Select Committee on the European Union
Sub-Committee G (Social Policy and Consumer Affairs)

Inquiry into the EU Commission's Green Paper
"Modernising labour law to meet the challenges of the 21st century"

Submission by

The Institute of Employment Rights

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Flexibility and security within a collective framework[1]

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.[2]

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.[3]

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.

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[1] 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 .

[2] 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.

[3] 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% 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.[4] This would embrace measures to support the organisation of working time to achieve a better balance between work and family/private life,[5] and guaranteeing a minimum decent wage.[6] 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.[7] 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.

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[4] As defined by the European Court of Justice in *United Kingdom v. Council*, Case C-84/4, [1996] ECR I-5755.

[5] 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.

[6] 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.

[7] 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".

"Economically dependent" workers

8. The concept of 'economically dependent workers' refers to those workers who do not correspond to the traditional definition of 'employee'.[8] 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).

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 worker*s. The legal characterisation of such workers should not deprive them of at least the protection available to employees.[9] At least, because it may be necessary for EU law to intervene to provide special protection, for example, for agency workers.[10] 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.[11] 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.[12]

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[8] 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] 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".

[10] See the Green Paper, Question 10.

[11] 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.

[12] See the Green Paper, Question 9.

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.[13] 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.[14] 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'[15]

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.[16] 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.[17]

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[13] 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.

[14] *Commission of the European Communities v. United Kingdom*, Case C-484/04, decided 7 September 2006.

[15] See Green Paper, Question 7.

[16] 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".

[17] As with equal pay in *Allonby v. Accrington & Rosendale College*, Case C-256/01, [2004] *Industrial Relations Law Reports* 224.

Supporting material[18]

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".[19] An earlier draft of the Green Paper, in September 2006[20] entitled "Adapting labour law to ensure flexibility and security 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?[21] 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

[18] 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.
[19] "Modernising labour law to meet the challenges of the 21st century". COM(2006) 798 final, Brussels, 22.11.2006.
[20] Communication from the Commission, Green Paper, "Adapting labour law to ensure flexibility and security for all" (n.d.).
[21] See Question 6 posed by the Green Paper.

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 %). 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.[22]

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.[23] EU labour law has encouraged trade union membership by promoting the role of collective representation in a number of directives.[24] In light of declining trade union membership and failures of these directives to secure collective representation[25], 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.

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[22] 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.

[23] "Unemployment insurance and trade union membership", *European Industrial Relations Review* No. 392, September 2006, pp. 20-24.

[24] 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.

[25] 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".[26] More recently, amendments introduced by the European Parliament to the proposed Services Directive,[27] 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.

[26] G. and A. Lyon-Caen, *Droit Social International et Européen*, 7ème ed., 1991, p. 153.
[27] 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.