establish a “one-size-fits-all” model of flexicurity.
83. Several witnesses, including Mr Meager and Professor Shackleton (QQ 13, 15), noted that, in order to sustain its flexicurity model, Denmark had to spend a large amount of taxpayers' money on labour market programmes (around 4.5% of GDP, compared with less than 1% of GDP in the UK). Countries faced with this funding issue would have a range of options for the relative extent to which (a) individual taxpayers and (b) businesses should bear the cost of labour market programmes.
84. Professor Shackleton also observed that Denmark has a strongly unionised workforce (75% of workers are union members) and that the elements of its flexicurity model were designed and agreed in co-operation with the trade unions. (Q 15) A similar observation was made by the TUC's Richard Exell: “We think where flexicurity is a positive way forward it is because it represents a modernisation of the European Social Model and that is all about combining social justice and economic efficiency. Flexicurity at its best is about high levels of workers involvement in decision making both in terms of participation by workers but also collective participation through collective bargaining and social partnership, high levels of training and emphasis on the high road to economic success, so training, investment, going for high value added.” (Q 126)

Does the UK already have flexicurity?

85. In making this point, the TUC was countering the view of some others who submitted evidence to us that the less regulated, less unionised, lower tax UK model represents an equally good example of flexicurity in action. For example, the Unquoted Companies Group (UCG)—an informal group of around 30 chief executives of owner managed companies—argued that “the UK's relatively unregulated labour market already delivers flexicurity, if we must use this word.” (pp 200–204)
86. This view was contested by Mr Owen Tudor, Head of European and International Relations at the TUC, who told us: “Flexicurity has been successful in Nordic economies but we would contend that what the UK has is not flexicurity.” (Q 102) However, the UCG's view was consistent with evidence given to us by the DTI. (pp 85–96)

²³ Office for National Statistics:

http://www.statistics.gov.uk/downloads/theme_labour/LMS.FR.HS/WebTable19.xls

87. Although the UK labour exhibits a high degree of labour turnover—with around 6 million leaving jobs each year and a similar number finding new jobs—more than two-thirds of these job moves are voluntary and UK workers generally feel secure in their jobs. The DTI cited the recently published Fourth European Working Conditions Survey which finds that the UK has the second lowest rate in the EU for the percentage of workers who fear they will lose their job in the next six months. In addition, the flexibility bestowed by light employment protection legislation meant that the UK had a relatively high rate of workers employed on permanent contracts (these accounting for 94% of the workforce). (pp 85–96)
88. Expanding on this point, Mr Meager of the IES told us “There is a paradox actually that across countries there seems to be an inverse relationship between the strictness of employment protection legislation and how people feel”. (Q 12)
89. This paradox may be explained by the fact that in more regulated labour markets workers protected by law, fear that if they do lose their job it may be difficult to find another, at least on a permanent contract. This explanation was posited by the EU-wide employers’ organisation Business Europe (known until recently as UNICE, the Union of Industrial and Employers’ Confederations of Europe, of which the UK’s CBI is a member) which contended that the essence of the flexicurity approach is that it does not seek to organise trade-offs between flexibility and security but, on the contrary, sees flexibility and security as reinforcing each other, with flexibility looked upon as a way to improve employment security. (pp 125–132)
90. Mr Meager also argued that in countries where employers were not easily able to make staff redundant, instead of doing so regularly they tended to do so occasionally and on a large scale, particularly at times of economic crisis. This tended to create a sense of unease amongst workers. (Q 12)

Flexicurity: what lessons for the UK?

91. Mr Meager went on to make the point that, from the UK’s perspective, any lessons to be drawn from a debate on flexicurity relate to skills policy and welfare to work measures for those individuals and groups who face the most difficulty adapting to change, rather than to matters of labour law as the Green Paper suggests. Mr Meager thus concluded that this element of the Green Paper was “off the point”. (Q 13)
92. It is therefore significant that the interim report of the European Commission’s Expert Group on Flexicurity²⁴—which has been received by the Committee—concludes that “there is not one way that leads to Rome”. As the Expert Group states: “Resulting from consultations and negotiations at national levels, flexicurity can take different forms from country to country. In some cases flexicurity will focus more on solutions within companies, in other cases it will concentrate on transitions between jobs and from employer to employer. Sometimes it will focus more on the interplay between relatively flexible rules of economic dismissals in combination with high benefits, whereas in other cases emphasis will be on safe bridges from work to work organised by social partners and public employment services”.

²⁴ Expert Group on Flexicurity’s report from the rapporteur to the Commission: *Flexicurity pathways*: April 2007

93. **We commend the Commission for starting, in the Green Paper and elsewhere, an important policy debate on how labour market flexibility and employment security might be combined and reinforced to the benefit of both employers and workers and in furtherance of the common good.**
94. **However, we recommend that the purpose of this debate should be primarily to share information and examples of good practice, recognising the diversity of circumstances between Member States identified by the report of the Commission's Expert Group on Flexicurity. Any common principles of flexicurity agreed at EU level should therefore be interpreted as guidelines rather than as obligations.**
95. **We recommend also, that as far as the UK is concerned, progress toward enhancing flexicurity requires action on skills and welfare to work measures rather than changes in labour law.**

CHAPTER 5: THE NEED FOR LABOUR LAW REFORM AND THE ROLE OF THE EU

96. A central theme of the Green Paper is the question of how well frameworks of labour law in Member States deal with people with standard and non-standard work contracts.
97. The Green Paper asks in particular if there a need for a “floor of rights” covering all workers regardless of the form of their work contract and also whether there ought to be a convergent definition of “worker” in EU directives to guarantee the rights of people working in the EU in Member States other than their own. In addition, the Green Paper asks how minimum requirements concerning the organisation of working time might be modified in order to provide greater flexibility for employers and workers without compromising health and safety.
98. This chapter considers the views presented to us on the broad framework of UK labour reform, whether there is any need for reform, and what if any role the EU should play in promoting reform. Specific issues related to temporary agency workers and the self-employed are considered in more detail in Chapter 6.

The UK’s “targeted approach” to labour law

99. The Green Paper highlights the UK’s so-called “targeted approach” to labour law. This involves a legal distinction between “employees” and “workers”. “Employees” are people who work for an employer under the terms of a contract of employment. “Workers” are people who work for an employer whether or not under a contract of employment.²⁵
100. Workers without employment contracts include temporary agency workers, casual workers and some freelance workers but not genuinely self-employed people. Under UK labour law therefore all employees are workers but not all workers are employees, and the genuinely self-employed are not deemed to be “workers”. It may be for an Employment Tribunal or higher court to decide a person’s contractual status in cases where this may be disputed. Such disputes can be significant to those involved because the rights of employees and workers differ.
101. All “workers” are entitled to certain rights: equality of opportunities (non-discrimination), the national minimum wage, health and safety, working time entitlements such as paid annual leave, daily and weekly rest breaks, protection against unlawful deductions from wages and the right to be a member of a trade union.
102. However, certain other rights, including amongst others those relating to unfair dismissal, redundancy and some parental leave rights, are restricted to employees. This is largely because these rights confer entitlements that are considered appropriate only to permanent employment relationships or require a person to have worked for an employer for longer than a specified period of time (or “qualifying period”). By the same token workers do not have the same legal responsibilities as employees (in principle being able to choose when and whether to work etc.).

²⁵ op. cit. page 12

103. The UK distinction between employees and workers does not parallel the distinction between the terms “standard” and “non-standard” employment as discussed in the Green Paper. For example, people with part-time employment contracts or working on a fixed-term contract with an employer are employees even though they are non-standard workers. In the UK context it can therefore be misleading to suggest that there is an imbalance of employment rights between “standard” and “non-standard” forms of work. The relevant distinction, to be made in considering any such imbalance, is that between workers and employees.
104. The DTI informed us of the Government’s consultation on the differing legal rights and responsibilities of employees and workers, the results of which were published in the DTI document *Success at Work*.²⁶ The Government’s conclusion was that the current framework was appropriate, that workers were not unfairly disadvantaged in comparison with employees, and that changes to the framework could damage overall labour market flexibility and employment prospects. The Government acknowledges that some people are denied their legal rights at work, but this is because of abuse or lack of awareness rather than their legal status and thus needed to be addressed by way of better enforcement or better information about existing entitlements rather than changes to the legislative framework. (pp 85–96)
105. The DTI’s conclusion was questioned by the TUC in its written evidence to us which described the distinction between employees and workers as “significant” and argued that there should be a legal presumption that all workers would qualify for the full range of EU and domestic employment rights. Far from harming employers, the TUC contended, equal treatment for all people at work would make non-standard work more attractive and expand the pool of workers available. (pp 52–68)
106. Despite the TUC’s argument, however, on this matter the DTI gained the overwhelming support of all the employer and business organisations from which we took evidence. These gave solid approval to the UK’s “targeted approach” to individual employment rights and the restriction of some rights to employees only, which was thought justifiable given the variable levels of responsibilities in different employment relationships. (pp 144–156) In addition, contended the British Retail Consortium, “extending employment rights to ‘workers’ would not actually deliver employment security because, in our view, true employment security does not come from employment rights.” (pp 119–122)
107. The sole major concern of employers’ groups—raised amongst others by the EEF—was that guidance to employers concerning employment status should be as clear as possible and that court decisions based on the existing definitions of employee, worker and self-employed sometimes gave rise to uncertainty. (pp 144–156)

A “floor of rights” for workers?

108. In view of this it is not surprising that we heard little support for a floor of rights covering all workers. The consensus was that the UK already in effect has a reasonable “floor of rights” covering workers, the main concern on this issue being to ensure that references to such a floor within the Green Paper

²⁶ DTI publication: *Success at Work—protecting vulnerable workers, supporting good employers*, March 2006

did not translate into an attempt by the Commission to establish a common floor of rights for workers that would operate across the EU.

109. The Chartered Institute of Personnel and Development (CIPD)—the UK membership body for professionals working in human resources—told us that it would be “wholly resistant” to any such EU wide floor of rights. (pp 132–137) This was consistent with the views of the DTI, CBI, EEF, FSB, and most other bodies we heard from, that, following the principle of subsidiarity, it should be a matter for individual Member States to decide what, if any, floor of rights should be to reflect their national circumstances. (pp 85–96, pp 16–28, pp 144–156, pp 37–40) As the FSB’s Mr Tyrrell told us: “We firmly believe that each state should look after its own in this respect and the role of the Commission should be to deal with cross-border aspects.” (Q 100)
110. This widely held view generally reflected practical considerations, rather than ideological objections to EU intervention. For example, the Law Society described the principle of a floor of rights as “undoubtedly attractive” but concluded “It will be very difficult to provide for measures affecting all workers that will operate successfully in all Member States”. (pp 176–179)
111. The general consensus of opinion was that this left little practical room for EU level regulation but that there was a potential role for the Commission through processes and procedures (such as the Open Method of Co-ordination) to influence what happens in Member States by means of education and the sharing of best practice. This could amount to the application of “soft” EU law although, as written evidence from Catherine Barnard and Simon Deakin of Cambridge University suggested, co-ordination in this way tended to be more effective at influencing employment policies in Member States as opposed to employment law. (pp 113–115)

More convergent definitions of “worker”

112. The concerns expressed to us about the possibility of the Commission advocating a common floor of rights stemmed, not from anything the Green Paper stated directly on this matter, but rather from references to whether more convergent definitions of worker are needed in EU directives relating to so-called frontier and posted workers, or short-term migrant workers more generally. Frontier workers are those who live in one Member State but work in another, while posted workers are usually people who work for an employer in one Member State but are sent on an assignment to another Member State.
113. The DTI in its submission to us (pp 85–96) stated that a convergent definition of worker is neither necessary nor practical, a view shared by amongst other the CBI, the EEF and Business Europe. (pp 125–132, pp 16–28, pp 144–156). In her written evidence Liz Lynne MEP warned that “Any definition would be extremely difficult to draft and would inevitably have negative consequences for the flexibility of the UK’s labour market.” (pp 179–181)
114. We were told that frontier workers were covered by the law and collective agreements operating in their home country, the terms of which should be left to individual Member States to determine. There is already an EU

Directive that adequately dealt with the issue of posted work.²⁷ Moreover, any differential treatment of workers in these situations was mostly due to cross border differences in tax and social security rules, and the consensus was that the EU should not seek harmonisation on these matters. It was clear that increased migration within the EU, especially of less skilled Central and Eastern Europeans following enlargement, raised new issues. These, however, stemmed mostly from abuse of existing labour laws rather than from an absence of legal rights (a matter we discuss further in chapter 7).

Collective labour law

115. The TUC and Amicus also questioned the notion of a floor of rights, but from a markedly different viewpoint from that of the employers' organisations. The TUC said it would not generally support the idea because of the risk that it might in effect translate into a "ceiling of rights" leading to a levelling down of current best practice. (pp 108–110, pp 52–68) However, what most concerned the trade unions about the Green Paper was its focus on individual employment rights rather than collective rights, especially since what the unions consider the most progressive model of flexicurity—Denmark's—is based on collective agreements and social dialogue.
116. This point of view was best summed up in evidence presented to us by the trade union backed Institute of Employment Rights (IER). Its submission stated that "the purpose of labour law is to restore a balance of power in the employment relationship. Flexibility is only a threat if an individualised, segmented workforce is not protected and regulated within a collective framework. Modernisation of labour law to meet the challenges of the 21st century starts with the collective dimension not, as in the Green Paper, with individual employment law." (pp 159–163)
117. The Law Society took a similar view: "As for changing existing arrangements for employment security the priorities for a meaningful labour law agenda should include giving appropriate emphasis to collective as well as individual rights". (pp 176–179) The TUC agreed, arguing that collective bargaining and worker representation offer the best means of building high trust, high skilled workplaces, in the process improving both working time flexibility and functional flexibility. (pp 52–68)
118. Ms Hannah Reed, Senior Policy Adviser at the TUC told us that, in its response to the Commission on the Green Paper, the TUC had called for examination of the case for extending collective rights across Europe, particularly in the area of information and consultation in the context of restructuring.
119. Ms Reed thought this would help prevent what she described as "cornflake redundancies": "Where employers will announce over the radio first thing in the morning that a plant is closing and thousands of jobs will be lost." (Q 113) Mr Reed told us that before any such action was taken employers should be required to consult with trade unions to consider alternative options. Her colleague Richard Exell added that while the TUC was not saying "Let's get off the world, we want it to stop", such consultation helped countries such as Denmark, in the face of the evident

²⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

challenges of globalisation, by encouraging joint action by unions, employers and government to discuss innovative responses to restructuring. (Q 125)

120. However, the Employment Minister Mr Fitzpatrick told us that he did not see the Green Paper as an attack on collective bargaining or trade union organisation. Its focus on individual labour law, he said, was merely a reflection of the fact that the Commission “do not have competence to legislate in the area of industrial relations”. As for our country, he stated the Government’s view that “We think that the collective arrangements that we have in the UK are serving us well”. (QQ 155–156) The Minister saw a role for trades unions in helping individuals to benefit from the employment rights introduced by the Government, alongside their role in protecting collective rights. In relation to the latter role, he observed that “Only six and a half million of our 27.28 million people in work are formally members of trades unions affiliated to the TUC, so it is a minority position ...” (Q 155)

Small businesses and the “proportionality” of labour law

121. The degree of regret displayed by the TUC and some others about the underplaying of collective rights in the Green Paper was matched on another matter by the complaint of the FSB about the scant attention given by the Green Paper to the importance of proportionality in labour law. According to Mr Tyrrell from the FSB, this had a significant negative impact on the small business sector. What was proportionate for large organisations with HR departments was not proportionate for small businesses, yet both EU and UK labour law tended to apply a one-size fits all approach. (Q 63)
122. This raised the possibility of there being a case for small businesses, or at least micro businesses with very few staff, to be exempt from some if not all employment regulations. Professor Shackleton, for example, told us of a recent German reform along these lines: “Businesses with ten or fewer full-time equivalent people are actually exempted from some of the employment protection legislation which is very strong in Germany.” (Q 21)
123. The Employment Minister Mr Fitzpatrick acknowledged the particular problems faced by small businesses and indeed reminded us that statutory trade union recognition procedure does not cover companies with fewer than 20 employees.
124. Mr Fitzpatrick nonetheless told us that in general circumstances individual employment rights should apply to all workplaces, regardless of size, and said that the Government’s priority was to help small employers to cope better with this. He said “We are working very hard with our on-line guidance, with the tools that we are providing through Business Link, with the assistance that we are giving and working hard on the simplification programme and trying to identify those areas where it could be more pressure on small companies and to make life as easy for them as possible.” The Minister also mentioned that regulations are now only ever introduced on two dates in the year 1 April and 1 October. (QQ 150, 171)
125. The view that small businesses were necessarily hard done by when it comes to labour law was, however, challenged by the TUC’s Hannah Reed, who told us that employment rights introduced in recent years had benefited employers, large and small, as well as workers “We are not convinced that

there is any real evidence at present that the current level of employment law within the UK does impact on the ability of small businesses to compete.” (Q 117)

Regulation of working time

126. Working time in the UK has traditionally been determined by voluntary negotiations between employers and individual employees, sometimes influenced by collective agreements. The EU Working Time Directive²⁸, first implemented in the UK in 1998, represented a significant departure from this tradition by providing employees with certain basic legal entitlements and protections, covering such matters as a guaranteed minimum number of days of paid leave, required rest periods and a limit of an average of 48 hours on the working week.
127. The Working Time Directive was adopted primarily on health and safety grounds, though there was an underlying economic rationale for regulating working time based on the assumption that this would be beneficial for productivity. The evidence we heard to support this rationale was mixed.
128. Professor Shackleton noted that, other things being equal, legal reductions in hours of work would require organisations to hire more staff in order to maintain any given level of output, thereby reducing productivity per worker employed. (Q 8) Mr Meager, by contrast, suggested that other things may not be equal. He pointed to evidence indicating that restrictions on working time provide an incentive to organisations to produce more output from their existing workforce in order to lower unit labour costs rather than take more people on. This was often achieved by means of reducing overtime, which was often worked unnecessarily for reasons of custom and practice in order that employees might benefit from higher rates of pay for overtime hours. (Q 9)
129. Whatever the merit of this particular argument, there is, however, an opt-out clause to the 48 hour week limit enabling employees to voluntarily work longer. The opt-out clause—which is used relatively more extensively in the UK than in other Member States—has been a source of controversy both within the EU and the UK. The TUC told us they would like the opt-out removed whereas employers’ organisations, including the Confederation of West Midlands Chambers of Commerce, stated that for many UK businesses the retention of the opt-out was critical to their ability to remain competitive. (pp 52–68, pp 137–142)
130. Attempts within the EU to secure removal of the opt-out have to date been unsuccessful—being opposed by the UK government amongst others—but judgements by the European Court of Justice in the cases of *SiMAP* and *Jaeger*²⁹ have, at the very least, opened up consideration of the need for clarification of the 48 hour work limit. The result of these judgements is that time spent “on-call” on an employer’s premises constitute hours of work for the purposes of calculating the limit regardless of whether any work is actually done during this time. This has particular implications for such

²⁸ Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time, as amended by Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000.

²⁹ European Court of Justice: Case C-303/98, Sindicato de Médicos de Asistencia Pública (*Simap*) and Conselleria de Sanidad y Consumo de la Generalidad Valenciana, *SIMAP* [2000] ECR I-7963; Case C-151/02, Landeshauptstadt Kiel and Norbert Jaeger, *Jaeger* [2003] ECR I-8389

essential services as hospitals and fire-fighting. These issues were covered in greater detail in the European Union Committee's Report HL Paper 67.³⁰

131. The Employment Minister Mr Fitzpatrick told us he was not sure what would happen next on this matter but was adamant that the UK would oppose any attempt to remove the opt-out. He stated that working time is not a health and safety issue for the UK which has a very good health and safety record by EU standards. Moreover, the opportunity voluntarily to choose the opt out preserved employment flexibility for employers and freedom of choice for people in work without reinforcing a long-hours culture: "The vast majority of our people are happy, and companies are happy, and the average hours worked for UK workers since 1997 have come down from 33 to 32 hours. So, we are working less in the UK notwithstanding we do use the opt-out. We will fiercely defend the opt-out, and our European partners know that." (Q 172)
132. **We conclude that the present framework of individual labour law in the UK strikes a fair, efficient and sensible balance between the rights and responsibilities of "employees" and "workers".**
133. **We agree with the Government that any change in this framework would create difficulties for employers without providing any substantive advantage to workers and possibly harm employment prospects. The focus of attention should therefore be on informing all workers of their rights and enforcing existing entitlements.**
134. **We recognise the important role played by trades unions and collective machinery in helping to ensure people are treated fairly at work, are able to exercise their legal rights, and can make a productive contribution in the workplace. However, we see no need for action at an EU level to alter directly the scope of collective labour law in the UK or other Member States.**
135. **We fully appreciate the particular pressures facing smaller businesses in coping with an increasing amount of labour law which may seriously hamper their ability to create jobs and improve their performance. We therefore recommend that the Government should pay serious attention to the concerns of small businesses about the impact of employment protection provisions on their operations. We would not, however, wish to see any groups of workers, including those working in the smallest businesses, left without the employment protection which is afforded to workers in larger organisations.**
136. **We do not believe there is need for more convergent definitions of worker in EU directives. We also firmly reject any suggestion of a common floor of rights, although we do not consider this to be the intention of the Green Paper. The UK already provides a sensible floor of rights covering all workers and any changes to this legislative floor should be left for the UK to decide for itself.**
137. **We recommend that efforts at EU level to affect the broad frameworks of labour law within Member States should be planned to promote the sharing of experience and good practice, rather than to introduce new legislation.**

³⁰ House of Lords European Union Committee Report: *The Working Time Directive: a response to the European Commission's Review*, April 2004

CHAPTER 6: ISSUES FOR GROUPS WITHIN THE LABOUR MARKET

138. As well as the broad question of the coverage of employment rights across different workers the Green Paper raises an number of specific issues relating to the contractual employment status of temporary agency workers and the self-employed.

Agency workers

139. The Green Paper asks whether there is a need for greater clarity in so-called “dual employer” relationships given that although agency workers are employed by their employment agency they are hired out to work for a client organisation often alongside that organisation’s “regular” staff. Who therefore should be considered the “employer” in such circumstances, and should—as outlined in the proposed but currently dormant Directive on Temporary Agency Workers³¹—agency workers receive “no less favourable treatment” than other people working in the organisations in which they are placed.
140. In this context the Green Paper also examines the case for subsidiary liability in dual or multi-employer relationships (including those between Agencies and their clients as well as in wider sub-contracting relationships) as a way of guaranteeing that workers receive their legal entitlements.
141. The possibility of any change in the law on agency workers is a matter of particular concern to employers in the UK. Although the UK has a relatively small temporary workforce by EU standards it has a relatively large proportion of agency temps (roughly 2% of all employees) working in both the private and public sectors.³²
142. Agency temps are mainly hired to help organisations meet unexpected fluctuations in demand, undertake short-term assignments or cover employee absence and maternity leave. We were told that improved employment rights for parents and carers were itself a cause of increasing use of agency workers. (Q 95) Agency temps were also sometimes used as a means of providing de facto “work trials” which could lead to permanent employment opportunities. This could therefore be a route via which jobless people could enter, or move in and out of, the labour market. The DTI suggested that as many as one in three agency workers were economically inactive prior to taking up work placements.³³
143. Evidence presented to us by the Recruitment and Employment Confederation (REC) outlined the current status of temporary agency workers in the UK. These workers were deemed to be employees of their Agency for tax, national insurance and immigration purposes and workers, but not employees, of either the agency or the client employer for who they work. They were thus entitled to the statutory rights given to workers rather than those enjoyed by employees.

³¹ Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers—COM (2002) 701.

³² DTI Report: *Success at Work: Consultation on Measures to Protect Vulnerable Agency Workers*, Feb 2007. p.36

³³ *ibid.* p.4

144. Our evidence suggested that three main concerns arose from the possibilities raised in the Green Paper: that the status of agency workers might be changed to that of employee of their Agency; that they might be deemed employees of the client employer for whom they work; and that either way agency workers might have to be given the same terms and conditions as regular employees of the employer for whom they work. (pp 192–199)
145. There was a universal consensus in our evidence that the agency should be treated as the primary employer of agency workers. However, while, agreeing with the Green Paper's references to subsidiary liability, the TUC added the rider that the hiring employer should also have joint and several liability for any breaches of employment rights. (pp 52–68)
146. This requirement was disputed by most employers' organisations. Business Europe, for example, commented that subsidiary liability placed a considerable burden on the main contractor in a dual or multi-employment relationship. This was considered a particular problem for small and medium sized businesses which did not have the time or resources to make the necessary checks and were often not in a position to control legal compliance. (pp 125–132)
147. Employers' organisations and the trade unions were also divided on which rights should be accorded to agency workers. In support of adoption of the proposed Temporary Agency Workers Directive, the TUC argued that agency workers in the UK "face discrimination on pay and other basic employment conditions". They referred to DTI estimates that agency workers earn approximately 68% of the earnings of permanent employees. (pp 52–68) It should be noted, however, that the DTI in common with other evidence we have received, pointed out that agency work was not all of low status and low paid. A quarter of agency temps worked in managerial and professional positions and could sometimes earn more than the regular employees they work alongside. (pp 85–96)
148. Despite this the CBI was especially wary of the possibility that the proposed Temporary Agency Workers Directive, as currently drafted, might require employers to offer agency temps the same pay and conditions as regular employees after only six weeks in a job. The CBI's Susan Anderson told us: "That to us does not seem a sensible provision because they will not have the experience, the skills and the competence necessary to the permanent worker employee in the user company." (Q 56)
149. The Recruitment and Employment Confederation (REC) considered the current relationship to be clear to all parties concerned. (pp 192–199) EUROCIETT (the European Confederation of Private Employment Agencies) agreed stating that there was no need for further regulation because existing relationships were already clear and comprehensively regulated by national labour law. (p 156)
150. The argument against change rested primarily on grounds that this would raise the cost of employing agency temps, either directly or indirectly via higher agency fees. The result, it was claimed, would be less agency work and probably lower employment overall since agency temps would not necessarily be replaced by additional permanent employees. This in turn would mean that both employers and agency workers would lose the flexibility that agency work offered and block off the route from unemployment and economic inactivity into the labour market that agency work sometimes provided.

Defining self-employment

151. The Green Paper asks if greater clarity is needed in Member States' legal definitions of employment and self-employment.
152. The starting premise is the possibility that some self-employment is either really “disguised employment” (whereby a person is defined as self-employed simply to reduce tax or national insurance liability) or “economically dependent work” (because the self-employed person works mainly, if not entirely, for one client). Implicit in the Green Paper is the suggestion that because some self-employed people are economically dependent they should be entitled to the same rights as dependent workers, thereby requiring a new legal category of “economically dependent worker”.³⁴
153. The TUC cited research suggesting that economically dependent work was a growing problem, particularly freelancers who may have been working regularly for one, or a limited number, of employers without employment protection and thus at lower cost to the organisations hiring their services. (pp 52–68).
154. BECTU (the trade union representing freelancers in the audiovisual and live entertainments sectors—excluding performers and journalists), stated in its evidence that many of its members fell into this economically dependent category even though they were taxed as self-employed and/or often had uncertain employment status. According to BECTU “the classic freelance experience is not one of independent choice but of chronic insecurity. They are, unambiguously, economically dependent workers.” BECTU thus called for EU Member States to devise new inclusive definitions of “worker”, allowing all so defined access to the full range of employment rights, with a statutory presumption of coverage with the burden of proof of employment status placed on the employer rather than on the worker. (pp 123–125)

Employment contracts vs. commercial contracts

155. However, a number of other organisations (including the FSB, the Institute of Interim Management and the Professional Contractors Group Ltd, the latter a representative body for freelance contractors and consultants) took a very different view. These organisations stated that, in considering this matter, it was necessary to distinguish between employment relationships (involving contracts of service) and commercial relationships (involving contracts for services). (pp 37–40) (pp 163–168) (pp 185–189)
156. In practice, in the UK the issue of self-employed status is complicated by the tax authorities sometimes adopting a narrower definition of who is self-employed than Employment Tribunals or courts. However, the consensus view was that the basic legal distinction between employment and self-employment is clear and that any problems arising from particular cases should be left to the UK authorities to resolve without the involvement of the EU.
157. As Mr Meager from the IES put it to us: “It is not clear to me that this is an issue for European labour law. It seems to me that it is an issue for the UK authorities to clarify the definition of self-employment and actually, although it is complicated it is pretty clear already: you have to have several clients,

³⁴ op. cit. pages 10,11

- you have to exhibit some choice over when and where to work, you have to provide your own tools and equipment, otherwise there will be a presumption that you are not really self-employed, you are a dependent employee”. (Q 26)
158. The Professional Contractors Group, while recognising disguised self-employment as a reality that ought to be combated when identified, argues in its evidence that the notion of “economically dependent work” as referred to in the Green Paper is actually a “red herring” once one distinguishes between employment and commercial contracts (which the Group believed the Green Paper fails to). On this argument, genuinely self-employed people should never be considered dependent and thus entitled to the same rights as workers: people who are either genuinely self-employed are independent. (pp 185–189)
 159. The Institute of Interim Management expanded on this same point thus: “Where services are provided by interim/freelance workers under commercial contracts, such contracts are business to business not employment contracts, and therefore do not need employment security of social protection—that is the business risk of entrepreneurship.” (pp 163–168)
 160. The National Farmers Union took a similar viewpoint: “The Green Paper proposal to apply labour law to all intermediate employment statuses could render ineffective or unlawful many positive economic relationships which are not based on an imbalance of power between the parties but rational allocation of risk and autonomy. In particular, the Green Paper proposal could reduce the flexibility of workers to act as independent agricultural service providers and contractors.” (pp 181–183)
 161. Business Europe agreed, stating its view that there is no need for a separate category of “economically dependent worker” across Europe and added that it is strongly opposed to explicit or implicit attempts at EU level to harmonise national definitions of employment and self-employment. (pp 125–132)
 162. **We recommend that in the UK, the agency should continue be treated as the primary employer of agency workers and that agency workers should retain their current status in law. There is no strong case for change in the current regulation of agency work, the existence of which benefits employers, agency workers and the UK economy as a whole.**
 163. **We conclude also that there is no strong case for any change in the definition of employment and self-employment or the extension of employment rights to those deemed genuinely self-employed. We recognise, however, that in the UK the distinction is complicated by tax authorities sometimes adopting a narrower definition of who is self-employed than Employment Tribunals or courts. We recommend that, so far as possible in practice, the Government should clarify this position.**

CHAPTER 7: ADDRESSING LABOUR MARKET DISADVANTAGE

164. The Green Paper asks what role might law or collective agreements play in promoting access to training and transitions between different contractual forms. We considered this question in relation to what the Green Paper has to say about labour market segmentation and the disadvantages suffered by market “outsiders”, including those vulnerable to exploitation or working in the informal economy.³⁵

How segmented is the UK labour market?

165. Several organisations suggested to us that the focus in the Green Paper, on a possible extension of employment rights to all workers, was based on a faulty interpretation of the degree to which people working on non-standard contracts are actually vulnerable or insecure, and might therefore be considered labour market “outsiders”. According to Business Europe, for example: “Outsiders are the unemployed. All those legally employed, whether under full-time indefinite contracts, working part-time, under a fixed-term contract, or doing temporary agency work should be considered as insiders.” (pp 125–132)
166. This view is particularly strongly held by employers’ organisations in the UK where it is argued that the vast majority of people working on a non-standard basis prefer to do so and should not be thought of as being stuck in an inferior segment of a two-tier or multi-tier labour market. As Susan Anderson of the CBI put it: “We do not consider part-time workers or fixed-term workers or agency temps as somehow outsiders or vulnerable workers or people who need extra levels of protection.” (Q 51) The CIPD also cited evidence that temporary workers generally had more positive attitudes to their jobs than permanent employees. (pp 132–137)
167. Moreover, we heard evidence that within the UK that there was considerable movement from non-standard to standard work contracts. Mr Meager of the IES told us: “In the comparative tables that the European Commission produces, for example, showing the proportion of the workforce that moves between permanent work, temporary work, employee status, self-employed status etc in either direction, the UK is right at the top of the list. It has a very, very mobile workforce so the idea of being trapped in a particular segment of the labour market or in a particular form of work is less of an issue in the UK. Insofar as there is segmentation in the labour market it is much less to do with forms of contractual agreements determined by labour law and much more to do with skills.” He later concluded: “If there is an excluded underclass in the workforce in my view it is much more to do with the educational opportunities and skill levels and fiddling around with labour law is not going to make a huge difference to that.” (Q 81)

Labour law and the employability challenge

168. The EEF noted that employability in the face of the increased pressure from globalisation is the greatest challenge facing the UK workforce but that labour law is neither the primary nor most effective means of meeting that challenge. (pp 144–156)

³⁵ op. cit. pages 9,10

169. This point was picked up by the Employment Minister, Mr Fitzpatrick, whose comments echoed those of Mr Meager: “I think the numbers we have are the moment without any qualifications, I think I am right in saying, is about five million, and I think the projections are that, within 20 years or so, the number of jobs that will be available for people without skills will be reduced hugely down to a million or less, which is why the drive for education and training is so important. Labour law and the framework of law clearly have a place and a role to play, but if we do not upskill our people, if we do not impress upon people the importance of getting educational qualifications and the ability to demonstrate and maximise their potential, then we can pass whatever laws we want on legislation and labour law.” (Q 163)
170. The DTI response to the Green Paper referred to the Leitch review of skills, which in December 2006 published its final report for the Government on raising UK skills to world class levels *Prosperity for all in the global economy—world class skills*³⁶. Lord Leitch’s recommendations, to which ministers are due to respond by autumn 2007, include a call to employers to make a so-called “skills pledge”. This amounts to a promise by employers to allow employees without basic or level 2 equivalent skills (i.e. equivalent to 5 GCSE’s at A–C grade or comparable vocational standard) to undertake work related training leading to a level 2 qualification.
171. The skills pledge is intended to help meet what Leitch thinks should be a priority of government skills policy—raising the proportion of UK adults qualified to at least level 2 equivalent from around 70% at present to above 90% by 2020. However, Leitch also recommends that if, by 2010, the contribution of employers to making progress toward meeting the 2020 target for level 2 equivalent skills is deemed insufficient, the government should consult on introducing an individual legal entitlement to workplace training for employees without level 2 equivalent qualifications.
172. This suggests one possible route via which labour law might be able to address labour market disadvantage. However, although commenting on the Green Paper rather than the Leitch proposal, Business Europe pointed to the experience of countries that have introduced a right to skills training to suggest that this has had little impact on the qualification levels attained by the most disadvantaged. (pp 125–132)
173. Taking a slightly different tack the TUC’s Ms Reed told us that she thought improved employment rights, or at least greater employment stability, would help disadvantaged groups: “We know employers generally do not train short-term workers because they do not see the benefit of that and we believe there would be a benefit to the whole economy if agency workers, including migrant workers, could develop their capabilities more effectively through work place training.” (Q 129)

Help for vulnerable workers and migrant workers

174. We heard that a major problem for many disadvantaged workers was not necessarily a lack of employment rights, but exploitation by the minority of bad employers that flouted labour law and denied people their legal entitlements. As the DTI stated in its comments to the Commission on the

³⁶ HM Treasury report: *Prosperity for all in the global economy—world class skills*, December 2006.

Green Paper (pp 85–96): “... it cannot be assumed that any category of workers is vulnerable by definition; a whole range of factors have a bearing on whether or not a worker is vulnerable. The root cause of vulnerability is very often lack of skills. Basic skills (including language skills) are more important than ever for entering the labour market”. Individual workers may also become vulnerable for other reasons. For example, people who have suffered from a mental health problem may experience discrimination in the labour market as a result of stigma³⁷.

175. Among the people who may be exploited are migrant workers, from elsewhere in the EU, who have entered the UK legally in search of work. A separate issue is the situation of workers, from outside the EU, who are working illegally in the UK. We noted with interest the adoption on 16 May 2007 by the European Commission of two Communications^{38,39} which, inter alia, would require that employers must check, before recruiting an employee from outside the EU, that he or she has a valid residence qualification. Employers who fail to do this, and employ such a person who is illegally staying in the country, would be liable to fines and other sanctions.
176. The Home Office also launched its Illegal Working Action Plan on 16 May 2007 which will be coordinated through the new Border and Immigration Agency (BIA). Key measures in the plan include a new pilot project to help employers check migrants’ identity and right to work, implementation of civil penalties for employers who employ illegal immigrants as a result of negligent recruitment, and a new criminal offence for knowingly employing illegal workers. This is subject to a consultation which ends on 7 August 2007⁴⁰. The Government will also be carrying out a national media and direct mail campaign on illegal working, reminding employers of their responsibilities. The measures are expected to come into force early 2008.
177. Migrant workers unsure of their entitlements and misinformed by employers were often those most at risk of being exploited. With net migration into the UK from the EU currently at a record high—boosted in large part by the roughly 600,000 central and eastern European migrants that have come here to work at one time or other since EU enlargement in 2004—the issues this raised have gained greater prominence. Indeed during the course of our Inquiry the BBC broadcast⁴¹ an exposé of appalling treatment of Lithuanian immigrants to the UK which, the TUC told us, was a far from isolated example. (Q 128)
178. Hannah Reed of the TUC told us “Many migrant workers are facing exploitation, being housed in very cramped conditions, having very substantial deductions being taken from their pay packet, which is often in breach not only of the regulations but also of minimum wage laws.” (Q 128)

³⁷ House of Lords European Union Committee Report: 73-I “*Improving the mental health of the population: can the European Union help?*”, April 2007 (page 48)

³⁸ Commission Communication: *Applying the Global Approach to Migration to the Eastern and South-Eastern Regions Neighbouring the European Union* COM(2007) 247 final, 16 May 2007

³⁹ Commission Communication: *Circular migration and mobility partnerships between the European Union and third countries* COM(2007) 248 final, 16 May 2007

⁴⁰ Home Office: *Consultation on the implementation of new powers to prevent illegal migrant working*, 16 May 2007 <http://www.bia.homeoffice.gov.uk/6353/6356/17715/preventionofillegalworkingc1.pdf>

⁴¹ BBC News and Newsnight reports—25 April 2007

179. Pressed on whether this reflected a deficiency in enforcement procedures rather than in the law itself, Ms Reed argued that there were genuine gaps in the law but also a lack of enforcement. Although the TUC welcomed the recent establishment of the Gangmasters Licensing Authority this only operates in agriculture, whereas gangmasters, some illegal, were spreading to other parts of the economy.
180. For the Government's part Mr Fitzpatrick told us that the DTI would soon be completing a consultation on possible measures designed to assist vulnerable agency workers and was funding two pilot exercises to support vulnerable workers and help their employers to comply with employment rights legislation. There was also to be a 50% increase in resources for teams of inspectors enforcing the national minimum wage.
181. Mr Fitzpatrick said it was essential, however, that the Government acted in a precise way to come down hard on rogue employers rather than impose unnecessary additional regulatory burdens on decent employers: "We want to focus on those who are not playing by the rules because they are not only cheating vulnerable workers but they are undercutting decent companies and preventing them from operating at a better profit level because they are doing the right thing. This is a business protection measure as well as protecting vulnerable people." (Q 167)
182. In similar vein, the DTI's written evidence argued that an overly regulated labour market might itself result in more people entering the informal/illegal economy and working without enjoying any employment rights. In the terms of the Green Paper this represented another example of how efforts to improve labour market flexibility could reinforce genuine employment security and enhance working conditions. Aside from this the best way for the EU to combat undeclared work, said the DTI, is to co-operate on detecting cases where this was evident and to share best practice on enforcement methods. (pp 85–96)
183. On May 16 2007, after we had heard evidence from the Minister, the Government launched a consultation document⁴² with the aim of creating better enforced and more effective penalties for employers' non-compliance with National Minimum Wage legislation and the Employment Agencies Act. While any measures that result from this consultation will clearly have general application, they should, in particular, help to address the problems of illegal exploitation faced by vulnerable groups.
184. **We have noted the high rate of transitions between different forms of employment and contractual status within the UK labour market. We conclude that whatever market segmentation does exist is explained primarily by social disadvantage, caused by lack of basic skills and qualifications, rather than by barriers created by labour law.**
185. **In the UK context, therefore, we recommend that measures to improve employability, rather than modernisation of labour law, should be the main priority of government policy toward the labour market.**
186. **We are greatly concerned by evidence of the exploitation in the UK of vulnerable groups, especially migrant workers. We conclude,**

⁴² DTI Consultation document: *National Minimum Wage and Employment Agency Standards Enforcement*, May 2007

however, that the appropriate course is to tackle abuse where it occurs and to provide vulnerable and migrant workers with information about their existing legal entitlements.

187. We welcome the action taken by the Government during our Inquiry to consult on the introduction of measures which would help to strengthen the employment protection in the UK of vulnerable groups of workers by creating better enforced and more effective penalties for employers' non-compliance with National Minimum Wage legislation and the Employment Agencies Act. We will take a close interest in the outcome of this consultation and in the effectiveness of any new measures which result from it.

CHAPTER 8: EU LEGISLATION: ITS FORMULATION IN BRUSSELS AND IMPLEMENTATION IN THE UK

188. We took evidence on two issues which, while not central to the Green Paper, go to the very heart of the formulation and implementation of EU labour law: the role of the social partners in the EU legislative process; and the suggestion that the UK “gold plates” EU directives when implementing them.

Formulating EU employment regulation

189. Article 137 of the EC Treaty provides the Commission with a legal base on which to propose legislation on working conditions and certain other matters relating to employment. Before doing so, the Commission is obliged, under Article 138(2), to consult management and labour (the “social partners”) on the possible direction of Community action. These partners comprise the European employers’ confederation Business Europe (of which the UK CBI is a member), the European Trade Union Confederation (ETUC) (of which the UK TUC is a member), and the European Centre of Enterprises with Public Participation, representing public sector organisations. This consultation process is termed the “social dialogue”. The interests of small and medium enterprises are represented by the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) which, however, has no representation from the UK.
190. Additionally, under Article 139, the social partners can, if they choose, reach agreements on workplace matters which can be implemented throughout the EU by way of a Council decision on a proposal from the Commission. Social partner agreements can also be implemented by Member States acting independently or by the social partners working together at individual Member State level.

Small business and the social partners

191. The Commission’s action plan for better regulation⁴³ sets out the aim of “simplifying the body of Community law and reducing its volume”. Furthermore, EC Treaty Article 137(2)(b) provides that any Directives adopted under Article 137 “shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings”. Nevertheless, the Federation of Small Businesses (FSB) told us that, despite the importance of small business to the EU economy, the small business sector had no official status in the social dialogue process. There is a European Small Business Alliance, of which the FSB is a member, but the FSB told us this does not have a formal independent role in the social partner dialogue (although now a member of Business Europe, the Alliance must vote on issues as Business Europe directs).
192. Mr Tyrrell from the FSB told us that it had been pressing for small businesses to have their own institution in Europe with the same ability to operate as the “two sides of industry” a phrase incidentally which he said was

⁴³ Commission Communication: Action plan *Simplifying and improving the regulatory environment* COM(2002) 278 final, page 14

“anathema to us because there are not two sides of industry, as we know, there are many more, at least three.” (Q 78)

193. The DTI Minister, Mr Fitzpatrick, told us that he agreed with the FSB about the importance of small businesses engaging in the European Social Dialogue. He explained that, since 1998, the European Association of Craft, Small and Medium-sized Enterprises (UEAPME) had been recognised for consultation by the Commission. Unfortunately, however, there was currently no UK representation on this body. He suggested that the issue of the engagement of organisations representing small firms with the social dialogue is something that they could consider raising with the European Small Firms Envoy. (pp 106–107)

“Gold plating”

194. Agreed EC directives specify an implementation date by which they must be transposed into national law. Directives often set minimum legal requirements and may be formulated in fairly general terms, which leaves Member States room for manoeuvre in implementing them.
195. In the UK, the House of Lords Merits Committee on Statutory Instruments has the role of reporting to the House on any Statutory Instrument that it considers to have inappropriately implemented an EC directive. We welcome the work of this committee, but note that only a very small number of Statutory Instruments have been drawn to the attention of the House for this reason (one during the 2004/05 parliamentary session and three during the 2005/06 session).
196. A common accusation, which we heard again during our Inquiry is that the UK sometimes implements measures far beyond what directives actually require as a minimum—a tendency popularly referred to as “gold plating”. The FSB’s Mr Tyrrell presented us with a number of examples of this, including that of the Part-Time Workers Directive: “It provided that part-time workers should be treated not less favourably than other workers employed by the same employer under the same contract. The UK Government transposed that in regulation from ‘under the same contract’ into ‘any contract’”. This, Mr Tyrrell concluded increased the scope of the Directive considerably. (Q 81)
197. Miss Jane Whewell, Director of European Strategy and Labour Market Flexibility at the DTI, responded by outlining to us the reason why there was often a perception of gold plating: “I think there is a tension particularly inherent in EC law where it tends to be drafted in a very broad brush manner, there is a lack of detail and we are caught in the middle. It is perfectly possible for us to copy out the directive and say ‘that is the law’, and say to industry ‘now get on with it’. I do not think they would be terribly happy because just as much as they are saying please do not gold plate, and we try very hard, they also ask us for the maximum flexibility under the directive. They ask us, above all, for clarity. Clarity is not a predominant feature of a lot of European law, so we do our best to make the law as clear as possible for business. Sometimes people feel that this is gold plating. One could debate that for a very long-time but we do our best and there is a programme now looking at large parts of UK legislation, both domestic implementation of European law and UK law, about can we simplify it? Can we make it easier? How can we help business?”(Q 170)

198. Miss Whewell's explanation was consistent with the final report of the independent Davidson Review *Implementation of EU Regulation*⁴⁴. This concluded that "Inappropriate over-implementation may not be as big a problem in the UK—in absolute terms and relative to other EU countries—as is alleged by some commentators." The review found firm evidence of gold plating to be lacking. Criticism sometimes arose because of concern about the fact there is a regulation at all rather than the details of its implementation. Moreover, similar concerns were found to be expressed by business representatives in other Member States suggesting that complaint about regulation was simply a widespread fact of economic life.
199. **We are persuaded that the current social partnership consultation arrangements for formulating EU legislation have an exclusive "two sides of industry" feel.**
200. **We recommend, therefore, that the Government should support UK small business organisations in finding means to ensure that social dialogue in the EU includes a wider representation of interests, in particular representatives of the small business sector. This would seem the most appropriate way of making sure that the EU matches up to the spirit of its treaties which state that the EU should avoid imposing administrative, financial and legal constraints on small and medium sized enterprises.**
201. **We recognise that the perception remains strong that the UK "gold plates" EC directives relating to employment. However, we have seen no conclusive evidence to support this view and indeed the final report of the Davidson review suggests that the perception is exaggerated. We recommend no further action on this matter.**

⁴⁴ HM Treasury report: *Implementation of EU Regulation*, November 2006

CHAPTER 9: CONCLUSIONS AND RECOMMENDATIONS

Chapter 1—Setting the scene

202. We recommend this Report to the House for debate.

Chapter 2—The development of 21st century labour markets

203. We conclude that most of the issues raised in the Green Paper are already adequately addressed within UK labour law where the labour market is relatively lightly regulated in comparison with some other Member States.

204. In consequence, we recommend that it would not be helpful to introduce new EU wide changes to labour law since this would not meet the specific circumstances of the UK nor of other individual Member States.

205. We consider, nevertheless, that the Green Paper provides valuable insights into the role of labour law in promoting labour market flexibility and in enhancing the genuine employment security that comes from helping people to cope with structural change. In addition, we welcome the focus it provides on what individual Member States might learn from the experience of others when deciding what reform of labour law or other employment and welfare policies might best help them to meet the economic and social challenges of the early 21st century.

Chapter 3—Labour law and the UK economy

206. We accept the evidence that the UK's relatively light employment protection legislation, by facilitating a high degree of numerical labour market flexibility, has benefited the UK economy (although we recognise that this has not necessarily been a major factor in the improved performance of the economy in recent decades). This has helped the UK to avoid the high unemployment and labour market segmentation witnessed in some other EU Member States, notwithstanding the problems of structural unemployment and social disadvantage suffered by some people in this country.

207. We recommend that the problems of structural unemployment and social disadvantage in the UK need primarily to be addressed by measures directed at tackling poor skills and social inequality, and by enforcing existing labour law where this is being flouted, rather than by changes to labour law.

208. It was clear from our evidence that, whatever the overall success of the economy, there remains a major problem for the UK in relation to labour productivity. Our view is that significant changes in labour law can have either a positive or a negative, but only marginal, effect on productivity. We conclude that, to improve the UK's productivity performance appreciably, the priority needs are:

- to raise levels of investment in physical capital and in research and development;
- to improve skills at all levels;
- to assist the innovation process; and
- to increase the standard of people management and development in the workplace.

Chapter 4—Flexibility and employment security—“flexicurity”

209. We commend the Commission for starting, in the Green Paper and elsewhere, an important policy debate on how labour market flexibility and employment security might be combined and reinforced to the benefit of both employers and workers and in furtherance of the common good.
210. However, we recommend that the purpose of this debate should be primarily to share information and examples of good practice, recognising the diversity of circumstances between Member States identified by the report of the Commission’s Expert Group on Flexicurity. Any common principles of flexicurity agreed at EU level should therefore be interpreted as guidelines rather than as obligations.
211. We recommend also, that as far as the UK is concerned, progress toward enhancing flexicurity requires action on skills and welfare to work measures rather than changes in labour law.

Chapter 5—The need for labour law reform and the role of the EU

212. We conclude that the present framework of individual labour law in the UK strikes a fair, efficient and sensible balance between the rights and responsibilities of “employees” and “workers”.
213. We agree with the Government that any change in this framework would create difficulties for employers without providing any substantive advantage to workers and possibly harm employment prospects. The focus of attention should therefore be on informing all workers of their rights and enforcing existing entitlements.
214. We recognise the important role played by trades unions and collective machinery in helping to ensure people are treated fairly at work, are able to exercise their legal rights, and can make a productive contribution in the workplace. However, we see no need for action at an EU level to directly alter the scope of collective labour law in the UK or other Member States.
215. We fully appreciate the particular pressures facing smaller businesses in coping with an increasing amount of labour law which may seriously hamper their ability to create jobs and improve their performance. We therefore recommend that the Government should pay serious attention to the concerns of small businesses about the impact of employment protection provisions on their operations. We would not, however, wish to see any groups of workers, including those working in the smallest businesses, left without the employment protection which is afforded to workers in larger organisations.
216. We do not believe there is need for more convergent definitions of worker in EU directives. We also firmly reject any suggestion of a common floor of rights, although we do not consider this to be the intention of the Green Paper. The UK already provides a sensible floor of rights covering all workers and any changes to this legislative floor should be left for the UK to decide for itself.
217. We recommend that efforts at EU level to affect the broad frameworks of labour law within Member States should be planned to promote the sharing of experience and good practice, rather than to introduce new legislative interventions.

Chapter 6—Issues for groups within the labour market

218. We recommend that in the UK, the agency should continue be treated as the primary employer of agency workers and that agency workers should retain

their current status in law. There is no strong case for change in the current regulation of agency work, the existence of which benefits employers, agency workers and the UK economy as a whole.

219. We conclude also that there is no strong case for any change in the definition of employment and self-employment or the extension of employment rights to those deemed genuinely self-employed. We recognise, however, that in the UK the distinction is complicated by tax authorities sometimes adopting a narrower definition of who is self-employed than Employment Tribunals or courts. We recommend that, so far as possible in practice, the Government should clarify this position.

Chapter 7—Addressing labour market disadvantage

220. We have noted the high rate of transitions between different forms of employment and contractual status within the UK labour market. We conclude that whatever market segmentation does exist is explained primarily by social disadvantage, caused by lack of basic skills and qualifications, rather than by barriers created by labour law.
221. In the UK context, therefore, we recommend that measures to improve employability, rather than modernisation of labour law, should be the main priority of government policy toward the labour market.
222. We are greatly concerned by evidence of the exploitation in the UK of vulnerable groups, especially migrant workers. We conclude, however, that the appropriate course is to tackle abuse where it occurs and to provide vulnerable and migrant workers with information about their existing legal entitlements.
223. We welcome the action taken by the Government during our Inquiry to consult on the introduction of measures which would help to strengthen the employment protection in the UK of vulnerable groups of workers by creating better enforced and more effective penalties for employers' non-compliance with National Minimum Wage legislation and the Employment Agencies Act. We will take a close interest in the outcome of this consultation and in the effectiveness of any new measures which result from it.

Chapter 8—EU Legislation: its formulation in Brussels and its implementation in the UK

224. We are persuaded that that the current social partnership consultation arrangements for formulating EU legislation have an exclusive “two sides of industry” feel.
225. We recommend, therefore, that the Government should support UK small business organisations in finding means to ensure that social dialogue in the EU includes a wider representation of interests, in particular representatives of the small business sector. This would seem the most appropriate way of making sure that the EU matches up to the spirit of its treaties which state that the EU should avoid imposing administrative, financial and legal constraints on small and medium sized enterprises.
226. We recognise that the perception remains strong that the UK “gold plates” EC directives relating to employment. However, we have seen no conclusive evidence to support this view and indeed the final report of the Davidson review suggests that the perception is exaggerated. We recommend no further action on this matter.

APPENDIX 1: CALL FOR EVIDENCE

Inquiry into the EU Commission Green Paper “Modernising labour law to meet the challenges of the 21st century”

EU Sub-Committee G (Social Policy and Consumer Affairs) is conducting an Inquiry into the issues raised by the European Commission’s Green Paper “Modernising labour law to meet the challenges of the 21st century”, published on 22 November 2006. The Green Paper—COM(2006) 708 final—is available on the Commission website at:

http://ec.europa.eu/employment_social/labour_law/docs/2006/green_paper_en.pdf

The Commission’s consultation is intended to launch a debate on how labour law can evolve to support the EU’s objective of achieving sustainable growth with more and better jobs. They recognise that rapid technological progress and globalisation have fundamentally changed European labour markets. Fixed term contracts, part-time work, on-call and zero-hour contracts, hiring through temporary employment agencies and freelance contracts have become an established feature of the European labour market, accounting for 25% of the workforce. At the same time, there is a growing gap between those looking for work, those in non-standard, sometimes precarious contractual arrangements on the one hand (so-called ‘outsiders’), and those in permanent, full-time jobs on the other (the ‘insiders’).

The Commission’s view is that employment rules which are clear and easy to understand are as important for employers as they are for workers. Even though many aspects of labour law are dealt with at national level, they seek views about how labour law at EU and national level can help the job market become more flexible while maximizing security for workers (the ‘flexicurity’ approach).

Interested parties are invited to submit a concise statement of written evidence to this Inquiry by Friday 30 March 2007. In particular, we would welcome responses to some or all of the following questions:

Flexibility of the labour market

How flexible is the labour market in the UK? What could be the benefits of making it more flexible, and how could this be achieved? In which ways, if any, could changes in labour law help with this?

Employment security

What is the extent of employment security in the UK? What could be the benefits of changing the present arrangements for employment security? In which ways, if any, could changes in labour law help with this?

The concept of “Flexicurity”

How helpful do you think is the Commission’s concept of “flexicurity” seeking to combine the ideals of a flexible labour market with those of employment security? How practical could it be to strike a balance between these two ideals and where should such a balance be struck? In which ways, if any, could changes in labour law help with this?

Other labour market challenges

What other challenges are facing those involved in the labour market? Respondents may wish to comment on their knowledge of a variety of different types of “subordinate” employment contracts and/or on their knowledge of the challenges faced by those in self-employment, “economically-dependent” self-employment and agency work. To what extent could changes in labour law help to address these challenges?

Groups covered by labour law

To which categories of workers should labour law apply? Are any workers currently excluded that ought, in your view, to be included? What is your view of the issues raised by the Green Paper about the applicability of labour law to groups of workers whose employment status is intermediate between that of employee and self-employed?

Role of EU Regulation

What is the role of regulation at the EU-level in achieving a modernised system of labour law? Are there any specific pieces of EU legislation that need either to be repealed or to be introduced? Do you consider that the Green Paper’s proposed “Floor of Rights” for all workers is a viable one? In order to promote worker mobility, would a Community-wide definition of “worker” be useful?

APPENDIX 2: LIST OF WITNESSES

The following witnesses gave evidence. Those marked with * gave oral evidence and written evidence.

- Amicus
- Dr Diamond Ashiagbor
- Dr Catherine Barnard
- Dr Alan L Bogg
- Brethren Christian Fellowship
- British Retail Consortium (BRC)
- Broadcasting, Entertainment, Cinematograph and Theatre Union (BECTU)
- BusinessEurope
- * CBI
- Chartered Institute of Personnel and Development (CIPD)
- Confederation of West Midlands Chambers of Commerce
- Construction Confederation
- Professor Simon Deakin
- Department of Trade and Industry
- EEF
- Eurociett
- * Federation of Small Businesses (FSB)
- * Mr Jim Fitzpatrick MP, Minister for Employment Relations, Department of Trade and Industry
- Professor M R Freedland
- * Mr Nigel Meager, Institute for Employment Studies
- Institute of Interim Management
- Italian Lawyers
- Dr N Kountouris
- The Law Society of Scotland and The Law Society
- Ms Liz Lynne MEP
- National Farmers' Union
- Dr Wanjiru Njoya
- Professional Contractors Group
- Recruitment and Employment Confederation
- Professor Silvana Sciarra
- * Professor Len Shackleton
- * TUC
- Unquoted Companies Group

APPENDIX 3: RECENT REPORTS

Recent Reports from the Select Committee

Session 2006–07

Evidence from the Minister for Europe on the Outcome of the December European Council (4th Report, Session 2006–07, HL Paper 31)

Government Responses: Session 2004–05 (6th Report, Session 2006–07, HL Paper 38)

The Commission's 2007 Legislative and Work Programme (7th Report, Session 2006–07, HL Paper 42)

Evidence from the Ambassador of the Federal Republic of Germany on the German Presidency (10th Report, Session 2006–07, HL Paper 56)

Recent Reports prepared by Sub-Committee G (Social Policy and Consumer Affairs)

“Improving the mental health of the population”: can the European Union help? (14th Report, Session 2006–07, HL Paper 73)

Proposal to Establish the European Institute of Technology: Interim Report (13th Report, Session 2006–07, HL Paper 69)

Cross Border Health Services in the European Union (8th Report, Session 2006–07, HL Paper 48)

Proposed European Institute for Gender Equality: Supplementary Report (51st Report, Session 2005–06, HL Paper 271)

Minutes of Evidence

THE SELECT COMMITTEE ON THE EUROPEAN UNION (SUB-COMMITTEE G)

THURSDAY 22 MARCH 2007

Present	Dundee, E	Neuberger, B
	Gale, B	Thomas of Walliswood, B (Chairman)
	Greengross, B	Trefgarne, L
	Howarth of Breckland, B	Uddin, B
	Morgan of Huyton, B	Wade of Chorlton, L
	Moser, L	

Examination of Witnesses

Witnesses: PROFESSOR LEN SHACKLETON, Dean of University of Westminster Business School and MR NIGEL MEAGER, Director, Institute for Employment Studies, examined.

Q1 Chairman: Professor Shackleton and Mr Meager, thank you very much for coming to give evidence to us. You are the first people to give us verbal evidence on this particular inquiry which we are just starting and we are very grateful to you for coming to do that. The Commission's Labour Law Green Paper is obviously potentially quite an important piece of work. Employment issues are of great interest to this Committee and a couple of years ago we published a report on the inquiry into the Working Time Directive which you have probably seen. So our inquiry on this Labour Law Green Paper is a good opportunity for us to pull together evidence which will bring our views on the impact of legislation in the labour market up to date. The session is open to the public and it will be recorded for broadcasting or webcasting, a verbatim transcript will be taken and that will also be put onto the public record in printed form and on the parliamentary website; in fact your evidence session will form part of the evidence that we add to the report when we write it. You will be sent a transcript of this session a few days afterwards and if you wish to correct something, if you feel you have misspoken yourselves or you wish to add something, that is fine but you need to do it as quickly as possible please. If you think at the end of the session that points that you wish to make were not made or if you wish to expand something you said or you were not quite satisfactorily able to answer a question, please send us supplementary evidence. That is very welcome and would be well regarded by the Committee. The acoustics in this room are relatively good, but if you could speak at slightly above a normal speaking voice, I am sure that would help the members of the Committee to follow what you are saying. Before we start perhaps you could for the record state your names and your official titles.

Professor Shackleton: I am Professor Len Shackleton; I am the Dean of Westminster Business School.

Mr Meager: I am Nigel Meager; I am the Director of the Institute for Employment Studies which is based at the University of Sussex.

Q2 Chairman: Excellent; thank you. Did you want to make an opening statement before we go into the question and answer session?

Professor Shackleton: I did. One of the central issues of the Green Paper is the issue of employment protection. Employment protection, like other sorts of mandated benefits such as holiday leave and parental leave tends to increase costs for employers which has an impact on their demand for employees. But it also has an impact on the behaviour of the employees themselves, so you tend to get an increase in the supply of people willing to do a job at a particular wage rate. The net result of this in a static analysis is that you would expect average wages to fall, and on reasonable assumptions you would also expect employment to fall. In a more complex framework, a dynamic framework, what is happening is that greater employment protection reduces dismissals and tends to reduce job turnover, but it also deters new hires by firms who face the risk of significant costs if they have to lay staff off. There is evidence, which I hope we shall talk about, that this increases the duration of unemployment, it makes it more difficult for younger, less skilled workers to achieve employment and we get a tendency towards labour market segmentation, which is one of the features to which the Commission's paper draws attention. In that kind of situation you have relatively privileged insiders who have secure jobs and outsiders who are either in insecure employment or cannot get jobs at all—and this is the issue which the Commission want to focus on. That is where the discussion probably ought to go in this session.

22 March 2007

Professor Len Shackleton and Mr Nigel Meager

Q3 Chairman: That was a very helpful introduction; thank you very much indeed. May we stick to the questions or something like them, because we would like to explore with the witnesses their views about the general economic background in the United Kingdom and the impact of labour regulation on this before we go on to points specifically related to labour law? What is your view of the general health of the UK economy compared with the economies in the other Member States at the present moment?

Professor Shackleton: Economies, like people, are rarely in perfect health. There are always some niggles around and indeed there may be unrecognised symptoms of more serious problems for later on. Nevertheless, my view would be that the UK's labour market at the moment is in an enviable condition compared with those of many of our continental neighbours, particularly countries such as France and Italy and to a lesser extent Germany. We have unemployment which is significantly lower than the average for the EU as a whole. Employment continues to grow and over 70 per cent of those of working age are actually in employment in the UK, whereas the figure in countries like Italy and Spain is less than 60 per cent. We have had 15 years of continuous growth of national income. Our GDP per head has overtaken that of a number of countries which were formerly ahead of us, such as France and Italy. Problems like inflation bogged the British economy for many years and although they have not entirely disappeared, and indeed inflation has gone up again this week, the consensus is that inflation is broadly under control and it is on a time path where it will come down in a year or two. It is a pretty good picture overall but it has flaws in it. Productivity has not grown as rapidly as it might have done; that is one of the issues. Taxation has certainly risen and despite yesterday's Budget we are no longer a low tax economy in quite the way we were a few years ago; we have crept up much closer to the average level of tax in countries like Germany and France, although not to the same extent. Employment regulation, one of the issues we are talking about here, has clearly increased in recent years, so some of our advantage in labour market flexibility has been eroded. On the whole, however, the economy is strong. There are other issues which people might like to take up like inequality and poverty and so forth, but if we are just looking at the broad measures, the British economy is in a very favourable position.

Q4 Chairman: Thank you. Mr Meager, would you like to start off by making a short statement?

Mr Meager: Just very briefly, if I might my Lord Chairman. I should just like to say that I have a number of reservations about any project to harmonise labour law provisions further across the EU which is implicit in the Green Paper. It seems to

me that labour law is a rather blunt instrument for achieving the objectives that the EU has, which are to improve labour market performance on the one hand and to provide a degree of social protection on the other. One thing which has become very clear to me, doing comparative research on labour market policy in the EU, is that the extreme diversity of legal provisions, traditions and institutional arrangements makes valid comparisons very difficult to make. It is certainly not possible to conclude that a set of laws and institutions which has one effect in one national context will have a similar effect in other national contexts. Particularly when one looks at it from the side of labour market performance, it is not possible to consider the effects of labour law separately from the effects of the labour market policy regime (by which I mean the kinds of training and other support measures that are in place for the unemployed), or indeed from the effects of the benefit system and the welfare regime, or indeed from the effects of the collective bargaining and employment relations tradition in the country in question. In my view it makes absolutely no sense to make prescriptions about labour law without taking a view on these other elements. For example, a set of labour legislation which gives rather little employment protection, such as we actually have in the UK, will have vastly different implications for labour market performance depending on how generous and supportive the unemployment benefit regime is and how well developed the institutions for retraining and redeploying displaced workers are. That is what I would like to say in general terms. May I just pick up the points that Professor Shackleton was making about the relative performance of the UK economy and the potential relevance of labour regulation to that? I could not agree more that the UK economy is in a relatively healthy state, and the positive end-of-term reports that we keep getting from OECD and IMF tend to reinforce that. We have had continuous economic growth and employment growth for well over 10 years. The question is why? It seems to me that there is no single factor which can account for that performance. We have had a stable macroeconomic environment; I do not wish to go into who might take credit for it which is a rather spurious discussion. However, the link which used to exist between sustaining low unemployment and generating high inflation has clearly been broken in the UK in a way which has surprised a lot of economists including me. A number of reasons can explain that. We have had rather more success than might be expected in getting inactive groups into the labour market and expanding labour supply. The recent expansion in immigration has been a positive factor from that point of view; it has both increased labour supply and dampened down inflationary pressures in the economy. And one should not

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Professor Len Shackleton and Mr Nigel Meager

underestimate the effect of the changed industrial relations climate since the 1980s; the inflationary effect of wage bargaining and collective behaviour and so on has just completely gone; or perhaps not completely gone, but it has a very different effect than it used to have. The role of labour law or labour regulation in all of this, seems to me to be rather small. There is a common argument that the UK's relative success, in labour market terms, is due to its rather de-regulated and loose employment protection regime and its rather light touch labour law. I really do not buy this argument at all. The UK, despite recent changes, has pretty well the least regulated labour market in the EU. The OECD regularly publishes rankings of the strictness of the employment protection regimes in Member States, and the UK is always at the bottom among EU Member States. It is at a similar level to other English-speaking liberal economies, the United States, Australia, New Zealand and so on, but it is well below nearly all continental European countries; only Denmark comes close. The key point is that the UK has always been like that. If we go back to the 1970s and the 1980s, when the UK by any measure of labour market performance was seriously the sick man of Europe, we had the highest unemployment rate of the large economies, very poor growth, recession and all the rest of it; but we also had a deregulated labour market then. If anything, labour regulation has got slightly tighter since that time; it is still low but it has not got looser, so it is very difficult to argue that the improved labour market performance is a result of changes in labour law. I am not saying that labour regulation is irrelevant to labour market performance. Clearly it is not, and there would come a point beyond which further tightening in labour law would have a negative effect on employment. My argument is simply, certainly when you look at the international comparative evidence, that we are not anywhere near that point yet, but we still have a relatively loose regulatory environment and, to give credit where credit is due, the Government have done not a bad job in balancing over the last few years the conflicting pressures to improve protection for disadvantaged groups of workers, on the one hand, and the need to maintain a labour market which adjusts flexibly to business market and technological changes, on the other hand.

Q5 Lord Moser: There is one central point in your joint economic assessment, which I agree with on the whole and it is a good picture of GNP, et cetera . . . I do not buy everything that the Chancellor says about how good it all is, but never mind that. The puzzle is our poor productivity and you both commented in passing on that. After all, you talk about the improving labour situation, but productivity is

extremely disappointing still and compares poorly with most other countries. That deserves one more word from both of you before we go on.

Professor Shackleton: Productivity is an extremely tricky concept to play around with. The most commonly quoted measure is labour productivity and one of the effects of having more people in work is that the average productivity tends to fall because you are taking in workers who, in a different context, would not get taken on. Apart from that of course, major factors are the education and training of workers, which we know to have been a longstanding problem in the UK, and also the level of investment and the type of industries being invested in. The UK has a much more service-based economy than, say, Germany and this is reflected to a degree in these macrostatistics on productivity which do need to be deconstructed to see exactly what could be done.

Q6 Lord Moser: It applies throughout the system.

Professor Shackleton: Yes.

Lord Moser: I shall be very interested as we go through this project in understanding whether changes in labour law will impact on productivity. To me productivity is actually the key economic measure rather than all the ones that the Chancellor tends to talk about, but I shall leave it at that for the moment.

Chairman: I am going to pass on to Lord Wade because he wants to get into this aspect of things and also onto the international comparisons outside the European Union.

Q7 Lord Wade of Chorlton: Thank you both for the presentation so far. I should like to build on that by just exploring a little bit further as to whether you think existing labour law has been a good or a bad thing for the economy in the UK as it stands at the moment, but, more particularly, how that looks and affects our globalisation of our products and how that impacts upon our international trade and how you see that evolving. Clearly it is all right having labour laws in Europe, but if those laws are very different from the rest of the world, then clearly that is a competitive issue. Coming back to Lord Moser's point, an important point which he has raised and which I want to explore with you is about how labour law impacts upon productivity because that is, I agree with him entirely, the key really to wealth creation and making more money available and lifting the whole standard of living for everybody. Perhaps Professor Shackleton might answer that first because Mr Meager did address one or two of those issues.

Professor Shackleton: Let me say I agree with Mr Meager that labour law is only one aspect of a complex situation. We have had a very good macroframework in this country and macroeconomic policy is one issue, industrial relations another. Product market competition is a

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third which has not been mentioned. We do have a pretty good competition regime in the UK and we do allow firms to enter and leave without the kind of restrictions which are placed in France and Germany and so on. It is a complex picture. Nevertheless, you are quite right to focus on international comparisons because there is some evidence now. The World Bank has produced a series of indices about various aspects of labour legislation. If you take the index they have on employment protection, for example, which focuses on hiring and firing in that index the only major world economies in the same ball park as we are are the United States, New Zealand, Australia, Denmark and also, an important one of course, China where there are relatively few restrictions, as you can imagine, on hiring and firing workers. When these sorts of indices are put into a proper econometric framework, where you are controlling for some of these other factors which Mr Meager was drawing attention to, there does seem to be evidence that a high level of employment protection is associated with a small proportion of the working age population in employment, slower growth and a higher proportion of so-called atypical employment, particularly temporary employment rather than permanent employment. There is something real there about the association of labour law with the effectiveness of a particular labour market, so that is an issue. Of course, you are right to draw attention to the context of international trade. We are not competing just with Germany and Italy and France, we are competing with China, we are competing with Japan, we are competing with all the industrialising economies of Asia and so forth and we always have to bear this in mind.

Q8 Lord Wade of Chorlton: Coming back to the point of productivity, perhaps you could explore that point further. You mentioned the importance of productivity but how is that actually related in your view to different levels of employment law?

Professor Shackleton: For example, if you have restrictions on the number of hours in which people can work, this is going to lead to more people having to be employed to meet a particular output and that is going to be associated with lower productivity per worker, other things being equal; of course this is always the qualification which you have to apply. If, on the other hand, you have the kind of regime where employees are highly trained and they can move from one job to another and productivity can be increased to offset the impact of labour legislation, then that is a very different matter. Economists are always getting criticised for that old bit of Latin they keep bringing out, *ceteris paribus*. You have to control for these other factors when making statements about the impact of this variable on that, and it is very important to re-emphasise that.

Q9 Lord Wade of Chorlton: Would Mr Meager care to comment on this international issue?

Mr Meager: Just briefly. I would not like you to draw the conclusion from my earlier remarks that I think labour law is, in principle, irrelevant to economic performance. My point was rather that it has not been a key factor in explaining the UK's current economic performance and, in my view, strictness of employment protection and related legislation is not a significant barrier in the UK to its economic performance. In some other EU Member States I would reach a very different conclusion, as indeed those Member States themselves are making that conclusion. I would agree with Professor Shackleton's analysis thus far. On the productivity question, it is a slightly more nuanced picture in my view than portrayed by Professor Shackleton. To take the example that he gives of working time, it has been argued and indeed there is some evidence that there are problems indeed in restricting working time, but actually one of the side effects can be that if employers cannot work their workforces longer than a certain number of hours, it provides an incentive for them actually to get more out of the hours that they are working rather than necessarily employing more people, and as a result to invest in training and development and so on. Interestingly, my institute did do a small study for the DTI a few years back where we followed up, after a period of two or three years, a number of companies who had expected to be affected by the working time regulations when they were introduced into this country. One of things we found on following them up was, independently of the opt-out really, how easy they had found it to adjust to the working time regulations; and some of them were actually saying "Well, to be honest, it gave us an incentive to tackle some of these slightly unhelpful practices of systematic overtime" et cetera and it did lead to a prompt flexibility and so on. I would not go as far as to say that would be a reason for having working time regulation; that is not a good reason for introducing working time regulation. All I would want to say is that the effects on productivity do not necessarily go one way and it is surprising often for economists that, despite the extreme working time restrictions that have been in place in France for a number of years, they do have extremely high productivity per hour.

Q10 Chairman: I worked at NEDO for quite a number of years. In those days we used sometimes to make the suggestion that if you did not have a lot of control on working time, it was a disincentive to investment by the company in better working practices of all kinds. I do not know whether that is still a viable assumption or not but it rather suggests that where your labour time is expensive because it is short, you therefore have a higher incentive to invest

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in different working practices, better machinery, whatever it is that you are doing to off-set the cost of your labour force. Does that operate at all?

Mr Meager: My argument would be that it operates to some extent but that is not a good reason for introducing working time practices.

Chairman: No, I am not suggesting that. One of the reasons that we were less effective in investment was that our labour costs were low, so we had less incentive to invest in better machinery and better methods. We do not have very much of a manufacturing industry any more so that is probably not relevant.

Q11 *Baroness Neuberger:* A very quick follow-up and I ought to declare an interest, being married to an academic economist. Just to press you further on the point about the UK and the way, I think you were saying, that people adapt to things like working time directives. Do you think there is something particularly distinctive about the way people in the UK operate within the labour law, how firms react, how employees themselves react, that is different from other parts of Europe? Is it a particularly UK characteristic?

Mr Meager: It is very difficult to answer that question because there is a lot of anecdotal evidence. You will get a lot of people who say “Of course what happens in the UK is that we gold-plate the legislation whereas those rotten foreigners just ignore it”. The evidence is less strong than that might suggest. Certainly when we did the working time study a few years back looking at long working hours—this was a cross-country study that we did for the DTI and we looked not just at the UK but also at companies in Sweden, France and Germany—the thing that struck me was actually the similarity, particularly for professional and white collar workers. It did not seem to us that there was anything particularly distinctive about the UK. There was just as much of a long-hours culture amongst managers in these other countries and they were just as prone in the UK and, say, Germany to get round the legislation if it did not suit them. The thing that was very different between the UK and these other countries in terms of long hours, because we were looking at the working time legislation, was amongst blue collar workers where we did find much more long-hours working in the UK, which seemed to be associated not with legislation but more to do with a culture not of long-hours working but of systematic overtime often driven by low wages, particularly in parts of the economy, the South East and London, where these people were wanting to work long hours and to keep their overtime shifts because that was the way of reaching a target income level. We looked at the Post Office in the UK and also in Sweden and there was a huge difference in working time for exactly that

reason. Talking to Post Office union officials, they were saying “We don’t want these hours taken away. Our members want them and they need them to pay their mortgages” whereas in Sweden it was exactly the opposite. That was not really anything to do with working time legislation, it was something completely different.

Chairman: We should move on. Lady Howarth, your question on flexibility and security in the labour market.

Q12 *Baroness Howarth of Breckland:* I am going to concentrate on what would have been question three and question five because they go together and they are two sides of the same coin. First of all, the flexibility and security in the labour market, which we have very much just been talking about, anything else in relation to that and the variety of contracts that now exist. It is *The Empty Raincoat*, Charles Handy sort of picture. Then, to move into the other question at the same time because it is the other side, this wonderful word “flexicurity”, which is how to make sure that people have life-learning to develop their skills, all the alternatives of policies, encouraging employment in inactive people in order to encourage the economy. Both of those things at the same time.

Mr Meager: “Flexicurity” is a hideous word but we know what it means. First of all I should like just to challenge slightly the association that seems to be written into this Green Paper that there is an association between insecurity on the one hand and certain types of non-standard working patterns on the other. Lumping together part-time work, temporary work, self-employment as though they were similarly insecure, precarious, et cetera is extremely unhelpful in this. It seems to me that, for example, part-time work, certainly in this country offers a considerable amount of flexibility to lots of employees and to lots of employers. You get high quality part-time work and you get low quality part-time work, but there is nothing definitionally true about part-time work that makes it more insecure than full-time work. Most part-time workers have open-ended contracts the same as I do and I am a full-time worker. They are not more insecure, they just work fewer hours per week. That is my first point. If you are going to look at these things, you need to disentangle it a bit more. Secondly, the relationship between labour law and security, which again is implicit in this, is not a clear one. The points that Professor Shackleton has made are true: there are strange relationships between employment protection legislation and security. If you have more employment protection legislation, that can give an incentive to employers, which we tend not to have to much extent in the UK, to generate unusual forms of work or strange temporary contracts to get round the legislation and that can lead to more insecurity.

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Another paradox, another thing we have to look at, is the relationship between legal security as laid down in the law and how secure people actually feel. It seems to me that if you care about individual welfare, it is as important to know how secure people feel in their jobs and in their labour market circumstances. Interestingly there are several comparative surveys across the EU and other countries on this and in the UK employees, workers generally, score surprisingly highly in these surveys in terms of their perceived feelings of security about their jobs. There is a paradox actually that across countries there seems to be an inverse relationship between the strictness of employment protection legislation and how secure people feel. It is almost the case that, in those countries where you have very, very restrictive employment legislation, for some reason surveys of employees find that they feel more insecure than in countries like the UK where there is less employment protection legislation. One of the reasons might be, and this has been suggested by some commentators, that in countries where there is really, really strict employment protection legislation it is virtually impossible, except in dire circumstances, to fire anybody; it is a rather rare event, you do not get these sort of people made redundant in small numbers. They tend to save it up for big crises and you get these huge redundancies which are all over the newspapers. This is the sort of thing that happens in Germany and France and they have these collective agreements. That creates a climate of anxiety and similarly in countries like Spain, where it is virtually impossible to fire a permanent worker, nearly all new jobs until recently have been temporary jobs. So the workforce notice that nearly all the people they know who are starting new jobs are getting temporary jobs and that makes them feel insecure. If there is anything in this “flexicurity” thing, and I think there is something in it, it is this idea that if we are concerned about security, we might want to move away from focusing just on job security and focus on employment security. The traditional employment protection approach to security protects people in a given job. The “flexicurity” approach, if it means anything, is saying rather than worrying too much about protecting particular jobs, let us try to protect the capacity of the economy to generate new jobs on the one hand by having a relatively flexible regime but also the employability and, on the other hand, the skills of the workforce and the kind of support they have between jobs so that it makes it easier to take those new jobs when they come up. There are some examples of European economies where they seem to have begun to crack that job security-employment security puzzle.

Q13 Baroness Howarth of Breckland: Where does the UK stand in that in relation to others?

Mr Meager: It is interesting. The country that has done it, on the face of it, most successfully is Denmark because Denmark actually, of the continental European countries (and this is often a surprise to people), has a fairly hire-and-fire labour law regime. It is almost as loose as in the UK. The Danish workers are right at the top of all the indices of happiness, feeling secure in their jobs et cetera and the paradox seems to be that despite the fact that there is a very, very high labour turnover in Denmark people expect to find a new job relatively quickly and to be supported in the gaps between jobs. The sting in the tail is that it is very, very expensive. They have a generous, although time-limited, unemployment benefit regime where there is a lot of obligation on the jobseeker to retrain and look for work but there also is a lot of support for them and they have a very, very extensive set of active labour market programmes aimed at training, retraining, upskilling people so that they can take new jobs. If we take the Danish example, there are three corners to the triangle: there is labour law, which is the flexibility bit; there is the unemployment benefit and welfare regime bit of it; and there is the training and skills bit of it. The UK probably does rather well on the labour law flexibility bit, but rather less well on the other two corners and that is, in a sense, why I think from the UK’s perspective, not from other Member States’ perspective, this whole Green Paper focus on labour law is sort of off the point. We probably have that bit quite well in place and there is not a strong case for tinkering with labour law in order to enhance “flexicurity”: it is much more about the welfare-to-work and unemployment support regime for people, and particularly the training and upskilling. I hate to be too negative about it, but I do think it is off beam.

Q14 Baroness Howarth of Breckland: We have the happiness indices. Do these factors have any relation to the productivity indices that we were trying to get to?

Mr Meager: I have not seen that done. Productivity is very high in Denmark as well, but reported happiness is not that high in France actually. I do not think there is a one-to-one correlation but there has not been any work on that.

Q15 Chairman: Do you want to add something to the discussion we have just been having Professor Shackleton?

Professor Shackleton: A couple of thoughts on flexibility first of all. I would want to emphasise that by most indicators the UK has a very flexible labour market. Normally economists talk about four different types of flexibility: numerical flexibility, which is about hiring and firing and we have already spoken about that; working time flexibility which we have also already spoken about; functional

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flexibility, the ability to move from job to job. This is a mixed picture in the UK. On the plus side, we have very few restrictions based on qualifications. In Germany, if you want to open up a pastry cook's or something you have to be a *Meister*. You do not in the UK. Gordon Ramsay can do it if he wants to; he does not have to have a qualification and most people would think that was a good thing, unless you do not like Gordon Ramsay very much. We are flexible in that sense. Of course, you could argue on the downside though that countries like Germany have very high levels of skills for middle range people in the labour market, which we do not have in the UK, and this makes them more adaptable. Finally, there is wage flexibility in both its real and nominal forms; the nominal form of course is how money wages, move in relation to shifts in demand. Real wage flexibility is wages corrected for inflation, how they adjust to labour supply and demand shifts. Although in the 1970s and 1980s we were considered to be relatively inflexible, the most recent evidence on this suggests that both in nominal and in real terms the UK has a very high level of wage flexibility. We are very flexible in that sense. The other thing I would just throw in, in relation to what Mr Meager was saying, is about the Danish system. It is an attractive system and it has been very successful though it is very expensive. There are two other points you could make about how transferable it is to other countries, particularly to those countries who are thinking about labour market reform like Germany, France and Italy and so on. You have to put the Danish system in some kind of long-run context. Denmark has never had restrictive employment legislation. It has always operated, rather in the way we used to operate in the UK, by collective negotiations with a very powerful trade union movement. They still have something like 75 per cent unionisation in Denmark, very high, and unions currently negotiate at a national level. The reforms which brought about the "flexicurity" we now associate with Denmark in the 1990s were actually agreed with the trade unions. Whether you could get that same result in Germany or France or Italy I really doubt. The other element, and we are talking about national attitudes and things, is an interesting piece of work being done recently by a couple of German economists who argue that the "flexicurity" model is only sustainable in countries with very strong public spiritedness. They asked a question in a cross-country survey about people's attitudes towards welfare cheating. The Danish come out as the most critical of welfare cheating and they have a very good sense of public morality, whereas I am afraid France comes bottom of this particular league; many French people seem to regard welfare cheating as perfectly acceptable. What these authors argue is that in this context, trying to transfer the Danish model to the French labour market, say, would be very difficult to do.

Q16 Lord Trefgarne: Could you say where we are in the welfare cheating league?

Professor Shackleton: We are somewhere in the middle.

Q17 Earl of Dundee: Following from the Green Paper proposals on the need to reform existing labour law provisions, what benefits do you think would accrue from these to our UK economy?

Mr Meager: Briefly, you will probably have gathered from my previous answers that I do not think very many benefits would flow. The model implied in the Green Paper seems to be that the growing deregulation at the edges of labour law in some continental countries in particular has led to an increased segmentation in the labour market and that is why they are making these proposals. That does not seem to me to apply to the UK. We have not had those kinds of changes to labour legislation because we have not needed them to the same extent, because we already had a relatively loose regime. There is no evidence that the forms of work that they seem to be concerned about in the Green Paper have been growing strongly in the UK. So if you take part-time work, apart from the Netherlands we have always had the second highest rate of part-time work in the EU, but it has not been going up particularly strongly, if at all, in recent years. Self-employment has gone up and down with the cycle. There was a blip in the 1980s for reasons we could perhaps talk about but there is no long-term upward trend in self-employment in the UK. Temporary work, likewise: it has hovered at around five to six to seven per cent of the workforce ever since I can remember, certainly since the early 1980s. This idea that there is growing segmentation . . . I am not saying there is not segmentation in the UK, but the problem identified in the paper, that there is growing segmentation in some countries due to the upsurge in these forms of work and we need to reform labour law to do something about it, does not seem to me to characterise the experience in the UK, so I am not convinced.

Q18 Earl of Dundee: Earlier on you pointed out the paradox to do with the so-called "flexicurity". For example, part-time work which sounds insecure is now really much more secure than people think. Nevertheless, what measures of reform would you like to see to best protect insecure employment, whatever that may currently be?

Mr Meager: There are several points to make there. One is that one of the characteristics that the UK labour market actually seems to do quite well on is its ability to allow people to move between segments of the labour market. In the comparative tables that the European Commission produces, for example, showing the proportion of the workforce that moves

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between permanent work, temporary work, employee status, self-employee status et cetera in either direction, the UK is right at the top of the list. It has a very, very mobile workforce in that sense compared with most countries, so the idea of being trapped in a particular segment of the labour market or in a particular form of work is less of an issue in the UK. In so far as there is segmentation in the labour market, it is much less to do with forms of contractual arrangement determined by labour law and it is much more to do with the question we were talking about earlier, skill levels. Persistent disadvantage and being trapped in parts of the labour market is much more, in my view, to do with what the economists call the human capital of people involved than it is to do with the availability or otherwise of fancy employment contracts. The segmentation there is not just an individual one, there is an inter-generational segmentation. One of the features of the UK economy is that educational disadvantage gets transmitted between generations. One's chances of moving out of the occupational and skill level that one's parents had are no higher now in the UK than they were in the 1950s and 1960s. It is a real surprise when you look at the data. If there is an excluded underclass in the workforce, in my view it is much more to do with the educational opportunities and skill levels, and fiddling around with labour law is not going to make a huge difference to that. It seems to me to be low priority if that is our concern.

Q19 Earl of Dundee: In this context you believe that little help comes from labour law changes. Nevertheless, segmentation remains a problem. The Commission recognises this problem but connects it, incorrectly as you assert, to labour laws.

Mr Meager: Incorrectly in the UK's case.

Q20 Earl of Dundee: In the UK's case, and may be incorrectly in the cases of many other others too. If the Commission wants to tackle segmentation, what should it do instead?

Mr Meager: I suppose I should like to see a focus on skills and life-long learning, which everybody agrees actually is a crucial part of that picture, and perhaps some of the barriers and disadvantages which are not to do with skills faced by particular groups in the workforce. It is childcare for lone parents, it is attitudinal and physical barriers for disabled people et cetera. There are several. It is skills and discrimination for certain groups of black and minority ethnic groups and so on; specific barriers for specific groups. Much more can be done on the segmentation problem off the terrain of labour law.

Q21 Lord Trefgarne: I am not sure whether I am asking my question in the right place, but it does seem to be that these proposals seem to lump all employers

together, large and small. I am very anxious that we should be considering carefully how the effect of these recommendations and suggestions or indeed the effect of existing provisions impact more or less on small businesses which are, as far as our economy is concerned at least, a crucial part of it. I wonder what you think about that.

Professor Shackleton: I could not agree more. I was hoping to get an opportunity to say something on those lines. In the earlier discussion we were having about investment and productivity those sorts of issues tended to be associated with large firms. You have to consider the impact of labour law on three areas: one is the public sector, which is already very highly over-protected, way beyond what national labour law legislation says; second, large companies; and third, as you quite rightly point out, the small business sector. Trying to set up a business, trying to make a business grow, is an extremely difficult thing to do. You need to focus on your market, on your customers and what we do not need to do is have increasing restrictions on small businesses so that they are concentrating more on that kind of thing than they are on their core business. It is interesting that even Germany has recognised this in recent years and as part of the Hartz reforms businesses with 10 or fewer full-time equivalent people are actually exempted from some of the employment protection legislation which is very strong in Germany. That is very important to emphasise.

Lord Trefgarne: We are going to take evidence from the small business sector specifically later in our inquiry, but thank you for that.

Chairman: Thank you; that was most useful. Now we are on to temporary agency workers.

Q22 Baroness Gale: My question relates to temporary agency workers. What is your view on the need for the proposed EU Directive on minimum standards for the temporary agency workers and who should be regarded as the legal employer of the temporary agency workers? Should it be the agency or the client employer?

Professor Shackleton: As Mr Meager pointed out a little bit earlier on, the UK has one of the highest proportions of temporary agency workers in the European Union, though not a huge number. The figures are actually rather difficult to interpret, but probably around two per cent of employment, something like that, at any one time, which is much higher than many places in continental Europe; indeed in some continental European countries agency work was actually illegal until about 10 or 15 years ago, in Greece for example and Italy. We have a tradition, as does the Netherlands, of using agency workers and this tradition is not always fully understood by some of our continental neighbours. Agency work is not growing rapidly in the UK. It has

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grown more rapidly in continental Europe because there it may be being seen as an alternative to restrictive permanent employment legislation. That is not the case in the UK. In the UK there is a long-standing use of agency workers in a range of well-known fields like office work and so forth. Incidentally, the Government is a major user of temp agencies as some of your witnesses will no doubt tell you, if you ask them a similar question on that. There is plenty of evidence that a high proportion of workers with temp agencies do actually value the flexibility of the work. It tends to be a particular subset of the workforce which uses agencies and they find it a useful way of doing things. Over time people do migrate from temporary to permanent work to a much greater extent in the UK than they do in continental Europe, so the idea that temp agencies are part of a problem in some sense is wrong; they are actually evidence of the flexibility of the UK labour market and they have valuable benefits to both employers and employees. Your legal question was about who should be regarded as the employer of agency workers. This is not a legal opinion but a commonsensical view suggests to me that if you are employed by an agency, you are employed by that agency and you are not employed by the firm you happen to be working with for variable periods of time. Clearly this can get ludicrous if somebody has been working for a single employer for two or three years or something and then there may well be a case for doing something about that, but the default position for me should surely be that the agency itself is the employer.

Q23 Baroness Gale: We are all familiar with the concept of temping for office workers and I know for many women it is really a good way of working because they can take time off when they want to and so on and that seems to be quite a long tradition in our country. Would you say that agency working now has developed in other fields? I am thinking of people who drive heavy goods vehicles for example who will register with an agency and for them the position might not be as good because they are waiting at the end of the phone to see whether they have work today and they may have two days' work this week and one day's work next week. From what I can see, they have no protection whatsoever and they are just hoping they will have work. I cannot see that that is good for the employee looking for a job, but it must be beneficial to the employer because they can employ staff as they wish and if they do not have much work on tomorrow, they do not have to have anybody working for them. I am thinking of the protection of these people, mainly because they cannot get a permanent job.

Professor Shackleton: In the UK people tend to move out of temporary work fairly quickly. To go back to your example here; if a company only has work for a driver one day a week, what is there to suggest that there will be further work if they are not allowed to employ a temporary worker on that basis? In what way will extra work be created? What may happen is that the firm will simply not employ anybody and there will be a job opportunity lost. That is always the problem with this sort of interference with a free contractual arrangement. It goes back to the small businesses we spoke of: the kind of firm which only wants to employ a driver one day a week is likely to be a small firm not Tesco's; they are not doing it on that kind of scale.

