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**GREEN PAPER**

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

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## 1. INTRODUCTION – THE PURPOSE OF THIS GREEN PAPER

The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs. The modernization of labour law constitutes a key element for the success of the adaptability of workers and enterprises. This objective needs to be pursued in the light of the Community's objectives of full employment, labour productivity and social cohesion. It is in line with the calls by the European Council to mobilise all appropriate national and Community resources to promote a skilled, trained and adaptable workforce and labour markets responsive to the challenges stemming from the combined impact of globalisation and of the ageing of European societies. As the Commission's 2006 Annual Progress Report on Growth and Jobs emphasises: *“Increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity”*<sup>1</sup>.

European labour markets face the challenge of combining greater flexibility with the need to maximize security for all<sup>2</sup>. The drive for flexibility in the labour market has given rise to increasingly diverse contractual forms of employment, which can differ significantly from the standard contractual model<sup>3</sup> in terms of the degree of employment and income security and the relative stability of the associated working and living conditions.

In 2003 the report to the European Council from the European Employment Task Force, chaired by Wim Kok, observed that a two-tier labour market might emerge divided between permanently employed "insiders" and "outsiders"<sup>4</sup>, including those unemployed and detached from the labour market, as well as those precariously and informally employed. The latter occupy a grey area where basic employment or social protection rights may be significantly reduced, giving rise to a situation of uncertainty about future employment prospects and also affecting crucial choices in their private lives (e.g. securing accommodation, planning a family, etc). Recourse to alternative forms of employment could further increase in the absence of moves to adapt the standard employment contract to facilitate greater flexibility to both workers and enterprises alike. Accordingly, the Task Force urged Member States to assess, and where necessary alter, the level of flexibility provided in standard contracts in areas such as periods of notice, costs and procedures for individual or collective dismissal, or the definition of unfair dismissal<sup>5</sup>.

The Integrated Guidelines for Growth and Jobs<sup>6</sup> highlight the need for the adaptation of employment legislation to promote flexibility combined with employment security and reduce labour market segmentation. Social dialogue also plays a key role in framing collective and/or firm level solutions enabling "insiders" as well as "outsiders" to make successful transitions between different employment situations while also assisting businesses to respond more

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<sup>1</sup> “Time to move up a Gear” The European Commission’s 2006 Annual Progress Report on Growth and Jobs, p. 6. Also Council and Commission Joint Employment Report 2005/2006, pp. 6, 12-13.

<sup>2</sup> *ibid.*

<sup>3</sup> The research study "The Employment Status of Individuals in Non-Standard by Employment", by B.Burchill; S.Deakin; S.Honey, UK Department of Trade and Industry (1999), identifies non-standard forms of employment as "those forms of work which depart from the model of the "permanent" or indeterminate employment relationship constructed around a full-time, continuous work week".

<sup>4</sup> Jobs, Jobs, Jobs: Creating more employment in Europe. Report of the Employment Taskforce, November 2003, p. 9.

<sup>5</sup> *ibid.*, Chapter 2, p. 30.

<sup>6</sup> 2005 Integrated Guidelines 2005-2008 (adopted on 12 July 2005) - OJ L 205, 6.8.2005, p. 21.

flexibly to the demands of an innovation-driven economy and to changes in the competitive landscape brought about by restructuring.

Other policy components of the "flexicurity" approach include life-long learning enabling people to keep pace with the new skill needs; active labour market policies encouraging unemployed or inactive people to have a new chance in the labour market; and more flexible social security rules catering for the needs of those switching between jobs or temporarily leaving the labour market.

