For the citizens of the European Union, the credibility of the European project largely depends on the "human face" of the EU. This implies that individual and collective labour law must exist at European level which, on the one hand, comprises a legal framework and minimum provisions for protecting young people, workers, job seekers, disabled workers and older workers, and on the other hand, encourages and guarantees autonomous collective legal relations at every level between employers and workers. Labour laws of this kind form part of social legislation and have their own social objective. Until now European labour law has been limited; and the existing laws are generally an over-subordinated instrument of economic principles, such as free movement of services. This adversely affects the autonomy of European labour law. The following cumulative rules of European labour law are of key importance: · The basic principle governing European labour law is the highest standard of social protection. · Autonomous social dialogue with a view to concluding collective agreements (whether or not generally binding) must be expressly recognised and promoted. Evidently this includes rights such as the freedom to organise, freedom to demonstrate, freedom of expression, freedom to take action, etc. · A legal framework can only be established at European level which can be built on at national level in the interests of young people, workers, job seekers, disabled workers and older workers. · As a consequence of the application of equal treatment provisions, the basic rule applies "equal conditions of pay and employment for equal work". · In the case of cross-border work, the basic rule applies that the labour laws of the country of employment take priority, unless the country of origin provides better social protection. · Each member state must take actual measures to ensure that labour law is implemented and complied with (no paper measures). · There needs to be "real" coordination across Europe among the different national government institutions so that national bodies are able to obtain information quickly about labour law in another member state. · It needs to be clearly established at European level who is responsible for compliance with labour law and for paying the associated wages, social security contributions and taxes in a chain of subcontractors. The EFBWW again states that labour law is in fact aimed at regulating employment relations. This implies a stable legal framework with legal security for the protection of young people, workers, job seekers, disabled workers and older workers. The EFBWW proposes the following priorities: · The modernisation of labour law goes hand-in-hand with developing industrial relations among
the social partners and autonomous responsibility for concluding collective agreements. The recognition and protection of this principle is paramount. The realisation of the fundamental social rights enshrined in the Charter of Fundamental Rights (Nice, 7 December 2000, (2000/C 364/01)), e.g. o Right to form and to join trade unions for the protection of his or her interests o Right to education and to have access to vocational and continuing training. o Equality between men and women must be ensured in all areas, including employment, work and pay. o Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action. o Every worker has the right to working conditions which respect his or her health, safety and dignity. o Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. o The family shall enjoy legal, economic and social protection. o The right to paid maternity leave and to parental leave following the birth or adoption of a child o … o The right to organise and to form trade unions goes hand in hand with the right to take industrial action. o A stable legal position for employed and unemployed workers in the labour market. o No unilateral imposing of flexibility on workers. o Setting of limits for flexibility (night work, overtime, weekend work, …). o Explicit recognition of the right of workers and jobseekers to receive further vocational training and retraining.

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<th>2(a). Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation?</th>
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<td>2(b). How?</td>
<td>The adaptation of labour law and collective agreements can only be successful if the adaptation is brought about with the express approval of the representative social partners. The EFBWW hereby gives its express preference for the conclusion of general, collective agreements concluded autonomously by the social partners. By this means, a balance can be struck between more flexibility, on one hand, and employment security and a reduction in labour market segmentation, on the other. In absence of collective agreements the national authorities have the obligation to provide social protection via labour legislation. Such a legislation should be created in close consultation with the recognized social partners. The EFBWW proclaims that any form of labour law by collective agreement or law must be enforceable. Undermining social protection is a serious “offence/crime” which needs to be taken seriously by the national authorities.</td>
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3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?

Increasing productivity and adjusting to the introduction of new technologies and competition can only be achieved by workers who "feel good" about it. In practice this means that they will want to invest in increased production, greater skills, ... when there is "something in it" for workers. These "benefits" can take different forms (e.g. job security, income security, worker participation and dialogue, right to basic and further training, recognition of the "work-family" relationship, ...). Only when these are present (to be achieved via labour law) will there be a win-win situation for companies and workers alike. This principle assumes that a good balance is struck between the interests of companies and rights of workers. In order to achieve this balance, it is very important that "laws" and "collective agreements" are brought about by means of structured dialogue between the social partners. Experience has made it abundantly clear that "laws" and "collective agreements" brought about by "genuine" participation of the social partners leads to greater productivity, innovation, skills and competitiveness for companies and workers. In those countries with highly developed social dialogue between the social partners the results are extremely positive. The EFBWW therefore takes the view that European and national labour law has a competitive added value when this is brought about by autonomous social dialogue with only moderate State intervention. Regarding the size of the enterprise, labour market regulations in general must be the same, this should be especially the case for employment contracts and the conditions of work for the individual worker, irrespective of the size of the company.