Q24 Baroness Gale: In this EU Directive then on minimum standards, how could you build in standards for these people?

Professor Shackleton: Of course temporary agency workers are already protected in many ways in terms of minimum wages, in terms of paid holidays, in terms of sickness and maternity pay and things like this. It is really a question of just extending some of these things a little bit further to give full employee status rather than worker status. Because I am doubtful about whether extra permanent jobs would be created, this is probably not a necessary thing to do. I would leave it at that.

Mr Meager: It is a very difficult question. You get very different views on both sides of the equation. I am sure if you talk to the TUC, they will tell you there is massive exploitation of agency workers and give some heart-rending examples which are undoubtedly true. If you talk to the CBI and the temporary agencies, there will be dire warnings of massive job losses if there is further restriction. As is usually the case, both sides are probably overstating the case. There is very little evidence on what the likely effect of the specific measures in the directive would be in the UK. I would stress that we do have a low proportion of temporary workers of any sort in the UK workforce. What is also true is that among that low proportion a higher than average proportion is through agencies, but that is a small proportion of the UK labour market and temporary work generally is not growing. Again, a bit like Professor Shackleton taking a commonsensical perspective on this, my intuition is that we ought to be looking at what is the legitimate motivation for the use of an agency worker by an employer to meet a temporary need. On the one hand it might be because of convenience, because of reducing the administrative burden associated with just employing somebody for a short period (because the agency does that). It might be because the agency worker can provide specialist skills which are only going to be required for a certain period or for a certain period of cover. Those seem to me to be

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wholly legitimate reasons. On the other hand it might be because there is a feeling actually that this is a way of undercutting wages or getting away with inferior terms and conditions than we might otherwise if we employed the people directly, and that is probably a less legitimate reason. It seems to me that employers should not object in principle to giving the same rights to agency workers as they would to temporarily-employed direct employees. That seems to me to be reasonable, although it probably should depend to some extent on the length of the assignment and who the employer is. If assignments tend to be short with very rapid moves between one employer and another, it seems to me entirely reasonable that the employer should be the agency and the agency should determine the terms and conditions. It is a moot point about whether those terms and conditions ought to include some payment for downtime between assignments. My view is that they probably should in general. One of the advantages of being an agency is that presumably you have economies of scale, you have lots of clients. If you are managing your business properly, you ought to be able to place people fairly often and to build into your prices some provision to cover them during downtime. That is a lot fairer for the employee than being in this position of uncertainty and having their income fluctuating in a wholly unpredictable manner. In those circumstances their terms and conditions could differ from the regular employees in the companies where they are placed and who are working next to them, because terms and conditions and wages do differ between companies. They might actually be better. There are plenty of examples, particularly in sectors like IT, where you get these highly paid people coming in from agencies and it is the in-house employees who are looking askance at these people coming in at twice their wages. If the assignments are much, much longer, then it is much more reasonable to argue that they should be treated rather similarly to the employees that they are working alongside, even if they are still employed by the agency. The key question is what the cut-off should be, and intuitively to me it seems that when it starts to be months rather than weeks or days then the question arises about why it is being done and whether it would not be reasonable to regularise the conditions. There is not, that I am aware of, very reliable evidence for the UK on the duration of assignments across the temporary agency sector and the actual differences that exist between terms and conditions. We need a bit more work on that. A common sense middle position between the two extremes that you are likely to hear makes sense to me in this area.

Lord Trefgarne: A useful quarry for all this would be the National Health Service I suspect where there are agency nurses in huge numbers I believe. I do not know the detail.

Q25 Chairman: Yes, there certainly are. Do we know who employs them?

Professor Shackleton: It is mixed; it varies. Sometimes it is the agency.

Mr Meager: May I just add a slight rider? If we are moving towards harmonisation of terms and conditions between agency workers and regular employees, it should work both ways. For example, at the moment agency workers do not have to give any notice, so if they are getting the terms and conditions they should also have to have the normal notice period.

Chairman: That is an interesting point. Thank you.

Q26 Baroness Greengross: It really follows on very well from the last question. Do we need to change definitions for some things because work is changing so fast? Would some of these people in fact be better as self employed and their tax position queried? Self-employed or employed was also leading to my second question which is: what are we going to do about the Working Time Directive? These are all things where there is a muddle now because work has changed and the two legal cases have really put us in a very difficult position as a country.

Professor Shackleton: The question about self-employment is an important one. Even in yesterday's Budget there was the implication that anybody who is self-employed is slightly dodgy and trying to evade tax or whatever, whereas this is not really the case. Being self-employed is for many people a very sensible way to operate and it does create opportunities for employment which would not exist otherwise. Not all relationships with employers are permanent and there is no way efficiently that they should be. There have to be opportunities for flexibility and self-employment is one route there. There are issues about that. The other issue is the Working Time Directive. The Working Time Directive is a very peculiar business. It was originally pushed through as a health and safety measure which of course at extreme levels it would be. If people were working absolutely ridiculous hours, then it would be. Nowadays in most developed countries, however, you are not talking about extraordinarily long hours. The average hours worked in many part of the EU are lower than in the UK, but on the other hand there are countries like Australia, Japan and New Zealand where working hours are considerably longer, with no obvious ill effects. Mr Meager was talking about some of these very interesting pieces of research recently, about attitudes to work and so forth. It is interesting to note that in France in 2005 the average full-time employee worked about 150 hours fewer than in Britain, but both sickness and self-reported stress appeared as higher in France than they did in the UK. This suggests that this is not really a health and safety issue, it is something to do with attitudes

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to work, it is to do with the social partners and the way in which they want to see work controlled; rather than it being a free choice between employer and employee they want to see restrictions on things. We ought to continue to resist application of common hours across Europe, but I have not much optimism that we will in fact succeed in doing that.

Mr Meager: Briefly on this self-employment question, this sort of debate is not a new one. For a very, very long time there have been discussions about where the boundary should lie between employee status and self-employed status and there has always been an element of arbitrariness in how people are classified for various tax, social security, employment law purposes and indeed how people see themselves. I have looked at this quite a lot over the years. For example, there was a massive growth in self-employment in the 1980s and the Government at the time did hail this resurgence of an enterprise culture and entrepreneurialism and all the rest of it. However, when you actually looked at the figures, a lot of it, if not all of it, was not that at all. It was not self-employed entrepreneurs setting up exciting new profit-making businesses, spotting a niche in the market: it was people, particularly in the construction industry, being moved from employee to self-employed status because there was a change in the structure of the industry and the break-up of the big contracting firms and the use of labour-only sub-contracts and so on. They were still doing the same jobs pretty much for the same employers, but they were classified as self-employed and it was advantageous certainly to the employer and sometimes to the former employee for tax and social security purposes. It had all sorts of other implications; not least it was a contribution to the decline in apprenticeships in that sector, for which we are still paying the price now. Sticking on this terrain, I have to say at some stage during the 1990s, the Inland Revenue clamped down very heavily on this sort of thing in the construction sector and we saw a significant decline in construction sector self-employment in the 1990s as a result. Shortly after that, they turned their attention to similar perceived scams in IT contracting and similar areas where they had noticed that large numbers of people suddenly disappeared from working as employees in big companies and suddenly reappeared working full time for the same company but as a self-employed contractor. It is not clear to me that this is an issue for European labour law. It seems to me that it is an issue for the UK authorities to clarify the definition of self-employment, and actually although it is complicated it is pretty clear already: you have to have several clients, you have to exhibit some choice over when and where you work, you have to provide your own tools and equipment otherwise there will be a presumption that you are not really self-employed,

you are a dependent employee. Secondly, it is up to the UK authorities to address scams and abuses when they occur. I might also add that it happens in the other direction as well because the assumption is that what we are talking about always is people who ought to be employees who are being classified as self-employed, but there are also genuinely self-employed people who, as their businesses grow a bit, will get advice from an accountant or somebody that what they ought to do is incorporate their company and become employees of that company. They will still be a small business person, they will still be as entrepreneurial and independent and 'self-employed-like' as they were previously but they now have employee status. Again it is a matter for the authorities to decide when that is reasonable and when it is not. It seems to me that if there is an issue of segmentation and insiders, outsiders and so on, which relates to self-employment, once again it is not really to do with labour law. It is much more to do with the social security system, pension system and related institutions. The evidence suggests that the self-employed are a very polarised group: quite a significant number do rather well, they run successful businesses, they put some money aside for their pensions, they save and they do well in later life. There is another significant group who, particularly when you look at them later in life, and there are studies which do this, are people who have either been self-employed throughout their working life or have had significant spells of self-employment during their working life, and once you control, as Professor Shackleton would have us do, for all of the other factors that you can, *ceteris paribus*, compared with otherwise similar people who have only been employed they are less likely to have a decent pension provision, they are less likely to have savings put away and their risk of poverty in old age is much greater. My view is that it is the case that we have a more flexible labour market. More people these days experience spells of self-employment during their working life than used to be the case generations ago when it was a fairly segmented part of the labour market, affecting skilled craftspeople, farmers, certain people in the liberal professions, law and the like. Now it is much more pervasive, so more people and different kinds of people experience spells of self-employment during their working lives. The question for me is how good the social security regulations and the portability of pensions and access to social security rights are. If I were worried about segmentation of excluded self-employed people, I would not fiddle around with labour law I would address these other questions.

Q27 Chairman: Pension law and so on. Thank you. We are technically speaking beyond our time, but I do not see a lot of people rising from their seats. I

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wonder whether you could give us a little bit longer. Is that a possibility for you or are you on your way to your next engagement?

Mr Meager: I am very flexible.

Chairman: Lord Trefgarne, would you like to ask your question? You have a question about good practice in labour law in the United Kingdom. It might be quite useful to get the answer to that question.

Q28 Lord Trefgarne: We are, in forming our views on all of this, wondering where we look for the best examples of good practice. Some will be here in the UK as you have already indicated, but others may be elsewhere and you seem to have waxed very eloquent on the Danish model for example. I suppose we should assume that if we look at the new members of the EU from the East, they are probably the least likely source of good practice in this area.

Professor Shackleton: The UK's good practice is largely in negative terms. Since the 1980s we have kept discussions about labour law out of the hands of the social partners rather than the way that they operate in continental Europe. Unions and employers are consulted in the process of generating law in this country, but they do not have the kind of powers to exercise control over this that they do in many continental countries. I find the notion of the social partners extremely pernicious. What they are is not "the social partners", they are a bunch of unions and a bunch of employers' associations and in large parts of continental Europe unions are becoming totally unrepresentative of the workforce. In France the unionisation rate is lower than the United States but despite that something like 90 per cent of wages are still collectively bargained and French unions have very considerable veto power over legislation. If you look at the employer side as well, this tends to be industry employer associations and that is part of the old economy. We do not have them in the UK as significant players these days because the labour market has changed or the product market has changed for that matter, whereas in continental Europe this group of social partners also dominates. Things move extremely slowly when the social partners are involved. That would be one negative thing in favour of the British system. On the positive side, we do some quite good things like, for example, the use of ACAS to try to conciliate before employment tribunal cases, which is a very sensible arrangement and better than is practised in many continental jurisdictions. If you want examples of good practices from other countries, I would flag up the very interesting thing which they have done in Austria in recent years. I do not know whether people are aware of this but instead of employers having to pay redundancy payments or severance payments when people are dismissed, there is a tax of 1.53 per

cent of the payroll which is paid into an individual account for workers. If they become redundant, they can use this account to pay a severance payment or they can keep it in there and indeed it serves as a form of retirement saving as well. What this means is that, although the employer has in effect to pay more, it takes away the risk from the employers' side, so the employer is less inclined to worry about what he is taking on when he takes on an extra worker because he is going to have great difficulty in getting rid of them and in Austria that is no longer the case. That is a very attractive model, not so much perhaps in this country, where we do not have the problem on the same scale, but it is certainly the kind of thing which you could think about in the context of a number of continental European economies.

Q29 Baroness Morgan of Huyton: Which is why presumably a lot of the continental European economies have been obsessing about agency workers; they have been taking on a lot of temporary workers because that is the only way round the system.

Professor Shackleton: That is right.

Baroness Morgan of Huyton: In a sense we are about to be affected, yet one could argue we are running our own economy differently. In a sense it is being done because of problems in Spain, rather than because of problems in the UK economy.

Q30 Baroness Howarth of Breckland: May I go back to flexibility and another question I wanted to ask somewhere? It is to do with one of the other social partners, and other regulators of course, who do have an effect on employment patterns particularly in the social care setting. One of the advantages of flexibility is that private companies at the moment are employing Eastern European workers to do some social care without any training. The equality issue here is the effect on the service delivery and on those receiving service. How do we ensure that we have the right kind of flexibility and the right kind of protection, "flexicurity", but also the protection for the people who are receiving, in public services particularly, those services that can be developed, but are not always of the quality we might want them to be?

Professor Shackleton: I can see there could be an issue in that area but clearly it is for the profession or for the regulators to impose service standards upon these areas; it is not really a labour law issue.

Q31 Baroness Howarth of Breckland: It is the other side of "flexicurity", is it not, the training and the standards side of it?

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Professor Shackleton: Yes.

Chairman: There certainly is a recognised problem in the care of elderly people, let us say, just for one example, where the staff is poorly paid, it rotates very quickly so you cannot form relationships between inmates and people who are looking after them. This leads to less good quality of care, less care with feeding the patient. It is very, very well recognised; anybody who has had a mother or an elderly relative in an old person's home knows exactly what we are talking about. However, you might be right, this is not so much labour law as standards law, but there is such a competition to drive down the costs of this particular kind of care which are heavy.

Baroness Howarth of Breckland: It links into labour law.

Chairman: It does link into labour law.

Baroness Howarth of Breckland: It is about security, about being flexible in new businesses, but the private sector new businesses then undercut the voluntary and public services in terms of payment so the whole thing does interrelate into the quality of service the patients receive.

Q32 Chairman: There are several different factors interrelating on that.

Professor Shackleton: There is a very high turnover in the care sector generally, but it was not my impression that the vast majority of employees in this area were on temporary contracts. They are on permanent contracts, but simply a very high turnover because they are so badly paid.

Chairman: They are so badly paid they are forever trying to get a better rate.

Q33 Baroness Neuberger: And they are very badly trained.

Professor Shackleton: One of the issues we have not talked about at all is immigration. A positive feature of the UK economy is that it has been open to immigration and this has had beneficial effects. Gordon Brown two or three years back raised his estimate of the sustainable rate of growth of GDP precisely because of immigration. We have had a

much better record on this than many continental European countries.

Q34 Baroness Howarth of Breckland: We still continue to pay care workers less because of immigration and it is an issue how labour law or any regulation deals with that.

Professor Shackleton: There are clearly problems in the care sector; I do agree with that. It is a question of how you diagnose the problem and this is something which Mr Meager has been talking about in other contexts. What is the issue here? Is it labour law or is it something rather different? That is my view of it.

Chairman: It might be a combination of all those factors, might it not, but perhaps the standards one would be the most important one? How you get round that, I am not quite sure because it is a question these days of who now pays for the standards. The public sector's involvement in this is now relatively small.

Baroness Morgan of Huyton: The public purse's involvement is huge.

Chairman: The public purse's involvement is huge, but are they getting value for the money they are investing? We are going off our subject now. We have had a very interesting morning. Baroness Morgan of Huyton was going to ask about the advantages or disadvantages in EU legislation that ensured uniformity of employment rights regardless of Member States. If you feel there is something that you have not contributed that you wanted to contribute on that particular question, we would be very happy to hear from you, but we have had a very wide-ranging discussion. If you do wish to add anything in writing, if you feel we did not cover a subject particularly well, although you have been extremely thorough, a written contribution from you would be extremely welcome. Meanwhile, we all should thank you for a most fascinating morning and, once again, a brilliant introduction to a new subject or what is a relatively new subject, for the Committee working as a whole together. Thank you very much for your presence here and for all the help you have given us. I wish we could spend more time with you, but I am sure you are both very busy.

Supplementary memorandum by Professor J R Shackleton

These comments are intended to amplify some of the points made in my oral evidence.

EMPLOYMENT PROTECTION

1. Employment protection is one of the central issues of this Green Paper. Legislation to limit the freedom of employers to dismiss workers is found throughout the European Union. It varies considerably, however. In the UK and Denmark restrictions on firing workers, though not negligible, are still fairly limited. But in many EU countries, such as France, Italy and Spain, restrictions are extensive. Permission may have to be sought

from labour courts to make people redundant, costly compensation has to be paid, and redundancies are made on the basis of social criteria such as family responsibilities rather than economic factors.

2. Although this type of job protection has an obvious appeal to employees, its wider economic effects can be damaging. It has long been argued that, although employment protection legislation may have the effect of reducing dismissals in cyclical downturns, it will also tend to deter employers from taking on workers in the early stages of recovery. This will in turn tend to lengthen the duration of unemployment for those who lose their jobs, or are entering or returning to the labour market.

3. This theoretical argument has been buttressed recently by evidence that has come forward at both macro- and micro-economic levels to suggest that tight employment protection legislation can be damaging and divisive.

4. The World Bank has devised various indices of employment regulation based on an examination of legal restrictions and financial costs. Cross-country analyses indicate that overall employment tends to be lower where employment protection is greater.¹ Similarly, higher degrees of employment protection are associated with higher unemployment of women and young people, with a greater reliance on temporary and other forms of “atypical” employment, and a larger proportion of activity in the informal or “black” economy.

5. These aggregate analyses can be backed up with microeconomic evidence. For example, matched plant studies show that young people and those without much work experience are less likely to be employed in French plants than in equivalent plants in the UK.² Comparative analysis of manufacturing industries shows that strong employment protection laws reduce growth in sectors such as fashion clothing, footwear and textiles where demand is volatile.³ And examination of individuals’ transition rates from unemployment to employment and from temporary to permanent employment are higher in the UK, with only limited employment protection, than in most EU countries.

6. All this supports the European Commission’s view that greater flexibility in the job market is important in reducing unemployment and the segmentation of the workforce into “insiders” and “outsiders”.

THE DANISH “FLEXICURITY” MODEL

7. However the dominant view in Europe is that an “Anglo-Saxon” solution, where employment regulation is reduced to British/American/Australian levels is unacceptable. Instead the current favourite model amongst EU policy-makers is the “flexicurity” approach. Although elements of this model apply in other countries, notably the Netherlands, most attention has focused on Denmark.

8. The Danish model involves (a) limited job protection, with very few restrictions on hiring and firing (b) high levels of social security payments for those out of work (c) active labour market policy, with stringent conditions about job search and retraining for those receiving benefits.

9. The attraction of this model to continental Europeans is that Denmark’s set-up seems to generate similar low levels of unemployment (around 5 per cent), and high levels of employment of women (70 per cent) and younger people (60 per cent), as the UK—but with less inequality and fewer people in poverty.

10. However there are caveats to be attached to the Danish model. First, it is very expensive. Denmark is a high-tax economy and spends about 4.5 per cent of its Gross Domestic Product on labour market programmes (compared with less than 1 per cent of GDP in the UK).

11. Second, the Danish policy is not a soft option. It is the tough benefit conditions, introduced after 1993 reforms, which make the system work: prior to these reforms unemployment was high in Denmark.

12. There are also doubts about the transferability of the Danish model. In Denmark unions (covering even today about 75 per cent of the workforce) have historically been moderate and pursued social consensus. There has never been a tradition of strong employment protection laws, as they were felt not to be needed in this environment. Clearly in countries like France, Germany and Italy there have been very different traditions and it is difficult to see an easy transition to Danish-style policies.

13. More controversially, it has been suggested that the “flexicurity” model is only sustainable in countries with a high degree of public-spiritedness. Survey data suggest that the Danes are very much opposed to welfare cheating, while people in countries such as France and Greece are a great deal more permissive⁴.

THE DANGERS OF THE GREEN PAPER

14. The Green Paper is important in identifying issues about the role of labour law in affecting economic performance. However it does present some dangers.

15. For one, it is not clear that action at the European level, and a common approach, are what is needed. The problems of high unemployment, low growth and labour market segmentation found in countries such as France and Italy need changes to their own *national* systems. Some countries with similar problems (for example Spain and Germany) have already taken steps to reform their employment protection laws. But why should we make changes in British law to reach a common system? The process of doing so is likely to be time-consuming and expensive.

16. Moreover a common approach to labour law across the EU runs the risk, as a result of the inevitable horse-trading which accompanies all European harmonisation processes, of successful economies such as the UK having to import some of the problems of our European neighbours. There is considerable suspicion that the UK's generally liberal economic policies are a form of "unfair competition". For example there is considerable opposition to UK (and US)-style takeovers of firms, which can lead to redundancies, and it is plausible to imagine some countries insisting on Britain restricting the grounds on which such redundancies can be made as a *quid pro quo* for their relaxing other aspects of employment protection.

17. Another issue is that the Green Paper continues to see the "social partners" as a key element in reform, when arguably they constitute a large part of the problem. In many parts of the EU, organised labour and employers' associations act as a highly conservative force. The unions restrict competition in labour markets, while industry and other producer associations discourage product market liberalisation, particularly in services.

18. Unions are losing membership throughout the EU, and under-represent those "outsiders" (for example younger workers, women returners, immigrants) who are losing out in the labour market. Union strength is disproportionately in the public sector, where they resist change and act as a powerful lobby group for expanded state spending. Similarly industrial and other employers' associations represent the interests of large rather than small businesses, and those in traditional industries rather than new ones.

19. In the UK, the unions do not have the sort of veto powers which they often exercise in France, for example (despite the French unionisation rate now having fallen below 10 per cent, less than that of the USA). If the adoption of harmonised European labour laws involved extending union power in the UK, this would not be something to be undertaken lightly.

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THURSDAY 29 MARCH 2007

Present	Dundee, E Gale, B Greengross, B Howarth of Breckland, B	Neuberger, B Thomas of Walliswood, B (Chairman) Wade of Chorlton, L
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Memorandum by the CBI

1. The CBI is pleased to submit its response to the European Commission's Green Paper on "Modernising labour law to meet the challenges of the 21st century". The CBI welcomes the Green Paper's recognition that EU labour markets need to become more flexible in order to raise employment and provide economic growth. In a fiercely competitive global market, business must adapt quickly to market changes and find staff with the necessary skills to compete.

2. However, employers are concerned at some of the Green Paper's analysis and assumptions. In particular, the Green Paper paints an overly negative view of "atypical" employment contracts, such as temporary agency work. It argues that individuals on these types of "precarious" employment contracts and working patterns represent labour market "outsiders", as compared to "insiders" on permanent full-time contracts. The CBI believes this analysis is flawed and does not recognise that many individuals value the flexibility that these forms of working provide. Employers therefore do not accept that further employment legislation is appropriate or necessary.

3. In considering the Green Paper, CBI members;

- welcome the Green Paper's recognition that a flexible labour market is necessary for continued economic competitiveness is welcome—but ensuring employment security and improved labour market transitions is best served through improving access to training for employers and individuals
- it is clear that the "flexicurity" approach can mean all things to all people—the CBI urges caution if the Commission is minded to develop common principles for Member States to adopt.

4. The CBI has a number of concerns about the Commission's approach, in particular;

- the pejorative language used to discuss "atypical" forms of work raises serious concerns
- the introduction of a "floor of employment rights" for all individuals is unnecessary as this already exists
- the employment status of agency workers does not require further clarification and subsidiary liability is impractical
- Working Time law needs reform to end confusion and over-regulation
- undeclared work must be combated—but EU level intervention, other than assisting Member State co-ordination, is unlikely to be effective.

The Green Paper's recognition that a flexible labour market is necessary for continued economic competitiveness is welcome

5. The CBI welcomes the Commission's assessment that the flexibility of EU labour markets should be increased and that flexible forms of work benefit both employers and individuals. The CBI welcomes EU actions to promote labour market flexibility across Europe and the debate on the modernisation of labour law. Labour market flexibility has played a key role in making the UK an attractive place to do business and it is essential that it is not undermined through excessive employment legislation.

6. The UK has introduced balanced measures to meet both employers' and employees' flexibility needs. For example, parents of young children have a right to request flexible working arrangements with employers being able to refuse a request where there is a recognised business reason for doing so. The CBI/Per Temps Employment Trends Survey 2006 found that in 90 per cent of cases, requests have been accepted by the employer or a compromise reached, with little differences in acceptance rates between large and small firms. This indicates the success of the approach which creates benefits for employees without creating undue burdens on companies. The right is being extended to carers of adults from April 2007.

—but ensuring employment security and improved labour market transitions is best served though improving access to training for employers and individuals

7. Labour law reforms must focus on facilitating the creation of new jobs rather than trying to preserve existing ones—together with the promotion of effective lifelong learning policies. The Commission is concerned with ensuring that labour and social security laws are appropriate in assisting workers in making transitions from one status to another—whether due to redundancy and dismissal or voluntarily through full-time education and training, caring responsibilities, career breaks or parental leave.

8. Whilst there is a need for more flexible employment protection legislation across Europe, the role of the Commission is to encourage Member States to introduce the necessary changes and organise exchanges of experiences so that different countries can learn from each other and adopt the mix of approaches most suited to them. There is a need for greater focus on education and training measures (not an area of EU competence) to assist individuals with their career development and transitions from unemployment or different forms of work—rather than relying on further employment regulation and social security provision to protect individuals. Reforms should therefore focus on supporting employers and individuals in adapting to market changes.

9. Ensuring employers and individuals have access to appropriate training is essential in maintaining levels of employability and upskilling the workforce to ensure business remains competitive and individuals have the skills required to find employment and adapt to a rapidly changing economy.

10. Improvements to training systems are the responsibility of individual Member States and employers are clear that the UK system must continue to improve, putting employers' and individuals' needs at its heart. The CBI has welcomed initiatives such as “Train to Gain” which are helping to develop a more demand-led approach to training and continues to lobby strongly for young people to enter the labour market with employability skills to ensure that they are successful in the workplace.

11. Legislation is not the right instrument to influence training and learning behaviour. At European level, agreements between the social partners have played a useful role in promoting a life-long learning culture. For example, the CBI was involved—through BUSINESS EUROPE (formerly UNICE)—in developing the framework of actions on the life-long development of competences and qualifications. Subsequent implementation reports have shown that agreeing on a common approach to life-long learning contributes to changing attitudes. It is clear from examples across the EU that the key is to create the conditions that will induce companies and individuals to invest financial resources, time and efforts to upskill.

12. The competence to modernise labour law lies first and foremost with the Member States. Most of the measures to enable employment security and improved labour market transitions will therefore need to be taken by national players. The role of the EU should be to organise exchanges of experiences between Member States and monitor national reforms using the instruments of the European growth and jobs strategy. Taking a top-down legislative approach at the EU level is likely to be counter-productive for national reforms.

It is clear that the “flexicurity” approach can mean all things to all people—the CBI urges caution if the Commission is minded to develop common principles for Member States to adopt

13. The Green Paper's promotion of the concept of “flexicurity”—characterised as “balancing flexibility and security”—in the operation of labour markets is a welcome addition to the debate on this issue. CBI members understand there to be four general principles underpinning flexicurity:

- relatively unrestricted access to hire and dismiss, and to fix wages
- an economic safety net in the event of unemployment
- an active labour market policy which assists the unemployed who are unable to find a new job immediately
- a focus on lifelong learning to ensure individuals remain employable.

14. Although these principles appear to be a sensible basis for labour market policy, they are open to interpretation in practice. Individual Member States have different views and approaches to flexibility in their labour market—depending on their individual circumstances. It is therefore crucial that any common flexicurity principles that are developed remain capable of adaptation to Member States' individual needs. It would be inappropriate to impose a rigid template on Member States—particularly those such as the UK which have achieved consistent success through a flexible labour market, producing high employment rates (71.7 per cent—one of only four Member States to beat the Lisbon target of 70 per cent) and strong growth.

15. The CBI therefore believes it is vital that the “subsidiarity” principle is respected on these matters—the UK is not seeking to impose its model on other countries, just as another model being imposed on it would be unacceptable. The CBI believes that flexicurity should not be forced upon Member States through binding common principles—rather these principles should be non-binding and suitably non-specific. The UK should not have to adapt its successful labour market policies to fit in with an overly rigid flexicurity agenda from the Commission.

The pejorative language used to discuss “atypical” forms of work raises serious concerns

16. The Green Paper provides an overly negative view of atypical forms of work—such as fixed term employment, part-time work, temporary agency work and self-employment. It argues there is a risk that this part of the workforce becomes trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position—although such jobs may in fact serve as a stepping-stone in enabling individuals to enter the workforce.

17. The Green Paper appears to classify only those employed on permanent, full-time contracts as labour market “insiders”, with those on other, more flexible employment contracts viewed as “outsiders” in need of further protection. This is a flawed use of the insider-outsider concept. “Outsiders” should instead be the unemployed.

18. Evidence from CBI members and from other sources shows that atypical work can have significant advantages for workers. Reports on the motivations behind agency work, for example, have revealed that temporary work can often suit individual lifestyle choices. Casual and freelance workers also benefit from not having to commit themselves to one employer and being able to work for a number of companies in the same industry. Employers in the journalism industry, for example, have commented that freelance journalists value being able to work on a number of different assignments for different organisations, thus expanding their portfolio.

19. The UK Government has recognised that flexible working arrangements do not automatically equate to more vulnerable workers. As the Government’s 2006 “Success at Work” policy document states, fewer than one in 10 people who work part-time do so because they cannot find full-time employment.

20. Temporary agency workers provide a valuable source of labour to the UK economy, used by firms to meet fluctuating demands in workload or to cover staff absences. Temporary agency work is a key aspect of the UK’s flexible labour market and benefits both employers and workers. Agency work can act as a stepping stone from unemployment to employment, and from agency work to permanent employment. Equally, other workers prefer to work as agency temps as such working arrangements offer individuals a wide variety of work and working patterns to suit their individual lifestyles and aspirations. Agency work therefore enables more people to work—including parents of young children, older workers and students. Data from the Recruitment and Employment Confederation (REC)¹ suggests that up to half of agency workers are not seeking a permanent job. REC research (2005) shows that over half (52 per cent) of agency workers choose temporary work for positive reasons such as increased flexibility, better pay or to gain valuable work experience and 20 per cent use temporary work as a route into a permanent job.

The employment status of agency workers does not require further clarification and subsidiary liability is impractical

21. Triangular employment relationships—in particular those involving temporary agency workers—are also addressed in the Green Paper, with reference to the currently stalled Temporary Agency Workers Directive. The Green Paper argues that further clarification is required about accountability for compliance with employment rights.

22. UK employers are clear that the agency worker’s primary relationship is with the agency. User companies do not get involved in the details of an agency worker’s terms and conditions and it would not be acceptable for employment responsibilities to be passed to the user company. User companies are not prepared to take responsibility for upholding the working rights of temporary workers, apart from with respect to rights in the workplace, eg those related to non-discrimination and health and safety, and will only contract with a temporary agency on the basis that the agency guarantees the rights of its temporary agency workers.

23. Providing agency workers with an employment relationship with the user company would remove the benefits contracts for services and would completely change the UK model of agency work. Administration and costs for the user company would increase, removing the incentive for companies to contract with temporary agencies for work. This would result in significantly fewer agency workers engaged. The UK would

¹ REC (2005) *Satisfaction levels amongst temporary agency workers*.

see the removal of vital employment opportunities and the restriction of important labour market flexibility. The UK Government concluded in its 2006 “Success at Work” policy statement that no further clarification was needed on the employment status of agency workers, and the CBI supports this position.

24. The Commission is also concerned with the protection of workers under sub-contracting arrangements. Sub-contracting, which is essentially a commercial relationship with contractual obligations but no subordination between the client and the service provider, must not be confused with temporary agency work.

25. Subsidiary liability—where any claim can only be brought against the main contractor in the event of non-compliance by sub-contractors—is proposed as a means to deal with establishing responsibility in the case of sub-contracting. However, this solution is unlikely to be effective. All sub-contractors must ensure that they follow relevant labour law when dealing with their employees—contractors and user employers must therefore be able to expect that sub-contractors are fulfilling their responsibilities and cannot be held accountable for circumstances in which sub-contractors have not fulfilled their responsibilities. Companies using sub-contractors should be able to rely on the fact that those sub-contractors have to fulfil their labour law responsibilities—ensuring their sub-contractors comply with the law is not their responsibility.

26. The subsidiary liability principle could also place a considerable burden on the main contractor. SMEs in particular do not have the administrative resources to make a thorough examination of their subcontractors, let alone situations where there is a chain of subcontractors. The main contractor is not in a position to control compliance in practice.

The introduction of a “floor of employment rights” for all individuals is unnecessary as this already exists

27. The Green Paper suggests that the emergence of diverse forms of non-standard work has made the boundaries between employment law and commercial law less clear, with the traditional distinction between “employees” and the independent “self-employed” no longer an adequate depiction of the economic and social reality of work in Europe.

28. The Commission argues that there could be a need for greater clarity in Member States’ legal definitions of employment and self-employment and all those individuals not on a standard employment contract could benefit from a “floor of rights”. The Green Paper also suggests a new concept of “economically dependent work”, which would cover situations falling between the two established concepts of employment and independent self-employment. In such situations, workers are formally self-employed but are economically dependent on a single client or employer for their source of income and could therefore be considered “vulnerable”.

29. In the UK, employment tribunals, HMRC, the Benefits Agency and courts use a wide range of tests to determine the employment status of an individual. There is a wide range of case law on this issue and it appropriate for Member States to clarify legal definitions rather than having EU intervention in this area.

30. The Green Paper recognises the UK’s employee-worker distinction as an example of a “targeted approach” in dealing with employment status issues. Workers receive core employment rights but not the full range of labour law entitlements associated with standard employment contracts. All workers are therefore covered by the majority of employment legislation, including the National Minimum Wage, working time legislation, health and safety and social security provisions (such as maternity and sick pay). Part-time workers have the same rights as full-time workers on, for example, pay, access to pensions and bonuses, and fixed-term workers must also be treated in the same way as comparable permanent employees.

31. Whilst there are some reports of abuse and a lack of knowledge about existing rights for some workers, there is no basis for changing the framework of rights in the UK—a position which has been accepted by the Government. The UK system conferring core employment rights on “workers” is working well. Workers provide a valuable resource to the economy because they are flexible and can be deployed easily to where work is available. This is possible because such individuals are employed on contracts for services, as opposed to contracts of employment. Under contracts for services, there is no mutuality of obligation—rather the work provider is under an obligation only to consider the individual for any work that becomes available.

32. Whilst it is welcome that the Green Paper is not explicitly calling for an extension of all employment rights to all individuals regardless of their employment contract, what the Commission means by a “floor of rights” is unclear. UK employers would be concerned if the Commission wished to introduce legislation that is not compatible with the UK approach. Furthermore, the Green Paper suggests that harmonising definitions of “workers” across Member States could assist in ensuring that so-called “frontier workers” are able to exercise their employment rights regardless of the Member State in which they work.

33. The UK approach to providing employment rights to workers has been successful and there are positive aspects to atypical work for individuals. However, the terms and conditions of employment of workers are best defined by Member States and existing EU law—including protection of workers against forms of discrimination—already amply covers what could be legislated for at EU level.

34. The role of the Commission is to facilitate the sharing of experiences of national initiatives to deal with these issues so that Member States can learn from one another, rather than a European level generalisation of new legal categories of “economically-dependent workers” and harmonising (whether explicitly or implicitly) national definitions of employees and the self-employed.

Working Time law needs reform to end confusion and over-regulation

35. The Commission briefly raises working time as an issue in the Green Paper and asks what aspects of the legislation should be tackled as a priority. The CBI believes that, in the UK, overcautious interpretation combined with a fear of infraction proceedings by the European Commission has led to the excessive regulation that characterises the UK implementation of the Directive.

Undeclared work must be combated—but EU level intervention, other than assisting Member State co-ordination is unlikely to be effective

36. The issue of enforcement of employment rights, particularly around undeclared work, is also raised in the Green Paper. The Commission believes that undeclared work—often associated with cross-border labour movements—is responsible for both the exploitation of workers and for distortions in competition. It is important to note that undeclared work appears to primarily be a problem for certain countries—primarily the new Member States—with others, including the UK, having comparatively few concerns.

37. The EU Social Partners have identified undeclared work as an issue to be addressed as part of ensuring a balance between flexibility and security in reforming labour law in the work programme for 2006–08. The Commission suggests that there should be more effective co-operation between different government enforcement agencies.

38. However, effective enforcement of existing European labour law as transposed into national legislation and combating undeclared work lies first and foremost in the hands of national authorities. The EU can play a useful role by organising exchanges of experiences between national labour inspectorates as is already done. Furthermore, technical assistance and co-operation between Member States to help new Member States efforts to enforce the EU legislation can also be useful.

March 2007

Annex

CBI submission to the Davidson Review of implementation of EU Legislation in the UK

INTRODUCTION

1. The CBI welcomes the opportunity to submit evidence to and comment on the work of the Davidson Review team and also to re-emphasise some of the general points that we think are important to the delivery of better regulation. We look forward to working closely with the team as the Review progresses.

2. The Confederation of British Industry (CBI) is the national body representing the UK business community. It is an independent, non-party political organisation funded entirely by its members in industry and commerce and speaks for some 240,000 businesses that together employ around a third of the UK private sector workforce. The CBI’s membership includes 80 of the FTSE 100, some 200,000 small and medium-sized firms, more than 20,000 manufacturers and over 150 sectoral associations.

3. The CBI supports the Government’s commitment to ensuring that EU legislation is not implemented in the UK in a way that imposes unnecessary burdens on business; a commitment illustrated, for example, in the Cabinet Office’s transposition guide on how to implement EU Directives effectively, and of course, by the commissioning of the Davidson Review.

4. The CBI supports the aim of the Davidson Review to bolster the productivity of the UK economy. We believe that timely and coherent implementation of EU legislation, and effective enforcement by relevant authorities in EU Member States, is key to creating a level playing field in the internal market and ensuring consistency and stability in the regulatory environment.

5. There is no doubt a need to review existing legislation and how it has been implemented in the UK and to correct any irregularities that exist under the current regulatory regime. The remit of the Davidson Review is limited to identifying instances where EU-derived legislation has been over-implemented and making suggestions for which individual pieces of regulation could be simplified, but the CBI agrees with the Review team that work to address over-implementation of EU legislation in the UK must address all issues surrounding the implementation process.

6. In the end it is the appropriateness of legislation and regulation, allied to the way in which it is implemented and enforced, that will determine the success of a regulatory regime. Therefore, “better regulation” must mean ensuring that any new legislation and regulation that is created, at EU or UK level, adheres to the Better Regulation Commission’s (BRC) principles for good regulation: proportionality, accountability, consistency, transparency and targeting. So, as well as simplification of existing regulation, the CBI would emphasise the need to put effort and resources into improving the process by which EU legislation is made and then implemented in Member States.

7. It is malfunctions in this process that ultimately cause problems for those on the receiving end of regulation. Any examples of over-implementation of EU legislation in the UK provided in this submission are symptoms of a process that is complex and causes concerns for many companies, in many sectors, regarding the nature and standard of legislation emanating from the tripartite EU legislative structure.

8. Ultimately, what business wants is a targeted and effective regulatory and enforcement regime that is effective, efficient and joined-up and works to high standards of consistent delivery. This allows companies to plan effectively and with certainty, and gives them confidence to expand across the European internal market.

PROCESS-RELATED CONCERNS

9. There are certain aspects in the process of creating, transposing and implementing EU legislation that CBI members have identified as being of particular concern for business. The main issue is appropriate “timing” at the different stages in the process, but linked to this are also consistent and clear implementation and good consultation with stakeholders. These things are essential for creating the desired level playing field in the internal market and consistency and stability in the regulatory environment.

10. While we recognise that this is outside the direct scope of the Davidson Review, the examples cited in this submission reinforce the importance of our broader messages on the legislative “process”. These messages are also recurrent themes in discussions that the CBI has with its members on better regulation. Therefore, and considering the importance, of addressing all issues surrounding over-enforcement EU legislation in the UK, we find it relevant to include a discussion on “process”.

11. Examples highlighting the points made in paragraphs 12 to 43 are outlined in Annex 1.

1. *Timing*

12. The CBI agrees with the EU Commission in its statement regarding the importance for Member States to engage in the better regulation agenda at EU level in order to “guarantee that legislation is designed and implemented efficiently, under a common strategic approach”². We believe that the quality of EU legislation and subsequent implementing regulation can be improved by early and timely engagement by UK officials and stakeholders in the EU legislative process.

13. There is a view within the CBI membership that UK government departments and officials do not monitor and get involved in the negotiation, transposition and implementation of European law as early and as systematically as they should. There must be consideration of how a European proposal will be implemented in the UK throughout the regulatory process, from formulation, to negotiation, to implementation. It is too late to begin thinking about the practicalities of implementation once a directive has been agreed.

14. So, it is encouraging that there seems to be recognition within the Government that many potential problems related to the implementation of EU legislation could be avoided if UK representatives were involved in negotiations at the very earliest stage, preferably before a proposal is formally published by the Commission.

15. The CBI notes that the Cabinet Office’s guide on transposition clearly states that policy makers and government lawyers should “consider at the earliest possible stage how a proposal will be implemented in the UK” and that they should “think about how best to shape a proposal, both before and after formal publication by the Commission”.³ It encourages officials to engage more proactively with policy development at EU level.

² EU Commission (2005) Communication “Better regulation for Growth and Jobs in the European Union”—COM(2005) 97 final.

³ Cabinet Office (2005) Transposition Guide: how to implement European directives effectively.

16. We also agree with the Government's policy that Regulatory Impact Assessments (RIA) should be drawn up at the earliest possible stage and include a cost benefit analysis. The RIA should then be used throughout the process and inform the UK's policy and negotiating line. This also encourages early engagement with business and consideration of the expertise available within the business community in a range of policy areas. CBI members report that this stage is too often over-looked in the process of arriving at an agreed EU directive. However, it is felt that early consultation with business could help alleviate difficulties experienced at implementation stage.

17. One area where this early involvement in the policy-making process seems to be happening is financial services. There is engagement by both government officials and business representatives at the earliest stage at EU level to influence policy-making. CBI members report that the Financial Services Authority, for example, has a policy team that ensures this early involvement from the very start of the policy and decision-making process in Brussels to influence what any given directive will look like, with consideration for what is needed for smooth implementation in the UK as the starting point. Financial services legislation is also an example of where the UK has a good track record of implementing legislation on time.

18. Ultimately this is about good project management; a key concept in business that should be used more extensively and effectively throughout government. A fundamental component of project management is planning. It seems that lack of proper planning has in some cases caused problems at implementation stage, for example, where departments have been late with issuing consultations and guidance.

19. The 2003 report by Robin Bellis on implementation of EU legislation suggests that a UK project team should be set up as soon as the Commission publishes a proposal, in the same way as Bill teams are formed at national level. The team would then be responsible for assessing the impact of the proposal on the UK legal system and stakeholders and agreeing a project plan and timetable, which allows sufficient time for the drafting of implementing legislation with appropriate consultation. The CBI would strongly support adoption of such an approach to dealing with proposed EU legislation.

20. In addition, if a good project plan, with a clear timetable for action, is drawn up from the start, the project team and stakeholders have a document to refer back to throughout the process from proposal to implementation. A good initial project plan could also provide an "audit trail" and help, in tracking changes to directives as they pass through the legislative process, as well as provide information generally of developments at each stage of the process. This is important as there are often substantial changes made to a draft directive before a final text is agreed. In addition it would be a way of ensuring that the collective memory of the project team is not lost if staff has to change during the process but can be used to inform the process right through to implementation stage.

21. A clear project plan and timetable would also ensure that the Government's policy stance is well recorded so that regulators and enforcers know what policy objectives are to be achieved by a certain piece of legislation in order that they do not have to reinterpret policy. Missed deadlines and misinterpretation have been a major cause of infraction proceedings. This is another area where better project planning and a strategic approach could assist the process.

22. The CBI recognises that officials transposing directives face a real challenge when deciding whether to elaborate the text or to "copy-out". Elaboration is seen as a way of providing greater clarity and certainty and is often valuable to business. Additionally, the Bellis report notes that copy-out can sometimes be recommended as it ensures that officials do not inadvertently change the intent of the directive. High quality guidance can instead remove much of the ambiguity of the directive in practice. While recognising the value of guidance the CBI would stress the need to ensure that its content and tone do not widen policy aims.

23. The CBI is of the opinion that the appropriate approach to transposition must be determined on a case-by-case basis. Since there are often different implementation options, we would recommend that discussions on how to implement be held at an early stage in the policy-making process to facilitate decision-making at implementation stage.

24. As argued above, it is imperative that officials engage at an early stage in the policy-making process to avoid the creation of EU legislation full of ambiguities that then produce uncertainties or gaps in national regulations, leading to uncertainty for those who have to comply.

1.1 *Timing and Guidance*

25. Another area where timing is crucial is in providing guidance to regulated businesses. Guidance has to be timely to allow business to plan ahead and be prepared for their new compliance obligations. Late publication of guidance is not in the “better regulation” spirit of full and open consultation and good communication with stakeholders. Officers on the ground must be able to provide timely, appropriate and consistent advice to business.

26. The Cabinet Office and the Small Business Service advise officials to have guidance available for stakeholders 12 weeks before the regulations come into force. However, there are many instances where this has not been the case.

2. *Consistent Implementation and Enforcement*

27. The CBI has pointed out in the past that regulatory overlap is a great concern among the business community. Overlap of areas of responsibility, inconsistencies regarding interpretation of regulations at different levels within or between regulators or conflicts between individual pieces of regulation, cause uncertainty for companies trying to ensure that they are fully compliant with regulations governing different areas of their business operations.

28. Business wants clarity and consistency from government and central government must therefore eliminate ambiguity about the Meaning of laws and provide guidance on how laws should be interpreted and implemented through regulation and by regulators. The Government should identify precisely who among government and regulators is likely to be affected by new regulatory proposals and make sure that they are all informed about any new developments. In addition where it is unavoidable to have two or more regulators responsible for a particular regulatory area, the Government must also clearly set out which regulator has the lead responsibility. Businesses need to know which regulator’s decision to follow or have a single interpretation of how to deal with conflicting rules, agreed by the different regulators.

29. Failure by the Government to provide information on interpretation and implementation, results in EU-derived legislation being implemented and enforced by local enforcement staff who may have had no involvement in the policy-making process and who, due to lack of guidance from central government, have to interpret regulation. This leads to regulatory creep and inconsistencies, as each enforcement unit applies its own interpretation.

30. It is also essential for officials working on a specific directive to provide information to any departments that may be affected by the directive. For example, officials in charge of the planning system need to be aware of waste regulation, for example in relation to the number and range of waste facilities likely to be needed as a result of the Landfill Directive. There is also a need to inform the public of the costs of environmental regulations, as some of business’ compliance costs may have to be passed on to customers.

2.1 *Flexibility*

31. As previously discussed, because of its nature, EU legislation can sometimes be ambiguous, which means there is room for different interpretations of how it should be implemented.

32. Therefore it becomes even more important that there must be a flexible and understanding approach from regulators towards business. For example, firms and regulators need to be able to decide jointly what the optimum way of handling risk is. Regulators should have the flexibility to be able to accept different ways of dealing with a situation rather than having to enforce inflexible rules pedantically. It is the way that laws are interpreted and applied in practice that makes a big difference to business.

33. It is a general problem, however, that at present if there is disagreement between a regulator and a company on interpretation, the main way to settle the dispute is by going to court. This means that in most cases, firms will back down both because it is generally much more expensive to go to court than to comply with the regulator’s interpretation and because there are reputational issues at stake for the firm. Regulators should be encouraged to work with business to avoid this type of situation and to build more constructive relationships with business to allow for problem solving and early resolution of disputes.

2.2 *A level playing field*

34. The CBI believes that it is important that officials who transpose directives at national level are encouraged to monitor how directives are transposed in other EU Member States. In this way UK officials would learn both about good and bad practice in other countries. This type of exercise could also lead to great consistency of transposition and implementation of EU directives across Europe.

35. Inconsistencies in this area cause difficulties for business operating in more than one EU Member State since they may have to deal with several versions of one directive at any one time. This also counter-acts the creation of a level playing field in the internal market. CBI members have reported that UK officials are often reluctant to engage in learning about what happens in other Member States and there is a feeling that, at the moment, it is largely up to business and other stakeholders to provide evidence of good or bad practice in other European countries.

36. Especially in the area of environmental regulation there seem to be big disparities in terms of how regulations are interpreted in different countries. For business this creates significant problems and means that there is not a level playing field in the internal market.

37. Extending the Lamfalussy process to industries other than financial services might be a step towards more streamlined European legislation and of ensuring greater consistency in implementation of EU directives at national level.

38. The CBI thinks that it would be useful to have a comparison of the implementation of EU legislation in the UK and how it is done in other Member States to enable an analysis of the differences and the reasons for them.

3. *Consultation*

39. New legislation may have significant consequences for business. Therefore, the CBI thinks that there should be consultation with stakeholders at the start of any legislative proposal. There is wide-ranging expertise in companies about how to deal with regulated areas of business and we believe that the end-result would improve if, when new legislation, regulation and compliance guidance are devised, full consultation is undertaken with business.

40. The consultation should include the possibility, of alternatives to traditional regulation, such as information campaigns, the open method of co-ordination, co-regulation, social partner agreements and sectoral agreements.

41. To avoid stakeholder fatigue and cynicism, it is imperative that consultation is well-organised and relevant. This may mean going further than having an on-line consultation document. Arranging stakeholder events is one way of teasing out and addressing the real concerns surrounding a policy proposal. For example, the proactive good practice demonstrated by the Health and Safety Executive (HSE) in its work with stakeholders on the RIDDOR Review in 2005 could be transferred to other agencies and government departments seeking to review or implement legislation. For the HSE, the consultation on RIDDOR did result in a delay to the expected time-scale for change, and the possibility of delays must be recognised by regulators and taken into account when planning the consultation process and time-scales.

42. Consultation should also take place with key players on the issue of information about implementation and enforcement. All players who have a role in implementing changes should be involved as their involvement is needed in ensuring preparedness, timely implementation, and subsequent compliance.

43. The CBI is pleased that Cabinet Office guidance encourages formal consultation as key to seeking stakeholders' input and states that consultation should take place at the first reading of a Commission proposal and during the negotiation phase, and once the proposal has been adopted a consultation should take place on the transposing regulations. The Cabinet Office's transposition guide states the importance of ensuring appropriate co-ordination and consultation within government, including devolved administrations, agencies and local authorities.

THE IMPORTANCE OF CULTURE CHANGE

44. The CBI is encouraged that there is recognition by the Government that EU legislation has not in all cases been brought into effect in the UK in the least burdensome way possible and that business and other stakeholders are concerned about process failures and over-implementation.

45. We recognise and welcome that the Government has put systems in place to deal with many of the issues and problems discussed above and to ensure that EU legislation is not over-implemented in the UK. The most important thing will be to make sure that the guidance is followed and that the “culture-change” that it encourages takes place. Business will judge the Government’s performance on delivery.

May 2006

Annex 1

Examples Illustrating Points Made in Paragraphs 12–43

THE INTEGRATED POLLUTION PREVENTION AND CONTROL (IPPC) DIRECTIVE

1. The implementation of the Integrated Pollution Prevention and Control (IPPC) Directive by the Department for Environment, Food and Rural Affairs (Defra) through the Pollution Prevention and Control (PPC) regulations is a good example of inconsistent implementation and enforcement of EU legislation in the UK. In 2000, Defra decided to leave out the research development and testing exemptions contained within the IPPC Directive because the department considered that there were risks that the exemption might be abused. In 2004, Defra decided to include the exemption in the PPC regulations after all, but only with the condition that operators had to notify their “claim” for exemption to the regulator. Some of these claims are still in dispute. This approach by Defra to implementing the IPPC Directive has inflicted large costs on businesses trying to gain clarity in terms of what is or is not included in the PPC regulations. CBI members have also reported that there are instances of inconsistent enforcement between regions in the UK. The IPPC Directive is also an example of different approaches to implementation in different Member States and where CBI members feel, for example, that implementation is done in a better way in both Germany and Sweden compared with the UK. *For further information on the IPPC Directive, please contact Alice Hume—alice.hume@cbi.org.uk*

THE WASTE ELECTRICAL AND ELECTRONIC EQUIPMENT (WEEE) DIRECTIVE

1. An example of where the issues discussed in terms of timing, importance of involving stakeholders and ensuring consistency across the EU have not been part of the process is the implementation of the Waste Electrical and Electronic Equipment (WEEE) Directive.

2. The CBI has had reports that the transposition of the WEEE Directive has already led to extensive administrative burdens on firms trying to keep track of the Department of Trade and Industry’s actions related to implementation of this Directive. CBI members affected by the WEEE Directive agree that the process of transposing and implementing the Directive in the UK has been badly managed.

3. The main problems from a business point of view have been the lack of transparency and poor project management during the process of bringing WEEE into UK law. This has led to a situation where regulations are still not in place for a directive that should have been implemented in 2004. This delay has meant that some firms that invested in new plants because they knew that the UK has to implement the Directive in 2004, are now not really sure what is happening or if they will have to make further investments. Private investment in new infrastructure to provide treatment and processing capacity to meet the requirements of the Directive will be predicated on the certainty provided by the implementing regulation.

4. The CBI recommendations to government in terms of implementation of the WEEE Directive included the need to ensure that timely regulation and guidance are provided. Without this business will not have the clarity on which to base investment decisions. Previous experience, for example, with the End of Life Vehicle, the Landfill Directive or with regulation dealing with the removal of ozone depleting substances from fridges where business was given no certainty on investments needed in new fridge processing infrastructure, illustrate the poor record the UK government has on implementing EU Environmental directives.

5. In our different submissions on the WEEE Directive to government, the CBI has recommended the need to ensure harmonised implementation across all Member States with minimum scope for variation to avoid the creation of distortions within the EU. Harmonisation across Europe would ensure that companies operating within the UK are not at a competitive disadvantage to similar companies on mainland Europe or have to comply with 25 different interpretations and implementations. Business is also keen to see harmonised transposition across England, Wales, Scotland and Northern Ireland, taking into account the local infrastructure.

6. The CBI fully supports the Government's emphasis on cost efficiency, flexibility and competition in its proposals for the implementation of the WEEE Directive. These must remain the focus when agreeing the details on the issues still outstanding. *For further information on WEEE (please contact Richard Foreman—richard.foreman@cbi.org.uk*

THE REGISTRATION, EVALUATION AND AUTHORISATION OF CHEMICALS (REACH) REGULATORY FRAMEWORK

1. CBI members are concerned that a situation of regulatory overlap may arise in the process of determining which agency will be the Competent Authority (CA) for REACH. Although REACH is a regulation not a Directive, there is still a question of how the UK deals with its implementation. So far, there are two bids for CA. One by the Environment Agency (EA) accompanied by the Health and Safety Executive (HSE) and one by the Pesticides Safety Directorate (PSD). The former bid is not supported by Scotland, as the EA has no jurisdiction there, but the Scottish Environment Protection Agency does not have adequate resources to make a bid. The latter bid would be supported by Scotland but would still co-opt resources from the EA and the HSE as the PSD does not have the adequate resources, or indeed the experience, to manage REACH either. This example highlights one type of problem that occurs in the UK implementation process of EU legislation. *For further information on REACH, please contact Alice Hume—alice.hume@cbi.org.uk*

THE CONSUMER CREDIT ACT

1. Another example of where timing will play an important role is the Consumer Credit Act. The Act is, of course, completely separate from the EU Consumer Credit Directive but this Directive is being reviewed, which means that further legislation will have to be introduced in the not too distant future. Business finds it surprising that the Government has introduced this legislation at a time when it is known that there is a Directive in the pipeline in Europe. *For further information on the Consumer Credit Act please contact Linda Jackson—linda.jackson@cbi.org.uk*

Annex 2

Examples of Over-Implementation

1. GOLD-PLATING

Examples for the Review team to consider:

- The **Cross-border Pensions Regime**—the Directive on the Activities and Supervision of Institutions for Occupational Retirement Provision (2003) has been poorly implemented through the Pensions Act 2004, leading to a lack of clarity in the regulations. This has led to many companies mistakenly downgrading their level of pension provision. *For further information please contact Sumantra Prasad—sumantra.prasad@cbi.org.uk*
- The **Landfill Directive**. The targets in this Directive relate to bio-degradable municipal waste. The Government is currently consulting on introducing targets also for industrial and commercial waste. The Directive only requires adequate provision to be made for aftercare of landfills. The Environment Agency has nonetheless proposed introducing a new system of compulsory escrow accounts for landfill operators, which goes far beyond adequate provision. *A separate submission has been made by CBI member Viridor Waste, which outlines the problem in more detail.*
- The **Marketing in Financial Instruments Directive** (MiFID) was intended to apply to banks, investments firms and independent advisers who hold client money. The FSA has chosen to apply it to all regulated firms with a consequent re-write of all conduct of business rules and other changes, which will be very time-consuming and, above all, hugely expensive for the financial services industry. *For further information please contact Clive Edrupt—clive.edrupt@cbi.org.uk*

- When considering the **Solvency 1 Directive**, the FSA chose to require some firms to hold more capital than required by the Directive because the Agency did not believe the requirements in the Directive were strong enough. The FSA also declined to allow the transitional period permitted by the Directive. *For further information please contact Clive Edrupt—clive.edrupt@cbi.org.uk*
- The **Directive on Fixed Term Work** does not require employers to provide equal treatment to employees on a fixed-term contract in respect of pay or pension benefits. However, in the 2002 Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations, the UK Government has nonetheless included such requirements. The final regulations require no less favourable treatment on pay and also require employers to offer access to occupational pension schemes to fixed-term employees on the same basis as permanent employees, unless the difference in treatment is objectively justified. *For further information please contact Mariska van der Linden mariska.vanderlinden@cbi.org.uk*
- The **Directive on the Extension of the Directive on the Framework Agreement on Part-time Work to the United Kingdom of Great Britain and Northern Ireland**. The Directive provides that, Member States can exclude from the scope of national regulations part-time workers who work on a casual basis. The UK did not take advantage of this provision. In addition there is a right under the UK regulations for part-time workers to request a written statement of reasons if they believe that they have been less favourably treated than a full-time worker and there is an obligation for the employer to respond within 21 days. This right, which is not required by the Directive, has been much criticised as being excessive and onerous for the employer. *For further information please contact Mariska van der Linden—mariska.vanderlinden@cbi.org.uk*
- Consumer Protection Enforcement Co-operation Regulation. New powers for on site inspections in respect of cross-border cases under the regulation are to be extended to purely domestic cases. This is unnecessary gold-plating of the requirements of the regulation. The CBI has argued that there is no justification for the power to be extended to infringements of national law. *For further information please contact Linda Jackson—linda.jackson@cbi.org.uk*
- The **Insurance Mediation Directive** is an example of a regulatory regime that companies consider more burdensome in the UK than in other EU Member States. *For further information please contact Duncan Campbell—duncan.campbell@cbi.org.uk—or Rod Armitage—rod.armitage@cbi.org.uk*

2. DOUBLE BANKING

Examples for the Review team to consider:

- The **Unfair Commercial Practices Directive (UCPD)**—an opportunity to avoid double banking. There are concerns that the DTI consultation document on the UCPD refers to the Directive as “gap filling”. The CBI has argued that the Directive must deliver on its deregulatory promise and that it should not impose another layer of legislation on top of the already extensive framework of specific vertical legislation, which applies at national level. Transposition of the UCPD provides an opportunity for a wholesale review of consumer law, which should result in significant simplification, and it is imperative that the outcome of transposing and implementing the UCPD is deregulatory.

The general purposive approach adopted in the Directive should be accepted as the way forward. This move towards principles-based legislation presents the opportunity for fundamental reassessment of the way consumer protection law should operate in the future, particularly where set against the government’s commitments to the Hampton principles and to its simplification agenda. This will present significant challenges to business but the reward could be a modern regulatory framework, which could permit consumer-focused innovation on the part of business while allowing flexibility for enforcers and eliminating the need for new, specific regulation in response to market developments. The onus is on the Government to sweep away all overlapping legislation unless there are very strong reasons to justify its continuation. In its recent consultation paper on transposition, the DTI floats a number of policy proposals, which, if implemented, would exceed the requirements of the Directive and its policy aims. *For further information please contact Linda Jackson—linda.jackson@cbi.org.uk*

- The **Sale of Consumer Goods and Associated Guarantees Directive**. The new Directive regime was superimposed on top of the existing sale of goods legislative framework without rationalisation. *For further information please contact Linda Jackson—linda.jackson@cbi.org.uk*

3. REGULATORY CREEP

Examples for the Review team to consider:

- The **Working Time Directive**. Guidance on technical aspects of the Directive such as exemptions from working time limits for “autonomous workers”, compulsory rest breaks for employees and the way in which workers are paid for their annual leave has been challenged by the European Court of Justice in 2006, causing changes to guidance and confusion for employers. *For further information contact Thomas Moran—thomas.moran@cbi.org.uk*
- The **Distance Selling Directive**. The implementing regulations and Office of Fair Trading guidance embellish the requirements of the Directive in certain key respects. *For further information please contact Linda Jackson—linda.jackson@cbi.org.uk*

Examination of Witnesses

Witnesses: Ms SUSAN ANDERSON, Director of Human Resources Policy and Mr TOM MORAN, Senior Policy Adviser—Employment, Employee Relations and Diversity, CBI, examined.

Q35 Chairman: Thank you very much for coming. Obviously employment issues are of great interest to this Committee. We did publish a report on the Working Time Directive and we are coming back again to this area of policy. We are very lucky to have Professor John Philpott (whom no doubt you know) as our Specialist Adviser for the inquiry. This session is open to the public and it will be recorded for broadcasting or webcasting. We will take a verbatim transcript as well and that will be put on printed record in the report and on the parliamentary website. You will be sent a copy of the transcript to check it for accuracy; please advise us of corrections as soon as you can. If you want to submit supplementary evidence after the session if we have not covered something or you want to amplify a point that has been made, then of course that is your opportunity to do so. The acoustics in this room are good, but still it helps everybody if you speak clearly, as I am sure you do. Could you start by stating your names and official titles for the record and if you want to make an opening statement you are welcome to do so; if not we will ask our questions.

Ms Anderson: I am Susan Anderson. I am Director of Human Resources Policy at CBI.

Mr Moran: My name is Tom Moran. I am Senior Policy Adviser in Susan Anderson’s team at the CBI.

Ms Anderson: We will not make an opening statement on this occasion, thank you.

Q36 Chairman: We have a report of your news release which reacted to the publication of the Commission’s Green Paper. The Commission’s readiness to acknowledge the need for flexibility in labour markets is welcomed in that, but concerns are expressed that the Commission is still considering further employment legislation. Could you summarise the reasons why you welcomed the Commission’s Green Paper; and what do you know about the views of employers or employers’

organisations in other EU Member States with regard to the issues raised in the Green Paper?

Ms Anderson: We welcomed the Green Paper because we felt that it was important that the Commission acknowledges that the debate has moved on and that in Europe we all need to have flexible labour markets if we are going to raise employment and reduce unemployment and, indeed, have greater economic growth. I think that recognition that flexible labour markets play a key role in that was very welcome. Our concern is that, having recognised that actually what we need is more flexibility, the Commission has a tendency to see more regulation as a way of introducing more flexibility whereas what many of the Member States need is possibly less regulation and certainly more flexibility. Whilst there is much in the Paper that we like, when we look at some of the detailed questions when they suggest that we need more action on working time or agency temps, we wonder how that matches the commitment to greater flexibility. That is our concern. We think that it is actually down to the Member States to take action. To answer the second part of your question, that is very much a common theme with our European counterparts. The organisation representing European employers and employers’ organisations renamed itself; it is now called **BUSINESSEUROPE** and it is putting its finishing touches to its response to the Green Paper, as indeed are we and we will be very happy to let you have copies of both those responses hopefully by the beginning of next week. **BUSINESSEUROPE**’s strong view is that taking a top down approach to legislation is not helpful. We do not need more legislation. Many of them are in discussion with their trade unions and indeed with their governments about how they can introduce more flexibility. They are very much against more legislation and have taken a very strong line on that particular point.

Q37 Chairman: What is your view of the process of determining labour laws at EU level and what role do the CBI play in that process once it starts?

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Ms Anderson: We have a very active role in the policy formulation at European level. If the Commission is minded to introduce new legislation under the new procedures it must ask the social partners—ie the trade unions and the employers—whether they wish to negotiate an agreement. If the social partners do wish to negotiate an agreement then they will sit down, undertake those negotiations and the European Council of Ministers can either accept or reject that agreement in its entirety. I was actually part of the EU negotiating team that negotiated the directives on part time work and fixed term work and having negotiated those agreements over a period of some nine months, although it was informed by previous attempts by the Member States to reach agreement on those areas, we were able to reach an agreement and that legislation for that agreement was then agreed by the European Council of Ministers and then effectively became a European directive and that obviously led to the passing of the part time work and the fixed term work regulations in the UK. Having reached successful agreements—they were legally binding agreements that led to directives—we failed to reach agreement on agency temps (not down to the UK I must emphasise, actually it was the Germans and the Swedes who could not agree at the final hour a draft agreement on agency temps) and then we looked at other areas. We looked at teleworking and stress and we came up with voluntary agreements. These are areas where it is very much for the national level partners to move forward. On teleworking and stress these were not agreements that led to directives but they led to action at the UK level where we worked with DTI, with TUC and came up effectively with guidance on the issue of teleworking and stress rather than a regulatory framework. We have had different approaches. I think they have been equally successful. We are now in a position where we are looking forward to what we might do next as the European social partners. In fact Tom has been involved in some of those discussions and what we are doing now is that we are looking at the labour market, taking stock of the labour market and looking to agree a common analysis in order that we can then decide where we would want to focus our attention next as European social partners. I have to say that reaching agreement just on analysis is rather harder than one might expect but we are hoping to do that in the next month or so.

Mr Moran: Just to add to that, we have a work programme that is agreed between *BUSINESSEUROPE* and the TUC which is scheduled for 2006 to 2008 and that sets out very clearly the areas of common interest or common agreements or similar procedures that will be agreed. The next stage, following the labour market

analysis which, as Susan said, is hopefully going to be agreed and then approved within the next few months, is an agreement in the work programme which specifically gives the choice between either something that looks at the integration of disadvantage groups into the labour market (which is obviously a key concern across Europe) or Lifelong Learning which is equally important, it is something we actually addressed in the 2003 to 2005 work programme but it is obviously something where there is still a lot of discussion to be had.

Q38 Chairman: It is a moving target.

Mr Moran: Yes, and obviously there are continually new challenges on that. We are doing a lot of work at the moment.

Q39 Lord Wade of Chorlton: What I am going to do is join the next three questions together because they go together. First of all, I want to try to understand your view of what the effect of existing labour law—both UK and European labour law—has been on our industry's global competitiveness and particularly on productivity levels. I would then like to understand your views on the cost of existing labour laws as you see them under British business. Following that I am going to ask you a further question on small businesses. Perhaps you could deal with the first two questions together.

Ms Anderson: I would like to say, here is one we prepared earlier. This is called *Lightening the Load* and this looks at European and national legislation on employment issues. If we are looking at the cost in particular what we did in this report—we will be very happy to circulate copies to you—was to indicate the cumulative cost of employment legislation and looked at the total cost from 1998 to 2006. This is the cost based on the Government's own regulatory impact assessments. This suggested that if you put all those costs together the total cost was just a shade over £37 billion. That is quite a considerable cost. That said, if we look at the various new rights and regulations that have come in we have accepted the majority of them as appropriate. We did not reject the national minimum wage when the Government was elected on a mandate to introduce the national minimum wage. We have worked with the Low Pay Commission to ensure that it is a success. We often say that the national minimum wage is a little higher than we would like and the trade unions always say it is lower than they would like, but by and large we have got it about right and the national minimum wage has been a success. It has taken over a million people out of chronic low pay; it has helped close the pay gap between men and women; it has certainly helped ethnic minorities as well to close the pay gap. If we look at many of the regulations that

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have come in, particularly from the UK, they have been introduced in an acceptable way on a full consultation and they have not been surrounded with too much red tape. The national minimum wage, for example, is not surrounded with a lot of bureaucracy. Similarly rights like the right to request flexible working, 90 per cent of employees' requests are granted either initially or after some small changes. These sorts of rights that we have seen coming in in the UK have added to labour costs, they have not added necessarily to productivity.

Q40 Lord Wade of Chorlton: Could you explain that a little bit further? You are of the view that it has not had an impact on productivity? Do you think productivity is related very much to labour law generally or not?

Ms Anderson: Clearly if you have employees feeling that they are secure in their jobs, if you have them having all the skills they need so they can progress, then that gives you security in the labour market. Certainly if you feel that you have protection, for example, against unfair dismissal, protection against unfair discrimination, that is going to make you a happier, more productive employee. We have looked to see, especially in respect of the national minimum wage, if there has been an impact on productivity; we can see an impact on employee satisfaction, it is hard to see—government has failed to see—any impact that you can assign to any rights in terms of an impact in productivity.

Q41 Lord Wade of Chorlton: How do you think European labour law has affected our competition with other parts of the world, particularly in the Far East as we are now competing on a very different level?

Ms Anderson: We have seen a lot of legislation. The UK legislation has tended to be to go with the flow of where employers are going around labour market flexibility, around those sorts of issues. When we see some of the legislation that has come from Europe, for example, the principles can often look very simple but when we have actually seen them implemented—such things as the Working Time Directive where we have a lot of red tape and bureaucracy and possibly uniquely in the UK—then they have had a detrimental impact and they certainly had detrimental impact in terms of the reputation of the UK to do business where our flexible labour market has always been seen as a source of strength. We asked our members as part of doing this report on labour market regulation and they do feel that it is having a negative impact, that the cumulative impact, the steady flow of regulation. According to our survey not surprisingly three quarters of employers said that they were spending more time on administrative compliance and

particularly the smaller firms felt it was taking valuable senior management time. Around two-thirds of them said that more and more senior management time was being taken with the administration of new rights, for example implementing the new age discrimination legislation required a lot of time to absorb this new legislation without necessarily companies having to make too many changes to what they were doing in terms of their workforce practices.

Q42 Lord Wade of Chorlton: You are of the view that the SME sector is more seriously affected by legislation generally than the larger companies?

Ms Anderson: I would not say that is necessarily true. What you tend to find with the large firms is that they implement to the nth degree. They have HR practitioners which the smaller firms do not so if new legislation comes in they will crawl all over it, they will get the employment lawyers in, they look at every aspect of their policies to make sure that inadvertently they are not falling foul of the new legislation; they will follow the progress of the regulations as they go through; they will get worried because the employment lawyers may be telling them that this is all going wrong, that they are going to have to do X, Y and Z whereas we are busy beavering away at CBI trying to ensure that the regulations do come in a common sense way so I get worried so they will start to maybe thinking about over-implementing. Smaller firms, on the other hand, do not worry about the legislation until just before it comes in. They will then take a more practical approach and say, "Let's think about what we're doing. Are we being ageist?" and they will not have all the complicated occupational benefits for example that a large employer will have. If they are paying redundancy pay they will tend to pay the minimum amount of redundancy pay as specified in the legislation. They will not have an occupational redundancy pay scheme but they may have to think about changing because it does not meet the requirements of the legislation. I do not think you can make a very easy small/large firm split but undoubtedly what I would say is that in the smaller firm, because you do not have those HR experts and the guidance is not always very accessible or indeed very simple (although I do acknowledge that DTI are making strong moves to try to sympathise) you can get employment lawyers who tend to worry you too much and you do get the problem that you have the senior executives who should be busy spending their time growing the company engaging with the workforce, spending their time worrying about legislation which really distracts them from the things that would probably be a more valuable use of their time. Certainly more simple guidance is part of the solution for those smaller firms.

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Q43 Lord Wade of Chorlton: I have one more question on productivity. We have seen in the UK that poor productivity is probably the worst issue we have in growth creation. Germany has higher productivity than we do and yet they have tighter labour laws. Would that be true?

Ms Anderson: They do not have higher productivity because they have more employment law; they have higher productivity because they have a higher skilled workforce.

Lord Wade of Chorlton: I wanted you to say that. We can only use what you say, not what we think.

Q44 Earl of Dundee: Do you agree with the claim that the United Kingdom gold plates European Union directives in general and therefore would be likely to do so with any EU directive on labour law?

Mr Moran: The CBI has done quite a lot of work on this both as part of our Better Regulation work and also as part of the Davidson Review into implementation of the EU directives into UK. This work was done last year and again we would be happy to send you a copy of our evidence for that. The short answer is yes, but I think the more nuanced answer is that that often comes with the best intentions and the general impression we get from our members in dealing with the various implementation processes is that the UK crawls all over the legislation to make sure it has got it absolutely right, to make sure it is compliant, whereas other EU Member States simply do not report the same kinds of problems and seem to get along fine without going through the same fairly arduous process that we go through. I think there were two key messages we got when looking at our work on the Davidson Review on this specific process. One is that it often takes a very long time by the time you have gone through the various consultation processes to implement things into UK law in the equality regulations that come out of the EU. The Equal Treatment Directive in 2000 is a good example of that; the age regulations of last year was something that was poured over for a very long time, caused a lot of problems in consultation process, potential impact on pensions, on retirement schemes, on redundancy schemes, on the benefits offered to staff. We were all going through this process, it was all full and frank, but we were simply not having the same story reported back to us from other EU Member States who were, of course, bound to implement exactly the same directives. I think the Working Time Directive is another one where again we see the UK making sure that it has done its homework properly, but that does lead to a lot of very complicated and often quite bureaucratic regulation in the UK which does impact on the amount of time that employers have to spend making sure they are compliant with it. One

example would be that some EU Member States have interpreted the 48 hour limit on working hours per week as applying per contract rather than per worker so you have people in some Member States happily working potentially two jobs each of 48 hours per week which of course the UK does not do, quite rightly. That is one example of where the UK often goes well beyond where it may strictly have to if it is implementing the directives.

Q45 Earl of Dundee: A generous interpretation would claim that the UK does its homework very thoroughly; a less generous one might allege that it holds things up through scrutinising too much. So here in the UK we may be too thorough. Other European states may not be thorough enough. In which specific ways then should these separate camps and approaches make adjustments?

Mr Moran: It is not so much relaxed or unrelaxed; the UK in general has a better regulation agenda which we fully support and it is something that is slowly being absorbed into the Commission's mentality. Obviously they have these principles of transparency, proportionality, accountability, consistency and targeting to make sure that where regulation is necessary it is no more than is necessary.

Q46 Earl of Dundee: Do you think that flexicurity suffers in the UK, because we are too good at our homework?

Ms Anderson: I think there is a certain truth in that. I know you have spent a lot of time looking at the Working Time Directive and it is one of those areas where the principle seems quite clear, you are protecting vulnerable workers from having to work excessive hours that could be detrimental to their health. However, if you actually look at the Directive it is clear what some Member States thought they were signing up to and it is equally clear what we thought we were signing up to, but clearly we were not signing up to the same thing. For example, when we discussed it before, this definition of autonomous workers, these are the people who do not need so much level of protection. In some Member States you define an autonomous worker by the level of your pay or whether your hours are actually measured. Typically those people who are working set hours and are paid overtime, let us protect them because they tend to be the lower paid people, whereas the people who just do the hours needed to do the job do not need so much protection. Everybody thinks they are clear what they are signing up to because some of these directives have very broad principles, but when they come down to the legislation and because, for example, the EU directive talks about autonomous workers being clergymen and senior executives, we

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think, “Hang on, if that is autonomous workers, they are right up here in terms of their seniority within a firm”, but clearly that is not what other Member States have said. Other Member States have said that it is about protecting vulnerable people so they will not have a very small group of people who are autonomous. The principles seem fine until you start to look at the detail; whether this is an argument for more detailed regulation I am not sure. I think it is an argument about being clearer. Again, if we look at Working Time and the whole SIMAP Jaeger case—what is on-call time, what is not on-call time—it was clear that every state in Europe apart from the UK thought that doctors who were in a hospital who were on-call felt that these people were somehow not working and therefore their time did not count. However, in the UK we were pretty clear that somebody who is on-call, on the employer’s premises, that is their working time, particularly if they are called up regularly. It is a fascinating study: how can different Member States see things so differently? I think the other key difference from other European states is the fact that they do so much through collective agreements and not through individual agreements. In the UK, even when we have collective agreements an individual still has the right to take a case to employment tribunal so we tend to find that this much more rights-based approach leads more individuals to say that it is not clear or, to take a case of discrimination going through with lots of big payouts, this creates a whole climate of challenge because individuals think that their particular rights have not been observed or that they can see an opportunity, because of lack of clarity, to take forward a tribunal claim. This makes us very risk averse in the UK which is why our members call in the employment lawyers and why we have everybody crawling over the regulations to try to get them identified and specified to the nth degree. When we have something clear-cut like the national minimum wage or the right to request flexible working, these have worked well and they have not given rise to massive amounts of tribunal claims because they are clear and precise and in a way that some of EU legislation just is not. I think if we can get the EU to back off our view, going back to this Green Paper, is to say that we have the minimum rights now, we do not need more European legislation. What we need and what our counterparts in other European states are saying: we want more of what you have around flexibility, we do not want more legislation, in fact we want less. Our view is that the Commission has finished the legislation of part of it, what they now need to do is do that exchange of good practice, look at what countries are doing around active labour markets. That is the way of the future, not more legislation.

Q47 Baroness Gale: The UK has this gold plated approach, is that beneficial to the UK in terms of the rest of Europe and in terms of the business and the employees? Do we benefit to a greater degree by adopting such an approach?

Ms Anderson: I do not think we benefit at all. I think we end up with confusion. We have smaller firms tearing their hair out because of the Working Time Directive. Age discrimination is a case in point. Other Member States say that they have something in their constitution that says there is no age discrimination. We have actually reached not a bad place but it took an awful long time to get there on age discrimination. Even at the eleventh hour we had problems, for example, with our pension schemes. We set off with the right intentions and then we have some unintended consequences. What happened on pensions was that clearly if you close your defined benefits schemes to new members of staff it is indirect age discrimination because new members of staff tend to be younger people. Some of the civil servants had the bright idea that it was indirect discrimination and therefore it must be outlawed. The upshot of this, they thought, was that those closed defined benefit schemes would have to be opened to let in the younger members of staff. However, that was not likely to be the result; the result would have been that the defined benefit schemes would have been closed to everybody which would have led older workers to have particular levels of disadvantage. We managed to persuade them that that would have been the consequence and then consequently they amended the legislation to allow DB schemes to remain closed to new entrants. We had to fight that particular battle twice, once with the DTI and then about a year later with the Department of Work and Pensions. It is never over until it is over and it takes a lot of effort to get these things right. Eventually we do get them right, but had that gone the wrong way—and it was not an approach they were taking in Ireland, for example—we would have seriously gold plated and come a real cropper.

Baroness Howarth of Breckland: I would like you talk a little bit about how you see the balance between all this legislation and things we heard from other witnesses about better training and other advantages that would actually help our productivity. I am still stuck on Lord Dundee’s paradox which is that if we are gold plating our issues and we have less than Germany has—Germany has greater productivity—how do we get to the point where we have the kind of flexibility that we want and yet we still achieve the security for workers and the productivity? That is what we are trying to seek. How does Europe get those things into perspective? If people are achieving things in different ways, what are the variables that are

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actually going to help us to get to that position? I was also interested in you talking about your report. You quoted £37 billion and I wondered how much you measured social productivity as against profit? Is that to do with profit as against workers being in a better position to continue to work and a workforce being improved by having workers in it because we can get more people from the lower levels going up through the workforce? I wondered if you had looked at that, although it is not necessarily a CBI issue. The third thing which comes out of what I have been listening to is how much do you think the over implementation of legislation in this country is due to the standard of leadership in management, which is a CBI issue? It seemed to me that the senior managers should not be spending their time away from their strategic management issues in order to implement, particularly if they have good HR staff. Is that a leadership delegation issue rather than an issue of real diversion?

Ms Anderson: On the final point, we were talking about smaller firms there. Where you have a company employing 20 people the managing director is the HR director, the company secretary, the finance director. You do not have an HR department.

Q48 Baroness Howarth of Breckland: You were talking about SMEs.

Ms Anderson: Yes.

Q49 Baroness Howarth of Breckland: Not large firms.

Ms Anderson: No. Education and skills are top of the business agenda. Skills are really important at the moment. When I am talking about the age discrimination legislation, that is done by the HR department who have obviously sent something up at some point to the board. The distraction of time is for the smaller firms who do not have HR experts and probably cannot afford an employment lawyer either. Tom will talk about flexicurity because I think it is a very interesting development in the EU and there is a lot of interest from the European Commission. It is one of those concepts that is really growing apace, but I have to say that a lot of people are using it as a peg to hang on either a lot of security or a lot of flexibility. There is an interesting debate there. On the skills point, it is the skills that are key if we are going to look at where we stand in relation to our European counterparts. It is in the area of skills that we are weaker than many of our European competitors. So, for example, if we look at basic skills we still have 20 per cent of the workforce with poor basic skills. That compares to about seven to nine per cent in Germany and France. We do well compared to them in terms of degree levels; around 27 per cent of the workforce

in the UK now has a degree level qualification and that compares pretty well with France and Germany, they have about 25 or 26 per cent. At higher skills we are doing really well; with basic skills we have problems but we are addressing them with government initiatives both for the unemployed and for those in work which are designed to raise those levels of literacy and numeracy. They are really working. Then we have another issue around the intermediate skills where, to be frank, we have a lot of people who are skilled but without a qualification. For employers it is more important to have competent people than those who have a piece of paper which says you have qualifications. It is important for individuals and certainly if you want labour mobility having more people with qualifications would be an important aspect and that is something we are turning our attention to now, to try to transform the qualification system. Competence and qualifications are not necessarily the same thing. If you compare our best firms and our high performing sectors, they compare just as well with the best of Germany and France. It is some of that underperforming tail where we tend to lag, but if you look at our pharmaceutical companies, if you look at our car manufacturers, they are just as productive, in fact some of them are more productive. I do not think we need lash ourselves too much, but certainly it is going to be the skills that we need to focus on; that is not an area of competence for the EU (and God forbid that it should be). We all have our own particular problems to address at the national level. Other Member States are concerned about their education systems as indeed sometimes we are.

Q50 Baroness Howarth of Breckland: If we are talking about flexicurity, the alternative to more legislation is actually this imperative of encouraging the Member States to improve skills, education and training.

Ms Anderson: Legislation does not do it. The best security you can have is the security of knowing that if you lose your job you will get another job either because you have the skills that you need or because you have a labour market that is growing and that we are creating jobs. That is the best security that anybody can have and I think that is the whole ethos of this flexicurity approach. May be Tom can add a bit on flexibility.

Mr Moran: Yes, and perhaps I can give a bit of background about how we, as the CBI, and through BUSINESSEUROPE have been involved in this. It kind of first popped up—I do not know whether it is in the Oxford English Dictionary just yet—and is certainly being used a lot as a phrase. I think it is a way to get things in perspective. We have these priorities: a flexible labour market, the need for

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adequate social security, active labour market policies to encourage people back into the labour market and Lifelong Learning is something that has been added. It used to be the flexicurity triangle so presumably it is now the flexicurity quadrilateral now or something similar. It is a combination of what the Member States and the EU quite rightly see as priorities. We welcomed it and our members have welcomed it on that basis because clearly they are key issues and things which we all need to draw our attention towards. I think it is fair to say that we see the UK as strong in the flexible labour market aspect but, as Susan was saying, we do have particular issues with skills which we are working very hard to try to address and it something that will hopefully improve our productivity in the future. I think the records do show that you do get employment security from knowing that you can get a job and whether you measure it by the UK's national statistics or whether you judge it by the EU's Eurostat markings, we have the third or fourth highest employment rate in the EU; we are one of only four Member States meeting the Lisbon target of 70 per cent employment. That is the target for 2010 so we are obviously well above the pace that needs to be set there although obviously we need to do more. I think, delving down a bit more into where flexicurity is going, it is clear from the various models that you have Denmark and also the Netherlands which is actually a very different system and derives its flexibility from a lot of part time work (they have the highest incidence of part time work in the EU). What we would like to see is more work on this but very much respecting the principle of subsidiarity amongst the Member States. We think the UK is a very good model but we would not seek to impose it on other countries or tell them they should adopt it. It would not be appropriate given the diversity and the detail of labour markets and social models. As something to focus efforts it is very useful but we do need to recognise the differences of social and labour market systems amongst the EU and make sure that they can work to the best advantage within the encouragement offered by flexicurity.

Chairman: Thank you very much; I am really sorry to have to leave you now. It has been very interesting so far. I am sure it will continue to be so under Lady Greengross's chairmanship.

(In the absence of the Chairman, Baroness Greengross was called to the Chair)

Q51 Baroness Neuberger: You have largely covered my next question because as to the question about policy actions relating to education and skills formation I think you have made it very clear that that is where you think the action needs to be. Given that the Green Paper does describe this

segmentation—the insiders and the outsiders—given that you clearly feel it is education and skills training, do you think, as we heard last week from Professor Shackleton and Mr Meager, that social security needs to be added into that? What do you feel needs to be done legislation-wise, if anything at all, to deal with the insiders/outside question?

Ms Anderson: I think one of the interesting things about the Commission's Green Paper is that it talks about insiders and outsiders and we are pretty clear that the outsiders are those people who are trapped outside the labour market and unable to get in because so many Member States have restrictive employment protection legislation. We do not consider part time workers or fixed term workers or agency temps as somehow outsiders or vulnerable workers or people who need extra levels of protection.

Q52 Baroness Neuberger: They can be; it depends what kind of temporary workers they are.

Ms Anderson: I do not see that then need additional levels of protection. They have the same employment rights as anybody else in the UK so they have rights in the protection of long working hours, they have holidays, they have national minimum wage, they have protection against unfair discrimination. Going back to what we have been saying, if you want another job as a fixed term person you must make sure that your skills are right and for many people fixed term work can be a way to break into a new career. There are problems if people are abused; if people do not get the national minimum wage or they do not get their 20 days' holiday, that is abuse and is against the law. There are people who are vulnerable. Migrant workers, for example, whose lack of knowledge of the employment rights in the UK are clearly vulnerable. If they do not have the language skills then they are vulnerable to abuse, but abuse is unacceptable, the law is the law and we do not want good employers undercut by abusive employers who do not pay the national minimum wage or, for example, who make unreasonable deductions for things like accommodation from migrant workers who happen to be working on a farm or whatever. There is abuse there and where there is abuse it must be dealt with. However, we do not think there is anything abusive about a fixed term contract or working as an agency temp. Many agency temps prefer to work as agency temps. They get much more than their colleagues who are working on permanent contracts and they are very happy with that and many of them do not want to be full time permanent members of staff. Similarly, the vast majority of people who are working on a part time basis are there because they want to work on a part-time basis. Personally I think it is rather insulting to suggest that somehow

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they are vulnerable or atypical and need levels of protection. I just do not buy into them being on the periphery of the labour market. I think we accept that there are people who are abused and we are quite clear that that is not acceptable and the best way to prevent that is by having simple legislation that everyone can understand with very clear rights.

Q53 Baroness Neuberger: I think it is fairly clear that you do not really think there needs to be much more in the way of labour law around that. I was particularly interested in the question of social security. One of the suggestions that was beginning to come up last week was that if you really wanted to deal with temporary workers who work for a bit and then have a patch when they are not working, one of the things you want to do is to make the social security system possibly be quite generous for a very short time.

Ms Anderson: There is an issue around people on incapacity benefit who, for example, fear taking a job that may not lead to a long period in the labour market because they may have issues around health. I think there is an issue around incapacity benefit but I do not think there is a real issue around needing higher levels of unemployment benefit.

Q54 Baroness Gale: I would like to ask a particular question relating to what you have just said. Are you linking in the people who are on temporary contract—not agency workers but temporary contract—which can go on and on as a temporary contract? I know someone in my family had a contract for four years and was not paid any sickness benefit or holiday pay (he could take the holiday but not get paid) and this is in recent times. I am wondering whether temporary contracts are all right up to a point.

Ms Anderson: After a certain period there is not much point being on a fixed term contract because you end up with all the rights of a permanent member of staff so if you constantly roll these contracts on you end up with the same levels of redundancy pay as somebody who has not been on a fixed term contract. If people are not getting their sick pay or their holiday pay, that is against the law. This is a case where they should be taking the employer to an employment tribunal.

Q55 Baroness Gale: You wonder how they can be getting away with it with all this legislation in place.

Ms Anderson: Yes, you do wonder how they get away with it. There are some issues around people on fixed term contracts wanting to take the holiday at the end of the contract. It was called rolled up holiday pay. It was quite clear they still had the holiday pay but they would take it at the end of the contract so at the end of the 12 months they would

still have another month when they were paid on the basis that that was holiday pay. I guess that was not happening to your acquaintance. It is unlawful, it should not be allowed and he should be taking the employer straight to an employment lawyer. ACAS, for example, can intervene.

Q56 Baroness Gale: Moving on to temporary agency workers, I wondered what your view was on the need for the proposed EU Directive on minimum standards for temporary workers. Who should be regarded as the employer of the temporary agency worker, should it be the agency or the client employer?

Ms Anderson: It is quite clear that the employment relationship should be with agency and not the user of the agency temp because it is the agency that has the responsibility for the holiday pay, making sure the person is paid the national minimum wage, statutory sick pay, protection against dismissal. All those things are the responsibility of the agency. Users of agency temps would expect that the employer obeys the law. You should not have to write that into the contract because everybody should obey the law. The responsibility lies with the agency and not with the user of the agency temp. Do we think there is a need for a directive? We can accept there should be a directive. We do not have a problem having a directive. What we do not like are some of the earlier drafts of the directive and one of the ones that is floating around at the moment suggests that the agency temp ought to get the same pay as the user company's employees after only six weeks. That to us does not seem a sensible provision because they will not have the experience, the skills and the competence necessarily of the permanent worker employee in the user company. Often they do so there are many agencies who are paid the same if not more because they come in as a temporary secretary, for example, and are often paid a lot more because they are only there for a short period and you want somebody who can just pick up the ropes really quickly. In other areas that is not the case. Going back to the earlier question about gold plating, everybody else would happily sign up to equal rights after six weeks but if we look at some Member States they put all their agency temps on the trainee rate and therefore they get the trainee rate and not the rate of the worker they are working alongside so they say they have implemented the directive but actually they have not implemented the directive because it is not equal pay for people working alongside each other doing the same job. We would not do that. I think there are problems with the directives. There are countries which sign up to a principle but in reality they are not providing equal pay. We do get cross when these

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things are passed off as an acceptance when really there is no reality.

Q57 Baroness Howarth of Breckland: I want to talk about mobility now and to look at what the advantages or disadvantages might be in the introduction of EU legislation that ensured uniformity of employment rights for workers regardless of the Member States in which they are working. I think I have already got the drift of what you are likely to say in the answer to this, but what do you see as the implications of EU enlargement for labour law?