This Green Paper looks at the role labour law might play in advancing a "flexicurity" agenda in support of a labour market which is fairer, more responsive and more inclusive, and which contributes to making Europe more competitive<sup>7</sup>. It seeks:

- To identify key challenges which have not yet yielded an adequate response and which reflect a clear deficit between the existing legal and contractual framework, on one hand, and the realities of the world of work on the other. The focus is mainly on the personal scope of labour law rather than on issues of collective labour law.
- To engage Member State governments, the social partners and other relevant stakeholders in an open debate about how labour law can assist in promoting flexibility combined with employment security, independently of the form of contract, thereby ultimately contributing to increase employment and to reduce unemployment.
- To stimulate discussion on how different types of contractual relations, together with employment rights applicable to all workers, could facilitate job creation and assist both workers and enterprises by easing labour market transitions, assisting life-long learning and fostering the creativity of the whole workforce.
- To contribute to the Better Regulation agenda by promoting the modernisation of labour law, taking into account the overall benefits and costs involved, so as to enable individual workers as well as businesses to grasp more clearly what are their rights and obligations. Consideration needs to be given to the problems faced especially by SMEs in dealing with the administrative costs imposed by both Community and national legislation.

An open public consultation will be conducted on this Green Paper over a four-month period<sup>8</sup>. Following the public consultation, the main policy issues and options identified in the responses by Member States, social partners and other stakeholders will be considered in a follow-up Commission Communication in 2007. This is to be seen in the context of the range of initiatives on the wider topic of flexicurity that the Commission is developing in collaboration with Member States. In particular, a Commission Communication on flexicurity will be presented in June 2007, 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.

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<sup>7</sup> Labour law is not the only relevant factor in this context. The Integrated Guidelines for Growth and Jobs recognise that a review of the tax wedge may also be needed to facilitate job creation, especially for low wage employment. Shifting taxation from labour to consumption and/or pollution taxes can also make a significant contribution in this regard. This Green Paper does not address economic immigration, which is dealt with under the common immigration policy.

<sup>8</sup> Contributions are invited using the electronic form which you can find on the European Commission site at the following address: [http://europa.eu.int/yourvoice/consultations/index\\_en.htm](http://europa.eu.int/yourvoice/consultations/index_en.htm).

## **2. LABOUR LAW IN THE EUROPEAN UNION – THE SITUATION TODAY**

### **a. Developments in the Member States**

The original purpose of labour law was to offset the inherent economic and social inequality within the employment relationship. From its origins, labour law has been concerned to establish employment status as the main factor around which entitlements would be developed. This traditional model reflects several key assumptions about employment status. It was assumed to involve i) permanent, full-time employment; ii) employment relationships regulated by labour law, with the contract of employment as the pivot; and iii) the presence of a single entity employer accountable for the obligations placed upon employers. It has to be recalled that national traditions are very different when it comes to the formulation and implementation of labour law and policy.

Rapid technological progress, increased competition stemming from globalisation, changing consumer demand and significant growth of the services sector have shown the need for increased flexibility. 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 shifts, 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.

The traditional model of the employment relationship may not prove well-suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers. Overly protective terms and conditions can deter employers from hiring during economic upturns. Alternative models of contractual relations can enhance the capacity of enterprises to foster the creativity of their whole workforce for increased competitive advantage.

Since the early 1990s, reform of national employment protection legislation has focused on easing existing regulation to facilitate more contractual diversity<sup>9</sup>. Reforms tended to increase flexibility "on the margins", i.e. introducing more flexible forms of employment with lesser protection against dismissal to promote the entry of newcomers and disadvantaged job-seekers to the labour market and to allow those who wanted to have more choice over their employment. The outcome has given rise to increasingly segmented labour markets<sup>10</sup>.

Developments in social dialogue at national, industry and enterprise level, geared to introducing new forms of internal flexibility, have also demonstrated how workplace rules can be adapted to changing economic realities. The evolving relationship between law and collective agreements is reflected in the ways in which such agreements cover new issues (e.g. restructuring, competitiveness, access to training) and apply to new categories of workers (like agency workers). Collective agreements no longer play a merely auxiliary role in complementing working conditions already defined by law. They serve as important tools adjusting legal principles to specific economic situations and to the particular circumstances of specific sectors.

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<sup>9</sup> OECD Employment Outlook 2004: Chapter 2, "Employment Protection Regulation and Labour Market Performance".

<sup>10</sup> Joint Employment Report, 2005/06.