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

Labour law must include express recognition that each form of flexibility has natural limits. Imposed flexibility opens the door to abuses for which the economically weakest party (normally the workers) pay the price. Imposed flexibility of employment contracts does not tally with adequate employment security and social protection. The EFBWW emphasises the need to ensure that recruitment of workers takes place within a legal, regulatory and contractual framework in the form of an individual signed contract. As far as the flexibility of permanent and temporary contracts is concerned, the EFBWW recognises that labour law must not be allowed to become a system of complex and non-transparent procedures. A traditional feature of the European construction sector is its considerable natural flexibility. The major challenge consists in organising this natural flexibility in such a way that: · it does not overburden employers with unnecessary red tape; · it combines acceptably with workers' private lives; · it does not give rise to precarious jobs for workers; · it guarantees a social safety net and permanent protection for workers; · social abuses are reduced to an absolute minimum; · it is open to inspection by the workers' organisations and inspectorates; · social partners, paritarian and State institutions manage the "flexibility" adequately... The EFBWW recognises that the comprehensive electronic exchange of data on tax, labour law, social security and migration can simplify the recruitment of workers and at the same time give added value to labour law. Clearly, this must go hand-in-hand
With comprehensive administrative cooperation among all the parties concerned (State departments, inspectorates, national/regional and local administrations, paritarian institutions and social partners). Such cooperation is necessary in every country and between countries. This last form of cooperation needs to be organised European level.

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<th>5. Would it be useful to consider a combination of more flexible employment protection legislation and well-designed assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?</th>
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<td>On this question we must again refer to the &quot;limits of flexibility&quot;. The overwhelming majority of workers would in the first place opt for &quot;measurable&quot; employment protection. This &quot;security&quot; in turn leads to a high degree of job satisfaction thereby encouraging efforts to produce added value for the companies. The EFBWW expressly points out that &quot;more flexible legislation on employment protection&quot; can in no case be a substitute for &quot;business flexibility&quot;. The flexibility that is specific to any company is the primary responsibility of the entrepreneur and the buck may not be passed indirectly to the workers. This does not mean that the EFBWW is opposed to &quot;more flexible legislation on employment protection&quot;, but that such an instrument can only be created by the (sectoral) social partners having a say in it (not just being consulted) at each appropriate level. Following on from this point, the EFBWW would also point out that &quot;more flexible legislation&quot; should not be regarded as a hidden agenda for &quot;deregulation and dismantlement&quot; of employment protection. Linking increased income compensation to an active labour market policy can indeed produce positive results. Here again it is for the social partners to take an active part in achieving the necessary balance between employers' and workers' interests. With regard to an active labour market policy, the dangers of such a policy must also be highlighted. There is no question here that any form of &quot;pressure&quot; may be put on unemployed workers. The EFBWW would only accept active &quot;support&quot; for jobseekers. In this connection, the personal circumstances of the jobseeker must also be taken into account.</td>
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6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

The social partners are the best placed bodies to shape labour law. For that reason, it is very important that social dialogue be expressly promoted and recognised at Community level. Above all, the activities of sectoral paritarian training funds/institutions can contribute greatly to promoting access to training and transitions between different contractual forms. The key benefits of the sectoral paritarian training institutions are as follows: · They can offer considerable additional benefits on top of traditional education; · The possibility of adapting rapidly and efficiently to the needs and requirements of the labour market; · Making room for the individual needs of workers and undertakings; · Giving responsibility for management to social partners who are very familiar with the challenges and solutions of the labour market; · Funding and costs on a basis of solidarity; · Making use of existing networks via the internal structures of the social partners. Workers must have entitlement to access vocational training. In this sense, the training must be free of charge for the worker, at the free choice of the worker and taking place during normal working time.