Mr Moran: In addition to what you quite rightly guessed I might say about the already very comprehensive number of employment rights that people do enjoy as EU citizens and EU workers, I think there is a lot of work that needs to be done, particularly in the newer Member States, simply around implementation and enforcement and that sort of thing that we all recognise is an issue. To be honest, it is not just an issue with employment law because these countries have had a very turbulent recent past, they are entering the EU, they have to implement all the legislation and that is a tremendous undertaking by their public legislators. BUSINESS EUROPE, with the ETUC, is doing a lot of work funded by the Commission and also with the respective secretariats in building what is known as capacity building firstly in terms of making sure that employers' organisations and trade unions are able to consult with government effectively but also making sure that they are aware of how you do implement EU law because we all know it is a very tricky subject and one where there is a great need for expertise to make sure that there is—this is what we are all aiming for—a level playing field across the EU to make sure firstly that all workers have access to equal rights but also workers in different Member States or companies in different Member States are, as I said, operating on a level playing field and no one country is able to undercut another. That is where we see the priority in making sure that all workers and employers are able to access and use the same rights.

Q58 Baroness Greengross: It falls to me to ask you the last question. I am going to ask you to be very, very brief and perhaps follow up, if you have not made all the points you would like to, in writing

afterwards. My question is about the legal status of employee versus self-employed people and whether there is anything else that you would like to tell us about looking forward with regard to the infamous Working Time Directive.

Ms Anderson: We do not think we need more legislation in the UK or at the European level on definitions of worker, employee or indeed of self-employed. I think these are well-known at the UK level. There are always some anomalies around the edges but they get sorted out pretty quickly. I do not think we need legislation to tell us at a national level or at an EU level what the distinctions are. In terms of the Working Time Directive, it is an ongoing debate. We have been very pleased by the way that the UK Government has supported the principle of maintaining the opt-out. It is interesting how many other Member States have come to back us on that because they too see the flexibility of having the opt-out. What I would leave you with is, do we think there should be scope for simplifying the UK regulations or simply simplifying the guidance on the Working Time Directive? I think that is something we have set ourselves as a challenge and we very much want to work with the DTI and TUC to see whether we cannot strip away some of that excess baggage, particularly around this whole definition of who is autonomous and who is not. What we want to do is very clear: protect vulnerable people, ensure that they get their rights, but remove all the red tape and bureaucracy that goes around because a lot of the guidance is just so complicated. That is what we intend to do.

Q59 Baroness Greengross: I think that was very clear but if there are additional points you want to write to us about that would be very interesting for us. Could I thank you both very much; that was extremely interesting.

Ms Anderson: Thank you very much. We will send you a copy of our formal response to the Green Paper and the BUSINESS EUROPE response as well. We will leave the report with you.

Q60 Baroness Greengross: Anything on the Working Time Directive would be very interesting.

Ms Anderson: We do come up with some suggestions in here, but that is very much work in progress but we will keep you posted on that as well.

Baroness Greengross: Thank you very much.

THURSDAY 19 APRIL 2007

Present	Dundee, E Greengross, B Howarth of Breckland, B Morgan of Huyton, B Moser, L	Neuberger, B Thomas of Walliswood, B (Chairman) Trefgarne, L Wade of Chorlton, L
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Memorandum by the Federation of Small Businesses

INTRODUCTION

1. The Federation of Small Businesses is the UK's leading non-party political lobbying group for UK small businesses, existing to promote and protect the interests of all who own and manage their own businesses. With over 200,000 members, the FSB is the largest organisation representing the self-employed and small and medium sized businesses in the UK. FSB members together employ more than 2.5 million people and turn over more than £10 billion a year. About 25 per cent of the membership are self employed, the others being mainly one or two person companies, which are owner-managed and one third of our members work from home. The FSB welcome the opportunity to respond to the Call for Evidence from the House of Lords Select Committee on the European Union on the EU Commission Green Paper on Labour Law.

1. *Flexibility of the labour market*

2. Flexibility is being progressively reduced in the UK and the FSB considers that this reduction has already gone too far. The role of small business as employers is huge. A successful small business provides prosperity, security, and flexibility to its employees. But the small business employer is rarely accorded adequate recognition and the FSB would like to see greater recognition and support for small businesses employers. Contracts can no longer be freely negotiated between employee and employer due to "one size fits all" regulation.

3. While flexibility has to be balanced by essential protection for employees, the FSB believe that the balance has swung too far in favour of the employee at the expense of the employer. With the recent increase in employment legislation, the FSB are concerned that this legislation will result in less employment opportunities. The following facts support our concern:

- In the 2006 FSB Employment Survey, 35 per cent of business owners said they had chosen not to employ anyone because of the perceived threat of employment legislation.
- In the 2006 FSB and FPC Survey, "Burdened by Brussels or the EU", we found that as a result of the Part-Time Workers regulations of 2000, nearly a quarter of small businesses said that new amendments deterred them from employing part-time staff.
- These fears are further demonstrated to be realistic by the figures from the FSB helpline which compute a massive 77,000 calls (of a membership of 200,000) in the year 2006 on the subject of employment law.

4. Flexibility in the labour markets has been accepted as crucial by both the UK Government and the European Union. It benefits employers by enabling them to adapt rapidly to changing trading conditions—vital if the EU's small businesses are to hold their own in a global marketplace. It also benefits employees in a variety of ways. It can enable them to manage their family lives and have greater control over their working day. It gives them greater job security in difficult times and can enable them to participate in the rewards in prosperous times. Many workers prefer the traditional informality and convenience of small businesses.

2. *Employment security*

5. The FSB believes that there is no need for any enhanced employment security in the UK. In the UK, employees already enjoy a network of rights. Some of these derive from EU law, eg working time including paid holidays and age discrimination and these are frequently "goldplated" by the UK Government. Others derive from UK national law, for example national minimum wage and unfair dismissal. These rights are subject to inspections and monitoring and are enforceable by Tribunals. Cumulatively they impose a heavy

administrative burden. Workers in the UK are also entitled to free healthcare under our National Health Service and are protected by our health and safety legislation.

6. The already protective network of rights in the UK does not require any further regulation and any such attempt will seek only to encourage the black economy, a move we strongly oppose. If the labour market becomes even more formalised, it will damage the bridge into employment as many people return to work through these casual flexible means. In the United States, where businesses suffer from less bureaucracy and regulation, 75 per cent of large firms founded since 1980 grew from small businesses. By contrast, more than 80 per cent of the large European firms created since 1980 were the result of mergers of pre-existing firms. (EU Research Advisory Board (EURAB 04.028-final, EURAB report on: "SMEs and ERA", 2004)

7. To counter any loss of jobs to the newly emerging economies, the diversity of the EU labour markets should be utilised to meet the challenge. This can best be done by application of the principle of subsidiarity, which enables national labour markets to respond quickly and experimentally. Each Member State knows best how to govern its own labour market as it has a closer and more detailed understanding of its own cultural, demographic and economic requirements. The FSB would urge the House of Lords to take a firm stance on the needs of the UK in this issue.

3. *The concept of "Flexicurity"*

8. The FSB has examined the principles of Flexicurity, in particular the Danish labour market model characterised by:

- loose legislation for employment protection;
- a generous social safety net for the unemployed; and
- high intensity spending on further training.

9. While Flexicurity has been successful in Denmark, the FSB considers that it would be unwise to indiscriminately apply Denmark's system to other Member States who have also evolved differing Labour Market models to suit their needs and choices.

10. Any such measures would result in unsustainable tax rises to fund the enhanced security which would cause the SME community to face additional pressure on cashflow. If the disparity in income for those who work and those who are out of work was minimised, there is the risk that there would be less incentive for workers and employees to return to work. Any tax rises would also be most likely to result in loss of employment opportunities and would greatly harm the efficiency of the labour market, putting a greater financial burden on the State, due to increased need for more social security.

11. The UK labour market is geared towards flexibility and has a culturally low tolerance to high taxes. It is also worth noting that the UK rate of unemployment is already the same as Denmark's, at around 5 per cent.

4. *Other labour market challenges*

12. In more recent years the income tax authorities have administratively narrowed the scope of self-employment. To counter this, the FSB supported a bill to make provision about self-employment ordered to be brought in by Mr Mark Prisk MP on 9 January 2002. It provided that when a person makes his/her income tax return he may make a declaration that he/she is self-employed. Such a declaration would entitle him/her to be regarded as self-employed.

13. However, if the officer is of the opinion that the declaration should be disallowed, he may give notice of disallowance, with reasons. The declarer may then, if he so wishes, appeal against the disallowance. On such appeal, there is a presumption in favour of the declarer. The bill includes provisions to protect workers from being pressurised into making such a declaration. These provisions would give statutory recognition to the right and freedom for a worker to be self-employed whilst at the same time inhibiting the comparatively small number of employers who seek to "disguise" their employees as self-employed in order to evade their responsibilities. It would provide a speedy solution to borderline cases.

5. *Groups covered by labour law*

14. Small businesses suffer from legislative attempts to undermine the status of self-employment and the stifling of self-employment by administrative burden. In the FSB's Employment Survey 2006, it was found that 40 per cent of small businesses have at least one casual or seasonal worker per average year. One third of employers said that they were deterred from creating jobs because of the burden of employment regulation

and further regulation would only serve to deny these casual workers the opportunity for the flexible work they seek.

15. Workers who are not employees do not need regulating. They are recipients of public services which apply to all whether workers or not, for example, healthcare and health and safety regulation. Apart from the right to be self-employed, this sector has the right to “buy in” services as and when required and the right to provide services in accordance with commercial contracts, such as computer services. Commercial contracts take a wide variety of forms and much depends on the sector. They are tailored to meet the needs of the parties and as such, flexibility is crucial. Self-employed contractors are adept at spotting and filling gaps in the market, and make a huge contribution to the efficiency and productivity of the business sector which they serve. They do not need a “floor of rights” which may reduce their flexibility and labour law should be confined to employment contracts.

Self-employment

16. The FSB doubts that creating a rigid, EU-wide definition of self-employment would be a helpful way of competing with other emerging economies as it may hold back enterprise and innovation. Each Member State’s definition of self-employment has evolved over time to suit their needs. The FSB believes the fact that different Member States have variations in definitions of self-employment and employment is a necessary reality which the EU would be best advised to accept and work with.

17. The FSB would urge the committee to bear in mind the dangers of standardising the definitions of self-employment or do anything to limit or undermine this increasingly important social and economic trend. The majority of EU citizens favour self-employed over employed status⁴. Furthermore, this correlates with a wider trend towards self employment, for example in Australia where the number of self-employed outnumbers trade union members.⁵

18. The FSB believes that a rigid definition of self-employed status would hinder the development of socio-economic trends that are society’s natural response to the challenges of the 21st century. The development of so-called “lifestyle” businesses is a relatively new but increasingly important phenomenon. According to an FSB survey, lifestyle or home based businesses account for over one-quarter of small businesses in the UK. 45 per cent of home-based businesses are registered as sole traders⁶. Research has demonstrated that operating from home, often in rural areas, is no barrier to growth. Fuelled by the revolution in information technology this development is contributing to a renaissance of local communities, strengthening the social fabric that is perceived to be under attack from globalisation.

6. *Role of EU Regulation*

19. In employment regulation, the FSB considers that harmonisation should not be a general approach. It is at least as easy to get permanent work in the UK as temporary work, therefore any employee who seeks-temporary work does so because it suits his/her needs at the time. We would suggest that the current system in the UK is more than adequate and provides a flexibility which is beneficial to both employer and employee. Any attempt at universal clarification would be likely to attract unintended consequences. EU legislation in labour law should be restricted to making provision for posted workers and cross border workers where the EU can usefully stipulate which laws should apply, but without attempting to change the substantive law.

20. In cases where collective agreements are permitted to replace legislation, individual employees of a small business should also be able to opt out. The principle could be adopted that wherever a collective agreement (in which small business is represented) can provide for an opt out of a regulation for small businesses who employ less than 20 people, an individual employee in a small business, should be entitled to do so. Where a legislative remedy is deemed proportionate for large business and public sector employees, but not for small businesses, there should be an exemption for small businesses.

⁴ Flash Eurobarometer n° 83: Entrepreneurship, Survey conducted on behalf of The European Commission, Directorate-General Enterprise by EOS Gallup Europe, September 2000.

⁵ Institute of Public Affairs Review June 2005, John Roskam.

⁶ Lifting the Barriers to Growth in UK Small Businesses, The FSB Biennial Membership Survey, 2004.

Social Dialogue

21. Small businesses, which are still comparatively excluded from the social dialogue, should have their own institution and be given equal weight with the so-called social partners. The traditional collective bargaining system where agreements are made between large businesses and trade unions, is increasingly less relevant and more importantly, less representative of the current UK labour market. Given the fact that small businesses account for 99 per cent of all EU companies, (*European Commission: DG Enterprise and Industry*) the FSB would urge a realistic appraisal of the future validity of the traditional collective bargaining system.

30 March 2007

Examination of Witnesses

Witnesses: MR ALAN TYRRELL QC, Chairman, European Law Policy Unit and MISS LUCIE GOODMAN, Policy Development Officer for Employment and Local Government Issues, Federation of Small Businesses, examined¹.

Q61 Chairman: Good morning Mr Tyrrell and Mr Goodman and thank you very much for coming to speak with us today. As you know, the main subject of today's evidence session is the Commission's labour law Green Paper. Thank you also for the written evidence, which we have in our pack here. Employment interests are of great interest to the Committee and a couple of years ago we published a report on the Working Time Directive. Our inquiry into the labour law Green Paper is therefore a good opportunity for us to pull together evidence which will bring our views on the impact of legislation in the labour market up to date and obviously enable us to advise Government as to what we think on these matters. I am sure I do not need to introduce Professor John Philpott to you; you have probably been talking to each other from time to time before. He is our specialist adviser for this inquiry and of course we are extremely lucky to have him. We have an hour for this session, it is open to the public and it will be recorded for public broadcasting or webcasting. A verbatim transcript will be taken of the evidence as well and this will be put into the printed record as part of our report and also put onto the parliamentary website. You will be sent a copy of that record a few days after this conversation and if you feel that anything needs to be corrected, that you have perhaps not clearly explained what you wanted to explain or there has been some misunderstanding, do not hesitate to supply us with that correction, but we would be grateful if you did it as soon as possible. If at the end of the interview you still feel that you would like to submit supplementary evidence to us, that of course is always very welcome. We would not want lose a point that you wanted to make simply because we had failed to cover it in our conversation. The acoustics in this room, thank goodness, are good unlike some of the rooms in this Palace; nevertheless, for the benefit of the recording and for the taking of the note, we would be grateful if you could speak as

clearly as possible. Could you start by stating your names and official titles for the record? After that, if you wish to make an opening statement, it is up to you; otherwise we shall go straight through the questions. I hope that is all clear.

Mr Tyrrell: My name is Alan Tyrrell and I am the Chairman of the Federation of Small Businesses' European Law Policy Unit.

Miss Goodman: I am Lucie Goodman and I am the Policy Development Officer for Employment Issues in the Federation of Small Businesses.

Q62 Chairman: Do you wish to make an opening statement, or shall we go straight into the questions?

Mr Tyrrell: I think we could go straight into question one because it is such a wide-ranging question and it enables me to set out a few principles as well.

Q63 Chairman: That is right. We have been looking at the papers that you supplied to us—thank you very much for those—and they indicate, especially the press release of 22 January, the huge increase in the number of calls on labour law issues which are received by your helpline from your member businesses. The press release states that the average business owner spends 28 hours per month filling in government forms. It goes on to explain the economic importance of the small businesses sector which I am sure everybody in this room is entirely aware of. The suggestion is made that red tape actually hampers the employment of more people. Could you describe some of those difficult problems faced by small businesses in this country in dealing with existing labour law? What role do you think that employment law should usefully play in the UK? What do you think is wrong with the present situation? That is a very broad opening question so it is up to you.

Mr Tyrrell: May I first of all thank you very much for inviting us to come to address you and to so many people for giving their precious time to this meeting. I did read the Working Time Directive report at the time and it gave us some satisfaction and some confidence in coming today. As far as the role of UK

¹ In relation to questions 64, 70, 83, 84 and 91 following, the oral evidence was supplemented by further information supplied in writing by the witnesses. This is printed in the Supplementary Evidence section which follows the oral transcript.

*19 April 2007*Mr Alan Tyrrell QC and Miss Lucie Goodman

law in the UK is concerned, one can extend it equally to the role of the European Union, certainly in terms of what I am going to say. May I mention seven principles—seven sounds a lot but they will only take half a minute each—being the direction in which we feel the European Commission ought to be going and indeed the UK Government could also usefully go. The first one I call recognition. As you have already said, the contribution of small businesses to the economies of the European Union is massive, but it is barely recognised; the position of small business employers has no special status, but it really ought to have. The small businessman is a self-sufficient worker himself, but he also provides, with his colleagues, around 75 million jobs in the European Union and a comparative number in the United Kingdom. Finally, the small businesses of today are the big businesses of tomorrow. For all those reasons, the small business employer does deserve special recognition which he does not get anywhere. My next heading in my set of principles is proportionality. What is proportionate for a large business is not proportionate for a small business. In a small business cash flow worries are forever present; that is perhaps the main difference of all. Similarly between the large business and the small business, large business has its human resources department, it has funds to back up its research and so on and so forth, small business has not except of course through our own modest efforts in the Federation of Small Businesses. The European Union, and I am afraid also usually the UK Government, apply the one-size-fits-all principle, but there really is no comparison between the small business employer of typically under five employees and the international conglomerate and they should not receive necessarily the same treatment. My third principle is freedom of contract. It is easy to lose sight of the fact that every regulation which replaces a negotiated contractual term with a compulsory statutory term reduces the flexibility of the labour market. In small businesses each contract of employment usually is, and traditionally has been, tailored to the particular individual concerned. Successively over many years now most of the terms of such a contract are dictated by statute and they are the same both for an employee of a very substantial international business as they are for one in a small business. My fourth principle is that administration is a burden. All these regulations require administering. Time is money. The time spent on administration is reducing the productivity of the business. It reduces expansion and development, all the other activities that go into making a business successful take second place. The fifth principle is that small businesses should have their own institutionalised system for consultation. Large businesses have it, certainly in Europe through the Social Dialogue, small businesses do not have it

anywhere. It is true that in the UK we have fairly easy access to senior civil servants dealing with our problems, but that is not the same as having an institutionalised system for consultation. The sixth one is subsidiarity. The principles should be applied and it gets scant attention in the Commission's Green Paper, indeed proportionality gets scant attention as well. We consider that each Member State is the organisation best suited to the needs of its small business employers and therefore directly small business employees, so we would regard subsidiarity as an important principle which commands a lot of lip service usually but very little practical result. Finally: legislation. Small business employers are also workers. They should be treated as workers as well as employers and employment law legislation should be legislation that encourages small businesses to employ people, not discourages them. Those are the seven principles which indicate a direction to move in; it does not mean to say one has to go to extremes for any of these, but that is the direction. What is wrong? It is the sheer volume of regulation that is wrong. One can take any particular statute, any particular regulation and say it is not doing much damage. A good example is maternity leave. It is estimated that a typical small business will only have this problem once every five years with only four or five employees, but when it does crop up, it is an absolutely massive crisis, or can be. It takes about two days for the small business employer to find out what he or she ought to do about it and that comes from a precise case that we had a few months ago. One might say that the maternity leave problem is a rare one, but when you add that kind of problem to all the other problems that occur once every five years, it is a massive one and it means reorganising the entire workforce in a small business and probably spending quite a lot of money employing a temp or an additional part-timer. So there is that and then there is the complexity of the legislation. The regulation attempts to cover every eventuality. Of course it does not, especially in Europe where there are so many possible eventualities that a vast mass of problems are not foreseen, but it ought to be possible for a small businessman to pick up the regulation, look at it, see what it means and implement it. However, as our helpline results show, it does not work like that. There really is a massive number and when suggestions are made, as they are from time to time, that small businesses do not bother or do not worry about regulation and press on regardless, that is certainly not so with our members as one sees from the care and effort. Each one of these 70,000-odd calls that are made each year has arisen because a problem has arisen and the problem needs to be solved and an employer has to spend time trying to solve it, one of which is getting onto the helpline but that is not the end of the matter because after that he has to

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implement the helpline's advice. There is no adequate focus, no direction about UK employment law. It is all regulation or statute after statute in isolation because somebody has thought the time is right to deal with what might be a very minor problem, but there is no overall principle involved or ethos or anything; it is very much a "What shall we do next?" kind of approach. That is particularly so in our current problem with holiday leave, which I shall be dealing with in answer to another question later on. Small business employers are geese that lay the golden eggs, they need special attention and at the moment what is wrong is that they do not get it and the one-size-fits-all principle rules the day. I am sure I have left points uncovered in those remarks but you will direct me to them.

Q64 Chairman: Thank you for that. It certainly took me back to my days at the National Economic Development Office where I used to listen to very similar arguments and that is a very long time ago, so you may be right that not enough has changed in the intervening period. Can you give us any direct evidence which would show that if smaller firms had fewer labour law requirements, they would be able to increase the number of people they could employ? That is one of your theses, as it were, in the evidence that you have written to us.

Mr Tyrrell: Yes, it is a very important one. Lucie has extracts from the research survey here.

Miss Goodman: We conducted a survey in August 2006 and the findings of this employment survey were that of the total sample, 65 per cent had employees while 35 per cent did not. When the FSB asked why they did not employ, 44 per cent of that group of respondents said the reason was the volume of employment legislation, the complexity of employment legislation and the overall burden of red tape and the fact that employees are considered too great a business risk. In other words, they would create more jobs, if they did not feel threatened by regulation.

Q65 Baroness Morgan of Huyton: How large was the survey?

Miss Goodman: It was about 2,500.

Q66 Baroness Morgan of Huyton: So 35 per cent of 2,500.

Miss Goodman: Yes.

Q67 Lord Moser: Mr Tyrrell referred throughout to five and under. Is that what we are talking about rather than medium-sized firms? I think some of the papers referred to medium and it makes quite a difference if we are talking about the very small.

Mr Tyrrell: The majority of our members are micro businesses, under five; that is the majority, the biggest single group. Under 20 is common; over 20 is far less common.

Q68 Lord Moser: I was just wondering whether the concerns that you started with and that we shall be discussing relate equally whether it is four people or 30 people.

Mr Tyrrell: They apply equally to all under 20.

Q69 Lord Wade of Chorlton: What I should like to do is just explore what you believe to be the relationship between productivity and employment law. Clearly from the paper the EU believe that it could be an issue, that they could help to improve productivity through looking at the labour law and I wondered what experience you had and what your thoughts were on the relationship between productivity, economic development and labour law?

Mr Tyrrell: It is a question of time and resources, the figure of 28 hours a month being typical in the research that took place in or shortly before 2004 and we are proposing to update it in our next survey. It does not matter whether it is 28 hours or 20 or 35, it is all time spent on administering regulation which could be better spent in developing the business.

Q70 Lord Wade of Chorlton: Just looking at a rather different issue than that, generally speaking we define our productivity level as a relationship between output and cost of input and clearly that varies throughout Europe. Europe has suffered a little bit generally from low productivity compared with the United States of America for example. I wondered whether your research shows your members feel that they could improve the productivity of their business as a result of labour law, which is a slightly different issue from the amount of time that they spend dealing with regulation. Evidence that we have had here already suggests that there is not a relationship or not a strong relationship between those two; there are other issues that come in. I will give you my view: I think that investment is a much more important issue on productivity than labour law. However, I was wondering what you felt and what your members felt about that issue?

Mr Tyrrell: Our members feel that if they had the opportunity to devote all their working hours to developing their businesses, then that would certainly increase the productivity of the business. We do not have any figures that show that; indeed it is almost impossible to prove but it is very widely believed in the small business world. Small business employees tend to have more than one job in the firm. They will double up, being a warehouseman in the morning and a van driver in the afternoon, to give one kind of example. If you have a small number of employees,

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you expect them to be ambidextrous. The labour law reduces that ability to be flexible with one's employees.

Q71 Baroness Morgan of Huyton: I do not quite follow that argument actually. Can you explain to me which elements of labour law currently would stop what you have described being possible?

Mr Tyrrell: The general realisation that an employer cannot just switch an employee from one job to another without running a risk of raising a grievance of an unfair dismissal if the employee is not satisfied with the new jobs that he is being given. That is the kind of area where you find a problem.

Q72 Lord Trefgarne: I have a bit of experience of that. The problem is that where nowadays an employee is required to have a contract of employment that contract of employment will set out what his duties are and if his employer wants briefly change those duties, the employee could challenge that.

Mr Tyrrell: Exactly so; yes.

Q73 Baroness Neuberger: Clearly that is so if an employee has a contract and a job description and so on but surely where an employer wants to switch an employee into something else it is normally done by consultation whether the employer is a large employer or a small employer. Does it really make an enormous difference what size the employer is? I just cannot quite follow the argument, because I think it is a much wider point than whether the business is large or small.

Mr Tyrrell: It is the flexibility that matters and the deterrent on an employer to risk anything that is new or different is a real one and that will doubtless be where he will get in touch with the helpline and ask our legal advisers whether he can or not.

Q74 Chairman: Can you remind us what the general theory is of the number of employees you need to sustain somebody who does nothing except management?

Mr Tyrrell: Anecdotally it is accepted within the Federation that if you employ over ten, then you have to have a specialist member of staff looking after personnel matters. Under 10 the owner tries to do it himself and gets away with it usually.

Q75 Chairman: Right, so there is a whole mass of concerns which needs at least part of one specialist time once you have 10 employees.

Mr Tyrrell: Yes.

Q76 Baroness Howarth of Breckland: Does your Federation encourage small businesses to work together when they are reaching that stage? My

experience is in the non-profit sector, the charity sector, which are small businesses. They have to have all the same elements and when they are very small they also cannot employ HR specialists, but often latch into other organisations and share expertise, sometimes *pro bono*, sometimes by paying. Does your organisation encourage that kind of sharing of expertise across businesses?

Mr Tyrrell: No, I think not. As far as our members are concerned, they will all be in branches and they will consort together at networking evenings and what have you and we have publications that draw their attention to new legislation as it is coming or likely to come and give business advice in those articles to help them. That is as far as it goes.

Q77 Lord Wade of Chorlton: I would make the point that clearly from the size of the economy that the small business sector dominates the productivity of it is an important part of our total economy. Quite clearly your level of productivity and how you can convert the skills that you have in the small business sector into profitable activities is very important and my experience is that small businesses find it very difficult to move out of that small business sector because they cannot reach that level of income and profitability and efficiency which enables them to raise the money for the next stage. So productivity levels in small businesses are a very important issue and it would be very interesting at some time to try to analyse much more fully how you could increase the productivity of your members in that way. Overall it would give them a much greater slice of the economy and a greater opportunity to grow.

Mr Tyrrell: A very interesting position you have set out there. I would like to consult with some of my colleagues on the other committees, because it is not only a labour law problem there and perhaps we could write in a reply to that question.

Chairman: That would be very useful, thank you.

Q78 Earl of Dundee: We know that the Commission have a plan to consult social partners about the process of forming EU labour law legislation. We therefore expect the Commission to consult small businesses, but does it? Even if it might do, does the Commission properly take the views of small businesses into account?

Mr Tyrrell: No. There is no system for consulting small businesses. As far as the individual Commission officials are concerned, we have found them open, accessible and willing to talk. The onus has to be on us of course to make the appointment to discuss the problem but they will respond to that. As far as receiving any composite representations from small business as a whole is concerned, no, they do not get it. They will only consult formally with European small business associations not with

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national ones. We are by far the biggest. Most of the other countries have fairly little small business organisations, so as far as we are concerned, we found it very difficult to get through to the Commission through the European Small Business Alliance, of which we are a member. The other small business organisation in Europe is separated from our own because it is an organisation which has compulsory membership in the Member States. For example, in Germany you have to belong to a chamber and belonging to a chamber means that the union of chambers have a massive number of self-employed people on their books, but in fact, they are there because they have to be and their organisation is very subservient to the government of the day because they are funded. That is the Commission's position. That organisation to which I have just been referring, UEAPME actually took the Commission to the European Court of Justice about three years ago now, claiming that they ought to have a seat on the Social Dialogue. The Court of Justice ruled against them, not on the merits I am sure, but on the law. So the European Employers' Organisation offered them a seat, one of their places, on the Social Dialogue which is now occupied by this organisation I have just been referring to, but with a condition attached, namely that they would vote as the Employers' Organisation directed them. That is really as near as one comes to representation in Europe. We feel strongly and have been pressing for a long time now for small businesses to have their own institution in Europe, one which we as a UK organisation could ourselves join and would be entitled to consult on its status which would mean that there would be formal meetings with a Commissioner responsible, at least twice a year, where a programme of potential work would be laid out and acted upon with a secretariat. The Social Dialogue has all those things, that is the two sides of industry, which is a phrase which is a complete anathema to us because there are not two sides of industry, as we know, there are many more; at least three. That is where it stands at the moment. A lot of the social legislation that comes out of Europe is born in the Social Dialogue of the European trade unions and the European Employers' Organisation. They meet regularly, they have their secretariat and they work to a particular programme. For example, at the moment they have just embarked on a new programme for the next two years and are concentrating on undeclared work, what we would call black market work, and they are going to come forward with proposals for Member States to deal with the black market problem. We feel quite strongly that the black market victims are our members who are bitterly opposed to black market practitioners because our members do abide by the law and feel that they are being taken for a ride when

the black-marketeers get away with it. We think that undeclared work is very much a small business problem, but this work is going on without any consultation with us and without any representation of us.

Q79 Earl of Dundee: How do you see the role of the FSB developing in Europe? The FSB is already much respected in Europe. You mentioned the existing plan for an institution. Perhaps there are further ideas. For example, how might you best help your sister bodies in Europe so that the Commission and EU does not ride rough shod over the interests of small businesses in Europe quite as easily as they may now do.

Mr Tyrrell: We do play an active part in the affairs of ESBA, the European Small Business Alliance and the last chairman, Brian Prime, was a member of our policy committee and the new chairman is also a member of our policy committee and they are elected by the small business organisations of half a dozen Member States. They have a full-time person in Brussels to deal with their affairs and they have put in their own answer to the Commission's Green Paper. We ourselves realised, perhaps a little late in the day, but realised that to make any real impact in Europe, you would have to get your ideas in before the publication of the document, setting out the direction. In order to cope with that one, we have ourselves opened an office in Brussels with a full-time employee working in Brussels whose main job it is to find out through talks with Commission officials what is going to be happening and to get an opportunity for our committee chairmen, depending on what kind of area of law it is, to meet with the Commission officials who are thinking of producing some new statement, recommendation, directive, regulation or whatever. It is important, but enormously difficult. I was on the receiving end of that at one time in my career, as a Member of the European Parliament and I know how difficult it is even for the MEPs. It is enormously difficult to get anything done in Europe because the whole thing is enormously big. We have a much better relationship with the MEPs than we do with the Commission.

Lord Trefgarne: May I say that I think representation of small businesses is a crucially important point. It is the officials in the Commission who are the problem. I once took a mission of small businesses to see Commissioner Bangemann when he was in that role and he could not have been more helpful; indeed in our very presence he rounded on his officials in the most vitriolic terms for failing to brief him adequately on the problems that we were bringing to his notice and the matter that we complained about was swiftly corrected. The moral is to ignore the officials if you can and get up to the commissioners themselves. I find that the British ambassador to the

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EU is always willing to arrange a meeting for somebody like yourself with the commissioner himself and not the wretched officials who will just fob you off.

Chairman: You have probably heard some good advice there based on experience.

Q80 Lord Trefgarne: You have made much in some of the documents that we have seen and elsewhere of what is described as the “gold-plating” of EU regulations when transposed into British legislation. Can you give us some additional examples of that and also perhaps explain how they have thus damaged the small business sector? Is the problem similar in other Member States?

Mr Tyrrell: I can attempt to give some examples. Last year, in 2006, we produced a book, *Burdened by Brussels or the UK* together with the Foreign Policy Centre, a study of “gold-plating” which we can provide to members if they wish. One of these eight studies deals with part-time workers and that is the first one here. It is rather a complex thing to try to put across in a meeting of this nature. If I might deal with it in a nutshell and not do justice to exactly what happened, the Part-Time Workers Directive, as passed by the European Union, provided—

Q81 Lord Trefgarne: Is this the Working Time Directive?

Mr Tyrrell: No; part-time working which came out of the Social Dialogue. It provided that part-time workers should be treated not less favourably than other workers employed by the same employer under the same contract. The UK Government transposed that in regulation from “under the same contract” into “any contract”, so that means that a part-time worker who is there on a fixed-term basis, maybe because they are standing in for someone on maternity leave, would be able to claim compensation on the same basis as a permanent worker in the firm and that enlarged the scope of the directive very considerably and has made it quite difficult for small businesses to take on part-timers safely, indeed it has given rise to quite a lot of difficulty. Then the other extension in that particular directive was that whereas the directive provided that Member States need not apply this directive to casual workers, the UK has applied it to casual workers. There are two other topical ones. The Age Discrimination Directive which came into effect in 2006 dealt with the vexed question, the complicated question of retirement age and retained the Commission’s directive position that it is open to Member States to have a default retirement age which has been fixed in this country at the age of 65. However, the UK imported something that is not in the directive at all, “a duty to consider”. In order to retire an employee at the age of 65 a procedure has to

be gone through. A letter has to be written to the employee no more than 12 and no less than six months in advance stating the proposal to retire and then there is a procedure for listening to an application not to and an appeal procedure and so on. This “duty to consider” is an entire gold plate. Other Member States do not have it to the best of our knowledge and it means that retirement has become quite a major problem for this reason, that if you retire someone without going through the procedure to the letter, the six months, 12 months to the letter, the dismissal is automatically unfair, which can be a very expensive business for a small business employer. That is a second example. May I just comment on the side that retirement is not a problem in small business? 80 per cent in the August survey to which Lucie already referred did not, before the regulation, have a retirement policy because it was all done by agreement; every individual was looked at separately. If it was somebody whose job was foreman of a building company and the owner thought that he was really no longer fit to go up ladders on account of his age and general health, he could deal with the matter on a basis that did not take account of any particular age. Lots of small business employees went on working into their 70s quite happily in the past. So that is the gold-plating part of it. I alluded to the third one already. The Working Time Directive provided that there should be 20 days’ minimum holiday a year and commensurate for part-time employees. Those 20 days were translated from the directive into UK law under the working time regulations of 1997 and 1998 and there they have stood until now when they are being amended to grant an extra eight days leave putting up the 20 days to 28 days. That is gold-plating. I am not suggesting it is surreptitious gold-plating, indeed it was in the Labour Party manifesto at the last election. It is not surreptitious, but gold-plating it is and they increased from 20 to 28 and most other countries probably did not; certainly our competitors in Asia did not. There is a great sense of grievance about this because the costs are going to be quite inordinate to allow a small firm to take on temporary staff to enable employees to have an extra eight days. I may say that it applies to 37 per cent of our members, as the others give over 20 days anyway voluntarily, but for those 37 per cent it might be a make or break matter.

Q82 Baroness Morgan of Huyton: Turning your argument the other way up, is there a set of basic labour laws to which your members subscribe or are you basically against all forms of labour law and protection for workers?

Mr Tyrrell: No, we are not against all forms. We have been supportive of the national minimum wage for some years. We have a lot of criticisms of it but we

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support the principle. We support unfair dismissal and we have always supported redundancy.

Q83 Baroness Morgan of Huyton: But issues relating to maternity, flexible working, all of those you are opposed to, are you?

Mr Tyrrell: We are saying that small businesses should be separately treated in respect of those.

Q84 Chairman: Do you have a list or a paper which explains the difference between the two categories which have emerged as a result of Baroness Morgan of Huyton's question? It is difficult for us, who are not small business employers, at least I am not a small business employer, to grasp where the line is, the line that you draw between what is acceptable and what is not acceptable. I do not want to put words in your mouth; I am talking off the cuff. Do you have anywhere where that is available to us in some broader form as it were, a paper which has been written or something of that sort?

Mr Tyrrell: No, we do not have that.

Q85 Chairman: An indication?

Mr Tyrrell: We could locate areas where we have asked for small business exemptions or special treatment, but we do not have a paper that sets it out *en bloc*.

Chairman: If you could do that without causing you too much trouble, then that would help the Committee to understand the problems that you are delineating.

Q86 Lord Trefgarne: May I just ask two supplementaries that flow from that? Firstly, where a regulation is introduced by the Government implementing an EU directive but going much further and is nonetheless made under the European Union Act which provides for Orders in Council to have a swift passage, if that Order is actually going much further than the regulation requires, I suppose it is for consideration as to whether it should be introduced under that Act and therefore enjoying a swift passage to the statute book because there is of course a difference in procedure. If you are not implementing something under the EU Act, there is a 40-day process and all sorts of things you can do to query it. Have you considered briefing parliamentarians in that way? Or maybe I am wrong, maybe even if it is a gold-plating regulation, it still enjoys the privileges of the EU Act?

Mr Tyrrell: To the best of my knowledge, we have not; certainly not on employment law matters while I have been chairman we have not.

Q87 Lord Trefgarne: May I ask you to consider that and perhaps you would like to let us have a note.

Mr Tyrrell: Thank you very much. This is education not by me but to me.

Q88 Lord Trefgarne: One of the ways of actually meeting the difficulties, and I very much agree with what Baroness Morgan of Huyton was saying, that we have to make sure that we are not portrayed as opposing everything to do with EU regulation as it applies to employment, but nonetheless, it is very burdensome and vexatious for the very smallest businesses which you represent and therefore perhaps we should be arguing for a larger sized company to be exempt from some of these, not all, but some of these regulations. A company which appoints three or four people is surely going to be extremely burdened by, say, having to provide extensive maternity leave for an employee? Have you thought of arguing for a higher level of exemption for the very smallest companies?

Mr Tyrrell: Yes, we have thought of it. We have not conducted a campaign about it.

Q89 Lord Trefgarne: It might be worth it.

Mr Tyrrell: Yes, it might.

Q90 Baroness Howarth of Breckland: If you are a charity, if you are under a certain level, you are exempted from certain areas of the Charity Commission's hard work so it is quite useful to think about those sorts of structures. I really want to go on to talk about employment security and this curious "flexicurity" word which has been developed, but one of the things that the Green Paper talks about is outsiders and insiders and they describe the insiders as those people who have a good job and it is full time or part time but regular and on the full payroll and others who go in and out of bits of employment. The evidence we have had so far from other witnesses is that that is not really the distinction. The distinction is between those who are employed—and some people would wish to be employed in short bursts for their own requirements—and those people who are unemployed and would like to be employed but just are not employed. I wondered what in your view the best way would be in the small business sector for this area of labour market disadvantage to be addressed. What we have heard is that what are really needed are skills; that is what enables people to get into what we would see as the insider role, being able to get a job as and when they want it. To what extent do small businesses have the capacity to help people to gain skills for the 21st century and what could enhance their future security in employment in the way we have described it just now?

Mr Tyrrell: As far as skills are concerned, we do regard it as the duty of the Government to make sure that everyone can read and write and we do not think we can do very much for those who cannot. Once

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they can, of course, the world is at their feet if they want it to be and if they have the ability to make use of it. There was quite a dramatic debate at our annual conference last year. A motion selected by ballot from the floor for a debate dealt with the whole problem of skills and there was a great deal of criticism of the lack of available courses. Small business owners are willing to allow time off for workers to go on day release or even a two- or three-week full-time course, but there just are not any courses available and that problem is being addressed by our Skills Committee which is trying to put forward some kind of proposals that would cover it. Small businesses cover such an enormous range of activities themselves that it is very difficult to put forward a comprehensive strategy. That is being tackled by us in certain areas.

Q91 Baroness Howarth of Breckland: Do you see your position as lobbying the Government and other organisations to provide courses? Will your Skills Committee define some of the areas in which courses should be provided?

Mr Tyrrell: That is the idea, but it will be on a sector-by-sector basis and not on a comprehensive, across-the-board basis.

Q92 Baroness Howarth of Breckland: I know this can work because I have worked in the Food Standards Agency where the Food Standards Agency provided funding for small businesses in the catering industry to be able to develop their skills in hygiene but that was partly because the industry pressed clearly for the kind of skills that were needed; that might be quite helpful.

Mr Tyrrell: Yes, it might. I have not heard of that one myself.

Q93 Baroness Greengross: We know that there are more and more calls on temporary staff working really through agencies and you will know that there was a proposal some time ago by the Commission for an EU directive on minimum standards for temporary agency workers. I just wondered whether you had a position on who should be considered the legal employer of such workers. Would it be the agency, would it be the business, would it be one of your members? Do you use a lot of agency workers?

Mr Tyrrell: We do, yes, but the majority of agency workers are self-employed. They are self-employed by choice. They work under contracts for services not contracts of service. They might have their name down with a number of different agencies and go from one to another, depending on who is offering the most profitable or interesting work and most

temporary workers are temporary workers because they want to be and they prize that position of being able to take a week off whenever they like really.

Q94 Baroness Greengross: If that went on, would that mean that if there was an EU directive, they would not be subject to it if they were self-employed?
Mr Tyrrell: They would not be covered by EU employment law, no, but they would be covered by English temporary workers' legislation which provides for quite a wide raft of rights, about 11 different rights, tailored simply to temporary workers who are self-employed temporary workers; one group of self-employed who get very real protection from Parliament. As far as Europe is concerned, the temporary workers directive was thrown out by the European Parliament in the last European Parliament before the elections. The central provision of that was that they were to be comparable in pay and conditions with permanent employees and that provision was excised from the directive by the European Parliament. We saw the person working for the Commission, the civil servant responsible for that, soon afterwards and her view was that the whole thing was dead and that was also the view of the President of the European Union Commission, President Barroso, who announced a list of 80 proposals for legislation that were being withdrawn and this was one of them. So I was a bit surprised to see it rear its head again in the Green Paper, but we certainly want the status of self-employment to be enhanced and reinforced rather than reduced. The course we would prefer to take is the one in fact the United Kingdom started to take way back in 1973, but it has been developed a lot since then, in providing various rights for temporary workers. The last big amendment was in 1996 and that seems to have settled down now pretty happily; both the agencies and the workers seem to be satisfied with it. That is the route that the Commission ought to be following, if any.

Q95 Chairman: Can you just clarify? Are you saying that in the sort of companies which your organisation represents the temporary employees may well be self-employed? Is that a distinction between those who are self-employed and those who are employed by the agency which supplies the temporary employee?

Mr Tyrrell: Yes. The large majority of temporary workers are people like actors who have their names down with a number of agencies, nurses also usually have their names down with different agencies and that condition can continue. As far as our members are concerned, yes, we are quite big users of temporary workers, we have to be and it is getting worse in the sense that maternity leave means that the demand for temporary workers is increasing, and holiday leave is going to do the same to it. The *quid*

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pro quo is that all these rights that temporary workers have been given by Parliament against the agencies with whom they work mean that the agencies are carrying quite heavy financial responsibilities now for the temporary workers and that means that their prices have gone up and temporary workers are in danger of being priced out of the market.

Q96 Baroness Morgan of Huyton: Obviously we are all aware of the number of workers coming in as a result of EU accession and what we are interested in is what the impact has been of that movement on small businesses, if any, and whether it has been a positive or a negative. Related to that, are there any advantages or disadvantages that your members would see in introducing a level of EU legislation that was about uniformity of employment rights? Would that be a positive or a negative again in terms of your members?

Mr Tyrrell: I do not think uniformity of rights is practical irrespective of whether it is desirable or not. We are not a political organisation so I would not move into that area. The divergence of the economies is so great that one simply cannot say the terms and conditions of employment of one Member State must be the same as another. This is particularly poignant in the case of the new Eastern European countries who have recently joined, where they think nothing of working 12 hours a day for only half what they would get in France or Germany. We would discount that.

Q97 Baroness Morgan of Huyton: I was not thinking so much about terms and conditions: I was thinking about employment rights. Obviously we are not suggesting for a minute that terms and conditions as such could be negotiated across the EU, but in terms of the sort of directives that have been coming through which are applicable across the EU, what is the impact of those sorts of directives as far as you can see in terms of workers from the accession countries?

Mr Tyrrell: We have not had any particular problems arising out of that at all. I think 84 per cent have not employed anybody from outside the European Union, so we are not really involved in that. What we are going to be very much involved in are the new migrant regulations which are at present under preparation, which is going to impose heavy burdens on employers to check that someone who they take on has the right to work. That is causing many

problems because there is no simple way of finding out.

Q98 Chairman: I am reluctant to keep us here any longer. The last question on the legal status of employees and self-employed people is potentially quite complicated. I wonder whether you would be so good as to send us a written answer to that question.

Mr Tyrrell: Yes.

Q99 Earl of Dundee: The UK is recognised in Europe for fair mindedness in its approach towards labour law. Yet the UK may still not be thought to show best practice. Which other countries are?

Mr Tyrrell: Each country has its own mixture of strengths and weaknesses.

Q100 Earl of Dundee: Lord Wade of Chorlton referred to the productivity test. The absence of red tape is another one. Both reflect good practice and attitudes towards small businesses in certain countries. Which European states may then be better than us at minimising red tape and encouraging productivity as far as small businesses are concerned?

Mr Tyrrell: I am afraid I just cannot answer that, because each country has its strengths and its weaknesses. The Germans and French have an admirable system of protection for workers but it has made them particularly inflexible. The Danes and the Swedes have a high quality, but on the other hand they have heavy taxes. It is not easy to answer that question. We firmly believe that each Member State should look after its own in this respect and the role of the Commission should be to deal with the cross-border aspects of it, having workers employed in one country but actually working in another. That is where the Commission law should come in, to deal with that situation, not to impose what the substantive law is, but to say which law it is that should be applied.

Chairman: That in itself raises another series of discussions which I have had in other parts of the Select Committee business which I have been working on. Thank you very much for coming to us today. We have had a very interesting session and if you could write us an answer to that last question and, as I said before, if there is anything you feel you did not get across properly or something that you would have liked to have said and did not, we are very happy to get supplementary evidence from those witnesses who have come before us. Thank you once again for being with us and I hope you have also found it an interesting occasion.

Supplementary memorandum by the Federation of Small Businesses**QUESTION 64***The FSB's Employment Survey 2006*

Of the total sample, 65 per cent of the businesses had employees, whilst 35 per cent did not. Of those businesses without employees, the three main reasons that prevented them from employing, the most significant culprits were as follows:

1. Employees considered too great a business risk at 36 per cent.
2. The complexity of employment legislation at 32 per cent.
3. The overall burden of red tape and regulations at 31 per cent.
4. The volume of employment legislation at 25 per cent.

NB: As each respondent could choose three answers the results add up to more than 100 per cent. The individual percentages refer to the proportion of the sample who chose the stated area of regulation as one of the three that they considered to be particularly burdensome.

QUESTION 70*Productivity*

Time spent on administration including, importantly, the implementation of and compliance with regulations, is unproductive time. Most small business owners are themselves participating in the supply of goods and services to customers. Most are also their own sales managers. Time spent on administration is time deducted from these activities. Time is money and money is required for investment. Lack of money holds productivity back. The FSB has no statistical evidence to support its proposition as measurement of productivity across such a wide range of businesses poses exceptional problems. Our proposition is therefore based on principle and on anecdotal evidence.

QUESTION 83

The FSB are not opposed to maternity leave and flexibility for employees per se. The FSB recognises and supports the principle of wellbeing for workers and employees. However, the FSB has concerns about the sheer volume of employment legislation and the recent increases in areas such as parental leave, annual leave and the National Minimum Wage. The cumulative impact and cost of such regulations could ultimately deter owners of small businesses from creating employment opportunities as the supporting statistics for question 64 illustrate.

The worst case scenario is that the most vulnerable micro businesses could be forced out of business.

QUESTION 84

The FSB Employment Policy Committee intend on producing a list of exemptions on employment legislation, both on current legal exemptions and exemptions that the FSB believe should be implemented. However, this is ongoing work which will take more time and the FSB apologises for the fact that no such list will be available in the immediate future.

QUESTION 91*Education and Skills*

Much training in small businesses takes place informally. For example, a manager who has just been on a training course may return and pass the knowledge he/she has gained back to the staff. The FSB believe that such informal training should be acknowledged. The FSB also consider that there is very little small business representation on Sector Skills Councils and that it is in the interest of the labour market as a whole for there to be more input at a small business level.

The fact that many small businesses employ workers from new Member States is partly due to the shortage of skills in the UK.

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WRITTEN ANSWERS TO FURTHER QUESTIONS

Question *Would you describe any issues relating to the current UK legal definition of self-employment and employment which affect small businesses. What advantages (or disadvantages) might there be in the Commission seeking a clarification of self-employment/employee status across the EU?*

We bear in mind that employees have great economic advantages over the self-employed in terms of rights and security. Notwithstanding this, a Commission survey shows that a majority of workers would like to be self-employed. Also that the Government Actuary has recently confirmed that national insurance contributions paid by the self-employed are commensurate with those paid by the employed having regard to benefits received. Also, that the tax authorities much prefer payment through the PAYE system to self-assessment for administrative reasons. Classification of worker between the employed and the self-employed is an important issue both from the concern of the worker and the public interest.

In our view, there is only one question. Is the work to be performed subject to a contract for services or a contract of service? The same question can be rephrased: is the contract a commercial contract or an employment contract? In the UK, this question is subject to the common law. The Judges have solved it by application of various criteria. These include:

- Does the worker supply his own skill and judgment?
- Does he/she supply his own tools and equipment?
- Is he/she free to supply services to other contractors or is he required to be dedicated to a single contractor?
- Is he subject to supervision not only for his outcomes but also the way in which he achieves them?
- Is he in business on his own account?
- Has he invested money in that business?
- How have the parties themselves expressed their relationship?
- What is the mutuality of obligation?

The common law is flexible and moves with the times by progressing from precedent to precedent.

It would be easy for the EU to incorporate this question into an EU definition of self-employment. But we oppose such a step. The question would then be moved from one for the national Courts to one for the European Court of Justice. That august body would start again and all our jurisprudence would be lost. The result could be mayhem. We are not willing to risk taking that road.

We consider that though our existing jurisprudence leaves some uncertainty in borderline cases, it presents a definite answer in the overwhelming majority of cases.

The problems in the UK are not in the substantive law but in the procedure. There has been a narrowing in the classification of self-employment by the tax authorities. There have been introduced acrimonious regulations to this effect in the construction industry, particularly pertaining to craftsmen. More recently there has been an administrative challenge to one-man computer consultants, who are called in by larger companies to advise and administer their computer needs when required. Most of these have now found it necessary to incorporate. Change of status has been accompanied by debilitating uncertainty.

To deal with this problem, we supported the Bill introduced by Mark Prisk MP ordered to be brought in on 9/1/2002. In a nutshell, it provided that a worker claiming to be self-employed should make a declaration to that effect when filing his tax return. The Revenue would then have an opportunity to challenge that declaration in a simple procedure before a Tribunal within a limited time and bearing the burden of proof. The Bill failed through want of time but its policy is one we continue to support.

In most other Member States, the insurance provisions dominate. In France, the *Loi Madeleine*, although quite complex, enables a worker to be self-employed provided he joins one of several autonomous insurance societies to ensure he receives and pays for comparable benefits of an employee. In Spain, a Bill to define the position of the self-employed is, we understand, before Parliament at present. It also is dominated by the insurance question, but has run into deep controversy especially a provision for a new status called “the dependent self-employed.” We understand that in the new Member States the acquisition of self-employed status is easy.

In all, we consider that the principle of subsidiarity applies to this problem. The Commission should leave well alone.

19 April 2007

Question *How do you see the way forward in relation to the implementation of the Working Time Directive? What is your view of how minimum requirements for working time could usefully be modified?*

Our view has always been and continues to be that an attempt to impose maximum hours over such a wide range of work, workers, and countries, could not be proportionate and would fail. We have been pleased to support the DTI in its policy of retaining the opt-out by agreement between the employer and the employee. Member States have found ways to mitigate the effects of the Directive. Some have classified most of the management as “autonomous workers” (for example France). Some have made extravagant use of collective agreements (for example Luxembourg, where the hotel and restaurant industry has opted out by collective agreement). Some have accepted that a single worker may have two employment contracts with the same employer, giving double the amount of working time (new Member States). In the UK we have the individual opt-out. The Council is in stalemate.

Our preferred course is the abandonment of any across-the-board restriction. This being apparently impracticable by reason of a blocking majority, we propose two amendments.

First, that on-call time should only be treated as working time if the worker is in fact called, and for the hours so worked. This is urgent for hospital doctors, where the law of unintended consequences has actually damaged patients who can no longer get 24-hour cover. But it has also damaged other 24-hour services: locksmiths who offer a 24-hour service to protect customers who have locked themselves out of their home, or suffered a night-time burglary; rural taxi firms who offer emergency services at all hours; and of course, care homes.

Secondly, to clarify that hours need not be recorded for employees who are not paid by the hour and who have opted out. The UK regulations to this effect have been challenged by the EU Commission, but such paperwork is a useless burden.

1 May 2007

THURSDAY 26 APRIL 2007

Present	Dundee, E. Gale, B. Greengross, B. Howarth of Breckland, B.	Trefgarne, L. Thomas of Walliswood, B. Uddin, B. Wade of Chorlton, L.
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Memorandum by the TUC

INTRODUCTION

The Trades Union Congress (TUC) has 63 affiliated unions, representing nearly 6.5 million people working in a wide variety of UK industries and occupations. The TUC welcomes the opportunity to participate in the Sub-Committee's Inquiry on the EU Green Paper on Modernising Labour Law. The TUC's submission to the EU Commission is attached.

1. *How flexible is the labour market in the UK? What could be the benefits of making it more flexible, and how could this be achieved? In which ways, if any, could changes in labour law help with this?*

The TUC believes that labour law should be improved to provide protection for workers against arbitrary and unfair practices by employers and to assist organisations to adapt to the changing pressures arising from increased globalisation. We do not share the assumption set out in the EU green paper that improved employment levels and labour market dynamism and innovation are dependent upon the increased use of atypical forms of employment and a weakening of employment protection, in particular dismissal protections.

Experience from the UK shows that such views are based on assertions rather than evidence. Between 1997 and 2005, employment growth in the UK occurred against the backdrop of a partial re-regulation of the labour market, including strengthened unfair dismissal protection. The vast majority of new jobs created during this period were in permanent employment. Independent research also demonstrates that there is no negative correlation between employment protection legislation and employment levels, innovation or productivity.

Rather labour law can play an important role in removing barriers which prevent disadvantaged groups from participating fully within the labour market. Enhanced maternity leave entitlements, combined with equal treatment rights for part-time workers, have assisted in increasing female labour market participation in the UK. Similarly, the minimum wage has led to an increase in productivity by incentivising spending on improvements in recruitment/retention, training and IT.

Collective bargaining and effective worker participation play an important role in building high trust, high skilled workplaces which are equipped to respond to the rapidly shifting challenges generated by increased globalisation. Joint working between unions and employers brings benefits in terms of increased working time flexibility. It can also contribute to innovation and to promoting "functional" flexibility, through increased investment in training enables employees to adjust their skills to match the demands of changes in technology and workload.

The TUC believes changes to labour law are needed to further enhance labour market productivity and flexibility. These include measures to encourage collective bargaining and worker representation; improved rights for all workers to work flexibly and improved protections for agency worker and other vulnerable groups.

2. *What is the extent of employment security in the UK? What could be the benefits of changing the present arrangements for employment security? In which ways, if any, could changes in labour law help with this?*

Employment insecurity is widespread. Although the UK has one of the best records unemployment in Europe, we have one of the worst records as regards the share of inactive people of working age who say they want a job. In 2004, the UK's want-work rate was estimated at 11.5 per cent, or 7 per cent higher than the official ILO unemployment rate. This is the fourth highest rate in the EU. Job insecurity and financial insecurity are also prevalent among so-called "atypical" workers. However vulnerability and insecurity is not limited to those on non-standard contracts. The costs and risks associated with increased globalisation, including restructuring,

contracting-out and plant closures have led to pressure for increased flexibility, have also been experienced by those employed on permanent contracts.

The TUC believes that a range of labour law and welfare reforms are needed to address the problems of employment and job insecurity. These include:

- Improved employment protection for agency workers and those employed in non-standard employment.
- A substantial increase in statutory redundancy payments entitlements.
- Reforms to information and consultation arrangements in cases of collective redundancies and insolvencies to ensure that early and meaningful discussions take place between employers and trade unions and worker representatives.
- Enhancements in welfare benefits for job seekers.

3. How helpful do you think is the Commission's concept of "flexicurity" seeking to combine the ideals of a flexible labour market with those of employment security? How practical could it be to strike a balance between these two ideals and where should such a balance be struck? In which ways, if any, could changes in labour law help with this?

The TUC has concerns about the concept "flexicurity" as defined by the Commission in the green paper. The paper appears to reduce the "flexicurity" agenda to the issue of labour law reform and increased "numerical flexibility" through external contractual flexibility and the increased use of atypical forms. Reducing dismissal protection would result in increased job insecurity and job satisfaction with its consequential effects on worker motivation, innovation and productivity levels. In seeking to improve flexibility, to generate better quality jobs and to ease labour market transitions, the Commission should focus on positive measures such as improved education and life-long learning, generous social protection and measures to improve the reconciliation of work and private life.

There are also important lessons which may be learnt from those Nordic economies where the concept of flexicurity originated, notably Denmark. The Danish model of flexicurity combines generous social protection arrangements with comparatively strict employment protection measures. The development of flexicurity models also coincided with a highly developed social dialogue, where social partners have played an essential role in negotiating the balance between flexibility and security on the labour market.

4. What other challenges are facing those involved in the labour market? Respondents may wish to comment on their knowledge of a variety of different types of "subordinate" employment contracts and/or on their knowledge of the challenges faced by those in self-employment, "economically dependent" self-employment and agency work. To what extent could changes in labour law help to address these challenges?

A growing proportion of EU workers including many migrant workers, face financial and job insecurity, limited access to training and discrimination due to their precarious employment. In 2002 the UK Government (DTI) estimated that agency workers in the UK earn approximately 68 per cent of the earnings of permanent employees. There is evidence of migrant agency workers being forced to live in over-crowded, sub-standard accommodation and then being charged exorbitant rates for the accommodation.

The adoption of the EU Temporary Agency Worker Directive would guarantee agency workers equal treatment on pay and other basic employment conditions. It would also contribute to the Government's strategy for promoting fairness, flexibility and productivity and to its wider social cohesion agenda.

The distinction in UK employment law between "worker" and "employee" is a significant one, governing access to a hierarchy of employment rights. In order to qualify for important rights such as unfair dismissal protection, redundancy payments and certain parental rights, it is necessary for an individual to demonstrate that they are an "employee" rather than a "worker". Groups of worker in the UK labour market, notably those in "non-standard" employment relationships, find it particularly hard to demonstrate that they are "employees." This includes the so-called bogus self-employed, agency workers, home-workers and freelancers. As a result such workers are vulnerable to being laid off without notice or good cause. Lack of access to maternity, paternity and parental leave rights also restricts the ability of workers to choose flexible working patterns which accommodate their caring needs.

Equal treatment for agency workers and measures designed to clarify employment status and to extend employment rights to all workers would not restrict the abilities of employers to use more flexible contracts. They would however ensure that those employed on flexible contracts are treated fairly and assist in making non-standard employment a more attractive option for a wider category of workers, thereby extending the pool and increasing the quality of workers from which employers can choose.

5. To which categories of workers should labour law apply? Are any workers currently excluded that ought, in your view, to be included? What is your view of the issues raised by the Green Paper about the applicability of labour law to groups of workers whose employment status is intermediate between that of employee and self-employed?

The TUC believes that labour law should apply to all economically dependent workers, including agency workers, home-workers, so-called “casual” workers and freelancers who regularly work for a number of different employers within the same industry. There should be a legal presumption that all workers qualify for the full range of EU and domestic employment rights. The onus should be placed on the employer to demonstrate that an individual is genuinely self-employed. In the case of agency workers, while the employment agency should be treated as the primary employer, the hirer employer should also have joint and several liability for any breaches of employment rights.

6. What is the role of regulation at the EU-level in achieving a modernised system of labour law? Are there any specific pieces of EU legislation that need either to be repealed or to be introduced? Do you consider that the Green Paper’s proposed “Floor of Rights” for all workers is a viable one? In order to promote worker mobility, would a Community-wide definition of “worker” be useful?

The TUC believes that there is a need to promote and extend the social dimension of the European Union. Under Treaty obligations, the European Union is already committed to promoting the employment, improved living and working conditions, dialogue between management and labour, high employment and the combating of social exclusion. The Commission therefore has a duty to maintain the social dimension of the European Union through the development of core European labour standards. Priorities for future reform should include:

- The introduction of equal treatment rights for agency workers, similar to those provided for fixed term and part-time workers.
- Measures to ensure that all workers, including agency workers, home-workers and freelancers, qualify for EU employment protection regardless of their employment status.
- Improved measures to protect migrant workers from exploitation and discrimination.
- Measures to provide improved work-life balance, in particular for workers with caring responsibilities.
- The protection and promotion of fundamental rights, in particular rights to freedom of association and for trade unions to organise, bargain collectively and to take industrial action.

The Commission should also take further steps to ensure that EU employment legislation is effectively implemented and enforced in EU member States. Beyond core EU labour standards, the TUC believes, however, that decisions over the reform of labour law and the level of social protection provided should remain primarily a matter for determination for Member States and should not be subject to challenge under free movement principles.

The TUC would not generally support a “floor of rights” approach to guaranteeing fair treatment for workers across the EU. There is a risk that a floor of rights approach can all too readily translate into a ceiling of rights leading to a “levelling down” of the best legal and collectively negotiated employment rights.

March 2007

TUC SUBMISSION TO THE EUROPEAN COMMISSION

INTRODUCTION

The Trades Union Congress (TUC) has 63 affiliated unions, representing nearly 6.5 million people working a wide variety of industries and occupations in the UK. In November the EU Commission published its green paper: “Modernising labour law to meet the challenges of the 21st Century”. The green paper seeks to initiate an important debate on how labour law should evolve in the EU to respond to the challenges of increased globalisation and to support the Lisbon Strategy’s objective of achieving sustainable growth in good quality employment. The TUC welcomes the opportunity to participate in this debate.

SUMMARY

The TUC’s key views on the green paper can be summarised as follows:

- The TUC welcomes the recognition in the green paper of the need for increased protection for the growing proportion of workers across the EU in precarious forms of employment. This employment is characterised by low pay; financial and job insecurity; exclusion from basic employment rights including unfair dismissal and redundancy rights and family friendly rights; and limited access to training or in-work benefits including sick pay, and pensions. Increasing the security of those employed in non-standard employment and providing access to training, would contribute to the Commission’s objectives of reducing labour market segmentation, increasing flexibility for employers and workers; making atypical employment a more attractive employment option and increasing productivity.
- Vulnerability in the labour market¹ is not limited to those employed on “non-standard” contracts. The costs and risks associated with increased globalisation have also been experienced by those employed on permanent contracts. The effects of restructuring, contracting-out and plant closures have led to pressure for increased flexibility, including on working time patterns and job losses. The TUC believes that consideration should also be given to improving employment and welfare protection for those affected by restructuring or redundancies.
- The TUC is concerned that the green paper focuses on individual employment rights and gives very limited consideration to the contribution of collective labour laws, including collective bargaining to labour market productivity and flexibility.
- The TUC strongly disagrees with the general arguments advanced in the green paper that improved employment levels and labour market dynamism and innovation is dependent upon the increased use of atypical forms of employment and a weakening of employment protection, in particular dismissal protections.
- Experience from the UK labour market and from other member states demonstrate that these arguments are based on assertion, as opposed to evidence.
 - Between 1997 and 2005, employment growth in the UK took place against the backdrop of a partial re-regulation of the labour market, including strengthened dismissal protection.
 - The vast majority of new jobs created in the UK during this period were in permanent employment. Atypical forms of employment still only represent 6 per cent of the UK labour market.
- Independent research also demonstrates that there is no negative correlation between employment protection legislation (EPL) and unemployment, employment levels or innovation and productivity.
- There is no evidence that increased staff turnover, arising from reduced unfair dismissal protections, would contribute to increased innovation. Indeed, increased turnover is more likely to lead to productivity losses due to the negative impact on staff loyalty and commitment, the reduced return to training investment and the loss of the tacit knowledge of employees with longer tenure.
- The TUC does not believe that the Anglo-Saxon model provides a paradigm for labour market success. Although it has a good employment record, the UK labour market is also characterised by earnings inequality, and a high level of in-work poverty. In contrast, Nordic countries have similar employment records to the UK. However as a result of higher levels of collective bargaining coverage, employment protection and welfare benefits they experience lower earnings inequality and there is a relatively low level of in-work poverty. In addition, these economies have achieved better social outcomes with higher life expectancy, better general health and a lower level of in-work poverty.

- In terms of the future of EU labour law, the TUC believes that the EU should focus on developing a labour market policy based on three key objectives:
 - An efficient labour market, with a higher proportion of working-age people in employment, and quick and effective matching of people without jobs to jobs without people. Over time we want more and more jobs to be good jobs, offering fair pay, sustainability and security, satisfying jobs that are compatible with family life and involvement in the community.
 - A fair labour market. We want safe and healthy workplaces; secure employment and an end to discrimination and inequality in pay and prospects.
 - A participating workforce, where unions play a key part through collective bargaining to give employees a distinct voice at work and in dialogue with social partners.
- The European Union is already committed, under Treaty obligations, to promote the employment, improved living and working conditions, dialogue between management and labour, high employment and the combating of social exclusion. Priorities for the Commission should include:
 - The introduction of equal treatment rights for agency workers, similar to those provided for fixed term and part-time workers.
 - Measures to ensure that all workers, including freelances, qualify for EU employment protection regardless of their employment status. The legal distinction drawn in the UK between “employees” who qualify for all employment protections, and “workers” who are entitled to very limited rights, has contributed to increased labour market segmentation, which is compounded by the problem of some freelances not even qualifying as workers.
 - Improved measures to protect migrant workers from exploitation and discrimination.
 - Measures to provide improved work-life balance, in particular for workers with caring responsibilities.
 - The protection and promotion of fundamental rights, in particular rights to freedom of association and for trade unions to organise, bargain collectively and to take industrial action.
- The Commission should also take further steps to ensure that EU employment legislation is effectively implemented and enforced in EU member States, including the Working Time Directive, the Posting of Workers Directive and the Collective Redundancies Directive.
- Beyond core EU labour standards, the TUC believes that decisions over the reform of labour law and the level of social protection provided should remain primarily a matter for determination for Member States and should not be subject to challenge under free movement principles.

RESPONSES TO QUESTIONS

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

(a) Purposes of Labour law

The TUC believes that the objectives of labour law remain the same today as they have always done. These are:

- To redress the unequal power imbalance, which exists between employers and workers.
- To provide protection for workers against arbitrary treatment by employers.
- To outlaw discrimination.
- To protect and promote fundamental rights and freedoms including the freedom of association and the right for trade unions to organise, to bargain collectively and to organise collective action.

In addition, regulation of the labour market, including employment legislation and collective bargaining, can also support active labour market policies, for example, by removing barriers which prevent disadvantaged groups of workers from participating fully within the labour market. It is widely recognised that enhanced maternity leave entitlements, combined with equal treatment rights for part-time workers have played an important role in increasing female labour market participation in the UK. Individual regulations often create business advantages, as well as costs. The minimum wage, for instance, has led to an increase in productivity by incentivising spending on improvements in recruitment/retention, training and IT. Labour market regulation, including collective bargaining, can also assist on building high trust, high productivity workplaces.

(b) The role for EU Labour Law

The TUC believes that there is a need to promote and extend the social dimension of the European Union. Under Treaty obligations, the European Union is already committed to promoting the employment, improved living and working conditions, dialogue between management and labour, high employment and the combating of social exclusion. The Commission therefore has a duty to promote and maintain the social dimension of the European Union through the development of core European labour standards. Areas of competences and obligations include:

- working towards the upward harmonisation of living and working conditions of non-standard workers;
- providing for fair and just working conditions to all EU workers;
- adopting 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;
- guaranteeing 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;
- ensuring proper implementation and enforcement of existing EU rules and regulations;
- guaranteeing free movement of workers, services, goods and capital, in a framework of equal treatment and fair competition;
- developing employment and other policies to promote more and better jobs; and
- promoting social dialogue.

(c) Priorities

The TUC would identify a number of priorities for the Commission in the area of labour law. The TUC does not support the view that future reform should be limited to individual employment rights. The Commission and Member States have an important role to play in protecting and promoting of fundamental rights of workers in the including rights to freedom of association and for trade unions to organise, bargain collectively and to take industrial action, as safeguarded in the European Social Charter, the Charter of Fundamental Rights, ILO Convention 87 and the European Convention on Human Rights. The case for the introduction of equal treatment rights for agency workers, similar to those provided for fixed term and part-time workers is also well established. The TUC would welcome urgent progress on negotiations on the Temporary Agency Worker Directive. As outlined in our response to questions 7 to 9, the issue of employment status and the application of EU employment standards also needs to be addressed. Provisions should be introduced to ensure that all economically dependent workers qualify for EU and domestic employment rights, regardless of their employment status. The TUC believes that the extension of basic employment protection to vulnerable groups of workers including agency workers, “casual” workers and freelancers would contribute to the Commission’s strategy for promoting fairness, flexibility and productivity in the workplace and to its wider social cohesion agenda.

In addition the TUC would support:

- Measures to protect migrant workers from exploitation and discrimination. The TUC supports the ETUC framework of action on migrant workers.
- Measures to provide improved work-life balance, in particular for workers with caring responsibilities.
- A review of and improvements to existing regulations designed to provide workers with protection during restructuring and outsourcing, including the directives on collective redundancies, acquired rights and insolvencies.

The Commission should also take further steps to ensure that EU employment legislation is effectively implemented and enforced in EU member States, including the Working Time Directive, the Posting of Workers Directive and the Collective Redundancies Directive.

In the light of pending litigation before the ECJ in the *Viking/Laval line* of cases, the TUC believes that action by the Commission is necessary to protect the right of Member States to implement social protection measures which exceed the European minimum standards and in particular which protect fundamental rights, such as freedom of association and the right to take collective action. The TUC does not believe that social policy and

labour law or industrial relations systems adopted in Member States should be subject to or “trumped” by free movement principles.

The TUC would be firmly opposed to any initiatives designed to encourage the weakening of job protection measure’s or other aspects of EU or domestic labour law.

2. *Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?*

The TUC believes that improved labour law and the extension of collective bargaining coverage can play a central role in reducing labour market segmentation, extending employment security and creating more adaptable and responsive organisations. Any weakening of employment protection measures or restrictions on collective bargaining would lead to increased labour market segmentation.

(a) Improved protection for vulnerable workers in the EU

The TUC shares the concerns expressed in the green paper over the emergence of a two-tier labour market due in part to increased contracting out and diversity of employment relationships. As a result, a growing proportion of EU workers find themselves in insecure and vulnerable, forms of employment.

While a majority of the UK workforce are employed in permanent jobs a significant proportion, including many migrant workers, face exploitation, financial and job insecurity, limited access to training and discrimination due to their precarious employment.

Agency workers in the UK face discrimination on pay and other basic employment conditions. In 2002 the UK Government (DTI) estimated that agency workers in the UK earn approximately 68 per cent of the earnings of permanent employees⁷². The OECD⁸ also recognises that temporary employment is associated with a wage penalty.

Research⁹ carried out by the TUC in 2005 revealed that far from receiving equal pay as compared with directly employed staff, there are many instances of agency workers not even receiving the minimum wage. Case studies gathered by the TUC revealed that some agencies:

- Make deductions for “unforced” payments for benefits such as meals, (which in reality the agency Worker has no choice but to accept as part of the package) and then counting those deductions towards the minimum wage.
- Count deductions for items such as uniforms, equipment and transport towards national minimum wage pay, contrary to the legislation. In one case, workers had £500 deducted from their wages, allegedly in payment for their return fare to Spain. The TUC was also told about workers being charged for health and safety equipment in direct contravention of the law.

The TUC has also received reports of migrant agency workers being forced to live in over-crowded, sub-standard accommodation and then being charged exorbitant rates for the accommodation. Migrant workers are particularly vulnerable to abuse from unscrupulous operators in the sector, due to language difficulties and a lack of awareness of their rights.

The TUC believes that the adoption of the EU Temporary Agency Worker Directive would guarantee agency workers equal treatment on pay and other basic employment conditions. It would also contribute to the Commission’s strategy for promoting fairness, flexibility and productivity in the workplace and to its wider social cohesion agenda. The introduction of equal treatment rights would not restrict employers’ freedom to use flexible forms of employment. It would however prohibit discrimination against agency workers, making agency work a more attractive option for a wider category of workers, thereby extending the pool and increasing the quality of workers from which employers can choose.

Many UK workers, including agency workers, casuals, freelancers and others employed on non-standard contracts, are also vulnerable due to their precarious employment status and their exclusion from many employment rights. The inconsistent application of employment rights has contributed to the creation of a two tier workforce and increased labour market segmentation in the UK.

By employing individuals on non-standard contracts, employers are free to hire and fire at will. Although non-standard employment is often transient in nature, atypical workers are increasingly employed on a longer-term basis. Statistics from the Labour Force Survey indicated that 25 per cent of agency workers remain on the

⁷ The DTI Regulatory Impact Assessment, of the effects of the proposed EU Temporary Agency Worker Directive.

⁸ 2002 Employment Outlook Report.

⁹ TUC *Below the Minimum: Agency workers and the minimum wage*, 2005.

same assignment for more than 12 months. However, unlike directly employed permanent staff or those on fixed term contractors, agency workers have no rights to unfair dismissal protection or redundancy pay if laid off.

“Workers” are also excluded from maternity, paternity and parental leave, reducing to their ability to choose flexible working patterns which accommodate their caring needs. Some freelancers have faced difficulties in enforcing their working time rights. “Workers” are also excluded from trade union rights, including the right to protection for taking part in official industrial action, limiting their ability to take collective action to protect their interests.

Measures designed to clarify employment status and to extend employment rights to all workers would not restrict the abilities of employers to use more flexible contracts. However, it would ensure that those employed on flexible contracts are treated fairly, making non-standard forms of employment more attractive.

(b) Collective bargaining: offering win-win solutions

The TUC also believes that collective bargaining and effective worker representation can play a central role in reducing inequality and enabling organisations to adapt to increased competitive pressures.

Trust is an essential element for facilitating successful change in workplaces. Involving employees in decision-making and giving them a real influence over decisions leads to higher morale and to staff being more likely to support workplace change. An independent voice can reassure workers that their interests have been fairly taken into account. There is no evidence that union recognition impairs any employer’s flexibility. Research conducted by the TUC reveals that unionised workplaces are more likely to use temporary workers and more often outsourced functions.

Joint working between unions and employers can also bring benefits in terms of increased working time flexibility. Unions have for several years been negotiating for flexible working time to enable workers to integrate the whole of their lives. This has resulted in working patterns which marry operational needs of the organisation and those of working parents. For example, the Times of Our Lives project at Bristol City Council, backed by the TUC and council trade unions, succeeded in developing innovative working patterns that helped improve Council services at the same time as employees were able to enhance their work-life balance. The Time or Our Lives succeeded because everyone involved was committed to a mutual gains solution, joint working and a partnership approach.¹⁰

(c) Effects on equality and social cohesion

Some commentators point to the Anglo-Saxon model—based on low welfare benefits, light levels of employment protection legislation, and a low level of collective bargaining coverage—as providing a paradigm as offering a paradigm for labour market success. However, it is important to note that the UK labour market is characterised not only by a comparatively strong employment record but also by earnings inequality, a high level of in-work poverty and discrimination. For example:

- According to the 2006 Monitoring Poverty and Social Exclusion Report commissioned by the Joseph Rowntree Foundation and prepared by the New Policy Institute, the number of adults aged 25 to retirement in poverty but in working households in the UK has risen from 1.3 million to 1.9 million on the last decade.
- Many low paid workers in the UK are not classified as living in poverty, as a result of long working hours, living in households with those earning more or the effect of tax credits. According to the Monitoring Report, in 2005 14 per cent of men aged 22 plus and 29 per cent of women in the same age range earn less than £6.50 an hour. Part-time work in the UK brings a high (50 per cent) risk of low pay. The proportion of both male and female workers on low pay has however slowly declined since 2000, as a result of the introduction of the National Minimum Wage.
- In the UK, women face major barriers to rewarding employment.
 - In 2005, full time hourly earnings for men were 17 per cent higher than for women and much higher in some sectors, eg 42 per cent higher in banking and insurance services.¹¹
 - According to the OECD¹² on gender pay gap the UK ranked 12th out of 19 countries studied.
 - Key explanations in the UK include job segregation, but also the long hours culture where part-time work is ghettoised into lower-paid, short hours jobs. In 2005, women working part-time earned only 62 per cent of the average hourly earnings of men working full-time.

¹⁰ *Work/Life Balance: findings new ways to work*, Jane Pillinger, PCS, Inland Revenue and TUC, 2001.

¹¹ ONS (2005) Annual Survey of Hours and Earnings 2005 revised December 2005.

¹² *Employment Outlook*, OECD, July 2002, chapter 2, “Women at work: who are they and how are they faring?”.

- Many thousands of women earn less than the Lower Earnings Limit and therefore lose out on social protection benefits.
- The prevalence of part time and other forms of non-standard employment for women in the UK has a major impact of pension entitlement. In retirement, women receive 47 per cent lower weekly income than men.
- People from black and minority ethnic communities also suffer discrimination in the workplace.
 - Unemployment is now higher for black workers than it was 10 years ago. People from black and minority ethnic communities are nearly twice as likely to be unemployed as those from white communities.
 - In 2005, 69 per cent of Pakistani and Bangladeshi community were classified as poor compared with 22 per cent of the country as a whole and individuals from these communities are three times more likely to be unemployed than the population as a whole.¹³

In contrast, Nordic countries, which are characterised by collective bargaining and social dialogue, more generous welfare benefits and more restrictive employment protection, have achieved similar employment records to those witnessed the UK. This clearly demonstrates that there is no one route to full employment. However in these Nordic countries earning inequality is lower and there is a relatively low level of in-work poverty. In addition these economies have achieved better social outcomes with (higher life expectancy, better general health and a lower level of in-work poverty).

Independent research also confirms that collective bargaining, and in particular centralised bargaining at a sectoral or national basis, reduces income inequality. In its 2004 Jobs Study¹⁴ the OECD looked at two measures of earnings inequality: the ratio of top to bottom earnings and the relative rewards of women in Members States. It found: “consistent evidence that overall earnings dispersion is lower where union membership is higher and collective bargaining more encompassing and centralised.”

A World Bank review¹⁵ reached similar conclusions: “Countries with highly coordinated collective bargaining tend to be associated with lower and less persistent unemployment, less earnings inequality . . . and fewer and shorter strikes compared to countries with part-coordinated bargaining (for example, at industry level) or uncoordinated (for example, firm-level bargaining or individual contracting.”

3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?

It is now widely recognised that levels of employment protection legislation (EPL) do not have a negative correlation with levels of employment or unemployment. In 2002 Richard Freeman looked at countries’ economic performance and their labour market institutions, product Market regulation and regulations on business formation and found “no discernable link”.

This point was recognised in the OECD Jobs Study in 2004¹⁶ and is confirmed by experience from the UK labour market and other member states. Since 1997, the UK Government has introduced a number of new employment regulations, including signing the Social Chapter; giving workers a right to four weeks’ paid holiday, introducing paternity leave and extending paid maternity leave, the creation of statutory recognition rights that have led to over 1,000 new recognition deals, and the introduction of the national minimum wage and its extension to young workers. Most significantly in the context of debates on the green paper, the Government also made to individual job protection, including the reduction in the qualifying period for unfair dismissal protection from two years to 12 months and increased compensation awards.

Critics argued that each and all these of these measures would result in increased unemployment and reduced employment opportunities. In practice, the exact opposite occurred. Since 1997 unemployment has fallen from 8 per cent to 5 per cent. Over the period 2001–04, the UK’s average employment was 5.1 per cent. The economy generated 1.5 million new jobs. In addition, Nordic countries have as good an employment record as that experienced in the UK. However these economies are characterised by high collective bargaining coverage and stricter employment protection legislation.

¹³ *Poverty, Exclusion and British People of Pakistani and Bangladeshi Origin*, TUC.

¹⁴ *Employment Outlook 2004*, Chapter 3, OECD, 2004.

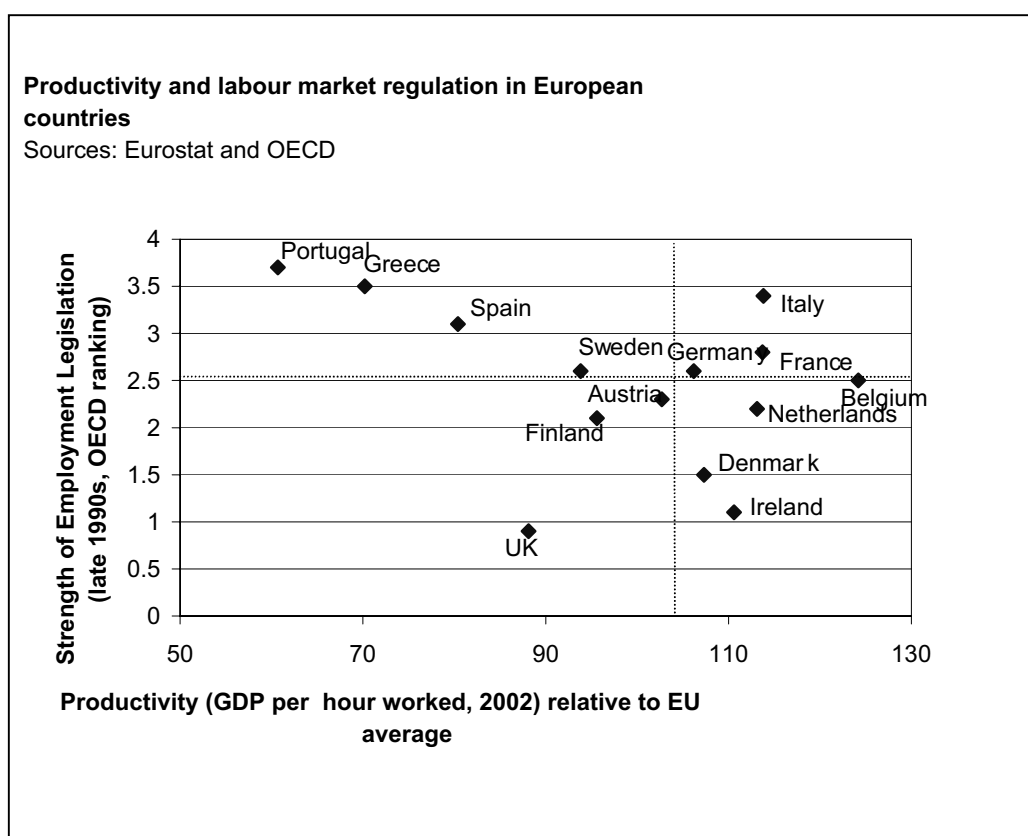
¹⁵ *Unions and collective bargaining—Economic effects in a global environment*, Todd Ait and Zafiris Tzannatos, The World Bank, 2002.

¹⁶ OECD, *Employment Outlook 2004*.

Further the TUC does not agree with the argument reflected in the green paper that labour market regulation, including collective bargaining coverage, has a negative effect on productivity. Although the European Commission¹⁷ has ranked the UK's labour market performance "among the best in the EU", it has also recognised that UK productivity is "historically weak compared to the EU average . . . due in part to insufficient levels of basic skills and a lack of access to training among certain categories of worker".

Labour market regulation seems not to be the cause of the UK's relatively poor productivity record. In the following chart the unbroken horizontal line divides the seven countries with the highest level of regulation from the seven with the lowest, based on an OECD index measuring the rules covering regular and temporary employment and collective dismissal.

The vertical line divides the higher from the lower productivity countries. The measure is GDP per hour worked: in 2002 the UK's productivity was 88.3 per cent of the EU average.



EU member states are scattered equally across all four quarters of the chart. The UK is outstanding for low regulation and low productivity. Only Portugal, Spain and Greece record lower levels of hourly productivity. Any correlation between productivity levels and employment protection legislation is clearly not established.

The TUC also does not accept the argument that job protection legislation impacts on innovation because it slows down labour market churn. This argument assumes that the adoption of new technologies and innovation is dependent on labour turnover. However, as a recent Work Foundation report¹⁸ argued employment protection legislation is more likely to have "a positive effect because offering employees a higher degree of security elicits a higher level of discretionary effort. Longer job tenures may enhance human capital too—employers are more likely to invest in the training and development of workers who stay with the organisation for a prolonged period. Equally, there are valuable opportunities for employees to develop tacit knowledge leading to productivity gains that can be captured by the employer."

There is widespread recognition of the important role which collective bargaining and effective worker participation can also play in building high trust, high skilled workplaces which are equipped to respond to the rapidly shifting challenges generated by increased globalisation. The presence of unions in workplaces make an important contribution to innovation and to promoting "functional" flexibility, through increased investment in training enables employees to adjust their skills to match the demands of changes in technology and workload. Analysis of data from the Chartered Institute of Personnel and Development's 2001 Training

¹⁷ *European Economy 4/2003*, European Commission.

¹⁸ "Who's afraid of Labour Market Flexibility?" *Work Foundation (2006)*.

and Development Survey revealed where unions are directly involved in training policy decisions at the level of the establishment, the company is more likely to use staff attitude surveys, workplace consultative committees, job rotation, mentoring, train-the-trainer programmes and quality circles.

4. *How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility Within the framework of these contracts while ensuring adequate standards of employment security and social protection alt the same time?*

As stated above, the TUC welcomes the recognition of the need for measures to improve the labour market opportunities, including access to training, for vulnerable groups of workers including agency workers. The TUC however does not accept the insider/outside analysis contained in the green paper or the assertion that improved labour market opportunities for those precarious forms of employment is dependent on the weakening of employment protection for those in permanent employment.

(a) Benefits of equal treatment rights

The TUC believes that the introduction of equal treatment rights for agency workers would improve the quality of working life for vulnerable groups of workers and increase the attractiveness of such flexible forms of employment. Some people enjoy agency work because they relish the variety of flexible working patterns and new challenges, or want to get a taster or experience of working in a particular sector or industry at the start of their careers. But they are a minority. The UK Labour Force Survey reports that only a quarter (26 per cent) of agency workers choose agency work because they do not want a permanent job, while half (48 per cent) say that they would prefer a permanent job. 57 per cent of male agency workers said that they could not find permanent work, compared to 37 per cent of female agency workers. For many agency work is second best—insecure, badly paid and at worst downright exploitation.

The Temporary Agency Worker Directive would also assist workers to make labour market transitions by providing rights for agency workers to improved training opportunities and prohibiting the use of temp-to-temp fees. The DTI in the UK estimated that if agency workers were to be given access to equivalent training opportunities as permanent staff, as proposed in the Temporary Agency Worker Directive, this could result in improved productivity at a value of between £98 million and £272 million.

(b) Atypical employment and employment growth

However the TUC is concerned that the green paper over-exaggerates the importance of a greater use of “non-standard” employment for economic success. Evidence from the UK labour market demonstrates that employment growth is not dependent on an increased use of contingent labour.

*Re-regulation and job growth in the UK 1997–2002*¹⁹

<i>UK, seasonally adjusted Spring 1997–Autumn 2002</i>	<i>1997 (000s)</i>	<i>2002 (000s)</i>	<i>Change (000s)</i>	<i>Change (%)</i>
Employees	22,660	24,452	+ 1,792	+ 7.9%
Permanent employees	20,903	22,874	+ 1,971	+ 9.4%
Temporary employees	1,757	1,578	– 179	– 10.2%
Full-time employees	16,896	18,197	+ 1,301	+ 7.7%
Part-time employees	5,764	6,255	+ 491	+ 8.5%
Self employed	3,277	3,141	– 136	– 4.2%
Total employment	26,270	27,778	+ 1,508	+ 5.7%

The vast majority of jobs created between 1997 and 2002 were in permanent employment. Fewer than 6 per cent of employees in the UK work on a temporary basis.²⁰ The most common form of temporary work is fixed term contract that accounts for nearly half (45 per cent) of all temporary employees. This is followed by casual work (20 per cent). Agency working comes third at just under 18 per cent.²¹ Seasonal work was 6 per cent. All other forms of non-permanent employee work account for 11 per cent of temporary workers.

¹⁹ Labour Force Survey data, total employment includes government trainees and unpaid family workers.

²⁰ Labour Force Survey 2005.

²¹ It is highly likely that the total number of agency workers is somewhat higher than the LFS estimate. The DTI Regulatory Impact Assessment estimated that there were 700,000 agency workers in the UK in 2001.

Other key trends in the UK labour market include:

- Part-time work has grown steadily in every decade since the start of the 1970s. The UK's figure is above the EU-15 average, and more prevalent in the UK than any other EU-15 nation except The Netherlands (44 per cent).
- Self-employment has ranged between 3.3 million to 3.6 million employees over the past decade, and is increasingly dominated by white-collar professional jobs.
- Second jobs (1.1 million) have fallen back slightly since 1997, and are more common amongst the low-paid.
- Homeworking—about 2.5 per cent of employees work from home, well below the EU-15 average (3.8 per cent)²².
- Teleworking cuts across various forms of employment and is replacing more traditional forms of homeworking, but less than 1% are engaged in telework.

(c) Limitations on the role for atypical work

Further as a recent ESRC funded research report *Managing to Change*²² argues that while flexible working practices in the UK may be widespread, future growth in flexible working may be limited and the spread of flexible labour “is running out of steam”. *Managing to Change* suggests that various factors explain the plateau of flexible working in the UK; employees’ resistance to providing endless supplies of expendable labour in a booming labour market; its attractions for employers may be declining as temporary and part-time employees are given more rights in employment law; and employers are becoming convinced that “the best flexibility is that of well-trained, motivated and adaptable employees”.

Indeed, measures designed to encourage member states to incentivise the use of atypical forms of employment could prove detrimental to business success. As the UK Treasury²³ points out: “A high proportion of temporary workers may be detrimental to the economy if it reduces the incentives for employers to offer training and development opportunities to workers whom they judge are unlikely to stay with them in the longer term.”

Research carried out by Beynon et al (2002) on employers’ strategies reveals that agency and casual staff are increasingly concentrated in low skilled and often monotonous jobs on a permanent basis. These practices are particularly prevalent in the food manufacturing, hotels and catering, transport, communications, finance and local government sectors.

Such strategies have a number of risks. Research by Purcell et al (1999) found that employers often associated the use of so-called “flexible-workers’ with high labour turnover, absenteeism, and low staff morale which could result in low levels of commitment, loyalty and performance. These factors often outweighed the benefits associated with increased flexibility for employers to match labour supply to shifts in demand. As a result in a number of sectors employers were retreating from the use of flexible working arrangements.

It is also widely recognised that the lack of appropriate training is one of the key problems associated with the use of casual and agency workers. Due to the frequently temporary duration of their assignments, there is limited incentive on employers to invest in the vocational training of such workers. In the case of agency workers, where training is provided, skill levels are often not firm or organisation specific. The absence of relevant experience and knowledge can result in increased burdens on permanent staff, who are required to perform a mentoring role for temporary workers.

5. *Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (ie passive labour market policies) and active labour market policies?*

The TUC recognises that there is a wide-ranging debate on “flexicurity” in the European Union. We look forward to participating in this wider debate.

The green paper appears to reduce the “flexicurity” agenda to the issue of the reform of labour law and increased “numerical flexibility” through external contractual flexibility and the increased use of atypical forms. Very limited consideration is given in the paper to the benefits of “functional’ flexibility; through which increased investment in training and life long learning enables employees to adjust their skills to match the demands of changes in technology and workload.

²² *Managing to Change: British Workplaces and the Future of Work*, M White, S Hill, C Mills and D Smeaton, 2004.

²³ *EMU and labour market flexibility*, HM Treasury, 2003, para. 2.93.