## b. Action at the EU level

At the level of the EU, a range of legislative and political actions, along with a series of analytic studies, have been undertaken in the interest of establishing how new more flexible forms of work might be combined with minimum social rights for all workers.

The improvement of living and working conditions as regards fixed-term contracts, part-time working, temporary work and seasonal work was originally highlighted in the 1989 Social Charter and in the ensuing Social Charter Action Programme<sup>11</sup>. A period of intensive debate about the appropriateness of Community-level initiatives relating to these employment relationships culminated in the Part Time Work<sup>12</sup> and Fixed Term Work<sup>13</sup> Directives which gave binding effect to the EU social partners' framework agreements establishing the principle of equal treatment for part-time and fixed-term workers in relation to comparable full-time workers.

In 2000, the Commission launched a first-stage consultation of the social partners on modernising employment relations, which led to the adoption in 2002 of a framework agreement on telework<sup>14</sup>. In 2002, the Commission adopted a proposal for a directive on minimum standards for the employment of temporary agency workers<sup>15</sup>, on which the Council has not yet been able to agree a common position.

Detailed studies have been published of the evolution of labour law in the EU-15 in the period 1992–2003<sup>16</sup>. The results of these studies were presented at a conference “Labour Law in Europe: Steps towards 2010” which was organised by the Dutch Presidency in 2004, with the support of the Commission<sup>17</sup>. Further country studies are being undertaken to cover the development of labour law in the EU-25, and in Bulgaria and Romania.

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. At the EU level, the social *acquis* supports and complements the actions of the Member States in this sphere.

The Commission also acts as a catalyst to support action by the Member States and the social partners to strengthen the Lisbon goals of growth and jobs through its support for a range of policy instruments including the EU Social Dialogue and financial measures such as the European Social Fund, Progress, and the proposed European Globalisation Adjustment Fund. Coordination of employment policies within the partnership for growth and jobs and the open method of co-ordination in the field of social inclusion policies also help to ensure full mobility for workers across Europe within the context of the Treaties. These combine concrete goals and policy objectives set at EU level, which are translated into national plans,

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<sup>11</sup> European Commission, Social Charter Action Programme, November 1989.

<sup>12</sup> Directive 97/81/EC concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and ETUC.

<sup>13</sup> Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by UNICE, CEEP and ETUC.

<sup>14</sup> At the request by the social partners, the Commission initiated a study by Adalberto Perulli "Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects" (2002).

<sup>15</sup> COM(2002) 149, 20.3.2002, which was presented after social partners attempted to reach agreement without success and later modified by COM(2002) 701, 28.11.2002.

<sup>16</sup> The Evolution of Labour Law (1992-2003), vols I and II. A general report was prepared providing a comprehensive overview of the evolution of labour law in the EU-15.

<sup>17</sup> See also Final Conclusions of Dutch Presidency conference, Leiden, 2004, [http://internationalezaken.szw.nl/index.cfm?fuseaction=dsp\\_document&link\\_id=44922#3738600](http://internationalezaken.szw.nl/index.cfm?fuseaction=dsp_document&link_id=44922#3738600)

the use of benchmarks and indicators to measure progress, exchange of experience and peer review so as to learn from good practice.

### 3. THE KEY POLICY CHALLENGE – A FLEXIBLE AND INCLUSIVE LABOUR MARKET

A proliferation of different contractual forms has emerged in the absence of a more comprehensive adaptation of labour law and collective agreements to rapidly changing developments in work organisation and society. By availing of non-standard contractual arrangements, businesses seek to remain competitive in the globalised economy by avoiding *inter alia* the cost of compliance with employment protection rules, notice periods and the costs of associated social security contributions. Administrative burdens associated with the employment of regular employees also have a significant influence on employment growth, particularly in small firms<sup>18</sup>. Non-standard as well as flexible standard contractual arrangements have enabled businesses to respond swiftly to changing consumer trends, evolving technologies and new opportunities for attracting and retaining a more diverse workforce through better job matching between demand and supply. Workers are also afforded greater choice particularly as regards arrangements for working time, increasing career opportunities, a better balance between family life, work and education as well as more individual responsibility.