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

A clear legal distinction between employment and self-employment is profoundly important. As there are considerable differences between the two types of employment on the labour law, social security and taxation fronts, it is necessary to clearly distinguish between them. What must be avoided, for example, is making it too easy for a worker to be assigned the status of "self-employed" in order to avoid having employed status. This means that effective control mechanisms must be applied to ensure that "bogus self-employment" does not arise. The EFBWW points out that "merely" adjusting the legal distinction between employed and self-employed workers in order to facilitate the transition from one status to the other and vice versa opens the door to "abuses of employment status". A "bona fide" transition from employment to self-employment means that abuses are prevented from occurring. This can only be done by building in concrete and verifiable parameters (criteria) proving that this is indeed a "bona fide" transition. Clearly this must be accompanied by actual checks on the "criteria".
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<th>Question</th>
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<td>8. Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as on the protection of workers?</td>
<td>The existence of a “floor of rights” dealing with the working conditions of all workers, regardless of the form of their work contract is a fundamental principle of labour law. The EFBWW is extremely surprised at this first question. Does the question mean that the European Commission doubts that a “floor of rights” for all workers is necessary? Every properly functioning labour market is characterised by the harmonious interplay of the different social and economic interests. Provisions governing working conditions determine whether or not a balance exists. Unevenly-balanced working conditions lead to social exploitation or a step backwards for the economy. The application of the minimum requirements governing working conditions, the principles of which have already been enshrined in, e.g. the Nice Charter (2000), the various ILO conventions, the European Charter of Social Rights (1999), … guarantees steady growth in jobs and social protection. In exceptional circumstances, there is a possibility that the economic interests of companies and the social interests of workers need to be weighed up against each other. Such a procedure is the sole domain of the social partners who together need to make some fundamental choices. With regard to occupational health and safety (OHS), from the outset, all types of OHS law at European level were devoted to protecting all people in the working environment. But at the time when the first European directives on OHS were formulated, the diversification of forms of employment had not emerged. Some research by the Dublin Foundation has shown that people working in precarious forms of employment suffer more than those with normal working conditions. The accident rate is higher, amongst other things, owing to a lack of training for the workers. In the end, society meets the cost of these negative consequences of precarious work. The basic rights have to cover: · all forms of occupational health and safety regulation for every form of employment · all forms of instruction and training in connection with safety and health requirements at the workplace · general access to all forms of occupational training to ensure that those with atypical forms of employment are enabled to adapt to technical change as well as to developments in work processes. In addition the EFBWW underlines that it is important to clearly define, in the European and national legislation and in the practice of labour law, that “minimum levels are minimum levels”. There should not be any ambition to make these levels universally applicable. The analyses in the Green paper contains a tacit question whether it would be possible to find a common level for those with good employment security and for those with insecure employment contracts. Making improvements for those with insecure employment at the sacrifice of security for those who have good employment security can never be an acceptable method. Minimum levels should therefore be a way of improving the situation for those with the poorest security.</td>
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9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of subcontractors? If not, do you see other ways to ensure adequate protection of workers in “three-way relationships”?