The green paper emphasises the need, for a relaxation of “overly protective terms and conditions” linked to the traditional employment relationship, such as dismissal regulation. The assumption is that such changes would ease transitions for standard workers from one job to another job, and to ease access for “outsiders” or non-standard workers into more regular employment.

The TUC has a number of concerns about this approach. Firstly, the TUC does not accept the assumption that weakening job protection measures for those in standard employment would ease access for non-standard workers into more regular employment. Evidence from across Europe gathered by the OECD shows that significant numbers of people in all forms of temporary job move into permanent work. In most economies studied between one third and two thirds of temporary workers move on to permanent jobs within two years. There was limited evidence that the presence of stricter employment legislation restricted employment transitions for agency workers. The rate of transition into permanent employment was similar in the UK, where there are limited job security measures, to the rate in economies with stricter protections.

Other factors, in particular lack of access to education and training, or protracted periods of unemployment may have a more significant effect. The OECD found in 2002, “mobility into permanent jobs is the highest for medium to highly educated persons between the ages of 25 and 34, who have not been unemployed in the previous five years and are employed by a medium or large sized firm in the private sector.” This is hardly surprising, as such a group of workers would be highly employable in almost any labour market. Those with poor education, older workers, and those with lengthy and frequent spells of unemployment are far more likely to be left behind. The OECD also warned, “persons spending an extended period of time in temporary jobs may be compromising their long run career prospects, in addition to being subject to considerable employment insecurity”.

Secondly, the green paper 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 supposition fails to recognise the increased pressure for flexibility faced by those on standard contracts in recent years. Experience from the UK reveals that vulnerability in the labour market is not limited to those employed on “non-standard” contracts. The costs and risks associated with increased globalisation have also been experienced by those employed on permanent contracts. The effects of restructuring, contracting-out and plant closures have led to pressure for increased flexibility, including changes in working time patterns and job losses. In addition, many UK workers in permanent employment lack a strong skills base.

In the UK, job losses have been particularly prevalent in manufacturing. In December 1980, there were 6,401,000 jobs in manufacturing; 25 years later, in December 2005 the figure was nearly halved to 3,367,000 and manufacturing jobs continue to be lost at a rate of about 100,000 a year. A study undertaken by the Work Foundation looking at what had happened to the workers laid off at MG Rover found that eight months later a third were still unemployed; over half were now employed full-time, but on average their new jobs paid them £3,523 a year less than MG Rover, and almost half thought their new jobs were worse.²⁴

UK unions have repeatedly expressed concern that the inadequacies of UK redundancy laws mean that employer’s too often fail to engage in meaningful consultation with union representatives prior to announcing collective redundancies. As a result there is limited opportunity to give serious consideration to options restructuring organisations or the reduction of job losses. The absence of effective sanctions also means that there is no deterrent for employers acting in breach of the legislation.

The inadequacy of protection is at least in part due to the defective implementation of the EU Directive on collective redundancies in UK law, in particular relating to the timing and nature of consultation. The limitations in UK employment law create incentives for employers to close plants, reduce the size of workforces and outsource work from the UK on the basis of short-term gains from reduced labour costs. Commentators and employers have commented that the “flexible nature of the UK labour market” means that it is easier and cheaper for employers to make UK workers redundancy as compared with their EU counterparts. There is also a concern that employers take pre-emptive action, for example, selling plant equipment in advance of announcing redundancies, thereby reducing the prospects of longer term survival specific plants or enterprises. The TUC would argue that such approaches are not consistent with policy objectives of promoting a business rescue culture and retaining high skilled jobs.

Thirdly, the TUC is concerned that the green paper gives inadequate consideration to the need for improvements in social protection for those required to make labour market transitions. In 2006 the OECD revised its former 1994 assumption that out-of-work benefits must be kept low has been substantially revised, with the acceptance that “relatively generous” unemployment benefits are not inconsistent with strong incentives to move into employment. The OECD also highlighted that workers seem to feel more secure in

²⁴ *Life after MG Rover*, Kathy Armstrong, Work Foundation, 2006, *passim*.

systems offering generous benefits than in systems that seek to achieve this end through labour market regulation.²⁵ In the UK workers experience not only a low level of employment regulation, but also a lack of generous social benefits. After housing costs are taken care of, a single non-disabled unemployed adult's benefit will be about 375 Euros a month. (Those aged under 25 will receive even less.)

Finally, there are important lessons which may be learnt from those Nordic economies where the concept of flexicurity originated, and most notably Denmark. It is important to note that the Danish model of flexicurity combines generous social protection arrangements with comparatively strict employment protection measures. Danish workers facing economic dismissals have comparative long notice-periods, providing them time to find another job before ending their previous. These protections are far more extensive than existing UK laws. Danish workers also enjoy strong protection against unfair dismissal for non-economic reasons.

Further the development of flexicurity models have coincided with a highly developed social dialogue, where social partners have played an essential role in negotiating the balance between flexibility and security on the labour market. Social partners have 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.

In conclusion, the TUC is concerned that reducing dismissal protection would result in increased in job insecurity and job satisfaction with its consequential effects on worker motivation, loyalty and productivity levels. In our view, in seeking to improve flexibility, to generate better quality jobs and to ease labour market transitions, the Commission should focus on positive measures such as improved education and life long learning, generous social protection measures and, measures to improve the reconciliation of work and private life.

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

It is important that employees on different forms of contracts are supported in progressing their careers by enabling them to access training and development programmes that are in place for all permanent full-time staff. Collective bargaining has a key role to play in this respect and one positive recent example of this in the UK is the collective agreement covering the workforce of the National Health Service ("Agenda for Change") which includes a significant agreement on training and development ("Knowledge and Skills Framework") and which can be used for staff on different contracts (eg temporary staff). However, collective bargaining in the UK does not require employers to address training and development issues and as a result many employees on different forms of contracts, especially in the private sector, would only be helped to access training and development to help develop their careers if this was achieved under law rather than via the collective bargaining process.

7. *Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?*

In 2000 the OECD recognised "the borders between self-employment and wage salary employment are becoming more blurred"²⁶. There are growing numbers of workers occupying the "grey areas" between employed and self-employed status. This is particularly an issue in sectors where employers increasingly rely on outsourced or subcontracted labour, including the media sector and print journalism, and most significantly construction that currently accounts for 22.6 per cent of all self-employed workers.²⁷

In these sectors, the traditionally held assumptions that employees accept the trade-off of security in return for personal dependence or subordination, while the self-employed enjoy independence and access to fiscal subsidies and the greater opportunity for profit for the self-employed, often no longer hold. There are many nominally self-employed workers who do not employ others, have little or no access to working capital, and have few business assets other than their own know-how and expertise.

As research by Mark Harvey has demonstrated, many workers in these sectors, whilst being classified by the courts as being self-employed for the purposes of employment protection, are in practice economically dependent on one or a number of employers. As a result they are excluded from employment protection and employers avoid the costs of direct employment. This a problem commonly experienced by freelancers who

²⁵ *Employment Outlook—Boosting Jobs and Incomes*, 2006, OECD.

²⁶ OECD *Employment Outlook*, 2000.

²⁷ Labour Force Survey data for 4th quarter of 2006, downloaded from http://www.statistics.gov.uk/downloads/theme_labour/LFSHQ/STable23.xls on 13/03/2007 10:20.

may work regularly for a limited number of employers over a number of years, working at the employers' premises under their direction, but as they are described as freelance or as engaged as and when required, they are not considered to be employees. As the workers are not free to set their own rate for the job, but rather are paid the rate set by the employer or the sector, they are in practice economically dependent.

As our response to question 2 highlighted the two-tier approach to employment status has contributed to increased labour segmentation and the exclusion of a growing proportion of the workforce from core employment rights.

Employment status is a confusing and contentious issue in the UK. The distinction in UK employment law between "worker" and "employee" is a significant one, governing access to a hierarchy of employment rights. In order to claim entitlement to important rights such as protection from unfair dismissal and entitlement to redundancy payments and certain parental rights, it is necessary for an individual to demonstrate that they are an "employee" rather than a "worker". Certain groups of worker in the UK labour market, notably those in what are regarded as various forms of "non-standard" employment relationships, find it particularly hard to demonstrate that they are "employees". The so-called bogus self-employed are one such group. Other groups of workers similarly affected are agency workers and homeworkers. This is compounded by the problem of some freelancers not even qualifying as "workers" and therefore losing out on working time rights which are crucial in long hours areas such as the audiovisual and entertainment sectors.

The TUC would welcome any legislative changes at an EU level that would prevent such exploitative practices. The TUC believes that all EU employment legislation should apply to a wide category of workers and that there should be a legal presumption that an individual qualifies as a worker. The onus should be placed on the employer to demonstrate that an individual does not qualify for employment protection rights. We would be concerned about any change in EU law that encouraged employers to increase the out-sourcing of labour or promoted labour market segmentation.

8. Is there a need for a floor of rights dealing with the working conditions of all workers regardless of the form of their work contract? What in your view would be the impact of such minimum requirements on job creation at well as on the protection of workers?

The TUC shares the concern expressed in the Green Paper that there are groups of vulnerable workers who are excluded from basic employment protection. As highlighted in our response to question 2 in the UK, the legal distinctions drawn between "employees", "workers" and "the self-employed" means that growing groups of workers lose out on basic rights.

Measures designed to clarify employment status and to extend employment rights to all workers would not restrict the abilities of employers to use more flexible contracts. However, it would ensure that those employed on flexible contracts are treated fairly, making non-standard forms of employment more attractive.

The TUC would not, however, generally encourage the Commission to adopt the UK-styled "floor of rights" approach to guaranteeing fair treatment for workers across the EU. There is a risk that a floor of rights approach can all too readily translate into a ceiling of rights leading to a "levelling down" of the best legal and collectively negotiated employment rights.

The TUC would also want to protect the right for member states to implement and maintain social policy and industrial relations systems which exceed EU employment law minima. Increasingly, such social systems have been threatened in the Viking/Laval line of cases, on the grounds that they are trumped by free movement principles.

The EC Treaty has always treated social policy as at the heart of national sovereignty and, under the principle of subsidiarity, social policy remains largely a matter for individual member states. We believe that this principle should be maintained and safeguarded.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of Sub-contractors? If not, do you see other ways to ensure adequate protection of workers in three-way relationships?

The lack of clarity in UK employment law as to which party—agency or end user organisation—employs the agency worker and is responsible for their terms and conditions is well documented and is evident from case law decisions. The Conduct Regulations 2003, as mentioned above, provide that employment agencies (businesses) must provide certain contractual information to those they place in temporary work. However, this does not require them to offer employed status. Nor is there any such obligation on the organisation that

the worker is placed with— even though in some cases, a temporary worker may be placed with an organisation for years and work under their direction and control doing exactly the same work as permanently employed staff.

The TUC believes that while the employment agency should be treated as the primary employer for agency workers, the hirer employer should also have joint and several liability for any breaches of employment rights.

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

Agency workers in the UK have precarious employment status and as a result they are often excluded from basic employment rights. See responses to questions 2 and 8 for further information.

Neither the Employment Agencies Act 1973 nor the Conduct of Employment Agencies and Employment Businesses Regulations 1976, specify what the status of agency workers should be for the purposes of employment protection law, leaving the matter to be decided under the common law tests of status. Although the Conduct Regulations 2003 provided that employment bureaux must provide contractual information to temporary workers that they engage, whether the contract is a contract of employment or not continues to be a matter for case law to be determined on the individual facts.

The definition of “employee” in UK employment law is a problematic one that a number of legal tests have been developed to try to deal with. In practice where a dispute arises, the issue of employment status is to be determined by application to an employment tribunal, which must decide the employment status on the facts of the individual case. This is unsatisfactory for a number of reasons:

It is an individualistic and legalistic response, which may only be applied where employment status needs to be determined as a preliminary issue in a dispute as to entitlement to a specific employment right or benefit. As decisions depend so much on the individual facts of each case and the degree of discretion regarding the tests is so wide, it is hard to overturn cases on appeal and many inconsistent decisions stand. The resulting lack of clarity is not in the interests of any party: worker, employer, agent or government.

Each case requires recourse to the employment tribunal system for determination. This is costly both in terms of time and resources for the parties involved.

There is much case law on this. One of the key tests to be applied to determine employment status is whether there is any “mutuality of obligation”—to offer and to accept work. This is a particular stumbling block for agency workers, as agencies often insert a clause into contracts claiming that there is no obligation on either party to offer or accept an assignment. Although tribunals are required to look at the reality of the situation and not just the wording of the contract, the existence of such a term can be problematic for the agency worker.

The TUC would welcome measures to deal with the problem of employment status for agency workers, and other atypical groups of workers, outlined in our response to question 8.

11. *How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?*

When the rationale of “flexicurity” is applied to working time it is clear that there must be that there are robust minimum standards to prevent excessive working time, which are a proven health and safety hazard and tend to have an adverse effect on morale and productivity.

The TUC believes that the response of the European Parliament to the Commissions’ review of the Working time Directive took an approach that was strongly rooted in “flexicurity”, combining as it did the strengthening of the 48 hour limit with the creation of offsetting flexibility for employers.

The TUC can envisage a number of solutions to the on-call issues raised by the European Court of Justice but they will not be deliverable as long as the opt-out provisions remain. To move this issue forward, the Commission might now consider changing the political equation by taking legal action against selected member states, concentrating on those who are deliberately ignoring certain aspects of the directive.

There is certainly no need to consider weakening the existing legislation. The conversations that are going on in certain countries about working time are largely about whether the full-time working week should be 37, 38, 39 or 40 hours. No serious commentator really believes that growth, job creation and high productivity depend on working more than 48 hours on a regular basis.

Indeed, in the EU context long hours are more clearly associated with low productivity, poor management and lack of investment and training. In addition many women still bear the greater part of caring responsibilities in European society, so reliance on long hours contributes to the exclusion of many women from the labour

market and helps to explain their continued under-representation in managerial and skilled manual occupations. Thus it also contributes to the gender pay gap in the UK, which is in part attributable to occupational segregation.

Although the UK government is still tied to a political deal to defend the opt-out, it has privately recognised the force of some of these arguments and has therefore tried to help companies to move away from long hours in order to boost their productivity²⁸.

Turning to measures to promote more flexibility over working time, it is important to note that the benefits of flexibility will not be reaped if it were to come to mean that employers can simply dictate changes to working patterns. Such a state of affairs would lead to low morale and low productivity.

In contrast, measures that give workers some say over their hours and patterns of work would aid recruitment and retention and boost morale and productivity. In the UK, legislation that allows the parents of young children and, from April 2007 those with caring responsibilities, to request a change in their working patterns has been a success²⁹. The UK legislation requires employers to take such requests seriously. Although requests can be turned down for business reasons, there is often a discussion about the exact details of how flexibility can be made to work both for the employer and for the employee alike. Compromises are common, but most requests are agreed in some form.

The TUC is also involved in the WorkWise UK coalition³⁰, which brings together business leaders, trade unions and local authorities to promote high-quality teleworking and flexible working more generally. Mutually beneficial high-quality flexible working can also have desirable financial and environmental effects, as it can reduce commuting costs and city congestion.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of “worker” in EU Directives in the interests of ensuring that these workers, can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

The TUC believes that rules relating to employment in a transnational context could be improved in three key ways.

Firstly, the TUC believes that there is a need to strengthen the Posting of Workers Directive and in particular to strengthen the enforcement of the Directive. We believe that the UK Government has failed to implement this Directive effectively.

The lack of separate posting of worker regulations means that awareness of the protections for posted workers is very limited in the UK. The absence of a Government agency gathering information relating to the number of workers posted to the UK at any one time also undermines the enforcement of the Directive. Further the TUC has concerns about the narrow territorial scope tests which apply to different UK employment legislation, which have the effect of excluding posted workers from their entitlements under the Directive. The absence of legally enforceable sectoral agreements in some industries, in particular construction, means that the spirit of the Directive is not observed within the UK. Migrant workers are often paid less than UK workers for doing the same job.

Secondly, subject to the outcomes of the litigation in the Viking and Laval cases, there may be a clear case for the introduction of new rules governing cross-border industrial action.

Thirdly, the TUC supports the ETUC framework for improved protections for migrant workers. The framework would assist in ensuring that migrant workers are not subjected to discrimination or exploitation.

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

The TUC would support improvements in the administrative co-operation between relevant authorities. In particular, we believe that improvements could be made in the enforcement of the Posting of Workers Directive. We do see a role for social partners in such cooperation; indeed they could be determinative in the success of such improvements.

²⁸ *Managing Change: Practical Ways to Reduce Long Hours and Reform Working Practices*, DTI, 2005
<http://www.dti.gov.uk/files/file14239.pdf>

²⁹ *Flexible Working and the Work life Balance*, DTI
<http://www.dti.gov.uk/employment/workandfamilies/flexible-working/index.htm>

³⁰ For more information, see <http://www.workwiseuk.org/>

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

The TUC supports the ETUC framework for improved protections for migrant workers.

Examination of Witnesses

Witnesses: MR OWEN TUDOR, Head of European and International Relations, MS HANNAH REED, Senior Employment Rights Officer, and MR RICHARD EXELL, Senior Policy Officer, examined.

Q101 Chairman: Mr Tudor, Mr Exell, Ms Reed, thank you, all three of you, for coming before us today, it is very nice to see you here and we are grateful for your time in helping us to come to some conclusions about the Commission's Labour Law Green Paper. Thank you also for your written evidence which we have in front of us now. Obviously employment issues are of great interest to this Committee and you will be aware that we published our report on the Working Time Directive a couple of years ago. Our inquiry into the Labour Law Green Paper is therefore a good opportunity for us to pull together evidence which will bring our views on the impact of legislation in the labour market up to date. We are fortunate to have Professor John Philpott, whom I expect you may have met before, helping us with this inquiry as our specialist adviser. Now, there are a few housekeeping points. We have an hour. The session is open to the public and it will be recorded for possible broadcasting or webcasting. A verbatim transcript will be taken of your evidence and that will be put in the public record in printed form and on the parliamentary website, and you will be sent a copy of this transcript a few days after this meeting to check it for accuracy. Please advise us of any corrections as soon as you can. If you wish you can submit supplementary evidence after the session. Sometimes we spend a little longer on one question than maybe we ought to or something like that so a question does not get a full response or maybe does not get asked, so if you would like to expand or clarify what you have said we are happy to receive supplementary evidence. The acoustics in this room are good but you do need to speak a little bit above your normal speaking voice. Could you start by stating your names and your official titles for the record?

Mr Tudor: I am head of the European Union and International Relations Department of the TUC.

Ms Reed: I am Senior Employment Rights Officer at the TUC.

Mr Exell: I am an economist at the TUC.

Q102 Chairman: Do you want to make a statement at the opening of this meeting?

Mr Tudor: If I may, just a very brief one, so we can summarise the main points of our interest in this area. We believe that flexibility on its own is not the route to economic success. Flexicurity has been successful in Nordic economies but we would contend that what the UK has is not flexicurity. We do, indeed, have high levels of employment which is welcome, but we lack the

security that characterises Nordic economies, and therefore have vulnerability, and skill levels are not high enough. What the TUC wants to see is fourfold: firstly, more high value skilled jobs because they provide more security in the global economy than low value jobs do; we want to see the extension of employment protection in practice as well as in law to vulnerable workers; higher levels of social protection to enable people to switch jobs when necessary; and, finally, better worker representation arrangements to assist in the restructuring process. We believe this would represent a development of the current social dimension of the European Union which we believe is vital to ensuring that Europe's people support globalisation.

Q103 Chairman: Thank you, and that leads us straight into our first question which is exactly about the Anglo-Saxon and Nordic labour models, which you contrast one with the other, and the differences between them, and that opinion seems to be shared by the Green Paper as well. I wonder if you could summarise your concept of the labour market systems in Nordic countries and describe what you see as their advantages as a model for other EU Member States? Do you know anything of the views of trades unions elsewhere in the European Union as to the relative advantages of the Anglo-Saxon and Nordic models of labour markets?

Mr Exell: We tend not to use the phrase "Nordic model" because there are differences between the different Scandinavian countries, but having said that there are enough similarities, I think, to talk about them in general terms. Probably the best known theorist of the Nordic model is Professor Gosta Esping-Andersen, and he suggested that it is characterised by high levels of social protection, equality of opportunities, a labour market policy directed towards full employment, and high levels of growth. From a British perspective what is also noticeable about it is higher levels of unionisation than we have in this country, higher levels of collective bargaining, higher levels of taxation and much more generous social security benefits. The advantages from our perspective are, firstly and most importantly, that the existence of the Nordic countries and their success shows that you do not have to trade off the aims of reducing poverty and achieving employment growth; both are compatible. Also, the emphasis on high levels of training is a route that is more likely to succeed in an era of globalisation than Britain's weak performance on

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training. In terms of union attitudes, there are differences across Europe in attitudes to the Nordic model. Various national trade union centres might prefer some aspects of their national model to the Nordic model but, generally speaking, the European trade union movement regards the Scandinavian countries as setting the gold standard. John Monks as General Secretary of the European TUC has described the Scandinavian countries as “outstandingly successful”. I remember Jean Lapeyre when he was Deputy General Secretary of the ETUC saying that Sweden was where every trades unionist turned to at night in prayer before going to sleep! Equally what I would say is I have been active in European trades union affairs for 15 years now and I have never met a single European trades unionist who regards Britain as the model.

Chairman: That was pretty comprehensive. Are there any supplementaries on this, because it is quite an important question?

Q104 Lord Wade of Chorlton: There are lots of things we could explore because what are you judging it by, from whose point of view? Is everybody happier? I do not know. What are the down sides? Clearly there are some.

Mr Exell: There was a recent survey that found that Denmark was the happiest country in the OECD—

Q105 Lord Wade of Chorlton: There are lots of other reasons.

Mr Exell: Undoubtedly there are problems but most of them are problems of success, so for instance Sweden—and this is why I was saying there are differences between different countries—has a high level of gender segregation in its labour market which we would not regard as being ideal. Roughly speaking men work in the private sector and women in the public sector, which means that women’s jobs are particularly vulnerable to changes in government, so no system is going to be without problems, even from our perspective, but generally speaking we would rather have their problems than ours.

Q106 Lord Wade of Chorlton: If everything was perfect, what would you guys have to do?

Mr Exell: That is a very good point!

Q107 Baroness Howarth of Breckland: I know the Nordic countries somewhat and environmentally they are very different places from this country. We have to remind ourselves that the suicide rate in Northern Scandinavia is higher than in most places so I do not know how that measures in terms of happiness, and there are other holistic issues if you look at the whole community and I just wonder how you see those differences. Just looking at England, let’s not take the UK as a whole, with its immensely

dense population, it is a very different environment from Sweden—

Mr Exell: Absolutely.

Q108 Baroness Howarth of Breckland:—so do you not see that there are some of those issues when you are looking at employment and, indeed, employment law that underpin a very different environment? I suppose we are looking at your views on how we get the best here, recognising that we want to get to the gold standard, in a very different place.

Mr Exell: Yes, and indeed in Sweden they are building on 69 years of social partnerships since the famous 1938 agreement between the employers and the unions, and you cannot transfer a system of industrial relations that is built on generations of trust lock, stock and barrel to a country that does not have that experience, so we would say that the emphasis on employment as the key to dealing with poverty is very much in tune with what all the political parties in this country are saying at the moment, but which the Scandinavians pioneered, and the emphasis on promoting employment through social systems and social security, and the attempt to build up not just a high quality education and training system but a learning society. I do not know about Norway and Denmark but I know that in both Sweden and Finland that is very much an emphasis there, and in Sweden the proportion of adults involved in adult education is astounding, I forget the exact figures but over half the adult population is involved in some form of adult education, and very often self-directed as well, which is an interesting point. People set up their own learning circles and sometimes hire in a tutor to help them; it is a fascinating model. Finland, of course, has the most successful schools system in terms of literacy in the world, though it is very interesting in that it is remarkably difficult to put your finger on what it is that is creating that success. Finnish children do not start school until they are seven and many of them arrive at school able to read already, and it has been suggested that it is the fact that there are so few television programmes available in Finnish so they get used to reading the subtitles on the children’s television programmes.

Mr Tudor: I am not sure we have an evidential base here!

Mr Exell: So there are directions that we can learn from but it would be ludicrous to say that we just want to import the agreements that you have between employers and unions in different sectors, for instance.

Chairman: I think we need to move on. Lady Uddin?

Q109 Baroness Uddin: All this happiness just overpowered me into thinking about some of the rationale and about how inclusive some of that policy

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may be. Would you agree or subscribe to the view that many of these countries that you mentioned may be quite happy and people may be quite full of happiness in some quarters but the record of disadvantages to particularly minority groups and others is not so good as in Britain. Do you feel that not only would we not want to get their model here but that maybe we have something to give back to some of the countries that you mention?

Mr Tudor: I think that is true although I would also note, and this is possibly apocryphal but it is illustrative of the general feeling, that the Swedish Fascist Party in the 1990s advocated reducing Sweden's take of refugees to the UN recommended limit, and this would therefore put the Swedish Fascist Party considerably to the left of any party in most of the rest of continental Europe! We also know that studies done by our colleagues in Sweden show that in a country with phenomenally high levels of unionisation, and joining unions is one example of social inclusion, the highest group of unionisation was among women borne outside Sweden who had moved to Sweden and joined unions in greater numbers than even domestic Swedes, which I think suggests there is a level of inclusion there that is worth looking at. That said we do not consider it possible, let alone necessarily desirable, to try and reproduce any of the Scandinavian countries in the UK. There are lessons to be learned, however. The Treasury published a report last year which indicated that it could see the Swedish model as being better than the British model. For the Treasury to accept anybody does anything better than the Treasury strikes me as surprising.

Chairman: I think we should move forward.

Q110 Baroness Greengross: Could you just summarise what you think about the role of labour law in EU Member States? Why do you think the EU Commission should focus more on bringing forward proposals for labour law in the field of collective rights, and do you think that your views on this are the same as other trade unions in other Member States?

Ms Reed: In terms of summarising the role of labour law, it is the same today as it has always been. This is to protect workers from arbitrary treatment by employers and from unfair treatment, and to prohibit discrimination in work places, whether on grounds of race or sex or disability or sexual orientation or, now, age, and also to provide workers with voice to enable them to exercise some of their democratic rights within the work place as they do in the rest of society. However, we also recognise within the TUC that labour law can have real benefits for employers and for the economy as a whole. We need look only at the introduction of enhanced maternity rights within the UK and equal treatment rights for part-time

workers, which have had real impact in terms of increasing women's participation within the labour market. There is also evidence that the national minimum wage, for example, has improved recruitment and retention benefits for some employers. So there are benefits of labour law for all parties. The question that we would hope that the Green Paper would address, however, is what is the best mechanism for achieving these objectives. We know across most of the rest of Europe that social norms and minimum standards within the work place are achieved through collective bargaining, through social partners working together, and obviously in the UK compared to many other European Member States we have low levels of collective bargaining. We believe, therefore, that we are losing out on some benefits within the UK. The TUC takes a clear view that collective bargaining offers real flexibility for organisations. We just need to look at the issue of working time, for example. Social partners, trade unions and employers have a good track record of sitting down and negotiating working time arrangements which meet both the needs of organisations and also the needs of working parents who want to have more time to accommodate their caring needs and their family needs. Also we believe that providing workers with a greater sense of voice and therefore buying into organisations means that they are more likely to trust their employers, particularly in the context where change is on the horizon with increased pressures from globalisation. If workers feel they are being listened to and that they have a stake and can influence how organisations adapt and change in the light of increased competition. That enables workers to have a greater sense of loyalty and motivation. Therefore the TUC in our response to the Commission did call on the Commission to look at increasing and extending collective rights across Europe, particularly in the area of information and consultation in the context where restructuring is on the horizon. We also think in the light of a series of cases that are currently going before the ECJ, the *Laval* and *Viking* cases, where in some countries social protection models, particularly the Nordic ones, are being challenged under competition law principles, that there is a role for the Commission to protect and promote fundamental rights for trade unions to organise and to be able to bargain collectively. That is not just a principled argument; we believe there are real economic benefits from such an approach.

Q111 Lord Wade of Chorlton: Just for clarification, what do you mean when you talk about collective rights in the sense that they are not there now? Surely any two parties have a right to negotiate? What is it that stops you from doing that? What do you see is the handicap in the system?

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Ms Reed: Certainly employers and trade unions can voluntarily reach collective agreements and can negotiate in work places. But there has been a sense since the 1980s that there is no encouragement maybe for collectivism within the UK. We do welcome measures that the Government has introduced since 1997, particularly statutory rights to recognition and information on consultation rights, but there is evidence that those rights have holes within them and therefore there are not the levers that trade unions can use to bring employers who are really reluctant—

Q112 Lord Wade of Chorlton: So what you want to do is check the balance of power, which is slightly different from a collective right.

Ms Reed: We want to strengthen rights for trade unions but on the basis that there are real benefits for employers and for the work force by talking through issues, working through problems relating to—

Q113 Lord Wade of Chorlton: I would argue that is a different point from saying what we want is a system where we work together, because there is nothing to stop you working together. What you are saying is you want to move the balance of power from one side to the other side.

Ms Reed: We believe the role of the law is to provide a framework which encourages and enables the social partners to discuss together. Ultimately what is included within a collective agreement and the relationship between trade unions and employers is a matter for both parties. But our concern is that at the present time the framework of law does not provide sufficient support. For example, the real concern we have is in relation to cornflake redundancies, as some general secretaries call it, where employers will announce over the radio first thing in the morning that a plant is closing and thousands of jobs will be lost. That has a devastating impact not only on the financial lives of those individuals but also often on communities. We believe there should be clearer laws that require employers to sit down and talk with trade unions well in advance of making such an announcement public, so that both sides can seriously consider alternative options for the future of the organisation, whether there is need for restructuring in terms of working hours or whether there is need for increased training so staff are capable of taking on new roles or functions. Our concern is that too often in the UK employers still take the quick route of simply saying: “We are going to lay off large numbers of staff” and do not consult with trade unions in advance.

Q114 Lord Trefgarne: Is the closed shop widespread in Scandinavian countries? I guess it is. What would be your view on that if it were to be re-introduced here in some cases?

Ms Reed: The closed shop was ruled as being unlawful right across Europe so any country that operates a closed shop would be in breach of the European Convention on Human Rights potentially. However, I think in many other European Member States that individuals recognise the benefits of trade union membership and that being part of the collective in their work place, not only in terms of having access to better information about what is going on in the work place but also having a greater voice in terms of future restructuring of organisations.

Q115 Lord Wade of Chorlton: I would like to explore this whole issue of productivity and labour law and perhaps some other issues as well, and I think you would agree that it is accepted that productivity in this country could be better and if it were better we would all be better off as a result, so I would like your views on that really, both on how it applies to the UK and how any change in labour law could improve it, and also on the European context.

Mr Exell: Thank you very much for that question. Our position on productivity is one that we developed together with the CBI six years ago. In 2000 the Chancellor set the TUC and the CBI a productivity challenge, and the next year we produced a report on it and we said essentially that there are four issues in the UK where we need to look hard: investment, skills, innovation and best practice. Now, in investment what has definitely got better in recent years is that in the past an uncertain macro economic climate has deterred investment and the much greater stability we have had in recent years has improved the investment climate tremendously, but we still have problems with the culture of short-termism. Since we produced that report there has been the massive growth of private finance which often leads to even greater pressures for short-termism, and there are continuing problems with a lack of understanding between industry and finance, so that would be one issue. On skills, I do not need to lecture a Committee that has Lord Moser as one of its members, but we came to the unsurprising conclusion that Britain has a big problem with high levels of people lacking in basic skills and high levels of people whose skills are no higher than level two. There is a second order problem with a shortage of management skills as well, but that is less significant than the problem of basic skills and skills above level two. On innovation, the situation has improved to some extent and certainly the picture varies a great deal from sector to sector. We have some world-beating industries in this country which are very good at managing innovation. Overall, however, we are still laggards when it comes to utilising new technology, and that is a problem not just in product but also in process innovation, so we are not just slow

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in making new things; we are slow in picking up new ways of making them. On best practice, again there are very high quality companies. I meet managers from those companies and I have the greatest respect for them, but unfortunately they are not typical of industry overall and there are too many examples of companies that do not follow best practice in management. I am not just engaging in a union whinge about human resources management standards but it can be as diverse as supply chain management, marketing—a whole range of important skills that are not widely enough spread across British companies. So that would be where we see the problems as resting.

Q116 Lord Wade of Chorlton: But you have not mentioned the role of labour law in that aspect, so you do not think it is an issue?

Mr Exell: If you look at the international surveys that have been done, the work that has been done for the OECD, some of the research that Stephen Nickell has done, they have come to the conclusion that the strictness or otherwise of employment protection legislation has very little impact on levels of employment or productivity.

Q117 Lord Wade of Chorlton: That is interesting. I agree with you entirely, investment is one of the most important things and it is really having a system that encourages that. We heard last week about the concerns of the small business sector, that you can have a very small company that can be very highly influenced by changes in labour law if it applies to them, and that has a big impact on their ability to raise money and to invest, and that is a very important part of our economy as a whole. What are your views on that?

Ms Reed: We share some of the government's own views that any regulation introduced in the area of labour law should be good and should not introduce excessive red tape, but our experience is that most employment laws, particularly those introduced in recent years, are about setting a framework of minimum standards of fairness and fair treatment in the work place, which brings benefits not only to employees in small and large businesses, but also to employers in small business as well as in large. For example, issues relating to flexibility, the need for small businesses to be able to recruit members of staff and the growing recognition within that sector that to be able to attract women to work in businesses, whether small or large, you often need to be able to offer more flexible working patterns in order to accommodate working life alongside childcare needs. We are not convinced that there is any real evidence at present that the current levels of employment law within the UK do impact on the ability of small businesses to compete or be successful. We believe

probably that there are other factors which are of greater significance. Most employers within small businesses I believe would want to say they would want to be good employers and not have a reputation of undercutting terms and conditions of employment not offering fair treatment.

Q118 Lord Wade of Chorlton: The evidence last week was that 44% of their members have said that they would not employ an extra person because of the labour law requirement, and these were people with about five employees.

Ms Reed: We have heard those statistics repeated regularly whenever new employment rights are introduced. For example, with the national minimum wage it was predicted that would result in three million jobs being lost. But the actual evidence in terms of employment growth in the UK does not support those arguments. Particularly between 1997 and 2005 we saw substantial employment growth right across the economy. We do hear those arguments regularly but our view is that the evidence does not necessarily support the points being made.

Q119 Earl of Dundee: What do you think about the Commission's description of the evolution of EU labour markets in recent times?

Mr Exell: Certainly we have some concerns about what we might almost call a teleological assumption in the Green Paper, the view that we are headed towards the destination of greater labour market flexibility as the only route towards greater competitiveness and jobs growth, and indeed one of the interesting points if you look at the international comparisons is that Britain presents the opposite lesson from the one that is often drawn from our experience. At the TUC we get an awful lot of foreign journalists and political delegations who come over to learn what Britain is getting right, and then right at the end of their trip, before they get the plane back to where they come from, they say: "We had better speak to someone who disagrees with all of this, we will go to the TUC"!

Q120 Chairman: I know the syndrome!

Mr Exell: So we regularly find ourselves speaking to people who have spent the rest of the week learning how Britain shows you have to deregulate your labour markets if you want economic success. But if you look at our record on employment, for instance, in the 1980s and 1990s when we were leading the world on labour market deregulation our record on job creation was consistently either much the same as or worse than the EU average. If you look at our record on unemployment, our record was much the same as or worse than the rest of Europe. When we started to get an improvement from the mid to late '90s onwards it was round about the time when we

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started partially reregulating our labour market with the minimum wage, rights to union recognition, maternity rights, rights to time off work, age discrimination, enhanced disability discrimination legislation—none of which has been responsible for any reduction in employment. In fact, we have higher levels than before. On productivity the picture is more mixed but we have, during the period when we have been reregulating the labour market, seen a modest improvement in our productivity performance as well, so what we say is that the Commission is to some extent—in this very suave way that Commission officials have—in headless chicken mode; they are concerned about the lack of jobs growth that they are suffering but they are drawing the wrong lessons from the UK. Where we have got lessons to teach them is on monetary policy. Trying to achieve growth through structural reform is an example of the sort of policy that Keynes called “pushing on a piece of string”. It might possibly increase capacity but it does not do anything to power growth. It is macro economic policy, in particular monetary policy, that has been a great success in this country.

Q121 Earl of Dundee: The Commission would probably say that more flexible labour markets are very important to the success of economies in European states. You would not necessarily agree—and why should you? That is quite a broad sweeping statement if the Commission were to make it and you have explained already your reservations about it. If you sought to modify the Commission’s views you would begin, as you have also explained to us, by drawing their attention to the Nordic model, you would point out the good things within UK labour law, and elsewhere in Europe the need for maintaining certain checks and balances. How then would you summarise your message to the Commission, taking these points and some other ones into account?

Ms Reed: I think we could draw a few conclusions. The Green Paper seems to suggest two primary routes for the future of labour markets. The first is the increase use of atypical forms of employment, non permanent, and the second is a suggestion that job security measures should be weakened. Our view is that evidence from the UK demonstrates that employment growth is not dependent upon the increased use of fixed term contracts or agency work. Indeed, in the UK we only still have 6% of the whole labour market which are employed on more flexible forms of contract. The vast majority of jobs created in the UK were permanent. We also disagree with the assumption in the Green Paper that weakening job security measures, unfair dismissal protection, will create employment or provide better protection for those people who find themselves vulnerable in the

labour market. Again, we are partly pointing to the experience of the UK in this context. We experienced employment growth in the early 2000s at the same time as we strengthened our job security protection, and I think the Commission fails to recognise also the benefits of having people in jobs for a longer period of time, the importance for employers of retaining staff and not having constant turnover and churn of staff. There are clear benefits for employers in terms of retaining trained staff, not having to experience the cost of re-investing in staff all the time and having staff who are familiar with processes. Our belief is that the future for the EU labour market is not a route towards deregulation, low quality jobs and insecure jobs; our belief is that the only way the EU labour market can compete in the future is if we invest in high quality, high skilled jobs which are based on a level of job security for workers and effective representation. Ultimately we cannot compete in low cost, cheap jobs. We can compete by investing in skills, and by investing in the knowledge base of the work force.

Q122 Chairman: In your opinion, are there Member States where the existing rigidities of labour law does impede employment? It is said almost daily in the papers that the French have a problem and that it is so expensive to sack a person, and I am speaking in vulgar terms, that they do not take them on in the first place. Is that the reality or is it just kind of thing that people say when they do not know?

Mr Tudor: Each country must find its own way to balance the needs of business and the work force in terms of what is fair. It is just as possible to say that you build in rigidities by making it difficult to sack people as suggesting that it builds in rigidities if you reduce people’s employment protection. We recently had a delegation from Malaysia who looked at reducing employment protection from two years down to six months, the point at which it kicks in, and we pointed out that that discourages people from switching jobs because if they build up their employment protection in one job and are then told that if they go to the next job they will not be able to count on that employment protection then they would not switch jobs because you would be asking someone to give up all their employment protection. So there are all sorts of ways of building in rigidities. For instance, in the French system one of the problems identified with the most recent labour market reforms that were put forward and were defeated on the streets was the fact that it would be building in short-term jobs for young people by saying they could be got rid of fairly quickly at the end of a certain period and therefore the expectation was that is exactly what would happen. They would be taken on for six months and then got rid of, and another group would be brought in, taken on for six

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months and got rid of at the end of six months, and the view of the French people was that that was not actually solving youth unemployment, but producing churning.

Q123 Lord Wade of Chorlton: You started off by saying that each country should have to set its own system depending upon its own circumstances. Does that mean that you say, then, this is an issue that Europe should not be involved with?

Mr Tudor: No. I think the fine-tuning has to be done very often at country levels. We are not complete opponents of subsidiarity and there are areas where this is appropriate. As we discussed in terms of Sweden, if you have a country which has been doing it one way for 70 years you cannot export that to a country that has not been doing it, but there are elements of a common European labour market which requires common European labour market rules, so there are some elements that need to be done on a European level and some on a domestic level.

Q124 Lord Wade of Chorlton: How do you decide which is which?

Mr Tudor: One way is by getting employers and unions to sit down across Europe, as we get in the social dialogue process, to work out which are the areas where it would be sensible to do it jointly.

Q125 Baroness Gale: Following on from that, we have all this legislation on a European level but how do we deal then with globalisation? I am thinking of the Rhondda, where Burberry have just closed a factory where the workers were on a national minimum wage so they were not highly paid but highly skilled, and they have relocated to China because it was cheaper to produce their goods in China. Poor trade union and employer relationships there, but there was nothing that could be done to stop Burberry making that decision to relocate and to close the factory down which has been there since the '30s. So European law could not protect those workers and could not stop that business from doing what it wanted to do and going to China. I am not sure how this can all fit in?

Ms Reed: We recognise there are pressures from competition and that there is some transfer of jobs around the world economy as a result of increased competition. One of the roles, however, we see in terms of EU employment law is on the issue about information and consulting. That requires employers before they make decisions on where to site their work force, for example, to sit down and talk to the work force first to consider whether there are alternative options for restructuring to maintain jobs and maintain high skilled jobs within local communities. But we do recognise that there will be circumstances where jobs are lost within local

communities and there is a responsibility for regional development agencies, for the Welsh Assembly and for other organisations to look at how we can then restimulate the local economy and create new job opportunities.

Mr Exell: The TUC does not argue for saying: "Let's get off the world, we want it to stop"; we are not saying the answer to problems like Burberry is to close down trade and international investment. Apart from anything else more British jobs depend on trade and investment than are threatened by it but there are ways that offer more hope even than a concert by Tom Jones in support of the Burberry workers, welcome though I am sure that was! If you look at what has happened in Denmark, for instance, Denmark lost its textiles industry at much the same time as textiles plants were closing down in this country, but in Denmark they brought together unions, employers, and government to think through the problems in advance, put in place the training so that people could move into jobs, very often higher paid jobs than the ones that they were losing, the businesses can stay in business but concentrating on the value added that they are still able to bring to their industry, and the Government provides the support to help people over the hiatus when the factory is having to close down. Now, that sort of intervention is not beyond us in this country; we could do it if we wanted to.

Chairman: Thank you for that.

Q126 Baroness Howarth of Breckland: You began by talking about this country not having flexicurity but having flexibility without security so maybe I can ask the question that is on my mind. What are you like with principles? If you are saying to Europe there are a set of principles that would underpin flexicurity, you have just talked about training and you have mentioned collective bargaining which some people may be more sympathetic to in a wider way than others, but you must have somewhere a set of principles but if you are saying to Europe these are the things that underpin labour law that would ensure flexicurity, productivity at its best with employees having the best opportunities?

Mr Exell: We think that where flexicurity is a positive way forward it is because it represents a modernisation of the European social model, and that is all about combining social justice and economic efficiency, denying that those two principles have to be in competition. Flexicurity at its best is about high levels of worker involvement in decision-making, both in terms of individual participation by workers but also collective participation through collective bargaining and social partnership, high levels of training and emphasis on the high road to economic success, so one has training, investment, going for high value

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added. The flexicurity model, especially in Denmark, has relied on a much more generous benefits system than we have. The Dutch version of flexicurity is not quite as generous as the Danish version but still has benefits a lot higher than in this country, and the same goes for levels of unionisation and collective bargaining. When the Danes send over their teams to enthuse the rest of the world about the Danish model, which they do, they always send a three person team with someone from the Government, an employer and a trade unionist. It is very much a tripartite model of success. Now, one reason why across Europe some trades unionists are becoming sceptical about the notion of flexicurity, and this applies in this country too, is (a) because the Commission is using flexicurity sometimes as a synonym for deregulation and, (b) because in this country we weighed into national debates in other countries about flexicurity with our size 11 boots on saying: "Look at Britain, are we not wonderful, everyone should copy us", and they take one look at us and say: "If that is flexicurity we are not having it"! So we have recommendations, first, for the Commission, that if they want to continue to have worker support, which for 50 years they have wanted, they really ought to be a bit more careful about suggesting that they see deregulation as the way forward and, secondly, for the British politicians that not everyone thinks that the sun shines out of the British model!

Q127 Baroness Uddin: The Green Paper describes the concept of insiders and outsiders, and I was just wondering really how far you think the need for labour law addresses the disadvantage experienced by some workers, and what is your organisation doing to ensuring that the outsiders are aware of, or that you maximise their awareness of, the rights that exist and how limited they may be?

Mr Exell: Certainly we think there is a need to protect vulnerable workers. A third of a million workers are not paid the minimum wage; DTI surveys showed that in the course of the previous two years 1.7 million workers had been treated unfairly at work—that sort of figure reminds me why I am a trades unionist, it is the sort of thing that makes your blood boil.

Q128 Baroness Uddin: It reminds me why I came into the Labour Party, yes, a long time ago!

Mr Exell: So there is a need, first of all, to protect workers in a vulnerable position. So who is in a vulnerable position? Well, firstly, all workers can sometimes be in a vulnerable position, in particular if you are facing redundancy, short-time working and so on, all workers need rights, but far from protecting insiders at the expense of outsiders it is the people in the most deregulated areas of employment who need rights the most so, if you look at who is most likely to

be exploited, it is migrant workers, temporary agency workers, people working on short-term and part-time contracts who very often are the first to face exploitation, and the sort of regulation that we call for is to protect the labour market outsiders. To some extent the way we campaign for rights on this shows our movement at its best because, to be frank, most labour market outsiders are not in trades unions. If we were only concerned with giving workers incentives to join a union we would say get rid of labour market regulation altogether; we will look after our members and the devil take the rest. We do not say that because we think we have a duty to workers, whether they are in a union or not. The sorts of rights that we are calling for, particularly for temporary agency workers, would make sure that alternative forms of employment, what in Euro jargon gets called "atypical employment", would be a genuine choice by employers and their employees rather than a quick route to treating people unfairly without breaking the law. In particular at the moment we are concerned about the interests of migrant workers, and Hannah and I were talking about this on our way here.

Ms Reed: It may well be appropriate to mention this now because we may not get the chance in terms of answering some of the later questions, but we just wanted to bring to the Committee's attention some of the TUC's greatest concerns about the exploitation that has taken place amongst some of the most vulnerable workers within the UK, and I am sure many of you may have seen the reports on the *BBC News* last night and on *Newsnight* which in some senses highlighted case studies we have been aware of for some time. Although we do believe that the levels of exploitation, particularly experienced by migrant workers, is often hidden and not understood by anybody, because many of those are working in sweatshops and are simply out of the public gaze. We are very concerned that in the UK atypical workers, particularly agency workers and migrant workers, are facing quite extreme levels of discrimination and exploitation, and the concern that that is having an impact not only on those individuals but also on social cohesion. Some employers are starting to use tactics of using different groups of workers to undercut the terms and conditions of established groups of workers, which naturally impacts not only on working life but also on community life. To give you a few brief statistics, the DTI assessed in 2002 that agency workers in the UK only earned 68% of the earnings of permanent employees. So there is a very substantial pay gap experienced by agency workers, and that pay gap is assessed on the basis of individuals doing the same type of jobs in the same type of industries as permanent members of the work force. We are also aware, as was highlighted by the *BBC News* report, of many migrant workers facing

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exploitation, being housed in very cramped housing conditions, having very substantial deductions being taken from their pay packets, which is often in breach not only of the agency regulations but also of national minimum wage laws. They also face deductions being taken for transport and uniform costs which are not so regulated by the law. So we are saying to the Government, and this is a priority issue in the TUC, that we would like to see them take further action in terms of protection of vulnerable workers. They have taken many steps in recent years to introduce new rights for vulnerable workers. But more could still be done: equal treatment rights for agency workers, extending the licensing regime across the sector for agency workers, and also improving enforcement.

Q129 Baroness Uddin: Just pursuing that, would you say that the romantic notion that the outsiders' problems can be tackled simply by training is almost fallacious. Also, given what you just stated, do you feel that the underclass have become even more underground and beyond the reach of organisations such as yours, and government institutions?

Ms Reed: First, the TUC approach to agency workers' rights is that we need to see basic treatments, basic employment rights, including equal treatment on pay and employment conditions and on access to training within work places. We know employers generally do not train short-term workers because they do not see the benefits of that. We believe there would be a benefit to the whole economy if agency workers, including migrant workers, could develop their capabilities more effectively through work place training. On your second point, there is a real issue about enforcement in the UK at the present time and the inadequate resources that are in place, at the moment, to enforce the existing law. Again, as was reported on the news last night, the Gangmasters' Licensing Authority has eleven inspectors. The agency authority based in the DTI has fewer than 20, and this is to cover the whole country. We are saying to the Government that we welcome the legislation that has been introduced but that will only ever become real for those workers if it is properly enforced. There is also a challenge to the trade union movement in that, and trades unions recognise that we have a responsibility also to be organising migrant workers and vulnerable groups of workers, and many trades unions are now being very active, for example in the cleaning sector in London, groups of workers working in hospitality right across the UK and also in food manufacturing. So we would say to the Government: "Please, take further steps to protect vulnerable workers but we also will work with you as a trade union movement to ensure that this hidden work force gets the best treatment we believe everybody is entitled to in the UK."

Mr Tudor: These workers are definitely not outside of our potential to reach and rather than this just being our good intention, the most recent figures on union membership, for instance, showed an increase in union density in agriculture, which is clearly one of the areas where there are large numbers of migration and problems of unemployment.

Q130 Baroness Uddin: The restaurant industry I think is another.

Mr Tudor: Yes. But we recognise we have a lot to learn as well and my department is doing a lot of work with unions around the world in India, for instance, in Ghana and in Zimbabwe, about ways we can reach people who are not in traditional employment forms, the informal sector, and recruit them. We recognise the challenge but we are meeting it.

Chairman: I thought the most shocking thing was the gangmaster who refused to talk because he said he was working within the law.

Q131 Lord Trefgarne: I wanted to make a similar point, my Lord Chairman, in that the problems we were seeing portrayed on the television were problems of enforcement of the law, not problems of deficiency in the law.

Ms Reed: It is both/and. We totally agree that there are issues related to enforcement, and I have already raised the issue about resources, for example, but there are also problems in terms of gaps in the law. Firstly, in terms of licensing, we very much welcome the steps the Government took in introducing the Gangmasters' Licensing Authority following the Morecambe Bay experience. But that legislation only covers a tiny section of the labour market and therefore the worst gangmasters are at total liberty to go and operate in other parts of the economy and to continue their appalling practices. So we are saying to the Government: Extend the licensing regime right across the labour market to ensure that the government, the enforcement agencies, know where agencies are, because at the moment the problem is a hidden problem.

Q132 Lord Trefgarne: But it is quite new, too.

Ms Reed: It is a growing problem.

Mr Tudor: I do not think gangmasters are new. For instance, in East Anglia they have been a feature of employment relationships for at least a couple of hundred years, and they have always been associated with problems.

Chairman: I have spoken to people who have said to me they are coming back again, in other words they felt they had gone away to a certain extent and over the last 10 years or something like that they have come back. You see them standing on street corners and their buses waiting—

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Q133 Baroness Uddin: Mobile technology may be making them more effective.

Mr Tudor: If you had Jack Dromey from the Transport & General Workers here before you he would be telling you about his father who used to stand on the streets of Brent and get picked up by the gangmasters.

Lord Trefgarne: But the problem is re-emerging, presumably, because of an increased supply of migrant workers who are from the EU?

Q134 Chairman: They are all EU citizens, or most of them.

Ms Reed: That is one of the reasons. We talked about gaps in enforcement law and in the licensing law, but there are also gaps in employment law in the UK. We operate within the UK a two-tier work force approach to our employment law. Individuals who qualify as employees—and I will not get into the technicalities because it is immensely complicated and only the highest paid lawyers really understand the issue—have a full range of employment rights, whereas workers employed on a very casual basis have a much lower level of employment rights including working time rights—

Q135 Baroness Uddin: So they often do not know about them.

Ms Reed: Yes, but there is an indicator I would suggest being given by the law to bad employers that you can save costs by employing people on insecure forms of employment. We believe ultimately that is not OK in terms of fairness of treatment for those workers but also ultimately it is not a sensible economic approach for the economy, because we know we need to have a higher skilled work force. It was as if we are saying to a certain group of the work force: “We are going to treat you as second class citizens and not give you access to the opportunities and skills that the rest of the work force has. Then those individuals are losing out and the economy is also losing out on their contribution.

Q136 Baroness Gale: We know we have laws in this country but it is the implementation of them really so to ensure uniformity of employment rights for workers, regardless of the Member States in which they were working, what would you see as the implication of EU enlargement on labour law? We have got legislation but how would we deal with all that in terms of the implementation, because that is the difficulty at the moment?

Mr Tudor: In terms of the enlargement to the EU, which we support strongly for other reasons as well, the extension of liberal democracy to Eastern Europe is an incredibly important achievement of the EU, but in terms of the uniformity of employment law across the European Union, we think it would help

prevent exploitation of those vulnerable workers from Eastern Europe, prevent undercutting of those vulnerable and not so vulnerable workers in the UK, and prevent division in society by making sure people were not first and second class citizens.

Ms Reed: There are certain areas of employment law where we think there should be common standards right across the EU, so not only migrant workers who have come to work on a long-term basis but also increasingly workers on short-term assignments in different parts of the economy, high school workers as well, should know they get a common level of treatment wherever they go in the EU, and that is the purpose of more cross-border employment laws. But we do need to ensure that those laws are enforced equally right across the EU and not more rigidly in one economy than the other, and I must say our track record within the UK is not good in terms of ensuring that workers here on a short-term basis do have the level of employment rights that they would get in the rest of Europe.

Q137 Baroness Gale: How would you get that information to the workers? That is the problem. How do they then access it all, as we saw last night? They have not the knowledge, have they? And then they are isolated in the way they are working.

Mr Tudor: There are all sorts of ways of making sure that information gets to workers. We work with their own community groups, for instance, and with the Catholic Church, for instance. In terms of Polish workers that is a very important channel. We are also using official government channels. If you register under the worker registration scheme for A8 nationals you get a leaflet from the TUC explaining your employment rights and the opportunity to obtain it in your own language. But there is another route for this. It is not simply making workers aware of their rights; it is making sure that we use the supply chains from the supermarkets then on to the agricultural workers to make sure that the supermarkets are ensuring that people are not being exploited, as the T&G very successfully did in terms of strawberry farmers in the Midlands over the last five or six months. They talked to the supermarkets where they had members and said: “Don’t use your supply chains to exploit migrant workers in the strawberry picking industry”, so there is a responsibility for everybody.

Q138 Chairman: A contract compliance approach, in a way?

Mr Tudor: Yes.

Q139 Lord Trefgarne: Do you agree with the assertion which we often hear that the UK government tends to gold plate regulations when they emerge from Brussels and apply them more

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strictly than other Member States, sometimes beyond the requirements of the Directive or the regulation, while other Member States take a more relaxed approach, and even if they do implement the regulation correctly they police it very badly?

Ms Reed: Very quickly, the TUC does not agree with the assertion that we do gold plate EU Directives, ie we do not over-implement EU Directives, particularly in the area of employment law and labour law. And it is not just the TUC who hold this view. The Government commissioned its own review of the implementation of EU Directives last year, the Davidson review, and that came out with a number of clear conclusions. First, that evidence to support assertions that the UK implements and enforces more rigorously than other Member States is often lacking. Furthermore, the review had similar concerns about other governments and business representatives in other EU countries, so maybe this is a concern that is common across the EU. Also, the review concluded that many allegations of over-implementation are misplaced as they often relate to concerns about the EU measure itself rather than the actual implementation of the EU measure, or maybe wrongly assumed that the UK legislation originated from the EU. Perhaps most importantly in terms of the conclusions from that review it recognised that sometimes it can be beneficial to the UK economy to set or maintain regulatory standards which exceed the minimum requirements of EU legislation. Finally, and briefly, the OECD and World Bank has repeatedly found that the UK is one of the least regulated industrialised economies, and there simply is no evidence, in our view, that we are overloaded with this excessive red tape. Indeed, from the TUC's view there are a number of occasions where the UK has not implemented EU Directives fully in which case we are constantly finding unions and employees in the courts.

Q140 Lord Trefgarne: I must say we have some evidence to the contrary of all that, not least from the witnesses we had last week, the Federation of Small Businesses.

Ms Reed: I thought it was important maybe to bring to the attention of the Committee the Davidson review which did a very thorough consultation. It may be something the Committee would want to look at that.

Q141 Chairman: I am conscious that we are now 10 minutes past your time, and you are no doubt busy people and need to be somewhere else. There are two questions we have not really tackled, namely the

legal status of the employee and self-employed. You have talked around that quite a lot and I wonder if it would be possible for you to put it on one side of a sheet of paper or send us your recent pamphlet on the issue or something like that? I do not want to make more work for you but this is quite a technical problem and it may be more sensible to deal with it in that way. Then we also have a question about the Working Time Directive which was Lady Greengross' question and, again, this is quite a technical and difficult subject but I am sure you have a written opinion on all of this already and it would be very helpful if, on those two subjects, you could give us something in writing.

Mr Tudor: We can certainly do that if we have run out of time on working time!

Q142 Chairman: Before you go, do you have any views on whether or not the EU process of forming labour law is satisfactory, or is it a mess? Do you have any view or vision about that?

Mr Tudor: I was going to say that we realise you are busy but I hesitate to say we are flexible! In terms of the process of forming labour law, there is good and bad; it is curate's egg territory. The extent to which it involves social partners in a structured form we find to be, as you might imagine, an excellent innovation. We believe that the work that has been done between unions and employers over the part-time workers' directive and parental leave, where these things were negotiated between both sides of industry before being passed at the European level, is an excellent example of the way producing flexible legislation improves people's lives. On the other hand, at a UK level we have problems because we have no implementation mechanism other than if the social dialogue agreements get turned into Directives; we have no tripartite or bipartite implementation mechanism, and overall at the UK level, and this is simply a matter of political will rather than process, whilst there remains a deep reluctance on the part of the Council of Ministers and the Commission to give legislative backing to the negotiations of the social partners, those social partner negotiations have a little less bite and a little less urgency than they might otherwise have because everybody who is involved knows it may not lead anywhere.

Chairman: Thank you for that, and thank you very much for being with us. It has been a most interesting session, and you have been most generous with your time. As I say, we would like those bits of almost technical information which would help us to round out our picture, and I hope we have not kept you from important business of your own, or rather of the trades union movement!

Supplementary memorandum by the TUC

SUPPLEMENTARY EVIDENCE ON EMPLOYMENT STATUS AND SELF-EMPLOYMENT

To what extent do you think the current UK legal definitions of self-employment and employment need to be clarified, and how should this be done? What advantages (or disadvantages) might there be in making such a clarification part of a wider EU clarification?

Employment status is a confusing and contentious issue in the UK. Three main categories of employment are recognised: “employees”, “workers” and the “self-employed”. Assignment to a particular category has implications for tax, national insurance and benefits and for employment protection. The Government itself acknowledges that employment status is far from straightforward. Guidance on its DirectGov website states that: “there is no one thing that completely determines your employment status because an Employment Tribunal decides, based on all the circumstances of a case.” This demonstrates the completely unsatisfactory nature of employment status in the UK: that it requires recourse to an employment tribunal to determine status in an individual case, a costly, stressful and time consuming procedure for all parties involved.

The distinction in UK employment law between “worker” “employee” and “self-employed” is a significant one, governing access to a hierarchy of employment rights. In order to claim entitlement to important rights such as protection from unfair dismissal and entitlement to redundancy payments and certain parental rights, it is necessary for an individual to demonstrate that they are an “employee” rather than a “worker”. Certain groups of worker in the UK labour market, notably those in what are regarded as various forms of “non-standard” employment relationships, find it particularly hard to demonstrate that they are “employees.” The legal distinctions drawn between “employees”, “workers” and “the self-employed” combined with economic changes means that growing groups of workers lose out on basic rights.

The so-called bogus self-employed are one such group. According to the DirectGov website the self-employed do not have employment rights (with a few notable exceptions i health and safety and some discrimination protection) as they are their “own boss” and can decide how much to charge for their work, how much holiday to take etc. However, an increasing concern is that growing numbers of workers are being classified as self-employed, but are in reality, dependent workers who do not have the independence and autonomy over their work, that characterises genuine self-employment.

In 2000 the OECD recognised “the borders between self-employment and wage salary employment are becoming more blurred”.³¹ There are growing numbers of workers occupying the “grey areas” between employed and self-employed status. This is particularly an issue in sectors where employers increasingly rely on outsourced or subcontracted labour, including the media sector and print journalism, and most significantly construction that currently accounts for 22.6 per cent of all self-employed workers.³²

In these sectors, the traditionally held assumptions that employees accept the trade-off of security in return for personal dependence or subordination, while the self-employed enjoy independence and access to fiscal subsidies and the greater opportunity for profit for the self-employed, often no longer hold. There are many nominally self-employed workers who do not employ others, have little or no access to working capital, and have few business assets other than their own know-how and expertise.

As research by Mark Harvey has demonstrated, many workers in these sectors, whilst being classified by the courts as being self-employed for the purposes of employment protection, are in practice economically dependent on one or a number of employers. As a result they are excluded from employment protection and employers avoid the costs of direct employment. This a problem commonly experienced by freelancers who may work regularly for a limited number of employers over a number of years, working at the employers’ premises under their direction, but as they are described as freelance or as engaged as and when required, they are not considered to be employees. As the workers are not free to set their own rate for the job, but rather are paid the rate set by the employer or the sector, they are in practice economically dependent.

Some freelancers do not even qualify as ‘workers’ and therefore lose out on working time rights, which are crucial in long hours areas such as the audiovisual and entertainment sectors.

The TUC would welcome any legislative changes at an EU level that would prevent such exploitative practices. The TUC believes that all EU employment legislation should apply to a wide category of workers and that there should be a legal presumption that an individual qualifies as a worker. The onus should be placed on the

³¹ OECD Employment Outlook, 2000.

³² Labour Force Survey data for fourth quarter of 2006, downloaded from <http://www.statistics.gov.uk/downloads/theme—labour/LFSHQ/STable23.xls> on 13/03/2007 10:20.

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employer to demonstrate that an individual does not qualify for employment protection rights. We would be concerned about any change in EU law that encouraged employers to increase the out-sourcing of labour or promoted labour market segmentation.

SUPPLEMENTARY EVIDENCE ON THE WORKING TIME DIRECTIVE

How do you see the way forward in relation to the implementation of the Working Time Directive? What is your view of how minimum requirements for working time could usefully be modified?

The European Commission Review of the Working Time Directive

The European Commission has been reviewing a number of aspects of the Working Time Directive (WTD) since 2004. In 2005 the European Parliament agreed a position, after which the Commission issued a revised proposal in the summer of that year.

However, since then a number of attempts to reach agreement in the Social Affairs Council have failed. Member states are split into three groups: those who broadly support the Commission's proposals; those who want more robust social protection and those, including the UK, who want more liberalisation. Both of the groups that are not content with the EC's proposals have enough members to form a blocking minority.

It would be likely that the review would make no further progress if it were not for the fact that the SIMAP and Jaeger European Court of Justice (ECJ) Judgements mean that on-call work spent on the employers premises counts towards the limits and triggers the rest break entitlements in the directive. As this has a significant impact on the operation of hospitals in many countries it is likely that a large number of member states will continue to press for a solution.

A second factor that militates against the status quo prevailing is that a large number of member states are not complying with the directive in full. It seems most likely that the Commission's next step will be to take action against some of the worst offenders, which may result in a shift in some member state's position in the Social Affairs Council.

The TUC's view is that the position of the European Parliament was a strong attempt to forge a compromise. The Parliament wants to see the individual opt-out phased out within five years, in exchange for which employers would be able to calculate the 48-hour limit over a 52-week averaging period rather than over the present 17-week calculation period. In addition, the ECJ judgements on working time would be severely watered down.

The TUC supported the European Parliament's position because our prime goal is to get rid of the opt-out, which is much abused and undermines the other WTD rights. We took this position even though it would have meant exempting nearly half of our long hours workers from the limit on working time by lengthening the reference period and rolling back the on-call judgements, which we wanted to keep.

How the Working Time Directive was implemented in the UK

The WTD was implemented in UK by the Working Time Regulations (WTR) 1998, which has since been amended on several occasions. Responsibility for enforcement for different rights and industries is split by industrial sector and by groups of rights:

- Health and Safety Executive—48 hour week, night-work limit, night work health assessments in factories, construction sites.
- Local authorities—48-hour week, night-work limit, night work health assessments in shops and retailing, offices, hotels and catering, sports, leisure and consumer services.
- Individual cases to Employment Tribunal (ET) in all industries—annual leave and rest break entitlements.
- The Maritime and Coastguard agency have responsibility for seafarers and inland waterway workers; the Civil Aviation authority have responsibility for pilots and cabin crew; the Vehicle Operator and Service Agency have responsibility for heavy good vehicle and passenger coach drivers.

Our general assessment is that the widespread use of the individual opt-out has also undermined the other rights in the directive, as many UK managers believe that they do not have to address working time issues at all and many UK long-hours workers believe that the directive did not really give them any rights.

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The context is that although extent of long hours working in the UK has declined by 15 per cent since the WTR were introduced in 1998; the UK still has the highest incidence of long hours working in the European unions - some 2.5 times the EU average.

The TUC would still be concerned even if all of these workers had signed the opt-out through free choice, since we believe that it should not be possible to opt-out of health and safety legislation. Unsafe working practices impact not just on the individual but also on third parties and the wider society. Therefore the right to work long hours must be mediated by the duty to work safely.

However, there is also abundant evidence that employers put pressure on employees to opt-out, including the DTI's own 2004 report - 'A survey of workers experiences of the Working Time Directive'. This ranges from the practice of sending the worker opt-out forms with the job offer to some nasty cases of old fashioned bullying.

Unsurprisingly, independent enquiries have concluded that UK business does not really need the freedom to make its employees work more than 48 hours per week for 52 weeks of the year:

- “There was no sign that the extent of sustained long hours working was systematically associated with the business and financial needs of workplaces workplaces have organisational choice and are able to reduce the need for sustained long hours should they choose to do so”.³³
- “With the WTD only aiming to limit the working week to an average of 48 hours, it would seem to us that there is plenty of scope for particularly long hours to be reduced without encountering the problems that these economies are facing. Consequently we are not convinced of the necessity of maintaining the opt-out”.³⁴

The DTI's assessment of the Working Time Regulations

The DTI commissioned a survey of workers experiences of the WTR. The results highlighted below suggest that the UK regime needs to be made more robust:³⁵

- 31 per cent of night workers have not been offered health assessments;
- 44 per cent of those who have signed an opt-out say that it was a condition of their employment
- 23 per cent of long hours workers have not signed an opt-out but have been put under pressure by their employers to work more than 48 hours;
- 28 per cent of UK long hours workers (eg those working more than 48 hours per week) know that there is a 48-hour limit;
- 50 per cent of the long hours workers who have either raised issues about the 48 hour limit or know that such issues have been raised by somebody else in their workplace say that the issue was not resolved—in other words, they have been unable to access their rights;
- 13 per cent of employees did not get all their statutory annual leave;
- 15 per cent of employees did not get the rest breaks stipulated by the WTR.

Problems with the UK regulations

In the TUC's view there are a number of areas where the WTD has not been properly transposed or where the regulations have simply failed to work:

- The Health and Safety Executive and local authority environmental health departments do not fulfil their duties as the legal enforcement agencies. Complaints are screened using risk assessment techniques, which means that many are not investigated. Some local authorities do not even know that they have responsibility for enforcing the WTR.
- The regulations governing the use of the individual opt-out are too weak to ensure genuine freedom of choice.

³³ “The Business Context of Long Hours Working”, T Hogarth, WW Daniel, AP Dickerson, DCampbell, M Wintherbotham, D Vivian, University of Warwick Institute for Employment Research, DTI Employment Relations Series 23, November 2003, p 9.

³⁴ House of Commons Trade and Industry Select Committee Report £7, “Labour Market Flexibility and Employment Regulation”, March 2005, paras 64/63. <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/90/9002.htm>

³⁵ Source: A survey of Workers Experiences of the Working Time Regulations, DTI Employment Relation Series No 31, 2004

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- Enforcement by ET has not been sufficient to ensure that workers can get their rest breaks and holidays. Workers will generally not take their employers to ET because this would effectively destroy their employment relationship.
- The European Court of Justice judgements on on-call work and compensatory rest have not been included in the UK regulations.
- The rest breaks and leave provisions are couched as “entitlements” in UK law and can therefore be ignored by the worker. Taken together with the opt-out, this means that there is no enforceable limit on the working time of those who have opted out.

The TUC has raised the issue of enforcing the existing law on the 48-hour week and the rules on the opt-out with the government on numerous occasions.

We also made a formal submission to the UK Government’s 2004 consultation on enforcing the rules on the opt-out.³⁶ This government consultation followed the publication of the EC report by Barnard et al on the implementation of the WTD.

The TUC suggested a 10-point program of improvements to the current rules. The Government initially gave a positive response to just two of our suggestions: that there should be a campaign to raise awareness of the existing rules, and that the WTR should be amended so that the opt-out could not be signed before commencement of employment.

However, the government has so far taken no action since publishing its response to the report, citing the ongoing EC review as the reason for the delay.

Finally, as the rest breaks and leave provisions are only entitlements in the UK, there is no effective limit on the hours of those who have opted out, with the result that 430,000 employees regularly work more than 60 hours per week and 130,000 more than 70 hours per week.³⁷

We are concerned about the detrimental effects that long hours are likely to have on the health of these workers. In addition, many are in safety-critical occupations such as driving delivery vans.

The next steps for the UK regulations

The TUC would prefer the Government to change its position in the Social Affairs Council to one that is better aligned with the evidence on long hours workers and affords more protection for UK workers.

The problems with the UK regulations are substantial, and have detrimental effects on our workers. The TUC’s initial assessment is that the UK government might have to justify to the Commission several real breaches of the directive. The on-call judgements have not been incorporated into the UK regulations, the enforcement system is moribund, and the rules on the opt-out are too weak to support free choice.

However, progress in the UK should not be dependent on the ongoing European Commission review. Given that the UK Government’s formal position is that UK workers should be able to invoke their WTD rights whilst retaining the right to opt out of the 48 hours average weekly limit, they ought now to take steps to try to alleviate the problems with the UK Regulations.

If the government were to try to deal with some of these problems immediately this would improve their bargaining position in Europe whilst giving greater protection to UK workers.

First, the government needs to deal with the ECJ judgement concerning on-call work. They should begin by taking further steps to minimise on-call working in public services. In fact, the Department of Health has already advised hospitals to do this, although implementation has so far been patchy.

Second, it is clear that the enforcement regime for the WTD is not working. Enforcement is split between a number of routes and agencies. Annual leave and break entitlements are enforced by the worker taking a case to Employment Tribunal, whilst the 48 hour week and nightwork limits are enforced for 61 per cent of workers by complaint to the HSE, for 37 per cent of workers by complaint to the relevant local authority and for 2 per cent of workers by complaint to one of the transport authorities.

Leaving aside the complexity of the arrangements, the main problem is that neither the HSE nor local authorities see this as a priority or have the resources to answer complaints. As a result, many complaints have simply been ignored, in which case the worker has nowhere else to go.

³⁶ <http://www.dti.gov.uk/files/file11782.pdf>

³⁷ Source: ONS Labour Force survey Microdata Service autumn 2006.

26 April 2007

The TUC believes that this problem could be most easily resolved by emulating the 2-channel model used to enforce the minimum wage. Workers should be allowed claim their working time rights either by taking an ET case or by complaining to an enforcement agency.

In addition, more effort needs to be made to ensure that workers can take their annual leave entitlements and rest breaks. This is particularly important in the light of the Governments' welcome plans to increase the minimum statutory leave entitlement. Again, the simplest thing would be to establish a two-channel enforcement mechanism for all the WTR rights by giving the HSE and local authorities a duty to enforce these provisions.

Finally, the rules around the use of the opt-out should be tightened. The TUC proposes the following changes:

- The opt-out should not be signed before the contract commences or during any probation period;
- The working time of those who have signed the opt-out must be capped in order to protect the health and safety of both the workers themselves and others who might be put at risk by dangerous long hours working.
- Employers must monitor the hours of workers who have signed the opt-out, must keep records, and must make them available for inspection
- The notice period for opting back in should be the same as the notice period in the workers contract - typically either 1 week or 1 month.
- Opt-outs should be reviewed after one year.
- Workers need to be protected against detriment for trying to enforce their rights.

May 2007

THURSDAY 3 MAY 2007

Present	Dundee, E Gale, B Morgan of Huyton, B Moser, L Neuberger, B	Thomas of Walliswood, B (Chairman) Trefgarne, L Uddin, B Wade of Chorlton, L
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Memorandum by Department of Trade and Industry (DTI)

15725/06—Commission Green Paper: Modernising Labour law to meet the challenges of the 21st century.

Further to my letter of 13 March, I am enclosing written evidence for Sub-Committee G's Inquiry into the Green Paper on Labour Law. We have addressed the Sub-Committee's questions directly and the core of our response is based on our formal response to the EU Commission consultation, which I also enclose for information.

Q1. Flexibility of the labour market

1. The UK labour market is characterised by diversity and flexibility with one of the widest range and types of job and ways of working available in the world. This means workers and employers have more choice over the type of employment that suits them.
2. General indicators such as the OECD's Employment Protection Legislation (EPL) index show the UK with the least strict EPL across Europe. The European Commission's Employment in Europe 2006 notes that stricter EPL may harm in particular the employment prospects of weak groups.
3. But as this Government has shown, flexible labour markets are compatible with social justice and worker rights. We have demonstrated that we can lead the way in providing a framework of rights without overburdening business by applying better regulation principles by using first class and innovative methods of consultation, making effective use of alternatives to regulation (including better guidance, advice and support), pioneering common commencement dates and showing they can work and, when we make changes to the law, balancing, rights and responsibilities.
4. In terms of making the UK labour market more, flexible, our policy document "Success at Work—protecting vulnerable workers; supporting good employers"³⁸ (March 2006) set out a programme to help good employers comply with the law through simpler regulation and improved guidance. We will seek to target our enforcement efforts on the minority of businesses that flout the law.
5. For example, the DTI has just launched a consultation on resolving disputes in the workplace³⁹. This consultation sets out a package of measures for taking forward the recommendations of the Gibbons review of employment dispute resolution in Great Britain. It seeks views on a package of measures to help solve employment disputes successfully in the workplace so that productivity is raised through improved workplace relations, access to justice is ensured for employees and employers, the cost of resolving disputes is reduced for all parties and disputes are resolved swiftly before they escalate.

Q2. Employment security

6. The UK has a high employment rate of just under 75 per cent, which indicates a strong, healthy labour market and also a low unemployment rate of 5.5 per cent. For 77 per cent of UK unemployed, unemployment is short-term, compared to an EU average of 54 per cent. Only around 11 per cent of UK unemployed would be categorised as very long term unemployed (have been out of work for at least 2 years) compared with 25 per cent in EU25.
7. And UK workers feel secure in their jobs; the UK has the second lowest rate in the European for the fear of losing a job in the next six Months (see the European Foundation for the Improvement of Living and Working Conditions: Fourth European Working Conditions Survey 2007). <http://www.dti.gov.uk/employment/employment-legislation/success-at-work/index.html> 2 <http://www.dti.gov.uk/consultations/page38508.html>

³⁸ <http://www.dti.gov.uk/employment-legislation/success-at-work/index.html>

³⁹ <http://www.dti.gov.uk/consultations/page38508.html>

8. Labour law is just one part of a package that includes a range of other measures to encourage and enable people to come into and remain in the workplace. Equipping people to manage and take advantage of change, rather than seek to protect specific sectors or jobs is the best way to manage the uncertainties and opportunities of globalization.

Q3. *The concept of “Flexicurity”*

9. Europe needs to address its history of poor labour market performance if it is to meet the overall Lisbon employment target of 70 per cent by 2010, maximise the benefits of globalization, and face demographic change. Flexibility is necessary both to achieve our goals, and to achieve modern security: combating social exclusion and giving people security in transitions and employment opportunity, while encouraging labour participation. As such, it is right and welcome that within Europe we examine the relationship between flexibility and security and share experiences of different national approaches.

10. For Europe we need a broad interpretation of flexicurity—a framework where flexibility and security are mutually reinforcing, rather than in competition with one another, or balancing each other out. In the right environment, a policy normally associated with security, like providing childcare, also increases flexibility by allowing more people to work. Policies traditionally associated with flexibility, like reform of employment protection legislation and allowing businesses to adjust, also increase security by enabling job creation and preventing two-tier labour markets. Flexicurity offers an approach to our common objectives—jobs, growth and social cohesion, not a specific model for all EU Member, States.

11. Having a framework of light touch labour law providing reasonable rights for workers whilst allowing business to make necessary adjustments is just one part of a package that includes a range of other measures to encourage and enable people to come into and remain in the workplace. In the UK we also have in place a comprehensive set of active labour market policies which help people to make transitions in the labour market. Our focus is on helping individuals who find themselves out of work back into the labour market as quickly as possible.

Q4. *Other labour market challenges*

12. Worklessness remains the key social challenge in Europe with around 18 million unemployed and over 90 million economically inactive. Labour market performance must be addressed if we are to achieve the overall Lisbon employment target of 70 per cent by 2010. Changing demography means broadening labour market participation must be a priority if we are to meet the competitive challenge and are to continue to afford the social protections we value.

13. So, labour law must be consistent with job growth and encouraging more people to come into and stay in the workplace. To do this, flexibility is essential. Businesses need the flexibility to create jobs and people need flexibility to work in ways that balance their work and family life. In the UK, we have more people in work than ever before and the highest employment rate in the G8. Significant progress has also been made in increasing labour market participation. For example, there are more women in work than ever before.

14. Even well functioning labour markets have groups of workers that may be vulnerable in some circumstances. The root cause of vulnerability is very often lack of skills. Basic skills (including language skills) are, more important than ever for entering the labour market. Vulnerability can also result from abuse of existing systems, not because of lack of rights but because rights are denied. In these circumstances it is necessary to address lack of awareness or abuse in the specific circumstances in which it occurs.

15. The Government is tackling vulnerability through a range of measures detailed in *Success At Work*, which committed us to protecting vulnerable workers, cracking down on rogue employers and lightening the compliance burden for legitimate business. For example, the DTI is funding two pilots to support vulnerable workers and help their employers to comply with employment rights legislation.

16. In July 2002 the Government published a consultation on the issue of the differing rights and responsibilities in employment law of “employees” and “workers”. This considered the current framework and coverage of employment rights to see if they were still appropriate and fair and supported our aim of high participation in work. Our response was published in *Success At Work*. Having reviewed the evidence provided in responses to the consultation and taken account of action already undertaken since 1997, we believe that changes to the legal framework would not prevent instances of abuse or lack of awareness. It could however damage labour market flexibility and result in a reduction in overall employment.

17. We have concluded that the present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and rights in different employment relationships. We believe that it meets the labour market's current needs and there is no need for further legislation in this area. We will help people understand the current framework better, and the rights to which they are entitled, whether that be employee, worker or self-employed and how to enforce those rights. We will improve the guidance available.

Q5. Groups covered by labour law

18. The scope of labour law is a matter for each Member State to determine. A key aspect of the UK labour law framework is that not just employees but other workers, including agency workers, are entitled to certain rights regardless of their employment status. This is not the case in all Member States. In the UK workers (as well as employees) have rights associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wages and the right to be a member of a trade union. Also, workers and others on atypical contracts in the UK are not denied access to social benefits such as those provided through the health service or National Insurance. In some other Member States we understand, this may not always be the case. The onus is on Member States to identify where there is need for reform in their social systems.

19. However providing for variation in the balance of other rights and responsibilities in the work contract for workers that are not employees provides the benefit of diversity for both business and workers. For example, we have a thriving agency and temporary work sector that is a key part of our economy and in which many choose to work for positive reasons. But this is not at the expense of permanent jobs, which are increasing in number (and accounts for 94 per cent of the workforce). The Government believes that our present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and associated rights in different employment relationships.

Q6. Role of EU Regulation

20. We have already agreed, or have under consideration, some EU-wide minimum standards that form a common denominator on which all Member States can build on in the way that is best suited to their circumstances. While respecting national traditions and practices, we need to ensure that where common standards are agreed these can be applied fairly across the EU.

21. As the Green Paper notes, "It has to be recalled that national traditions are very different when it comes to the formulation and implementation of labour law and policy." The Government sees little appetite for further significant new EU legislative initiatives at this time. Where the EU can add value is by providing opportunities for identifying and sharing good practice, data gathering, analysis and as appropriate providing guidance on aspects of policy making, better regulation practice and on enforcement.

22. The UK experience is that providing a package or framework of certain rights for workers and employees is an essential component of a flexible and fair labour market. However, it is a matter for individual Member States as to what the "floor of rights" should be to reflect national circumstances. In the UK, all workers, not just employees, are entitled to certain rights including those associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wages and the right to be a member of a trade union. Also, workers and others on atypical contracts in the UK are not denied access to social benefits such as those available through the health service or national insurance. We understand that in some other Member States, this may not always be the case. The onus is on Member States to identify where there is need for reform in their social systems.

23. We do not believe that it is either necessary or practical for there to be a more convergent definition of "worker" in EU Directives. It should be for Member States to guarantee workers certain minimum rights and protections within their territory whether locally employed or working across borders.

29 March 2007

Green Paper on Labour Law: UK response

1. What would you consider to be the priorities for a meaningful labour law reform agenda?
2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?
3. Do existing regulations, whether in the form of law and/or collective agreements⁴⁰, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?
4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

Question 1

Any approach to labour law must be seen in the context of both business and the workforce. These interests are not mutually exclusive; we can ensure that economic progress is consistent with social justice.

The UK is committed to full employment and social inclusion. Jobs are at the heart of both economic progress and social justice; competitive success comes from an effective workforce and for most people a job is the way to realise their potential. Employment enables people to provide for themselves, their families and their future. Jobs also lead to social inclusion because work is the best route out of poverty and prevents people from falling into poverty in the future.

The dominant feature of the world economy is the expanding reach of global economies into national economies. Europe must be competitive if it is to continue to make the economic and social progress valued by its citizens. That is why we have agreed a Lisbon Agenda focussed on “jobs and growth” which remains our focus for future action.

Worklessness remains the key social challenge in Europe with around 18 million unemployed and over 90 million economically inactive. Labour market performance must be addressed if we are to achieve the overall Lisbon employment target of 70 per cent by 2010. Changing demography means broadening labour market participation must be a priority if we are to meet the competitive challenge and are to continue to afford the social protections we value.

So, labour law must be consistent with job growth and encouraging more people to come into and stay in the workplace. To do this, flexibility is essential. Businesses need the flexibility to create jobs and people need flexibility to work in ways that balance their work and family life. This does not mean a trade-off between flexibility and security, they should be mutually reinforcing.

EU labour markets are increasingly diverse. Work is organised differently in Member States reflecting different traditions and structures. As the Green Paper notes, “It has to be recalled that national traditions are very different when it comes to the formulation and implementation of labour law and policy.” We have already agreed or have under consideration some EU wide minimum standards that form a common denominator on which all Member States can build on in the way that is best suited to their circumstances. While respecting national traditions and practices, we need to ensure that where common standards are agreed these can be applied fairly across the EU.

However it is increasingly apparent that one size does not fit all. Whilst we might reach a common understanding about directions and goals the delivery of labour market reform is now for individual Member States. We see little appetite for further significant new EU legislative initiatives at this title. As the Green Paper notes, “Responsibility for safeguarding working conditions and improving the quality of work in the Member States primarily rests on national legislation and on the efficacy of enforcement and control measures at national level.

Where the EU can add value is by providing opportunities for identifying and sharing good practice, data gathering, analysis and as appropriate providing guidance on aspects of policy making, better regulation practice and on enforcement.

⁴⁰ As in the UK labour law is delivered through direct legislation, rather than through universally applied collective agreements, questions that refer to both are addressed only from this perspective.

Within this framework and context Member States are generally best placed to manage the evolution of their own labour law frameworks alongside other related social policies to deliver Lisbon goals. This is consistent with the “better regulation” principles of subsidiarity. But in considering labour market measures it is important to be clear where legislation is the appropriate tool to achieve labour market objectives. Depending on the nature of the problem, it may be more appropriate to consider whether the answer lies in other mechanisms, for example, achieving better awareness of existing legislative provisions and whether they are being appropriately enforced. There may be circumstances where what is necessary is for initiatives to promote culture or behavioural change amongst employers and/or workers. This all needs to be done in partnership with key stakeholders including from business and trade unions.

Even well functioning labour markets have groups’ of workers that may be vulnerable in some circumstances. Experience in the UK shows that vulnerability and employment status are not synonymous and it cannot be assumed that any whole category of workers is vulnerable by definition; a whole range of factors have a bearing on whether or not a worker is vulnerable. The root cause of vulnerability is very often lack of skills. Basic skills (including language skills) are more important than ever for entering the labour market. Vulnerability can also result from abuse of existing systems ie: not because of lack of rights but because rights are denied. In these circumstances it is necessary to address lack of awareness or abuse in the specific circumstances in which it occurs.

In the UK we are tackling vulnerability through a range of measures detailed in our policy document “Success at Work⁴¹—protecting vulnerable workers, supporting good employers” (March 2006) which commits the Government to protecting vulnerable workers, cracking down on rogue employers and lightening the compliance burden for legitimate business. For example, the UK Department of Trade and Industry is funding two pilots to support vulnerable workers and help their employers to comply with employment rights legislation⁴².

Labour law is therefore only part of the picture. The onus is on the Member States to identify where there is need for reform in their own legal frameworks and social systems.

Where legislation is seen as the appropriate way forward—this should be framed in ways that take account of business, employers and workers through full consultation and appropriate impact assessments. Overly restrictive legislation can damage job creation and the effective functioning of labour markets.

In the UK, we have created one of the most successful labour markets in the world, with more people in work than ever before and the highest employment rate in the G8 whilst unemployment remains at a low level. Our approach has been based on combining social justice with economic prosperity so that businesses grow and employment expands, delivering opportunity for all. Since the beginning of 1997, there are 2.5 million more people in work and unemployment remains at a low level. Significant progress has also been made in increasing labour market participation. For example, there are more women in work than ever before. The UK labour market is characterised by diversity and flexibility with one of the widest range and types of job and ways of working available in the world. This means workers and employers have more choice over the type of employment that suits them. We have the second highest job satisfaction rate in the EU and the second lowest rate for the fear of losing a job in the next six months⁴³. Also, our record on health and safety at work is one of the best in the world.

Questions 2 to 4

While traditional permanent employment contracts continue to be the first choice for many, it is important to also allow for new and flexible forms of work that meet the changing needs of business and workers. UK experience shows that legal frameworks can allow for that diversity without creating a “two-tier” labour market, by enabling different types of contract and allowing for easy transitions between them. Firms need to be able to restructure and adjust to change; Instead of stopping them, we need to ensure a policy framework that support transitions. This is not primarily a matter of labour law but includes education and skills and active labour market policies to help people to find and to change jobs. The onus is on Member States to ensure that national structures do not impede transitions but rather help people to manage change.

⁴¹ <http://www.dti.gov.uk/employment/employment-legislation/success-at-work/index.html>

⁴² Two pilot partnerships are under development; one led by the TUC in the City of London and Canary Wharf focused on workers in cleaning and building services; the other led by Marketing Birmingham focused on employers and workers in Birmingham’s hospitality sector. The pilots will develop local partnerships with unions, business groups, local authorities, community groups, government agencies and others to help vulnerable workers secure their employment rights, and put them in touch with opportunities to develop their skills. They will also help employers to comply with the law, and help raise workplace standards.

⁴³ European Foundation for the Improvement of Living and Working Conditions: Fourth European Working Conditions Survey (2007).

Traditional employer/employee contracts remain the cornerstone of working life. But where traditional contracts are too rigid, or over-protect labour market insiders at the expense of those not in work, distortions can occur. Evidence suggests that overly restrictive legal frameworks, that place undue burdens on employers and assign very high levels of rights only to permanent employees; have the opposite of the intended effect by depressing the creation of permanent jobs resulting in much higher levels of temporary and atypical work and also risk forcing jobs into the informal/illegal sector. (eg see Chapter 2 of *Employment in Europe 2006*).

In the UK we have shown that proportionate regulatory frameworks can provide rights for workers without stifling job creation or creating two-tier labour markets. In consequence some 94 per cent of the UK workforce works under traditional contracts, with only around 6 per cent on temporary and agency contracts.

A key aspect of the UK labour law framework is that not just employees but other workers, including agency workers⁴⁴, are entitled to certain rights including those associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wages and the right to be a member of a trade union. But providing for variation in the balance of other rights and responsibilities for workers that are not employees provides for the benefits of diversity for both business and workers. For example, in the UK, we have a thriving agency and temporary work sector that is a key part of our economy and in which many choose to work for positive reasons. But this is not at the expense of permanent jobs, which are increasing in number.

With regard to small firms, we must make sure that labour law does not discourage firms from taking on staff. European SMEs are key to delivering the Lisbon objectives of stronger growth and more and better jobs. They make up a large part of Europe's economy: there are some 23 million SMEs in the EU, providing around 75 million jobs and accounting for 99 per cent of all enterprises. A proportionate, fair and comprehensible regulatory environment is essential for the growth and development of small firms. In all cases, it is important that employers and workers are aware of both their rights and responsibilities in any working relationship. This can be achieved through readily available guidance and information provided for both and by ensuring that effective systems are in place for dispute resolution and to enforce those rights and responsibilities.

In the UK, we provide an online one-stop shop to provide a single source of employment law information for individuals⁴⁵. Also, an Advisory, Conciliation and Arbitration Service (Acas) has always been a major source of information and advice and demands on its helpline are growing, both from employers and workers⁴⁶. The TUC also produces leaflets on individual's rights at work and maintains the workSMART website to help working people get the most out of the world of work⁴⁷. "Business Links" provides information on employing people on their national webpage⁴⁸ and regional business links regularly hold Employment Law Update events to provide their members with information on the rights and responsibilities of their staff.

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (ie passive labour market policies) and active labour market policies?

6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

Question 5

Labour law is just one part of a package that includes a range of other measures to encourage and enable people to come into and remain in the workplace. Each Member State must develop the right, sustainable mix of policies in accordance with its own structures and traditions.

Equipping people to manage and take advantage of change, rather than seek to protect specific sectors or jobs is the best way to manage the uncertainties and opportunities of globalization.

⁴⁴ In the UK, a "worker" means an individual who was entered into or works under (or where the employment has ceased, worker under—
(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; (Ref Statutory Instrument 1998 No.1833, Terms and conditions on employment- the Working Time Regulations 1998).

⁴⁵ See: <http://www.direct.gov.uk/Employment/fs/en>

⁴⁶ See: <http://www.acas.org.uk>—Acas (Advisory, Conciliation and Arbitration Service) aims to improve organisations and working life through better employment relations. They provide up-to-date information, independent advice, high quality training and work with employers and employees to solve problems and improve performance. Founded in 1975, they have 1975 over 30 years experience of working with people in businesses of every size and sector.

⁴⁷ See <http://www.worksmart.org.uk>

⁴⁸ See <http://www.businesslink.gov.uk>

Flexibility and security should be mutually reinforcing; it is not a trade-off between one of the other. This can be done by providing insurance in the broadest sense, including through: skills and retraining, unemployment benefits, conditions suitable for high job creation, making sure work pays by ensuring reasonable levels of income (as we do in the UK through the national minimum wage and other measures of income support such as working tax credit) and policies on flexible working and child care which make it easier to combine work and family life.