Fixed term contracts, part-time contracts, on-call contracts, zero-hour contracts, contracts for workers hired through temporary employment agencies, freelance contracts, etc., have become an established feature of European labour markets. The share of total employment taken up by those engaged on working arrangements differing from the standard contractual model as well as those in self-employment has increased since 2001 from over 36% in 2001 to almost 40% of the EU-25 workforce in 2005<sup>19</sup>. Part-time employment, as a percentage of total employment, has increased from 13% of total employment to 18% in the last 15 years. It has accounted for a larger contribution (around 60%) to employment creation after 2000 than full time standard employment. Part-time working remains predominantly a feature of female employment – with nearly one-third of women in employment having a part-time job compared with only 7% of men. Fixed-term employment has increased as a percentage of total employment from 12% in 1998 to over 14% in 2005 in the EU-25. Unlike part-time work, fixed-term employment does not exhibit significant gender differences<sup>20</sup>. Given the increasing levels of participation in these forms of contracts, the level of flexibility provided under standard contracts may need to be examined to enhance their capacity to facilitate recruitment, retention and the scope for progression within the labour market.

Self-employment is also providing a means of coping with restructuring needs, reducing direct or indirect labour costs and managing resources more flexibly in response to unforeseen economic circumstances. It also reflects the business model of service-oriented business delivering completed projects to their customers. In many cases it reflects a free choice to

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<sup>18</sup> Observatory of European SMEs No 7, Recruitment of employees: Administrative burdens on SMEs in Europe, 2002, p. 11.

<sup>19</sup> Employment Guidelines (2005-08): Indicator for total employees in part-time and/or fixed-term contracts plus total self-employed as % of persons in employment based on EU Labour Force Survey, 2005, ESTAT.

<sup>20</sup> Employment in Europe, 2006, Statistical Annex. Part-time work contracts may be of indeterminate as well as temporary duration. The latest data on workers' perceptions of their working conditions in the European Foundation's Fourth European Working Conditions Survey reveals that 68% of part-time workers are satisfied with their working schedule compared to 23% wishing to work more hours and 9% wishing to work less hours.

work independently despite lower levels of social protection in exchange for more direct control over employment conditions and terms of remuneration. Self-employed workers in the EU-25 numbered over 31 million in 2005 or 15% of the total workforce<sup>21</sup>. Those who are self-employed on their own account and without employees constitute 10% of all workers in the EU-25. Although agriculture and retailing still hold the larger share of this category, it is a growing feature of the construction and personal services sectors associated with outsourcing, subcontracting and project based work.

However, there is evidence of some detrimental effects associated with the increasing diversity of working arrangements<sup>22</sup>. There is a risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position. Such jobs may however serve as a stepping-stone enabling people, often those with particular difficulties, to enter the workforce.

EU-15 data show that around 60% of those who had taken up non-standard contractual arrangements in 1997 had standard contracts in 2003. However, 16% of them were still found in the same situation and 20% of them had moved out of employment<sup>23</sup>. There is also a strong gender dimension and intergenerational dimension to the risk of having a weaker position in the labour market, since women, older and also younger workers engaged on non-standard contracts have fewer chances to improve their position in the labour market<sup>24</sup>. It has to be taken into account however that different Member States have very different rates of transition.

The recent Employment in Europe 2006 report<sup>25</sup> refers to findings that stringent employment protection legislation tends to reduce the dynamism of the labour market, worsening the prospects of women, youths and older workers. The report underlines that deregulation "at the margin", while keeping stringent rules for regular contracts largely intact, tends to favour the development of segmented labour markets with a negative impact on productivity. It also stresses that workers feel better protected by a support system in case of unemployment than by employment protection legislation. Well-designed unemployment benefit systems, coordinated with active labour market policies seem to perform better as an insurance against labour market risks.