Subcontracting in the construction sector is inherently associated with the complex organisational planning in this sector. In other sectors too it is becoming increasingly common. There is nothing wrong in that per se. Over recent years in the building sector there has been a trend for the subcontracting chain to become ever longer and in the lowest part of the subcontracting chain for increasing use of foreign firms, (bogus) self-employed workers or fraudulent contractors. A logical explanation for this trend lies in the fact that every contractor contracting out work to a subcontractor keeps a certain percentage of the sum contracted for (usually between 2% and 10%). It goes without saying that the amount ultimately contracted for at the lower end of a long subcontracting chain is considerably smaller than the original sum. The consequence of such a system is heavy price pressure on the contractors who ultimately execute the work. These are generally smaller firms and (bogus) self-employed workers. As the building sector is an extremely labour-intensive service sector, in which roughly half the profits depend on the productivity and cost of labour, the price pressure is directed at these two factors (productivity and cost of labour) first of all. In virtually every country, the construction sector is organised to a relatively large extent by the State and the social partners. The reasons for this are obvious: protecting consumers, health and safety of workers, preventing social fraud and undeclared work, ... Such regulations are indispensable. In reality, for the subcontractors in a long subcontracting chain there is therefore very limited scope for substantially reducing the final sum contracted for. Working within the framework of the law there are not many possibilities of carrying out the work for “too low a price”. Concerning the cross-border provision of services we would refer in particular to Posting Directive 96/71/EC and Regulation 1408/71. The Posting Directive stipulates that in principle the conditions governing pay and employment of the country of employment are applicable. The social security regulation provides that in principle the social security of the country of origin applies. Where everything is carried out in the correct manner, in principle, from a financial viewpoint, it is not worthwhile for a client to use a foreign subcontractor or subcontractors. The reality is, however, that there is a clearly discernible trend whereby increasingly foreign building firms are actively involved in the lowest part of the subcontracting chain on building sites. Unfortunately, these are often the firms responsible for the most glaring irregularities concerning pay, working conditions and social security. Against this background, most member states have introduced provisions relating to ultimate liability in a subcontracting chain, which mainly apply in the building sector. Such provisions exist in: Belgium, the Netherlands, Germany, Italy, France and Finland. This legislation was recently introduced in Spain. There is debate in various countries (including Hungary) on introducing such provisions. This means that the general contractors (and/or clients) are in principle responsible for the social security and tax fraud committed by their subcontractors. There are a number of arguments to support this: · The general contractor (and/or client) is responsible for the
building work, planning and organisation on the building sites; · The general contractor (and/or client) selects the subcontractors itself; · Each general contractor has a financial advantage at the expense of the subcontractors. Such provisions are not entirely new at European level either. For instance, Directive 92/57/EC of 24 June 1992 relating to the minimum safety and health requirements at temporary or mobile construction sites stipulates that building managements, clients and employers are jointly and severally liable for the health and safety of subcontractors on their building site. This liability is far-reaching in scope and entails, inter alia: (a) keeping the construction site in good order and in a satisfactory state of cleanliness; (b) choosing the location of workstations bearing in mind how access to these workplaces is obtained, and determining routes or areas for the passage and movement and equipment; (c) the conditions under which various materials are handled; (d) technical maintenance, pre-commissioning checks and regular checks on installations and equipment with a view to correcting any faults which might affect the safety and health of workers; (e) the demarcation and laying-out of areas for the storage of various materials, in particular where dangerous materials or substances are concerned; (f) the conditions under which the dangerous materials used are removed; (g) the storage and disposal or removal of waste and debris; (h) the adaptation, based on progress made with the site, of the actual period to be allocated for the various types of work or work stages; (i) cooperation between employers and self-employed persons; (j) interaction with industrial activities at the place within which or in the vicinity of which the construction site is located. In addition, reference can be made to the opinion of the European Court of Justice in the Wolf&Müller ruling (Case C-60/03 (Wolff & Müller GmbH & Co KG v. José Filipe Pereira Félix)) which expressly confirms that ultimate liability in a subcontracting chain cannot be regarded as a barrier to the free movement of services. This problem has not gone under the radar of the European Parliament either. The European Parliament report on corporate social responsibility: A New Partnership (2006/2133(INI)) “calls on the Commission to regulate joint and several liability on the part of general or principal undertakings in order to deal with abuses in the subcontracting and outsourcing of workers and to set up a transparent and competitive internal market for all companies.” The European Parliament report on the application of Directive 96/71/EC relating to the posting workers (2006/2038(INI)) “calls on the Commission to create a European legal framework to regulate joint and several liability for general or principal undertakings, in order to deal with abuses in the subcontracting and outsourcing of cross-border workers and to set up a transparent and competitive internal market for all companies.”. In order to create a transparent and open internal market, EFBWW recognises that the diversity of national provisions makes it difficult for foreign firms to know which national rules on liability in subcontracting chains are applicable. The fact is that these provisions are generally fairly complex and highly specific to the national situation. As a solution to this, the EFBWW considers that
the adoption of a European directive on ultimate liability of general contractors and/clients is indispensable with a view to ensuring compliance with and application of provisions governing pay and working conditions, social security and tax liabilities in a subcontracting chain. Such a directive would close the legal loophole whereby subcontracting is used to get around tax, social, statutory and contractual obligations, thereby distorting the market and removing protection for workers.

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

Temporary agency work is a form of employment needed to make up for exceptional personnel shortages in a company. In this sense, temporary agency work is an instrument for removing a threat to continuity of business. The agency workers are expected to accept a high degree of flexibility. Provided that the worker concerned agrees, there is nothing wrong with this. However, temporary agency work and the employment status of these workers must be well regulated. If this does not happen, inevitably there is a danger of “unfair competition” and “social dumping”. In this sense, it is no coincidence that private-sector temporary employment agencies are often instrumental in domestic and cross-border social security fraud. The EFBWW therefore takes the view that temporary agency work must always be subject to thorough prior checks within a framework of labour law established by the social partners of the hiring industry. With regard to employment status, it is not acceptable for temporary agency workers to be an army of “cheap labour”, with poorer conditions of pay, employment and social protection than the ordinary workers of the hiring company. As a minimum, the same conditions of pay, work and social security as those applying to the ordinary workers must therefore apply to agency staff. Furthermore, temporary agency personnel should reasonably not be allowed to work for prolonged periods in the same company with the status of “temporary agency worker”. Temporary agency work is a stopgap solution in exceptional circumstances. The EFBWW cannot accept temporary agency workers working for lengthy periods in the same hiring company so as to introduce flexibility on a significant scale. At the end of a specified period, a temporary agency worker should be regarded as an ordinary worker. A European Directive on Temporary Agency workers would be an important added value. The EFBWW considers it unacceptable that the draft TAW Directive, on which there was a political consensus within the European parliament, is blocked by some member states.
11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?

