Key analysis and recommendations

- PCG welcomes the opportunity for a debate on modern ways of working in the EU and hopes that it will be conducted in an informed manner and without descending into rancour

- EU member states should note the ILO’s Recommendation that employment law should not interfere with commercial relationships
  - This principle must be at the heart of all member states’ efforts to adapt their legal frameworks to accommodate modern ways of working
  - It allows full protection for employment to be maintained in all instances where an employment relationship exists
  - The ILO Recommendation of May 2006 is an imperfect document but contains more good than bad

- No plans should be brought forward to develop EU-wide definitions of terms such as “employee” or “worker”
  - The exercise would prove too contentious and agreement would never be reached
  - Employment status and related issues should be left to member states to decide

- Disguised employment should be eradicated at member-state level
  - PCG recommends that in the UK the Government places the current legal situation in statute, such that end-clients are clearly responsible for employment rights for disguised employees
  - This will not change the current legal situation, but it will make it much clearer
  - Clarity in the law is essential for vulnerable workers to be able to access their rights and for professional workers to be able to exercise their freedoms

- “Economic dependency” is merely a variety of disguised employment
  - As an independent phenomenon it does not exist
  - The European Commission should desist from using the term in future

- A new language is needed to discuss modern ways of working in the EU
  - The old dichotomy of “employer” and “employee” is outdated - the 40% of workers identified by the Green Paper as “non-standard” sit outside this division
  - The Green Paper is wrong to use such a dismissive and pejorative term as “non-standard” to describe such a large percentage of the EU’s workforce
  - Dichotomies can nonetheless be useful tools: the discourse should in future be conducted using the more useful and precise distinction between “employment” and “commercial” contracts and relationships

- Other member states should consider PCG’s example in developing and promoting best practice in the UK’s freelancing marketplace, which includes:
  - Template contracts, independently verified as sound both legally and commercially
  - A range of products developed to allow freelancers to enhance their value proposition
  - Extensive guidance for freelancers, clients and agencies

- Other member states should consider instituting a legal distinction between “workers” and “employees” as is seen in the UK
  - This allows a basic level of rights to be applied to all “workers”
  - Professionals who work via commercial relationships are unencumbered by such protections while vulnerable workers are within their scope
  - Full employment rights depend on the presence of an employment relationship
Introduction
The Professional Contractors Group was founded in 1999 as the representative body for freelance contractors and consultants in the UK. Many of its members operate their own one or two-person limited companies; PCG also represents unincorporated sole traders and freelancers who operate via umbrella structures.

All of PCG’s members take on business risk and supply their services to a range or succession of clients. They therefore represent the flexible, skilled, knowledge-based workforce on which the EU’s future prosperity depends. They provide IT, engineering, project management, marketing and other functions in sectors including financial services, telecoms, oil and gas and defence.

PCG considers the needs of its members both as workers and as enterprises. As enterprises, PCG’s members represent the very smallest enterprises in the UK. As workers, they can be classed as self-employed, freelance, independent or a number of other variations. Here they will be referred to as freelancers or contractors for convenience.

PCG exists because a large number of freelancers grouped together to safeguard and protect their way of working, which they adopted as a positive career choice. They represent a large section of the “atypical” workers at issue in the Green Paper.

PCG makes this response in addition to its answers to the questions set out in the Green Paper. Our answers to these are included at the end of this document also.

Commercial relationships and employment relationships
The Green Paper repeatedly refers to “contracts” without distinguishing between fundamentally different types of contract. It also tends to use the terms “worker” and “employee” interchangeably: the latter term in fact carries a very specific implication of being in an employment relationship.

There are two types of contractual relationship: employment contracts and commercial contracts. In the UK, this distinction is often expressed in terms of contracts “of service” (employment) and “for services” (commercial). PCG’s members operate via commercial contracts, or contracts for services.

The Green Paper’s reference to “employment security, independently of the form of contract” (page 4) is therefore an intellectual and legal nonsense: commercial contracts do not and cannot carry employment security with them.

The Green Paper also misses the point somewhat when it observes that there is, “a demand for a wider variety of employment contracts,” - it is true that there is increasing demand for flexible working arrangements within employment relationships, but the more significant demand is for a wider variety of working relationships, which go beyond employment relationships altogether and utilise commercial contracts instead.