The UK already has one of the most flexible and dynamic labour markets in the world. Each year around 6.5 million people start a new job, responding to incentives in the labour market, progressing by moving from job to job, and helping employers fill vacancies, thus remaining competitive, productive and profitable, as well as curtailing skills shortages.

The UK also has in place a comprehensive set of active labour market policies which help people to make transitions in the labour market. The UK's focus is on helping individuals who find themselves out of work, back into the labour market as quickly as possible. The Jobseeker's Allowance (unemployment benefit) intervention regime is built around the individual and fully focused on the labour market. Individuals are required to actively seek work and the intervention regime promotes continuous job-search by requiring regular attendance at a Jobcentre⁴⁹. Under this approach, the payment of benefit is an active labour market measure. This approach means that the majority of people—around 80 per cent—leave the unemployment register within six months. However, for those who need it, extra help becomes available as the duration of unemployment increases through, for example; the New Deals which are targeted on the long-term unemployed.

Whilst UK unemployment is at one of the lowest levels it has been in its recent history, there continues to be people who are inactive in the labour market, and claiming key out of work benefits. We are progressing welfare to work policies to help those currently out of the labour market into employment and into a position where they too can benefit from a flexible, dynamic labour market. Policies have been introduced offering lone parents and those on incapacity benefits the help and support they need to make the transition from benefit to work.

Question 6

We understand this question to mean how can access to training and transitions between forms of employment be implemented through various means, rather than suggesting more labour law should be established via the route of collective agreements between the social partners.

Employment legislation should be flexible enough and complementary with other policies to aid transitions in the labour market. However, labour law is not in itself the key mechanism for delivering training opportunities.

Evidence suggests that proportionate law frameworks (together with active labour market policies) are associated not only with higher numbers of permanent contracts but also ease of transition between different types of contract, thus avoiding the kind of two-tier labour markets experienced elsewhere (eg see Chapter 2 of *Employment in Europe 2006*)⁵⁰.

In the UK some 94 per cent of the workforce works under traditional contracts, with less than 6 per cent on temporary contracts. It is not the case that UK temporary workers are all in low-status or low-pay jobs. For example, an estimated 25 per cent of temporary workers work in managerial and professional positions.⁵¹

Evidence suggests that, in the UK, the availability of agency and short-term contracts also provides an entry route to employment for those with limited work experience or under-developed skills. According to figures for 2006, 24 per cent of agency temps in the UK were unemployed or inactive one year ago⁵². Across the EU, 40 per cent of young people have temporary contract compared to 14 per cent of workers overall. However, the temporary work sector is also across the EU. The EU average of 14 per cent covers a wide range of figures from around 4 per cent in Malta to 33 per cent in Poland⁵³.

⁴⁹ Jobcentre Plus remains at the heart of the UK's active approach, which is a key factor in successfully increasing employment. On every working day, Jobcentre Plus now conducts 43,000 advisor interviews and helps around 7,000 people find work. By combining payment of benefits with active labour market interventions for customers, Jobcentre Plus provides a service based on the needs of the individuals and helps to maintain continuous attachment with the labour market. See: <http://www.jobcentreplus.gov.uk/JCP/index.html>

⁵⁰ UK Longitudinal Quarterly Labour Force Survey data suggests that between 2005 q2 and 2006 q2 around 520,000 workers transferred from a permanent position to a temporary one, and around 330,000 moved from a temporary post to a permanent one over the year. Also, a quarter of temporary employees changed the type of contract they were on over the year.

⁵¹ Labour Force Survey (LFS) data 2006, Q4.

⁵² Labour Force Survey (LFS) data 2006, Q4.

⁵³ Eurostat EU-Labour Force Survey (LFS) 2006.

For people to come into the workplace, they must be able to work in different ways to combine work and family life. Sometimes people want to work more, to earn more money for their families and at other times want to work less for example to combine work and child care or to phase into retirement. Part-time work offers people flexibility to combine work with other priorities. Around a quarter of all employment is part-time in the UK. The majority of people who work part time—over 70 per cent—do so because they do not want a full-time job and just 9 per cent of those working part-time say they are doing so because they cannot find a full-time job. And whilst many people want permanent jobs—others may prefer a series of temporary jobs perhaps to gain a range of experience or perhaps because they want to work only when they chose. It is important that people are able to make use of more flexible forms of work for positive reasons and also that they are able to move between different forms of work contract.

The UK is taking steps to bridge the gap between employability and skills. The Government is currently considering the Leitch Review of Skills' recommendations and is expected to publish a response in Autumn 2007. Efforts thus far have focused on the formation of an employer-led Commission for Employment and Skills and the development of an integrated employment and skills service, which will play a key role in aiding the transition into work. The UK has one of the highest rates for employees who received paid training over the past 12 months in the EU⁵⁴.

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

8. Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contact? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

Question 7

We do not believe that UK definitions of employment and self-employment need to be amended. We believe our present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and associated rights in different employment relationships.

In the UK, an individual's employment status is relevant for taxation purposes and entitlement to employment rights. There are no barriers to prevent individuals moving from one status to another or being both self-employed and employed in differing jobs or roles at the same time as long as they have the appropriate status which reflects the reality of the situation.

Individuals who are, or believe that they are, self employed are obliged to register with the relevant government department as such for tax and national insurance purposes. Where a company has incorrectly treated an individual as "self employed" rather than "employed" this may come to the attention of the Government authorities in a number of ways and the company may be liable for unpaid tax and national insurance and, where appropriate, financial penalties. Individual tax payers can also be the subject of compliance enquiries. It is, therefore, not in the interest of an employer to maintain that its workers are self-employed when, given the facts of the situation, they are not. Individuals who are concerned about their tax status can contact the relevant government department to question their tax treatment directly—or they could use an on-line Employment Status Indicator (www.hmrc.gov.uk/calcs/esi.htm).

Member States national conditions, law and practice differ considerably and therefore a "one size fits all" approach would not be desirable or practical. The huge variety across the EU in terms of definitions of employment does not lend itself to harmonisation. Member States need to ensure that they provide proper advice and guidance so people know where they stand in terms of their employment status and tax position within their national systems.

Question 8

The UK's experience is that providing a package or framework of certain rights for workers and employees is an essential component of a flexible and fair labour market. It is a matter for individual Member States as to what the "floor of rights" should be to reflect national circumstances.

In the UK, all workers, not just employees, are entitled to certain rights including those associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wages and the right to be a member of a trade union.

⁵⁴ European Working Conditions Survey (2005).

The UK's present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and associated rights in different employment relationships. We have shown that proportionate regulatory frameworks, drawn up in full consultation and having done full impact assessments, can provide rights for workers without stifling job creation. Legal frameworks can allow for diversity without creating a "two-tier" labour market, by enabling different types of contract and allowing for easy transitions between them.

In the UK we also have a comprehensive welfare state that covers people in all forms of employment. It is for Member States to determine the right system of social protection for their individual circumstances.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

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

Question 9

All individuals should be aware of what their rights are, who is responsible for delivering those rights, where to go for advice and how to seek redress if their rights and entitlements have been infringed or impeded, which can be done at Member State level. This does not mean that all individuals have to have a single, identified employer in order to have the rights to which they are entitled. In multiple employment relationships, different people can be responsible for different rights. What is important is clarity.

We need to take into account the wide diversity of national practice in terms of employment status (a point made clear by many EU Member States at meetings in the ILO on this subject over the last few years). The Method by which this essential clarity is provided does not need to be the same in every circumstance or in every Member State.

In the UK, we believe that our present legal framework reflects the wide diversity of working arrangements and the different levels of responsibility and associated rights in different employment relationships.

We are also tackling vulnerability where it exists through a range of measures to provide information and increase awareness of rights. The full range of measures is detailed in our policy document "Success at Work—protecting vulnerable workers, supporting good employers" (March 2006), which commits the Government to protecting vulnerable workers, cracking down on rogue employers and lightening the compliance burden for legitimate business.

Question 10

We see no need to further clarify the employment status of temporary agency workers.

In the UK some 94 per cent of the workforce works under traditional contracts, with less than six per cent on temporary contracts. However, temporary work, such as agency work, is greatly valued by employers and many individuals. We have a thriving agency and temporary work sector that is a key part of our economy and in which many choose to work for positive reasons. According to Eurostat figures for 2005, only 27 per cent of temporary workers in the UK did such work because they could not find a permanent job. It is not the case that UK temporary workers are all in low-status or low-pay jobs. An estimated 25 per cent of temporary workers work in managerial and professional positions.⁵⁵

Evidence suggests that, in the UK, the availability of agency and short-term contracts also provides an entry route to employment for those with limited work experience or under-developed skills. According to figures for 2006, 24 per cent of agency temps in the UK were unemployed or inactive one year ago⁵⁶. Across the EU, 40 per cent of young people have temporary contract compared to 14 per cent of workers overall. However, the temporary work sector is also across the EU. The EU average of 14 per cent covers a wide range of figures from around four per cent in Malta to 33 per cent in Poland.⁵⁷

⁵⁵ Labour Force Survey (LFS) data 2006, Q4.

⁵⁶ Labour Force Survey (LAS) data 2006, Q4.

⁵⁷ Eurostat EU Labour Force Survey (LFS) 2006 Q1.

In the UK workers, including agency workers, are entitled to rights associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wages and the right to be a member of a trade union.

There is sometimes a lack of knowledge about actual rights, associated with an individual's employment status, and how to exercise them—this is not confined to agency workers. What is therefore important is that all individuals know what their rights are, who is responsible for delivering these rights, where to go for advice and how to seek redress if their rights and entitlements have been infringed or impeded, which can be done at Member State level.

In the UK we are tackling vulnerability through a range of specific measures as detailed in our policy document "Success at Work—protecting vulnerable workers, supporting good employers" (March 2006), which commits the Government to protecting vulnerable workers, cracking down on rogue employers and lightening the compliance burden for legitimate business.

Giving everyone the same employment status (and associated employment rights) across all categories of workers would not reflect the fact that there are variable levels of responsibility in different employment relationships. Many temporary agency workers, and those that engage them, value the flexibility of agency work gives them such as the need to give little or no notice when leaving an assignment. Giving such workers other rights would mean the user undertaking and agency would be likely to respond by requiring agency workers to give specific, and potentially lengthy, periods of notice. This would undermine the very flexibility we know both employers and workers value.

It is not, for example, practical to give an agency worker a right to return to a job which by its very nature is no longer likely to exist—in the same way as a permanent employee in the user undertaking. Nor is it within an agency's capacity to promise to place a worker in a similar job on return from parental absence as the availability of a similar job is also not within an agency's control. However, a pregnant agency worker or one returning from time away from work is not unprotected. They cannot be discriminated against and has every right to go back on the books of the agency which placed them or any other agency and to seek work for any hours they wish, so are in essentially the same position as before their parental leave.

With regard to the Agency Workers Directive, the UK continues to support the underlying principles enshrined in the current draft. We look forward to debate resuming on these important principles in the Directive in the EU in 2007 and will play our part in helping to reach an agreement.

11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?

Question 11

The UK believes that the time spent working should be a personal choice and strongly supports the continuation of the individual right to opt out of the 48 hour week. At the same time, the UK recognises that the choice to work long hours should be a genuinely free choice for individuals. The majority of workers in the UK and in some EU countries agree, and do not think that Government or the EU should dictate maximum working time limits and believe that the individual should have the right to choose their own working hours.⁵⁸

Moreover, the retention of the individual right to opt out is essential for competitiveness—Europe needs flexible labour markets to adapt to globalization. The Lisbon Strategy and the Kok Report both highlighted the importance of flexible labour markets for job creation.

The UK has some concerns that, without the necessary flexibility for individuals to choose their working hours, people that wish to earn additional money by working some overtime (such as when raising a family or saving to buy property) will be forced into the informal/illegal economy to take a second job. In this situation, people could lose the minimum existing working time rights such as paid annual leave and rest breaks and protection against coercion to work longer hours. The UK has one of the highest official employment rates in Europe⁵⁹ and both non opted-out and opted-out workers are afforded considerable rights and protections.

⁵⁸ See FT/Harris survey (<http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=1081>) that showed the majority of French, German and UK workers agreed that the Government should not have the ability to limit the number of hours a worker can work in one week. The majority of workers in Britain, France, Germany, Spain and Italy agreed that they would be prepared to work a longer week for more pay.

⁵⁹ Eurostat data shows that the UK employment rate is the fifth highest in Europe at 71.9 per cent.

The choice to work longer hours is not a health and safety issue—the UK has one of the best health and safety records in Europe for both fatal and non-fatal injuries. Particular types, of work which present health and safety risks are covered by horizontal amending directives, which already impose strict limits on working hours.

The solution to the organisation of working time should respect the labour market traditions of all Member States and should not discriminate such that EU citizens can work in particular patterns in some Member States via collective agreements, but are banned from similar patterns of work in a Member State that has a tradition of national legislation. The UK is aware that some Member States use a number of different methods to allow longer hours working, such as implementing the limits per contract or exempting entire categories of workers, rather than implement the opt out. We would oppose the imposition of a single approach upon Member States that have different traditions—a variety of approaches can be equally valid providing there is adequate protection against coercion and measures to guarantee health and safety.

Recent discussions during the negotiation of a new Working Time Directive have also indicated that, increasingly, Member States are seeking a more flexible solution that would give them the right balance between employee protection and a sufficiently flexible climate for business and essential emergency services to operate in.

Europe should be open to the possibility that prescriptive legislation may not work for all 27 Member States at different stages of economic growth. The “right” solution, which will safeguard the preferences and needs of Workers while addressing the challenges of globalisation and need to ensure labour market compatibility, may be different for each Member State. However, legislation in this area needs to be legally secure and not open to interpretation by the courts or else Europe will be faced with more difficulties such as those caused by the recent ECJ judgements in this area.

The UK strongly believes that Europe urgently needs a universal solution to solve the problems caused by the ECJ rulings on SIMAP and Jaeger. If Member States are unable to agree a way forward on all aspects of working time legislation as a package, we should aim to make progress step by step. The Commission should not allow difficulties on certain aspects of the Directive to delay finding a resolution to the problems caused by SIMAP and Jaeger. In certain countries these judgements are putting the health and security of EU citizens at risk and action to combat this should be a top priority.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of “worker” in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

Question 12

The UK does not believe that it is either necessary or practical for there to be a more convergent definition of “worker” in EU Directives, It should be for Member States to guarantee workers certain minimum rights and protections within their territory whether locally employed or working across borders.

For example Directive 96/71/JEC on the posting of workers in the framework of the provision of services provides that a core nucleus of employment protections are available to workers who are temporarily posted from one Member State to another. If the deployment is not temporary, or in the case of a worker living in one Member State but employed in another (a frontier worker), then the employment rights of that person is guaranteed by the national laws where the employment takes place.

In the UK, all workers are entitled to rights associated with equality of opportunity (non-discrimination), a national minimum wage, health and safety in the workplace, working time entitlements such as paid annual leave, daily and weekly rest breaks, protections against unlawful deductions from wage and the right to be a member of a trade union.

The UK takes the view that indigenous, posted, transnational and frontier workers should have similar access to the enforcement of employment law. Where enforcement is primarily the responsibility of a labour inspectorate or an enforcement agency, then that body should not discriminate in enforcing the laws that apply.

In the UK, the primary method of enforcement of employment law is by means of an individual complaint to an Employment Tribunal⁶⁰ All workers, including posted workers, may assert their rights by making a complaint to an Employment Tribunal to enforce the protections afforded to them by the law.

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

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

Question 13

It is important to distinguish between co-operation and harmonization. Member States have different labour law systems and means of enforcement and these differences need to be respected.

Arrangements in each Member State should cover all workers on their territory, whether they are indigenously employed (including migrant workers), posted, transitional or frontier workers. Responsibility for employment law protection must therefore fall to the State in which the work is taking place. In the UK, the social partners are subject to the law but have no specified role in enforcing employment law.

Whilst co-operation between the authorities and enforcement agencies of different Member States is to be encouraged where matters of common interest arises between them, different systems and enforcement mechanisms mean that there cannot be a single method of enforcing workers rights. Whilst co-operation can assist with this, it cannot replace the need for the appropriate national arrangements.

The Commission also has its own role in ensuring Member States are implementing EU law. Member States can facilitate co-operation between them by ensuring that details of relevant authorities and/or enforcement agencies as appropriate are readily available.

Question 14

Member States are best placed to consider and address any specific circumstances of illegal work. For example in the UK, as set out in “Success at Work” we are taking steps to crack down on rogue employers who routinely flout the law.

It is important for Member States to consider and address the particular circumstances of illegal work which could range from overly restrictive labour law to external causes. Overly restrictive labour markets have a distorting effect, this could result in more people out of work or at the margins and at the extreme could even run the risk of pushing more jobs into the informal/illegal economy, where they would not enjoy the same rights and opportunities that otherwise exist. In some other circumstances, for example in relation to illegal migrant workers member states may want to co-operate on a bi-lateral basis. The EU can provide opportunities for sharing experience and good practice.

⁶⁰ In the UK, Employment Tribunals hear claims about matters to do with employment These include unfair dismissal, redundancy payments and discrimination. They also deal with a range of claims relating to wages and other payments. An Employment Tribunal is like a court but it is not as formal. Like a court, it must act independently and cannot give legal advice. Employment Tribunals are independent from Government, social partners and businesses. All workers may assert their rights by making a complaint to an Employment Tribunal to enforce the protections afforded to them by law.

Examination of Witnesses

Witnesses: JIM FITZPATRICK, a Member of the House of Commons, Minister for Employment Relations, and MISS JANE WHEWELL, Director, European Strategy and Labour Market Flexibility, Department for Trade and Industry, examined.

Q143 Chairman: Good morning, Minister, and welcome to our Committee, and also to Miss Whewell.

Q144 Chairman: We are grateful to you for making the time to speak to us. I know you have got a busy schedule this morning and somebody is going to drag you away at the appropriate moment so that you can do your duty at Questions at 10.30. Thank you also for your written evidence, which we have in front of us. Employment issues, of course, are of great interest to this Committee and, you will remember, we did a report on the Working Time Directive a little while ago and so we are welcoming this Labour Law Green Paper as a way of coming once again to these issues. We have Professor Philpott, who I am sure you know, who is our specialist adviser for this inquiry. I am sure you have done this before and you know all the points I am going to make, but before we start I need to make a few housekeeping points. We have scheduled an hour for the session until 10.30. It is open to the public and it will be recorded for possible broadcasting or webcasting. A verbatim transcript will be taken and will be sent to you for your correction, if you could correct it as soon as possible. It will eventually be put into the public record in printed form and on a Parliamentary website. If you wish to submit supplementary evidence after the session to clarify or amplify any points made during your evidence or to answer questions which are not reached or fully treated today, that is most welcome. Quite a number of our witnesses find that a useful exercise from their point of view as well. It would be helpful if you could try to speak clearly so that the record that is made is as accurate as possible. Perhaps you could start by giving us, for the record, your names and your positions.

Jim Fitzpatrick: Good morning. Thank you very much for the invitation. Jim Fitzpatrick, Parliamentary Secretary at the Department of Trade and Industry with responsibility for employment relations, postal services and Minister for London.

Miss Whewell: I am Jane Whewell, and I am a director in the Employment Relations Directorate for the Department of Trade and Industry.

Q145 Chairman: Would you like to make an opening statement, Mr Fitzpatrick?

Jim Fitzpatrick: No, I think we have declined to do that, with greatest of respect, in order to make sure we can try and cover the questions that you have down; and that would suspect that anything that we

would want to say will probably be included in our responses.

Q146 Chairman: Excellent; thank you. Obviously labour law in the Member States is a mixture of domestic and EU-wide legislation and that mixture varies from Member State to Member State, and, in some countries, measures implemented not by legislation but through collective bargaining also play an important role. It will be valuable to have your view on the impact of labour law on the global competitiveness and productivity of UK business. What is your view of the extent to which global competitiveness and productivity has been helped or held back by the labour law that already exists in this country? Has the major part of that impact, if it is there at all, arisen from EU legislation or from domestic legislation?

Jim Fitzpatrick: I am not sure how easy it is to quantify the impacts of labour law on productivity. I think what we can say over the past decade is that the UK economy has performed exceptionally well. Clearly, on record, we have increased our work force by two and a half million people since 1997 and we are graded highly by the World Bank as a good place to do business. We have introduced new rights and responsibilities on employers, rights for employees. We feel that we have got the balance about right. We clearly identify that there is a skills deficit, hence the Government's ambition to get 50 per cent of young people to university or further higher education. The Leitch Review and initiatives like Train to Gain identify a way forward in terms of upskilling. The impacts of labour law are difficult to quantify. We would, I guess, suspect it would be less than people may imagine.

Q147 Chairman: Thank you. You have answered the second question in a way, because you have said that improving performance falls on investment and skills formation. Is that the way to tackle productivity, do you think, rather than a more rigid and rather differential attitude towards labour law? Also, what do you say in relation to the point made by one of our previous witnesses that the UK's relatively lower productivity record partly arises because a larger proportion of people here are able to find employment than in many other EU states; in other words full employment has not assisted with productivity?

Jim Fitzpatrick: Full employment may assist with productivity, in their view, but it makes for a happier country, given that people have a better opportunity

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to have a decent quality of life. I think we are moving up the productivity league table. I think the gap between us and France and Germany has narrowed quite considerably in the last decade. We are now on a footing with the likes of Canada, Italy and others, and we feel that there has been an improvement in the productivity arena. Certainly a number of the new rights that we have introduced, like the right to request flexible working, seem to be producing evidence from companies which says that people are happier at work in those environments where they feel valued and that productivity goes up, absenteeism goes down, morale is higher and, therefore, the companies that have gone down the road of trying to create a work-life balance for their staff seem to be benefiting from that. So, I think, in general terms in respect of productivity, we are clearly improving our international position and domestically, in terms of whether people are producing more at work, I think the evidence, which, as I say, is starting to emerge, indicates that the balance which we are trying to introduce in terms of assisting people to get the right work-life balance for themselves and their families is having an impact on productivity and helping people as well as companies.

Q148 Lord Wade of Chorlton: May I ask a supplementary to your first answer to the first question. You commented on the fact that we have got increased employment in this country and that globalisation is not going to affect us, but surely you would agree that we are becoming more and more dependent on imported manufacturing goods. We have transferred a lot of our manufacturing employment abroad, and the increase in employment in this country has really been service and social benefit jobs and all these other things in society rather than actual wealth creating jobs. Would you agree with that?

Jim Fitzpatrick: I am not convinced that we have replaced the traditional manufacturing jobs from the industrial sector with non wealth-creating jobs. I think we are creating wealth in different ways in the UK. It is clear that we cannot compete with the wages levels that are being offered in China, India and emerging nations. Where we are still ahead is as the knowledge economy, in the service sector, tourism is growing, and in other industries which are bringing in good revenue, but if we are not careful we are not going to stay ahead in those areas given the millions of graduates which are being turned out from the universities in India, China and in other emerging countries. So, if we do not upskill, if we do not encourage more young people to go to university, the fear, naturally, would be that we would be overtaken in the knowledge economy. Just as we have been overtaken in the manufacturing arena on cost, we will

be overtaken on knowledge because of the better opportunities that young people have in emerging nations. So, I agree that we have changed where we are getting our wealth from, but I am not persuaded that, because it is coming from non-traditional industries, it is not welcome and it is not performing well for the UK Plc.

Q149 Lord Trefgarne: May I ask a quick supplementary? You referred to the modest improvement we have had in productivity in recent times, and that is fair enough. How far has that been the result of increased investment, rather than the sort of things we are talking about now, and maybe even more investment would improve the picture further?

Jim Fitzpatrick: I think that that is a very fair comment, your Lordship. One of my areas that I mentioned at the start is being Minister for Postal Services, and in Royal Mail Group it is absolutely clear that Royal Mail is very vulnerable to the competition. We now have a liberalised market, because lots of the companies which are moving into mail delivery are very automated, very mechanised, which is why we are spending hundreds of millions of pounds to assist the company in its modernisation and transformation programme, because if they do not introduce new technology, if they do not introduce automation, they are not going to be able to compete against the other companies in the field; and that means investment- it means investment in technology, it means investment in equipment—and that costs jobs. There will be jobs lost, and there have been tens of thousands of jobs lost from Royal Mail already in this arena. So, investment is a big part of making sure that the UK remains competitive.

Q150 Lord Wade of Chorlton: Minister, I would like to discuss a couple of issues with you in relation to the impact of labour law on UK business. As you will be aware, we have had evidence from the CBI and from the Federation of Small Businesses, and both are concerned about the impact of labour law upon businesses and on their wealth creation. I wonder to what extent you have any sympathy with the views of the CBI and the FSB argument that, regardless of the merits of individual pieces of legislation, the cumulative effect is becoming quite serious in some companies in some sectors?

Jim Fitzpatrick: We always take very seriously any submission from the CBI, as we do from the TUC. However, I think that, notwithstanding that business will always complain about the burden of regulation, the evidence suggests that we are getting the balance about right, otherwise the UK economy would not be performing as it has been over the last decade. Surveys undertaken for small businesses right the way through say that regulation is a very tiny

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restriction on their ability to expand and to grow, and from our point of view the fact that we are introducing minimum standards across the UK labour market, such as four weeks paid holiday, the regulations that we are consulting on at the moment to give eight additional days for bank holidays to everyone in the UK, some people have criticised as being burdensome, just as some criticised the introduction of the national minimum wage. We do not think they are burdensome, and we do not think they are burdensome on the vast majority of companies, because the majority of companies in the UK observe far better than minimum standards. There will be always be concern about regulation, and we have got, as I am sure you know, the Government's simplification plans which were published only a few months ago. We are regarded as being one of the best places to do business by the World Bank. We took the Dutch lead in terms of trying to reduce the regulatory burden. The DTI, because of the fact that we are the business-facing government department, has more regulation to deal with than anybody else in terms of making life easier for business, and we have already identified £700 million worth of savings in regulation. We have introduced simple mechanisms. Regulations are now only introduced on 1 April and 1 October. So there are two implementation dates in the course of the calendar, which means business knows and can plan forward, but we have also got a number of other initiatives. We have a practitioner panel, which includes representatives from business, and from the TUC, which meets regularly to advise us; I myself Chair a Ministerial Challenge Panel on a bi-monthly basis—I think it is bi-monthly; it sometimes seems more frequent—but this is a clearing house for business representatives from small business, from the Chamber of Commerce through to the CBI to ask us to bring officials from any government department to actually explain regulation and to defend regulation, and we make recommendations as to where we can go, and we also have the Business Link website, which has an open invitation to small businesses in particular to demonstrate where they think there is a problem that we need to look at to try and make life easier for business. We have got on-line tools and guidance now to make life much easier for small businesses because they can download templates, to tick-box and fill in forms as opposed to having previously to deal with and list regulations themselves. So, we think we are working very hard to make the regulatory burden as light as possible, but we know that this is an ongoing and continuous task. We know that business will always complain that they are over-regulated, and sometimes they are right.

Q151 Lord Wade of Chorlton: We had views from the FSB that small businesses might be in some way exempted from some aspects of employment

regulations. In asking this question I must declare an interest because I am involved with a number of small businesses, particularly in venture capital activities where I have spent a lot of time starting businesses and I know the enormous pressure that, in fact, they are under in practice. I must make the point that running a small business is a very, very lonely business and you have got to concentrate all your efforts on what you can do to make the business survive, and you know better than I how many businesses do not survive. I think this is an issue and, although I am pleased to hear that you are looking at it very closely, I do hope you will continue to do so because I think it is a very important issue. Do you have a view on a possible *de minimis* system for small business?

Jim Fitzpatrick: There are some regulations, for example the statutory trade union recognition procedure does not cover companies with less than 20 employees. We thought that was perhaps too burdensome when we introduced it, but when we introduced the national minimum wage and paid holidays, maternity leave extensions, et cetera, we felt that those were appropriate to be extended to the whole of the workforce. We do give assistance where we can to small businesses. I did mention a moment ago that surveys undertaken indicate that, although there are some businesses who do say that there are problems, a very small per centage actually identify that the regulatory burden is what is preventing them from expanding. Therefore, we think we have got the balance about right.

Q152 Lord Trefgarne: May I ask another quick supplementary, with your permission? I think the Minister said he was consulting on allowing the eight bank holidays as further compulsory holiday, if you like. I have done a brief calculation, and I hope I have got it right. That is four per cent on the wages costs of every firm. Is that what you intend?

Jim Fitzpatrick: The evidence that we have at the moment is that the vast majority of companies already give at least 28 days. In the European league table of public holidays, the UK sits either at, or very near, the bottom. The introduction of time off for the eight bank holidays will take us to just below mid table. So, in terms of European competitiveness, we do not think that this ought to create a major problem. When we introduced the four weeks paid holiday through the Working Time Regulations back in 1998, I have to say, as a backbench MP at the time, our expectation was that people would get the bank holidays on top of the 20 days. What has emerged since then is that the vast majority do, but there is a small minority who do not, and what we are saying is that everybody ought to be able to expect time off for eight bank holidays as well as four weeks paid holiday during the course of the year's working time

for a company. We made this a manifesto commitment in 2005. We have been consulting almost since then with business and with the trade unions. We are closing in on our conclusions. We hope to introduce the first four days from October this year and the second four days from October 2008. We are just concluding our consideration of the submissions that we have had from businesses saying that they would like a transitional period, which we may be able to allow, but we are determined to introduce this and we do not think the cost is going to be unnecessarily high for business to match.

Q153 Lord Trefgarne: There is talk of another bank holiday, I think, is there not?

Jim Fitzpatrick: There is always talk of another bank holiday. I am the Minister for time. So, when we get the clock changing every spring and every autumn, there is a flurry of letters saying, "Why cannot we go to central European time", or double summer time, or whatever. There was a Private Members Bill from Mr Tim Yeo only recently. Again, looking back at all the evidence, we had the experiment from 1968 to 1971 (three years) when we had double summer time, and the Government changed it because the country said, "We have had enough of that. We want to go back to where we were before." The Portuguese had a four-year experiment. They abandoned it; they came back to GMT. There is almost a line you could draw in the country as to who would benefit and who would not benefit and even there it is not quite clear. There is a flurry of letters coming through because in Northern Ireland they are introducing an extra bank holiday. The Scottish Parliament has passed legislation to say that St Andrews Day should be more closely celebrated. Forgive me, this is classic cockney. I have been a Londoner for 35 years, so in case this is causing any confusion, as Baroness Uddin knows, my constituency is Poplar and Canning Town in Docklands in East London, and because the Scottish Parliament has passed legislation to say we should celebrate St Andrews Day more closely, people have been saying, "The Northern Irish have got an extra bank holiday, the Scots are having one, we want one and we want St George's Day."

Q154 Lord Trefgarne: Trafalgar Day, please!

Jim Fitzpatrick: We would, obviously, have some sympathy with that, but what the Scots have said is that they are not having an extra bank holiday, what they are saying is people can reserve the right to work on one of the traditional bank holidays and ask their employer if they can have St Andrew's Day off instead, and they are trying to get some flexibility in here. So, there is not an extra bank holiday in Scotland, and the Government has no plans to introduce one at this point in time. The eight days leave that we are introducing is to create a level

playing field for the good businesses who have traditionally given people the leave that we all expected they were entitled to and to say to the businesses, some quite big businesses, who have not that they should play fair by their work force and give the minimum that is required, and these are minimums. Some companies, obviously, allow a lot more.

Chairman: I think we had better get back to labour law and collective rights and Lord Moser's question.

Q155 Lord Moser: I am rather sorry to leave that subject. Minister, you referred to the TUC just now. The TUC, when they gave evidence to us, stressed the importance of fundamental rights as part of labour law and, in particular, the coverage of collective bargaining, et cetera. It was an obvious topic. What do you feel about the TUC's view that the EU approach to all this should cover collective rights more than they do as well as individual rights? That is the issue.

Jim Fitzpatrick: I do not see the Green Paper as an attack on collective bargaining or an attack on trade union organisation. I probably should declare an interest. The last ten of my 23 years as a member of the London Fire Brigade was as a seconded lay official of the Fire Brigade Union on full-time release doing trade union duties. So, I have a trade union background, albeit in lay terms. We think that the collective arrangements that we have in the UK are serving us well. Only six and a half million of our 27, 28 million people in work in this country are formally members of trade unions affiliated to the TUC, so it is a minority position, and the TUC obviously used to be a much bigger organisation and hopefully it will be able to take advantage of that which we have introduced by way of better rights and statutory recognition arrangements, which have been in position for some years now, but we do not see the Green Paper as being an attack on collective bargaining or on trade union rights and we would be firmly protective and defensive of those because we see that we have the balance right between the social partners in the UK.

Q156 Lord Moser: Does the EU have the balance right? I suppose that was the implication of the TUC question.

Jim Fitzpatrick: I think the difficulty in assessing that is that there are so many different models. Almost every country has a different model, and the Commission is trying to put in place some basic standards and some guidance, but they do not have competence to legislate in the area of industrial relations. Things like the Working Time Directive and Agency Workers Directive, et cetera, they can put down what ought to be applying in the workplace, but it is up to individual Member States

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look at that and apply it in the way that is appropriate for them and introduce it through the consultative mechanisms that are existing in those countries. I do have to say that sometimes it is a bit confusing to me how all the different Member States have their collective arrangement agreements when we are criticised sometimes by trade union colleagues in this country for not introducing different aspects of European law, but we can point to other European Member States who use collective agreements which give derogations to aspects of European labour law and we say ours are better, ours are stronger, and that is a no-win situation because it is a judgemental call as to whose provisions are superior.

Q157 Baroness Neuberger: The Green Paper, as you know, has a kind of description of the changes in the labour market and has all the different flexible types of contract, short-term and whatever. Some people would say that it may make it much easier for employers because it is so flexible, but it makes job security much lower. In your evidence to us you argue that we have the second lowest job insecurity feeling, if you like, in Europe, and, of course, we have got very high employment and very low unemployment. To what extent do you think it is the framework for employment flexibility and security in the UK that actually offers an approach for the EU that they could adopt, or to what extent do you think that at the moment we are fortunate because employment is so high and unemployment so low? To what extent is it the way we do things, or to what extent is it just the chance of the way the statistics fall?

Jim Fitzpatrick: I think it is probably a combination of both. Forgive me, I am not quite clear how wary I should be of making partisan political points, but the way the Government has handled the economy over the past ten years has created the economic framework within which business has been able to operate, which is given as the fortunate position whereby we have put on two and a half million extra jobs and, therefore, with the arrangements that we have in organisations like the employment service with Jobcentre Plus, the New Deal, which really attacked the long-term unemployed and youth unemployment, I think that people now know there is a framework of social protection and social assistance out there that if they do lose their job, for whatever reason, then there are provisions within society to be able to look after them and to assist them to get into another job; and because we have two and a half million new jobs, because unemployment is down and it is no longer the spectre that it was in recent decades, I think that gives people a greater sense of well being and a greater sense of security. How we have arrived at that, obviously the economists among you would be probably much better placed than me to make an analysis of whether

it was Bank of England independence, whether it was a light touch labour market, whether it was reducing regulation or whatever, but I think generally circumstances have worked in our favour and obviously the Government will want to take some credit for that.

Q158 Baroness Neuberger: Sure, but as far as you are concerned, you would not say that legislation was the key player in that?

Jim Fitzpatrick: I think it has an influence. To say that it does not would be foolish. If we were to introduce regulation which would strangle companies in red tape then companies would leave. We can always read in the financial pages of different transnational corporations who are based in the UK who are saying, “We are going to move out”—the discussion we had earlier on about manufacturing—sadly that has been the picture for some decades. Companies will always have the opportunity to relocate. We are seeing Barclays at the moment in discussion with ADN and all of a sudden they might move, but they would maintain a huge UK presence. Companies can move wherever, and if we did get the regulatory burden or the tax burden wrong, then, clearly, that would act as an incentive for companies to move out. The fact that we are seeing location of companies to the UK and companies comfortable to operate within the UK tends to suggest to me that we have got the balance about right.

Q159 Earl of Dundee: How do you think that the modernisation of labour law can best advance a flexicurity agenda?

Jim Fitzpatrick: I have to say that the first time I heard the word “flexicurity” I was visiting the Greek Secretary of State for Employment in Athens—on a 22-hour visit, I have to say this was not an opportunity to enjoy the city—and he used flexicurity and that was new to me, as I was relatively new to the post. But, clearly, the concept has been created, as it were, because of the two imperatives on the one hand business wants to see flexibility in the workforce, the ability of workers to be upskilled and to be able to undertake tasks that are required, and the unions and workers themselves want security in employment so that they have got some comfort in the jobs that they have, in the wage levels that they enjoy and the conditions that would emerge; so to combine the two is very much the driver, I think, for European labour law. Every Member State, obviously, has different imperatives and different challenges and will adapt and adopt European regulation in different ways, although obviously the core essence is there. So, modernising law and modernising European labour law is very important, in my view, in terms of trying to make sure that, within the whole of Europe, we have a framework that allows individual Member

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States and the economies and businesses within those to be able to function competitively in the global market place.

Q160 Earl of Dundee: How far then do you agree perhaps with the TUC when they say that flexicurity does not necessarily make Europe more competitive?

Jim Fitzpatrick: I think that is a judgment call. Flexibility within the labour market is important. We need to upskill our workforce, we need to have training arrangements, and, sadly, some businesses are relocating, there are redundancies every year. I think the current UK rate of redundancy is about two per cent. In 1997 it was about three per cent. We have six million people changing jobs in the UK every year, moving to different occupations. Most, not forced, most because people want to change their job, there are opportunities for advancement, there is promotion—a whole manner of things. There needs to be flexibility within the labour market, but, equally, there need to be protections for people so that wherever they are working there are going to be minimum standards in terms of wages, in terms of conditions, in terms of health and safety, in terms of maternity provision, time off and the rest of it. So I think getting the balance right is where we are at, and I think we are doing quite well. I recognise the TUC may think that we are going too far in one direction. Were that to be the case and were we to move, the CBI would be straight on our case, saying, “You have gone too far in the other direction.” So, I think it is about keeping business and keeping both social partners happy.

Q161 Earl of Dundee: But if you believe that we, more or less, have the balance right as things are, what kind of further measures would you still like to see to get that balance even better?

Jim Fitzpatrick: I think that is very much a matter of looking at evidence that is emerging. The labour market is changing continuously. We are looking very closely at the moment, just as an example, in terms of how agency and vulnerable workers are treated within the UK. There have been a lot of debates, particularly in the past week after the BBC broadcast last week on Lithuanian migrant workers being taken advantage of up in Hull, and we are looking very closely at that in terms of our enforcement regimes. We are always looking at the labour market, we have a programme of issues that are continuously coming up, and business and the unions are always beating a path to our door saying, “You could do better here”, or, “You could do better there”, and we are always obliged to examine suggestions that come forward, particularly when they come forward on a joint basis between business and unions: because if there is a joint acceptance and acknowledgement that we need to adapt, amend,

withdraw or change regulations, then we would be obliged to do that. The world is a fast-moving place these days, and that is no less true in the labour market and in labour law than in any other aspect of society.

Chairman: I think we have made a natural move towards Lady Gale’s question.

Q162 Baroness Gale: The Green Paper describes the increased diversity of workers in the labour market across the EU as “insiders” with a high degree of job security and “outsiders” who are much more insecure in the workplace. They are suggesting that if we had a modernisation of labour law, that could address that issue. What is your view of the need for labour law reform in addressing these disadvantages of the people who are in this insecure position in the workforce, and to what extent do you think that other policy actions, for example enabling a high employment rate and encouraging education and skills development, would be much more effective?

Jim Fitzpatrick: I have mentioned earlier that we look at skills and upskilling education and training as being absolutely fundamental within the UK economy, and I think that is equally true within the European economy. We have 900,000 people claiming benefits, maybe one and a half million roughly unemployed within the UK. Within Europe the figures were 18 million people unemployed. I was with Secretary of State Hutton at an Informal Employment and Social Council in Berlin about two months ago, and the evidence that he gave was very much along the lines that we do run the risk, if we do not look after the 18 million unemployed, of creating or entrenching the emerging differences between those in work and those out of work. Now, as you describe, Baroness, there is a third strand emerging. There are those in work who are absolutely secure, there are those in work who are maybe not quite so secure but they are on the fringe and those out of work who will be possibly completely lost. I think labour law has a part to play, but I think the education, training and upskilling of the workforce within Europe will have a much more measured part to play to make sure that we can continue to compete within the world economy.

Q163 Baroness Gale: Labour law on its own, as far as I see it, and as you see it from what you have said, would not on its own secure these insecure workers then. What I cannot get round is we have a lot of workers in our country who are not skilled and they do lots of jobs that need to be done. Does the idea that we would upskill everybody leave us perhaps with a problem? You have a skilled work force, which is what we would all be aiming for, there are still a lot of people who can do unskilled jobs as well, so what

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would happen to the economy? “I have got the skills. I want to go on working. I want a better job”

Jim Fitzpatrick: I think the numbers that we have at the moment without any qualifications, I think I am right in saying, is about five million, and I think the projections are that, within 20 years or so, the numbers of jobs that will be available for people without skills will be reduced hugely down to a million or less, which is why the drive for education and training is so important. Labour law and the framework of labour law clearly has a place and a role to play, but if we do not upskill our people, if we do not impress upon people the importance of getting educational qualifications and the ability to demonstrate and maximise their talents and maximise their potential, then we can pass whatever laws we want on legislation and labour law. If people are not able to do the jobs that are available and if we are not able to nurture our entrepreneurial skills, because the Chancellor has been working very hard, the Treasury has been working very hard to encourage more entrepreneurialism within the UK, and we have improved a lot, but we can improve so much more, and if people have the skill, have the education, they will be able to spot opportunities within the global labour market to be able to take advantage of those; and if they start their own companies and we can help them do that, labour law will then come into place in terms of saying: “If you are now a new employer, we have got some minimum standards that we would want you to observe”, and they are bare minimums—the national minimum wage and paid holidays and the rest of it. Most decent companies, obviously, are paying far more than those. So, I think there is a part and a role to play, but I think education, training and upskilling is equally, if not more, important.

Chairman: Thank you for that. Lady Uddin.

Q164 Baroness Uddin: Good morning, Minister. I suppose you have led to my question very appropriately, but before I ask my question I just want to ask a supplementary to Baroness Gale. If what you say is right (and I know, of course, you are someone well informed), if you say that there are such difficulties, just dealing with the upskilling, or that upskilling is more important, if you like, or should be a partner also to ensuring enforcement of labour law, given the very significant Europe migration (and since the accession there has been much more flexibility about incoming migration), is not enforcement much more difficult, even to encourage entrepreneurship, when people are much more willing to undercut the current minimum standards that we apply in Britain? Do you feel that there is a sufficient amount of enforcement available to the UK to ensure that enforcement is available to the bare

minimum standard? I have another question, but I would very much like to hear from you.

Jim Fitzpatrick: The BBC expose[acute] last week was, obviously, very disturbing, because we have spent ten years putting minimum standards and protections in place and to see these rogues taking advantage of people from Lithuania was very disturbing and distressing. We have got all the agencies looking at the evidence at the moment and identifying what went wrong in that particular instance and whether we need to do anything to address it. We also, however, have identified ways of trying to protect people. We have produced leaflets (which Jane is putting in front of me at the moment) in Lithuanian, in Polish, in Portuguese which we send to trade missions and employment centres in those countries, we take adverts out in papers, we circulate these leaflets in these languages to the communities within the United Kingdom and the people from the new accession states who are applying for work permits, we supply literature in the Home Office pack that they get so that we can say to them: “When you come to the UK, these are the bare minimums.” One of the things that people are told before they come to the UK is that they can borrow money, because in the UK they get £5.35 an hour, but what they are not told is when they get to the UK the cost of living is a lot higher than in their own country. So, they are misled in many ways. We are trying to break down that misinformation, so that if people do want to come here, if they can come and be productive, which is what we want because we have got lots of jobs that, sadly, people do not want to do but in some of the migrant countries people do want to do and are happy to do and they are doing a great job for us, then we need to make sure that they are protected. The BBC programme demonstrated that there was a rogue operating in that arena. We know that there are people who will always take advantage of workers, whether they are indigenous UK workers or workers in EU states or even further afield. We need to look at the various enforcement agencies. We have got the Police Trafficking Team, we have got the Employment Agency Standards Inspectorate, we have got the National Minimum Wage Enforcement Teams, we have got the Gang Masters Licensing Authority, as well as others. Those are the four main protector agencies who all have legal powers to protect people and to prosecute where there have been breaches of legislation and protection. We need to look at the Lithuanian experience to see if there are any lessons to be learnt from that in terms of being more joined up or whatever. We have also got a Vulnerable Workers Consultation running at the DTI at the moment, which concludes on 31 May, where we have identified four or five areas where we know there are breaches going on, loop holes that we can close down very simply by regulation. We are

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starting two vulnerable worker pilots in spring this year. We are launching them, we hope, in late May, one in Birmingham to look at the hospitality sector, one in East London to look at the cleaning and security sector at Canary Wharf and in the City, on which we are spending almost a million pounds to gather evidence to say, “Okay, we will put all these protections in place. What is actually happening out there?” Because we are getting a lot of anecdotal evidence about wage levels being undercut, about people being taken advantage of, but we cannot draft legislation on anecdotal evidence, so we are going out into the field to gather hard evidence to see what we need to do and, in that instance, we think we have got a lot of it right but we are not thinking for a second it is perfect, and we know that we have got some tidying up and some closing of loopholes to do and, if further evidence emerges that people are being abused in different ways, we ought to be able to deal with that.

Q165 Baroness Uddin: You have pre-empted one of my questions, which is how are you going to inform those who may be vulnerable as a result of others taking advantage? I will come to my final point. Do you think that there may be advantages of uniformity of EU labour laws, European-wide labour laws?

Miss Whewell: Thank you Baroness. In response to your question, it is quite illuminating. Again, in the BBC case one of the issues that came up continually was that the worker had paid money for a job that did not exist. I was in Lithuania earlier this year and found it is currently legal in Lithuania to charge these fees; it is not legal in the UK. I have been in quite detailed discussions with my opposite numbers, giving them access to the evidence we have got and the experience we have had pointing out that there are certain areas of legislation where it does actually set people up for difficulty, and we will be working with Lithuania to try and warn people: “People say the streets are paved with gold; they never are. Think twice before taking a loan, because that can get you into deep trouble.” I know my colleagues in Lithuania are planning to introduce legislation to govern a whole range of aspects here, but we do need to talk to each other because there will be always be people quite determined to mistreat workers. They will lie; they will say things that are just completely not true. Therefore, the important thing is to get information to workers before they even leave, because by the time they reach the UK, having been lied to, in debt, no English, perhaps no skills, no job, no home, it is terribly difficult to help them; so we need to make sure they ask all the right questions before they even leave their own country.

Q166 Baroness Uddin: I think this group of people are still particularly vulnerable to not receiving the minimum wage. My experience and my understanding and knowledge suggests that, not only amongst migrants but also the vulnerable population within our country. I think we need to do much more about making people aware that it is totally unacceptable but, more importantly, it is illegal to be paid for a job that does not reach the standard of minimum pay?

Jim Fitzpatrick: I think that is a fair comment, and that is why the Chancellor in the Pre-Budget Statement last year announced that we will be increasing the resourcing of the National Minimum Wage Enforcement Teams by 50 per cent, which he confirmed in the Budget, because there was concern out there that there are people who are being exposed and we need to make sure that the minimum wage is paid and, where it is not paid, we can take those companies and businesses to task. We are about to consult on new penalties. We increased the penalties back in January, but we want to look at a regime where we can get better clawback. We got three million pounds back-pay from companies last year for people who were deprived the minimum wage, but now that we are focusing down (and we do believe we are focusing down) on the hard core of people who seem to be trying it on and getting away with it all the time—this is not about ignorance or lack of awareness—our feeling is that we have to beef up the penalties and we have to increase the enforcement teams, because we can crack it. There will always be some people who will take advantage, but if we can get a culture within the UK in force at the moment, then we think that will help everybody.

Q167 Lord Wade of Chorlton: Would you not agree that there are rogues in all walks of life and it is important to deal with the rogues and not impose regulations on everybody, the vast majority of whom are honest, decent people?

Jim Fitzpatrick: Absolutely, and that is why we are operating on a risk assessment basis, but we are not looking to take to task good companies that we know are doing the right thing. We want to focus in on those who are not playing by the rules: because they are not only cheating vulnerable workers but they are under-cutting decent companies and preventing them from operating at a better profit level because they are doing the right thing. This is a business protection measure as well as protecting vulnerable people.

Q168 Lord Trefgarne: Minister, we have heard concerns expressed that the British Government is rather prone to gold-plate EU regulations when they emerge, and we have heard examples of, for example, extension of the provisions of part-time workers to casual staff, the additional to the Age Discrimination

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Directive of a procedure for employers “duty to consider” the retention of staff—it went a bit further than the Directive—after the age of 65. You have already touched on the increase in the minimum annual holiday required, which is 20 days in the Directive and now 28 days as far as we are concerned, and you have just talked about that as we were discussing even more bank holidays. Why do we need to gold-plate the regulations if, as you have said previously, many British firms go further anyway?

Jim Fitzpatrick: I think this is probably the first point of clear disagreement with a statement this morning. We do not accept that we are gold-plating, and I think the easiest example is the eight days public holiday. We do not believe that is gold-plating. We believe that this is a minimum standard to which everybody in the UK should be entitled. We do try to measure and try to make sure when we introduce European measures that they are appropriately balanced. We do not think that we are gold-plating. We think that the CBI, in general terms, is supportive of the way that we have introduced legislation.

Q169 Lord Trefgarne: That may be so, but it is still going further than the Directive requires?

Jim Fitzpatrick: The “duty to consider”---. In terms of introducing anti-age discrimination legislation, we could have passed the legislation and said nothing and done nothing. To actually say to a manager or a business owner, if somebody is approaching 65 and they want to work beyond 65, “We think you have got a duty to consider it” and “We think that is fair play”. They are not obliged to keep the person on, they do not even have to give a reason, but we think there is a duty to consider, and we thought that that was the appropriate thing to do. It does not require any additional regulatory burden, in our view, because any decent employer, when an employee came to them and said, “I do not want to go. Can I stay on for another six months, another 12 months?”, would say, “Okay, let me think about it. I will come back to you.” They are considering it and, therefore, they are playing fair by their employee.

Q170 Lord Trefgarne: I am not necessarily disagreeing with the merits of what you have proposed, but the fact is that what you have brought into law is further than the directives require, and that is the criticism that has been raised?

Jim Fitzpatrick: In that case, we would not dispute that assertion, but the general position, I believe, of the CBI, for example, is that they accept that the way that we do it is appropriate and, therefore, there is no major dispute about the way that we implement the regulations within the UK.

Miss Whewell: Perhaps I should declare an interest as an official in this context, but I think there is a tension particularly inherent in European law where it tends

to be drafted in a very broad brush manner, there is a lack of detail and we are caught in the middle. It is perfectly possible for us to copy out the Directive and say, “That is the law”, and say to industry, “Now get on with it.” I do not think they would be terribly happy, because, just as much as they are saying, “Please do not gold-plate”, and we try very hard not to, they also ask us for the maximum flexibility possible under the directives. They ask us, above all, for clarity. Clarity is not a predominant feature of a lot of European law, so we do our best to make the law as clear as possible for business. Sometimes people feel that is gold-plating; one could debate that for a very long time; but we do our best and there is a programme now looking at large parts of UK legislation, both domestic implementation of European law and UK law about, “Can we simplify it? Can we make it easier? How can we help business?”

Q171 Lord Trefgarne: You have talked about the CBI. It tends to be the small business organisations who complain about gold-plating more than the others, because the larger firms tend to adopt these standards anyway.

Jim Fitzpatrick: And we do recognise that many small firms do not have HR departments, they do not have the legal back-up that large firms do, which is why we are working very hard with our on-line guidance, with the tools that we are providing through Business Link, with the assistance that we are giving and working hard on the simplification programme and trying to identify those areas where it could be more pressure on small companies and to make life as easy for them as possible.

Chairman: Thank you for that. We are running short of your time. If you could just deal with Lady Morgan’s question and then, if you do have some comments on the consultation process which the Commission goes through, is it satisfactory, et cetera, which is our last question, maybe you can put it on a sheet of paper, or get someone to do that for you, but I am concerned that we really are at the end of our time.

Q172 Baroness Morgan of Huyton: The Working Time Directive: where do you think this is going? Clearly the UK has had a pretty clear view on it. You have taken a position that it is not a health and safety issue as such, particularly in relation to doctors and judgments. Where do we think this is going?

Jim Fitzpatrick: To be perfectly frank, I am not sure. It has been around for so long. We worked very hard during the UK Presidency and got close to an agreement; the Austrians also did; as did the Finns in their Presidency in 2006; the Germans said they were not going to go near it because so much effort had been expended; the Portuguese are saying maybe;

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but, again, there has been so much time and effort put into trying to arrive at an agreement. When countries have a very limited six-month period of presidency and want to achieve objectives, why pick up working time when it has clearly failed over recent years, notwithstanding the great effort that has been put in? It is, in my limited view, in my limited experience in Europe, like Banquo's ghost: whenever you talk about anything else, working time is sitting over in the corner, then comes centre stage the minute you start making progress. People have such entrenched views now that there is almost a "them-and-us" mentality and trying to break that down when talking about other aspects of policy is very difficult. I think that is why it is so important we do try and arrive at an agreement. SIMAP/Jaeger and the rulings by the European Court made life even more difficult, it gave an imperative, and some countries were saying, "Maybe we could split the dossier for certain sectors." We would be supportive of that. We have not led on it because we are said to be leading the outside camp and, therefore, if we had been seen to be leading splitting the dossier, then people would have said, "If they are for it, we have got to be against it because there is something in it." We are very proud of the arrangements we have for working time in the UK because we have got total transparency. We count the hours we are paying individual workers, we give people the opportunity to opt out if they think it is appropriate for them, notwithstanding in certain occupations there are protections under health and safety legislation. Other countries are operating different conditions for two contracts for two jobs. Many countries have got bigger informal economies

than we have and, therefore, people are under the radar. We can demonstrate, we believe, that the Working Time Directive is correctly applied in the UK (1) because we have one of probably the second best health and safety records in the Union, and that was one of the biggest arguments put up about working time—we say, "We are open to scrutiny on health and safety. You can come and check the books"—and (2) in terms of the operation of the economy. Two and a half million extra jobs in the past ten years—it has not prevented that—and only 11 per cent of our work force exercise the opt-out. The vast majority of our people are happy, and companies are happy, and the average hours worked for UK workers since 1997 has come down from 33 hours to 32 hours. So, we are working less in the UK, notwithstanding we do use the opt-out. We will fiercely defend the opt-out, and our European partners know that. We are interested in trying to arrive at an arrangement for SIMAP/Jaeger, but whether the Portuguese Presidency is prepared to pick that up, I am not entirely sure. I think they are seeing that so many of us have had our fingers burned it may be too early, but SIMAP/Jaeger was producing a driver and a lot of commonsense to say: "This is just not working. We have got to fix it for all Member States", because the costs to health services, social services, security and fire services across the EU was considerable.

Q173 Chairman: Thank you, Minister, you have been very forthcoming and frank with us. We have enjoyed your session. We must release you now.

Jim Fitzpatrick: To the chamber for DTI questions.

Supplementary memorandum by the Department of Trade and Industry

When I gave evidence before your Committee on 3 May on the subject of the European Commission Green Paper on Labour Law, time did not allow for discussion on the last question on your list and I promised to write to you with my comments; these are set out below.

Question 12: How satisfactory do you find the social dialogue process under which the Commission seeks the views of the social partners about labour law issues? What is your view of the Federation of Small Business argument that the views of small businesses are insufficiently taken into account under this system?

[Preamble to your question: Under the arrangements for European social dialogue, tripartite consultations relating to labour law issues at EU level takes place: at a technical level, in the Commission's EMCO (Employment Committee); and at a political level, in meetings with the Informal Council on Employment and Social Affairs which customarily take place at the beginning of each Presidency. While the CBI and TUC have told us they are involved in this process, the FSB have argued that the system allows no provision for consulting with organisations representing the interests of small business. Given that small businesses provide, according to the FSB, around 75 million jobs across the EU, they feel that their interests should be much better represented in the social dialogue system.]

I agree with the Federation of Small Business about the importance of engaging Small Firms in European Social Dialogue because in addition to contacts mentioned in the preamble, under the terms of the Treaty the European Commission is required to consult European Social Partners on any social/employment measure in

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Europe. The Partners may then prepare legislative measures to be considered by the European Council and European Parliament or reach their own autonomous agreements.

Business Europe and the ETUC (whose UK representatives in Brussels are CBI and TUC respectively) do of course count employers and employees of small firms amongst their members. Additionally since November 1998 the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), an employers' organisation representing the interests of crafts, trades and SMEs at EU level, has been a recognised Social Partner and as such is recognised by the Commission for the purposes of consultation. We welcomed this. However the Forum of Private Business, the only UK representative, has recently withdrawn from UEAPME membership and I am not currently aware that any other UK organisation has plans to join—so unfortunately at this time there is no direct participation from the UK through UEAPME.

Beyond the formal European Social Dialogue, in the wider context of involving small businesses in European policy making more generally, the European Small Firms Envoy has a key role in considering small firm engagement with EU policy and regulation. Engagement with social dialogue is something that small firms organisations could might consider raising with the Envoy.

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Written Evidence

Memorandum by Amicus

INTRODUCTION

1. Amicus is the UK's second largest trade union with 1.2 million members across the private and public sectors. Our members work in a range of industries including manufacturing, financial services, print, media, construction and not for profit sectors, local government, education and the health service. It has recently agreed to a merger with the Transport and General Workers Union which will create a new union of over 2 million members.

2. Amicus believes that the best way to modernise EU labour law to meet the challenges of the 21st century (both in terms of globalisation and advances in technology) is to encourage and strengthen collective bargaining, without diminishing job security or contractual rights.

3. Amicus rejects the assumptions underlying much of the green paper, and the implied meaning of "flexicurity", that either the economy, or vulnerable workers such as women and migrant workers, would benefit from weakened laws on unfair dismissal and contractual rights.

THE SPECIFIC QUESTIONS POSED IN THE COMMITTEE'S CALL FOR EVIDENCE ARE ADDRESSED BELOW.

4. *Flexibility of the labour market*

4.1. It is necessary to define what is meant by flexibility in the labour market. Numeric flexibility is more than adequately provided for within UK employment legislation and indeed Amicus would argue that this works against the long term interests of British industry in favour of the short term gains of investors.

4.2. Amicus is concerned generally that "flexible" legislation might contribute to a situation that allows workers to be exploited. UK legislation, which supposedly protects employees' rights, actually contains many exceptions. This is vividly illustrated in an extract from Professor Keith Ewing's presentation to the Industrial Law Society in 2000:

*"Take a young man in his mid 20s, employed as a security guard. Despite the great reforms since 1997, it remains the case that he may be hired on a lower minimum wage; he may be required to agree to work long hours, certainly more than the prescribed international and EU maximum of 48 hours weekly; he may have no right to have his trade union recognised for collective bargaining if he has 19 rather than 20 colleagues; he will have no right to be represented by a trade union in the negotiation of his terms and conditions of employment; and he will have no right to be treated fairly by his employer for the first year of his employment"*¹.

4.3. On the other hand functional flexibility is dependent upon the adequate provision of skills to equip workers to meet the challenges that industry and commerce faces in a globalised economy. In this area the UK has much still to do as has been identified by the recent Leitch report².

4.4. Amicus does not believe that changes to labour law is capable of achieving functional flexibility but that the enhancement of the role of trade unions can advance flexibility, without detracting from security and fundamental human rights.

4.5. Training and innovation are key to the UK's competitive advantage in the world economy, and both are best served by secure work places where the workers have a voice to contribute ideas and both employer and employee have the incentive to invest in training. Unions have a key role to play in promoting education and training. Our workplace representatives can help employers invest in education and training. We also directly provide much training, both through the Union Learning Fund projects, and other initiatives and bodies.

¹ KD Ewing, *Employment Rights: Building on Fairness at Work*, speech to Industrial Law Society (2000).

² *Prosperity for all in the global economy—world class skills Final Report* December 2006.

5. *Employment Security*

5.1. It is easier to hire and fire UK workers than in almost any other Western European country. Amongst OECD Nations the World Bank places the UK as the 4th easiest in which to do business and the 6th easiest to hire and fire workers. Within Europe only in Denmark is it easier to hire and fire workers and that has to be viewed alongside its advanced social provision for workers displaced identified as a model for flexicurity in the EUC Green Paper.

5.2. Amicus would argue strongly that workers respond better to change and flexibility where there is confidence and trust in their own security of employment. This view is supported by research undertaken by, amongst others, The Work Foundation³.

5.3. Amicus has consistently argued that strengthening the laws on redundancy consultation and protection would enhance the security of employment of UK workers and create a level playing field for workers in companies operating across Europe.

6. *The Concept of “Flexicurity”*

6.1. Amicus is concerned about a number of flawed presumptions in the Green Paper and rejects the propositions that:

- reduced labour security improves productivity;
- women and disadvantaged job-seekers necessarily benefit from flexible forms of employment;
- new laws and better security must involve “red tape” harmful to legitimate business; and
- the labour law framework in the UK is conducive to growth and full employment.

6.2. The UK record on productivity over the last 10 years whilst showing some improvement has not reached the levels of other EU States where employment protection legislation is significantly stronger.

6.3. In the UK, where we have some of the most flexible employment practices in Europe, evidence points to the most vulnerable workers continuing to find themselves in the temporary labour market with less favourable protection than those employed in the permanent labour market and frequently on lesser conditions⁴.

6.4. Equivalent growth and full employment have been achieved in differing labour market models⁵. Research by Andrew Glynn & John Edmonds (among others) supports this. They wrote: “Taking these increases together it is clear that Mr Brown’s public expenditure programme has been directly responsible for all the growth in UK employment since 2000”⁶.

6.5. We do support the contention that certain forms of flexible *working* (quite different from *flexicurity*) can assist workers, especially those with caring responsibilities or certain disabilities. However, workers need secure employment and contractual terms and effective trade union representation, in order to negotiate flexible working that helps them. Flexibility of hours at the discretion of the employer, e.g. annualised hours contracts requiring long hours in periods of peak demand, effectively exclude most workers with caring responsibilities.

7. *Other labour market challenges*

7.1. Within the UK there are groups of workers who face challenges and are regarded as vulnerable. Amicus agrees with the government that legislative changes need to be made to protect the vulnerable workers in our society. Amicus has welcomed the steps taken for example to offer some protection to migrant workers through the Gangmasters legislation. However, Amicus is disappointed that government has obstructed the introduction of the EU Temporary Agency Workers Directive and has recently obstructed the passage of the private members bill⁷ designed to provide some protection to agency workers in the UK.

7.2. There is a clear need for clarity in Member States’ legal definitions of employment and self-employment, as there is a need for a convergent definition of “worker”. The EU should, of course, work to combat undeclared work.

³ An agenda for work: The Work Foundation’s challenge to policy makers Provocation Series Volume 1 Number 2 David Coats, Associate Director—Research, The Work Foundation.

⁴ Quarterly Labour Force survey, September–November 2005—from PSI Report “The Hidden One-in-Five” September 2006.

⁵ OECD Employment Outlook 2006—Boosting Jobs and Income.

⁶ Andrew Glynn and John Edmonds, as reported in Financial Times 30 June 2005 <http://www.ft.com/cms/s/4d573266-e903-11d9-87ea-00000e2511e8.html>

⁷ Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill.

7.3. There is a significant and growing problem here, which highlights general failings of the legal employment relationship. The particular solution would be to provide for joint and several liability in relation to “three-way relationships” including sub-contracting and agency work.

7.4. In the UK in particular the problem is such that workers may never be sure, even after obtaining legal advice from an expert in the field, whether they are employed by an agency, a sub-contractor, or by the end user of their services, or none of them. In *Johnson v Montgomery Underwood* in 2001⁸ the Court of Appeal asked Parliament to intervene.

8. Groups covered by labour law

8.1. The complications over this issue in the UK include those in relation to ministers of religion. In the UK the House of Lords⁹ and the Employment Appeals Tribunal¹⁰ are clearly saying that the legal framework must be reviewed and changed.

9. Role of EU Regulation

9.1. The citizens and states in the EU should seek nothing less than positive sound universal rights which accord with giving effect to existing international and European standards. This is not the same as a “floor of rights”, that provides low basic levels below which people should not drop and which may be used by the unscrupulous to create a ceiling.

9.2. Sound universal standards are the only means to avoid a drive for deteriorating rights and “the race to the bottom”. They are not the same as a “floor of rights”. The EU has a duty to emphasise, encourage or enforce compliance throughout Europe and also the rest of the world.

9.3. Consistent and clear rights will take care of the problems of workers operating in a transnational context, throughout the Community and beyond its borders. To that end Amicus views the need for a common definition of worker as secondary to the establishment of sound universal workplace standards.

10. Conclusion

10.1 In 2002, the Managing Director for Human Development at the World Bank, Zafiris Tzannatos, produced “Unions and Collective Bargaining—Economic Effects in a Global Environment”¹¹. This was an in depth report that reviewed more than a thousand studies on the effects of unions and collective bargaining. It found that co-ordinated collective bargaining tended to be associated with lower and less persistent unemployment, lower earnings inequality, and fewer and shorter strikes.

10.2. Amicus would assert that the promotion and development of collective bargaining is core to the success of meeting the challenges of the 21st Century.

March 2007

Memorandum by Dr Diamond Ashiagbor

Statement of written evidence on the Green Paper and EU employment policy: The employment and job-creation effects of non-standard contracts

1. The European Commission Green Paper has had a troubled gestation. If one compares the version of the Green Paper published in November 2006 with drafts from earlier in that year, it’s clear there’s been an important change of focus—in part as a response to some of the fierce criticisms from Member States, in particular the UK, as well as concerted lobbying from business organisations, above all UNICE.¹² Critics of what was perceived to be the Commission’s harmonisation agenda consider there to be a relatively

⁸ *Johnson v Montgomery Underwood* [2001] IRLR 269.

⁹ *Church of Scotland v Rev Helen Percy*, [2005] UKHL 73.

¹⁰ *New Testament Church of God v Rev Sylvester Stewart*, [2006] UKEAT/0293/06/DA.

¹¹ Co-written with Toke Aidt of Cambridge University—ISBN 0-8213-5080-3— <http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&theSitePK=523679&entityID=000094946-02083104140023&searchMenuPK=64187283&theSitePK=523679>

¹² Union des Industries des pays de la Communauté européenne (the European association representing private sector employers and employers’ organisations). UNICE views the Green Paper as an opportunity to have a “debate on flexicurity instead of EU harmonisation”: Euractiv.com, 10 October 2006, <http://www.euractiv.com/en/socialeurope/debate-flexicurity-eu-harmonisation/article-158635>.

straightforward correlation between use of non-standard contracts and job creation. The UK's response to the early draft of the Green Paper put it as follows:

The UK's increase in so-called "atypical employment" is one of our "Lisbon success" stories: there are now many more women and older people in the labour market than in 1997 because these workers have been able to choose to work flexibly. And there is a lot of good evidence which shows that when the employment legislation framework is looser, not only are more jobs created but there are also more transitions between different types of work contract, and more permanent contracts in the long run.¹³

2. So, the focus of the final version of the Green Paper has therefore changed. The starting point remains a recognition of the increasingly diverse contractual forms of employment, but the debate is now located much more squarely within the context of the Lisbon Strategy: to examine how labour law "can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs".¹⁴

3. The Green Paper makes some of the bland assertions we've come to expect from Commission documents, namely that there is a clear link between flexibility and jobs growth, on the basis that more responsive labour markets are more competitive.¹⁵ This much has been a staple of EU employment policy since the Lisbon European Council meeting in March 2000: in keeping with the objective of increasing the employment rate, atypical work is promoted since it encourages the unemployed or discouraged to enter the labour market, and arguably, the use of flexible work patterns and flexible work organisation also increases the competitive efficiency of enterprises.

4. However, the Green Paper also points to a less employment-friendly effect of non-standard contracts. This growth in contractual flexibility has the potential to undermine the Lisbon goals of encouraging greater labour market participation, investment in human capital and improved employability. Because those who are detached from the labour market in some way—whether unemployed, underemployed or economically inactive—have a insecure attachment to the labour market which is comparable to those on non-standard contracts, or informally employed. So, although certain types of non-standard work may well serve as bridges to labour market participation and high-quality work, the Commission acknowledges that others can also operate as traps—routes to low-quality, low-paid, insecure work.¹⁶

5. The original version of the Green Paper identified the need for policy instruments *other than* labour law such as life-long learning, active labour market policies and flexible social security rules as a means of achieving the desired balance between flexibility and security in labour markets. This view is reiterated in the final version of the Green Paper which refers to other policy components of the "flexicurity" approach.¹⁷ But I also detect more wariness towards traditional employment protection legislation, or EPL. Earlier drafts of the Green Paper referred to the need to modernise labour law, but were silent on the role of EPL in helping or hindering job creation. In adopting a critical approach to traditional EPL, the Green Paper draws heavily on another relatively recent report: the *Employment in Europe Report* for 2006, which provides an overview of EU labour market performance. The Green Paper quotes with approval from this Report, and in its interpretation of the economic effects of labour market regulation, the Commission is to a great extent pre-empting the results of the consultation exercise.

6. The conclusion which the Green Paper draws is that "stringent employment protection legislation tends to reduce the dynamism of the labour market".¹⁸ What does this actually mean? The 2006 *Employment in Europe Report* claims that employment protection favours "insiders", who are predominantly prime age males, at the expense of "outsiders". It argues there is "ample evidence" that strict EPL tends to worsen the employment prospects of those groups which are most subject to problems of entry in the labour market, such as young people, women and the long-term unemployed.¹⁹ In other words, those on standard employment contracts benefit at the expense of the informally employed and the unemployed.

¹³ "Very initial UK views on draft Labour Law Green Paper" available at <http://www.euractiv.com/-/29/images/UKposition-17sept06-tcm29-159857.pdf>

¹⁴ The streamlined Lisbon Strategy now contains only two headline targets: investment of 3 per cent of Europe's GDP in research and development by 2010 and an employment rate (the proportion of Europe's working age population in employment) of 70 per cent by the same date.

¹⁵ Green Paper, final version, p 4.

¹⁶ Green Paper, final version, p 8.

¹⁷ *Ibid*, p 4.

¹⁸ *Ibid*, at 8.

¹⁹ CEC, *Employment in Europe 2006*, p 83.

7. But the difficulty with traditional responses to the demand for more contractual variety is that they tend merely to “increase flexibility on the margins”. Partial deregulation, it is argued, whilst keeping stringent rules for regular contracts largely intact,²⁰ leads to creation of a dual labour market, where insecure temporary jobs coexist with highly protected or inflexible regular jobs.²¹ And in such a two-tier labour market, the brunt of adjustment to shocks falls on workers under non-standard contractual forms, such as fixed-term contracts.²² The Spanish government’s liberalisation of the use of fixed-term employment contracts in the mid-1980s is given as an example of the “perverse” macro-economic effects of partial reforms of EPL.²³

8. Another problem the *Employment in Europe Report* identifies with traditional employment protection legislation is that it can slow down the flow of labour between different jobs, making the labour market less dynamic and increasing the average duration of unemployment spells. This is problematic for the Lisbon goal of facilitating mobility, and the response of the Green Paper is therefore to question established approaches which seek to protect “insiders” in the context of one particular job. Instead, the Commission canvasses the adoption of a “lifecycle” approach to work, with flexible EPL and revised unemployment assistance protecting workers over the course of their engagement with the labour market, and enabling them to make transitions between jobs, and in and out of employment.²⁴

9. Given this portrayal of EPL²⁵—that it inhibits the labour market attachment of outsiders, reduces dynamism in the labour market and lowers employment transitions—the Commission looks to alternative means of protecting workers against labour market risks whilst ensuring flexibility for enterprises. In its *Employment in Europe Report*, and also in this Green Paper, the Commission comes out in favour of “well-designed” unemployment benefit systems and active labour market policies, rather than reliance on employment protection legislation. Whilst the economic orthodoxy holds that generous levels of unemployment benefit tend to increase unemployment, the *Employment in Europe Report* posits that this can be offset by a limited duration of entitlement and by introducing elements of compulsion and conditionality—what the Report refers to as an effective “activation” strategy with monitoring of job search efforts, participation in ALMPs and provision of effective assistance to the unemployed. Finally, in response to the “security” side of the flexicurity equation, the *Employment in Europe Report* asserts that benefit schemes and active labour market policies designed along those lines don’t hinder labour market adjustment and seem to perform better than EPL in enhancing workers’ perceived security. This is because social security is arguably more efficient at providing insurance against labour market risks, and high EPL is considered to lower the chance of re-entering employment once unemployed.²⁶

10. With regard to employment policy, therefore, the shadow of the Lisbon Strategy looms over the questions asked by the Green Paper. The background debates and assumptions which inform much of the Commission’s thinking suggest that “flexicurity” principles are the best response to the changing labour market, and further, that reform packages adopting such principles, should assign a greater weight to carefully designed unemployment benefit and active labour market policies and less importance to EPL.²⁷ The argument here, essentially, is that that EPL is undesirable, active labour market policies and modernised social security are better ways to achieve the desired flexicurity approach.²⁸

11. In this respect, the Green Paper finds strong echoes with UK labour market policy, at the centre of which lie the “Jobseeker’s Allowance”, and the “New Deal”, designed to develop the employability of the unemployed. The “stricter benefits regime” of the previous Conservative governments has been continued

²⁰ “Reforms tended to increase flexibility ‘on the margins’”, ie introducing more flexible forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged jobseekers to the labour market and to allow those who wanted to have more choice over their employment. The outcome has given rise to increasingly segmented labour markets”: Green Paper, at p 5.

²¹ Ibid, at 89–90.

²² Ibid, at 13.

²³ Ibid, at 90: “On the one hand, the lower firing costs associated with fixed-term contracts have contributed to employment growth but, on the other hand, there have been less desirable effects on employment and growth such as inadequate investments in human capital, higher wage pressures, lower labour mobility and higher wage dispersion” “In response to these adverse outcomes, a series of labour market reforms have been implemented in Spain since the mid-1990s . . . to loosen employment protection for regular workers, while at the same time tightening the use of temporary contracts.”

²⁴ CEC, Green Paper, at 9–10.

²⁵ The EiE Report 2006 does recognise, on the plus side, that strict EPL does have a positive effect on job tenure; it also encourages investment in firm specific human capital or skills; and can lead to productivity improvements from workers who are more incentivised to cooperate: CEC, *Employment in Europe 2006*, at 86–7.

²⁶ CEC, *Employment in Europe Report 2006*, at 88–89.

²⁷ “On the other hand, a generous UB tends to increase unemployment, but this can be offset by a limited duration of entitlement and by an effective ‘activation’ strategy with monitoring of job search efforts, participation to ALMPs and provision of effective assistance to the unemployed. Finally, UB/ALMPs designed along those lines do not hinder labour market adjustment and seem to perform better than EPL in enhancing workers’ perceived security. This discussion suggests that reform packages adopting ‘flexicurity’ principles should assign a greater weight to carefully designed UB/ALMPs and less importance to EPL”: CEC, *Employment in Europe 2006*, at 112.

²⁸ “A flexicurity approach is consistent with . . . loosening EPL to some extent in exchange for more generous UB and higher spending on ALMP”: CEC, *Employment in Europe 2006*, at 94.

under the New Labour Government, but with greater state assistance with job search and skills upgrading, as well as better resourcing than previous active labour market policies. Instilling the work ethic is an important part of the New Labour government's employability strategy, as is ensuring that people remain attached to the labour market. Thus the active job search requirements of the New Deal are being extended to groups traditionally exempt from such active labour market policies, such as lone parents, and people on disability benefits.

12. Parallel developments in welfare state reform are being urged within European Commission discourse, both within this Green Paper, and also in economic policy: in particular, the 3-yearly Broad Economic Policy Guidelines urge Member States to ensure that tax and benefit systems make work pay, by reducing labour taxes and high marginal effective tax rates, especially for low paid workers and addressing incentive effects, duration, eligibility and enforcement of benefit schemes to make them more employment-friendly. The supply-side agenda adopted in the UK gives rise to labour market policy which seeks to equip individuals to compete in the market, emphasising employability over social protection. Such developments in labour market policy shed light on what a "modernised" or "active" welfare state, as envisaged at Lisbon, might look like, and give an indication of one possible future direction of the supply-side agenda adopted by the Employment Strategy in its post-Lisbon stage. As one of those Member States which adopted deregulatory policies from the 1980s onwards, there are marked similarities between British discourse on labour market policy, and EU-level discourse on the need to remove labour market "rigidities". This similarity goes some way towards explaining the apparent willingness of the UK to comply with the "soft law" obligations imposed by European employment policy.

30 March 2007

Memorandum by Dr Catherine Barnard and Professor Simon Deakin

INTRODUCTION

1. The Commission's much anticipated Green Paper is a street map to the suburbs and not a roadmap to the exciting the Alpine heights of the EU. This, of course, is a deliberate policy since there is little appetite for legislative excitement in the field of EC labour law.
2. And yet, as the history of the Services Directive tells us, the need to preserve the EC Social Model (for which read national social models which the EU has appropriated) has been a central thread of recent debates, including the "no" votes to the Constitutional Treaty, particularly in France. The Green Paper therefore suffers from the need, which has afflicted EU social policy since 1957, of looking in two directions at the same time: respecting divergent national social models while at the same time trying to find a role for the EU.
3. Our evidence will focus particularly on question 6, the role of EU Regulation, while at the same time offering some thoughts on question 3, the concept of flexicurity and question 5, groups covered by labour law.

ROLE OF EU REGULATION

4. A number of rationales have been offered for EC legislation. One is that EC legislation is justified to harmonise costs for firms competing in the EU, thereby creating a level playing field. Such an approach would anticipate far-reaching EC legislation based on exhaustive harmonisation. Elements of this approach justify the Transfer of Undertakings Directive 2001/23 and Collective Redundancies Directive 98/59. Another perspective is that there should be EC legislation only where a truly trans-national issue is at stake. This helps explain the enactment of the European Works Council Directive 94/45.

5. A third model is the human rights perspective that views (EC) social rights as the core of EU citizenship. This approach helps to explain why the EU has adopted extensive equality legislation. It might also help to justify the EC enacting social legislation for atypical workers as envisaged by the Green Paper. A fourth model, which had largely fallen out of fashion until the 2006 Green Paper, is to justify giving EC employment rights to facilitate the mobility of workers under Article 39 EC. Pre-enlargement, levels of mobility in the EU were very low (c1 per cent of the population). Post-enlargement, numbers have increased, particularly in the UK, and this rationale might now carry more weight, albeit that the Green Paper focuses much on frontier workers, not migrant workers as the British now understand them. This appears to be the strongest rationale offered by the Green Paper to justify the EU intervening in this field. In particular, this would support the EU adopting a common definition of worker, extending the definition of worker developed by the Court in its case law under Article 39²⁹ to the employment rights Directive. There are some signs that the Court of Justice is beginning to do this.³⁰

²⁹ Eg Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, para 16 the essential feature of an employment relationship is that "for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration".

³⁰ Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-8349 (Art 141 EC).

6. Cross-cutting the various justifications for EC regulation is the need for the EU to respect the principles of subsidiarity and divergent national social models. These systems adopt different policy mixes towards insiders and outsiders:

- One model, found particularly in Spain and Italy, is to give much employment protection to insiders but little protection to outsiders.
- A second model, now found in the UK, is more nuanced. At its centre is a core of protected employees who benefit from a range of employment rights which increase the longer the employee works for the employer. Then, rippling out beyond the core, are rights which are also given to workers (eg national minimum wage, working time), professionals (eg anti-discrimination legislation), and, to a limited extent, the self-employed (health and safety legislation).
- A third model, found in Scandinavia, is where employment protection is less important than the social security safety net. While much attention has recently been given to the success of this model, it is premised on high levels of expenditure on social security (and the small size of the countries).
- A fourth model, and one not expressly considered in the Green Paper although it hovers in the background, is that found in the US, where the labour market is characterised by its flexibility and absence of security (albeit there is strong anti-discrimination protection).

7. The question for the EU, then, is how to marry the conflicting justifications for legislation with the diverse social models. The EU has experimented with different legislative mixes including, more recently, minimum standards directives and OMC. How might these work in the context of rights for atypical workers?

EU REGULATION AND ATYPICAL WORKERS

8. Assuming that the EU can justify intervening in this field, the question is what form that intervention might take. One possibility would be for a minimum standards Directive. But the content of such a Directive is far from obvious. Take the perennially difficult case of agency work. Let's suppose that an EC Directive says (1) user undertakings are responsible for compliance with employment rights for those they employ for (say) more than six months, the agency in all other circumstances, and that temps are employees of the user after six months, employees of the agency before that. But such a Directive would be a blunt instrument and presupposes that a one-size-fits-all approach can be applied to the very different types of people who do agency work.

9. The bluntness of this approach can be seen when considering Article 8 of Directive 91/383 which has posed considerable problems in terms of both the interpretation of the provision and the conflicts between what is legally possible and practically desirable. The British HSE takes the view that while it is legally possible to impose duties on the user undertakings, it may be more desirable to impose certain requirements on the temp agency who has a longer term interest in the well-being of the employee (eg the provision of appropriate footwear).

10. The other salutary tale of the EU's intervention in the flexicurity debate comes with the Working Time Directive 2003/88. This Directive provides security to workers through the provision of extensive and prescriptive rights (48 hour working week, four weeks' paid leave, in-work rest breaks every six hours, daily rest of 11 hours, weekly rest of 24 hours) and flexibility through the extensive and complex exemptions, derogations and, most controversially, individual opt-outs. In the UK this Directive has done little to reduce the overall working hours.

11. Another possibility would be for the EU to encourage soft law cooperation between the states on this point, through some sort of OMC methodology which the Green paper appears to envisage (p 6). Past experience suggests that OMC does not translate well in areas of essentially hard employment *law*, as opposed to *policy*. Furthermore, the ILO is already doing a lot of good work in this area, in particular through its Recommendation No.198—why replicate it?

REFLEXIVE LAW

12. One further possibility would be to encourage employers and trade unions to work out solutions which are suitable to them and their industry. The Communications Workers Union shows an interesting way forward. The CWU negotiated an Agency Best Practice Code I (2001) covering equal opportunities and disciplinary and grievance procedures, aimed at creating consistency of approach in promoting Best Practice among agencies providing workers for BT. The success of this measure was followed up by a second phase covering best practice in the fields of health and safety, welfare, parental maternity, paternity and adoptive

leave, working time regulations, recruitment, training and appraisals. In addition, the CWU has entered into a partnership agreement with a number of the larger employment agencies, such as Kelly Services and Manpower. The Manpower Agreement contains a commitment to active participation in the CWU Agency Forum and to use Agency Best Practice.

13. The CWU agreement was essentially worked out through traditional collective bargaining methods. The EU could provide some legislative incentives to encourage such agreements to be reached through framework or reflexive Directives, such as the Information and Consultation Directive 2002/14, where the social partners and the government are obliged to work out a solution failing which minimum standards, laid down in an annex, would apply. Such an approach might be all the more effective when allied to the fundamental rights laid down in the Charter (not mentioned in the Green Paper).

14. That said, there must be real incentives on the part of the social partners, probably at the intersectoral or sectoral level, to reach an agreement. In the absence of such incentives these framework agreements do not work, as research conducted at Cambridge shows³¹. This research looks at the application of the possibility open to employers to vary the effect of Regulation 8 of the Fixed Term Work Regulations. Reg. 8 renders a renewal of a fixed term contract permanent where an employee has been employed under successive fixed-term contracts with continuous employment of four years or more from 10 July 2002, unless the employer can show that the use of a fixed term is “justified on objective grounds”.

15. The employer can vary the effect of Reg 8 through a collective or workforce agreement. This may specify the maximum total period for which employees may be employed on fixed-term contracts before they are deemed to be permanent; the maximum number of renewals of fixed-term contracts which can be made; and more detailed objective grounds justifying fixed-term employment.

16. In fact, there is little take up of this option. In the university sector there appears to be only one agreement which formally varies the terms of Regulation 8. This is an agreement at Imperial College, London, which extends the period of time prior to which “permanent” status must be granted from four years (as stipulated by the Regulations) to six in the case of posts funded by external research projects. In return, the unions which negotiated the agreement, the AUT (now UCU), Amicus and Unison, obtained undertakings from the employer to minimise the use of fixed-term employment and to integrate fixed-term employees into the permanent workforce where possible.

17. In other universities, the UCU and other campus-based unions have reached agreement with university management on the stabilisation of fixed-term work and the integration of fixed-term workers into regular career structures, without going down the route of a formal collective agreement varying Reg 8. Indeed, some of these agreements go so far as to specify that they are *not* to be construed as collective agreements within the meaning of the Fixed-Term Employment Regulations, precisely in order to avoid the possibility that they will be viewed as derogating from the basic rights of employees which are set out in the Regulations. Again, the focus is on well-tried and tested forms of autonomous collective bargaining rather than on the adjustment of statutory norms via collective agreements.

29 March 2007

Memorandum submitted by Dr Alan L. Boggs

1. “Flexicurity” navigates a precarious course between, on the one hand, the social costs of a deregulatory agenda based on individual freedom of contract and, on the other hand, the rigidities and inefficiencies arising out of bluntly constructed mandatory employment rights. What is most striking about the “flexicurity” agenda is its alignment with a *procedural* mode of employment regulation.³² Characteristically, “flexicurity” measures specify default standards susceptible to modification through a range of procedural mechanisms. The distinctiveness of the “flexicurity” agenda lies in its perception of the competitiveness problem implicit in procedural regulation: the need for adequate safeguards to prevent the opportunistic abuse of flexibility by employers. Without “credible commitments to fair treatment at work” from employers,³³ the conditions for trust-based employment relationships and so high levels of productive cooperation between employers and workers are undermined.³⁴ Thus, in evaluating the prospects for a viable “flexicurity” agenda, the devil lies in the detail of the safeguards against opportunistic abuse contained in the procedural modes for modifying

³¹ Work in progress on the implementation of social policy Directives in the UK (Simon Deakin and Aristeia Koukiadaki, Centre for Business Research, University of Cambridge), part of a study for DG Employment which will be completed later in 2007.

³² H Collins, “Regulating the Employment Relation for Competitiveness” (2001) 30 ILJ 17.

³³ Collins, above n 1 at 36.

³⁴ For a theoretical analysis of the determinants of trust, see M Warren, “Democratic theory and trust”, in M Warren (ed), *Democracy and Trust* (1999) 325.

labour standards. The focus in this short paper will be on the procedural framework established in the Working Time Regulations 1998 (WTR).³⁵

2. There are a range of procedural modes for modifying default standards in the WTR framework. First, certain labour standards may be varied through individual agreement between employers and workers.³⁶ Secondly, certain labour standards may be varied through a collective procedure.³⁷ In turn, the WTR provides for two kinds of collective procedure: collective agreements and workforce agreements. Collective agreements are those concluded between employers and recognised independent trade unions, and these have regulatory priority in the legislative scheme. In the absence of a recognised independent union, the employer may conclude binding “workforce agreements” with directly elected worker representatives. Each of these procedural modes will now be evaluated from a “flexicurity” perspective.

MODIFICATION THROUGH INDIVIDUAL AGREEMENT

3. WTR provides for an individual opt-out from the 48 hour maximum working week. From a “flexicurity” perspective the procedural mode of individual agreement is controversial. Given the inequality of power between employers and individual workers the potential for opportunistic abuse of flexibility is very great. This is supported by evidence suggesting workers are routinely subjected to illegitimate pressure to opt-out of the 48 hour maximum, leading for calls to eliminate the individual opt-out entirely.³⁸ Nevertheless, there is also evidence that some workers prefer to work longer hours willingly for reasons of personal autonomy, professional advancement, or economic gain.³⁹ The law should presumptively respect the genuine exercise of valuable personal autonomy wherever possible. The challenge for “flexicurity” is to devise a procedural mechanism that discriminates between these two kinds of situation. This raises three issues.

4. First, the technique of waivable worker rights found in the WTR is innovative in British labour law. Allocating the relevant entitlement to the worker before bargaining commences ensures that the bargaining baseline is modified in the worker’s favour.⁴⁰ The entitlement is more likely to stick at its initial allocation to the worker, and *in theory* the worker is more likely to assign a higher economic value to the entitlement in selling it to the employer than she would if she were required to purchase it from the employer.⁴¹ In practice, this “endowment effect” is displaced in situations where contracting parties routinely use “standard form” contracts.⁴² This form of contracting is common in the British employment context, and this probably accounts for the routine use of the opt-out as a standardised term of the worker’s contract.⁴³ The “endowment effect” could certainly be harnessed more effectively if the recent Commission proposal to invalidate opt-outs at the inception of the contractual relationship were adopted.⁴⁴

5. Secondly, there is an urgent need to clarify the regulatory objectives. Presumptive respect for individual autonomy through waivable worker rights may be overridden where there are competing “third party” interests such as promoting the collective good of family life or ensuring gender equity in labour market participation.⁴⁵ Given the prevalence of long-hours working by fathers in the UK in particular,⁴⁶ “family friendly” and gender equity objectives might be better achieved through the restriction of individual worker choice and the enforcement of mandatory working time limits.⁴⁷ It remains obscure whether the WTR is a strategy solely for the protection of workers’ health and safety, or whether it also forms part of a strategy for promoting gender equity/“family friendly” policy. This ambiguity has significant implications for the regulatory choice between waivable and mandatory rights.

³⁵ Working Time Regulations 1998, implementing Directive 93/104 concerning certain aspects of the organisation of working time, [1993] OJ L307/18.

³⁶ Most notably, waiver of the 48 hour maximum working week can only be effectuated through individual agreement between the employer and the worker.

³⁷ In particular, collective and workforce agreements may modify standards on night work, daily and weekly rest periods, rest periods, and the reference period for calculating the average weekly hours worked.

³⁸ TUC, “Working Time Directive Review 2003: the use and abuse of the opt-out in the UK”.

³⁹ C Barnard, S Deakin, and R Hobbs, “Opting out of the 48-hour week: employer necessity or individual choice? An empirical study of the operation of Article 18 (1) (b) of the Working Time Directive in the UK” (2003) 32 ILJ 223, 247–248.

⁴⁰ C Sunstein, “Human Behavior and the Law of Work” 87 (2001) Virginia LR 205.

⁴¹ For a discussion of the economics of endowment effects, see C Sunstein, “Switching the Default Rule” (2002) 77 NYU Law Review 106.

⁴² Sunstein, above n 10 at 118.

⁴³ See Barnard, Deakin, and Hobbs at 245–246.

⁴⁴ The proposal for a revised Directive, which has failed to secure agreement, would have provided that “an agreement given at the time of the signature of the individual employment contract or during any probationary period shall be null and void”.

⁴⁵ Sunstein argues plausibly that in order for the law to alter undesirable social norms, and this might include long hours working by fathers, mandatory legal standards are likely to be much more effective in this regard than waivable standards: see Sunstein, above n 9 at 263–264.

⁴⁶ TUC, above n 7.

⁴⁷ For a defence of such a “gender equity” model of working time regulation, see J Conaghan, “Time to Dream? Flexibility, Families, and the Regulation of Working Time”, in J Fudge and R Owens, *Precarious Work, Women, and the New Economy* (2006) 101, 128.