Up to now it was not possible to bring the European directive on working time out of the wood. But we have to remember that the current situation is based on a political discrepancy. It seems necessary to go back to a realistic description of working time reality and to the scientific evidence. That is important in judging working time policy as a topic relevant for the whole European society and not only for the economy. Over the last two decades throughout Europe working time has become much more flexible than before. A plant like VW Wolfsburg is dealing with much more than 100 time schedules. Sometimes it really seems that companies are no longer able to cope with the existing possibilities of flexibility and in the same way it seems that they are not aware of the range of possibilities. We don't see a general lack of flexibility. We have scientific evidence that: · long working hours over lasting periods have major negative health effects · the accident rate increases significantly after working a seven-hour day · shift work but especially night work remains a major problem for workers' health · the workers' influence on working time schedules remains small · monotonous work in combination with long working hours results in chronic diseases and, consequently, enormous costs for society. Working time has to be considered in combination with other factors of the working environment. Of high importance are aspects of the work task. In this respect the existing directive refers to monotonous work and includes the employer's obligation to take measures to address monotonous work. A new directive should explain in which areas monotony could be reduced. A campaign against monotonous work and in favour of progressive forms of work organisation and work routines for specific occupations should be launched at the European level. Requirements for a redrafted directive: · a general limit of eight hours for daily working time for a regular worker · a clear framework of rules should indicate how the general limit of eight hours (as a daily working time) can be derogated from; these derogations should be voluntary. · a short compensation period for working hour regimes exceeding eight hours a day remains crucial · for shift work and especially for night work, stringent restrictions are important. · Compensation in time is the preferred option. · deletion of “opt-out” clauses – all experience and all data have shown that the opt-out regulation is not freely negotiable between employees and employers but sometimes for a whole sector a kind of obligation for workers to get access · a clear framework for collective agreements dealing with exceptions from the rule, set down in the directive, has to be formulated · Exceptions from the basic requirements shall not become a question of negotiation at company level. Concerning the British opt-out system the EFBWW states that the “instrument” is not in accordance with the European Treaty and related Directives on occupational health and safety. The possibility, given only by collective agreements, of prolonging the period of calculation of the maximum working time to up to one year, shows how the method based on collective agreements can be used to obtain flexibility also as regards the Working time Directive. The method based on making these rules negotiable through
| 12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of ‘worker’ in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter? | The reply to this question is currently the subject of internal discussion. Nevertheless, at this stage all member states have the full discretion to determine the employment status of a “worker”. Based on the earlier mentioned European labour principles (see question 1) the EFBWW considers that the country of employment is the only competent authority to define the legal employment status of a worker, “employee” or a “self-employed worker”. As such the EFBWW rejects the principle that member states can export their legal definition to another member state. As such, each enterprise has to respect the labour law rules of the country where it has an activity and a part of these rules is the definition of “worker” in that country. It is important to guarantee a dividing line between workers and self-employed that does not create any in-between solutions, which can develop into “grey zones”. An unambiguous dividing-line is important, not only for labour law but also for the implementation of social and tax obligations. |
13. Do you think it is necessary to reinforce administrative co-operation between the relevant authorities to boost their effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?

| At the present time, coordinated cross-border administrative cooperation between the relevant national authorities does not exist. This cooperation is currently organised by means of various bilateral agreements between the member states. This procedure is very difficult to set in motion. For example, many member states apply an internal ratification procedure through the national parliaments! At the same time, implementing the procedure throws up a great many difficulties as each national authority has its own internal procedures which are not easily understandable by their colleagues abroad. The current method of regulation by bilateral agreement is a huge waste of money, energy and time. Under this system, each country has to conclude 26 bilateral agreements. This gives rise to many hundreds of agreements – and that is not including the existing bilateral agreements. There is also very little or no consistency between the existing agreements. At the moment, only a few countries are actively working on initiating close administrative cooperation. The question contains the implication that there is already close administrative cooperation now. The EFBWW wishes formally to dispute this implication in the light of the existing cases and experiences. The inadequate administrative cooperation is one of the reasons why cross-border social security fraud has been almost entirely ignored. The companies committing fraud know the problems only too well and are taking full advantage. It would be much more efficient if the European Commission were to take the initiative to promote administrative cooperation between the relevant authorities so as to enforce Community labour law more effectively. The European Parliament has called on the Commission repeatedly to set up a “permanent coordination structure”. So far – totally incomprehensibly – this appeal has fallen on deaf ears at the Commission. The answer to the first question is glaringly obvious: it goes without saying that close (closer) administrative cooperation is needed between the member states. In order to achieve that, the Commission has to take the necessary concrete initiatives. In most countries, pay and working conditions in the construction sector are in the main established in collective agreements. These agreements are concluded by the social partners. Paritarian institutions/funds have been set up for this purpose in many countries which are managed by the social partners. Many of these institutions are adequately equipped to help promote the closer administrative cooperation in a constructive manner between the relevant authorities that is needed to enforce Community labour law more effectively. Evidently, such cooperation can only be brought about through dialogue between the different parties. |
14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