PCG agrees with the assessment on page 5 that labour law originally came into existence, “to offset the inherent economic and social inequality within the employment relationship.” We must observe, however, that with increasing numbers of workers opting to work via commercial relationships rather than employment relationships, the employment relationship is thus to some extent outmoded, and of declining relevance to the economy as a whole - though it is, of course, still important.

With reference to the next premise, PCG also agrees that employment status is the main factor determining entitlements: “an employment relationship... with the contract of employment as the pivot” remains a prerequisite for gaining access to employment rights. This is the case in the UK and is an
entirely sensible state of affairs: if employment rights were to intrude into situations where no employment relationship exists, these non-employment relationships would be destabilised and made unviable.

PCG therefore has some sympathy with the Green Paper’s assertion (page 10) that “the traditional binary distinction between “employees” and the independent “self-employed” is no longer an adequate depiction of the economic and social reality of work.” While this particular distinction is perhaps not the most useful way into the issue, it remains PCG’s feeling that dichotomies can nonetheless be useful tools: the discourse should in future be conducted using the more useful and precise distinction between “employment” and “commercial” contracts and relationships.

UK practice: ‘workers’ and ‘employees’
The United Kingdom has, since 1997, considerably extended the rights available to employees. In doing so, however, it has taken a “targeted” approach to which the Green Paper refers (page 11).

The UK has developed two categories of individuals to which rights might apply: workers and employees. These are not defined in a single piece of legislation setting out what constitutes a “worker” or “employee”: rather, legislation setting out each right or entitlement includes clauses specifying who is eligible for it. The categories are set out in these clauses using common legal formulations.

This system allows a core set of protection (for instance, minimum wage rules) to be extended to potentially vulnerable “atypical workers” without hindering professional self-employed people who do not need such protection and generally sit outside both categories.

The only protection extended to self-employed people such as PCG’s members is anti-discrimination legislation (age, sex, disability, race etc.). Anti-discrimination legislation is, however, not employment legislation: it extends to all aspects of daily life, not just work.

PCG understands that this distinction between “worker” and “employee” is not present in many other member states. This would certainly explain why the Green Paper uses the two terms interchangeably and does not recognise that the term “employee” carries the very specific meaning of being in a relationship of employment.

PCG therefore recommends that other member states should consider adopting the distinction, which is well-understood and generally successful in the UK, to the point of often being taken for granted. The alternative - that in order to qualify for any sort of basic protection one must be an employee - is undesirable and will undoubtedly hinder the development of a sophisticated labour market in any country in which it is in operation.

Freelancing
i) economic benefits of freelancing
The UK’s freelancers and contractors contribute approximately £100 billion (roughly €150 billion) to the UK’s GDP each year.¹

Of the 4.3 million enterprises in the UK in 2005, 73% had no employees: all of these one-person enterprises constitute “atypical workers” in the terminology of the Green Paper. This excludes temporary agency workers.

PCG estimates that there are between 12 and 15 million freelancers in the EU-15.²

¹ This figure is derived from the UK’s Labour Force Survey and PCG’s own internal survey data, based on an estimate of 990,000 freelancers in the UK
² “Study into the representation of freelancers across the EU”, Small Business Europe, 2005
So, why and how did freelancing develop? Governments and courts have over time, quite rightly, awarded employees extensive rights. Businesses, however, have need from time to time for resources more flexible than can be acquired under terms of employment. There is a whole range of reasons for these needs: the skills needed might be specialised and not part of the client’s normal requirements; there may be a project of limited or even uncertain duration; and so on.

For companies acquiring these skills on a non-permanent basis, the long-term obligations associated with employment relationships are unsuitable and unnecessary. Freelance contractors are prepared to provide these resources as a service, taking on board the concomitant business risks. This is beneficial for many reasons:

- The clients gain because they have the flexibility to hire in specific skills only when they are needed, rather than having to employ someone the whole time
- Contractors gain because they have the advantages of being in business, such as career advancement and a more flexible pattern of working
- Employees gain because they can be given their rights without damaging employers’ competitiveness
- Governments gain because they can award employees further rights without increasing economic costs across the board
- The EU gains because these developments give rise to a more flexible economy with which to meet the challenges of globalisation.

PCG is pleased to note that the Green Paper recognises many of these benefits in section 2b, particularly pages 7-8.

In March 2006 the UK’s Department for Trade and Industry endorsed freelancing by declaring that it did not intend to change the structures of employment law in the UK.