6. Finally, if individual opt-outs are retained, procedural protections need to be bolstered to ensure better safeguards against opportunistic abuse by employers. Informal or diffuse work pressures might elude the current “detriment” provisions in the WTR, whereby workers are protected from subjection to detriment for refusal to opt-out. Reform options include more restrictive criteria for valid waivers (for example, compulsory “cooling off” periods, the possibility of retrospective withdrawal of waiver within a fixed time period, a requirement to take independent advice) or substantive constraints on waiver (mandating overtime premiums for hours worked over the 48 hour maximum).⁴⁸ More radically, waiver might be channelled through collective agreements with trade union or workforce representatives who potentially negotiate from a position of greater bargaining power with employers.⁴⁹

MODIFICATION THROUGH COLLECTIVE AGREEMENTS OR WORKFORCE AGREEMENTS

7. Given the “security” risks with individual waiver, the modulation of labour standards through collective procedures is often advantageous from a “flexicurity” perspective. In the *Supiot Report*, collective bargaining was praised “as the most dynamic institution for coping with the diversity of types of work organization . . . collective bargaining proves its worth as a valuable tool that can be used to ensure adaptability [and] provide security in the face of uncertainty”.⁵⁰ This would be complemented by a symbiotic inter-relationship between union-led collective bargaining and works council representation at enterprise level. Thus, in evaluating “flexicurity” within the context of working time regulation, much depends upon the existence of widespread and stable structures of collective representation at different levels in the labour market. This necessitates an appraisal of the provision for collective agreements and workforce agreements in the WTR framework.

COLLECTIVE AGREEMENTS

8. Collective agreements have regulatory priority in the scheme of procedures for varying normative standards. Given the independence and expertise of union representation this priority is appropriate. Nevertheless, recent evidence indicates a continuing union representation gap, particularly in smaller private sector organisations, although there are signs that the rate of contraction of union recognition has slowed in recent years.⁵¹ Union recognition now stands at 16 per cent of workplaces in the private sector, although the incidence of union recognition is much higher in larger firms and in the public sector.⁵² As such, the promise of “flexicurity” is likely to remain illusory without concerted action at EU and domestic levels to promote the extension of collective bargaining. This raises three issues.

9. First, while Community legislation on working time “relies upon the existence of thriving collective bargaining structures at the national level”,⁵³ the EU has been remarkably reluctant to take any responsibility to ensure that such structures are in place. In part, this is due to the tightly circumscribed legislative competence of the EU in respect of trade union rights.⁵⁴ Nevertheless, “soft law” techniques for the co-ordination of member state activities in the field of collective bargaining may be utilised by the Commission under Article 140. To date, the efficacy of this kind of “soft law” promotional technique has been hobbled by a failure to prescribe specific targets and monitor compliance.⁵⁵ Secondly, while the implementation of the statutory union recognition procedure (SRP) is a positive step forward in promoting union recognition, the quantitative impact of the SRP has been small.⁵⁶ In part, this is due to its confinement to single employer bargaining and its exclusion from small firms (21 worker threshold).⁵⁷ In line with the *Supiot Report*, State support for collective bargaining in new bargaining units arranged along regional, group, network, or sectoral

⁴⁸ For example, the US Fair Labor Standards Act permits workers to waive their right to a maximum working week, but the legislation mandates the payment of an overtime premium (time and a half) for workers working over the default limit specified in the legislation. This increases the economic incentives on employers to consider more imaginative strategies for organising working time than exclusive reliance on long-hours working.

⁴⁹ This is not permitted under the existing Directive, which requires that “the worker’s consent must be given not only individually but also expressly and freely”; see *Pfeiffer v Deutsches Rotes Kreuz* [2005] IRLR 137. The Court of Justice’s emphasis on “freely” given consent renders the legitimacy of the current UK position on the individual opt-out dubious, to say the least.

⁵⁰ Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) 95.

⁵¹ B Kersley et al, *Inside the Workplace: Findings from the 2004 Workplace Employee Relations Survey* (2006) 117–122.

⁵² Kersley et al, above n 20 at 118.

⁵³ A C L Davies, “Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?”, in P Alston (ed), *Labour Rights as Human Rights* (2005) 177, 182.

⁵⁴ Davies, above n 22 at 192–197.

⁵⁵ Davies, above n 22 at 199.

⁵⁶ G Gall, “Trade Union Recognition in Britain: An Emerging Crisis for Trade Unions?” (2007) 28 *Economic and Industrial Democracy* 78.

⁵⁷ Both features of the SRP were preserved by the Employment Relations Act 2004. For discussion, see A L Bogg, “Employment Relations Act 2004: Another False Dawn for Collectivism?” (2005) 34 *Industrial Law Journal* 72.

lines would be a valuable support to the “flexicurity” agenda in the UK.⁵⁸ Finally, the allocation of consultation rights to “representative” unions (with something less than the majority support threshold specified in the SRP) for the purposes of varying normative standards should be given serious legislative consideration.⁵⁹

WORKFORCE AGREEMENTS

10. The WTR is based on a dual channel model of collective representation, permitting the variation of normative standards through “workforce agreements” in the absence of applicable collective agreements. In theory, this closes the representation gap associated with declining union recognition. In practice, two significant problems may be identified. First, “workforce agreements” have been rarely utilised in practice due to a cultural lack of familiarity with consultation procedures;⁶⁰ moreover, there is evidence that the prevalence of consultative bodies is in fact declining in British workplaces and that they are more likely to exist where there is already a union presence.⁶¹ Secondly, even if “worker representatives” are consulted there is no statutory requirement that such representatives are “independent” of management.⁶² While there is an extensive set of principles for evaluating trade union independence,⁶³ there is no parallel jurisdiction to scrutinise the independence of non-union representatives. Since the emergence of dual channel strategies has been largely stimulated by European legislation, it is regrettable that there has been no attempt to ensure the independence and representativity of this second channel at the European level.

11. The recent implementation of general consultation measures in the UK is unlikely to make any significant difference to these “security” risks to “flexicurity” in the “workforce agreement” channel.⁶⁴ First, consultation structures are not mandated by ICER 2004; 10 per cent of the workforce must request the initiation of “negotiations” as a trigger to the procedure.⁶⁵ This is a rather high threshold, and given the lack of any tradition of general consultation in the UK, it is unlikely that many employees will be sufficiently aware of its existence to pull the trigger.⁶⁶ Secondly, the conditions of validity for “pre-existing” and negotiated agreements are extremely undemanding, and are arguably not compliant with the Directive.⁶⁷ Even the prescribed “fall-back” provisions are ‘extremely “minimalist” in infrastructural terms’.⁶⁸ We should expect a greater degree of fluidity still with arrangements emerging out of the negotiated/pre-existing agreement phases. Thirdly, unions, even recognised unions, have no formal role under ICER 2004. There is no prescribed platform for integration between union and consultation structures. It is worth recalling the observations of the Supiot Report, that dual channel structures should be understood as complementary and symbiotic forms of collective representation.⁶⁹

12. In conclusion, the “flexicurity” agenda has been a valuable corrective to debates presenting flexibility and security in opposed antagonism to each other. The most pressing challenge in labour law terms is to ensure fair and democratic procedural modes for the variation of labour standards. As this overview of working time regulation has indicated, there is much more to be done in ensuring that flexible procedures embody sufficient safeguards against opportunistic abuse. This requires a tightening of the conditions for valid individual waiver of certain employment rights; and concerted action to ensure there are viable collective representation structures in place for the variation of labour standards.

29 March 2007

⁵⁸ Supiot, above n 19 at 134.

⁵⁹ This has been a recurrent reform proposal in the academic literature over the last 20 years. For the latest proposal for a legal concept of “representative” union, with consultation rights triggered once the union has reached 10 per cent membership density amongst the relevant group of workers, see P L Davies and C Kilpatrick, “UK Worker Representation After Single Channel” (2004) 33 *Industrial Law Journal* 121.

⁶⁰ Barnard, Deakin and Hobbs, above n 8 at 251.

⁶¹ Kersley *et al*, above n 20 at 125–128.

⁶² For a critique of this lacuna, see A L Bogg, “Representation of Employees in collective bargaining within the firm” December 2006 *Electronic Journal of Comparative Law* (available online at www.ejcl.org).

⁶³ See, generally, S Deakin and G Morris, *Labour Law* (4th ed, 2005) 757.

⁶⁴ Information and Consultation of Employees Regulations (ICER) 2004, implementing Directive 2002/14/EC.

⁶⁵ ICER 2004, reg 7(1)–(3).

⁶⁶ See M Hall, “A Cool Response to the ICE Regulations? Employer and trade union approaches to the new legal framework for information and consultation” (2006) 37 *Industrial Relations Journal* 456. Hall cites evidence suggesting that only 3 per cent of surveyed employers considered there was a serious prospect of the “10 per cent” trigger being pulled. As such, the incidence of consultation agreements has been low and is likely to remain so. There seems to be a strong case here for giving “representative” unions a legal right to trigger the negotiating process as an alternative to the “10 per cent” trigger.

⁶⁷ ICER 2004 gives regulatory priority to voluntary agreements. The substantive content of “pre-existing” and “negotiated” agreements is minimal, which again raises a question mark over whether ICER 2004 is sufficient to meet the minimum standards specified in the Directive.

⁶⁸ M Hall, “Assessing the Information and Consultation of Employees Regulations” (2005) 34 *Industrial Law Journal* 103, 115.

⁶⁹ Supiot, above n 19 at 226.

Memorandum by Brethren Christian Fellowship

Further information can be found on the only website endorsed by the Brethren which is www.theexclusivebrethren.com.

Many brethren run SME's and as employers strive to treat their employees well and fairly. Those who are employed also aim to work diligently for their employers based on the exhortations in the Holy Scriptures;

Col. 4 v 1 "Masters give unto your servants that which is just and equal; knowing that ye also have a master in heaven".

Col. 3 v 22 "Servants obey in all things your masters according to the flesh: not with eye service as men pleasers, but in singleness of heart fearing God".

In response to the questions;

1. The UK labour market is not as flexible as it used to be but is still more flexible than most European countries.
2. In our view labour reform has already gone too far and should go no further as this will increasingly damage our competitiveness in the market place.
3. In our view employment security in this country is well balanced with flexibility. Sufficient laws are in place to protect against rogue employers who would exploit their workforce and yet there is flexibility for those who like varied working environments and part time work to balance other obligations of life.
4. Manufacturing in this country is suffering form competition from the Far East where labour costs are much lower than ours. It is therefore essential to have a flexible workforce in order to survive. This is important to cope with trade and seasonal fluctuations and the burden of increasing regulation affecting every field of operation. It is important that this balance is maintained as good intentioned increases in job security can discourage employers hiring more workers which will affect availability of jobs themselves. This may have the effect of improving efficiency and productivity but at the same time restrain growth.
5. Not answered.
6. To attempt to apply "one size fits all" labour laws across the European Union would be a mistake and have the reverse effect of the objectives of the "Lisbon Strategy" of achieving sustainable growth with more and better jobs.

Europe has varied cultures, working practices, and local traditions and conditions therefore it is important for member states to formulate their own labour laws to seek to meet these variables.

The flexible working practices in the UK have helped migrant workers find suitable employment and make a valuable contribution to the economy. More rigid protection would exclude many from getting onto the employment ladder.

During the formulation of labour laws in this country unions and employers are consulted but they do not exercise control as they do in some EU countries. This has helped to have a more balanced employment regime.

Much labour law in the past has demanded better conditions, pay and job security in existing employment. What is now needed is more flexibility and the availability of retraining to increase the mobility of labour in an ever changing world.

We make this brief submission on behalf of a group of Christians who run many small to medium sized business and flexibility is important to reflect our Christian Ethos in our workplaces.

We would conclude by saying the need is for more flexibility and less regulation.

17 April 2007

Memorandum by the British Retail Consortium

1. The British Retail Consortium (BRC) represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and virtual stores. Membership includes all major multiples; a range of small and medium sized retailers plus various sector-specific and small business trade associations.

2. The BRC has-responded to the European Commission's Green Paper and is pleased to submit evidence to the House of Lords European Sub-Committee. The Committee has requested written submissions on the implications of the Commission's paper on the UK labour market and UK employment practices. The BRC

has discussed these issues with HR professionals from its membership and hopes the Committee finds our submissions helpful. We would be delighted to assist the committee should any further information be required.

3. The BRC is concerned at the Commission's suggestion that contracts of employment which depart from the five day 9am to 5pm week are, *de facto*, precarious and in need of additional protection. In the retail sector part time employment is a strong employee preference—64 per cent⁷⁰ of the workforce has chosen to work on a part-time basis. The suggestion that employers who facilitate flexible employment opportunities avoid long-term commitment to their staff is erroneous, illogical and not supported by evidence. The success of a sector like retail, where the majority of employees work part-time, is dependent on the take-up of these flexible employment contracts combined with security to assist staff retention. Competition from other retailers serves to ensure standards are high—both in terms of the types of employment contract available and in the incorporation of long-term commitment to an employee's personal growth potential. Retail can demonstrate that success is dependent on finding solutions which simultaneously meet the needs of the workforce and a demanding customer base.

4. In the UK, the employment law framework is already saturated and employers are forced to comply with an increasing burden of administrative requirements. The BRC believes that further legislation should only be imposed as a last resort and only where other forms of soft regulation, for example codes of practice and self regulation, are inappropriate. Given the Commission's own commitment to reduce the burden of administration contained in its Better Regulation strategy, new legislation should be the exception rather than the norm. Furthermore, the EU should resist temptation to harmonise employment administration across member states. However, it does pave a key role to play in raising employment standards by opening debate and facilitating an exchange of experience and practice.

Flexibility of the labour market

5. In the UK retailers have a history of providing innovative, flexible working schemes and the success of the UK retail industry is due, in part, to the types of working patterns that employees are able to choose. As a result, even though food retailers are increasing the number of stores that are open twenty-four hours a day and non-food retailers are extending their opening hours during the week, the majority of the 2.8 million retail employees work less than 48 hours, a week, and can choose working patterns to suit their specific needs. In the UK, retail has consistently led the way in creating a flexible, supportive environment by investing heavily in training and development, recruiting and retaining a diverse workforce, creating jobs in deprived communities, supporting further education and offering excellent career opportunities for all employees regardless of contract type. The BRC believes that the UK Retail Sector's success in creating flexible, secure jobs is an example that should be recognised across the EU.

6. In order for this debate to progress constructively it is vital to ensure there is a common understanding of "flexibility". For retail employees, flexibility means providing opportunities to vary working patterns, to change between working patterns and to choose to work around caring or educational requirements. To retailers, workforces must be in place to cope with seasonal demand and competition.

7. Retailers have developed policies to ensure that flexibility exists and this is demonstrated by the fact that 64 per cent of the workforce work part time. As different forms of work and working patterns emerge employers must be in a position to provide responsive employment opportunities. Entrenching any sort of "flexibility" in a rigid legal instrument will impede modernisation and the evolution of new forms of working. Employers should instead be encouraged to recognise emerging habits. Commercial competition and new forms of technology will in any case create new forms of work and competition for staff will ensure employers provide responsive employment solutions. This works as an extremely effective form of self-regulation—raising the bar for flexible and innovative opportunities.

Employment security

8. The Commission's debate must also start with a common understanding of the term security. Security means demonstrating long-term commitment to employees, rewarding their hard work and loyalty, ensuring they are informed and consulted in relation to changes in the workplace and encouraging them to develop their careers by providing training and supporting further education. The benefit to both sides of industry is clear; the employee is secure in their employment and has the opportunity to expand their skills base should they wish. By providing employment Security the employer will retain a dedicated, skilled workforce able to

⁷⁰ Nomis data February 2007.

perform well, provide efficient customer service and ultimately increase value to the corporation. Again, the BRC's members feel that along with the basic protection afforded to employees in UK law, commercial competition serves to ensure employers offer a range of benefits to enhance employment security.

The concept of "Flexicurity"

9. The Commission's buzzword is of limited use conceptually but has succeeded in engaging debate on employment models in the EU. The definition in Scandinavia, where this model stems, is based on the availability of significant social protection. The accessibility of flexible employment there is bolstered by the State. In other countries in the EU where this level of protection is not available the requirement to provide longer term security becomes more focused on the employer. In the UK our social protection adequately supports the unemployed who are also encouraged to gain employment through a range of government initiatives. However, our high unemployment rate coupled with our robust legal framework as well as the competitive nature of industries like retail requires employers to make long term commitments to their staff. Because many staff are on flexible employment contracts but receive the same employment security as their full time counterparts, the retail sector is a very useful exemplar of how flexibility and security can come together in an economic environment which differs from the framework in which the model was originally developed.

10. While flexibility and security are indeed key aspects of sustainable employment, the BRC believes it inappropriate to impose any one model on the whole of the EU and the operation of concepts such as flexibility and security will depend on the adequacy of social protection in each country. In addition, each member state has a different economy and a different legislative and regulatory framework. Each responds differently to regulation and in each the composition within employment types differs—those who make up the majority of the part time workforce, the night workforce etc. How the concepts of flexibility and security operate and how they are enforced will be an individual matter for member states. However, as a short-hand for engaging debate on flexible, secure employment it is a useful start point.

Other labour market challenges and groups covered by labour law (questions 4 and 5)

11. The BRC believes that combined, flexibility and employment security can produce optimum conditions for employment and that additional, burdensome regulation purporting to facilitate their operation serves only to hamper them. However well-intentioned additional regulation is, the UK employment legislative framework is already saturated and new regulation is likely to result in knock-on effects as employers spend time and money satisfying bureaucratic requirements. Regulatory framework on SMEs is of course even greater. The BRC believes that it is counter-intuitive to implement more regulation in the name of achieving modernisation. The dynamic nature of the labour market means it requires flexible, adaptable solutions which entrenched burdensome regulation simply cannot achieve.

12. Retailers have demonstrated their ability to adapt to the needs of the labour market and ensure that their solutions are original and competitive. In the UK retailers invest heavily in training and many have launched innovative schemes, providing their staff with access to professional or personal development plans. Low-skilled workers in particular benefit greatly from the opportunity to access training and enhance their skills base. Many retailers offer skills and development packages as standard to all employees regardless of length of service and go to great lengths to ensure there are a variety of original and accessible options available⁷¹. In terms of flexibility, again, employers respond to the requirements of their customers and their employees by providing flexible employment opportunities which meet the needs of both groups. Often those requiring flexible working patterns are those underrepresented in the labour market generally—for example women, the disabled and older workers. The fact that the UK retail workforce comprises 62 per cent women, 56 per cent older workers, 12 per cent disabled workers and 7 per cent workers from ethnic minorities⁷² is testament to the fact that these practices have eliminated marginalisation within the retail workforce. Ensuring that employers are poised to adapt to facilitate this trend. The BRC believes that a wealth of administrative requirements imposed by regulation will only hinder employers' ability to respond quickly and positively to the changing needs of modern workforce.

13. The definitions of employment and self employment and the issue of disguised self-employment, and how to facilitate bona fide transition between the two are distinct matters. The BRC agrees with the Commission that the most constructive direction in which to take the matter of definitions is by opening up an EU-wide discussion in which member states share the rationales behind their definitions, consider when to protect freedom of contract and allow parties to exclude employment protection and examine how and why harm is

⁷¹ For further info and examples please see BRC Brochure which accompanies this paper.

⁷² Nomis data February 2007.

caused. Regulation often presupposes that there are clear distinctions between contractual types that do not exist in practice and in any case, however tight the definition there will always be controversy at the margins. In the UK the statutory definition of “employment” requires reference to a common law test which looks at an indeterminate list of factors, including the degree of control exercised by the employee, the extent to which the employee is integrated with the employer’s organisation and the allocation of risk.

14. The European Court of Justice has held that the precise scope of the term “employment relationship”, used in many European Directives, is a matter for national law and this is in line with the wording of the Directives themselves which often include the statement “This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship⁷³”. The English Courts have demonstrated their commitment to ensuring that the existence of a contract and its provisions is a true reflection of the actual relationship between the parties and have found an employment relationship where contracts and tax codes expressly identify the claimant as self-employed⁷⁴. The BRC also agrees that there is a real need to protect workers who are forced into involuntary self-employment in order to exempt them from benefits and security which they would otherwise attract, and believes that initiating a debate as an opportunity to learn from experiences across the EU would be invaluable.

15. Pinpointing responsibility in multiple employment relationships in the UK is a matter for the courts assessed by reference to a range of factors. The end-user has frequently been held responsible for compliance with employment rights and while the BRC believes that has resulted in harsh consequences it also believes that requiring prescriptive contractual forms, and/or imposing liability as standard (eg subsidiary liability in the case of sub contractors) will not resolve this difficulty. The specific circumstances will indicate where the responsibilities lie and this is the case notwithstanding the purported contractual relationships and, again, the UK courts have demonstrated willing to look beyond the contract. While it is right that not too great a focus is given to formalities, neither should they be completely disregarded. Stripping away formalities in analysing the relationship will create uncertainty between all parties which is ultimately in the interests of no one.

16. The BRC believes that the employment status of short term temporary agency workers could be clarified to ease the burden on employers and employment agencies. The DTI is currently looking at ways in which to ease the requirements relating to the provision of information for short assignments and the BRC welcomes this proposal. Aside from this, and in relation to longer-term assignments, the BRC fully supports the principle of protecting agency workers from discrimination but believes that this must be balanced so as to preserve the use of agency workers and retain business flexibility.

ROLE OF EU REGULATION

17. The use of the term “worker” within European legislation provides a basic minimum set of employment rights. Workers are covered by all Minimum Wage and Health and Safety legislation including Working Time legislation and are also protected by the Employment Relations Act 1999 and provisions in the Employment Rights Act 1996. Statutory protection has also been extended in a variety of situations to new starters without a qualifying period⁷⁵. The BRC believes that the current minimum protection strikes the right balance between protecting freedom of contract and ensuring employee welfare. This debate focuses on the need for Labour Law to be appropriate or the 21st Century and able to adapt to emerging new forms of work, which it recognises as becoming increasingly mainstream. The BRC believes that restricting the available forms of contract further would serve to hamper job creation and stifle entrepreneurship.

18. The ECJ and many European Directives refer the definitions of employment contract and worker to national law and the BRC agrees with this approach. Aside from the fact that, as discussed, a base “floor of rights” exists across the EU to protect the welfare of workers any further definitions must be appropriate for the each member state. On a practical level, the BRC also believes that any attempt to converge the definition would be extremely difficult and unlikely to succeed.

19. The BRC hopes the Committee finds this paper useful and attaches its employment brochure which provides examples of the type of employment opportunities offered by the retail sector. We would be very happy to provide oral evidence as part of the enquiry should the Committee find that useful.

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⁷³ EG Acquired Rights Directive 77/187, Article 2.2.

⁷⁴ See for example, *Lane v Shire Roofing Company (Oxford) Ltd (1995) IRLR 493 (CA)*.

⁷⁵ For example unfair dismissal for discrimination or reasons relating to working time and minimum pay.

Memorandum by (BECTU) Broadcasting Entertainment Cinematograph and Theatre Union

1. BECTU is the British trade union for all workers in the audiovisual and live entertainment sectors (excluding performers and journalists)—encompassing creative, craft and administrative occupations. We welcome the opportunity to respond to the EC Green Paper which is of particular relevance to the freelance workers who constitute almost half of our membership (as well as to casual workers in the theatre sector). Our response will, of necessity, focus on the issues of most significance for our members—and therefore particularly on the issue of legal uncertainty on employment status (Q7/8). We have not responded to questions of less relevance to our members.

Q7: *Legal definitions of employment and self-employment*

Q8: *Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract?*

2. While the phrase “floor of rights” has the unfortunate connotation of minimum standards, we believe this question, and the related section of the Green Paper on “Uncertainty with regard to the law” encompasses the issue of greatest concern to us—which the employment status of our freelance members and specifically of our Schedule D freelances (see para 11). The UK Government held a very long running consultation on employment status leading effectively to an outcome of “no change” on the problems of most concern to us. We therefore welcome the opportunity for a debate at European level on the same issue.

3. BECTU has approximately 10,000 freelance members who work in areas such as independent production for film and television; in commercials, music promos and corporate audiovisual production; and directly for broadcasters. While the broadcasters have a shrinking core of permanent staff, the rest of the audiovisual sector is overwhelmingly freelance. The amount and nature of work obtained is unpredictable. These are all classic atypical workers.

4. Within this freelance labour-pool there are two categories: those whose employment status is as employees and whose tax is deducted at source (PAYE), and those whose employment status is sometimes as workers and sometimes unclear and whose tax status is self-employed (Schedule D). We are adamant that it is unacceptable for tax status to dictate employment status. However, in the current uncertain situation, tax status does provide a useful shorthand to distinguish these two groups of freelances. In this document we will therefore refer to “PAYE freelances” and “Schedule D freelances”.

5. The problem is that UK labour law—which confers some employment rights on “employees” and some on a notionally-broader category of “workers”—effectively excludes Schedule D freelances from any clear and unambiguous access to employment rights. For freelances working in a characteristically long-hours sector, this has the particularly unfortunate effect of denying Schedule D freelances access to any rights under the Working Time Directive (an issue on which some of our members have taken cases to Employment Tribunals and been refused access on the grounds that they do not count as “workers”). Other rights are of course also affected (including the sometimes important right to claim 8-weeks back pay in situations of employer insolvency and the right to appoint safety representatives). Lack of access to such employment rights is a fundamental problem (and also means, in our view, that EU Directives on employment rights are not being consistently applied).

6. The problem is made more acute since:

- Schedule D freelances often work side by side with PAYE freelances and with broadcasters’ staff on the same projects in the same locations and under the same collective agreements.
- Very many of these workers are not freelance by choice. There are simply no permanent jobs in large parts of the UK audiovisual sector and a shrinking number of permanent jobs even in broadcasting—with many former staff members being made redundant and forced to transfer to the freelance labour market. They are prime examples of the “unemployment push” noted in the paper (page 102) by Professor Perulli referred to below.
- We note that our Schedule D freelances form part of a much larger number of workers in the same category. As the Green Paper indicates (p8), “Self-employed workers in the EU -25 numbered over 31m in 2005 or 15 per cent of the total workforce”. We strongly suspect that the problems experienced by our workers are also experienced by many workers in other sectors and other member states.

7. We note with interest that the Green Paper refers (p11) to the concept of “economically dependent work” which falls “between the two established concepts of subordinate employment and independent self-employment.” However, the Green Paper’s reference (p11) to the UK’s “targeted approach” appears to miss the point that Schedule D freelances count neither as “employees” nor as “workers” in the UK.

8. We further acknowledge that Professor Perulli has investigated this concept at greater length in his EC-sponsored paper “Economically dependent employment: legal, social and economic aspects”. We note from his analysis that:

- The lack of clarity in employment law definitions is leading to a growing trend whereby “protective legislation is facing a problem of ‘defocusing’” (p31).
- “Economically-dependent workers are currently included in the self-employed category” and they “must not be confused with false self-employment” (p76).
- A recent EIRO study has found that economically-dependent work is most widespread in the service sector, specifically including the media (p92).
- The ILO has proposed extending the scope of employment law to cover “relationships other than subordinate employment” (p96).
- Economic dependence should encompass criteria such as that the work is performed personally (p98) and that there is no contact with the end-market (p105).

9. We believe that Schedule D freelancers such as our members fall clearly into the category of economically-dependent workers. They are not entrepreneurs who create their own work; they are entirely dependent for work on the employers operating in this labour market.

10. However, we strongly disagree with one aspect of the concept of “economically-dependent” as described in the Green Paper ie that they remain “dependent on a single principal or client/employer for their source of income” (p11). Schedule D freelancers such as our members may work for many different clients/employers in any given year. They remain, however, completely dependent on the prevailing terms and conditions in this freelance labour market. They cannot set their own terms and have to operate within the rates already set. Their ability to negotiate truly independent terms is non-existent for all but an elite. The notion that their ability to work for more than one employer implies economic independence is therefore a complete fiction. Schedule D freelancers move from engagement to engagement and company to company not out of independence but necessity. The classic freelance experience is not of independent choice but of chronic insecurity. They are, unambiguously, economically dependent workers.

11. With this amendment, we accept that the concept of economically-dependent worker, as referred to in the Green Paper encompasses our Schedule D freelance members. We believe that EC labour law requires reforms in the following way to overcome the problems faced by such workers:

- There should be encouragement for, new, inclusive definitions of “worker”—to be developed and applied by member states—encompassing such economically-dependent individuals.
- Any such definition should give access to the full range of employment rights, specifically including working time rights. We recognise that some rights might still be subject to a period of qualifying service.
- There should be a statutory presumption of coverage for all such workers. In the event of a legal dispute, there should be a burden of proof on the employer to show that an individual is not a “worker”.

12. **We believe it is vital to approach this issue in this way ie, by “equalising up” so that Schedule D freelancers become eligible for full access to the range of employment rights enjoyed by those currently defined as “workers”. We would be strongly opposed to setting an inferior and lower floor of rights for economically dependent workers.** We believe this would be unjustified and would merely offer unscrupulous employers a means of watering down rights for existing workers rather than improving the position of economically-dependent freelancers ie an equalising down in the form of a race to the bottom tier of employment rights.

13. NB: All of the above arguments are also potentially applicable to casual workers in the theatre and live entertainment sector. We therefore call for the same approach in relation to this group ie their inclusion within a new definition of “worker” with access to the full range of employment rights.

14. We further acknowledge that, in parallel to the whole issue of employment status, there are connections to issues of tax/social insurance status. Our view on this is very clear. We believe employment status issues should be resolved solely through reform of labour/employment law. We believe any attempt at a linked reform of tax/social insurance law would have such complex and far-reaching implications in other areas that it would, in effect, stall the whole initiative. **We therefore believe that there should be no call, arising from the Green Paper debate, for any consequential reform of tax/social insurance law (even if, as a result, there are some residual anomalies).**

15. In stressing the need to address employment status issues solely by means of labour law, we also take the view that the introduction of competition law into this area (eg on the matter of collective agreements encompassing freelancers) is wholly inappropriate. Competition law and competition authorities should, in our view, not seek to interfere in this area.

29 March 2007

Memorandum by BusinessEurope

SUMMARY

1. **BUSINESSEUROPE** supports EU actions to Promote labour market flexibility and welcomes the launching of a debate on the modernisation on labour law. However, the competence to modernise labour law lies first and foremost with the Member States. Most of the measures will therefore need to be taken there. The role of the EU should be to organise exchanges of experiences and monitor national reforms using the instruments of the European growth and jobs strategy.

2. European law can prevent the national legislator from introducing reforms in national law. Taking a top-down legislative approach at the EU level would be counter-productive. **BUSINESSEUROPE** would strongly oppose measures aimed at harmonising the definition of “worker” at the EU level.

3. Increased flexibility in traditional standard contracts must be improved. However, there is no one-size-fits-all solution to meet different employers and workers flexibility needs. Ensuring the availability of a variety of contractual arrangements is essential. The green paper presents an unjustified negative picture of flexible forms of work This is incompatible with the flexicurity approach.

4. Similarly, the green paper does not sufficiently underline the importance of self-employment for the development of the entrepreneurial mindset Europe so badly misses. Having competitive companies is a prerequisite for employment. The development of commercial contractual relations is not a threat to labour law. On the contrary, it is a pre-condition to create jobs in a market economy.

5. Labour law reforms must focus on facilitating the creation of new jobs as opposed to trying to preserve existing ones. Rather than imposing restrictions on possibilities to terminate individual employment contracts, or introducing restrictions on the use of flexible forms of work, reforms should focus on supporting companies and workers efforts to adapt to market changes. Workers protection should become less dependant of labour law instruments and rely more on education and training measures to assist individuals in their career development. In line with the flexicurity approach, work to follow on the green paper must promote flexible labour law.

INTRODUCTION

6. On 22 November 2006, the Commission adopted a green paper entitled “modernising labour law to meet the challenges of the 21 century”. The purpose of this document is to launch a public debate on how labour law should evolve to support the European growth and jobs strategy. In the light of the replies received, the Commission will issue a follow-up communication in 2007. This work is part of the wider debate on flexicurity on which the Commission will also prepare a communication setting out common EU principles in June 2007 to help Member states steer reform efforts.

7. **BUSINESSEUROPE** supports EU actions to promote labour market flexibility across Europe. It welcomes the launching of a Europe-wide debate on the modernisation on labour law. The 2006 annual progress report on growth and jobs rightly underlines that “increasing the responsiveness of European labour markets is crucial to promote economic activity and high productivity” However, the competence to modernise labour law lies first and foremost with the Member States. Most of the measures will therefore need to be taken in the Member States. The role of the EU should be to organise exchanges of experiences between Member States and monitor national reforms using the instruments of the European growth and jobs strategy. Taking a top-down legislative approach at the EU level would be counter-productive for national reforms. **BUSINESSEUROPE** would strongly oppose measures seeking to harmonise the definition of “worker” at the EU level.

8. The modernisation of labour law must be based on sound analysis. Flexibility in the labour market is crucial to create more jobs. **BUSINESSEUROPE** fully agrees that increased flexibility in traditional standard contracts must be improved. However, there is no one-size-fits-all solution to meet different employers and workers flexibility needs. Ensuring the availability of a variety of contractual arrangements is essential for effective functioning of labour markets. An unjustified negative picture of flexible forms of work underpins the Commission flawed concept of “insiders” and “outsiders” and is incompatible with the flexicurity approach.

9. Similarly, **BUSINESSEUROPE** regrets that the green paper does not sufficiently underline the importance of self-employment for the development of the entrepreneurial mindset Europe so badly misses. Having competitive companies is a prerequisite for employment. Bogus self-employment and undeclared work must be combated but the development of commercial contractual relations is not a threat to labour law. On the contrary, it is a pre-condition to create jobs in a market economy.

10. In order to contribute to the debate launched by the green paper, the present position paper sets out **BUSINESSEUROPE**'s views on how to modernise labour law.

FLEXICURITY AND THE MODERNISATION OF LABOUR LAW

11. Research shows that people feel secure because it is relatively easy to find a job rather than because they are safeguarded by employment legislation. Labour law reforms must therefore focus on facilitating the creation of new jobs as opposed to trying to preserve existing ones.

12. The essence of the flexicurity approach is that it does not seek to organise trade-offs between flexibility and security. On the contrary, flexibility is seen as a way to improve employment security. In order to be consistent with this approach, work to follow on the green paper must promote:

- flexible labour law with job protection legislation which does not hamper recruitment under indefinite duration contracts; a choice between various types of flexible employment contrasts to answer diversified needs of companies and workers; and a commitment to fight undeclared work which creates insecurity on the labour market and unfair competition for law-abiding companies and workers,
- effective active labour market policies, which requires that the necessary budgetary margins have been created to allow such an investment, and
- employment-friendly social protection system and in particular unemployment insurance which links rights and obligations for the unemployed as opposed to giving unconditional income support.

13. It must also be recognised that there is not one single model of flexicurity policies that can be generalised across Europe. Each country has to decide on its own on the sequence of reforms and different components of the policy mix to be put in place.

INSIDERS AND OUTSIDERS ON THE LABOUR MARKET

14. The green paper is based on a flawed concept of “insiders” and outsiders”. It classes as insiders only those who are permanently employed on a full-time basis. In reality, in the flexicurity approach, the “outsiders” are the unemployed. All those legally employed, whether under a full-time indefinite duration contracts, working part-time, under a fixed-term contract, or doing temporary agency work should be considered as “insiders”.

15. The report *Employment in Europe 2006* and the 2006 European working conditions survey published by the Dublin foundation provide useful data to understand recent trends on Europe's labour markets. These documents indicate that

- 80 per cent of workers say that they are satisfied or very satisfied with their working conditions and with their work life balance.
- With 78 per cent of labour contracts, indefinite duration employment remains the most widespread form of employment in Europe.
- 18.4 per cent of employees in the EU working part-time in 2005, part-time work has risen noticeably over the years but remains low in new Member States. Even if it continues to be predominantly a feature of female employment, working part-time is a choice for 70 per cent of those workers and a useful step to enter the labour market for the remaining 30 per cent. Since part-time workers are protected against discrimination following the framework agreement negotiated by the European social partners implemented by a European directive, it cannot be regarded as “precarious” work.
- The same protection applies to fixed-term work contracts which, after a significant rise since the mid-1980's, seem to stabilise around 14 per cent of the EU workforce. Fixed-term work has no significant gender dimension but a strong cyclical component. With regard to the share of fixed-term contracts in the labour market, important variations exist within Europe. They represent a higher proportion of the workforce in some countries as a consequence of excessive rigidities in permanent contracts. Hence the importance of removing the rigidities in indefinite duration contracts to address the real causes of this phenomenon rather than further penalising job creation by introducing further restrictions in the use of non-permanent contracts.

- 41 per cent of agency workers are in longer-term employment within a year of their assignment. Far from being a threat, with only around 2 per cent of employment across the EU, temporary agency work remains an underexploited stepping stone into the labour market in most EU countries. Temporary agency work does not necessarily mean temporary employment. Workers will sometimes have a fixed-term work contract with the temporary employment agency and sometimes have a permanent work contract with them.

How to Create a Flexible and Inclusive Labour Market?

Questions

1. What would you consider to be the priorities for a meaningful labour law reform agenda?
2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?
3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?
4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

16. The priorities for a meaningful labour law reform agenda are to remove unnecessary rigidities which hamper job creation and to find new ways of providing security in the labour market. Flexibility of labour law has tended to be improved through the introduction of various flexible forms of employment without sufficiently adapting the traditional standard employment model. Rather than imposing restrictions on possibilities to terminate individual employment contracts, or introducing restrictions on the use of flexible forms of work, reforms should focus on supporting companies and workers efforts to adapt to market changes. Workers protection should become less dependant of labour law instruments and rely more on education and training measures to assist individuals in their career development.

17. Reforms aimed at a simplification of regulatory and administrative procedures will be particularly beneficial for SMEs. Fully applying the Commission's approach of "think small first" by carrying out, before revising existing legislation or taking new initiatives, an in-depth impact assessment especially concerning very small enterprises is essential.

18. However, since the existing rigidities mostly stem from national legislation, the detailed agenda for labour law reforms can only be decided upon at the national level.

19. Depending on their content, labour law and collective agreements can contribute or not to a smooth functioning of labour markets. The relationship between legislation and collective agreements is complex and varies from country to country. The EU level should respect these differences and avoid adverse interferences in national negotiations. Furthermore, European law can prevent the national legislator from introducing reforms in national law, notably due to the fact that EU directives contain non regression clauses.

20. Examples of over prescriptive minimum requirements or badly designed EU legislation which can create difficulties in their implementation are:

- The rules on defence of rights contained in directives 2000/43 and 2000/78 on non-discrimination can lead to considerable bureaucratisation of human resources management by making it necessary to keep many documents for a long period after a human resources management decision to be able to establish the employers good faith in case of unjustified judicial claims.
- Article 7 of the transfer of undertakings directive makes an open ended requirement to inform individual employees on the date, reason and implication of the transfer when there are no employees representatives without setting any limits to this requirement. This creates legal uncertainty. Such an opened door to unjustified individual contestations even a long time after the transfer is damaging.
- The visual display unit directive requires the employer to evaluate technical details of software packages when designing, selecting, acquiring or modifying them to see whether they can be adapted to match the user's level of knowledge and experience. This is very difficult to apply in SMEs. Similarly, the rules governing breaks when working on visual display units should be limited to monotonous activities which genuinely cause a strain.

21. The following examples illustrate how labour law or collective agreements have impacted on the situation of employment in different European countries.

Examples of balanced measures to answer both the employers and employees flexibility needs are set out below:

- In the UK, a right to request working arrangements for parents of young children or with adult caring responsibilities, with employers being able to refuse a request where there is a recognized business reason for doing so. In 90 per cent of the cases, requests have been accepted by the employer or a compromise reached, with little differences in acceptance rates between large and small firms. This indicates the success of the approach which creates benefits for employees without creating undue burdens on companies. Employers have realized improved benefits in terms of improved recruitment and retention of staff, with many reporting increased productivity. 86 per cent of mothers return to work with the same employer meaning that fewer trade down their job in order to combine work and family responsibilities.
- In Spain, collective bargaining plays a crucial role in promoting change in labour relations. National surveys indicate that some elements of flexibility are slowly being developed in relation to working time frameworks (annual period of reference, irregular distribution of working time schemes), classification of workers (using more flexible parameters to group workers), and remuneration systems (the variable part of remuneration gaining weight). Employers and trade union organizations have also been promoting changes in the content of collective bargaining through different national agreements from 2001 onwards. However, these changes are too slow. The regulatory framework does not always facilitate change.
- In the Netherlands, transition from full-time to part-time work and vice versa has successfully been promoted by the social partners and later introduced as a legal right. The employer is able to refuse a request for business reasons. The law on flexibility and security allows deviation by collective agreement from the rule limiting renewal of fixed-term contract to a maximum of three contracts of maximum two years each. Finally, the concept of “working smarter” was introduced by employers, in consultation with trade unions, and aims at measures to increase productivity and employment in companies.

Examples of obstacles still to be removed in the Member States are set out below:

- In Germany, the law on protection against dismissals should be amended to open up possibilities for the employer and the employee to agree on severance payment as an alternative to the employee’s right to take legal action for wrongful dismissal.
- In Germany, restrictions to the use of fixed-term contracts limiting employers’ possibilities to employ person on a fixed-term contract if this person has been employed by the same employer before should be removed.
- In Spain, more flexibility is needed to allow companies to change working conditions (grouping of workers, tasks and functions, timetables, working time internal frameworks, remuneration systems) when it is necessary to anticipate change and meet market demands as the regulatory framework only allows it on the basis of too rigid requirements.
- In Spain, the requirement to have an administrative authorization prior to a collective dismissal slows down adjustment to change and distorts negotiations as in practical terms this authorization increases significantly the employment termination cost beyond already high legal provisions (it can even triple this cost). This deters companies from hiring workers for an indefinite duration.
- In Luxembourg, because private employment agencies can only provide temporary work services, a company looking for a permanent position will not be able to use the services and expertise of a temporary work agency to fill this job vacancy. This lack of flexibility creates less work opportunities for job-seekers and prevents them from accessing a further path to enter the labour market.
- In the Czech Republic, employers believe that there is a need for radical labour deregulation to ease the conditions for temporary contracts, lift limitations to their renewal, removing constraints related to the reasons to be given when notifying termination of an employment relation, and having a simpler and faster dispute settlement system.
- In the Netherlands, legislation on dismissals remains complex, rigid, and costly. Prior authorization is required, resulting in long procedures. Moreover, very high compensation costs are imposed on the employer. This deters employers from hiring workers for an indefinite duration.

*How to ease labour transitions?**Questions*

5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (ie passive labour market policies) and active labour market policies?
6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?
7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate *bona fide* transitions from employment to self-employment and *vice versa*?
8. Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

22. As indicated above, there is a need for more flexible employment protection legislation and more efficient assistance to the unemployed in a number of countries. However, the role of the European Union in this debate is to encourage Member States to introduce the necessary changes and organise exchanges of experiences so that different countries can learn for each other.

23. With regard to access to training, the experience of countries which instituted a right to training shows that it has little impact for the workers who are most in need: the less qualified. In reality, personal motivation remains the most important driver for the development of life long learning. The key elements to successfully increase participation in life long learning are the following:

- Ensuring that education and training offers are attractive and correspond to labour market needs,
- Having efficient guidance services to help companies and workers identify courses or programmes which meet their needs,
- Giving an appetite for learning to individuals from the very early stages of education and supporting them in their efforts to up-grade their skills,
- Creating the right framework conditions to encourage companies to invest in life long learning,
- Develop instruments to validate the competencies acquired through informal learning such as on the job-learning.

24. Legislation is not the right instrument to influence learning behaviours. By contrast, agreements between the social partners can play a useful role in promoting a life-long learning culture. The framework of actions on the life-long development of competences and qualifications negotiated by the European social partners and subsequent implementation reports have shown that agreeing on a common approach to life-long learning contributes to changing attitudes. Examples of practical tools developed by social partners to promote life-long learning range from the creation of funds to mutualise training costs incurred by enterprises, systematising the use of individual competencies development plans, designating learning representatives in companies, creating individual learning accounts, concluding collective agreements defining the respective roles and responsibilities of the employer and the employee with regard to life-long learning, etc. However, when developing policies to promote life-long learning, it should be borne in mind that motivation to learn cannot be decreed. The key is to create the conditions that will induce companies and individuals to invest financial resources, time and efforts to up-grade skills. The tools have to be adapted to local specificities and should be defined as close as possible to the end beneficiaries.

25. Concerning legal definitions of self-employment and employment, **BUSINESSEUROPE** believes that existing national legal definitions are generally sufficiently clear to establish the real status of a worker. There is no general need to clarify legal definitions across Europe.

26. There are important distinctions in the fiscal social security and legal regimes applied to self-employment and employment. These distinctions correspond to the specific features of a commercial activity versus a labour contract situation and are generally justified. **BUSINESSEUROPE** is not in favour of establishing a minimum floor of rights regardless of the workers status. Some Member States created an intermediary legal category between employment and self-employment in order to facilitate transitions from one status to the other. Sharing experiences on such national initiatives at the EU level so that Member states can learn from each other could bring added value. However, **BUSINESSEUROPE** sees no need for the generalisation of new legal categories such as the so-called "economically dependant workers" across Europe and is strongly

opposed to measures aimed at explicitly or implicitly harmonising national definitions of employees and self-employed at the EU level.

27. With regard to the establishment of a “floor of rights for workers regardless of the form of their work contract”, existing EU provisions protecting workers against discrimination already do that. It should be borne in mind that:

- comparisons must be made between comparable situations on a proportional basis, and
- differences in treatment justified for objective reasons are not discrimination as foreseen in the social partners agreements on part-time work and on fixed-term contracts.

28. Negotiations of a similar agreement on temporary agency work have failed and the directive proposed by the Commission is currently blocked in Council due to over prescriptive provisions on how to define the application of the principle of non-discrimination in the case of this triangular relationship. This shows that seeking to impose detailed EU provisions on issues which are best dealt with in Member States is neither appropriate nor effective.

29. Generally speaking, **BUSINESSEUROPE** believes that terms and conditions of employment of workers are best defined by the social partners or the legislator in Member States and that existing EU legislation, already amply cover what could be legislated at the EU level. Hence, the need to avoid over-regulation at the EU level.

How to deal with triangular relationships?

Questions

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of subcontractors? If not, do you see other ways to ensure adequate protection of workers in “three-way relationships”?
10. Is there a need to clarify the employment status of temporary agency workers?

30. Temporary agency work does not necessarily mean temporary employment contracts. As indicated above, a distinctive feature of temporary agency work is that it establishes a triangular relationship where the employer is the agency, with the agency having the obligations of an employer and agency workers protected by applicable legislation. The agency then sends its workers to a user company to perform a task and delegates power to give instructions to this user company.

31. Situations in which an employment agency acts as an interface to put a worker in contact with an employer and for which the employer and worker establish a work contract directly is not temporary agency work.

32. Similarly, sub-contracting, which is essentially a commercial relationship with contractual obligations but no subordination between the client and the service provider, must not be confused with temporary agency work.

33. The specificities of agency workers described above need to be born in mind to avoid misunderstandings when discussing the issue or comparing experiences at EU level.

34. Furthermore, it should be born in mind that a recent study of the European Foundation for the improvement of living and working conditions underlined that temporary agency work and the employment status of temporary agency workers is comprehensively regulated by national law and collective agreements. Clarifications of the status of temporary agency workers, if any, can only take place in Member States.

35. Subsidiary liability is not an appropriate solution to establish responsibility. All sub-contractors must ensure that they follow relevant labour law when dealing with their employees—contractors and user organisations must therefore be able to expect that sub-contractors are fulfilling their responsibilities. Ensuring their sub-contractors comply with the law is not their responsibility. The subsidiary liability principle would also place a considerable burden on the main contractor. SMEs in particular do not have the administrative resources to make a thorough examination of their subcontractors, let alone situations where there is a chain of subcontractors. In any event, the main contractor is not in a position to control compliance in practice. **BUSINESSEUROPE** is therefore opposed to it.

*How to promote mobility of workers?**Question*

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of “worker” in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

36. The labour relation of frontier workers who are living in one country but working in a neighbouring state are subject to the national law and collective agreements of the country of employment. In the case of workers temporarily posted to another Member State, the posting of workers directive defines which matters are subject to the law or collectively agreed provisions of the host country and which issues remain subject to the laws of the country of Origin. **BUSINESSEUROPE** sees no need for a more convergent definition of worker in EU directives and would strongly oppose moves seeking to indirectly harmonise existing national definitions.

*How to improve enforcement of labour law and combat undeclared work?**Questions*

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

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

37. Effective enforcement of existing Community labour law as transposed into national legislation lies up and foremost in the hands of national authorities. However, the EU can play a useful role by organising exchanges of experiences between national labour inspectorates as is already done. Furthermore, technical assistance and cooperation between Member States to help new Member states efforts to enforce the EU legislative acquis can also be useful. We welcome the fact that the ESF foresees the possibility to grant financial support for activities of capacity building with regard to the enforcement of legislation in convergence regions.

38. Enforcement is not limited to sanctioning non-compliance. It also involves prevention and awareness raising of the legal rights and obligations of companies and workers. Social partners can therefore also play a useful role. Initiatives such as twinning programmes between national employers’ federations to assist in the development, in the new Member states, of strong business organisations able to provide services to their members and advise them on how to respect their legal obligations are important in this respect. Similarly joint social partners initiatives such as the joint integrated programme of the EU social dialogue developed by **BUSINESSEUROPE**, **UEAPME**, **CEEP** and **ETUC** contribute to reaching that objective.

39. With regard to prevention, the reasons lying behind the development of undeclared work, which can vary from country to country, have to be identified and addressed. Removing unnecessarily restrictive or bureaucratic employment related requirements is part of the answer.

40. Furthermore, in case of cross-border posting of workers, improving administrative cooperation between relevant national authorities is essential to ensure effective implementation of the posting of workers directive.

41. In addition, steps should be taken to improve information for companies wishing to post workers in another Member State to help them complying with their legal obligations.

42. With regard to combating undeclared work, real actions to do so can only be taken in the Member States. The EU level can play a useful role by promoting exchanges of national experiences and encouraging Member States to act. Here also, social partners can make a useful contribution. A Seminar to examine national social partners’ initiatives to combat undeclared work was held in 2005. Further discussions on how to prevent and combat undeclared work is foreseen in the context of the EU social dialogue work programme 2006–08. As explained earlier on, combating undeclared work is essential in the context of a flexicurity approach. **UNICE** and its member federations therefore attach the greatest importance to contributing to making progress in this field.

*How to revise the working time directive?**Question*

11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?

43. The working time directive is a perfect example of what should not be regulated at EU level. Rules governing working time should be defined in the Member States and not at EU level for several reasons:

- Companies and workers needs vary a lot across Europe and there are many ways to organise working time to meet both the employer's and the worker's wishes.
- Opinions about what should be defined by national legislation, what should be left to autonomous negotiations between social partners at national, sector or company level and what should be agreed directly between individual workers and their employer also varies a lot from country to country.
- Negotiations on working time are closely linked to pay considerations and interference from the EU level into national pay negotiations must be avoided.

44. However, the fact is that the EU did adopt a directive on working time in 1994 and ECJ jurisprudence way beyond what the EU legislator intended has developed as a consequence. Amending the working time directive to solve the problems created by European jurisprudence on on-call time is urgent. The EU institutions have a joint responsibility to do so. **BUSINESSEUROPE** would like to make clear that any revision of the working time directive to solve the problems caused by the Simap and Jaeger judgements must retain the opt-out, which is a vital labour market flexibility.

CONCLUSION

45. The 2006 annual progress report on growth and jobs rightly underlines that "increasing the responsiveness of European labour markets is crucial to promote economic activity and high productivity". However, the competence to modernise labour law lies first and foremost with the Member States. Most of the measures will therefore need to be taken by national players. The role of the EU should be to organise exchanges of experiences between Member States and monitor national reforms using the instruments of the European growth and jobs strategy. Taking a top-down legislative approach at the EU level would be counterproductive for national reforms.

46. EU initiatives to encourage the modernisation of labour law through appropriate national actions must be part of the broader flexicurity agenda. **BUSINESSEUROPE** counts on the EU Commission to ensure that initiatives following on the green paper are fully in line with this approach.

47. **BUSINESSEUROPE** and its member federations for their part will continue to promote the necessary modernisation of labor law throughout Europe, including through joint initiatives such as the joint analysis of key labour market challenges foreseen in the EU social dialogue work programme 2006-08.

Memorandum by the Chartered Institute of Personnel and Development (CIPD)

With 127,000 members, the Chartered Institute of Personnel and Development (CIPD) is the largest body in Europe responsible for the management and development of people. Our response to the Green Paper is based not on theory or ideology but on the practical experience of our members and the evidence about employment conditions in the United Kingdom and other member countries. Our approach to issues of public policy is to ask "What works?" in the context of improving employee well-being and productivity.

As a professional body, our views are distinct from those of the UK Government, employer bodies and trade unions. Our research shows that the way in which people are managed is a key driver of business performance.

We would make three general points which underpin our comments on specific questions:

- (a) organisations need to be able to respond flexibly to changing circumstances in order to remain competitive;
- (b) flexible working is attractive to many UK workers, for whom it represents a positive choice, while for others it represents a "bridge" into permanent employment.
- (c) our survey evidence shows that those on flexible contracts tend to be more emotionally engaged in, and more satisfied with, their work.

This underlines that flexibility and employment security are best seen as mutually reinforcing rather than as alternative choices.

We set out below our answers to the questions posed by the Sub-Committee. Our response to the European Commission is relevant and is attached for information.

FLEXIBILITY OF THE LABOUR MARKET

1. The UK labour market displays considerable flexibility in comparison with other EU member states. Comments by CIPD members confirm that companies find it easier to shut down operations in the UK than in other EU countries, but equally the UK appears to continue to be an attractive destination for investment. Greater flexibility could be achieved if more employers seek to create a workplace culture based on teamwork, employee engagement and flexible working. According to WERS 2004, the number of organisations offering flexible working options to employees increased significantly between 1998 and 2004. Simplification of labour law would be welcome but changes that might realistically be contemplated seem likely to help only at the margin in achieving greater flexibility.

EMPLOYMENT SECURITY

2. CIPD surveys have consistently shown that the great majority of UK employees do *not* feel insecure, or worry that if they were to lose their job they would be unable to find another job at similar pay without having to move house. WERS 2004 found that the percentage of employees who feel that their job is secure went up from 13 per cent to 19 per cent between 1998 and 2004, while the percentage feeling insecure fell from 19 per cent to 15 per cent. Employment law cannot in any event provide a guarantee of job security, and changing employment law with this intention would be more likely to threaten than to support high levels of employment.

THE CONCEPT OF “FLEXICURITY”

3. The idea that employment flexibility and security are not mutually inconsistent but compatible—and can indeed be mutually reinforcing—is one that CIPD supports. However the meaning of the word is contentious and it must be doubtful how far it is helpful to seek to use it as a framework for political initiatives across the EU. Some elements in the Commission’s flexicurity agenda, particularly the emphasis on active labour market policies, are welcome. But the idea of a common floor of employment rights across member states seems to be only loosely related to the main theme of employment security and would be highly damaging to both flexibility and security (see the CIPD response to the Commission on the Green Paper).

OTHER LABOUR MARKET CHALLENGES

4. CIPD survey evidence has consistently shown that employees in the UK have generally positive attitudes in relation to job satisfaction and the state of the employment relationship. This evidence is reinforced by the recently published report on the fourth working conditions survey by the European Foundation for the Improvement of Living and Working Conditions, which finds that the UK comes third from the top of the list of 27 countries in respect of work satisfaction, and top in relation to the impact of work on employees’ health. In terms of working time, the UK is close to the EU27 average recorded by the European Foundation, and average working hours in the UK have actually fallen by an hour in the last year. It is misleading to use the term “subordinate” employment to denote the status of workers who are not in permanent or full-time employment, since many prefer temporary or self-employed status for financial or other reasons. Professor David Guest has shown that temporary workers generally have more positive attitudes to their job than permanent employees.

GROUPS COVERED BY LABOUR LAW

5. Employment status imposes rights and duties on both employer and employee, including—in the UK—terms such as that of mutual trust and confidence which have been implied by the courts. It would clearly be inappropriate to extend all such rights and duties to “workers” who do not have an employment contract. Occupational pension rights, and statutory protection against redundancy and unfair dismissal, could not simply be extended across the board to workers who are not employed. CIPD agrees with the Government’s conclusion (in “Success at Work” published in March 2006) that there is currently no need for further legislation in this area.

ROLE OF EU REGULATION

6. For the reasons given in our response to the European Commission, CIPD would be wholly resistant to any proposal to apply common floor of employment standards across EU members countries. There is no reason to believe that a Community-wide definition of “worker”—assuming one could be achieved—would be useful in improving worker mobility. CIPD sees no case for the introduction of further employment legislation at EU level: the UK Government has shown that, where circumstances make it appropriate, it is capable of acting to protect vulnerable groups (as with the recent legislation on gangmasters).

March 2007

Annex

CIPD RESPONSE TO THE EUROPEAN COMMISSION

With 127,000 members, the Chartered Institute of Personnel and Development (CIPD) is the largest body in Europe responsible for the management and development of people. Our response to the Green Paper is based not on theory or ideology but on the practical experience of our members and the evidence about employment conditions in the United Kingdom and other member countries. Our approach to issues of public policy is to ask “What works?” in the context of improving employee well-being and productivity.

As a professional body, our views are distinct from those of the UK Government, employer bodies and trade unions. Our research shows that the way in which people are managed is a key driver of business performance.

We would make three general points which underpin our comments on specific questions:

- (a) organisations need to be able to respond flexibly to changing circumstances in order to remain competitive;
- (b) flexible working is attractive to many UK workers, for whom it represents a positive choice, while for others it represents a “bridge” into permanent employment.
- (c) our survey evidence shows that those on flexible contracts tend to be more emotionally engaged in, and more satisfied with, their work.

This underlines that flexibility and employment security are best seen as mutually reinforcing rather than as alternative choices.

We set out below our answers to the specific questions posed by the Green Paper.

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

Employment legislation in the United Kingdom provides a comprehensive framework of employment rights. The CIPD believes that the priorities for employment law reform in the UK should be:

- to resist pressures for further regulation, whether originating from the EU or national government, that would discourage recruitment and add to employment costs
- **to consider areas for simplification of existing employment legislation, on the lines of the current UK review**
- to improve guidance to employers on the practical implications of employment regulation.

CIPD supports the UK legislation giving employees the right to request flexible working, and we continue to urge that the right should be extended to all employees.

2. *Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security, and a reduction in labour market segmentation? If yes, then how?*

Segmentation of labour markets reflects a range of social, economic and political factors. Legislation on equal opportunities can encourage good practice by employers and extensive legislation in this area is now in place. In the UK, active labour market policies have been effective in reducing unemployment and helping disadvantaged groups into work. **In those countries where employers have recruited temporary labour on a large scale, this may have been a response to perceptions that existing employment regulation inhibits enterprise.** Countries that impose substantial non-wage labour costs on employers, which have the effect of reducing their competitiveness, need to examine how these costs can be reduced.

3. *Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?*

In general the impact of legislation will depend on how well it is drafted and how employers and individuals respond. In order for legislation to be effective in promoting positive working practices that will support business performance, timing and presentation will often be important. The symbolic effect of legislation may be more important, through its influence on attitudes, than its direct impact.

Experience in the UK with a “shared human resources” pilot scheme suggests that help for small firms may most effectively be directed at supporting good employment practice so as to improve employers’ confidence in managing the employment relationship.

4. *How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?*

Within the UK, flexibility and employment security are not seen as alternatives. Research shows that good employment practices support business performance. In general employers are not looking for the relaxation or dilution of existing employment rights, but would welcome simplification, or the removal of unnecessary complexity. **Employment legislation in the UK already offers individuals a significant degree of protection. The current debate on dispute resolution is focussing on how individual rights can be more effectively enforced, while depending less heavily on legalistic processes.**

The statutory right to request flexible working has been effective in stimulating individuals to ask for, and employers to agree, more flexible working patterns. This is an example of “soft” law, where the individual employee’s right is limited to *requesting* a change in working pattern but research shows that the resulting dialogue between employer and employee produces positive outcomes in the majority of cases.

5. *Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?*

The United Kingdom has adopted extensive employment protection legislation and provides assistance to the unemployed in the form of both active and passive labour market policies. A wide range of employment and training programmes is available to help unemployed people into work, and their effectiveness is regularly evaluated and reviewed.

The aim of most employment legislation in the UK is to establish minimum employment standards and beyond that to stimulate good practice by employers. A key underlying theme of UK employment legislation is the need to ensure that employers can adapt to changing market circumstances, and are not inhibited from offering permanent employment because of the difficulties they would face should circumstances change and they needed to contemplate workforce reduction. **The 12-month employment threshold for certain employment rights, including unfair dismissal, offers significant reassurance to employers in this respect.**

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

Existing legislation on working time affords opportunities for employers to negotiate with workforce representatives so as to vary the detailed application of the regulations. In general however relatively little use has been made of this provision in the UK, reflecting the decline of collective bargaining. Trade union learning representatives are recognised in many larger organisations. However **CIPD does not believe that it would be helpful to require employers to negotiate on training since this would be likely to lead to unnecessary or inappropriate training and would be an inefficient way of determining training volumes and priorities.**

Similarly it is hard to see how collective agreements would help in facilitating transitions between different contractual forms in the UK context. There are no statutory barriers to employees entering into different contractual forms with employers, where this is acceptable to employers and employees. **The majority of**

workers on part-time and temporary contracts prefer these arrangements to the alternative; others see them as a route into full-time or permanent jobs.

UK employers have supported action to deal with unemployment black-spots and employment and training measures to help individuals negotiate transitions from unemployment or disability into work. Employers' increasing focus on engaging employees also aims to promote positive attitudes which support individual learning.

7. Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

The legal definitions of employment and self-employment in the UK are fairly clear. **The problem lies in applying the definitions to the actual circumstances of individual cases.** This is in large measure a matter for courts and tribunals to determine (and where necessary HMRC in order to decide the appropriate tax regime to apply). The category of "worker" has been increasingly used in UK legislation to extend many basic employment rights, such as the minimum wage and legislation on health and safety and discrimination, to individuals who are not employed under an employment contract but are in a similar relationship to the employer. **It is doubtful if significant value would attach to a further review of the distinction between "employee" and "worker", aimed at establishing which if any further employment rights might usefully be applied to "workers".** Some clarification in this area is arising through case law. It is any case evident that people who are not "employed" cannot be made redundant or unfairly dismissed.

8. Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?

There is some difficulty in laying down a fixed "floor of rights" applying to all workers regardless of their employment status. In the UK, "workers" enjoy the same protection as employees in respect of basic standards such as health and safety and the minimum wage (see above). It is not evident however that all "workers" should have the same minimum entitlement to holidays and pensions: for example, temporary or self-employed workers may in effect be trading off one form of employment benefit against another.

CIPD would be wholly resistant to any proposal to apply a common floor of employment standards across EU member countries. Tax and pension regimes, (including the balance of state/company/individual provision) differ widely between countries. To have a meaningful statutory floor on employment conditions, there would first need to be an un-bundling of state arrangements and equalisation across the EU, plus a move towards harmonisation of tax and social security policy. There would also be political pressures to set the floor at a high level, so as not to threaten the competitive position of those countries with more generous provision, and this would be seriously damaging to economic growth and employment across the Community as a whole.

Employment law cannot in any event provide a guarantee of job security. Where there is evidence of need, the UK Government has shown itself capable of effective action to combat abuse, for example through the recent legislation on gangmasters.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

It is in principle desirable that individuals should have a single employer, in the sense of some body or organisation that is clearly responsible for meeting the requirements of employment regulation. **However the increased focus on corporate social responsibility (CSR) means that many companies recognise that their commercial interests could be affected by poor treatment of employees by their suppliers or contractors, and this is influencing their behaviour in a positive way.** Recent UK legislation provides protection for workers employed by sub-contractors in certain sectors eg food production.

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

Recent cases in the UK have suggested that agency workers will often in practice be employees of the client organisation to which they are allocated. A minority of agency workers are directly employed by the labour supplier (or employment business). **It would in general be undesirable to require the client employer to take on the full responsibilities of an employer in the case of temporary agency workers since this would seriously damage the agency market and make it harder for employers to recruit temporary workers when needed for business reasons.**

11. *How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?*

The key issue for the UK is the maintenance of the existing "opt-out" for individual employees. **Where employees are willing to work for longer than the weekly hours threshold, it would be wrong to prevent them from doing so.** The definition of "on call" time needs to be amended so as to allow national health services and others to operate lawfully where there is no clear threat to employees' health.

12. *How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of "worker" in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?*

For the reasons outlined in the response to question 8 above, **Member States should certainly retain their discretion in relation to fixing employment rights for workers within their boundaries.**

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

Enforcement of employment law is a matter for member states. Community enforcement would be both undesirable and impracticable.

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

No. It is unclear how effective would be Community-level action to deal with undeclared work or the "black economy".

March 2007

Memorandum by the Confederation of West Midlands Chambers of Commerce

INTRODUCTION

The Confederation of West Midlands Chambers of Commerce is pleased to respond to the consultation and discussion surrounding the EU Green Paper on Labour Law. The Confederation consists of all of the Chambers of Commerce within the West Midlands Region, which include:

- Birmingham Chamber of Commerce and Industry (which incorporates Solihull Chamber of Commerce and Industry)
- Black Country Chamber of Commerce and Industry
- Coventry and Warwickshire Chamber of Commerce and Industry
- Herefordshire and Worcestershire Chamber of Commerce and Industry
- North Staffordshire Chamber of Commerce and Industry
- Shropshire Chamber of Commerce and Industry
- South Staffordshire Chamber of Commerce and Industry

The Chambers of Commerce that comprise the Confederation represent over 13,000 businesses in the region as a whole, offering extensive services to industry and commerce, promoting trade and advocating the interests of business locally, nationally and internationally.

RESPONSE TO QUESTIONS RAISED BY THE GREEN PAPER

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

Businesses across the UK are already expressing concerns about the raft of employment legislation. Any laws that are introduced must be a clear advance from the existing legislation. They must reduce and simplify the work needed to administer a business and promote a clear and flexible vision for European labour relationships in the future.

It must recognise that increasingly our competition is not other nations within the EU, but nations with a less “comfortable” relationship with work and employment rights. It should also seek to simplify the bureaucracy of cross border working.

In areas of our economy that are declining, we need to understand that this change is part of a global process. Low-value manufacturing and assembly and similar low-value jobs in other sectors will increasingly go elsewhere. To succeed businesses need to be able to access high quality employees and be allowed the freedom to make decisions based on their business needs. This flexibility will ensure that companies are able to expand their businesses and create a more stable long-term future for their employees.

Any new regime for regulating the business relationship between companies and employees therefore needs to ensure that the flexibility element of the proposed flexicurity model is the most important component. Businesses require flexibility in order to survive.

The second part of flexicurity, the need for security and a regulated, controlled labour market suggests that the EU jobs market is failing to live up to the promise of the Lisbon Agenda. It would also suggest that the education system fails to produce employable people. The future for Europe should be to provide its citizens with the necessary skills and opportunities to ensure that there is no need for employees to languish in jobs where they feel abused.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?

Collective agreements are largely irrelevant to the majority of UK companies. The mass of employers are too small to have taken part in union-brokered negotiations or in similar collective bargaining. Whilst there is some merit in this approach for larger companies, we do not feel that it would be beneficial for SME businesses to be forced to face an additional layer of bureaucracy.

As a group, we would not wish to see additional burdens placed on businesses, particularly small business. However, we recognise that many workers in semi-informal areas such as non-contract home-working schemes or in temporary positions may find their position far from ideal.

For businesses, the major reason for using these methods of employment is the inherent flexibility. There is little doubt that if these schemes were more heavily policed this avenue of employment would disappear for home workers and for some of the lower skilled employees in the formal temporary sector.

3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?

The UK has a record of “Gold plating” EU regulations during the transposition process to UK law. It is not always easy for lay people to understand where the original EU regulation finishes and what has been added by the UK. We would therefore welcome the alignment of the EU and UK Regulatory Impact Assessments. This would lessen the impact of regulation should it be proved necessary.

Much current employment legislation creates an often destructive burden on business particularly SME’s. There is a genuine need to create labour markets that are more flexible to reduce the pressure on employers. Red tape including administrative, legislative and tax burdens only serve to promote a long hour’s culture, not to mention the impact on productivity, competitiveness and innovation.

The demands of modern business often require flexibility on the side of both employee and the employer. Businesses can only be expected to embrace flexibility in their working practices if it can be demonstrated to improve the overall business. Businesses should be encouraged to develop working practices that provide more flexibility to both employer and employee. This should be promoted in terms of the positive impact it can make on business (e.g. productivity). We would strongly resist any undue attempts at forcing these changes upon

businesses. It should be recognised that in many cases, SME's are simply not able to offer flexible working on a formal and sustainable basis.

SME businesses suffer from the greater emphasis on rights for employees. That is not to say that individual employees should not have these rights, or that businesses do not want to provide them. However, a successful, thriving business benefits both employer and employee, so businesses must have the right to make employment decisions based on what is genuinely best for their business, without fear of litigation.

4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

In our opinion, the current UK regulation on temporary contracts allows roughly equal rights at work, whilst acknowledging that the position is temporary. We would not wish to see a major change in this legislation.

It is our assertion that temporary workers are in many ways necessitated by the high costs and bureaucracy associated with the hiring of permanent staff. Given this, we would suggest that there must also be greater flexibility to differentiate wages for low-skilled jobs.

In the UK, the above inflation National Minimum Wage rises have had an adverse impact on wage differentials and this can cause wage stagnation. Paying lower skilled people lower wages should have two benefits. It will enable businesses to take on more staff and lessen the need for as many temporary contracts. It should also encourage the take up of training provision to improve skills and hence pay levels of individuals.

5. Would it be useful to consider a combination of more flexible employment protection legislation and a high level of assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

Our members believe that they need to be in control of their businesses, similarly employees want (and need) to be able to balance their work and home lives. The costs for businesses that do not meet these needs are striking. The cost of sickness absence alone is estimated to cost UK employers about £10 billion a year. In a recent survey over a fifth of senior women in UK organisations said they would change jobs for more flexible working arrangements. Typical recruitment costs of replacing an individual have been estimated at £4,000. Lloyds TSB, for example, estimates that it costs in the region of £50,000 to replace a senior woman manager. Given these costs, it is clearly not in the interests of any business that wishes to be successful to endanger the relationship with their employees as employees with desirable skills will simply leave the company to work elsewhere.

Businesses require the flexibility to ensure they can compete in global market places. This is true for businesses of all sizes and sectors, but is particularly important for SME's. SME's need to become more flexible in order to compete with fierce international competition from countries with lower tax bases, prices and labour costs, less regulation and skilled workforces. They certainly do not require more restraint on their operations.

It is notable that within the EU the nations with more flexible employment legislation have shown the best progress towards the targets of the Lisbon Agenda. Despite the progress of those with light touch regulation, the European Union as a whole has lagged behind its competitors in terms of productivity. A move away from rigid employment legislation is likely to improve productivity growth.

Assistance to the unemployed is largely a matter for individual states. However, any such schemes to help individuals should focus on providing skills needed by the local business community. Training to improve skills should be targeted to areas of employment growth. We feel that focusing in this manner would be beneficial for both employers and potential employee as it should ensure that a long-term career is available. This should theoretically reduce existing and future pressures on the State.

We also need to tackle the problem of highly protective state benefit systems. The UK currently allows those in receipt of benefits to work up to 15 hours per week. This provides a barrier to work for those in receipt of benefit as it provides an artificial safety net preventing those who might be tempted back in to employment from taking work. This is in part due to the difficulty in regaining benefit if the employment is not suitable or otherwise fails.

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

The UK has recently made efforts to improve the responsiveness of training schemes in the UK and to broaden their attractiveness to small employers. Measures such as Train to Gain, whilst welcome, need to be simplified and widened. It is in the interests of the Governments of EU nations to have educated and flexible employees forming their working age populations. Well-educated and flexible citizens are usually in more stable employment. Those with skills are less likely to become unemployed for the longer term. This impacts on Governments' directly as it means less spending in benefits payments. It should also deliver a more consistent tax income.

The concept of job security itself is something of an oxymoron. It is not possible to create total job security in an entrepreneurial environment. Entrepreneurialism requires an element of risk and creating a risk-free society is not desirable or necessary. What needs to be developed is a quality service offering training that is valued by employers. If well qualified people are easy to find, then economic expansion will mean many more people are able to find work in the expanded job market that should result.

With the free movement of people, as advocated by the EU, the concept of a job for life is no longer realistic or indeed attractive for many employees. However, greater flexibility in labour laws is likely to lead to greater job creation, which will enable workers to move jobs easily and securely. This is what we feel the role of "flexicurity" should be.

7. *Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?*

We would welcome clarification, simplification and a common definition, particularly if the transition to self-employment (or vice-versa) were to be made across multiple EU states.

8. *Is there a need for a "floor of rights" dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?*

We have no clear view from our members on the concept of a floor of rights. We would need to see further details of the proposal to see if it was in line with our members' wishes. Some of the smaller self-employed business people amongst our membership may well welcome the ideal of protecting economically dependent self-employed workers. From the point of view of most businesses however, a floor of rights would not really ease the complications of dealing with multiple contracts and multiple benefit and remuneration levels, it would merely create an artificial floor and dependent on what is required to meet the level of the floor may raise the compliance costs for companies.

9. *Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?*

In the UK, the HMRC are beginning to work in the manner suggested with regard to the regulation of Construction Workers and their associated sub-contractors.

We also believe that the new Gangmaster licensing has a similar concept behind it. It has so far been in limited operation, but it does seem to have had some success in South Worcestershire amongst agricultural workers. We can see some benefits for smaller companies as nominally it should allow these businesses to share the responsibility for their compliance with employment legislation.

We have yet to investigate the full benefits and problems associated with these schemes. Their fundamental flaw faced by any scheme such as this is that it is not designed to fix problems and inequalities in the underlying laws. It merely attempts to alter the nature of the compliance.

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

In our opinion, the current UK regulation on temporary contracts allows roughly equal rights at work, whilst acknowledging that the position is temporary. We would not wish to see a major change in this legislation.

The flexibility that SMEs require is that which enables them to meet market demands and adjust their workforce and working practices accordingly. This includes flexible arrangements for working hours, part-time work, overtime and other types of employment contracts available. A flexible and open policy is most likely to ensure that work is available.

11. *How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?*

For many businesses, the retention of the opt-out is critical to their ability to remain competitive. This is particularly true of small businesses, where additional staffing costs would be prohibitive. The Working Time Directive and its' continual reforms are problematic to businesses throughout the UK. We would not be receptive to any additional legislation that increases in either time or financial costs the implementation of the directive. The continual changes to the working time directive have been a substantial cost to businesses that have been forced to adapt working practices and administration systems to meet the requirements of the Working Time Directive.

Simplification would be welcomed. At the very least, there needs to be a period of stability. We would suggest that the move to a longer reference period would be the most beneficial to business. This change would allow for semi-regular spikes in working hours. It is difficult for small businesses to remain competitive when the knowledge in a small team may be held in one or two people.

12. *How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of "worker" in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?*

The Confederation of West Midlands Chambers of Commerce has been active over the last few years in trying to shape the prospects for businesses operating in other EU states. We are committed to the principle that for businesses the legal framework for conducting the trade should be that of the home nation as long as there are no problems for health and safety or fair competition. The costs, particularly for small companies, in complying with multiple national regulations at present are unworkable.

However, we would genuinely welcome a flexible, business-friendly cross-border regulation that would allow companies to more easily manage employees and the self-employed across the EU.

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

The 2004 Kok Report recommended a comprehensive strategy to improve the quality of work and established a direct link between the quality of work and labour productivity. The major elements in this respect are Working conditions promoting lifelong learning and training, adequate income, social dialogue, safety, health protection and prevention measures at the workplace, balance between flexibility and security, compatibility of working and private life, and in-company integration management. We feel that the relevant authorities should be working together to promote these goals. The role for the business sector and its representatives as a social partner would be to work with governments to enable these to be achieved through a low regulation environment.

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

Illegal working is caused by two main problems. The high cost of employing someone (through taxation and labour law), and the willingness to avoid high taxes and often retain benefits on the part of the employee.

Whilst companies going to the effort and expense of operating legally would welcome a crackdown on those who cut corners and costs by not adhering to the same rules, they may well feel as though they are supporting a system that is making their life difficult and feel some sympathy for the aim of escaping the tax and regulatory burden.

Any short-term purge however is not likely to answer the problem. In the longer term, legal working needs to be made more attractive to truly stamp out illegal employment.

Any measures to deal with undeclared work must not result in additional burdens for business and should be voluntary.

29 March 2007

Memorandum by Construction Confederation

1. The Construction Confederation is the main trade association for building and civil engineering contractors in the UK, representing over 5,000 contractors which deliver 75 per cent of total construction turnover.
2. The Confederation comprises: British Woodworking Federation, Civil Engineering Contractors Association, Major Contractors Group, National Contractors Federation, National Federation of Builders, Scottish Building.
3. The Confederation welcomes the opportunity to submit evidence to Sub-Committee G (Social Policy & Consumer Affairs) of the House of Lords Select Committee on the European Union in order to assist the Inquiry into the EU Commission Green Paper "Modernising labour law to meet the challenges of the 21st century".
4. In submitting written evidence the Confederation has sought to provide answers both to the questions as detailed in the Call for Evidence and to a number of those featured in the original European Commission Green Paper.

FLEXIBILITY OF THE LABOUR MARKET

5. *How flexible is the labour market in the UK? What could be the benefits of making it more flexible, and how could this be achieved? In which ways, if any, could changes in labour law help with this?*

UK labour protection laws strike an effective balance between flexibility and the protection of the individual. The CC considers that should the European Commission pursue new or additional European-wide labour law proposals, the priority must be to maintain an overall EU framework of legislation that allows national flexibility in transposition into national legislation.

EMPLOYMENT SECURITY

6. *What is the extent of employment security in the UK? What could be the benefits of changing the present arrangements for employment security? In which ways, if any, could changes in labour law help with this?*

Existing UK legislation and regulations provide adequate social protection. The last decade has seen a significant increase in employment protection and "family friendly" entitlements, with a marked increase in the range of social protection in such areas as national minimum wage, discrimination, parenting, and business transfers. All of which place additional burdens upon the employer. Security of employment cannot be facilitated by law or collective agreement and is ultimately dependent upon prevailing economic factors in a competitive marketplace.

THE CONCEPT OF "FLEXICURITY"

7. *How helpful do you think is the Commission's concept of "flexicurity" seeking to combine the ideals of a flexible labour market with those of employment security? How practical could it be to strike a balance between these two ideals and where should such a balance be struck? In which ways, if any, could changes in labour law help with this?*

The CC believes that current EU and UK employment legislation strikes the correct balance. There is a danger that the imposition of further employment protection legislation may have a detrimental impact upon employment security with employers seeking new ways to maintain workforce flexibility. For example, taking work outside the European Union, where call-centres are an example.

8. The Commission's concept of "flexicurity" is idealistic and likely to create "unintended" effects. Even at the current conceptual stage of potential labour law review, the Commission appears to be taking a one-size-fits-all approach. Given differing traditions and employment cultures across the Member States, the Confederation does not believe it to be practicable to impose an EU-wide definition.

GROUPS COVERED BY LABOUR LAW

9. *To which categories of workers should labour law apply? What is your view of the issues raised by the Green Paper about the applicability of labour law to groups of workers whose employment status is intermediate between that of employee and self-employed?*

Labour laws should apply where a clear "master and servant" relationship exists. Consistency of approach between Government agencies would assist in removing ambiguities in this area. Increasing the burden and complexity of labour law is likely to promote the incidence of ill-defined relationships.

ROLE OF EU REGULATION

10. *What is the role of regulation at the EU-level in achieving a modernised system of labour law? Are there any specific pieces of EU legislation that need either to be repealed or to be introduced? Do you consider that the Green Paper's proposed "Floor of Rights" for all workers is a viable one? In order to promote worker mobility, would a Community-wide definition of "worker" be useful?*

The role of EU regulation must be to maintain an overall framework of employment legislation that allows national flexibility where appropriate. The floor of rights currently operating in the UK is that which is laid down in EU legislation and is satisfactory in dealing with working conditions.

11. If the intention of this "Floor of Rights" is to create a legal framework wherein an employer must, for example, provide paid holiday entitlement to a self-employed person providing services then this would have an adverse impact. Models that may suit one member state in respect of such issues may not be suitable for transport into EU wide legislation. These are issues that are best dealt with at national level.

12. *How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?*

This matter is currently being addressed through the proposed update of the Working Time Directive which seeks to provide flexibility for both employers and employees whilst ensuring a high standard of protection of workers health and safety. The Confederation is keen to maintain the opt-out facility to the 48-hour average working week.

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

Administrative co-operation between relevant authorities is important to ensure effectiveness in enforcing community law. Social dialogue in each member state differs and therefore any role for social partners must be dealt with at national level.

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

Undeclared labour practices are not only illegal but have serious social, economic, health and safety, and reputational consequences for the construction sector. National government has the key role to play in ensuring measures and adequate resources are in place to combat undeclared labour. It is a matter for Member States themselves collectively to decide whether or not further initiatives may be required at the EU level. Should this be the case, it would seem prudent for the national government to consult with and seek input from the national social partners in the construction sector. The Confederation believes that a reduction in VAT on domestic repairs and maintenance work would make a significant contribution to tackling undeclared work and the "black economy". This is an area where cash payments are notorious and the imposition of VAT creates a significant opportunity for those working informally to undercut the legitimate businesses.

CONCLUSION

15. The more complex the regulations then the greater the burden of understanding placed upon all parties. Both the EU and national governments need to ensure an acceptable balance in this area. No “one-size will fit all” concerning EU employment legislation. The concept of “flexicurity” is admirable, but as previously stated likely to create unintended detrimental effects.

16 April 2007

Memorandum by EEF, the manufacturers’ organisation

1. EEF is the representative voice of manufacturing, engineering and technology-based businesses. We have a growing membership of over 6,000 companies of all sizes, employing over 900,000 people. EEF comprises 11 regional Associations, the Engineering Construction Industry Association and UK Steel. This response is based on consultations with the EEF’s regional Associations and members, particularly EEF’s Employment Policy Committee.

Flexibility of the labour market—question 1

2. The view of our members is that the UK’s labour market is relatively flexible when compared to many other Member States. Overall, EEF member companies are not demanding significant reform of existing UK law in order to achieve more flexibility. However, they are concerned to ensure that the current level of flexibility is preserved. This means flexibility in the ability to make changes to the size and structure of their workforce, the organisation of working time and the types of contractual arrangements that can be offered to prospective new workers.

3. However, a number of changes to UK labour law would help to preserve and improve upon the current level of flexibility:

- legislation is needed to clarify that the agency (and not the client) should be responsible for compliance with any employment rights of agency workers. Recent court decisions suggesting otherwise have led to a situation of uncertainty and risk undermining the purpose of agency work;
- labour law should be simpler and more transparent. EEF members are struggling to keep pace with the continual influx of new legislation and case-law and find it hard to understand how the various rules interact with each other. In response to the recent DTI consultation on simplification of employment legislation, we called for a reduction in the amount of legislation introduced annually, better and more reliable government guidance and the simplification of certain legislation.

4. As regards EU law, EEF members are mainly concerned to resist any further legislation. However, they also see a need for better EU regulation, including greater clarity and effective impact assessments. For example, the legality of having a retirement age of 65 is now being challenged in the UK. This is a matter which could have been dealt with more clearly, rather than obliquely, from the outset in the 2000/78 EU Framework Directive. Moreover, ECJ judges should also develop a better insight into the practical impact of their decisions. The decision in *SiMAP/Jaeger* (on on-call working time) has, according to the EU Commission, left the majority of Member States in breach of the Working Time Directive. Decisions such as this, and the decision in *Robinson-Steele* (on rolled-up holiday pay), might have been taken differently—or at least better explained—if their practical impact had been fully understood.

Employment security—question 2

5. We do not see labour law as the primary, or most effective, means of delivering security. Labour law can confer job protection, but workers only feel truly secure when they know that:

- a high proportion of those who want to work can find work (ie the rate of employment is high);
- they have the experience, skills and attributes to continue to succeed in their current job and/or to find new work (ie they are employable); and
- they work for an organisation which is profitable and competitive enough to survive in today’s challenging environment.

The concept of “flexicurity”—question 3

6. The word “flexicurity” is helpful insofar as it acts as shorthand to describe the debate about balancing flexibility with security. This is an important debate for the EU to be having. However, the word “flexicurity” is less helpful if used simply to describe the current Danish labour market model. As explained below, this model cannot simply be imported to other Member States.

7. We believe that a balance can be struck between the two ideals of a flexible labour market and employment security but how this is best done should be left to the Member States. The UK already seeks to do so through a combination of:

- a relatively high employment rate;
- “traditional” employment contracts that are relatively flexible whilst still adequately protecting employees against dismissal;
- extending key employment rights to “workers” as well as employees;
- the relatively low social security burden attaching to such contracts; and
- initiatives such as New Deal encouraging the hard-to-employ back to work.

8. We believe that, for the UK, this strikes the balance in broadly the right place, except that we continue to welcome an additional focus on employability—ie ensuring that workers have the experience, skills and attributes to meet the challenges of succeeding in their current jobs and/or finding new work.

Other labour market challenges—question 4

9. The greatest challenge facing the UK workforce is employability in the face of the increasing pressure of globalisation. As discussed above, we do not see labour law as the primary or most effective means of meeting this challenge.

10. We disagree with those who perceive there to be a general problem of exclusion or exploitation amongst all “workers” who do not have traditional permanent employment contracts. We recognise that there are pockets of particularly vulnerable workers, but they are best protected through specific and targeted legislation such as the Gangmasters (Licensing) Act 2004 and the Government’s current proposals for addressing vulnerable agency workers. However, many “workers” in the UK:

- are highly skilled;
- are paid at higher rates than comparable employees; and/or
- have chosen to take this type of contract because it offers them more choice over when and where they work or a way of re-entering the labour market after periods of absence for childcare, unemployment or illness. This is true of the lower-skilled workers as well as the higher-skilled ones.

Groups covered by labour law—question 5

11. EEF members feel strongly that labour law should not be extended to cover any further categories of worker. In the UK, we already use the concept of “workers” to cover those who are neither employed nor running their own business. Such workers are already covered by key employment rights (see the Appendix). We also extend some legislation to cover the self-employed (for example, our anti-discrimination legislation).

12. We are also unconvinced that the concept of “economically dependent work” is a useful or meaningful way of deciding who should have employment rights. The fact that a consultant is working exclusively for one company does not make him economically dependent upon that company. He may be able to find other work very easily. In fact, he may be less economically dependent than the company itself, which may have just one single client and be unable to survive if the client, for example, decides to outsource the work beyond the EU.

13. Furthermore, the EU and UK Government should continue to promote innovation and entrepreneurship. They should encourage individuals who are setting up businesses to be economically independent, supported by the skills and economic circumstances necessary for success, rather than rewarding and appearing to put a higher value on economic dependence.

Role of EU regulation—question 6

14. We think that little can be done by EU-level regulation to achieve a more modernised system of labour law across the EU as a whole. This is for a number of reasons:

- First, there are too many differences between the 27 Member States in terms of their current labour laws, their approach to issues such as agency work and collective bargaining, their policies on tax, social security and the economy, their political ideology and their employee relations history/culture. These differences would make uniformity impossible even if it were desirable. We cannot therefore import the Danish model of flexicurity to all Member States. It is possible that some Member States are looking to the EU to help them demolish certain inflexible job protections built into their own national laws. However, if this is the case, the solutions would be better coming from within those Member States.
- Second, we think that the key role for the EU in this context should be education, by encouraging the sharing of good practice through, for example, the “Open Method of Coordination”. Member States should be left to progress the Lisbon agenda with support from the EU but without infringement of the subsidiarity principle. We are opposed to a top-down legislative approach being taken to these issues.

15. We would strongly resist an EU “floor of rights” and do not think this is viable or appropriate. “Workers” in the UK already have a floor of rights:

- Extending those rights to include protection against dismissal would significantly increase costs when the manufacturing sector is struggling to compete with companies in lower-cost economies abroad. It would also defeat the purpose of recruiting such workers. A large proportion of EEF members face significant peaks and troughs in demand and, when an order is received, time is of the essence. They need to bring in extra numbers or specialised skills very quickly, but cannot afford to retain extra labour once demand drops off. The same applies when they are using workers to cover for permanent employees who are absent. In any case, many workers would never accrue the one year’s continuous employment necessary for comparable employees to gain unfair dismissal rights.
- Extending other types of employment rights to “workers” would be largely impractical. For example, it is difficult to give sick pay to someone who can choose their working days or paternity leave to someone who has no ongoing obligation to work.

16. In addition, extending employment rights to “workers” would not actually deliver employment security because, in our view, true employment security does not come from employment rights.

17. Moreover, the UK government has already concluded, after extensive consultation, that there is no need for further legislation in this area (see the DTI policy statement *Success at Work*, 2006).

18. We do not see how an EU-wide definition of “worker” would promote worker mobility. Other Member States may struggle with the lack of a consistent approach to the employment status of frontier workers. However, we believe that the issue is confined to relatively small geographical areas within the EU. For example, our members in Northern Ireland, who employ workers commuting across the Irish border, do not encounter this problem. Even if an EU-wide definition promoted mobility in a small geographical area, it would create problems elsewhere.

19. An EU-wide definition of “worker” would be largely unworkable. The UK definition may be complex and unclear but this results from trying to fit a wide (and constantly changing) variety of relationships into a small number of categories and then reconcile these categories with tax/social security law. These factors are complex and cannot be overcome through legislation. Standardised EU definitions would be even more complex and unclear because there will be an even greater variety of contractual relationships throughout the EU and Member States have very different tax and social security regimes (which cannot and should not be harmonised).

30 March 2007

APPENDIX

The rights of workers in the UK

The UK Government has adopted a “targeted approach” to the rights of workers. Thus, when issuing new employment legislation it decides, following consultation of interested parties, if this should cover workers as well as employees. Overtime, this approach has created the following floor of rights for all UK workers:

- The right to the National Minimum Wage;

- The right to paid holiday;
- The right to sufficient breaks and maximum working hours;
- The right to be discriminated against on grounds of sex, marital status, race, nationality, disability, age, sexual orientation, religious belief or part-time status;
- Protection against unlawful deduction from wages;
- Protection against retaliatory action for having disclosed malpractice (“blowing the whistle”); and
- Data protection rights.

Annex

1. EEF is the representative voice of manufacturing, engineering and technology-based businesses in the UK. We have a growing membership of over 6,000 companies of all sizes, employing over 900,000 people. EEF comprises 11 regional Associations, the Engineering Construction Industry Association and UK Steel. We are also the UK member of the Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET), which represents the interests of employers’ organisations in these sectors across Europe.
2. This response is based on consultations with EEF’s regional Associations and member companies, particularly EEF’s Employment Policy Committee.

EXECUTIVE SUMMARY

The differences between Member States

- In an EU comprising 27 Member States it is unrealistic to think that a single labour market model could or should suit them all.
- There may be lessons to be learned from the Danish concept of “flexicurity” and the EU has a role in promoting the sharing of good practice in this area. Further legislation, however, is the responsibility chiefly of Member States.

