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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 a 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)