PCG agrees wholeheartedly with the objectives stated in the Green Paper of “a skilled, trained and adaptable workforce” and “labour markets responsive to the challenges stemming from the combined impact of globalisation and the ageing of European societies”. These are exactly what freelancing offers: the highly skilled, highly mobile and highly flexible workforce that is so vital to the EU’s future prosperity.

It may be the case that, “since the early 1990s, reform of national protection legislation has focused on easing existing regulation to facilitate more contractual diversity,” (page 5 of the Green Paper) but PCG does not accept the implication that this development has been solely responsible for the plethora of sophisticated working models. Freelancing in particular utilises commercial contracts: there is nothing innovative about this in legal terms. There is no legal difference between a commercial contract for the provision of services with a large, trans-national company and the same sort of contract with a one-person company. If anything, legislative changes have tended to introduce obstacles to these relationships in the UK, rather than removing them.

The reference on page 7 to businesses, “availing of non-standard contractual arrangements,” is therefore misguided: businesses who engage freelancers are utilising entirely standard commercial contracts. If these contracts are approached as employment contracts, they will indeed look strange and “non-standard”; but as commercial contracts they are in no sense extraordinary.

PCG therefore protests strongly at the implication that companies utilising these forms of working are doing so to avoid “inter alia the cost of compliance with employment protection rules”: they are doing so because an employment relationship is not appropriate, and greater economic flexibility can be obtained by engaging a commercial supplier. The implication that these legitimate commercial arrangements represent some form of fiddle, swizz or dodge is deeply offensive to the millions of freelance workers throughout the EU.
ii) personal benefits of freelancing

It is widely acknowledged that self-employment and other forms of working referred to in the Green Paper as “non-standard” tend to produce higher satisfaction among workers than the traditional employment model. A survey comparing the employed and self-employed in 2005 found that the opportunities to use one’s own abilities and initiative offered by self-employment were the two key factors in enhancing job satisfaction. The self-employed often work longer hours for less reliable incomes, but are nonetheless consistently more satisfied in their work than employees.1

Any argument that “better jobs” must necessarily entail higher levels of social protection is therefore clearly wrong: while it is right that the vulnerable are protected, the best quality of work is arrived at by allowing individuals to exercise their freedoms.

In this context, the Green Paper’s stated objective of “maximis[ing] security for all” is plainly misguided: highly-skilled professionals are able, and wish, to take responsibility for themselves. While it is right that protection should be extended to the vulnerable, foisting security on people who can provide it for themselves - for instance, by allowing employment law to disrupt genuinely commercial relationships - would constitute a hindrance to workers who would otherwise be generating wealth for the EU.

Freelancing brings a further benefit: it is an extremely important way of coping with demographic change. People commonly move into freelancing when they have amassed experience and expertise, and find that they can derive greater satisfaction from their work by working for themselves on a commercial basis. At the same time, it is difficult for workers aged much over 40 to secure new employment, while the traditional “job for life” is no longer at all common. The majority of PCG’s members are aged over 45. Freelancing is therefore an important way of retaining older workers in the workforce.

iii) freelancing in the Green Paper

Many of the benefits of freelancing discussed above are recognised, or alluded to, on pages 7-8 of the Green Paper:

“Self-employment is also providing a means of coping with restructuring needs, reducing direct or indirect labour costs and managing resources more flexibly in response to unforeseen economic circumstances. It also reflects the business model of service-oriented business delivering completed projects to their customers. In many cases it reflects a free choice to work independently despite lower levels of social protection in exchange for more direct control over employment conditions and terms of remuneration. Self-employed workers in the EU-25 numbered over 31 million in 2005 or 15% of the total workforce. Those who are self-employed on their own account and without employees constitute 10% of all workers in the EU-25. Although agriculture and retailing still hold the larger share of this category, it is a growing feature of the construction and personal services sectors associated with outsourcing, subcontracting and project based work.”

This discussion is very welcome and, PCG feels, broadly accurate. The presence of a balanced discussion of freelancing within the document makes some of the apparent confusion elsewhere within it all the more surprising to PCG. We are particularly concerned that the paragraph following on from the above excerpt makes reference to, “a risk that part of the workforce gets trapped in a succession of short-term, low quality jobs with inadequate social protection.” This sequencing strikes PCG as most likely to be an unfortunate but coincidental juxtaposition, but we would be extremely alarmed if a causal relationship between a healthy model of freelancing and “low quality jobs” were implied: such an implication would be wholly unjustified.