Flexibility (Consultation Questions 1–5)

- The UK’s labour market model balances flexibility and security.
- For manufacturers, the ability to make changes to the size, structure and working arrangements of the workforce is critical to meeting demand and retaining competitiveness.
- Many workers in the UK actually demand flexibility in their hours and contractual arrangements in order to achieve a better work/life balance.
- EEF members do not demand significant or wholesale reform of current employment law in the UK, but they see a need for greater simplicity and transparency in the law.

Security (Consultation Questions 4–6)

- True employment security comes not from just having employment rights or protection against dismissal. Workers feel truly secure when they know that:
 - a high proportion of those who want to work can find work (i.e. the rate of employment is high);
 - they have the experience, skills and attributes to continue to succeed in their current job and/or to find new work; and
 - they work for an organisation which is profitable and competitive enough to survive in today’s challenging environment.
- Economic, education and active labour market policies are much more effective in promoting employment security than employment rights alone.

Rights of workers (Consultation questions 2,8 and 12)

- Being able to use “workers” in a flexible way is critical for UK employers, especially those in manufacturing who need the ability to respond to changes in demand.

- It is wrong to typecast all “workers” in the UK as being excluded or exploited. Many are highly-skilled, paid at higher rates than comparable employees and choose to work on “non-standard” contracts.
- We are opposed to national or EU legislation extending full employee status to workers because:
 - Doing so would be impractical or would drive up labour costs
 - It would undermine the flexible way in which our sector engages such workers and so defeat the purpose of recruiting them
 - Workers in the UK are already well-protected by UK employment law
 - It would not deliver true employment security.
- The UK’s targeted approach to the rights of workers is the correct one.

Rights of Agency Workers (Questions 9 and 10)

- The EU should not undermine the principle of agency work by bringing in legislation which, in effect, turns it into a standard employment relationship.
- In the UK, there is a need to clarify that the agency bears sole responsibility for any employment rights.
- We are unaware of any issues created by commercial sub-contracting in the UK.

Harmonising the definition of worker (Consultation question 12)

- A standard EU definition of “worker” and “employee” is unworkable, largely due to the differences in Member States’ tax and social security regimes.
- Any concerns with the employment status of frontier workers should not be allowed to dictate the approach throughout the whole of the EU.

Self Employment (Consultation questions 7 and 8)

- The concept of “economically dependent work” is not appropriate for deciding which employment rights (if any) an individual should enjoy. In the UK many individuals who might be regarded as economically dependent are already protected by law.

Enforcement (Consultation questions 13 and 14)

- We believe that the enforcement of labour law generally, and monitoring of undeclared work specifically, is best left to Member States.

Working Time (Consultation question 11)

- EEF believes that the opt-out from the average 48-hour working week must be preserved. Working time should be automatically averaged over 52 weeks.
- The priority in this area is to resolve the issue created by the ECJ decisions concerning “on-call” working time.

Improving and reforming labour law (Consultation question 1 and 3)

- The EU needs to do more to ensure that the principles of better regulation become central to EU employment law. Impact assessments must become structured, meaningful and comprehensive, and greater consideration must be given to the practical implications of ECJ rulings.

INTRODUCTION

3. Manufacturing is on the front line of globalisation and EEF members face competition from companies in lower-cost economies to a greater extent than companies in most other sectors. The ability to adapt quickly and efficiently to this changing economic climate is critical for manufacturing companies if they are to remain internationally competitive in the 21st century.

4. Against this background, EEF members welcome the opportunity of having a constructive debate over modernising labour law to meet these new challenges. They particularly welcome the emphasis in the Green Paper on the importance of promoting flexibility to enable them to respond to competitive pressure. They also recognise that this flexibility should be complemented by providing some element of security for employees and workers.

5. While the Green Paper poses some specific questions, we believe that the key themes which lie behind these questions are potentially more significant. In discussions with our members, they have highlighted the following issues which need acknowledging or addressing in any debate on modernising labour law both at national and European level:

- The differences between Member States
- Flexibility
- Security
- Rights of workers
- Rights of agency workers
- Harmonising the definition of worker
- Self-employment
- Enforcement
- Working time
- Improving and reforming labour law
- The role of the European Union (EU)

6. Our response therefore addresses each of these themes directly. Wherever possible, we have also tried to cross-refer to the relevant questions in the Green Paper and include some specific examples from the UK.

THE DIFFERENCES BETWEEN MEMBER STATES

7. There is much interest in the EU in the concept of “flexicurity”—a term used to describe the Danish labour market model, which combines flexible employment law, generous benefits for the unemployed and a proactive labour market policy.

8. In an EU comprising 27 Member States, it is unrealistic to think that a single labour market model will suit all of them. There are key differences in terms of economic policy, tax/social security policy, the role of collective bargaining, employee relations history/culture and political ideology. These differences make uniformity impossible, even if it were desirable.

9. For these reasons, we believe that we cannot simply apply the Danish model of flexicurity across the EU. Whilst it undoubtedly offers many useful learning points for other Member States and appears to be working well in Denmark, it would be wrong to see it as the only suitable labour market model. In our view, the Danish model would not suit all Member States any more than the UK model would. Equally, we cannot assume that labour market problems in some Member States are the same as the problems in others or that a solution which is appropriate for one Member State would work equally well in another. For example:

- sectoral collective bargaining is successful and widespread in some Member States but very rare in others; and
- targeted solutions that address specific issues, such as the recent UK legislation on gangmasters, may be effective in the UK but not in other Member States.

10. What Member States can do however, is share experiences about what has worked and, equally importantly, has not worked and develop ideas from sharing good practice. A mechanism for doing so already exists in the form of the European Jobs and Growth Strategy and through the “Open Method of Coordination”. We are opposed to a top-down legislative approach being taken to these issues.

11. In the UK, the term “flexicurity” is not widely used or understood. However, the UK combines flexibility and security within its own particular labour market model (see Box 1 below).

Box 1: The UK labour market model

- key employment rights extend to “workers” as well as employees;
- relatively high employment rate helps to deliver employment security;
- “traditional” employment contracts are relatively flexible when compared to those in other Member States, whilst still adequately protecting employees against dismissal;
- the social security burden attached to such contracts is relatively low; and
- the unemployed are encouraged back to work through various government initiatives such as New Deal, which provides for support for particular groups such as lone parents and the over 50s.

Flexibility (Consultation questions 1–5)

12. Contrary to popular perception in some quarters, the UK has a wide range of employment laws. To name but a few, there are legal restrictions on the circumstances in which employers can dismiss employees; procedures to be followed in making single and multiple redundancies; minimum redundancy payments and notice periods; and a National Minimum Wage. Nonetheless, the view of our members is that the UK still remains a relatively flexible place to do business when compared to many other Member States.

13. Retaining and enhancing this flexibility is critical for the success of EEF members. If employers are unable to make changes to the size and structure of their workforces, they may be reluctant to recruit. This has potentially serious consequences for employment levels and economic growth. However, the need for flexibility goes further than flexibility in relation to employment levels. Our members also need flexibility, for example, in relation to the organisation of working time or the contractual arrangements they can offer to prospective new workers.

14. Our members’ need for flexibility in this latter sense, ie in terms of hours worked and contractual arrangements, coincides with a demand from workers themselves for the same types of flexibility in terms of work/life balance. Unfortunately, this is not always apparent from listening to the views expressed by some trade unions. This may be because trade unions have traditionally represented employees on permanent “standard” employment contracts, or the so-called “insider” group, and have been relatively unsuccessful in recruiting other workers into membership. Moreover, whilst many EEF members recognise unions for some of their employees and generally have constructive relationships with them, union membership is generally on decline in the UK, with just 17.2 per cent of employees in the private sector being union members.⁷⁶ As a result, the views expressed by trade unions do not necessarily accurately reflect the views of the majority of the workforce.

15. A recent UK survey⁷⁷ concluded that 50 per cent of all working adults (52 per cent of men and 48 per cent of women) now want to work more flexible hours. Moreover, UK employers are responding to this demand, where possible, in order to recruit and retain their most talented workers. At the same time, many individuals choose to avoid so-called standard employment contracts precisely because they want to be able to decide for themselves whether and when they work.

16. EEF members do not demand significant or wholesale reform of current UK employment law in order to achieve flexibility; but they wish to see that level of flexibility preserved. They also see the need for greater simplicity and transparency in the law (see below under “reform of labour law”) and the way in which it is enforced.

Security (Consultation questions 4–6)

17. The UK already protects workers as well as employees by a floor of key employment rights (see below under “rights of workers”).

⁷⁶ DTI (2006) *Trade Union Membership 2005*.

⁷⁷ Holmes *et al* (2007), *The future of Work: Individuals and Workplace Transformation*.

18. However, we do not believe that true employment security comes from just having employment rights or protection against dismissal. Instead, we believe that workers feel truly secure when they know that:

- a high proportion of those who want can find work (ie the rate of employment is high);
- they have the experience, skills and attributes to continue to succeed in their current job and/or to find new work; and
- they work for an organisation which is profitable and competitive enough to survive in today's challenging environment.

19. The Green Paper encourages a debate about what role labour law can play in promoting security. However, as outlined above, we do not see labour law as the primary or most effective means of delivering security. Labour law can confer job protection, but true employment security comes from being employable. Economic, education, and active labour market policies are much more effective in promoting employment security.

20. There is a role for employers, governments and indeed individuals themselves to ensure that workers have the requisite experience, skills and attributes to be employable. But this is, and should remain, an issue for national governments. The EU's role should be limited to encouraging the sharing of good practice across Member States.

Rights of workers (Consultation questions 2,8 and 12)

21. In the UK, a “worker” is (broadly speaking) somebody who is neither an employee or self-employed and running their own business.

22. Many EEF members use a wide variety of workers, including agency workers, casual workers, homeworkers and labour-only subcontractors. They are used for many different reasons, including coping with seasonal or unforeseen changes in the demand for products, staffing absence or because a particular type of working (such as homeworking) suits a certain work process.

23. Being able to use such workers in a flexible way is critical for employers. A large proportion of EEF members face significant peaks and troughs in demand and, when an order is received, time is of the essence. They need to be able to bring in extra numbers or specialised skills very quickly, but cannot afford to retain extra labour once demand drops off. The same applies when seeking cover when permanent employees are absent on, for example, maternity leave or holiday.

24. It is wrong to typecast all “workers” in the UK as being excluded or exploited. On the contrary, many of them:

- are highly skilled;
- are paid at higher rates than comparable employees; and/or
- have chosen to take this type of contract because it offers them more choice over when and where they work or a way of re-entering the labour market after periods of absence due to childcare, unemployment or long-term illness. This is true of lower-skilled workers as well as higher-skilled ones.

25. UK employers may not extend their full employee benefit package to workers sometimes because such workers lack “employee status” but also because the temporary or sporadic basis on which such workers tend to be engaged would make it impractical for employers to do so. For example, a company sick pay scheme might offer full salary on any day when an employee is too sick to work, but such schemes are unworkable if workers can choose their working days. Where such employee benefits are not extended to workers, this can be one (but not the only) reason why such workers may receive a higher rate of pay than comparable employees.

26. Not all UK employment rights extend to workers, as opposed to employees. Again, this is partly for reasons of practicality. For example, it is difficult to give paternity leave to a worker who has no ongoing obligation to do any work or rights to time off to a worker who can choose his working days. However, it is

also the result of the targeted approach adopted by the UK, which is referred to in the Green Paper and illustrated further in Box 2 below.

Box 2: The rights of workers in the UK

The UK Government has adopted a “targeted approach” to the rights of workers. Thus, when issuing new employment legislation, it decides following consultation of interested parties if this should cover workers as well as employees. Overtime, this approach has created the following floor of rights for all UK workers:

The right to the National Minimum Wage;

The right to paid holiday;

The right to sufficient breaks and maximum working hours;

The right to be discriminated against on grounds of sex, marital status, race, nationality, disability, age, sexual orientation, religious belief or part-time status;

Protection against unlawful deduction from wages;

Protection against retaliatory action for having disclosed malpractice (“blowing the whistle”); and

Data protection rights.

The UK Department of Trade and Industry (DTI) launched a consultation in 2002 on the issue of employment status and the current framework and coverage of employment rights. In its 2006 *Success at Work* policy statement, the DTI confirmed that further changes to the legal framework would not prevent instances of abuse or lack of awareness about employment rights. It could however damage labour market flexibility and result in a reduction of overall employment. The DTI therefore confirmed that the UK’s existing framework meets the labour market’s current needs and the government saw no need for further legislation in this area.

27. Equally, workers in the UK do not have the same legal employment obligations as employees. Often, workers can choose whether and when to work. They also do not owe obligations to give notice or duties of trust and confidence towards the employer.

28. The question of whether or not employment rights should be extended to all workers is a key theme running through the Green Paper. We would strongly resist any EU or national legislation which had the effect of extending employment rights to all workers in the UK for the following reasons:

- extending many employment rights to workers would be impractical for the reasons described above;
- it could significantly increase labour costs;
- it would undermine the flexible way in which our sector currently engages such workers and thereby defeat the purpose of recruiting them;
- workers in the UK are already adequately protected by UK employment law and the UK government has concluded, after extensive consultation, that there is no need for further legislation in this area (see Box 2); and
- it would not deliver employment security because, as outlined above, we believe that this ultimately comes from employability not just employment rights.

Rights of agency workers (Consultation questions 9 and 10)

29. EEF members use agency workers in the same way and for the same reasons as other “workers”. All agency workers have the floor of rights described in Box 2 above. Many agency workers are taken on by the agency as employees and so gain additional rights. However, whether the individual is engaged by the agency as a worker or as an employee, the essence of an agency work arrangement is that the agency bears all of the costs, uncertainties and risks involved in being an employer, and receives a fee from the client company in return for this. The client company, on the other hand, benefits from being able to source specialist skills, bring on board extra workers quickly at peak times or “try out” workers it might later want to recruit on a more permanent basis.

30. In our view, it is critical that the EU does not undermine the main purpose of agency work by converting agency work contracts into standard employment contracts.

31. In the UK, however, there is a need to clarify who should be responsible for compliance with any employment rights of agency workers. At the moment, the agency clearly bears the responsibility for paying tax and social security and ensuring compliance with the National Minimum Wage and working time

legislation. However, there have been some recent UK court decisions in which the client (not the agency) has been found to bear responsibility for compliance with employment rights. This has led to uncertainty with employers, agencies and agency workers not knowing where they stand. It is in the interests of all three parties that this situation is resolved. We understand that the UK government appreciates this and is considering how best to address this complex issue.

32. Whilst many employers might welcome EU legislation clarifying (and only clarifying) that the agency bears sole responsibility for any employment rights, we believe that such legislation would be better coming from the UK government. This is partly because the solution can then be better targeted at the specific problems within the UK. It is also partly because we are unconvinced that the EU can realistically hope to achieve workable legislation on agency workers, not least because different Member States have historically taken very different approaches to the position of agency workers and this is reflected in the issues (or lack of them) which these Member States have in relation to such workers today.

33. Clarifying that the agency bears responsibility for any employment rights would ensure a floor of rights for all such workers. However, the UK government has recognised that there are pockets of agency work where individuals are particularly vulnerable and has sought to address them through its recent legislation on gangmasters and its proposed legislation on particular types of agency work (see Boxes 3 and 4). This is a good illustration of the targeted approach to addressing specific problems that the UK is now following and which we support.

Box 3: The Gangmasters (Licensing) Act 2004

This act was the UK's response to heightened public awareness about the vulnerability of workers (especially immigrant workers) supplied by gangmasters to perform work such as gathering shellfish at UK seashores.

A *gangmaster* is defined as anyone who uses workers to carry out defined types of agricultural work. A *worker* is anyone doing the work, whether or not as an employee or through an intermediary.

The Act establishes the Gangmasters Licensing Authority to operate a licensing scheme, set licensing conditions and maintain a register of licensed gangmasters. The Act also creates new offences, including that of using false documentation, with financial penalties for non-compliance.

Box 4: Vulnerable agency workers—UK government consultation

The UK government is currently seeking to build on existing regulations governing the conduct of employment agencies by targeting particular areas of abuse or poor practice.

For example, the government has identified cases where individuals hire a venue for a short period, invite would-be actors/models to attend and then engage in hard-sell tactics to persuade them or their parents to pay high fees for the provision of services and the promise of work. The government proposes specific legislation outlawing this and other similar but isolated practices.

34. In the Green Paper, the Commission has linked the questions about agency work with questions about sub-contracting to commercial partners. In the UK, we would not tend to regard these issues as being related. Indeed, we are not aware of any issues presented by commercial sub-contracting in the UK. If a sub-contractor engages employees to perform a contract, the sub-contractor is responsible for ensuring compliance with their employment rights. No doubt there are some unscrupulous sub-contractors (just as there will always be a small minority of unscrupulous employers of every type). However, we are unaware of any kind of systemic problem with commercial sub-contracting in the UK. Indeed, we would have thought that the real problem, (if there is one) occurs with subcontracting to commercial partners *outside of the EU*, where compliance with employment laws may be much harder to ensure. Any legislation on this issue is likely to encourage more sub-contracting outside of the EU, and thereby worsen any problems rather than solve them.

Harmonising the definition of worker (Consultation question 12)

35. We recognise that the definitions of “worker” and “employee” in the UK are, to an extent, complex and unclear. However, this is the inevitable result of needing to:

- reconcile the approach of the taxation authorities towards tax/social security status with that of the courts towards employment status; and
- fit a wide (and constantly changing) variety of contractual relationships into a small number of categories.

36. These factors are complex and cannot be overcome through further legislation whether from the EU or the UK. Standardised EU definitions would be particularly inappropriate, not least because Member States have different tax and social security regimes.

37. The Green Paper asks the question about defining who counts as a “worker” in the context of a discussion about frontier workers, ie workers who live in one Member State but commute to work in another. Leaving aside certain highly-paid professionals in the London financial sector, the UK’s experience of such workers is probably confined to Northern Ireland—where some workers commute across the Irish border. However, we understand from our Association in Northern Ireland that employers have no difficulty working out the employment status of such workers and are not aware of any problems created by the fact that Ireland may have a different definition of “worker” from Northern Ireland (see Box 5).

Box 5: Frontier Workers—the view from Northern Ireland

EEF Northern Ireland confirms that some companies based in Northern Ireland do engage workers who commute across the Irish border.

When we asked if there were problems created by Ireland having different definition of “worker” from Northern Ireland, they did not believe that they had encountered any such problems. They consulted with some of the key organisations in the area, who were also unaware of any such problems. They often experienced difficulty in working out the tax and social security issues associated with such workers, but not in establishing their employment status.

38. When we raised this issue with our members in the context of the idea of harmonising the definition of worker, their consistent response has been that most problems arise because of the understandably different tax and social security rules between Member States (which of course cannot and should not be harmonised).

39. We appreciate that employers in some other Member States may well have difficulty in establishing, or establishing a consistent approach to, the employment status of frontier workers. We do not know how difficult these issues would be to resolve, but we believe that they will be confined to relatively small geographical areas within the EU. In our view, it is crucial that such issues (wherever and to whatever extent they exist) must not dictate the approach that is adopted throughout the whole of the EU.

Self-employment (Consultation questions 7 and 8)

40. The Green Paper asks questions about defining self-employment and extending rights to all those engaged in “economically dependent work”.

41. We think that producing a better definition of “self-employment” is unachievable for the same reasons that producing a better definition of “worker” and “employee” is unachievable (see above).

42. We are also unconvinced that the concept of “economically dependent work” is a useful or meaningful way of deciding which, if any, individuals should have employment rights. The fact that a consultant is working exclusively for one company on a self-employed basis does not necessarily make him economically dependent upon that company. He may be able to move onto replacement work very easily. In fact, he may be less economically dependent than the company itself, which may have just one single client and be unable to survive if the client, for example, decides to outsource the work beyond the EU.

43. It is also important that the EU continues to promote innovation and entrepreneurship. As such, the EU should be encouraging individuals who are setting up businesses to be economically independent, supported by the skills and economic circumstances necessary for success, rather than rewarding and appearing to put a higher value on economic dependence.

44. In any case, in the UK, many individuals whom the EU might regard as “economically dependent” are in fact covered by a number of key employment rights, either because they fall within the definition of “worker” or because UK legislation goes beyond workers to include the self-employed (such as, for example, our anti-discrimination legislation).

45. For these reasons, we would not support any legislation extending rights to self-employed individuals deemed to be engaged in “economically dependent work”.

Enforcement (Consultation questions 13 and 14)

46. As regards the enforcement of both labour law generally and undeclared work specifically, we do not see a useful or effective role for the EU. We see this as a matter that is best left to individual Member States which, over the years, have developed different approaches that suit their legal system and employee relations history/culture.

47. In our view, the key to effective enforcement is to identify the problem areas and then target them through whatever means are the most effective. This is likely to involve swift and focused action on a case-by-case basis. EU legislation is not going to be effective for this purpose and is therefore unlikely to be helpful.

Working time (Consultation question 11)

48. We consider that the review of the Working Time Directive must retain the ability for employers and workers to be able to agree working time arrangements that suit them and reflect workload peaks and troughs. In particular, EEF members are firmly of the view that:

- Working time should be automatically averaged over 52 weeks; and
- The individual opt-out from the average 48-hour working week should be retained.

49. EEF recognises that there are major differences of opinion between Member States as to how this review should be progressed. We consider that one way in which the current impasse could be addressed is to follow the suggestion of CEEMET, the European employers' organisation to which EEF belongs, of:

- First, finding a practical resolution of the issues arising from the ECJ decisions in *SiMAP/Jaeger*; and then
- Second, addressing the specific request in Article 22 of the Directive requiring the Council to “re-examine the provisions of this paragraph” which would address the individual opt-out question.

Improving and reforming labour law (Consultation questions 1 and 3)

50. The Green Paper asks how labour law might be reformed to address the various challenges of the future.

51. As far as the reform of domestic labour law is concerned, we have already highlighted the need for reform in relation to agency workers in the UK. There is also a need for greater simplicity and transparency in our domestic law. At present, EEF members are struggling to keep pace with the continual influx of new legislation and case-law and find it hard to understand how the various rules interact with each other. As a result, businesses often do not know in advance if a business decision will be legally compliant or not. In response to a recent DTI consultation on simplification of employment legislation, we called for a reduction in the amount of legislation introduced annually, more reliable government guidance centred on business processes and the simplification of certain legislation.

52. As far as reform of EU labour law is concerned, if de-regulation is not on the agenda, there is nonetheless a need for better regulation.

53. First, we believe there is a need for greater clarity in EU legislation. This is particularly the case for SMEs, who should not need to take specialist legal advice before making seemingly-routine business decisions. For example, the legality of having a retirement age of 65 is now being challenged in the UK. This is a matter which could have been dealt with more clearly, rather than obliquely, from the outset in the 2000/78 EU Framework Directive. Member States must retain sufficient room for manoeuvre but EU legislation should not be an invitation to litigate.

54. Second, we believe that EU directives on labour law should only be issued after an impact assessment has been carried out. It is important that:

- impact assessments are structured, meaningful and comprehensive;
- there is a genuine attempt to assess the practical impact of the would-be Directive in each Member State;
- any issues exposed by the impact assessment are resolved as far as possible before the Directive is issued.

55. Third, in relation to ECJ judgments, we believe that steps should be taken to ensure that ECJ judges have a better insight into the practical impact of judgments they may be about to issue. It is extremely hard to reverse decisions which have already been taken, but some decisions might have been avoided altogether had their practical impact been fully understood. For example, the ECJ decision on rolled-up holiday pay in *Robinson-Steele* etc has caused serious uncertainty and dissatisfaction in the UK and is almost impossible to

apply to the UK practice of using “casual-as-required” labour. Equally, the ECJ decisions in *SiMAP/Jaeger* have, according to the Commission, left the majority of Member States in breach of the Working Time Directive in relation to on-call work. All of these decisions involve the ECJ simply transposing principles which might be appropriate for “normal” employment contracts into very different “non-standard” types of contract. A better insight into how “non-standard” contracts are being used within Member States might have resulted in a different outcome.

CONCLUSION: THE ROLE OF EU

56. The question of what role the EU—as opposed to the Member States—should play in any programme of modernisation is a key theme throughout the Green Paper.

57. We see a critical role for the EU in promoting examples of good practice and in continuing to push forward the debate. For example, a number of EEF members have expressed interest in learning more about the Danish model of flexicurity and in what elements of this model might be adaptable for the UK.

58. However we believe that the main responsibility for labour law must remain with Member States and the EU should refrain from any top-down legislative measures in this area.

March 2007

Memorandum by Eurociett

Starting from a comprehensive presentation on the positive contribution of the agency work industry to better functioning labour markets, Eurociett puts forward the flexicurity concept as a policy approach for a meaningful labour market reform agenda. In its contribution, Eurociett advocates to create a level-playing field for temporary agency work services, particularly by reviewing and lifting unjustified restrictions and discriminatory measures the agency work industry is currently still facing in several EU Member States.

Furthermore, Eurociett calls for taking account of the stepping-stone function of the agency work sector and its contribution to the integration of those groups that are furthest away from the labour market.

With regard to the specific questions on the employment status of temporary agency workers and triangular employment relationships included in the Green Paper, Eurociett provides evidence in its submission that there is no need for further regulation, as both the employment status of temporary agency workers and the triangular employment relationship are already clearly and comprehensively regulated by national labour law.

March 2007

Memorandum by Professor M R Freedland FBA and Dr N Kountouris

FLEXIBILITY OF THE LABOUR MARKET

1. *How flexible is the labour market in the UK? What could be the benefits of making it more flexible, and how could this be achieved? In which ways, if any, could changes in labour law help with this?*

Defining the level of flexibility of the British labour market is not a simple exercise, as it requires a preliminary definition of the term “flexibility”, which is by no means unambiguous. Tentative definitions of this concept range from a simple understanding of “flexibility” as the cost borne by employers seeking to adjust their workforce to labour market changes (for instance unexpected downturns) to some very articulate and multifaceted notions including numerous quantitative and qualitative components (see for instance the very articulate definition used by HM Treasury in the 2003 study “EMU and Labour Market Flexibility”, and the ones discussed in the *Employment in Europe 2006* report, published by the European Commission). In any case, whatever definition is employed, our labour market consistently ranks as one of the most flexible in Europe and in the world (see Chapter 2 in OECD, *Employment Outlook 2004* (Paris, 2004)). One of the authors of the present submission has recently argued (P L Davies and M R Freedland, *Towards a Flexible Labour Market* (OUP, 2007)) that this is partly due to an explicit policy preference by recent Governments for “light regulation” and—in some instances—“de-regulation” with the aim of increasing “managerial flexibility in personal work relations”, coupled with more targeted “re-regulatory” interventions in those spheres of employment and labour market regulation that are perceived as being conducive to a more inclusive labour market.

EMPLOYMENT SECURITY

2. *What is the extent of employment security in the UK? What could be the benefits of changing the present arrangements for employment security? In which ways, if any, could changes in labour law help with this?*

The concept of employment “security” is also very complex. An up-to-date discussion of the various notions of flexibility and security can be found in Chapter 2 of *Employment in Europe 2006*, available at http://ec.europa.eu/employment_social/employment_analysis/eie/eie2006_chap2_en.pdf. At the very least the concept should be seen as applying within the employment relationship, and outside or beyond the employment relationship. The idea of security within the employment relationship suggests that working persons receive some (substantive and/or procedural, individual and/or collective) protections against the termination of work relationships. Conversely the concept of security outside or beyond the employment relationship indicates that workers may well be exposed to the sudden loss of work, but should be offered and receive a series of guarantees in terms of training and re-training, income support, employment and employability opportunities, all effectively geared to re-inserting them in the labour market. If this basic definition is taken into account, British labour market regulation would appear to offer a comparatively low degree of security within the employment relationship and a relatively higher degree of security outside or beyond it. This point can best be exemplified by reference to recent reforms in the area of unfair dismissal and active labour market policies. The adoption of the Employment Act 2002 (Dispute Resolution) Regulations 2004 adequately exemplifies the approach of recent governments in respect of numerical flexibility, whereby the “proceduralisation” of unfair dismissal legislation became an opportunity to limit the substantial impact of unfair dismissal legislation upon managerial flexibility, without also directly altering its substantive aspects (see further Chapter 2 in Davies and Freedland (2007) quoted above). On the other hand the stream of “Welfare to Work” initiatives, adopted by successive governments since 1997, adequately exemplify the British approach to promoting security outside or beyond the employment relationship through “New Deal” and other employability measures, and “making work pay” initiatives whilst at the same time trying to render our labour market more inclusive by means of anti-discrimination measures.

THE CONCEPT OF “FLEXICURITY”

3. *How helpful do you think is the Commission’s concept of “flexicurity” seeking to combine the ideals of a flexible labour market with those of employment security? How practical could it be to strike a balance between these two ideals and where should such a balance be struck? In which ways, if any, could changes in labour law help with this?*

The major problem with the Commission definition of “flexicurity” is its lack of clarity, partly due to the lack of a Community or even nation-wide consensus over the definition of “flexibility” and “security”. The EC has only started expressly using this term in the “Explanatory Memorandum” accompanying the 2006 “Proposal for a Council Decision Guidelines for the Employment Policies in the Member States” (COM(2006) 32 final). More recently, the Commission Green Paper of 2006 announced a “Commission Communication on flexicurity (. . .) which will set out to develop the arguments in favour of the “flexicurity” approach and to outline a set of common principles by the end of 2007 to help Member States steer the reform efforts’.⁷⁸ It is very likely that the Communication will not be very prescriptive as to the substance of the notion of “flexicurity”. In fact in recent months the Community has modified its rhetoric and has started talking about “flexicurity” in procedural rather than substantive terms. So, for instance, in the February 2007 Employment and Social Affairs Council Meeting, the Council concluded that “To proceed with the structural improvement of employment performance, Member States should enhance flexicurity as a method’ and the Commission was asked to “prepar[e] a range of flexicurity pathways to find the right mix of policies tailored to labour market needs” (see 6226/07 (Presse 23)). On the other hand it is likely that while focusing on process, the Commission will still seek to influence outcomes particularly by suggesting that greater flexibility for those on permanent contracts is necessary (see December 2006 Progress Report COM(2006) 816 final, at 9).

OTHER LABOUR MARKET CHALLENGES

4. *What other challenges are facing those involved in the labour market? Respondents may wish to comment on their knowledge of a variety of different types of “subordinate” employment contracts and/or on their knowledge of the challenges faced by those in self-employment, “economically-dependent” self-employment and agency work. To what extent could changes in labour law help to address these challenges?*

⁷⁸ Ibid, at 4.

Perhaps the single most important and overarching challenge currently faced by workers in the United Kingdom is that of ascertaining their employment status for the purposes of application of employment protection legislation. In recent months it has become increasingly evident that our present regulatory framework is struggling to provide adequate answers in respect of this important issue vis-à-vis several types of personal work relationships. This is particularly evident in the context of work relationships involving multiple parties, as most recently highlighted by two decisions of the Employment Appeal Tribunal where both Elias J and Bean J actively advocated an intervention by Parliament to clarify the status of workers providing services through an agency (see *James v Greenwich Council* [2007] IRLR 168 and *Craigie v London Borough of Haringey*, UKEAT/0556/06/JOJ, not yet reported at the time of writing). Recent cases have also highlighted the fact that a considerably degree of uncertainty pervades labour only sub-contracting practices (compare the status of the intermediary entity in *Hudson Contract Services Ltd v Revenue and Customs Commissioners* [2007] EWHC 73 (Ch) and in *Redrow Homes (Yorkshire) Ltd v Wright and Roberts and others* [2004] EWCA Civ 469) and in the context of personal work provided through a service company. There is hardly any point in introducing legislative measures aimed at providing more or less flexibility and security in personal work relationships if the legal framework is unable to define with some degree of clarity and legal certainty the personal scope of these measures.

GROUPS COVERED BY LABOUR LAW

5. *To which categories of workers should labour law apply? Are any workers currently excluded that ought, in your view, to be included? What is your view of the issues raised by the Green Paper about the applicability of labour law to groups of workers whose employment status is intermediate between that of employee and self-employed?*

The authors of the present submission believe that the current scope of application of labour law suffers from two main deficiencies. Firstly, as suggested above, there is a lack of clarity as to the exact definition of the persons and relationships to which labour law should apply. Secondly, employment protection legislation is increasingly emerging as a multilayered body of law where different types of rights (for instance protection against unfair dismissal, working time and minimum wage entitlements, anti-discrimination and health and safety legislation) are awarded or denied to different categories of workers without an adequate justification and, without a sufficient degree of certainty and predictability. These two deficiencies are further aggravated by the growing interaction between national and Community legislation in the areas of free movement of workers and services, citizenship of the Union, and employment law and policy. The present authors believe that a more adequate allocation of the protection afforded by employment legislation would require its reconfiguration around a new notion of the “personal work contract”, broader than the notion of “contract of employment”, with special provisions and regulatory regimes applying to personal work relationships which in various ways depart from the definitional parameters of the “contract of employment” notion, while not falling squarely outside it and into the province of “commercial contracts for services”.

ROLE OF EU REGULATION

6. *What is the role of regulation at the EU-level in achieving a modernised system of labour law? Are there any specific pieces of EU legislation that need either to be repealed or to be introduced? Do you consider that the Green Paper’s proposed “Floor of Rights” for all workers is a viable one? In order to promote worker mobility, would a Community-wide definition of “worker” be useful?*

There are numerous areas of labour market regulation, where EU law and policy interact with and influence several points touched upon by the Green Paper. This is rather obvious in respect of the various regulations and directives adopted over the past decades in areas as different as the coordination of social security systems and the regulation of working time, health and safety, and the working conditions of standard and “atypical” workers. It is also increasingly clear and documented that “soft law” initiatives, such as those developing under the aegis of the European Employment Strategy and the Open Method of Coordination, are extremely relevant in changing some national concepts of flexibility and security in the labour market.

What is less obvious, but no less important, is the impact that EC fundamental economic freedoms, and in particular free movement of persons and services, are having in respect of national labour markets in general and in respect of the notion of “employment status” in particular, most visibly since EU enlargement in 2004 and 2007. It is increasingly perceived that national provisions aimed at limiting the free movement of workers from some of the new Member States are easily by-passed through the use of “sham self-employment”, and fictitious service provision and sub-contracting’ (see COM(2006) 48 final, at 8), that exploit the loopholes in the EC and national definitions of the notion of “worker” and “self-employed”. On the other hand the

European Court of Justice has shown some clear signs of hostility in respect of some national legal devices aimed precisely at clarifying the (national) definition and notion of “worker”, for instance by means of legal presumptions of status (see Case C-255/04, *Commission v France* [2006] ECR I-05251), and other important decisions by the ECJ are currently being debated by the Court (for instance the *Laval* case C-341/05). While these pressures may justify in the long run some sort of EU-level regulatory intervention, at present the Green Paper reiterates the suggestion advanced by the Commission that the notion of disguised employment should be dealt primarily at a national level.

27 March 2007

Memorandum by The Institute of Employment Rights

The Institute of Employment Rights is an independent charity specialising in employment law. Established in 1989, it is a network of academics, lawyers and trade unionists. The aim of the Institute is to inform discussion around labour law through research, educational activities, publications, briefings and responses to consultation documents.

We welcome the opportunity to contribute to this Inquiry into the EU Commission’s Green Paper “Modernising labour law to meet the challenge of the 21st century”. We also welcome any opportunity to develop these arguments via oral evidence to a public meeting of the Inquiry.

FLEXIBILITY AND SECURITY WITHIN A COLLECTIVE FRAMEWORK⁷⁹

1. The adaptation of labour law to achieving labour market objectives requires a collective framework. The adaptation of labour law required is to promote collective agreements. The success of the Nordic model is built on this foundation. It is the promotion of collective agreements which can best contribute to flexibility and security. Legislation can provide a framework.⁸⁰
2. The original “adaptability” pillar of the European Employment Strategy (EES) focused on the role of the social partners: to achieve flexibility and security through social dialogue. But the responsibilities of the social partners can only be achieved with greater support, both economic and political, by both Member States and the EU institutions. Economic support is needed to equip the social partners to undertake the tasks specified. Political support is required to encourage the social partners to co-operate in the achievement of the tasks, but also to secure that national administrations embrace the participation of the social partners at all stages of the EES process, from the formulation of Guidelines, to their implementation through National Action Plans (NAPs), through to the evaluation of the NAPs by the EU institutions.
3. The purpose of labour law is to restore a balance of power in the individual employment relationship. Flexibility is only a threat if an individualised, segmented workforce is not protected and regulated within a collective framework. The potential for collective regulation is evident in the framework agreements on part-time work and fixed-term work reached through the European social dialogue. Similarly, protection may be secured by national collective agreements.⁸¹
4. Labour law should reinforce this collective framework by supporting trade union membership and organisation and collective bargaining. Modernisation of labour law to meet the challenges of the 21st century starts with collective dimension; not, as in the Green Paper, with individual employment law.

⁷⁹ This submission draws substantially from the briefing prepared by Professor Brian Bercusson, King’s College London, for the Committee on Employment and Social Affairs of the European Parliament, 21 March 2007. See further supporting material below.

⁸⁰ EU labour law has promoted flexibility through social dialogue, agreements between the social partners. For example, in the Working Time Directive, Council Directive 93/104/EC.

⁸¹ For example, in the temporary work sector, in Germany, on 20 February 2003 a framework agreement was reached between trade unions grouped together by the central German trade union confederation, DGB, in a bargaining cartel and the employer’s organisation in the temporary work sector, BZA. BZA (Bundesverband Zeitarbeit Personal-Dienstleistungen), the largest employers’ organisation in the temporary work sector, with some 1.600 members. In 2002, an estimated 4,000 private sector temporary employment agencies were operating in Germany employing some 273,000 temporary workers. “Collective agreements in place in temporary work sector”, *European Industrial Relations Review* No 354, July 2003, at pp 22–24. In Spain a national agreement was concluded in March 2005 for the telemarketing sector employing some 40,000 workers of whom some 90 per cent are temporary workers. “National accord provides security for telemarketing workers”, *European Industrial Relations Review* No 378, July 2005, at pp 27–29.

LABOUR LAW TO INCREASE SECURITY AND FLEXIBILITY

5. Labour law measures to increase security and flexibility include provision of training and building on the concept of health and safety to include the social and psychological well-being of employees.⁸² This would embrace measures to support the organisation of working time to achieve a better balance between work and family/private life,⁸³ and guaranteeing a minimum decent wage.⁸⁴ As stated by the European Court in Case C-84/4, a floor of rights looks not to the lowest common denominator, but specifies minimum standards with a view to improvement of living and working conditions, as declared in Article 136 EC.

6. What is required is not simplification or reduction of labour laws *per se*, but regulation assessed in terms of achieving its objectives. Reducing employment protection of “atypical employees” leads to lower labour market participation and hence reduces the pool of employees available to employers. Providing rights to training increases the pool of capable employees making it more attractive for employers to take on new employees.⁸⁵ If the objective is to make it easier for employers to take on new employees, better regulation means more effective, not merely less or simpler labour laws.

7. Simplification and reduction is achieved by eliminating the complexity of multiple labour law regimes for different types of workers (segmentation). Such diversity means employers are faced with choosing among different sets of labour and social costs, and, if they get it wrong, possible challenges by workers. A better solution might be a general legal framework applicable to all, or the vast majority of workers, or possibly, a sectoral approach. Again, the social partners may be best equipped to negotiate the legal framework appropriate to the needs of employers and workers.

“Economically Dependent” Workers

8. The concept of “economically dependent workers” refers to those workers who do not correspond to the traditional definition of “employee”.⁸⁶ This is because they do not have an employment contract as dependent employees. Despite their similarities to employees, such economically dependent workers do not generally benefit from the protections granted to employees both by law and collective bargaining. Such “economically dependent employment” has been regulated by law in the EU Member States in a number of ways, including: (i) presumptions that these are employees and fall within the scope of employment protection legislation (France, Greece, Luxembourg); (ii) reversal of the burden of proving employee status (Belgium); (iii) listing criteria that enable identification of workers as either employees or self-employed (Austria, Belgium, Germany, Ireland); (iv) extending protection to specified categories, even though they are not presumed to be employees (Denmark, France, Germany, Greece, Italy); (v) creating a special and separate status for such categories of workers who fall outside the established binary division of employee and self-employed (Germany, Italy, the Netherlands, Portugal); (vi) extending basic protections to all workers, but specific protections for specific categories (Italy).

⁸² As defined by the European Court of Justice in *United Kingdom v. Council*, Case C-84/4, [1996] ECR I-5755.

⁸³ The Commission’s proposals in the Green Paper on revision of the Working Time Directive link the organisation of working time with the objective of providing greater flexibility. This is in flat contradiction with the Directive’s purpose of protecting the health, safety and well-being of workers. Any regression from this health and safety objective of working time organisation would be subject to legal challenge. It is the UK’s general opt-out which needs to be tackled as a matter of priority.

⁸⁴ For a comparison of minimum wages across the EU Member States, including their relative value using Eurostat’s special conversion rates to remove the effect of differences in price levels between the countries, see “Minimum wage update”, *European Industrial Relations Review* No 392, September 2006, pp 31–32.

⁸⁵ A Report for the Commission by a group of eminent social scientists and senior civil servants included the following policy recommendation: “The national strategies for lifelong learning should, at the level of working conditions: . . . include access to training activities as a standard ingredient of the employment contract and collective agreements”. *Report of the High Level Group on the future of social policy in an enlarged European Union*, European Commission, Directorate-General for Employment and Social Affairs, May 2004, p 49. Regarding the role of collective agreements, the Report concluded (pp 47–48): “Empirically, a distinction between large enterprises and small and medium sized enterprises can be observed, with the latter clearly providing comparatively less training opportunities. However, it can also be observed that social partnership does play an important role, as the small and medium sized enterprises which are covered by agreements tend to do much better and agreements at national level may implement lifelong learning . . .”. It may be noted that the Charter of Fundamental Rights of the European Union, proclaimed at Nice in December 2000, includes Article 14(1): “Everyone has the right to education and to have access to vocational and continuing training”.

⁸⁶ See the comparative study by the European Industrial Relations Observatory (EIRO) at the European Foundation for the Improvement of Living and Working Conditions. A short version of the EIRO Study was published in the *EIRO Observer: Comparative Supplement*, 13 June 2002; a fuller version, together with most of the national reports, is available on-line on the EIRO website: <http://www.eiro.eurofound.eu.int>

9. The implication of this experience is that at least the same rights required for employees should also be guaranteed to “economically dependent” and agency workers. The legal characterisation of such workers should not deprive them of at least the protection available to employees.⁸⁷ At least, because it may be necessary for EU law to intervene to provide special protection, for example, for agency workers.⁸⁸ A step in clarifying responsibilities of various parties with a triangular employment relationship was the 1991 Directive on health and safety of temporary agency workers.⁸⁹ This precedent could be built upon. The responsibility of sub-contractors should be addressed in a number of contexts: public procurement, information and consultation where redundancies or re-structuring affect the employees of sub-contractors, etc.⁹⁰

SECURITY AND “UNDECLARED” WORK

10. Undeclared work refers to forms of employment which evade the norms of employment regulations. The problem has been magnified by the increased mobility of workers with the accession of new Member States. The correlation between undeclared work and problems linked to minimum wages and health and safety indicates that experience of enforcing such labour standards through labour inspectors is a potential mechanism to tackle undeclared work.⁹¹ The Commission’s recent legal action against the UK, upheld by the European Court, condemning the UK government’s advice to employers that they need not ensure that employees take the rest breaks guaranteed by the Working Time Directive is one instance of Commission action to enforce Community labour law.⁹² This needs to be expanded to compel employees to actively acknowledge undeclared work. Trade unions could be valuable partners in combating undeclared work.

A SINGLE EUROPEAN DEFINITION OF “WORKER”⁹³

11. National labour laws adopt a definition of “employee”, on which there is considerable convergence. It is at least arguable that a single European definition of “employee” could and should be established for the purposes of EU labour law. The principle of equal treatment is fundamental to the *acquis communautaire social* and implies a common definition ensuring that this common category of workers enjoys the protection of EU labour law regardless of the Member State in which they work.

12. Major problems can arise if it is left to the Member States to define the concept of the employment relationship delimiting the scope of application of EU labour law. Major discrepancies appear in the application of EU labour law in Member States. Further, opportunities are available for Member States to avoid it through manipulative definitions of their domestic legal concepts.¹²³ Clarity might be achieved in legal definitions of employment and self-employment if EU labour law were to propose a single European definition of “employee”, at least as regards employment rights regulated by EU law.⁹⁵

SUPPORTING MATERIAL⁹⁶

1. The Hearing for which this briefing paper is written serves for the preparation of the European Parliament’s Committee on Employment and Social Affairs (EMPL) initiative report on labour law in the context of the Commission’s Green Paper: “Modernising labour law to meet the challenges of the 21st century”.⁹⁷ An earlier draft of the Green Paper, in September 2006⁹⁸ entitled “Adapting labour law to ensure flexibility and security

⁸⁷ As stated in ILO Recommendation 198 concerning the Employment Relationship adopted by the Conference at its 95th session, Geneva, 15 June 2006, paragraph 9: “For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that have been agreed between the parties”.

⁸⁸ See the Green Paper, Question 10.

⁸⁹ Council Directive 91/383 of 25 June 1991. Clarification of the employment status of temporary agency workers might benefit from greater energy being devoted to the Commission’s proposal of a Directive on temporary agency workers. See K. Ahlberg, B. Bercusson, H. Kountouros, C. Vigneau, L. Zappalà, *Transnational Labour Regulation: A Case Study of Temporary Agency Work*, forthcoming 2007, Peter Lang, Brussels.

⁹⁰ See the Green Paper, Question 9.

⁹¹ For example, France has established committees to combat illegal work (Colti) bringing together in each département tax, customs, and labour inspectorates to control seven specific sectors subject to the predations of illegal work (food processing, agriculture, hotels and restaurants, etc). These committees in 2006 inspected 67,135 enterprises of which 7,000 were found to be violating the law. See “Le marché de l’emploi face à la pénurie et au travail au noir”, *Le Monde*, 28 March 2007, p. 16.

⁹² *Commission of the European Communities v United Kingdom*, Case C-484/04, decided 7 September 2006.

⁹³ See Green Paper, Question 7.

⁹⁴ For example, the Part-Time Work Directive (Council Directive 97/81/EC) as implemented in the UK applies to all workers. In contrast, the Fixed-Term Work Directive (Council Directive 1999/70/EC) is limited to “employees”, not the wider category of “workers”.

⁹⁵ As with equal pay in *Allonby v Accrington & Rosendale College*, Case C-256/01, [2004] *Industrial Relations Law Reports* 224.

⁹⁶ Edited extract from the briefing prepared by Professor Brian Bercusson, King’s College London, for the Committee on Employment and Social Affairs of the European Parliament, 21 March 2007.

⁹⁷ “Modernising labour law to meet the challenges of the 21st century”. COM(2006) 798 final, Brussels, 22.11.2006.

⁹⁸ Communication from the Commission, Green Paper, “Adapting labour law to ensure flexibility and security for all” (n.d.).

for all” echoed the Commission’s focus on employment policy. The final Green Paper has ambitions to transform the nature of labour law itself.

2. The Green Paper declares that labour law’s original purpose (to offset inequality between employer and employee) and traditional model (a secure employment status protected against dismissal) operates to the detriment of newcomers and jobseekers. The inequality and conflict which labour law is to address is no longer between employer and employee. Rather, the new conflict is between workers with secure employment status and jobseekers. The “modernised” purpose and model of labour law is to address this conflict between employees (“insiders”) and the unemployed and “atypical” workers (“outsiders”). Employers become neutral observers of this conflict. “Modernised” labour law aims not at unequal power and to achieve a balance between employers and workers (flexibility v security), but at unequal power and to achieve a balance between security (of employees) and inclusion (of the unemployed).

3. The Green Paper declares that its “focus is mainly on the personal scope of labour law rather than on issues of collective labour law”. All references to collective agreements are in the spirit of what role might collective agreements play in promoting the flexible individual employment agenda?⁹⁹ There is nothing about EU law to support and reinforce collective bargaining. This vision of the “modernisation of labour law” stands in apparent contrast with the questions posed by EMPL, which are more consistent with the original draft Green Paper’s concern with employment policy, balancing flexibility and security. Unlike the Green Paper, the questions posed by the EMPL do not assume a conflict between insiders and outsiders, with the employer outside as neutral observer. The EMPL questions ask how to increase both flexibility and security, without implying a trade off or conflict. This is a vital distinction between the two approaches.

4. On the other hand, like the Green Paper, EMPL’s questions do not sufficiently recognise the collective dimension of labour law, which, though relegated to the margins, is at least referred to in the Commission’s Green Paper. The EMPL may best achieve its objective of increasing both flexibility and security by bringing to the fore the role of collective labour law, and promoting an EU collective labour law capable of achieving this objective.

5. One of the Member States most successful in achieving flexible labour markets combined with a high level of social security for the unemployed and short transition periods between jobs is Denmark. However, the Danish model is characterised by relatively high expenditure on social security and active labour market policy as a proportion of GDP (3–5 per cent). This presents problems of a budgetary nature for Member States where expenditure is much lower. It poses particular difficulties for EU intervention, as social security is a jealously guarded Member State competence.

6. “Modernising labour law” through EU intervention is possible, therefore, only through promoting the emulation of active labour market policies. This is ostensibly the function of the European Employment Strategy implemented through the “open method of coordination”. Its success is disputable.¹⁰⁰

7. However, the Danish model (like that of Sweden and Finland) is also characterised by high trade union membership and the active engagement of trade unions in managing unemployment insurance.¹⁰¹ EU labour law has encouraged trade union membership by promoting the role of collective representation in a number of directives.¹⁰² In light of declining trade union membership and failures of these directives to secure collective representation¹⁰³, EU labour law needs to provide more effective protection for the fundamental rights of association, collective bargaining and collective action. EU labour law promoting trade unions could achieve better results in the form of flexible labour markets. In particular, it could influence Member States towards the engagement of trade unions in managing active labour market policies, including short transition periods between jobs.

⁹⁹ See Question 6 posed by the Green Paper.

¹⁰⁰ In November 2004, Wim Kok, former Prime Minister of the Netherlands, presented the report of a High Level Group on the Lisbon Strategy which had been requested by the Commission. Report from the High Level Group chaired by Wim Kok, *Facing the Challenge. The Lisbon strategy for growth and employment*, Office for Official Publications of the European Communities, November 2004. The Kok Report had harsh things to say about the process of its implementation: (p 42) “The open method of coordination has fallen far short of expectations. If Member States do not enter the spirit of mutual benchmarking, little or nothing happens”. See Janine Goetschy, “The European Employment Strategy and the open method of coordination: lessons and perspectives”, (2003) 9 *Transfer: European Review of Labour and Research* (summer, no 2) pp 281–301.

¹⁰¹ “Unemployment insurance and trade union membership”, *European Industrial Relations Review* No. 392, September 2006, pp. 20–24.

¹⁰² Council Directive 75/129 of February 17, 1975 on collective dismissals; Council Directive 77/187 of February 14, 1977 on safeguarding of employees’ rights in the event of transfers of undertakings; Council Directive 89/391/EEC of 12 June 1989 on the safety and health of workers at work; Council Directive 94/45/EC on the establishment of European Works Councils; Council Directive No. 2002/14 establishing a framework for informing and consulting employees.

¹⁰³ For the example of the UK, see B. Kersley *et al.*, *Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey*, Department of Trade and Industry, 2005, pp 35–36: “Most striking of all, perhaps, was the continued decline of collective labour organisation. Employees were less likely to be union members than they were in 1998; workplaces were less likely to recognise unions for bargaining over pay and conditions; and collective bargaining was less prevalent . . .”.

8. In contrast to the Green Paper, flexible labour markets are not achieved by reducing job security (employment protection legislation). Rather, they are associated with high social security for the unemployed in systems characterised by high trade union membership. Modernisation of labour law should reinforce trade union membership and trade union engagement in unemployment insurance systems with a view to promoting flexible labour markets.

9. Measures adopted at EU level must respect the competences of Member States in the field of labour law and the principle of subsidiarity. But there is a core labour law of the EU founded on *ordre communautaire social*: labour is not a commodity (like goods, capital), pursuing the objective of improved working conditions, respecting the fundamental rights of workers as human beings, acknowledging the central role of social dialogue and social partnership at EU and national levels, and adhering to the strict principle of equal treatment without regard to nationality.

10. Measures to increase the security of workers while adapting to the need for flexibility of both employers and workers may draw on both old and recent experience of the EU. The European Coal and Steel Community (ECSC) adopted a strategy of active labour market policy based not on stability of employment, but on the contrary, the adaptation of workers to economic change. The idea was that workers ought not to have to bear the consequences of economic change which technical progress makes inevitable. Enterprises which are being transformed can be given temporary assistance to avoid the need to lay off their employees. And if they close down, wholly or partly, assistance can be given directly to the workers, to enable them to search for work elsewhere, or to re-train for other jobs: “For stability of employment there was substituted a necessary continuity of employment, along with changes in work”.¹⁰⁴ More recently, amendments introduced by the European Parliament to the proposed Services Directive,¹⁰⁵ aiming to prevent “social dumping”, demonstrate that a legitimate and successful development of the internal market is conditional on taking into consideration the social consequences and implications of proposals.

30 March 2007

Memorandum by the Institute of Interim Management

We are writing as an Institute in response to the request for feedback in the above consultation paper. The Institute of Interim Management (the “IIM”) is established as a membership organisation for professional Interim Managers (“IM”s), with the principle aims of establishing quality standards and best practice for its members, including a Code of Conduct regulating the way in which they source and fulfil assignments on behalf of their clients. Its membership is drawn mainly from Interim Managers resident in the UK (although their assignments can take them world-wide), with a small number of overseas members, principally from other EU Member States.

Interim Managers are experienced business executives, usually professionally qualified, who deliberately choose to work as independent suppliers of specific skills & knowledge to fee paying clients, either for a period of time or for defined scopes of work. Contractually, IMs operate through contracts for services (commercial contracts), rather than contracts of service (employment). Although not employees, IMs form part of (or possibly even lead) the client’s management team, and expect to have delegated and to exercise the appropriate line authority required to fulfil their role. Depending on the circumstances of the client and the assignment, this can include becoming an officer of the company through formal appointment as director and/or company secretary for the duration of the assignment.

It will be appreciated that IMs are a specialised sector of the economy, occupying a niche section of the much larger self-employed/freelancer/independent contractor market. On the one hand, their own personal businesses are small. However, because of the roles they undertake at their clients, IMs will, at any given moment, have line authority for aggregate turnovers of billions of pounds, may be based internationally, and will be balancing the needs of a variety of stakeholders, including thousands of employees.

Estimates of the size of the Interim Management market vary, but the figures most commonly quoted in the media are that fees earned in the UK are of the order of £400 to £500 million, with the same again in total for the remainder of the EU Member States. Interim Management has long been an established feature in Holland and Belgium, and the Institute has an established Chapter in Italy serving IMs there—however, given recent changes in employment legislation, the IM market in other EU countries is believed to be growing rapidly.

¹⁰⁴ G. and A. Lyon-Caen, *Droit Social International et Européen*, 7ème ed., 1991, p 153.

¹⁰⁵ Proposal for a Directive on Services in the Internal Market, COM (2004) 2/3 final, adopted 13 January 2004. Now Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L376/26 of 27.12.2006.

 QUESTIONS

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

The diverse labour law and practices across the EU Member States, which are reinforced by different national cultures and psyches relating to employment, mean that it is very unlikely that any centrally imposed overarching structure will be acceptable at local level.

The most important objectives for all legislation must be clarity of purpose and clarity of definition. In the context of labour law, there is a tendency to use employment law to interfere with genuine, business to business, commercial arrangements between the self-employed and their customers/clients, especially where the supply is of services rather than goods. In this context it is essential to recognise that the terms “employee” and “worker” are not interchangeable, because many workers provide their services under commercial contracts, not employment contracts.

 2. *Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?*

Is labour market segmentation the bad thing the question implies? Jobs are only secure if the businesses providing those jobs can survive long term; survival requires businesses to be both competitive and profitable. With the business environment changing ever more rapidly as a result of technological change and globalisation, businesses and organisations in both the private and public sectors need to be able to make rapid adjustment to the size and skills balance of their workforce.

There will always be a need for the core “permanent” staff, and rightly, such staff are entitled to the long term rights and benefits that their relationship with the employer demands. Within this, “internal” mobility of permanent staff within businesses/organisations through redeployment and/or retraining should of course be preferred options, ahead of redundancy.

Equally important, there will frequently be occasions where the skill requirement is urgently needed but only for a limited time, or is specialised but not needed long term. In these circumstances, recruitment/redeployment of permanent staff is inappropriate—indeed, to offer “permanent” contracts where there is only a time limited skills need would be dishonest on the part of the employer, because it creates unrealistic/unrealisable expectations in the mind of the employees that they are being offered long term job security. Businesses and organisations rightly therefore need to be able to turn to the self employed Interim/freelancer market to draw in the required resource.

In addition, if businesses and organisations are to behave in a responsible fashion when they implement social policies such as parental leave following the birth of a child, they have to have access to a pool of resource available on a short term basis—relying on the remaining staff to “cover” for parental leave absences of others may be unreasonable, and their raised stress levels may even give rise to health and safety issues. And it will be appreciated that the pool of short term resource needs to encompass all levels from the boardroom downwards.

This problem of “cover” is particularly difficult for SMEs, which have limited staff numbers (so to have even one absent is significant), and are usually not as well placed financially to fund a temporary replacement whilst at the same time paying for parental leave.

On the Commission’s own figures, those operating under “non-standard” contracts of employment (ie the self-employed, temporary workers, etc) had reached nearly 40 per cent of the EU-25 workforce in 2005. There needs to be greater recognition on the part of the Commission and national governments that a thriving market for these “non-standard contractors” is an essential feature of a flexible and yet socially responsible market economy. At 40 per cent of the total, they are as much a “standard” feature as the “standard contract” permanent employees with whom they are compared; to refer to “atypical” workers and “outsiders” is unhelpful and represents a distorted view and misunderstanding of the labour market and its workings.

3. *Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?*

The SME sector in the UK makes a significant contribution to the UK economy, and yet over 60 per cent of those SMEs are “one-person” businesses consisting solely of the proprietor. Many of these are highly skilled and experienced “knowledge” businesses, who take the risk and operate outside the “corporate umbrella” out of choice, because they enjoy the challenges and risks of entrepreneurship, and the flexibility of being their own boss. For this large and growing body of people, this represents a positive life-style choice.

In order that their clients, and thus the economy, can benefit to the full, these knowledge businesses need the ability to go from client to client providing their services on a business to business basis under commercial contracts, not contracts of employment. However, so far as the UK is concerned, lack of clarity in the law over employment status make it difficult for businesses to take on such workers with any certainty for either party that the contracts entered into on an arms length basis will be honoured by the taxation authorities or the courts.

As commercial businesses, the self-employed recognise the need to make their own financial provision for pensions, training, holidays, and sickness—and self-provision of these is their preferred option. Were their clients obliged to treat them as employees, the result would be that they would build up a fragmented and, in monetary value, small series of employment benefits across a number of different organisations—keeping track of benefits and claiming them would develop into an administrative nightmare.

In the UK however, the self-employed may find themselves in the worst of all possible worlds in the event that they fall foul of IR35, a tax provision which attempts to treat one-person knowledge businesses not as self-employed, but rather as disguised employees, taxing them as if employees but at the same time denying them tax relief for the expenditure of providing certain of their own “employee” benefits—benefits which, had they been paid for by the client as “employer” would have attracted tax relief in the employer’s hands. In consequence for example, knowledge businesses who find themselves in this position find that they have to undertake the relevant training to keep their skills on which their businesses depend up to date at their own expense, and yet get no tax relief for incurring that expenditure.

4. *How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?*

As has already been mentioned, permanent contracts bring with them long term rights and obligations, including employment security and social protection, which, by definition, conflict with the flexibility to “hire and fire” at short notice.

So far as temporary contracts are concerned, there needs to be recognition of the difference between temporary employees who are under the control and supervision of the employer, and Interim/freelance workers who are providing their services under commercial contracts. Where services are provided by Interim/freelance workers under commercial contracts, such contracts are “business to business”, not employment contracts, and therefore do not need employment security or social protection—that is the business risk of entrepreneurship.

This is a core understanding that underpins a large number of people’s prosperity, and it is crucial that any changes to employment law do not interfere with this choice. It is hoped that this submission makes it clear that the large numbers of people working as Interims/freelancers do this from choice. They are not directly interested in employment law and employee rights. There is only concern that they do not become the unwitting recipients of “rights” they do not seek and would confuse an entire industry and way of life.

5. *Would it be useful to consider a combination of more flexible employment protection legislation and a high level of assistance to the unemployed, both in the form of income compensation (ie passive labour market policies) and active labour market policies?*

Such matters should be left to Member States, because what is appropriate depends on a variety of factors, including where they are in their economic cycles, national culture, etc.

However, allowing companies to discard and take on employees without penalty should encourage the hiring process and therefore reduce the numbers of unemployed. Whether it is beneficial to offer a high level of monetary assistance to the unemployed for anything other than a short period is less clear. There needs to be an appropriate counterbalance to reduced job security, but not to the extent that it discourages the unemployed from seeking work. The UK is currently staffing its skills shortage from other EU countries and elsewhere, whilst at the same time many thousands of UK nationals are claiming benefit and not taking up the jobs available.

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

With the decline in large scale manufacturing and the shift to high value added people skills—whether in technology, financial or service sectors—the importance of collective agreements is diminishing, and there is probably a need for greater representation of SME organisations in the social dialogue. At the very basic level, national governments must ensure that no one should be unemployable through illiteracy or inadequate communications skills, and must provide a safety net of skills training to equip the unemployed to get into (or back into) work, provided such training is genuine re-skilling and not merely a device for removing those not in work from the unemployment statistics. Beyond that, governments must create the right legislative framework, economic environment, and taxation incentives, to encourage and enable businesses to invest in people, and to foster entrepreneurship in individuals, as envisaged by the Lisbon Accord.

An important feature of this environment is ensuring that regulation does not of itself prevent individuals from making the transition between contractual forms whenever it is appropriate to move. Interim managers, for example, do not normally enter the sector until their 40s, by which time they have built up considerable skills and experience during their career as employees, and have achieved a degree of financial independence which allows them to take on the risk and rewards of working for themselves without compromising family responsibilities. To make the transition successfully, they need a legislative framework which allows them to set up their new business rapidly and at minimal cost, but no collective agreements or other external intervention is required. For this growing sector of workers, any additional regulation imposes extra administration where it is unnecessary and not wanted.

7. *Is greater clarity needed in Member States' legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?*

Any attempt to clarify the definition of employment and self-employment should be principles based, not based on arbitrary criteria of the sort of presumptive rules referred to in the Green Paper, such as those found in the Dutch Flexibility and Social Security Act.

In the UK, such principles include mutuality of obligation (whether the employer has a duty to provide work and the employee a duty to accept that work), the degree of supervision and control exercised by the organisation, who bears the financial risk if the work is not properly performed, whether the contractor has a right to substitute himself with a colleague or to involve subcontractors, use of own tools, etc. Although not normally included in the tests in the UK, one might also ask whether the organisation provides any employment rights—inappropriate in a commercial contract with an Interim/freelance worker.

8. *Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?*

One of the difficulties in the Green Paper is that the terms “worker” and “employee” are used interchangeably, when in fact they have different meanings. A self-employed worker enjoys the same general protections as the overall population—for example, to do with discrimination on the grounds of race, disability, sex etc. However, he is responsible for providing his own “floor of rights” as he is his own employer and therefore responsible for providing his own “employee” benefits.

The self-employed would not want an obligation imposed on their clients to provide a floor of rights—it would only serve to make them a less competitive resource, and, as previously mentioned, would lead to a plethora of fragmented and, in monetary value, small series of employment benefits across a number of different organisations. The imposition of a floor of rights would simply add more cost to the client organisations to provide something that is not needed or wanted.

9. *Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in “three-way relationships”?*

There is a need for clarity in multiple employment relationships as to who is the employer responsible for providing the employee with their employment rights, possibly by imposing a statutory presumption that the end user is the employer, or by imposing a requirement on end user and agency intermediary to provide the employee with a binding written statement at the commencement of the employment contract as to which of them is the employer.

Where the relationships of workers (rather than employees), clients and intermediaries are governed by commercial contracts, then there is no need to identify the employer—all rights and obligations flow from the commercial contracts, rather than being imposed by statute.

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

No comments, other than those already given to Question 9.

11. *How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers’ health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?*

No comments, provided no change is made which would affect the current exemption from the working time rules of Interims/freelancers as self-employed or as otherwise being able to determine for themselves what hours to work.

12. *How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of “worker” in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?*

Member states should retain their discretion in this matter, recognising that it is an issue for employers and employees, not for organisations and workers whose relationships are governed by commercial contracts.

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

Illegal immigration and people trafficking remain cross-borders issues which are fuelled by and impact on labour markets, and require cross-border co-operation.

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

Undeclared work occurs for a number of reasons, including high levels of taxation (a matter for Member States) and illegal immigration (see the answer to question 13). A consequence of undeclared work can be over-regulation of legitimate businesses/organisations and workers, which has a negative impact on the economy generally.

30 march 2007

Memorandum by Italian Lawyers

PREFACE

1. *What the Green Paper contains: modernisation and flexicurity*

1.1 What type of modernisation?

1.1.2 Some positive aspects of the modernisation proposed in the Green Paper

1.2 Flexibility and security

1.2.1 Flexibility and security in the “macro” dimension

1.2.2 Flexibility and security in the “micro” dimension

1.2.3 Flexibility and security as a regulatory technique

2. *What is missing in the Green Paper: reference to the Charter of Fundamental Rights.*

PREFACE

The European Commission’s Green Paper “*Modernising Labour Law to meet the challenges of the 21st century*” comes after a long period of stagnation in the building of a social Europe.

After the launch of the Lisbon Strategy in 2000, the start of the Open Method of Coordination (OMC) regarding employment policies, and its subsequent extension to sectors such as social inclusion and welfare, the growth of the European social dimension—despite these promising changes of both institutional and political nature—appears to have been excessively slow and inadequate to match the central role played in the process of European integration by economic goals and the single currency.

The innovative procedures of the OMC have led to the acquisition of common ground for discussion and dialogue between the various Member States and the identification of objectives to be jointly pursued. Thanks to this method, a shared knowledge of the different national situations, on the basis of consensually accepted quantitative data, has been acquired; best practices, combining competitiveness and social cohesion according to the Lisbon perspective, have been identified.

It is, however, undeniable that these examples have seldom been followed by less virtuous countries and national action plans have rarely been seen as an occasion for re-orienting domestic social policies in the light of the objectives set forth by the EU.

Attempts to re-launch the Lisbon Strategy do not appear to be capable of transforming the cognitive dissemination of the efforts made by Member States—one of the objectives the OMC pursues—into a platform for the definition of supranational social and labour policies endowed with any degree of effectiveness.

In addition, the EU has not succeeded in enlarging its floor of rights for working conditions by means of classical regulatory methods; on the contrary, it has not even managed to update those already established. Political differences, strengthened by an archaic voting system, do not seem to allow much progress towards the definition of minimum standards, even in the numerous areas in which such possibility is covered by art. 137 of the Treaty. No significant initiatives have been taken recently by either the Commission, groups of States, or the European Parliament.

Widespread concern has therefore been expressed: the weakening of the power of persuasion of OMC procedures and the failure to use classical regulatory methods in sectors in which the EU still has competency, may cause competition between the Member States, which would have an uncontrollable and disastrous impact on the credibility of the process of integration (or, after Cologne and Laeken, the possibility of a European Constitution).

This view does not change radically if one observes the trade union dimension and the results of the European social dialogue: although some of the results recently achieved are interesting and original, they do not appear to be adequate for the institutional role and regulatory functions of the social partners and the bargaining method, as recognised by both the Treaties and the ECJ.

Not even jurisdictional protection of fundamental rights is sufficient to change the prospects for the future. The judges in Luxembourg do continue to develop a jurisprudence which shows a general sensitivity towards fundamental social rights, but the frightening lack of balance between economic and social competencies in the current EU setup can only in part be amended by the courts, given the absence of clear political guidance and the failure to incorporate the Charter of Nice in the framework of Treaties, being those the only institutional factors that can serve as an incentive to Courts to foster a social Europe.

The Green Paper thus arrives at a stage in which the European public sphere seems to demand an act of courage and responsibility so as to reverse the trend, above all after the rejection of the Constitutional Treaty by the French and Dutch referendum which some commentators have attributed to the excessive “weakness” of its social clauses.

European debate concerning these crucial issues was therefore necessary and urgent.

The Commission cannot be accused of having disturbed the peaceful operations of an efficient shared mechanism: mounting concern about the inharmonious growth of the EU comes not only from scholars but also from sectors of society that do not share any nostalgia for a nationalistic level (and method) of protection.

Widespread fears as to the preservation of the European social model do not always imply a rooted protectionist stance; if rightly interpreted, they suggest, on the contrary, an intensification of EU intervention and resumption of the journey towards the construction of an innovative European model that can measure up not only to the transformations taking place in production processes but also to the radical changes affecting lifestyles.

The Green Paper is, therefore, important, irrespective of any objections that may be raised as to its methods and contents, because for the first time in the history of initiatives and research and consultative activities by EU institutions, the Commission has invited not only experts but a broad spectrum of participants to reflect on the social and cultural role that labour law can play in European society.

Thanks to the Green Paper, labour law in Europe is back on the EU agenda.

With this document we intend to make our contribution to the discussion promoted by the Commission, not only in our role as scholars and practising labour lawyers but also as European citizens committed to the construction of a social Europe.

1. WHAT THE GREEN PAPER CONTAINS: MODERNISATION AND FLEXICURITY

The key concepts on which the Commission document focuses, and which reflect its basic philosophy, are the modernisation of labour law and flexibility combined with employment security. Investigation of these concepts allows one to take up a stance towards the questions asked in the document without necessarily entering into specific details.

1.1 *What type of modernisation?*

The Green Paper owes its concept of the modernisation of labour law to ideological stereotypes and preconceptions: a certain concept of globalisation combined with uncritical acceptance of the neo-classical economic approach by international economic institutions and the prevailing economic literature. The selective use of studies and research into the labour market and its regulation—which emerges from the few, if any, references to important research reports proposing alternative approaches (eg the 1999 Supiot Report on the future of labour law in Europe)—reveals a rhetorical use of the scientific and theoretical analyses of labour law in circulation and also poses a more general problem of method and contents: whether, that is, the regulatory rationality of labour law is to be measured on the basis of mainly economic data (which are, among other things, disputable) and its capacity to adjust to economic change, or rather by looking at its function as a dynamic mechanism capable of correcting the imbalance of power that exists in the labour market and employment relationships and promoting social equality in the working place. The Green Paper seldom looks at this dimension of labour law and it is also for this reason that it appears to have been inspired by a unilateral vision of modernisation. Labour law can be modernised in various ways: the Green Paper mainly explores one of these—the adaptability of legal rules to the market. It pays little attention to the strictly normative dimension; in fact, as will be repeated later on, it does not even touch on the minimum level of social protection

that should be guaranteed in the EU, or how effectively to extend the *acquis communautaire* to the new Member States and bring their social protection systems closer to those of the other Members.

The vision of labour law modernisation the document contains is also the result of its contingent genesis; as is known, its publication was hindered and delayed by the great hostility expressed by entrepreneurs (UNICE) and professional associations (PCG: Professional Contractors Groups), who criticised the Commission's negative assessment of the proliferation of non-standard work, and its proposal to achieve an EU notion of an economically independent worker and provide a universal system of minimum worker protection standards. Following a trend that is becoming a constant feature of the stance taken by employers' associations, the requests for modification were: no regulatory intervention at an EU level (unless soft in nature); absolutely no form of harmonisation; at most, measures taken at a national level, preferably in the direction of deregulation.

The pressure brought to bear by these lobbies affected the final version of the Green Paper. It was also affected by pressure from certain governments, in particular the British government, whose initial reaction to the Commission's first draft was basically similar to that of employers' groups (no new legislation; no harmonisation because labour markets differ so much from one country to another; working in favour of flexibility and not against it, as would happen if certain forms of protection were extended to non-standard workers). These positions also had an impact on the final version of the Paper.

In short, the recipe suggested by the Green Paper consists of a generalised weakening of constraints in the regulation of standard work relationships—in systems where they exist—above all as regards dismissals, together with labour market intervention offering greater protection with a view to favouring greater individual worker mobility and therefore employability and employment rates in general. This would support the reorganisation of European enterprises, making them more efficient and competitive.

The fact that the recipe is based on an undemonstrated assumption emerges, among other things, from the apparently indiscriminate choice of examples of national regulation used to confirm the assumption and elevated to the rank of best practices. The 1999 Dutch law mentioned has nothing to do with protection against dismissal; indeed, according to still valid data published by the OECD in 1999, procedural costs in cases of dismissal in Holland present an index of 5.5, as compared with 1.5 for Italy. The second best practice, the 2002 Austrian law, is in reality very similar to a law recently passed in Italy concerning severance payments and pension funds, and thus has nothing to do with facilitations in dismissals. Finally, the Spanish law mentioned by the Green Paper is probably Royal Decree 5 of 9 June 2006: too recent to have proved to work as a best practice, or at least in the sense intended in the Green Paper.

The modernisation hypothesis set forth in the Green Paper is therefore based on an assumption which is contested by a number of serious, scientific analyses and which the very international organisations that originally inspired it are starting to reconsider: there is no proven correlation between the weakening of constraints on flexibility regarding dismissal and an increase in offers of employment by enterprises. National cases demonstrate the opposite: the persistence of high employment rates while regulations governing dismissals remain rigid.

The Commission document clarifies that the flexibility being discussed is no longer "marginal" flexibility: it affects the protection of workers already in employment, because marginal deregulation, leaving the job protection legislation applicable to standard contracts intact, would favour the segmentation of labour markets and have a negative impact on productivity.

In the Green Paper's view, workers should not be ensured of job security even as insiders. Instability becomes the rule; security is on the outside, in the market, where active employment policies and public redistribution policies take over.

The document completely neglects the social and existential costs of such a re-allocation of economic risk: strangely enough, society is absent from the Green Paper, or represented in paradoxical terms, as for example when it is hypothesised that stability in employment would deprive workers of opportunities and room for manoeuvre, whereas non-standard contracts would ensure them of more career and training opportunities, a better balance between family and professional life, greater personal responsibility. Or again, when it is stated that workers feel more protected by a system providing support in the event of unemployment than by legislation which protects their jobs, despite the contradictory statement, a few pages earlier, that diversification in employment contracts creates a risk of workers falling into the trap of a succession of jobs of short duration and poor quality, with an insufficient level of social protection which leaves them in a situation of vulnerability.

In reality the formula whereby less rigidity in dismissals equals more productivity is not acceptably demonstrated. Modern economic theory has, on the contrary, shown that shifting part of the re-allocation costs from workers to enterprises may, under certain conditions, lead to a gain in terms of productivity. And it is by no means easy to make standard employment more flexible and less expensive, starting with firing costs,

without jeopardising the protection against insecurity offered by all long-term contracts, including employment contracts. Despite the surprising claims made by the Green Paper, this is a function workers set great store by, regardless of income support intervention by the state (to which we will return later), as only reasonable job stability will allow them to plan their lives reasonably.

As regards the hypothesis set forth by the Commission document that a reduction in the protection offered by standard contracts could cause a reduction in market segmentation, it must be observed that there is no certainty that this effect will actually occur: on the contrary, longitudinal analyses demonstrate the persistence in time of a broad band of stably temporary employment relationships, even where constraints on dismissal have been removed (the Green Paper too recognizes that 60 per cent of workers with non-standard contracts remain in this situation for an average of 6 years).

1.1.2 Some positive aspects of the modernisation proposed in the Green Paper

Some positive aspects connected with the modernisation proposed by the document should be pointed out and promoted.

The first is economically dependent employment. The Green Paper correctly distinguishes between false self-employed work, to be held in check, and genuine economically dependent self-employed work, to be promoted within a framework of minimum guarantees.

The prospect of modulating protection starting from a universalistic floor of rights is gaining increasing credit among European scholars and is based on the replacement of the rigid juxtaposition between employment and self-employment with a continuum of activities to which a series of modulated, variable guarantees are attributed, starting from a shared minimum and then gradually progressing towards stronger forms of protection. A methodological perspective of this kind is also to be found in the above-mentioned Report drawn up for the Commission by a group of scholars coordinated by Alain Supiot, where the protection envisaged comes in the form of concentric circles.

In Italy a similar methodological approach was adopted in the “Charter of Workers’ Rights”, which starts from a minimum of general principles, universally applicable to all employment contracts: these include freedom of association, protection of dignity, right to privacy, fair treatment and non discrimination, health and safety in the workplace, protection against sexual harassment at work, fair wage and protection against unjustified dismissal.

Analysis of the Green Paper points to a plausible regulatory proposal by EU institutions—which could be accepted by the social partners—in the sense of a broad, common definition of an economically dependent worker and the provision of minimum guarantees. A provision containing general principles that could be adapted to the requirements of the various Member States according to the features of their national labour markets and the nature and socio-cultural genesis of semi-independent work. Economic literature, in fact, shows that various different elements¹⁰⁶ make up the dissimilar types and “supply” of semi-autonomous or semi-independent work in national and regional labour markets.

With the prospect of calibrating national diversities, excluding forms of harmonisation as such, it would perhaps be possible to obtain employers’ organisation consensus to new, general legislative intervention by the EU.

The second positive aspect of the view of labour law modernisation emerging from the Commission document is the recognition of the role of collective bargaining as a fundamental means of regulation, with the same status as the law, at both a national and supranational level. While the document does not pay adequate attention to the numerous aspects of the collective dimension, it should be observed that collective agreements are seen as a source that is not entrusted with the merely auxiliary task of completing legal provisions relating to working conditions but of adapting standard rules to specific territorial and sectorial situations, in agreement with a concept of horizontal subsidiarity that places collective actors at the centre of regulatory activity.

Finally, two proposals that are totally acceptable are those concerning the setting up of a system of joint responsibility in the chain of sub-contracting, and strengthening the mechanisms for the monitoring and control of the irregular or shadow economy, as well as administrative cooperation at an EU level.

¹⁰⁶ Such as: a) varying extension of the public sector, which may take away space for professional activities; b) different levels of taxation and social contribution; c) the rate of regulation of the commercial product market which could favour fragmented commercial distribution; d) legislation protecting dependent workers (in particular the OECD indicator of restrictions on dismissal); e) the *corruption perception index* which measures the level of corruption of a system: see R. Torrini, *Cross-country differences in self-employment rates: the role of institutions*, Banca d’Italia, 2002. From these analyses it emerges that the presence of particularly protective legislation regarding dismissals is not a decisive explanatory factor in the different self-employment rates.

1.2 *Flexibility and security*

The other key concept of the document, which has an impact in terms of both policy and models of regulation, is that of flexicurity, which is evoked as a sort of paradigm of modernisation capable of inspiring future policies and measures. It will be indeed the subject of a specific communication by the Commission which, as announced in the Green Paper, will be presented in June 2007.

Far from lifting, the mist surrounding this concept tends to be getting thicker, and the announced clarification of the concept itself and its practical implications appears highly appropriate if flexicurity is not to be transformed into a fetish concept.

Obviously the ambiguous nature of the expression, bordering on an oxymoron (security can also be viewed as the exact opposite of flexibility) has legitimised antithetical interpretations: among employers any contamination between flexibility and security is considered synonymous with new rules aiming to make the labour market and the employment relationships more rigid. It was on this understanding of the concept that the original opposition by UNICE led to a delay in publication of the Green Paper.

On the opposite side, including among others some trade unions, interpretations tend to equate flexicurity with flexibility *tout court* (obviously unilateral, in the interests of employers) and to consider the Green Paper as being unbalanced in favour of businesses and the market.

It therefore seems useful, to avoid irreconcilable dualisms, to give a preliminary clarification of the concept.

1.2.1 Flexibility and security in the “macro dimension”

As originally conceived, flexicurity is part of a Northern-European integrated system of industrial relations and welfare presupposing peculiar social and institutional conditions: flexible regulation of employment relationships in some systems¹⁰⁷ appears, in fact, to be directly proportional to the capacity of institutions controlled by trade unions and generously funded by the state via taxation to protect the workers in the employment transitions.

Recourse to this model at a European level cannot, therefore, neglect to consider that it is closely linked to highly particular welfare and industrial relations systems that would appear hard to export beyond the boundaries of Scandinavian democracies. While it is understandable that countries like Sweden should have insisted on this model of flexicurity being referred to in the Green Paper, it is difficult to imagine European integration benefiting from its generalisation, above all in countries which have only recently become EU members, a thing which, it must be restated, hardly ever happens in the document, which confines itself to announcing another study devoted to the development of labour law in the new Member States.

What, on the other hand, can be taken from the Northern-European welfare system is the regulatory idea of the need for—or at least a tendency towards—universal and inclusive extension of protection in favour of those risking social marginalisation and expulsion from the labour market, or the attempt to achieve fairer employment opportunities for women, or to favour self-chosen mobility for the workforce.

1.2.2 Flexibility and security in the “micro” dimension

The concept of flexibility and security changes when referred to more specific models of legal, contractual or mixed regulation regarding single aspects of employment relationships. Certain forms of regulatory rigidity, normally of legal origin, can be weakened by creating protection networks tuned via collective bargaining to support even individual solutions so as to reconcile the flexibility requirements of both employers and workers: part time, flexible, personalised working hours, reconciliation of market work and family work, time bank, lifelong learning and training contracts, parental leaves and negotiated management of temporary work are only some of the areas in which it is possible to experiment with, provide incentives for, and generalise regulatory measures and models of flexibility and security that can at the same time safeguard certain basic guarantees of standard employment and increasing requests by employers for more modulated availability in the supply of labour.

¹⁰⁷ Scandinavian systems, with considerable variations between countries, are inspired by the Ghent system. This system, which was set up in Ghent in the early 20th century, has been in force in Scandinavia (with the exception of Norway) and Belgium since the 1930s. The result of neo-corporative agreements, it consists of trade union administration of unemployment benefit funds: all workers pay voluntary contributions but benefits are prevalently state-supported via generally high taxation rates. The amount of benefit given is linked to the unemployed worker's last wage packet and the income replacement rate today ranges from 75 per cent in Sweden to over 90 per cent in Denmark. Those who decide to become trade union members are automatically enrolled in one of the unemployment insurance funds.

From this viewpoint, Directive 2003/88/EC on the organisation of working time, if one excludes certain “extreme” and widely debated provisions such as the individual opting out clause, is an interesting combination of legal regulation and devolution to contractual sources, aiming at adaptation and regulatory specification in a context of growing articulation and complexity.

It is also true that collective bargaining can usefully carry out this role of adaptation, with a view to effectively achieving the combination of flexibility and security, only in the presence of a floor of rights, formed by a core of workers’ fundamental rights. In the case of the working time directive it is therefore to be hoped that the process of re-examination currently and with some difficulty being implemented will lead to an improvement in the text. More specifically, it appears indispensable: (1) to strengthen the guarantee of the right to working time, not weakening (as has been suggested) collective bargaining’s essential function of defining and modulating flexible and multi-period working hours; (2) to confer effectiveness on the right to non working time (currently limited to the right to annual leave as guaranteed by hard law), ensuring the right to weekly and above all daily rest periods by drastically re-dimensioning the derogations currently provided by Directive 2003/88/EC (and, as a consequence, introduced in national legislative implementations), which in many cases jeopardises the right to a rest period that the directive limits to an hardly tolerable threshold of 11 hours during each 24-hour period; (3) to suppress the individual opting out clause, thus averting recourse to flexibility that is not filtered by collective bargaining.

Another example of a positive combination of legal regulation and collective agreements, this time on a supranational scale, is the requirement of information and consultation in transnational companies, which has given rise to the setting up of hundreds of European Works Councils. The consolidation of dialogue with workers’ representatives as to major company strategies has in many cases led to the negotiation of framework agreements applicable to transnational undertakings and forms of social responsibility that are shared or controlled by worldwide works councils and extended to cover suppliers and sub-contractors. The recent regulation of the discipline regarding worker participation in European companies and cooperatives appears to be a signal, albeit rather a late one, of the highly topical nature of economic democracy in European enterprises, by introducing a notion of corporate governance open to participation by workers in decision-making processes. The Framework Directive that completes the system of rights to information and consultation in national undertakings, giving it the status of a paradigm for undertakings at a European level, provides a normative basis for a negotiated and concerted anticipation of changes affecting enterprises needing to adapt and re-qualify their workforce.

The series of social pacts for competitiveness and employment, and the support they have received from the EU, are also an example to be followed and re-launched as regards both their specific contents and their flexible model of concertation and organisation of contractual structures (organised decentralisation).

It should not be neglected that in this particular dimension—negotiated flexicurity fitted to the needs of the worker as well as to those of the enterprise—the concept reflects a series of real needs for modernisation in labour law:

- (a) a flexibility that will improve the quality and not only the quantity of work ;
- (b) a flexibility in working conditions and working hours that will make it possible to achieve greater balance between women and men in the personal care services (which, although ignored by the authors of the Green Paper, represent a large slice of the new jobs currently on offer);
- (c) a flexibility that is not only unilaterally imposed (either by the enterprise via individual contracts, or by the State via mere deregulation) but democratically negotiated and thus made more effective, for the enterprise as well, because consensually obtained;
- (d) a flexibility that is not a negation but a necessary completion and adaptation of protective legislation: it is not a case of supporting reductions in protection in the employment relations in exchange for uncertain protection in the labour market, but of integrating the regulation of employment relationships with that of the labour market;
- (e) a flexibility that can also lead to changes in the sense of strengthening certain forms of protection in the market, following a logic of systemic integration but without totally upsetting particular consolidated national welfare systems and models.

This does not imply a reduction in the regulatory role of EU institutions; indeed it strengthens it: suffice it to think, for example, of the need to combine policies and legislative measures regarding flexibility with adequate generalised measures for income protection and continuity, including minimum wages (necessarily overcoming the limits of EU competencies); or again the need to strengthen and reorganise policies concerning the reconciliation of work and family obligations.

1.2.3 Flexibility and security as a regulatory technique

Finally there is a third conceptual dimension of flexibility in security that should be stressed: this model of social regulation requires a number of regulatory methods and techniques in line with the multilevel dynamics of the system being built.

The Community classical method and the social dialogue are flanked by the Open Method of Coordination which reflects, at one and the same time, a concept of governance and a view of the systems of social and work regulation that is much more ductile and complex than legal experts are usually accustomed to. The topic of working time has already been mentioned. Policies regarding training and active employment policies are another example in which hard and soft regulatory intervention by the Member States, local governments and the social partners can interact with hard intervention by the EU (above all through the European Social Fund) and soft regulation inducing the behaviour promoted, among others, by the Lisbon Strategy.

The Green Paper, however, says nothing about the possible mix of regulatory measures and techniques that is necessary to fulfil the demanding task of modernising labour law, and above all nothing about the tasks that EU institutions intend to perform in order to achieve this aim. This abandoning of any reflection as to the regulatory techniques and institutional mechanisms on which EU social strategy is to be based, just a few years after the attempt to reconsider European governance in the White Paper of 2001, is frankly disappointing. The normative reductionism of the Commission becomes even more evident when one considers what is decidedly missing in the Green Paper, that is to say, any reference to the constitutional dimension of the Union and its Member States, at a time when the process of adopting the constitutional Treaty seems to have ground to a halt.

2. WHAT IS MISSING IN THE GREEN PAPER: REFERENCE TO THE CHARTER OF FUNDAMENTAL RIGHTS

The Green Paper shows total indifference towards the language of fundamental rights, which has penetrated the European legal system though decades of ECJ decisions and subsequently incorporated in Treaties, especially Art. 6 of the European Union Treaty.

The reasoning followed by the Commission ignores that its document impinge on areas involving (according to ILO Conventions, the UN Charter of 48, the two European social Charters, the Nice Charter) fundamental rights: minimum rest periods, dismissals, working time, equality of treatment, etc.

The Nice Charter, as is known, contemplates socio-economic rights as being *pleno iure* rights, stating in its Preamble the inseparability of the fundamental prerogatives of European citizens. The Charter was not only signed by representatives of European institutions (the Council, Parliament and Commission) but also approved by the governments and Parliaments of all the States involved. Although the Charter was not given a binding effect in 2000, and the constitutional Treaty (which achieved this aim, the Charter making up its entire second part) has up to now been blocked as a result of the referendums in France and Holland, the Nice text has been widely used and interpreted by national and European courts, including the Court of First Instance on numerous occasions and some Constitutional Courts, such as the Italian one, which has frequently emphasised its valuable capacity to “express common constitutional traditions”. The Spanish Constitutional Court even quoted the Charter before its proclamation; the Court of Human Rights used it in a historic ruling in 2002 (*Goodwin*) regarding discrimination for reasons of sex.

Finally, the Court of Justice mentioned the Charter in June last year (although in a decision that was certainly problematic in nature), using it to verify the legitimacy of a directive which according to the European Parliament resulted in a breach of fundamental rights (ECJ Grand Chamber, case C-540/03 of 27 June 2006, *European Parliament vs Council of Europe*, concerning the right of children of citizens from third countries to join their families), and then again this year with regard to the principle of effective judicial protection of individuals’ rights under Community law (ECJ Grand Chamber, case C-432/05 of 13 March 2007, *Unibet v Justitiekanslern*).

After the first ruling, the Advocates General have been insisting in asking the Court for more extensive use of the European Bill of Rights. It should also be recalled that in the first of the above-mentioned rulings the ECJ upheld an element that has up to now been neglected by commentators: the fact that European organs, from the Commission to the Council and the European Parliament, always refer in their provisions to articles of the Charter, expressly declaring their application of it. The fact that the Commission is now presenting such an important document as the Green Paper which takes into consideration many of the rights set forth in the Charter, but does not mention it at all, is an unexplainable form of behaviour and represents a break with what the Commission itself spontaneously decided in March 2001.

Any discourse regarding the modernisation of labour law today implies a discussion of fundamental rights and their sphere of reference, paying greater attention to the effects of the Nice Charter, which on the one hand extends the spectrum of protected rights even to countries with more advanced social constitutions (for example, the right to information and consultation), and on the other obliges new Member States to adapt their legal systems accordingly.

According to the horizontal clauses of the Charter (Art. 52) the “essence” of the rights recognised in the text must always be ensured: even if one admits the merely “political” nature of the Nice Charter, the EU institutions have always declared their reluctance to trample on what it solemnly proclaims. Totally permissive regulations of dismissal, for example, would violate Art. 30 of the Charter. To quote a concrete case, on the basis of the Nice Charter, the two Social Charters, and international legal provisions, the Italian Court of Cassation has repeatedly found that regulatory systems providing no protection against unfair dismissal are in contrast with the concept of internal public order and so cannot find their way into the Italian legal system. On 7 February 2000 (Judgement n. 46) the Italian Constitutional Court saw the criterion of necessary justification of dismissal as the constitutionally binding content of the right to work. There are no similar considerations in the Green Paper, which does not bother to evaluate the coherence between the various hypotheses that are (or could be) put forward and the respect of rights (and principles) enshrined in the Nice Charter (and previously in the two European social charters and in the jurisprudence of the judges in Luxembourg).

The document proposes a model of labour market regulation allegedly intended to protect individual needs against the risk of unemployment and lack of income, but it is just in this area that it ignores the so-called “new rights” (second-generation social rights) that protect and support citizens over and above the existence of a contractual relationship, thus preventing inactivity from being converted into permanent forms of social exclusion.