The EFBWW recognises the recommendations by Regioplan Research Advice and Information that “undeclared work” must be tackled using a mix of measures. In so doing, a balance must be aimed for between preventive and repressive measures. The EFBWW stresses that a mix of measures is only effective where this forms a coherent whole. At European and national level the authorities need to formulate a legislative and administrative framework that gives the sectoral social partners the scope to develop concrete policy measures which can prevent, detect and sanction “undeclared labour”, which is undermining the socio-economic model. The sectoral social partners at European and national level know better than anyone else the real problems facing the sector. Consequently, they are the best placed to propose concrete measures for preventing, detecting and sanctioning “undeclared work” in the sector. As “undeclared work” is strongly linked to the type and nature of certain sectors, it is recommended that measures be adopted in close consultation with the sectoral social partners. Being closely in touch with the day-to-day situation on the ground they are very well-placed to formulate appropriate policy initiatives. In particular, the EFBWW emphasises the importance of tripartite dialogue between the State, workers’ and employers’ organisations in the construction sector in order to address the “undeclared work” problem jointly. Without such close cooperation among the social partners there is very little prospect of success, simply because there are no or too few connecting points with the real situation in the construction sector. By way of illustration, the EFBWW refers to European Council Directive 1999/85/EC of 22 October 1999, which enables member states, as an experiment, to apply a lower VAT rate to labour-intensive services. The purpose of this temporary experiment is to stimulate employment and curb the black economy. The EFBWW takes the view that this initiative can achieve this objective provided that the following cumulative conditions are observed: The European Council Resolution of 20 October 2003 calls for the European and national sectoral social dialogue expressly to discuss the question of “undeclared work”. The sectoral social partners at European and national level know their sector like nobody else. Consequently they are the best placed to propose concrete measures for preventing undeclared work in their sector. Seeing that European Directive 1999/85/EC is clearly aimed at reducing undeclared work, the EFBWW takes the view that this measure must be discussed by the European and national social partners, and in particular at sectoral level. Achieving the Lisbon objectives and in particular promoting employment and curbing the black economy is an important challenge for everyone. The EFBWW is of the opinion that these objectives can only be achieved by means of a coherent and well-balanced package of policy measures. The EFBWW regrets the fact that Directive 1999/85/EC is treated as an isolated policy measure without being linked to other measures. The Directive therefore needs to be discussed as part of a coherent set of measures aimed at achieving the Lisbon objectives. Directive 1999/85/EC stipulates that there
must be a direct link between the price reduction stemming from the lowering of VAT and the expected increase in demand. This criterion was added in order to prevent the lowering of VAT from simply producing an increase in company profit margins and, consequently, creating little or no extra employment. This criterion is a clear-cut economic objective. The EFBWW considers that the lowering of VAT, which is a considerable tax advantage, can only be granted where this advantage is linked to a concrete and measurable obligation with respect to the result achieved, in particular promoting employment and curbing the black economy. On the basis of its expertise, the EFBWW proposes various policy measures that could serve to reduce the level of "undeclared work". A. An appropriate awareness-raising campaign All too often the fact is ignored that “undeclared work” is first and foremost a collective responsibility. The problem is not just confined to those people doing “undeclared labour” but also encompasses a much larger group in our society who to some extent tolerate “undeclared labour”. In order to achieve the ambitious objective of full employment (by 2010) in the European Union, first of all a general climate of awareness must be fostered. To this end, the clear message must be put across that “undeclared labour” is a serious transgression with far-reaching socio-economic consequences. The authorities must clearly indicate that they really do want to put an end to “undeclared labour” by hammering out a clear and effective package of policy measures. Such an awareness campaign should target two groups. The first is society as a whole and the second those specific sectors in which a significantly higher level of “undeclared labour” prevails. A strong general awareness campaign is absolutely essential for those countries in which there is a higher degree of social acceptance of “undeclared work”. These are the countries where “undeclared work” is particularly prevalent and the concept is generally so well-entrenched in the general population that the seriousness of “undeclared work” is barely perceived. Consequently, a wide-ranging awareness campaign is vital. It is indispensable to target an awareness campaign on those sectors, including the construction sector, which has a higher degree of structural “undeclared work”. In this connection, a well-targeted message must be directed at all the parties involved in the sector. A public statement that the social partners and the State are agreed on a range of measures and that they also are actually working together on these measures sends out an extremely important signal. The EFBWW particularly advocates joint action by the social partners and the State. Set out below are a number of sector-specific policy measures aimed principally at preventing and combating “undeclared work” in the construction sector. With a view to putting an end to cross-border “undeclared work”, the EFBWW is calling for an awareness campaign to be launched in specific home countries aimed at persuading and warning people about the consequences and risks of carrying out “undeclared work” in another country. Such a campaign would obviously need to be organised in close cooperation between the authorities and the social partners in the home countries and the countries
of employment. B. Appropriate detection techniques A key feature of “undeclared work” is the invisible character of this activity. Depending on the degree of seriousness of the “undeclared work”, undeclared workers and users make even greater efforts to “hide their activities from the light of day”. The EFBWW proposes a number of very practical measures for making “undeclared work” more visible. (1) Prior notification of construction activities Before starting up a construction project every (principal) contractor and/or client must provide the inspectorate services in advance with all the information required to assess the scale of the site and, where appropriate, to identify the subcontractors. This data should be entered into an electronic database made available to the different social and tax inspectorates. In this way, construction sites can be monitored more effectively by the inspection departments. When notifying a construction site, the following data as a minimum must be reported: the identity of the customer, the architect and all contractors and subcontractors, the scheduled start and end dates for the works and the nature of the works. This notification should also be accompanied by a list of all workers to be employed on the site. Provided that this data is maintained and processed in a structured manner, the authorities would have an effective tool for carrying out targeted checks and investigations. In this age of the Internet and ICT it is perfectly possible for such notifications to be made electronically. Obviously where notifications are not made or are incorrect this must be regarded as a serious violation which is subject to sanctions. (2) Physical notification of construction sites In addition to the advance notification of construction sites, it is highly desirable that the site itself be clearly marked. Whatever the size of the site, clear and uniform signs must be placed on every site. Along with basic information about the site, the signs must clearly indicate the