In the context of globalisation, ongoing restructuring and the move towards a knowledge-based economy, European labour markets need to be both more inclusive and more responsive to innovation and change. Potentially vulnerable workers need to have a ladder of opportunity so as to enable them to improve their mobility and achieve successful labour market transitions. Legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular permanent contracts to explore opportunities for greater flexibility at work. If innovation and change are to be successfully managed, labour markets will need to address three main issues: flexibility, employment security and segmentation issues. The purpose of this Green Paper is to promote a debate about whether a more responsive regulatory framework is required to support the capacity of

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<sup>21</sup> *ibid*, also Industrial Relations in Europe, 2004. Self-employment is particularly significant in Poland, Hungary, Lithuania, Latvia and Estonia among the new EU Member States, and also in the UK, Ireland, Portugal, and the Netherlands.

<sup>22</sup> Precarious Employment in Europe: A comparative study of labour market related risks in flexible economies. ESOPE Final Report. Directorate General for Research, 2004.

<sup>23</sup> Employment in Europe 2004, p. 15, and Chapter 4. It has to be recognized of course that not all non-standard contracts can be considered as being precarious.

<sup>24</sup> Employment in Europe, 2004, Chapter 4, p. 181.

<sup>25</sup> Employment in Europe, 2006, p. 81 et seq.

workers to anticipate and manage change regardless of whether they are engaged on indefinite contracts or non-standard temporary contracts.

#### 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?

#### **4. MODERNISING LABOUR LAW – ISSUES FOR DEBATE**

##### **a. Employment transitions**

Labour and social security laws in most Member States were designed to provide protection for dependent employees in particular jobs. They may not be sufficient to assist workers in making transitions from one status to another, whether in the case of involuntary discontinuities (e.g. dismissal and unemployment) or voluntary discontinuities (e.g. in the case of education and training leave, caring responsibilities, career breaks and parental leave). The problems of female workers who are disproportionately represented in new forms of work arrangements and who still face obstacles in seeking access to full rights and social benefits also need to be addressed.

Opportunities to enter, remain and make progress in the labour market vary considerably, with both employment protection legislation and the legal contractual framework at national level having a strong impact on job status transitions, especially as regards the position of the long-term unemployed and precariously employed "outsiders". Examples of labour law measures supportive of employment transitions which have been developed through a process of social dialogue at national level include the Dutch Flexibility & Security Act 1999, the Austrian Severance Act (*Abfertigungsrecht*) 2002<sup>26</sup> and the June 2006 Spanish decree easing the conversion of temporary labour contracts into open-ended labour contracts with reduced dismissal costs<sup>27</sup>. The Austrian reform provides an interesting example of a radical shift away from a system based on the traditional employment relationship between one worker and one firm to one based on a broader employee benefit provision fund operated at national level. The link was cut between being laid off by an employer and the payment of a once-off

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<sup>26</sup> See commentary on these examples cited in Employment Task Force Report, pp. 33 and 35, also OECD Employment Outlook 2004, Chapter 2.

<sup>27</sup> See report in European Industrial Relations Observatory on-line of August 2006, <http://www.eiro.eurofound.eu.int/2006/05/articles/es0605019i.html>.

severance award. The new rules allow workers to leave when they find alternative employment rather than stay in a particular job for fear of losing the accompanying severance payment. The reform removed the threat to a firm's existence which could be posed by the sudden cost of redundancies, while the employer's contribution to the individual savings fund can be spread over time. From the employee's perspective, the new system reduces the cost of job mobility since workers no longer lose all of their entitlement to severance payments when taking a new job.

Adopting a lifecycle approach to work may require shifting from the concern to protect particular jobs to a framework of support for employment security including social support and active measures to assist workers during periods of transition. This is what Denmark achieved by combining "light" employment protection legislation, intensive active labour market measures, and substantial investment in training as well as high unemployment benefits with strong conditionality.

#### 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 (i.e. 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?

#### **b. Uncertainty with regard to the law**

The emergence of diverse forms of non-standard work has made the boundaries between labour law and commercial law less clear. The traditional binary distinction between "employees" and the independent "self-employed" is no longer an adequate depiction of the economic and social reality of work. Disputes concerning the legal nature of the employment relationship can arise where that relationship has either been disguised or where a genuine difficulty arises in seeking to fit new and dynamic work arrangements within the traditional framework of the employment relationship.