1 “Working Outside the Box - Changing work to meet the future”, Equal Opportunities Commission, 2007
Lifelong Learning

The “lifelong learning” component of flexicurity identified in the Green Paper is an important one and PCG concurs that lifelong learning is an important ingredient in ensuring the future success of the EU’s economy. Freelancers lead the way in this regard: they are responsible for their own training, and investment in this training represents a business risk – they rely on being able to secure further work as a result of acquiring new skills and updating existing ones. Lifelong learning is therefore an integral part of the freelance business model.

Disguised employment

PCG feels that the Green Paper is right to highlight disguised employment as a problem, but that it misdiagnoses some aspects of the phenomenon.

PCG believes that work should be carried out on the basis of either a commercial or an employment relationship. Attempts to set up relationships containing the “best of both worlds” are misguided. It is true that such relationships can represent an attempt by an employee to mitigate their tax bill to a level lower than that of an employee. But more commonly they represent an attempt by employers to procure a worker who they can control like an employee but who does not have any employment rights. PCG condemns this practice and regrets that the Green Paper fails to identify it. Instead it represents the issue as one of “persons posing falsely as self-employed workers” - this fails to recognise that the main beneficiary, and therefore main instigator, of disguised employment is the client / employer, not the worker.

PCG is not sure that the Green Paper is right to refer to disguised employment as an “illegal practice”: in the UK, it is relatively easy to set up a disguised employment relationship, and while it may technically be outside the law, the legalities in the area are obscure and it is extremely difficult for workers to seek redress. Companies do not face penalties for establishing disguised employment relationships in the UK: the worst that will happen is that they will be obliged to supply employment benefits to the worker in question.

PCG recommends that action should be taken to prevent companies from establishing disguised employment, but that this should be done by member states - to address this issue across all 27 EU member states would be impossible and enormously contentious. In the UK, disguised employment is possible because employment status is confused and unclear.

PCG’s recommendation to the UK Government is that it places the current legal situation in statute, such that end-clients are responsible for employment rights for disguised employees. This will not change the current legal situation, but it will make it much clearer: clarity in the law is essential for vulnerable workers to be able to access their rights and for professional workers to be able to exercise their freedoms.

Misconceptions in the Green Paper

1) “Economic dependency”

PCG feels strongly that the concept of “economic dependency” as depicted in the Green Paper is a mirage, and that the Green Paper is wholly wrong to distinguish the phenomenon it describes as separate to disguised employment. The situation described in the Green Paper is in fact nothing more than a subset of disguised employment. Brief consideration of a few examples will illustrate this point.
The three situations are exactly the same, and should in no sense be confused with ideas of “economic dependency” simply because one business is selling services instead of goods.

If Mr B was obliged to act as if he were an employee of the company with whom he had signed a contract, he would not necessarily expect to have his contract terminated and to have to find a new client: in this sense, he would in this scenario be “economically dependent”. But this only arises because he is, in this scenario, a disguised employee: “economic dependency” is therefore merely a variety of disguised employment. As an independent phenomenon it does not exist.

A legal definition of “economic dependency” therefore cannot be developed - it is not possible. The suggestion on page 12 that minimum requirements might be built into “all personal work contracts for services undertaken by the economically dependent self-employed” is therefore unworkable.

The use of the term “personal work contracts for services” again illustrates the difficulty the Green Paper has in conceptualising the ways of working it attempts to address: “contracts for services” are not “personal” contracts at all - they are commercial contracts. This is in the sense of UK law, of course - but this serves to illustrate the enormous difficulty in arriving at EU-wide definitions of many of these concepts.

ii) “Temporary agency workers”
It has been PCG’s position that there is no reason in principle why further protection cannot be extended to vulnerable agency workers, so long as it does not accidentally place burdens on freelance professionals who happen to use agencies to find their work. A clear definition of “temporary agency workers” is therefore needed which excludes the professional and captures only the vulnerable. With this in place, it will be for employers’ and employees’ representatives to debate what level of protection is appropriate. As with the Temporary Agency Workers Directive, the Green Paper fails to arrive at such a definition.