authority responsible for supervision so that any undeclared work can be reported. If necessary, the idea of a “whistle blowing” scheme for reporting such activities could be considered. (3) Effective control of construction sites In order to combat “undeclared work” effectively, effective checks on construction sites are necessary. For this purpose the competent authorities must have state-of-the-art equipment and sufficient personnel to carry out their inspection duties. It is absolutely essential that the services organise themselves efficiently and that resources and powers are not too thinly dispersed. Inspections should not only take place during normal working hours. They should also take place during weekends, nights, evenings and morning hours as well as during holiday periods. The frequency of the checks should be in proportion to the number of construction sites. Good coordination between employment offices, tax departments, inspectorates and the customs services is necessary. The trade unions need to have an active role in the inspections and should have opportunities to act proactively. In addition to the conventional inspections, new control methods must be used to detect “undeclared work”. In particular, construction firms declaring very low levels of work must be thoroughly checked. These firms report only small amounts of work per worker. This
information can be checked, for example, in the tax or social insurance declarations. A well-coordinated approach clearly calls for an interdisciplinary approach. The establishment of special investigation and detection services to combat “undeclared work” could make a considerable contribution to unmasking and detecting complex fraud techniques. (4) A social identity card for construction workers The social identity card is an additional control instrument for combating undeclared work on construction sites. The card is a personal pass which is sent out periodically to all building workers. Only those building workers for whom the employer has paid the social charges and taxes receive a social identity card. The employers must apply for the identity card using a special form before the building worker starts work. This form contains clear particulars about the actual terms of employment of the building worker and the social security and tax obligations of the employers. At the same time as the application is submitted, the employer makes an advance payment for the tax and social security charges. The building worker also receives a copy of the application form. Directly after receiving the application and the advance payment, the social identity card is sent to the building worker. The card contains social identification data about the worker concerned and his/her employer. On the basis of the social identity card, the employment inspectorate can ascertain on site whether the employer has paid the social charges. The building worker can also take action if he/she finds that no pass has been prepared for him/her. Construction workers can also take action when they find that they have not received a passport or when the information reported does not correspond to the work actually carried out. C. Improving organisation of the construction sector It cannot be emphasised enough that preventing and combating “undeclared work” in the construction sector can only be achieved from within the sector itself. For this purpose it is absolutely essential that the sector has sector-specific tools for preventing and combating “undeclared work”. There follow a few concrete proposals. (1) Combating the practice of abnormally low prices The prices of tenders submitted under procurement procedures for public contracts often vary widely. By accepting an abnormally low tender which does not cover the costs of works carried out correctly, the customer is turning a blind eye to certain practices such as non-compliance with social security and tax laws. The State must seek to counter knock-down prices in a structural manner. Possible solutions include automatically excluding any tenders more than 20% below the average of the tenders submitted. In addition, those authorities which place public contracts must assume their responsibility, as part of their supervisory and control obligations, to prevent “undeclared work” on construction sites. (2) More stringent establishment conditions In the construction sector, the lack of quantitative and qualitative requirements to be met by those wishing to become building contractors undoubtedly plays into the hand of the undeclared work phenomenon. Given the labour-intensive character of the construction industry, applying more stringent entry requirements for this sector would be a responsible move.
The criteria to be met by contractors must be laid down in advance and objectively in the light of the specific building activities of the contractor. (3) Joint and several liability of customer(s) and/or principal contractor(s) Joint and several liability laid down by law for the tax and social insurance debts of those parties using subcontractors to carry out construction work is a necessary measure to restrict “undeclared work” in the construction sector. The EFBWW has found that countries which already have such legislation are obtaining good results in their fight against this problem. In the light of these successes, the EFBWW wants a European legal framework to be drawn up in which joint and several liability is regulated. In other words, the customer and/or principal contractor can be deemed to have joint and several liability for tax and social insurance debts of the subcontractors organised by him. The basic premise here is that the customer and/or principal contractor has primary responsibility for the whole organisation of the construction site. Consequently, he is also jointly and severally liable for all social insurance and tax violations by all workers on the construction site, including the workers of the subcontractors. In order to organise this joint and several liability efficiently, the EFBWW proposes that this be implemented in conjunction with the compulsory prior declaration of construction sites (see above). In this declaration, the customer and/or principal contractor must accurately describe the construction work and identify all subcontractors. On the basis of this information, the customer and/or principal contractor can pay a specific guarantee into a bank account set up specially for this purpose. This amount corresponds to a percentage (e.g. 50%) of all tax and social insurance charges that the customer and/or principal contractor and the subcontractors(s) must pay for the personnel employed by him (them). If the customer and/or principal contractor does not wish to pay any guarantee into a special bank account he will be deemed jointly and severally liable for all tax and social insurance debts of his subcontractors. Should the customer and/or principal contractor choose to pay a guarantee his joint and several liability is limited to the portion of his guarantee. Only once the works have been completed and the customer and/or principal contractor and subcontractor(s) can produce proof that all tax and social insurance charges have been paid will this guarantee be released in favour of the customer and/or principal contractor. The EFBWW takes the view that the customer and/or principal contractor would then be more selective in choosing his subcontractors and would keep closer control over the personnel employed on the building sites. D. Adequate sanctions Effective controls clearly imply that strong and appropriate sanctions must be provided in law for those people and undertakings who gain the greatest (financial) advantage from “undeclared work”. It is important in this connection that the competent authorities can act quickly and effectively. To this end, they must have a range of powers with which they are in a position to prevent, detect, the combat and sanction “undeclared work”. In order to be effective, the competent authorities must be able to apply administrative sanctions. These sanctions must prevent the illegal situation from
persisting. (1) Genuine penalties For stringent penalties to have effect, the violations established must also be effectively punished by the courts. The EFBWW regrets to note that in practice there is a wide gulf between the judgments handed down and the actual sanctions applied. For the construction sector, the EFBWW argues the case for specially-adapted sanctions, such as the drawing up of "blacklists" and a ban on carrying out construction work.