Disguised employment occurs when a person who is an employee is classified as other than an employee so as to hide his or her true legal status and to avoid costs that may include taxes and social security contributions. This illegal practice can occur through the inappropriate use of civil or commercial arrangements.

Action at national level to combat the phenomenon of disguised employment, often developed in collaboration with the social partners, has ranged from the introduction of mandatory legal presumption rules<sup>28</sup> to improving enforcement mechanisms including targeted campaigns and special information and awareness initiatives<sup>29</sup>. Unclear legal definition of the status of self-employment in national legal and administrative frameworks may result in persons, who believe themselves to be self-employed, subsequently finding themselves to be classified by social security agencies or tax institutions as a dependent employee. This can result in an obligation for the self-employed/employee and his main client/employer to pay additional

<sup>28</sup> The Dutch Flexibility and Security Act, 1999, introduced a mandatory legal presumption whereby an employment contract exists when work has been carried out for another person in return for pay on a weekly basis, or for at least twenty hours per month during three consecutive months.

<sup>29</sup> As a consequence of recent social partnership agreements concluded in Ireland and Spain, the respective governments have agreed to increase the number of labour inspectors.

social security contributions<sup>30</sup>. The Commission has stressed that the problem of persons posing falsely as self-employed workers to circumvent national law<sup>31</sup> should be dealt with primarily by Member States<sup>32</sup>.

The concept of '*economically dependent work*' covers situations which fall between the two established concepts of subordinate employment and independent self-employment. These workers do not have a contract of employment. They may not be covered by labour law since they occupy a "grey area" between labour law and commercial law. Although formally 'self-employed', they remain economically dependent on a single principal or client/employer for their source of income<sup>33</sup>. This phenomenon should be clearly distinguished from the deliberate mis-classification of self-employment. Already some Member States have introduced legislative measures to safeguard the legal status of economically dependent and vulnerable self-employed workers<sup>34</sup>.

While these approaches have been somewhat tentative and partial, they reflect efforts on the part of legislators, the courts and the social partners to tackle problems in this complex area. The "targeted approach" adopted in the UK to establishing differing rights and responsibilities in employment law for "employees" and "workers" is an example of how categories of vulnerable workers involved in complex employment relationships have been given minimum rights without an extension of the full range of labour law entitlements associated with standard work contracts<sup>35</sup>. Anti-discrimination rights, health and safety protection, guarantees of minimum wage as well as safeguards for collective bargaining rights, have been selectively extended to economically dependent workers in several Member States. Other rights, particularly those relating to notice and dismissal, tend to be restricted to regular employees having completed a prescribed period of continuous employment.

At Community level, the regulation of the working conditions of self-employed commercial agents illustrates how Internal Market rules can closely resemble aspects of labour law. In order to provide basic protection to independent commercial agents in dealing with their

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<sup>30</sup> Second Career: Overcoming the obstacles faced by dependent employees who want to become self-employed and/or start their own business. Enterprise Directorate General, European Commission, (2004). p. 8, 29-31.

<sup>31</sup> Social partner organisations have observed that bogus "self-employed" work, fictitious service provision and extended sub-contracting chains have been used to circumvent post-enlargement transitional restrictions on access to some national labour markets. See Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty - COM(2006) 48, 8.2.2006.

<sup>32</sup> Accordingly, the Commission welcomes the adoption in June 2006 of a Recommendation on the Employment Relationship at the 95th session of the International Labour Conference promoting the formulation and adoption by member states, in consultation with the social partners, of national policies for regularly reviewing the scope of their laws, and where necessary clarifying and adapting them, in order to guarantee effective protection for workers who perform work in the context of an employment relationship. This non-binding instrument takes a strategic approach, leaving the nature and extent of protection given to workers in an employment relationship to be defined by national law and practice.