Integrating what is generally provided for by national constitutions, the Nice Charter recognises the right to social security and housing that will guarantee a dignified existence (Art. 34 Clause 3) with a clear allusion to widespread legislation (with the exception of Italy and Greece) regarding basic income, and the right to lifelong professional training (Art. 14). Now these two prerogatives which—following the Supiot Report—are widely considered to be of strategic importance to respond rationally and efficiently to the need to protect workers’ basic rights in the new dynamic typical of the knowledge-based economy, remain outside the Green Paper’s sphere of investigation.

Although it alludes to the “modernisation” of labour law, the Commission document implicitly accepts the more conservative attitude whereby existential “security” for workers can only be achieved with a *corpus* of rules governing contracts, whereas the Nice Charter—as a political document if nothing else—had already broadened the horizon to the plane of social citizenship, from public services to training processes and the guarantee of a “vital minimum” that would partly shield citizens from labour market risks.

ECJ jurisprudence is equally ignored: of the vast repertoire of decisions concerning labour law passed by the judges in Luxembourg, only 4 judgements are quoted.

In advancing the possible options for the future, no reasoning is offered as to the prevalent orientations of the Court: the debate that should be held in civil society and the European public sphere is not, in substance, called upon to assess the choices to be made on the basis of considerations as to the fundamental rights or the subjective claims involved, or even to reflect on what has been decided by supranational judges, whose authority on the issue cannot be doubted. The Green Paper seems to want to authorise any choice, to leave all options open, as long as some combination of “competitiveness” and “security” is achieved. The question is that in Europe the latter concept has for a long time been expressed through the semantics of fundamental rights and has a consolidated political, cultural and institutional foundation in solemn documents like the Nice Charter and the jurisprudential circuit that binds together supranational courts and national judges. A world that does not seem to exist for the “infinite pragmatism” of the Commission.

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Memorandum by The Law Society of Scotland and The Law Society

1. This response has been prepared jointly by the Law Society of England and Wales and the Law Society of Scotland. The Law Society of England and Wales is the representative body of over 100,000 solicitors in England and Wales. The Society negotiates on behalf on the profession and lobbies regulators, government and others. The Law Society of Scotland is the governing body for Scottish solicitors. It promotes the interests of the solicitors' profession and those of the public in relation to the profession.
2. Both Societies regularly comment on domestic UK legislation, as well as EU legislative initiatives through their joint Brussels office. This position paper has been prepared with input from the Employment Law Committees of both Societies. These Committees are composed of practitioners with an expertise in the field of employment law. This response is based on the views given in our response to the Commission's Green Paper, which is limited to issues of employment law, rather than broader issues of economic and social policy. As such, we have not answered all the questions posed.

INTRODUCTION

3. We endorse the Commission's introductory comments that the original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship. That is an inequality which exists between the worker and the employer. However, what the Green Paper goes on to conclude is that the original purpose is no longer appropriate and that the traditional model has the effect of disadvantaging newcomers and jobseekers. In our opinion, the Green Paper erroneously seeks to re-focus the economic and social inequality of employment as one between workers with secure employment status and those without. We believe that it is important to restate the original purpose of labour law by reference to an inherent tension in the employment relationship which legislation should seek to mediate.
4. Also of concern is the peripheral role in the debate given to collective labour law. The stated purpose of the Green Paper is to focus on individual labour law. The debate should be re-balanced to attach appropriate importance to issues of collective labour law. EU decision makers have already recognised firstly the importance of social dialogue in modernising Europe's economy and labour markets and secondly that for many, individual employment operates through a framework of collective bargaining.¹⁰⁸

¹⁰⁸ See for example the Communication from the Commission, "The European social dialogue, a force for innovation and change" (COM (2002) 341 final).

Question 1

5. In our response to the Commission we noted that it was not clear in the Green Paper exactly what “flexibility” was actually sought or envisaged. We would not, for instance, endorse flexibility which aimed to increase the use of zero-hour contracts; such contracts do not, in general, provide an adequate level of security.

Question 3

6. We noted that there is an inherent contradiction within the term “flexicurity”. It is difficult to envisage how measures can be adopted which will on the one hand preserve security and existing rights, and, on the other, provide for increased flexibility for employers. This contradiction is not addressed in the Green Paper.

7. As for changing existing arrangements for employment security, the priorities for a meaningful labour law reform agenda should include giving appropriate emphasis to collective as well as individual rights. If transition from one employment status to another is to be considered, then the role of collective labour law should not be overlooked. There are numerous instances, for example in relation to working time, where increased flexibility has been achieved through the use of workforce and collective agreements. These models should be fully considered in any labour law reform agenda.

8. It is also difficult to envisage meaningful advances in the employment model by considering labour law (collective or individual) in isolation. Priority must be given to related social security and economic factors which necessarily impact upon the employment relationship and the relative security of workers.

Questions 4 and 5

9. As to the challenges in the labour market, greater clarity is certainly needed in the UK to determine the legal distinction not only between employment and self-employment, but also between employment and the wider “worker” category protected by directive-derived worker rights. The current uncertainty about which employment/worker rights apply, the appropriate tax treatment, and ownership of related risks and responsibilities (particularly in relation to personal injury and other health and safety issues) militates against flexible transition between these key, different, working relationships. Particular difficulties include:

- (a) Different findings of status depending on the forum. For example, HMRC (Her Majesty’s Revenue and Customs) findings on the tax status of an individual will not necessarily be binding on an Employment Tribunal, and vice versa.
- (b) Since each case turns on its own facts, preliminary hearings by Employment Tribunals on employment status (as a pre-condition of enforcing statutory employment rights) will not be binding on other Tribunals, which leads to something of a Tribunal lottery for the parties involved.
- (c) For the same reason, currently there are many examples of where “hard cases make bad law”, where advantage is taken of the legal uncertainty to widen the parameters of protection (eg for health and safety protection as in *Lane v. Shire Roofing Co (Oxford) Ltd* [1995] IRLR 493, where the Court of Appeal pointed out there are “good policy reasons in the safety at work field to ensure that the law properly categorises between employees and independent contractors”, but then interpreted the law broadly to give the injured worker health and safety protections).
- (d) The plethora of, inevitably costly, higher court cases continues to develop the tests to be applied when determining employment status and means that this becomes increasingly complex and uncertain. In a recent example (the 2006 decision in *Ministry of Defence HQ Defence Dental Service v. Kettle*, [2007] UKEAT 0308-06-3101 (31 January 2007)) the Employment Appeal Tribunal (EAT) added an additional requirement when considering the weight to be attached to contractual documentation, namely to decide whether the parties intended the documents to be an exclusive record of their agreement, and, if not, to look at other relevant material, including oral exchanges and conduct, to determine employment status.
- (e) HMRC’s stricter test to accept the self-employed status of a former employee working for their former employer (eg the 2005 *HMRC Commissioner’s decision in Demibourne Ltd v. HMRC* [2005] UKSPC SPC00486, emphasising the need for a clear distinction between the old and new relationships, but again very much turning on individual facts). Again, the consequent uncertainty about the tax position going forward acts against easy transition from employed to self-employed status, even on moving to a consultancy position on retirement (as in the *Demibourne* case).

- (f) The added difficulty of distinguishing self-employment from the third, “worker”, category, as indicated by recent case law (*Bacica v. Muir* (2005, IRLR 35), regarding whether a supposedly self-employed painter was a “worker” under the Working Time Regulations), and the different tests to be applied.

10. Plainly such uncertainty not only militates against smooth transition from employed to self-employed status in the UK, but facilitates scope for non-bona fide transitions. In particular, it encourages those seeking to avoid employment, and tax, and health and safety obligations, to press those in less strong negotiating positions to move to less secure, ostensibly self-employed, status. This leaves these same individuals with the onus of subsequently proving employment protection before being able to claim attendant employment rights.

11. We would suggest, therefore, that this is a key area for legal reform within the UK (the same basic rules applying both in Scotland and the rest of the UK). Although the legal definitions and associated problems will differ in other Member States, plainly moves towards harmonisation, as well as clarity, at the Community level will inevitably assist cross-border transitions, and so in turn provide greater flexibility in the EU labour market.

12. There is also often uncertainty as to the employment status of temporary agency workers and an abundance of case law on the question. It is currently possible that an agency worker whose contract is with the agency and who is supplied to a client business may be an employee of both or either business or not be an employee at all. This obviously has important implications for the employment rights, such as protection against unfair dismissal, which is dependent on the worker having the status of employee.

13. While case law suggests that the worker might often be an employee of the client business, this is not automatic. Indeed in recent cases, the Employment Appeal Tribunal has itself called on government to clarify the position of such workers (*James v. Greenwich Council*, [2006] UKEAT 0006_06_1812 (18 December 2006)), noting that “many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users”.

14. We also comment in relation to such workers, that there are a number of factors that affect transitions from temporary to permanent positions. For instance “temp-to-perm” fees often have the effect of hindering a possible transition from a temporary agency position to a permanent position in the agency’s client company. Likewise other terms and conditions of the agency worker’s engagement might make it more attractive from the client business’s perspective (or indeed the worker’s) for him or her to remain in a temporary post. It should be recognised, however, that other factors must also be borne in mind when considering the merits of agency work and the rules pertaining to it.

15. If additional protections were afforded to agency workers, care should be taken so that such measures do not affect adversely the employment market. There are high rates of agency employment in the UK and it is often argued that “Day 1” protection could have adverse consequences for the amount of available employment.

Questions 6

16. The principle of a “floor of rights” is undoubtedly attractive to workers, particularly vulnerable workers who may enjoy few, if any, of the rights associated with the traditional model of full-time employment. For instance, those on zero-hour contracts are not considered to be employees under English law, and may not be workers either (*Carmichael v. National Power* [1999] UKHL 47). Although there will undoubtedly be cost implications for those who employ them, there may be some benefit associated with a simplification of the current system arising from granting certain basic rights to all workers. It may also remove the unfair competitive advantage enjoyed by those who seek to exploit workers by disguised employment. There are however serious obstacles to the notion of a floor of rights for all workers.

- (a) Given the variety of labour market conditions and employment protection rights throughout the expanded EU, it will be very difficult to provide for measures affecting all workers that will operate successfully in all Member States.
- (b) Identifying those who will benefit from the protection of a floor of rights is a very complex and perhaps impossible task. It is often very difficult to distinguish between genuine self-employment and disguised self-employment. The variety of tests developed by courts and tribunals in the UK gives some indication of the difficulties that exist in this area of law. Disguised self-employment is often used as a mechanism by unscrupulous employers to prevent the worker from enjoying the protection to which he or she would otherwise be entitled. However, self-employment, whether genuine or otherwise, may also be attractive to the individual for tax or other reasons. The extension of a substantial number of rights enjoyed by workers to the genuinely self-employed would undoubtedly

impose unacceptable costs upon those appointing them and give rise to loss of employment. It would therefore be unacceptable to business.

17. One of the most compelling arguments in favour of regulation of the employment relationship is that the parties enter into that relationship on an unequal footing. That notion of inequality is perhaps best illustrated in the context of vulnerable workers. Workers may be vulnerable on account of inexperience of the labour market, language difficulties, or inability to obtain or pursue traditional models of employment. Homeworkers, agency workers, migrant workers, those on zero-hour contracts and young workers are all categories of workers who are at particular risk of exploitation. As noted above, moves towards harmonisation and greater clarity of terms, such as that of “worker”, at the Community level will inevitably assist cross-border transitions, and so in turn provide greater flexibility in the EU labour market. However EU-wide measures could be adopted to protect vulnerable workers as they will exist throughout the EU and will often be subject to the same pressures and difficulties. While not endorsing specifically any of the following, a variety of measures could provide increased protection for these vulnerable groups and might merit further consideration.

- (a) The introduction of a legal presumption of either employee or worker status in the case of vulnerable groups of workers or workers employed in industries or sectors where exploitation or disguised employment is commonplace. The onus of proof would lie on the employer to demonstrate that some other relationship existed (for instance, worker instead of employee status or self-employed rather than worker). The decision as to the categories of workers or sectors in which the legal presumption should operate could be left to individual Member States to determine, in accordance with the principle of subsidiarity.
- (b) The creation of stronger disincentives for employers to deny basic rights for workers. These could include penalties for employers who seek to impose self-employed status on staff in order to avoid the additional costs and protection that follow from employment or worker status. These could follow the models for penalties already in place, where employers fail to consult on collective redundancies or TUPE transfers. Alternatively, awards made by tribunals could be subject to uplifts in the manner provided for by the Statutory Disciplinary and Grievance Procedures.
- (c) The imposition of additional obligations upon end-users of agency workers in order to remove the insecurity and poorer rates of pay experienced by agency workers. This could include a statutorily imposed equality clause on all agency workers, in the same manner already provided by the Equal Pay Act 1970, or an obligation upon end-users to notify all agency workers of suitable vacancies, as provided by the Temporary and Agency Workers (Prevention of Less Favourable Treatment) Bill.

April 2007

Memorandum by Liz Lynne MEP

1. Flexibility of the labour market

How flexible is the labour market in the UK? What could be the benefits of making it more flexible, and how could this be achieved? In which ways, if any, could changes in labour law help with this?

One of the most important ways of retaining a flexible labour market is better regulation at an EU level and better transposition and implementation of EU legislation by the UK Government. Independent Impact Assessment of new legislation must be introduced to force Ministers to look at the implications of their decisions. Existing Regulatory Impact Assessments (RIAs) are performed inconsistently and usually by the department that is proposing the directive. These should be performed by a new independent body, to give an objective view to Parliament. Sunset clauses should be standard in EU and domestic legislation, with different lifetimes set depending on the nature of the legislation. EU and national processes need to be streamlined. The UK Government must do more to ensure that proposed and existing legislation is necessary at EU level and delivers genuine improvements to social standards and Health and Safety at Work whilst at the same time not being detrimental to business competitiveness. In the health and safety field legislation must only be proposed if there is medical or scientific evidence proving the need for it. The European Commission should repeal or amend legislation that is either unworkable at EU level or can best be left up to Member States.

2. *Employment security*

2. What is the extent of employment security in the UK? What could be the benefits of changing the present arrangements for employment security? In which ways, if any, could changes in labour law help with this?

Recent years have seen a decline in unionisation and collective bargaining in the UK. Collective agreements are often not applicable to many small businesses which make up the vast majority of employers, where wages are agreed bilaterally between owner-managers and employees. Employment security is therefore often linked to flexibility, the availability of jobs in the economy and the ease of which these can be obtained. Individuals value the flexibility that so called “atypical” work, such as temporary work, provides.

3. *The concept of “Flexicurity”*

How helpful do you think is the Commission’s concept of “flexicurity” seeking to combine the ideals of a flexible labour market with those of employment security? How practical could it be to strike a balance between these two ideals and where should such a balance be struck? In which ways, if any, could changes in labour law help with this?

The concept of flexicurity should broadly be welcomed as a means to ensuring the development of modern, flexible labour markets across the EU. However, it must be acknowledged that there is not one single model of flexicurity that can be delivered, given the diverse traditions in Member States across Europe. Each Member State will have to mould any reforms to their own situation. In line with the flexicurity approach, any measures that lead from the green paper must be aimed at the promotion of flexible labour law whilst at the same time protecting workers where necessary.

4. *Other labour market challenges*

What other challenges are facing those involved in the labour market? Respondents may wish to comment on their knowledge of a variety of different types of “subordinate” employment contracts and/or on their knowledge of the challenges faced by those in self-employment, “economically-dependent” self-employment and agency work. To what extent could changes in labour law help to address these challenges?

A key challenge is to increase the skills levels of individuals in the UK, irrespective of religion or belief, age, gender, disability, race, sexual orientation. This is vital if all individuals are to benefit from the flexible labour market required if the UK is to remain competitive. It is vital that disabled people and other minority groups are provided with better training, skills and have the opportunity to fully participate in the labour market.

In many cases contracting, self-employed work, freelancing and temporary agency work provides choice and flexibility for individuals, many of whom choose these options for a number of different reasons.

For others, these forms of employment help to provide a transition from unemployment to employment, and in many cases suit the individual’s and the company’s preferences. The greater flexibility provided by so called ‘non-standard’ arrangements is vital. Due to different working traditions, any definitions of employment and self-employment should be dealt with at Member State level.

Temporary and agency workers already enjoy many of the same rights as employees. Further measures may be necessary at Member State level to address the needs of some vulnerable agency workers, which should be supported, but this cannot and should not be attempted at a European level.

5. *Groups covered by labour law*

To which categories of workers should labour law apply? Are any workers currently excluded that ought, in your view, to be included? What is your view of the issues raised by the Green Paper about the applicability of labour law to groups of workers whose employment status is intermediate between that of employee and self-employed?

The UK has given security to so called “atypical workers” by extending key employment rights to “workers” as well as to employees and by ensuring the relative flexibility of our traditional contracts. The negative image given by the European Commission of the various types of atypical work contracts and of self employment is not justified.

Bogus self employment and undeclared work should of course be clearly combated, but most self employment is not bogus. There are measures that could be taken to enhance the status of self-employment at Member State level, which would reduce the risk of the comparatively small number of cases of “disguised” self

employment from succeeding. Self employed workers are already covered by much of labour law in many Member States but the inclusion of self employed at EU level as a matter of course is not the way forward. Legislation should be looked at on a case by case basis.

6. *Role of EU Regulation*

What is the role of regulation at the EU-level in achieving a modernised system of labour law? Are there any specific pieces of EU legislation that need either to be repealed or to be introduced? Do you consider that the Green Paper's proposed "Floor of Rights" for all workers is a viable one? In order to promote worker mobility, would a Community-wide definition of "worker" be useful?

The competence to modernise labour law lies first and foremost at Member State level. The primary role of the EU should be to organise exchanges of experiences and best practice between Member States and monitor national reforms using the instruments of the European growth and jobs strategy, while at the same time bringing in legislation where it is necessary for the functioning of the internal market.

Examples of legislation that should be withdrawn are the Temporary Agency Workers Directive; currently stuck in Council of Ministers, as well as the Commission proposal to remove the UK's opt out of the Working Time Directive.

The proposal in the Green Paper for a "floor of rights" dealing with working conditions is a positive idea, in many ways EU legislation has already helped to secure this, however such a concept should not be used as a justification for further unnecessary or unworkable EU legislation.

There is no need to have a definition of "worker" at EU level, which should be left up to Member States to define. If such a definition was brought forward at a European level it would contravene the different traditions and labour markets across the EU. Any definition would be extremely difficult to draft and would inevitably have negative consequences for the flexibility of the UK's labour market. In particular, any definition concluded at EU level may include self employed people and others providing a commercial activity but not currently classed as 'workers' in the UK. It is vital that the UK Government continues to push to ensure that, in particular with regards to the application of the Working Time Directive, EU legislation is applied to the worker rather than to the contract, to prevent individuals having numerous contracts with the same or different employers as a means of circumventing the legislation.

30 March 2007

Memorandum by National Farmers' Union

On 22 November, the European Commission presented a Green Paper entitled "Modernising labour law to meet the challenges of the 21st century". The EU Green Paper invited the social partners to give their opinion by 31 March 2007 on how EU and national labour law can help make the labour market more flexible while at the same time providing workers with maximum security ("flexicurity"). This submission is the response of the National Farmers Union (NFU) of England and Wales to the House of Lords Select Committee on the European Union Inquiry into the EU Commission Green Paper "Modernising Labour Law to meet the challenges of the 21st century". The NFU is making this submission as the largest agricultural employer's federation in the United Kingdom representing farmers and growers in England and Wales.

FLEXIBILITY OF THE LABOUR MARKET

Inflexible labour market rules act to the detriment of both enterprises and workers by preventing or restricting the formation of mutually beneficial economic relationships. However, whilst it is now largely accepted that labour law is required to even the balance of power between enterprises and workers and to improve the operation of the labour market, it is also recognised that this can reduce flexibility within labour markets and reduce employment opportunities. A starting point to changes in labour law to increase the flexibility of the labour market would be to focus labour law initiatives on a narrow perception of the employment relationship, and for labour law not to be used to achieve broad social objectives.

The NFU notes the trend towards granting of derogations from general EU labour law in situations where a collective agreement is in place—for example Article 18 of directive 2003/88/EC. The NFU welcomes this flexibility, but is unable to take advantage of such opportunities because the tripartite social dialogue imposed by the Agricultural Wages Act 1948 falls outside of the narrower criteria of collective agreement. Consequently, the NFU requests that the derogations available for collective agreements by broadened to include additional forms of social dialogue.

The NFU is supporting the development of the proposed EU Agripas project of an EU wide system of recognition and accreditation of agricultural qualifications, skills and competences. It is hoped that this will enlarge the available labour pool for both enterprises and workers facilitating the free movement of skilled and semi skilled agricultural labour and the provision of training to benefit both enterprises and workers.

EMPLOYMENT SECURITY

In the UK workers gain protected status after one years service, and once protected they should not be dismissed without cause but may be made redundant if their role becomes obsolete. This can result in substantial re-structuring costs being imposed on enterprises to apply a fair redundancy procedure, and to meet the redundancy payments of workers with long service. This can result in substantial liabilities for enterprises already under financial stress, and can encourage the winding up of enterprises that might otherwise have a future.

The Transfer of Undertakings Regulations (TUPE) serve to protect workers employment rights when an enterprise is merged or taken over, "except when the role is redundant due to an economic, technical or organisational reason entailing change in the workplace". The revision of the regulations in 2006 is welcomed for the greater clarity of drafting, but the broad reach of this legislation is not entirely welcome for the added complexity to re-organising agricultural enterprises.

In trying to suggest helpful changes to labour law, one could revisit the accrual of labour rights with length of service. Redundancy payments for long service serve to reward inertia and may have age related effects. Such payments do not reward the worker for the present marginal value of labour.

THE CONCEPT OF "FLEXISECURITY"

The concept of "flexicurity" to combine the ideals of a flexible labour market with those of employment security is somewhat helpful. The conflicts inherent in flexible labour markets and employment security underpin many social dialogues at national and EU level and this newly coined word neatly encompasses these issues. What is less certain is whether the concept of "flexisecurity" will prove to be more than shorthand for maintaining the balance between these competing interests.

Changes to labour law to help secure "flexisecurity" must recognise that security of employment must be founded upon viable economic relationships, and that flexibility is necessary to retain viable economic relationships. Overemphasis on employment security will impact on the motivations of the workers, and the manoeuvrability of enterprises in responding to external stimuli, and consequently lead to adverse consequences damaging the prospects of the enterprise and the role.

OTHER LABOUR MARKET CHALLENGES

The present Working Time Directive reference period of four months sits uncomfortably with sectors operating to annual production cycles such as parts of agriculture. The NFU would welcome the introduction of a 12 month reference period which would allow the tailoring of working hours to growing and harvesting conditions with the effect of increasing the flexibility of the labour market whilst adding to the security of employment.

Seasonal migrant workers are becoming increasingly topical on both a national and EU level. The extent to which labour law changes could help is difficult as many of the concerns are outside of labour law as traditionally perceived and include issues such as migration policy, housing standards, and access to government services.

GROUPS COVERED BY LABOUR LAW

At present labour law applies irregularly to a spectrum ranging from employees, paid workers, unpaid workers and volunteers, with different definitions and applications in different acts. In this it would be helpful if the definitions could be common across different pieces of legislation, although it is to be expected that the application of any given piece of legislation would apply to the various categories of worker on a particular basis.

The Green Paper suggestion to apply labour law to workers whose employment status is intermediate between employee and self-employment is to be resisted. Whilst it is recognised that there is disguised employment this is adequately dealt with by the present national law. However, the Green Paper proposal to apply labour law to all intermediate employment status could render ineffective or unlawful many positive economic

relationships which are not based on an imbalance of power between the parties, but rational allocation of risk and autonomy. In particular the Green Paper proposal could reduce the flexibility of workers to act as independent agricultural service providers and contractors.

ROLE OF EU REGULATION

To an extent the labour market of England and Wales is now part of an EU labour market, and additionally with significant connection to some extra-EU countries labour markets. Despite this however, the role of EU-level regulation falls to largely be applied by the member states resulting in diversity at the level of member states. The EU members also exhibit substantial cultural and geographic diversity for example with daylight hours and temperature ranges. Consequently, further EU-level labour regulation is not to be welcomed. This may be illustrated by the problems on agreeing to reform of the Working Time Directive with alternative proposals being put forward but making slow progress towards the approval of an acceptable modified EU-level regulation.

The Green Paper “floor of rights” should be resisted as too inflexible to apply meaningfully across 27 members states with varied cultural traditions and geographic features. The Community wide definition of a worker to promote worker mobility should also be resisted as the risk of adverse consequences to national level policies is in excess of any advantage conferred.

28 March 2007

Memorandum by Dr Wanjiru Njoya

RESPONSE TO QUESTIONS 2 AND 3

Question 2. Employment security

What is the extent of employment security in the UK?

1. The current law governing the termination of employment provides relatively weak employment security when workers are dismissed for economic reasons.
2. The justification for this approach is that when employing entities undergo organizational restructuring, the firm’s economic success must take priority over job security. Recognizing the importance of unregulated dismissal in enhancing flexibility, the law generally respects the “managerial prerogative” to dismiss workers as a cost-cutting measure.
3. This approach is reflected across international law, European law, and UK law. For instance the International Labour Organization acknowledges that the “operational requirements of the undertaking” may justify termination of employment (ILO Recommendation No 119 of 1963, Art 2(1) and Art 12). European law generally allows dismissal for “economic, technical or organizational reasons” as a defence to an unfair dismissal claim (the Acquired Rights Directive). At common law, in the words of Lord Hoffmann: “Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest” (*Johnson v Unisys* [2003] 1 A.C. 518 at par 37). Similarly, in the United States economic dismissals are justifiable on grounds of “business necessity” (National Labour Relations Act, 29 U.S.C. §§ 151–169).

What could be the benefits of changing the present arrangements for employment security?

1. The current law governing employment security already contains ample scope for flexibility, and should not be changed to the detriment of job security.
2. In drawing the boundaries of its regulatory scope the law does, and should continue to, recognize that not all dismissals which take place during corporate restructuring are justifiable: see especially the Transfer of Undertakings (Protection of Employment) Regulations 2006.

3. It is important however to address more directly the concerns raised by the EU Green Paper about the possible detrimental impact of employment protection legislation, one of the key concerns being the protection of “insiders” at the expense of “outsiders”.

3.1 *The perceived problem of permanently employed “insiders”.* The EU Green Paper reflects the concern that job security for the employed might allow them to become entrenched in their positions, resulting in rigid labour markets where certain marginalized groups are perpetually unemployed.

3.2 The Commission suggests that job security should therefore be understood as simply extending to the availability of jobs in the economy as a whole, and especially widening access to employment opportunities, rather than with job protection for the employed in their specific or current positions.

3.3 The Organization for Economic Co-operation and Development (OECD) also notes that employment protection legislation may impede the creation of new jobs, as such legislation potentially “increases the costs for the employer of adjusting their workforce and can create a barrier to hiring” (*Employment Outlook*, 2006, par. 3.3).

4. While the concern about entrenched “insiders” is understandable, recent empirical studies published by the OECD “generally have not found robust evidence for a significant direct effect of [employment protection legislation] on unemployment” (*Employment Outlook*, par 3.3). It therefore seems likely that there is no direct link between employment protection legislation and rising or persistent levels of unemployment. The OECD found that evidence of indirect effects on job creation remains ambiguous. The risks of adverse effects on opportunities for the unemployed appear to arise only when job protection is “too strict”, and not simply from the mere existence of job protection.

5. Unlike the law in other EU member states UK job protection law cannot be described as “too strict”. The UK is second only to the United States in having the lowest levels of employment security legislation in the world (see the data in *Employment Outlook*).

In which ways, if any, could changes in labour law help with this?

1. Employment security should not be understood simply as workers being “adaptable” and “employable” in different jobs. Instead it should be understood as “a form of regulatory intervention designed to protect workers against arbitrary managerial decision-making”, a protection which recognizes the valuable long-term relationships which arise between employees and the firms for which they work, giving workers an entitlement to legal protection of their firm-specific human capital investments (Deakin and Morris, *Labour Law* (4th ed.) at 388; Njoya, *Property in Work*, Ashgate: Aldershot, 2007).

2. The statement in *Employment in Europe* (2006, p 81 *et seq*), cited in the EU Green Paper, that “workers feel better protected by a support system in case of unemployment than by employment protection legislation” cannot be considered reliable. It remains the case that job security in the job actually held is paramount: “a secure job is still an essential aspect, for most individuals, of their long-term economic security” (Deakin and Morris, *Labour Law*, at 569).

3. The law should therefore be based on a firm commitment to employment protection legislation, subject to conducting a careful assessment of the appropriate degree of protective legislation. The OECD recommends that the implementation of such legislation should be “quick, predictable and distort labour turnover as little as possible”, and “should be carefully coordinated with reforms to the unemployment benefits system . . . so as to reconcile so far as is possible labour market flexibility with security for workers” (par. 3.3.)

Question 3. The concept of “flexicurity”

How helpful do you think is the Commission’s concept of “flexicurity” seeking to combine the ideals of a flexible labour market with those of employment security?

1. Although the Commission still refers to “full employment”, this is giving way unduly to concepts such as adaptability, responsiveness, and employability. Flexibility on the workers’ side is understood as the workers’ capacity to anticipate change and move readily from one type of job to another. As European employment policy emphasizes the creation of “more and better jobs” the focus is on ensuring that workers who lose their jobs will find alternative opportunities within a dynamic and vibrant economy.

2. While these are worthwhile goals, the concept of “flexicurity” as depicted in the Green Paper does not in fact retain a sufficient focus on employment security.

How practical could it be to strike a balance between these two ideals and where should such a balance be struck?

1. It must be accepted that there are inevitably situations where it is not possible to “balance” both ideals. In these difficult cases, this response suggests prioritizing security over flexibility, in order to avoid unacceptable social costs of job loss.
2. *Social Cost of Job Loss*: Once a job is lost it may prove difficult or impossible to find an alternative of comparable worth, an effect often felt for the remainder of the worker’s career. Empirical studies demonstrate “substantial and long-lasting effects of job loss on annual earnings and wages” over the long term, from which many workers never recover (Topel, “Specific Capital and Unemployment: Measuring the Costs and Consequences of Job Loss” (1990) 33 *Carnegie–Rochester Conference Series on Public Policy* 181–214 at 181).
3. If the next best alternative is worth far less than the job lost, then the cost of job loss may well prove too high. Economists define the cost of job loss as the difference between the utility value of being in the current job and that of the next best alternative. The utility gained from the current job is primarily determined by the wage received, while the alternative level of utility is affected by the wages on offer, the chances of securing another job, and whatever utility is derived, in terms of both replacement income and leisure time, from unemployment (Green and McIntosh, “Union Power, Cost of Job Loss and Workers’ Effort” (1998) 51 *Industrial & Labor Relations Review* 363–83 at 365–6).
4. The social costs of job losses are severe: “The loss of a job . . . may be far more hurtful than a term in jail. When these deprivations are inflicted arbitrarily, and there is no recourse, a gap in the legal order exists. We become more sensitive to that gap when the decisions are made by organizations that seem large, powerful and impersonal” (Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage Foundation, 1969) at 38).
5. This has been recognized in the context of unfair dismissal litigation in the UK, Lord Millett observing that “many people build their lives round their jobs and plan their future in the expectation that they will continue. For many workers dismissal is a disaster” (*Johnson v Unisys* [2003] 1 A.C. 518 at par 72).
6. The social cost of job losses cannot invariably or uncritically be assumed to be necessary in the interests of efficiency or overall wealth benefits to society. During corporate restructuring substantial gains for shareholders are often made at the expense of employment and wage losses. When this happens the corporation is “effectively transferring to the public sector the costs of maintaining these displaced workers” (Singer, “Jobs and Justice: Rethinking the Stakeholder Debate” (1993) 43 *University of Toronto Law Journal* 475–731 at 496); large scale dismissals associated with corporate restructuring enhance private profits for the corporation while imposing the costs onto the taxpayer.

In which ways, if any, could changes in labour law help with this?

1. Workers generally accept that employing entities need to be flexible and respond quickly to changes in the global market. Nevertheless there is sometimes a real choice to be made between shareholder and employee interests, particularly where job cuts are intended solely to boost a firm’s share price on the market in response to what may be a temporary dip in the market. Therefore:
2. In balancing shareholders’ interest in profit maximization with the workers’ interest in job security the new focus in UK company law on “enlightened shareholder value” (see the Companies Act 2006, Part 10) may provide a blueprint for labour law: managers should not allow a short term gain in stock-market value to take priority over the long-term interests of the firm. Job losses should not be prompted simply by an undue focus on the firm’s short term share value.
3. It should be explicitly recognized that in the long term the firm’s value is tied to its workers, and this should be a factor which employing entities are required to take into account during corporate restructuring.

30 March 2007

Memorandum by the Professional Contractors Group

1. The Professional Contractors Group was founded in 1999 as the representative body for freelance contractors and consultants in the UK. Many of its members operate their own one or two-person limited companies; PCG also represents unincorporated sole traders and freelancers who operate via umbrella structures.

2. All of PCG's members take on business risk and supply their services to a range or succession of clients. They therefore represent the flexible, skilled, knowledge-based workforce on which the EU's future prosperity depends. They provide IT, engineering, project management, marketing and other functions in sectors including financial services, telecoms, oil and gas and defence.
3. PCG considers the needs of its members both as workers and as enterprises. As enterprises, PCG's members represent the very smallest in the UK. As workers, they can be described as self-employed, freelance, independent or a number of other terms. Here they will be referred to as freelancers or contractors for convenience.
4. PCG exists because a large number of freelancers grouped together to safeguard and protect their way of working, which they adopted as a positive career choice. We therefore represent many of the "atypical" workers identified in the Green Paper. It is relatively unusual for such workers to have such a representative voice: they sit outside the dichotomy of "employer and employee" that dominates the policy discourse and which also provides the structure for the EU's social dialogue. PCG hopes that the Green Paper will at least highlight the inadequacy of the social dialogue in its current form, which excludes so many workers and enterprises.
5. Analysis of ways of working often tends to focus, wrongly, on the nature of the parties: "employers" and "employees", "self-employed" and "clients". It would be far more useful and accurate to focus on the relationships themselves, of which there are two basic types: employment relationships and commercial relationships.
6. In UK law, this distinction is expressed in terms of contracts "of service" (employment—whereby the employee enters into the service of the employer) and contracts "for services" (commercial—whereby one party agrees to provide services to another, but not to enter into their service). Freelancers and contractors work using contracts for services, and are therefore not employees.
7. The Green Paper's repeated references to "contracts" without ever acknowledging that contracts exist in these two fundamental forms represents one of its chief weaknesses, as its terminology is often rendered meaningless by the resulting ambiguity. All working relationships fall into one of the two camps: PCG recommends that any party wishing to consider the nature of ways of working should take this fully on board at the outset, and is baffled that the Green Paper failed to do so.
8. PCG now offers responses to the questions posed in the Committee's Call for Evidence of February 2007.

Question One

9. Although "labour market flexibility" and "flexible working" are much-used phrases in the current policy discourse, they are seldom adequately defined or understood. The Government's "Success at Work" strategy paper, and many other contributions to the debate, have tended to view "flexibility" as entailing a variation in patterns of employment, away from the traditional full-time model.
10. PCG believes that a far more significant and meaningful contributor to flexibility in the labour market is freelancing or self-employment. Freelancers provide their services on a commercial basis. They can be engaged and terminated quickly and straightforwardly, and allow companies to gain easy access to specialist skills. They take responsibility for their own training, sick pay and holiday pay. They are highly mobile: many routinely work considerable distances from home.
11. PCG estimates, using Labour Force Survey data and data from its own surveys, that freelancers makes a contribution of approximately £100 billion per annum to the UK's GDP. This is generated by roughly 990,000 freelancers, out of an estimated 12 to 15 million in the EU15. Freelancers alone therefore offer a considerable source of flexibility to the UK's economy; no other EU member state has such a sophisticated model of freelancing.
12. Greater flexibility could enhance the UK's economy further still by allowing firms to access skills on a cost-effective basis. Freelancing is also an important way of keeping older workers economically active: the majority of PCG's members are over 45. Moving away from the traditional model of permanent employment must therefore be a key part of our response to demographic change and the ageing of society in Western Europe.
13. The most pressing change needed in labour law in the UK is greater clarity, as PCG will set out below. This will allow freelancing, as well as other forms of working, to flourish.

Question Two

14. In the UK, employment rights are applied using a highly successful “targeted” approach: when new rights or entitlements are introduced, they are made applicable to “workers” or “employees”. Full employment rights depend on the presence of an employment relationship and extent only to employees. Workers, who may work as “temps” or in other relationships that are not employment but do not amount to being in business, enjoy a smaller range of rights, for instance relating to the minimum wage. The term “worker” will however continue to be used in its generic sense in this document unless specified otherwise.

15. Self-employed people are excluded from both of these categories: rights are therefore made available in a sensible balance to those who need them, while self-employed professionals are unencumbered by them and able to go about their business. They are within scope of anti-discrimination laws, but these are of course not employment law—they extend far more broadly.

16. It is hard to see how there could be any benefits from changing the current arrangements: the targeted approach is extremely useful. To depart from the principle that an employment relationship must exist for employment protection to apply would be disastrous: this would entail imposing employment protections on commercial arrangements. Just as it would be ridiculous for a customer to owe employment rights to the shop from which they purchase a newspaper, so it would be ridiculous for a customer to owe employment rights to a contractor from whom they purchase services: these are commercial scenarios into which employment law should never intrude.

Question Three

17. Few would disagree that a balance must be struck between economic flexibility on the one hand and security for the vulnerable on the other. The Commission’s concept of “flexicurity” is, however, not a helpful articulation of this. It seeks to combine flexibility and security together, when in fact they are appropriate in different measures and balances in different types of working relationship.

18. A self-employed professional who supplies services to clients on a commercial basis is the archetypal flexible worker: the UK’s freelancers represent a pool of talented and experienced professionals who are able and willing to work on a flexible basis to meet their clients’ needs.

19. A less skilled worker providing labour as an employee may well need security in their employment. They may be able to adopt flexible working patterns involving flexitime, annualised hours, teleworking or any other number of possible arrangements. On the other hand, the nature of their work may preclude this in practice.

20. The Commission’s “flexicurity” concept is extremely vague but does not seem to address any of these scenarios. The failure of the Green Paper to distinguish between commercial and employment contracts makes it particularly unclear to which group of workers it envisages extending “flexicurity”.

21. In citing one specific model of flexicurity, involving relatively light employment protection, generous benefits and active labour market policies to move people back into work as swiftly as possible, the Commission highlights one solution that has worked reasonably well in one member state for a period of time. This does not for a moment mean that this approach is apt to be extended to other member states, although for some, depending on where they are in their economic cycles, it may be useful.

22. The UK strikes a fair balance between these two ideals at present. Employment protections are extensive but rightly extended only to employees. Flexibility is provided in large measure by individuals who operate in a freelance mode. If there is room for improvement, it lies in encouraging freelancing and making the tax and regulatory framework more conducive to it. Another useful measure would be for better information to be provided to companies about best practice for introducing flexible work patterns for their employees, and for engaging suppliers on a commercial basis.

Question Four

23. “Disguised employment”, whereby a worker adopts a commercial form but continues to work, in practice, as an employee, is a genuine problem. It can arise for two reasons: an employee wishing to reduce their tax liability; and an employer wishing to save on employment costs.

24. Tax-motivated disguised employment has been addressed in the UK by the intermediaries legislation, more commonly known as IR35; in cases where there is no corporate form and IR35 therefore does not apply, HM Revenue and Customs may deem a worker to be employed for tax purposes. Nevertheless, disguised employment persists: this indicates that the main drivers of disguised employment are not employees seeking

tax advantages, but employers seeking to avoid employment obligations. Action is needed to prevent them from being able to engage disguised employees.

25. Employers often do not understand employment law: sometimes they oblige commercial operators such as freelancers to act in an employee-like manner: this risks the freelancer's status becoming confused. At other times they oblige employees to forego their employment rights by adopting a commercial form: this is abusive.

26. Employment status in the UK is governed by common law, not statute. This is complex and it is impossible to say with any great ease what makes an individual employed or self-employed—in practice this is often clear-cut, but it can in some cases be a problem for both workers and employers. In the first instance, employers and end-users are able to exploit the uncertainty in the law for their own gain and to the detriment of workers; in the second, well-intentioned employers can get badly tripped up by not understanding the law fully.

27. A trend has recently developed in UK case law towards granting employment rights to workers who have not traditionally been thought to have any. The courts' logic is readily apparent: where an engagement is not commercial in nature but instead essentially an employment relationship, they pin employment obligations on the end-client. Unfortunately, while the logic is discernible, the law itself is not clear: it is impossible to say exactly what makes an engagement genuinely commercial and when employment rights are in fact owed.

28. This is deeply worrying for all involved with freelancing: contractors, agencies and end-users. It is causing some end-users to hesitate when taking on contractors and to make perverse decisions such as to terminate contractors at 48 weeks, irrespective of the amount of work left to be done on the contract. This commercial uncertainty is therefore increasing costs and undermining the economic advantages offered by the UK's freelancing model.

29. The current confusion has arisen mainly as a result of two employment status disputes, which are briefly outlined below.

30. In *Dacas v. Brook Street* (2004), although Mrs Dacas was unsuccessful in her claim for unfair dismissal against her agency, Brook Street, *obiter* remarks by Court of Appeal judges suggested that she had probably been the employee of her end-user, Wandsworth Borough Council. The same judgment set out that in such situations tribunals should consider the possibility of an implied contract of employment, which they have since done in several cases. The judgment failed, however, to set out at what point in her engagement, why, or how, Mrs Dacas had become an employee, when at the outset she had been a PAYE agency worker. It is therefore currently impossible for an end-user to say with any certainty when an implied contract of employment arises.

31. In *Cable and Wireless v. Muscat* (2006), the Court of Appeal found that Mr Muscat had had an implied contract of employment with Cable and Wireless, despite working through both a limited company and an agency. This is unprecedented and the judgment failed to give clear guidance on when it is "necessary"—in a legal sense—to infer an employment relationship in order to give "commercial reality"—a term left undefined—to an engagement.

32. It seems to be the case, therefore, that disguised employment is technically impossible in the UK: the courts will award employment rights to genuinely disguised employees. These cases are not widely understood, however, and it is difficult for workers to assert their rights in this complex area of law. It is PCG's recommendation to the Government that employment status should be brought within statute and the current position set out unambiguously, for the benefit of all. It will allow the vulnerable easier access to their rights and self-employed professionals easier exercise of their freedoms.

33. The Green Paper also discusses "economic dependency": this is a red herring and does not exist as an independent phenomenon. It is merely a variety of disguised employment. If a worker is in business but has only one client or customer, they are not in any sense economically dependent: if they lose that client, they will either find a new one or go out of business. That is the essence of business risk and is not the slightest bit remarkable. If, by contrast, a worker is obliged to work in an employee-like manner through superficially commercial structures and has only one client or customer, they are a disguised employee.

34. The apparent willingness of the Green Paper to write off genuine businesses as "economically dependent" solely because they have only one client and only one member of staff is an affront to small businesses throughout the EU.

Question Five

35. The International Labour Organisation passed a Recommendation in 2006 which stated that employment law should not interfere with commercial relationships.

36. In other words, where an employment relationship exists between two parties, it is right that employment protections are available to the employee. But where a commercial relationship exists between two parties, even if one of them happens to be a one-person enterprise, employment “protections” or obligations should not be extended to either party.

37. The UK does not quite have this healthy situation, but it is not far off. The core of “employment” rights that applies to “workers” (in the legal sense) is technically an intrusion into a commercial relationship. However, the real disjoin between commercial and employment relationships relates to employment status: the division between workers and employees, and between the self-employed and the employed, is unclear; the division between workers and the self-employed is seldom a matter of dispute. The existence of the category of “worker” generally allows rights to be extended to the vulnerable without accidentally entangling professional self-employed people in employment rights.

38. The only difficulty arises when allocating an individual to one category or another so that they might access their rights. As observed above, it seems likely that in cases of disguised employment (in which an employee may be disguised either as a “worker” or as self-employed), employment obligations in theory rest with the end-user—as already outlined, this is seldom enforced in practice.

Question Six

39. Regulation at EU level would be wholly inappropriate. Each member state has its own distinct traditions and legal systems in these matters, and a solution for one should not be imposed on another, where it will likely do damage. Member states should of course seek to learn from each others’ examples of best practice: some member states may find a Scandinavian-style “flexicurity” system helpful; others would perhaps be well-advised to institute the UK’s distinction between “workers” and “employees”. But rolling out a single measure across the entire EU would disrupt many systems that work tolerably well in their own contexts.

40. The idea of a “floor of rights” is unhelpful, for the same reasons. The UK’s “targeted” approach offers a more practical alternative.

41. A Community-wide definition of “worker” would not be helpful, for the same reasons. It would also be enormously contentious to implement: it could make the ructions over the services directive, which played a prominent and controversial role in the French and Dutch referendums on the EU Constitution, seem trivial.

March 2007

Memorandum by Professor Silvana Sciarra

1. MODERNISATION OR EVOLUTION? STYLE AND LANGUAGE IN THE GREEN PAPER

The Green Paper (GP) “*Modernising Labour Law to Meet the Challenges of the 21st Century*” intends to open up a debate among governments of the Member states and all stakeholders. The open consultation launched by the Commission on internet should be looked at as a positive sign. Attention is paid to controversial issues which are on the agenda of national legislatures and of the social partners. The consultation is addressed to a “virtual” community and is in itself a way of raising awareness even among non institutional actors. Furthermore, the GP confirms in several passages the need to enhance synergies with the European Council’s “Integrated guidelines 2005–08”, thus showing consideration for this “new” regime in employment policies.

Because of all these intended goals, the style adopted in the GP is at times heterogeneous and the language not too technical. “Modernisation” of labour law may be deemed as an ambivalent notion. How is a legal system defined more modern than another one? More modern compared to what standards?

Comparative research on “*The evolution of labour law(1992–2003)*” (vol.1, General Report Luxembourg OOEPEC 2005), coordinated by the present writer, under the auspices of the Commission, within a group of independent scholars (this study is quoted in a few footnotes of the GP), reveals that changes and adaptations have been and still are a constant feature of national labour law. Hence, the notion of “evolution”, better than “modernisation”, shows that national legislatures have been active in pursuing “adaptability” and in furthering their own models of “flexicurity”.

Differences in national legislative styles emerged in the enforcement of Title VIII TEC on employment policies. Diversity is an inborn feature of European labour law, as well as a demonstration that respect for national legislative traditions has been concretely achieved at a supranational level. The soft law regime in which the

so called Open Method of coordination (OMC) first flourished, fostered such differentiation. Activism of national legislatures was counterbalanced by difficulties in adopting Directives. Hence, a less significant role was assigned to harmonisation, a regulatory technique from which the completion of the internal market largely benefited in previous years.

In the jargon of the European employment strategy (EES)—not completely lost in the current regime of integrated guidelines issued by the Council—best practices in national performances were subject to comparative evaluation, based mainly on statistical “indicators”. It is submitted that legal indicators, emerging from comparative legal research, are indispensable tools for interpreting economic performances and facilitating changes. The debate on the GP offers an opportunity to add to existing research on the evolution of labour law.

It is worth noticing that the EES agenda is geared in several directions. For example, “flexicurity” is pursued as a response to globalisation and company restructuring. The Commission discusses in its web site, but not in the GP, such a “policy approach” (http://ec.europa.eu/employment_social/employment_strategy/flex_meaning_en.htm). **Future discussions and comparative analysis should encourage a combined and thorough investigation of all Commission’s approaches, both in hard and soft law regimes.**

2. CONTENTS AND SOURCES OF A “MODERN” LABOUR LAW

While developing the narrative on “modernisation” of labour law, the Commission is active on other fronts. In October 2006 consultation with the social partners was started (art. 138 TEC) for further action on work-life balance. Monitoring on the enforcement at national level of the 2002 Framework Agreement on telework is under way. These examples show that at least two significant areas of “modern” labour law are on the Commission’s agenda, although not specifically addressed in the GP. In its Proposal to the Council on employment policies, the Commission underlines that, notwithstanding higher employment rates, weaker segments of the labour market, in particular young and aging job seekers as well as women, still lack the necessary support (COM (2006) 815 final).

Against this complex and highly diversified background, it must be clarified that the method followed by the Commission in choosing areas of labour law to be included in the GP is selective. A selective option counts for the fact that collective labour law is only briefly and occasionally referred to.

However, original achievements in labour law—particularly in the continental European tradition—are found in a combination of law and collective bargaining. Furthermore, in several Member states the evolution of collective bargaining brought about significant innovations and confirmed the central role of collective actors in pursuing changes and adaptations. The GP only briefly acknowledges this in sec. 2.b, mentioning that collective agreements “no longer play a merely auxiliary role in complementing working conditions already defined by law”, but also serve the purpose of “adjusting legal principles to specific economic situations”.

For example, an element of efficient interdependence among legal and voluntary sources must be found in the area of company restructuring, an area in which some European Directives—transfers of undertaking, collective dismissals, EWC—play a most significant role. The Commission does not specifically address in the GP ways in which collective agreements are best suited to deal with the effects of restructuring, in view of maximising the recourse to the newly established European Globalisation Adjustment Fund. This is yet another area of “modern” labour law to investigate in comparative terms and to frame within trans-national restructuring.

3. THE NOTION OF “FLEXICURITY”

When de-contextualised from specific patterns of regulations, the discussion on “flexicurity” may include the most diverse contents. It is submitted that, to avoid broad generalisations, this new and composite concept should be anchored to specific legal indicators. This approach has been followed in a comparative project on *“The evolving structure of collective bargaining”* (http://www.unifi.it/polo-universitario-europeo/ricerche/collective_bargaining.html), coordinated by the present writer in collaboration with experts from all Member states of the EU, under the auspices of the Commission.

For example, the tradition of “semi-mandatory law” both in some Nordic countries and in The Netherlands, can be recalled as a successful way to pursue changes, combining law and collective agreements. Examples of legislation preceded by the successful enforcement of inter-sector agreements can also be quoted. In France it is worth noting the 2003 central agreement on lifelong access to vocational training, followed by a statute in 2004. In Ireland a centralized agreement on maternity and parental leave paved the way to legislation. In Spain a recent reform of the labour market dealing with fixed-term work and other employment measures, was preceded by central collective agreements.

In order to be framed within efficient patterns of policy-making, the notion of “flexicurity” must rely on comparative criteria. Such criteria—both within national legal systems and among Member states—can best emerge from the ongoing practice of reliable labour market institutions.

The GP does not fully analyse the contribution that consensus-building institutions—be they collective bargaining, consultative bipartite or tripartite bodies—have had in empowering the notion of “flexicurity” within national debates.

Furthermore, part of a well established tradition of “flexicurity” in the Member states of the EU is the combination of passive and active labour market policies. It is surprising that the specific area of employment services should not be fully addressed in the GP, despite the fact that the Council’s Integrated guidelines 2005–08 (guideline n.20) take this on board.

It may be worth mentioning that issues of active labour market policies, lifelong learning and training are part of the previously mentioned flexicurity program, pursued by the Commission within the EES.

A most profitable approach, in response to the many questions posed in the GP, should consist in verifying all current examples of existing flexicurity measures, both in a diachronic and synchronic perspective. Whereas the diachronic perspective can prove that flexicurity is nothing but a more sophisticated expression of well established traditions in European labour law, the synchronic perspective may show areas of convergence among current legislative reforms.

It can be argued that early versions of combined “flexibility” and “security” are those enshrined in European social policies aimed at avoiding distortions in competition, while safeguarding certain labour standards. A mixture of the same two ingredients can also be found in the Framework agreements on part-time and fixed term work. The symbolic relevance of these two words is stronger than the one attached to a difficult neologism such as “flexicurity”. This indication, rather than being dismissed as a truism, should be seen as a way forward to avoid juxtapositions in national and supranational debates.

4. THE “SCOPE” OF LABOUR LAW

In the light of comparative research carried on so far, it is well understood that the evolution of labour law, rather than concentrating on an overall definition of worker, should favour institutions capable of bringing about consensus on core labour standards to be applied in non-standard employment contracts and in cases of workers mobility across Member states.

The GP refers to *Wolff & Müller*, a 2004 ECJ decision dealing with the free provision of services and the posting of workers. It is correctly recalled that measures on minimum wage, a national public interest objective, must be pursued via efficient procedural arrangements, also for workers temporarily posted in host Member states. The principle of joint liability is recalled as an efficient legal device, aimed at bringing about clarity and fostering compliance of labour standards. This principle is appropriate for multilateral contractual relationships—be they agency work or subcontracting—and well represents existing legal traditions in several Member states. This principle, to be described as a legal indicator, brings about clarity and certainty in contractual relationships.

One of the issues at stake, when attempting an analysis of the scope of labour law, has to do with identifying core labour standards to be applied in multilateral contractual relationships.

It is submitted that this target can be efficiently accomplished by means of voluntary sources. Collective agreements are suitable for setting labour standards applicable to agency workers, both in their relationship with the agency and in executing work for the user company. Dutch legislation on agency work, accompanied by collective bargaining, is the most often quoted paradigm of “flexicurity”. Equally relevant are the solutions adopted in Sweden, where collective agreements aim at reducing differences among temporary and permanent workers in rates of pay and working hours. In Finland, if no sector agreement covers agency workers, the user company’s minimum wages apply. In Austria collective agreements deal, among other issues, with allowances due to agency workers for hours of non work.

When discussing cross-country trilateral relationships, attention should be paid to new ways of enhancing trans-national standards, freely agreed upon by trans-national social actors and developed in parallel to existing Directives.

Throughout the GP a false dichotomy is presented between labour law reforms—improve flexibility and security, reduce labour market segmentation—and techniques to achieve the goals enshrined in such reforms—law, collective agreements—. It is submitted, on the contrary, that the evolution of labour law brings about a remarkable arrangement of means and goals, whenever it aims at combining the protection of core labour standards with market efficiency.

In examining the scope of labour law the GP introduces the concept of economically dependent work. This choice must be positively underlined, even though an analytical interpretation of such a widespread—and yet still undefined—phenomenon is missing. However, the GP announces the intention to “promote a debate about whether a more responsive regulatory framework is required to support the capacity of workers to anticipate and manage change regardless of whether they are engaged on indefinite contracts or non-standard temporary contracts” (p 7).

The scope of labour law in all such cases is twofold. First of all it is of utmost importance to develop legal indicators—such as legal presumptions or criteria in financial and tax law—aimed at identifying a contractual relationship, different from self-employment. Furthermore, the scope of labour law is to regulate transitions among jobs and to promote adaptability to labour market demands, identifying new entitlements to social security and social policies tailored on the notion of economic dependence. Economic dependency can be efficiently counterbalanced by supportive measures such as accession to special pension funds, bank credits, mobility allowances, training facilities, pregnancy and parental leave.

5. COMPLIANCE MECHANISMS AND THE CASE LAW OF THE ECJ

Some national labour market reforms, initiated in the framework of EES, have given rise to interesting, albeit controversial, case law. Cases dealing with the right balance between flexibility and security—in the regulation of working time, in enforcing the rights of fixed-term workers—have been referred to the ECJ. This may in some cases represent a valuable indication of ways in which “flexicurity”, while pursuing significant innovation in national labour law, may cause too drastic changes within national legal systems and give rise to a divisive interpretation of “flexicurity”.

It is most surprising that the GP should be silent on these issues. Case law of the ECJ constitutes a ground on which to test legislative reforms and adaptations of existing legislation. Thus, a debate on how to “modernise” labour law cannot ignore this crucial part of law-making and its impact on national legal systems.

Compliance mechanisms are, furthermore, a relevant part of national labour law. Labour inspectors are among the most complex institutions to analyse in comparative terms. The same can be said for out of court conciliation, as well as for various other models of transactions on individual and collective rights.

Against this diversified scenario of national practices, compliance mechanisms should not be left out of the debate opened by the GP. In particular the question should be posed on whether non-standard and economically dependent workers are given sufficient information with regard to their entitlements. The Directive 1991/533 on the obligation to inform and consult individual employees could be a source of inspiration.

It is worth mentioning, in drawing some conclusions, that notions of “protection” and “compliance” are frequently developed in ILO sources and documents. References are made in the GP to the ILO *Employment Relationship Recommendation 198*. The Commission adhesively refers in its 2006 Communication (COM (2006) 249 final) to the ILO Decent Work Agenda. In the current debate on “modernising” labour law ways forward are to be found in a constant exchange of ideas with the ILO, looking at its well grounded methodology to foster social dialogue and to establish respect for core labour standards.

30 March 2007

Memorandum by the Recruitment and Employment Confederation

The Recruitment and Employment Confederation represents around 8,000 recruitment agencies in the UK. The UK recruitment industry is largely made up of small businesses who place 1.2 million people into temporary jobs every week. Last year the industry also placed over 700,000 people into permanent positions in the workplace. The UK recruitment industry therefore makes a significant contribution to the successful UK labour market model.

REACTION TO THE GREEN PAPER

The REC welcomes a debate at the European level about building successful labour markets and ensuring that workers receive their correct working rights. Our starting point in this debate is the diversity of European labour markets and their traditions. When considering the rights of temporary agency workers in particular it is important to view these rights within the context of national labour market conditions and national labour laws. Comments in the Green Paper relating to issues such as “segmentation of the labour market”, standard and non-standard contractual terms and even what constitutes flexible work may have very different

resonance in different countries. It therefore becomes impossible to draw meaningful generic European conclusions to a number of the questions asked in the Green Paper.

The responses below reflect REC's position from the UK perspective, particularly with regard to temporary agency workers. An Appendix details the legal relationship between employment agencies and temporary agency workers in the UK in detail. REC is an active member of our European association Eurociett and fully endorses Eurociett's response to the Green Paper. REC's response should be read as an addition to the Eurociett submission. This can be accessed at: <http://www.euro-ciett.org/>

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

The UK Government recently considered UK employment rights in their paper "Success at Work"¹⁰⁹, March 2006. This paper concluded that workers in the UK have a sufficient number of employment rights and that focus should now be turned to vulnerable workers who are denied access to their rights. The REC fully supported the conclusions of this paper and has been actively working with the DTI to support their work on vulnerable workers. Currently the REC is in line with Government thinking on this matter and believes that the priorities for labour market in the UK are that of enforcement of current rules and raising the employment level to 80 per cent.

In order to reach an 80 per cent employment level REC is working with Job Centre Plus (the public employment service in the UK) to explore ways in which those on incapacity benefit can be helped back into work. The REC also supports the focus taken in allowing those in permanent employment access to more flexible ways of working through the right to request flexible working. This may help young mothers, for example, to find work which is flexible enough to meet their needs. Any system of flexible working for the permanent workforce needs to be underpinned by forms of more flexible work such as temporary agency, for this to be a viable option for employers.

2. *Can adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes then how?*

REC supports Eurociett's assertion that temporary agency work should not be viewed as a segment of "outsiders" in the labour market. Rather than being marginal, temporary agency work and other forms of employment contract which are not simply full time permanent work should be seen as being at the centre of a successful and inclusive labour market. This central role is reflected in the rights of these workers in the UK. Labour law in the UK allows for a number of different employment relationships whilst preserving a base of working rights for all workers. The REC considers this to be an effective way of ensuring that segmentation within the labour market does not exist on the basis of contract type. In addition there are relatively low barriers between temporary and permanent positions which allows for easy transition from temporary to permanent positions, when the worker wishes. By having a system where it is no more expensive to employ workers on permanent contracts (in fact it maybe a cheaper option) and it is not very costly to dismiss people when necessary, for example when there is a turn down in demand, a labour market is not truly segmented as workers can move between different contract types at ease. Where this choice is not available this is usually linked to regional or local economic reasons rather than foundation of working rights in UK labour law itself.

3. *Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?*

The REC has no detailed comment to make regarding technological changes other than it is essential that employees have the opportunity to adapt and improve their skills so they can adapt to new positions in the labour market. It is also essential that businesses are afforded flexibility within their regulation so that they can adapt quickly to new realities.

With regard to SMEs, regulations should always be designed with them in mind as they employ the vast majority of workers in Europe. If regulations are too complex to implement, or do not allow for a small business to respond to critical changes in the market place swiftly they will simply go out of business, or ignore the regulations. In addition to the quality of the regulation itself, how it is communicated to SMEs and what tools SMEs are given to cope with the new regulation should also be considered.

¹⁰⁹ <http://www.dti.gov.uk/er/successatwork.htm>

4. *How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?*

The REC, and the UK Government in their March 2006 paper *Success at Work*, believes that the current balance between flexibility and employment security and social protection has been reached in the UK market. UK temporary workers receive all of the basic working rights. There are no restrictions on contract length and type in the UK recruitment market—thus allowing for maximum flexibility. Employment security is preserved in the UK labour market through ease of entry into the labour market (for example through recruitment agencies) and through a steady supply of jobs. More could be done to improve the skills training of some in the UK labour market, the link between skills levels and security of work is well proven.

5. *Would it be useful to consider a combination of more flexible employment protection legislation and a high level of assistance to the unemployed, both in the form of income compensation (ie passive labour market policies) and active labour market policies?*

The balance between unemployment assistance and active labour market policies is set in the UK by our Government. The REC has been supporting the public employment service, Job Centre Plus, in getting “work ready” candidates into work in a number of ways. December 2005 saw the launch of a joint Diversity Pledge for the industry which encourages recruitment agencies to seek more diverse pools of candidates and gives them the tools to do it through an online toolkit. On a local level many recruitment agencies advertise their vacant positions through Job Centre Plus and large agencies work with Job Centre Plus on national projects. Finally the REC is building regional links to job centre plus to ensure that the private recruitment industry is doing as much as possible to support the UK Government’s active labour market policies.

6. *What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?*

See comments to question 2 for a response on transitions.

Regarding training recruiters can play a useful role in identifying areas of skills shortages in the labour market. This can be used by Governments to tailor their skills training to the labour market need. A great deal of informal and formal training is conducted on the job in the UK. It is right for employers to support this as when they perceive there is a need. REC is also exploring ways in which recruitment agencies can actively support apprenticeships and other training schemes which are supported by our Skills Councils.

7. *Is greater clarity needed in Member States’ legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?*

This matter is currently being considered by the UK Treasury and Her Majesty’s Revenues and Customs (HMRC) with regard to workers who work as limited company contractors, and are therefore self-employed for tax purposes, through managed service companies. As this matter is in the process of being addressed by the UK Government, with the REC making lengthy representations on the way in which the new framework will work, further comments will not be made in response to the Green Paper. What is certain is that this is a very complex matter which needs to be addressed at the Member State level as it has implications for both employment and tax law, which vary greatly between Member States.

The REC strongly defends the right for contractors to operate as limited company contractors when this is appropriate. Recruitment agencies may facilitate the placement of limited company contractors onto assignments. It is vital that any system of identifying employment and self-employment allows for this type of transaction to continue. Typically it benefits end users who need highly skilled contractors at short notice and benefits contractors, who may be at the end of their career, but want to continue working on a more flexible basis.

It is worth noting that REC supports fully open labour markets in the EU as the current transition periods may lead to inappropriate use of self-employed status for immigration reasons. This subject is new to the UK as it only concerns citizens of Bulgaria and Romania, but it is one REC will continue to monitor.

8. *Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as the protection of workers?*

The UK has a set of working rights that apply to all workers. This allows for companies to engage people on non-permanent contracts when it is needed for business reasons without it creating a “2 tier” work force with respect to comprehensive basic rights. Companies should still be able to, for example, reward long-standing employees with extra rights, eg extended holiday leave, which go above the statutory minimum. The REC considers that the current base of working rights in the UK is sufficient and does not have a detrimental effect on either job creation or the protection of workers.

9. *Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in “three-way relationships”?*

It is essential to recognise when considering “multiple employment relationships” that the case of temporary agency workers is different from other forms of multiple employment relationship. As Eurociett clearly states in their response to the Green Paper the relations between client, worker and employment agency are clear in the EU. In the case of the UK the Employment Agencies Act very clearly sets out how this triangular relationship should be managed. The EAA and the associated conduct regulations tightly regulates the relationship between the agency and the client company and the agency and the worker. If these regulations are breached this can be investigated by the Department for Trade and Industry’s Employment Agency Standards Inspectorate, which if appropriate can prosecute the agency concerned. Ultimately Directors of employment agencies can be prohibited from running employment agencies for a number of years. Alternatively if the relationship between the worker and the agency breaks down on a matter of employment law this can be referred to an Employment Tribunal. In addition to this the worker receives all working rights (see Appendix 1 for further information).

It is clear in the UK that matters such as anti-discrimination and health and safety are a joint responsibility of both the agency and the end client. REC believes that this joint responsibility reflects the nature of the three-way relationship. It also means that the worker should be doubly protected as both the agency and the end user are ensuring these rights.

Temporary agency work is an example where the relationship between the worker and more than one company is very clearly regulated.

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

The REC support’s Eurociett’s view that the employment status of temporary agency workers is clearly defined at the national level.

Employment status is a matter which needs to be considered at two levels, employment status for taxation purposes and employment status for employment rights purposes. As both of these matters have a strong national focus it is most relevant to analyse the employment status of temporary workers at the national level.

In the UK temporary agency workers are usually engaged on a contract for services. They are employees of the temporary work agency for tax, national insurance and immigration purposes.

With respect to employment rights they have a large number of working rights but are not employees of the agency or the client company. In practice this means they receive number of rights including to the national minimum wage, working time, health and safety, anti-discrimination, health care coverage. They do not, however, receive the right to claim unfair dismissal after a year working with the agency, they have no right to redundancy pay (eligibility for statutory redundancy pay in the UK is earned after two years service) and the right to return to the same position after maternity leave (this would make no sense in the temporary staffing market and agencies frequently assist returning mothers back into the labour market).

The UK Government considered the question of the employment status of temporary agency workers from 2002–06 and concluded in March 2006’s publication *Success at Work* that the status was clear and no further legislation is needed in this area. The REC has best practice guidance on its online legal reference guide for members to ensure that agencies understand how to engage temporary workers correctly.

It is worth noting that some temporary work agencies do engage their temporary workers on zero hours contracts of employment. This therefore avails the temporary workers of the employment rights outlined above. However should the end user effectively treat their temporary worker in a way similar to an employee an employment relationship could still be found between the temporary worker and the client company in a tribunal.

11. *How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?*

Temporary agency workers are usually employed and paid on an hourly basis—it is therefore simple to track their working hours. The REC is happy with the current working time arrangements in the UK and does not call for action on behalf of its members by the Community.

12. *How can the employment rights of workers operating in a transitional context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of “worker” in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?*

The definition of a worker is largely defined by national employment law (see Appendix 1 re the UK definition). A more convergent definition of a worker in EU Directives, would presumably require a revision of these Directives. Considering the current political environment and the lack of agreement on social legislation in the Council this seems to be an unrealistic suggestion.

A harmonised definition of “worker” would not be welcomed by the REC, which believes that difficulties relating to cross-border working should be tackled through the correct implementation of the Posting of Workers Directive rather than other means. Additionally the REC does not believe that a harmonised definition of a worker would provide clarity for workers or employers in the future. Working rights can be attached to national taxation and social security regimes and so a harmonised definition at the European level would not, in itself, make sense.

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

Greater administrative co-operation could assist in tackling abuses in the cross-border posting of temporary agency workers and would be welcomed by the REC. National enforcement regimes should exchange information on licensing and other requirements for temporary work agencies. In addition much could be gained through greater cross-border sharing of intelligence on agencies who operate in more than one country. Both sides of industry should be able to feed into the process of cross border co-operation. For example greater knowledge of the REC's Code of Professional Practice could help authorities when dealing with UK recruitment agencies who are operating abroad.

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

The EU can contribute to the debate on the battle to combat undeclared work. Firstly if Member States reduce restrictions on legitimate forms of flexible forms of work, such as temporary agency work, this would allow for employers to have access to the flexible workforce they need without resorting to undeclared work.

Action on undeclared work at the European level could include:

- The promotion of temporary agency work and other forms of legitimate flexible work to combat undeclared work.
- Assistance in greater co-operation between labour and taxation authorities when tackling cross-border undeclared work.
- The EU can also assist in sharing best practice in the field of undeclared work.

March 2007

APPENDIX 1

Temporary agency work in the UK: the legal framework

Temporary agency work in the UK is facilitated in a unique set of circumstances. The UK model provides a successful solution for workers who want more flexible work options and employers who need temporary resourcing. The REC has a great deal of information about why temporary workers in the UK chose to work through agencies, why clients use temporary workers and on the profile of temporary workers. This briefing however looks at the legal framework for temporary agency work in the UK.

Temporary work agencies in the UK are governed by a specific set of regulations attached to the 1973 Employment Agencies Act. These were updated in 2003 and closely regulate the three-way relationship between the agency, worker and end user.

A temporary agency worker in the UK is not usually an employee of the employment agency. Rather they are engaged under a contract for services. This reflects the fact that there is no mutuality of obligation between the agency and the temporary worker. The worker may choose to leave the assignment at any time without notice or liability and the agency may terminate the assignment at any time in a likewise fashion. Another feature which illustrates that a temporary agency worker is different from an employee is that a temporary agency worker may work through several employment agencies at any one time. Their relationship to the agency is not an exclusive one.

It is worth noting that whilst temporary agency workers are not engaged as an employee, their primary relationship is always with the temporary work agency. The worker's contractual relationship, their terms and conditions are with the agency. These terms and conditions are governed by the provisions under the Employment Agencies Act and those attributed to the worker by virtue of them being a worker. In both cases these rights are governed by labour law and breaches can be addressed through the employment tribunal system. These relations are not governed by commercial law.

The regulations under the Employment Agencies Act (EAA)¹¹⁰ govern aspects of the worker's relationship which are exclusive to the triangular relationship. Some examples include:

- the information an agency should give a worker about the assignment,
- the fact that the agency cannot charge a worker for work seeking services,
- the fact that an agency should warn a worker of any health and safety concerns in the workplace of the end user,
- the fact that the agency should only place a worker who is qualified to complete the assignment,
- the obligation for an agency to pay a worker for the work completed, even if the agency has not been paid by the end user.

The temporary agency worker also has a great many rights through being defined as a worker. This is explained in more detail below.

Definition of employee and worker in English law¹¹¹

In order to explain the relative positions of an employee under a contract of employment and a worker under a contract for services in English law, it is helpful to look first at the statutory definitions of both employee and worker in section 230 of the Employment Rights Act 1996:

- “230.— (1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
- (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
- (3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
- (a) a contract of employment, or

¹¹⁰ 1973 and the associated Conduct Regulations from 2003 available at: <http://www.dti.gov.uk/employment/employment-agencies/index.html> and <http://www.opsi.gov.uk/si/si2003/20033319.htm>

¹¹¹ Please note that this briefing is set in the context of English law. English law applies fully in Wales. In Scotland and Northern Ireland similar provisions apply however slightly different case law may apply.

- (b) *any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
and any reference to a worker's contract shall be construed accordingly.
- (4) *In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.*
- (5) *In this Act "employment"—*
- (a) *in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and*
- (b) *in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly."*

Workers engaged by employment businesses in the UK fall into the definition in Section 230(3)(b) above and as such derive their working rights from this.

Employee and worker rights under English law

The vast majority of employment rights are also assigned to workers in the UK. A list below outlines the key rights attached to workers engaged by agencies.

<i>Temporary workers' rights</i>	<i>Further information</i>
Pay	National Minimum Wage Act 1998: Temporary workers have to be paid for all time worked at least at the national minimum wage. The Conduct of Employment Agencies and Employment Business Regulations 2003 (the Conduct Regulations): Temporary workers must be paid at the agreed rate for all time worked irrespective of whether the client company has paid the agency for the service. Employment Rights Act 1996: No unlawful deductions may be made from a temporary worker's pay.
Pay slip	Temporary workers should always receive a pay slip detailing their pay, tax and national insurance contributions.
Working time rules including overtime, work breaks, rest periods and night work	Working Time Regulations 1998 and amendments: Working time rules apply to temporary workers as to any other worker/employee in the UK labour market including sector specific working time rules, for example in the road transport sector. Temporary workers are usually paid by the hour. These hours are recorded on a time sheet.
Holiday entitlements	Minimum of 20 days a year (as part of the working time regulations). This will be extended to paid public holidays (a further 8 days a year being rolled out over 2007-2008).
Protection against discrimination on grounds of sex, race or ethnic origin, disabilities, religion, beliefs, age or sexual orientation	All of the below explicitly apply to temporary workers, agencies and employers: Sex Discrimination Act 1975 Race Relations Act 1976 Disability Discrimination Act 1995 Employment Equality (Religion or Belief) Regulations 2003 Employment Equality (Sexual Orientation) Regulations 2003 Employment Equality (Age) Regulations 2006

<i>Temporary workers' rights</i>	<i>Further information</i>
Health and Safety coverage	In English law an employer has a common law duty of care for all people on their site, whether they are employed by them or not. All European Health and Safety Directives apply equally to temporary workers in the UK. Employment Agencies have a duty, under the Management of Health and Safety at Work Regulations 1992, the Gangmasters Licensing Standards 2006, the Gangmasters (Licensing Conditions) Rules 2006 and the Conduct Regulations, to inform a temporary worker of the health and safety risks at their work place, the steps a hiring employer is taking to control or minimise those risks and to agree between them the management of the ongoing health and safety of a worker's working environment during the course of an assignment.
Sick pay	Temporary workers are entitled to Statutory Sick Pay subject to the normal qualifications applicable to employees.
Maternity, paternity and adoption pay	Temporary workers are entitled to Statutory maternity, paternity and adoption leave pay subject to the qualifications as applicable to employees.
Trade union membership and recognition rights	The laws governing trade union relations apply equally to temporary workers.
Training	This is dealt with by the Sector Skills Councils in the UK. For example in Construction employment agencies often pay the skills levy to the Construction Skills Council.
Temporary to permanent fees	These are governed by Conduct Regulation 10 which prescribe the limits within which such fees are enforceable.

NB: Temporary workers have full access to health services in the UK. The UK's comprehensive National Health Service is free at the point of use for residents who have permanent right to remain in the UK and EU citizens who reside in the UK. Access is not related to levels of contributions to tax revenues or the National Insurance scheme.

Rights which temporary workers do not have in the UK and the Government's assessment of these rights in relation to temps¹¹²:

- Protection from unfair dismissal: workers receive this after 12 months in the UK. It was not considered necessary to extend this to temporary agency workers as contracts are usually shorter than 12 months.
- The right to redundancy pay: workers receive this after 2 years, again it was not considered necessary to extend this to temporary agency workers as contracts are usually shorter than 12 months.
- The right to maternity leave: temporary workers receive statutory maternity pay. After returning from leave the worker has every right to be registered for work with their former agency or many other agencies.

Enforcement of worker rights in English law

In the event that a temporary worker has a claim against either an employment business or a client hirer arising out of an assignment or series of assignments, such claims are brought in the Employment Tribunal in the same way as an employee would bring any claim arising out of his/her employment to an Employment Tribunal.

Conclusion

Whilst temporary agency workers are usually engaged under a contract for services their rights as workers mean that they are rarely treated differently to an employee with respect to statutory rights. Essentially the definition of worker under the Employment Rights Act 1996 gives temporary agency workers, and many other workers on differing contract types, a "floor of rights".

¹¹² Success at work, March 2006, pages 16–17.

Memorandum by the Unquoted Companies Group

Note: The Unquoted Companies Groups (UCG) is an informal group of 30 or so Chief Executives of owner-managed (unquoted) companies. The family businesses we represent are spread right around the country (not only in the prosperous South-East), and we stress continuity and long horizons. Such continuity is critical for the UK's economic and social life. Our area of particular interest is the whole of the unquoted sector of the British economy, which includes most of the UK's small and medium-sized firms.

We are happy for this response to be made publicly available to any enquirer.

Christopher Cracknell

Chairman, UCG Industrial Relations Committee¹¹³

27 March 2007

THE IMPORTANCE OF FREE MARKETS

1) The EU has been responsible for a large increase in labour regulation, and now wishes to go further. In this latest Green paper, the Commission asks for a "debate" on further regulation, and better policing. It does not question the need for regulation which it takes (p. 5) as obviously necessary "to offset the inherent economic and social inequality within the employment relationship". The UCG disagrees that regulation offsets economic and social inequality.

2) On the contrary, free markets and freedom of movement are the best defence for the under-privileged. These vital concepts, which underlie English law, and which the UCG supports, are absent from the Green Paper.

3) We should help the UK government in its current attempts to stem the tide of regulation, a particular example being its defence of our opt-out from the 48 hour working time maximum. The UK's free-market tradition really does have something to show our continental neighbours, as we will demonstrate below. We urge the Select Committee to enter the Commission's "debate" with the aim of rolling back labour regulation.

4) To consider the Green Paper, the Select Committee puts forward questions on the flexibility of UK labour markets, on employment security, and on "flexicurity". Let us take these in turn, and then turn to Committee's final heading, the role of EU regulation.

FLEXIBILITY OF THE LABOUR MARKET

5) The Select Committee asks: how flexible is the UK labour market, and what are the benefits of this flexibility? The UK's labour market, since the Thatcher reforms, has been more flexible than all other EU states. Flexibility has two broad forms: wage flexibility and working conditions flexibility. The UK's well-known wide wage differentials point to flexibility along the wage dimension. Wide differentials mean unskilled workers (eg. young and inexperienced workers) are paid much less than high-skilled. The benefit of low unskilled wages is that firms are encouraged to take on unskilled workers who have low labour productivity. Unemployment is thereby avoided. A particular benefit is that unskilled workers in the UK are not cut out of work by high wages set by national collective agreements as happens in France, Germany and Italy.

6) Flexibility of working conditions has many aspects, and the UK does well here, too. An important example is working hours, shown in Figure 1. As can be seen, the UK has more working both long (over 45) and short (under 20) hours. Only about 50 per cent of our workforce works in the normal 20–45 hour range. In regimented France and Germany the comparable figure is around 80 per cent. Workers and businesses have a variety of desires and constraints. The benefit of UK hours flexibility is that it offers more "niches" in which these desires and constraints can be met.

7) A further benefit of UK's labour market flexibility is that it limits the tendency towards a growing black market that exists underneath heavily regulated markets, although this may be difficult to quantify. It goes without saying that those employed in the black market evade taxes, health and safety and other protections. Black markets naturally arise when labour markets become inflexible and too costly. The tendency of regulators is then to attempt to clamp down further, leading to more regulation. For example, laws preventing dismissal (see below) lead to the development of temporary contracts, and "bogus" self-employment, both of which have to be further regulated. This path leads to the French situation where a powerful Labour Inspectorate enforces a detailed 2,000 page *Code du Travail*. Employers have to become lawyers. The UK has not, fortunately, set up a Labour Inspectorate.

¹¹³ *Acknowledgments:* We are grateful for the input of Michael Brinton, Malcolm McAlpine, Professor W S Siebert, and Hugh Trevor-Jones.

8) It should not therefore be said that strict labour market regulation is an efficient response to “inherent social and economic inequality”. Rather, it is part of an anti-market legal inheritance (see Siebert 2005 and 2006). The French type of state-oriented *Code du Travail*, noted above, has been passed onto many countries in Europe. By contrast, Britain and countries in its sphere of influence (including the US) inherited the English common law, where independent judges and juries are so important that an elaborate code has never been possible, or needed. Freedom of contract, not state intervention, has been the norm.

EMPLOYMENT SECURITY

9) Here, the Select Committee asks, what is the extent of employment security in the UK labour market, and what would be the benefits of changing the present arrangements? Employment protection legislation (EPL) is a prominent feature of EU labour law. EPL enhances the job security of incumbent employees by making dismissal difficult, for example by requiring consultation with the works council and/or Labour Inspectorate, plus generous compensation. The UK’s unfair dismissal system via Employment Tribunals is light by comparison. Table 1 shows the contrast between the UK and France. We see that the OECD indicator of strictness of EPL is much higher, 2.5, in France, compared to 0.9 in the UK, which is one of the lowest in the OECD.

10) The consequence of EPL is, paradoxically, to increase employment insecurity—a disbenefit. First, firms circumvent the law by moving out of the country (the case study business in our Appendix has opened new plants in Poland and China). Second, firms resort to temporary contracts. Figure 2 shows this process at work clearly. There is a good correlation between the strictness of EPL and the per cent of workers on temp contracts. The UK and the US are at the bottom left, while Portugal, Spain and France and others with high EPL are at the top right.

11) Third, EPL causes firms to become more “choosy” in hiring workers if they cannot fire them. This effect particularly increases the insecurity of vulnerable groups, who do not have a “track record”. Evidence is given in Table 1, which shows the high long-term unemployment in France. Table 1 also shows the poor employment prospects of young workers, and old workers in France. In fact, only 36 per cent of the 20–24 age group work in France, and only 34 per cent of the 55–64 group—proportions which are far lower than in the UK.

12) Of course, EPL has not worked alone to create France’s poor labour market. We have to recognise the role played by high taxes, which push labour costs up. (High taxes cannot be offset by workers accepting low wages because of France’s national collective bargaining arrangements, noted above.) Table 1 gives data on the tax position. Indeed, strict EPL, high taxes and centralised collective agreements feed off each other. For example, strict EPL means high long-term unemployment which in turn requires high taxes to make the welfare payments.

“FLEXICURITY”

13) Here, the Select Committee asks how helpful is the Commission’s concept (Green Paper pp. 3, 4) of “flexicurity”, and whether changes in labour law could help achieve it? In fact, “flexicurity” is simply a buzzword. It holds out the hope that it is possible to moderate the unemployment effects of strict EPL by using active labour market policies such as training and job search advice to help those rendered unemployed by EPL. In other words, the hope is that it is possible to have EPL without the ensuing two-tier labour market. Denmark is thought to be a success in this respect (OECD, 2004, 97), with successful active policies. Yet, it should be observed that Denmark has quite weak EPL—the horizontal axis of Figure 2 puts Denmark quite close to the UK.

14) Indeed, the UK’s relatively unregulated labour market already delivers flexicurity, if we must use this word. Increased labour law would move us further away. Grant Fitzner (2006, 17) points out that the UK labour market is very dynamic, with 5–6 million people moving into a new job each year, and a similar number leaving. The vast majority of these job changes, about 70 per cent, are voluntary (even classifying the termination of temporary jobs as involuntary). Thus, the workers that wish to remain in their job can, and those who do not, quit, which is as it should be. We do not need a vast programme of active labour market policies.

THE ROLE OF EU REGULATION

15) It goes without saying that the free market within the EU is of immense value to all who live in Europe. This means we have to debate carefully what the Union ought to do. Its core task is to solve common problems between states, such as cross-border trade and the single market. Its task is not to attempt to solve problems within states, such as laying down requirements for labour law. The EU's constitutional principle of subsidiarity forbids such attempts.

16) In fact, as Table 2 shows, directives from Brussels have been responsible for much of the increase in the burden of labour legislation over the last 10 years. The EU role dates back to the 1989 Social Charter of Fundamental Worker Rights (mentioned approvingly in the Green Paper, p.6), which proposed a large programme of intervention. These interventions are worrying for UCG members, and as shown in the Case Study in the Appendix, one member estimates that new health and safety and environmental regulations have cost the company an amount equal to 5 per cent of the direct wage bill in 2003 and 2004. We have arrived at a position of over-regulation, particularly in view of the UK tendency to “gold-plate” EU directives.

17) In sum, the UK's flexible labour market has grown up organically over many years, based on the English common law tradition of freedom of contract. Other countries such as France, for example, minutely regulate. Such regulation springs naturally from the French tradition. We say, let both traditions co-exist, in accordance with the subsidiarity principle, so that we can see which is better. Good policy is more likely to be promoted in the EU by the power of example than by directives from Brussels.

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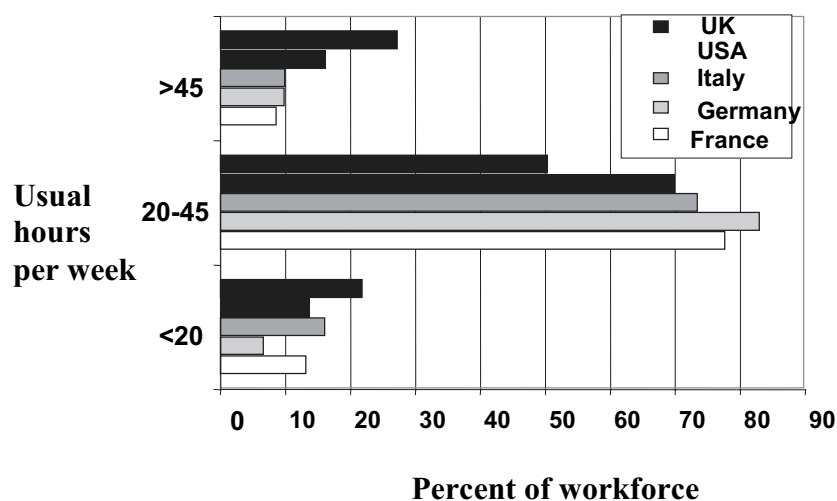
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Figure 1

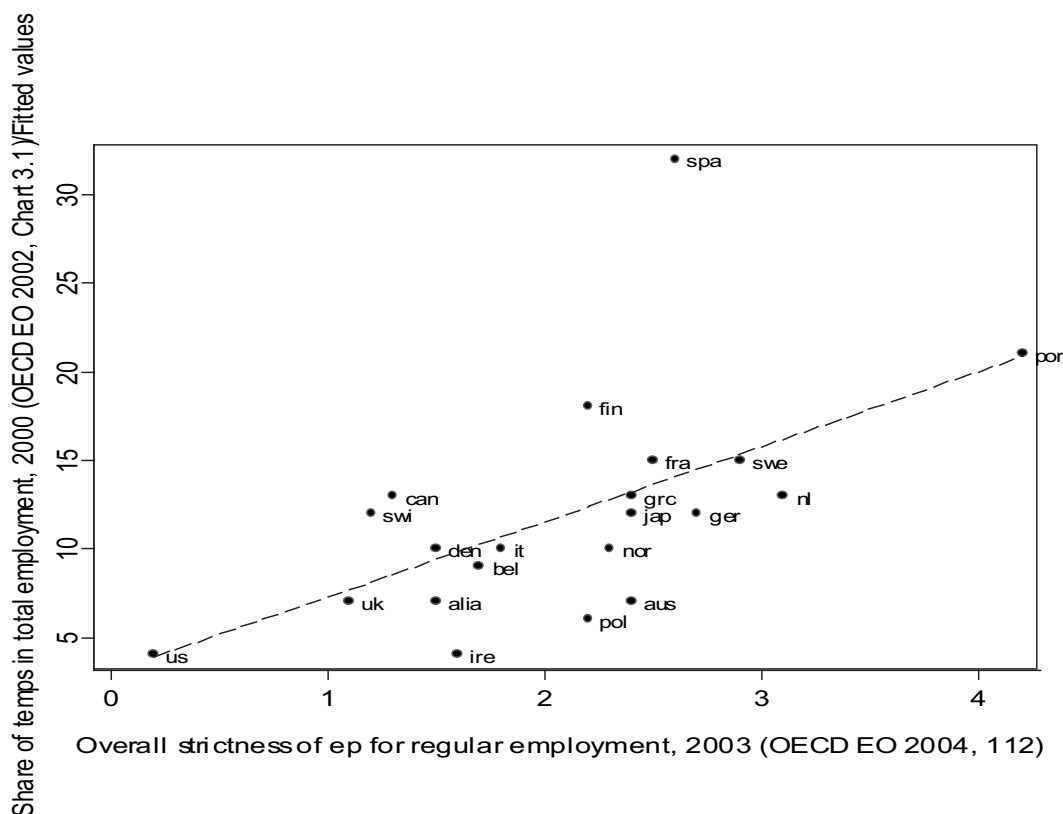
USUAL HOURS/WEEK, MAIN JOB, MEN AND WOMEN—COMPARISON BETWEEN THE UK AND OTHER MAJOR ECONOMIES



Source: OECD, 2004

Figure 2

THE LINK BETWEEN EMPLOYMENT PROTECTION AND TEMP WORK



Source: OECD, 2002

Table 1

LEGAL ENVIRONMENT AND EMPLOYMENT—COMPARISON OF FRANCE AND UK

	UK	France
(a) OECD index of overall strictness of employment protection, regular employment, average for late 1980s and 1990s	0.9	2.5
(b) Taxation of wage income, as % of average production worker gross wage (single worker, no dependents), 2000 Income tax	16.7%	10.5%
Employee social security contribution	8.1%	17.7%
Employer social security contribution	10.0%	40.0%
(c) Long-term unemployment, % of total, average 1995–2000	34	42
(d) Employment/population ratios, average 1995–2000		
20–24 age group:	69	36
25–54 age group:	79	77
55–64 age group:	49	34

Notes and Sources:

(a) Measures employment protection as a 0–4 index including scores for procedural inconveniences for dismissal, notice and severance pay for no-fault individual dismissal, and difficulty of dismissal, OECD Employment Outlook 2004, Appendix 2.A2—for example, France requires 16 months pay as compensation to an employee with 20 years service, the UK 8 months.

(b) Estimate of taxation of wage income, OECD data website at www.oecd.org/dataoecd/44/0/1942482.xls.

(c), (d) Source is OECD Employment Outlook 2004.

Table 2**LABOUR REGULATION MEASURES INTRODUCED SINCE 1997, AND THE EU ROLE**

<i>Area</i>	<i>Measures introduced</i>	<i>EU role</i>
Minimum wages	National minimum wage introduced 1998, now £5.35 Minimum for 16–17s introduced 2003, now £3.30	
Hours restrictions	Right not to work 48 hours; rest periods; 4 weeks paid leave	EU directive
Unfair dismissal	Reduction in the qualifying period for unfair dismissal from 2 years to 1	
Employment agencies	Reform of regulations	EU directive pending
Family friendly measures	Increased maternity leave; paternity leave, and parental leave; right to request flexible working conditions	
Discrimination	Right to no discrimination on grounds of disability, sexual orientation and age	EU directive
	Equal treatment of part-time and fixed-term employees compared to fulltime, permanent counterparts	EU directive
Information and consultation	Right to set up worker representative councils in firms > 150	EU directive
Health and safety	Many laws	EU directives

APPENDIX**Case Study of UCG Member's Costs of Labour and Environmental Regulation**

This case relates to a West Midlands painting and plating plant, employing 38. This evidence relates to health and safety regulations (Control of Major Accidents COMAH, and Major Accident Prevention Policy MAPP), and environmental protection (Integrated Pollution Prevention and Control IPPC, Control of Asbestos at Work Regulations, ISO14001, and Best Available Techniques BAT as required by the Environment Agency). The company estimates that the costs of these regulations are about £40k a year, for both 2003 and 2004 for this division, which employs only 38 people. This figure amounts to as much as 5 per cent, approximately, of direct wage costs.

The Managing Director also notes that the 5 per cent figure would have been near-zero 10 years ago, when COMAH, IPPC, BAT, ISO14001 and Asbestos regulations did not exist. As he says: "In fact we recollect that ten years ago our regulatory activity was just beginning and was at sensible levels; the cost to the business was negligible and it is in the last five years that activity and costs have mushroomed."

It is the large change in the company's costs over such a short period which gives pause for thought. Of course, there is a benefit side to these stricter health, safety and environmental regulations. We do not—and cannot—attempt to quantify such benefits. Yet, was our level of regulation so wrong five or 10 years ago? The answer must surely be, "No", in which case the situation is now one of over-regulation.

The company of which this painting and plating business is a part has been established in the West Midlands for a hundred years. It has plants in France Germany, Belgium, Poland and China. It is the Polish and Chinese parts of the business which are now expanding, due to their lower costs. Over-regulation will drive business out of the UK.