(2) Cross-border application of penalties and sanctions The EFBWW is finding increasingly often that the penalties and sanctions imposed in connection with undeclared work are being circumvented as a result of the guilty party being situated abroad and/or the enterprise having its registered office there. By this stratagem, organisers of undeclared work seek to achieve some form of immunity. To date, an effective legal framework for implementing penalties and sanctions in another EU member state and outside the EU has been lacking at European level. With an eye to EU enlargement and the rising trend in cross-border undeclared work, this legal vacuum must be filled as quickly as possible. In the meantime, the EFBWW is urging that cross-border coordination between the administrative, political and legal departments be improved.

(3) Negative publicity A "blacklist" is a summary of all enterprises and those responsible for them who, during the past five years, have received a judgment against them in the final instance for having carried out "undeclared work". The EFBWW takes the view that drawing up a blacklist is a highly effective deterrent for sanctioning and preventing "undeclared work". For a building contractor it is a serious additional sanction if it is publicly made known that in the past they have had a judgment against them for carrying out "undeclared work". In addition, customer(s) and principal contractor(s) will be less willing to use the contractor if he has been guilty in the past of carrying out "undeclared work". It goes without saying that the drawing up of blacklists must be subject to every precaution to ensure correctness and respect of privacy. For this reason, these databases should only be operated by an objective State body.

(4) Ban on carrying out construction work Again and again it has been stated that "undeclared work" in the construction sector can only be prevented when the driving force to do so comes from the sector itself. In this respect, it is very important that crooked contractors who use "undeclared work" are consistently and systematically rooted out of the construction sector. For these reasons, the EFBWW advocates the application of a ban on carrying out construction activities for those persons and enterprises who have a judgment against them for "undeclared work". For the reply to this question, the EFBWW refers to the following replies of this questionnaire: · 9, a European directive on ultimate liability in subcontracting chains; · 10, the organisation of temporary agency work and the employment status in law of temporary agency workers; · 13, the establishment of a permanent European coordination structure on the enforcement of the Community labour law.