<sup>33</sup> This does not mean that these workers are necessarily in a vulnerable position.

<sup>34</sup> Examples include the concept of "employee-like" workers corresponding to the civil law notion of "*parasubordination*" in Italy and Germany. In Germany amendments to the Social Code introduced in 1999 to cover the social security status of economically dependent workers were subsequently modified in 2002 (see *The Evolution of Labour Law*, Vol. 2 pp. 151-153). In Spain, a Self-Employed Workers' Statute is envisaged, to give effect to the agreement concluded on 26 September 2006 between the Spanish government and the main representatives of the self-employed, on the rights and benefits the self-employed, including economically dependent workers.

<sup>35</sup> DTI Discussion Document on Employment Status, July 2002; also *Success at Work: Protecting Vulnerable Workers, Supporting Good Employers*, UK Department of Trade and Industry, March 2006.

principals, Directive 86/653/EEC<sup>36</sup> laid down provisions concerning, *inter alia*, payment of remuneration; conditions for the conversion of fixed-term contracts into contracts of indefinite duration; as well as compensation in the event of damage suffered due to the termination of a contract.

It has been argued that minimum requirements be introduced into all personal work contracts for services undertaken by the economically dependent self-employed<sup>37</sup>. While increasing certainty and transparency and ensuring a minimum level of protection of the self-employed, such requirements could, however, have the effect of limiting the scope of these contractual arrangements.

#### Questions

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?

#### c. Three Way Relationships

The growing incidence of temporary agency work has led to changes in labour law in some Member States in order to establish the respective liabilities of the work provider and user enterprise for safeguarding workers' rights. The "three-way relationship" between a user undertaking, an employee and an agency, usually arises where a temporary agency worker is employed by the temporary work agency, and then hired out to perform work assignments at the user firm by means of a commercial contract. The resulting 'dual employer' situation adds to the complexity of the employment relationship<sup>38</sup>.

Temporary agency work is regulated in most Member States through a mix of legislation, collective labour agreements and self-regulation<sup>39</sup>. The Commission's proposal for a Directive on Temporary Agency Workers seeks to establish the non-discrimination principle to ensure that agency workers are treated no less favourably than the 'regular' workers in a "user enterprise"<sup>40</sup>.

Similar problems can arise where workers are involved in extended chains of sub-contracting. Several Member States have sought to address such problems by making principal contractors responsible for the obligations of their sub-contractors under a system of joint and several liability. Such a system encourages principal contractors to monitor compliance with employment legislation on the part of their commercial partners. However, it has been argued that such rules may serve to restrain sub-contracting by foreign companies and could therefore present an obstacle to the free provision of services in the Internal Market. In recent case law on the posting of workers such a system was considered to be an acceptable procedural means

<sup>36</sup> EEC Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents.

<sup>37</sup> See especially Perulli, *op. cit.* Chapter 3.

<sup>38</sup> Temporary Agency work in an enlarged European Union, European Foundation, 2006, p. 1.

<sup>39</sup> *ibid*

<sup>40</sup> Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers - COM(2002) 701.

of safeguarding an entitlement to minimum rates of pay where this form of worker protection is necessary and proportional and in accord with the public interest<sup>41</sup>.

#### 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 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?

#### **d. Organisation of working time**

The failure of the extraordinary EPSCO Council of 7 November 2006 to reach an agreement has highlighted how the provisions of Directive 2003/88/EC and the relevant ECJ jurisprudence<sup>42</sup> remain particularly challenging for certain sectors such as health.

The Commission is now reviewing the situation in the light of the stalemate in the Council.

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<sup>41</sup> Provided that such a system is necessary and proportional, the European Court held that Article 5 of Directive 96/71/EC on posting of workers in the framework of the provision of services, interpreted in the light of Article 49 TEC, does not preclude the use of such a system as an appropriate measure in the event of failure to comply with the Directive. See Judgement of the ECJ of 12 October 2004 in Case C-60/03 Wolff and Müller [2004] ECR I-9553.

<sup>42</sup> In particular judgments of the ECJ of 3 October 2000 in Case C-303/98 (SIMAP) ECR I-7963, of 9 October 2003 in Case C-151/02 (Jäger) ECR I-8389, and of 1 December 2005 in Case C-14/04 (Dellas) ECR I-10253.

## 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?

### **e. Mobility of workers**

The consistent application of EU labour law can be put in question, particularly in the context of the transnational operation of businesses and services, through the variations in the definitions of worker used in different directives. This is of particular concern when it comes to the situation of frontier workers<sup>43</sup>.

Outside of the specific context of freedom of movement of workers, most EU labour law legislation leaves the definition of 'worker' to the Member States. It has been argued that Member States should retain discretion in deciding the scope of the definitions of 'worker' used in different Directives. Continued reference to national rather than Community law could, however, affect worker protection especially where freedom of movement is at issue. Difficulties associated with the different definitions of worker have emerged particularly in connection with the implementation of directives on posting of workers and transfers of undertakings. Divergence in the scope of national definitions of 'employee' in such circumstances is difficult to reconcile with the Community's social policy aims of striking a balance between a flexibility and security for employees.

## 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?

### **f. Enforcement issues and undeclared work**

Enforcement mechanisms should be sufficient to ensure well functioning and adaptable labour markets, to prevent infringements of labour law at national level and to safeguard workers rights in the emerging European labour market<sup>44</sup>. In this context, undeclared work appears as a particularly worrying and enduring feature of today's labour markets, often associated with cross-border labour movements. Being the main contributing factor to social dumping, it is responsible not only for the exploitation of workers but also for distortions to competition. In October 2003 the Council adopted a resolution calling on Member States to address this problem<sup>45</sup>. Suggested measures included preventative measures and sanctions, as well as partnerships between social partners and the public authorities at national level to tackle undeclared work. These measures are currently reflected in a mix of incentives for

<sup>43</sup> See also EP Resolution A5-0338/2000 - OJ C 262, 18.9.2001, p. 148.

<sup>44</sup> See ILO Report V(1) The Employment Relationship (2005), par 65. See also problems highlighted in the Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty. See also Commission Communication COM(2006) 159 "Guidance on the posting of workers within the framework of the provision of services".

<sup>45</sup> Council Resolution on transforming undeclared work into regular employment - OJ C 260, 29.10.2003.

transformation of undeclared work into regular work; sanctions and penalties; better links with the tax system and benefits; and administrative or fiscal simplification.

The problem was identified by UNICE/UEAPME, CEEP, ETUC, as an integral part of the balance between flexibility and security, as topics for joint analysis in the EU Social Partners work programme for 2006-2008<sup>46</sup>.

Labour Ministries and their services have a crucial role to play in monitoring the application of the law, collecting reliable data on labour market trends and changing work and employment patterns, and designing effective and dissuasive sanctions, to combat undeclared work and disguised employment relationships. In the case of mobile workers in road and maritime transport, the transnational and offshore nature of operations in these sectors makes enforcement a particularly challenging task<sup>47</sup>.

There should be more effective cooperation at national level between different government enforcement agencies, such as labour inspectorates, social security administrations and tax authorities. Improvements in the resources and expertise of these law enforcement authorities, and in their cooperation with partners, can contribute to reductions in the incentives to undeclared work.

Strengthened administrative cooperation at the EU level may also assist the Member States in detecting and tackling abuse and evasion of labour rules so as to ensure compliance with Community law. Article 10 TEC establishes a general rule imposing mutual duties of genuine co-operation and assistance on the Member States and the Community Institutions and requiring that appropriate measures be taken to help achieve the aims of the Community. Illegal practices with an international dimension only serve to highlight the need for increased co-operation at the EU level to improve the strategies and inspection tools used in assessing working conditions and labour practices.

#### 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?

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<sup>46</sup> Work Programme of the European Social Partners, 2006-2008, 23 March 2006.

<sup>47</sup> Road Transport Working Time Directive – Self-employed and Night Time Provisions, forthcoming research report for DG TREN.