The Green Paper observes that, “a temporary worker is employed by the temporary work agency.” In the UK, this is not the case: the worker remains technically self-employed, and the agency merely finds work for them and administers payroll and other functions. Thus the “dual employer” situation described in the
Green Paper does not arise: if the agency worker is in fact a disguised employee, under UK law employment obligations rest with the end-client, not the agency.4

**iii) “contracts”**

The Green Paper uses many terms without defining them, which at times renders its meaning unintelligible or nonsensical. This has already been touched on: while the distinction between “workers” and “employees” is not common to all European legal systems, it is surely the case that, irrespective of context, “work” is not a synonym for “employment”: it is possible to perform an item of work without being employed.

The Green Paper nevertheless repeatedly refers to “employment” when it is not appropriate to do so. Its summation of the Kok report refers to “permanently employed ‘insiders’” (emphasis added) - it seems to PCG that freelance professionals are intended to be within scope of this “insiders” bracket - they are certainly not “outsiders”. Nevertheless, it is incorrect to refer to them as “employed” - in this context it might be better to use the term “economically active”. That said, the concern identified that the “outsiders” exist in a legal grey area and might suffer accordingly is a legitimate one.

The Green Paper’s acknowledgement of the numerous contractual forms available is of course welcome, but the listing of different types on page 7 without any attempt to define them, or differentiate between commercial and employment contracts, symbolises the difficulties the document seems to have in defining and conceptualising the different forms of working it seeks to address. PCG repeats that the Commission should acknowledge the two different forms of contractual relationship – employment and commercial – and base all future measures on the principle that the one should not interfere with the other.

The repeated references to “the standard contractual model” are, PCG presumes, intended to be a reference to permanent, full-time employment. Why does the Green Paper not simply refer to permanent, full-time employment? As we have seen, references to a “contractual model” merely confuse the situation.

**Best practice and influencing the marketplace**

Many companies have difficulty engaging contractors correctly and to their satisfaction in the UK. PCG’s goal is therefore to provide assistance and advice to companies hiring contractors, and also to contractors themselves on how to enhance their value proposition.

To this end PCG has developed a range of draft contracts which have been extensively and independently vetted as being commercially sound and fully compliant with all relevant tax, employment and other legislation. These include contracts developed with the representative bodies for recruitment agencies in the UK. These contracts are available to PCG members, and many of them are freely available to non-members also.

PCG has also developed a wide range of guidance for contractors, agencies and clients. Some of this is available only to members, but much is also freely available to all, including an extensive Guide to Freelancing, which offers an overview of best practice when freelancing in the UK.

In addition to these services, PCG has developed the world’s first ever ISO9001 certification scheme specifically designed for small businesses, thus making this certification, and the opportunity to bid for many more contracts, available to contractors for the first time. PCG has also developed a scheme for training accountants in specialist freelance issues, a background checking scheme for freelancers and numerous other services.

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4 The law in this area is not entirely clear in the UK, but the analysis above represents PCG’s understanding of the situation following the judgments in Dacas v Brook Street (2004) and Cable and Wireless v Muscat (2006)
By providing this kind of support PCG aims to enhance the already valuable freelancing model in the UK and lead the way for other countries to adopt best practice in developing sophisticated labour markets. This work is built on the fundamental premise that freelancing represents a positive career choice and works to the benefit of both the freelancer and the client.

**Social dialogue and its limitations in this context**

The Green Paper inadvertently highlights the shortcomings of the existing social dialogue structures. They are set up to represent employers and employees, yet most of the workers under consideration in the Green Paper are in neither category. Social dialogue mechanisms must be updated to include self-employment and freelancing - without this reform, it is inadequate as a mechanism for formulating policy.

The “evolving relationship between law and collective agreements” identified on page 5 of the Green Paper is therefore one of declining relevance: only 20% of private sector workers in the UK are members of trade unions. Similarly the large employers’ organisations that traditionally made up the other party in such agreements are declining in relevance: the proportion of employment accounted for by SMEs in the UK is now 58.7%; the days when most workers would be unionised and work for companies represented by the large employers’ organisations are long gone. The Green Paper’s statement that, “collective agreements no longer play a merely auxiliary role in complementing conditions already defined by law [but] serve as important tools adjusting legal principles to specific economic situations” does not really hold true in the UK.

**Flexicurity**

PCG notes the Green Paper’s focus on a “flexicurity” model as a way of meeting existing EU objectives. We question why this model has suddenly been promoted by the Commission and what other models will be considered. If no other models are to be considered, we ask how the Commission can justify its sudden and apparently arbitrary decision to opt for “flexicurity”. We hope that the forthcoming communication on flexicurity will shed some light on this perplexing issue.

The “flexicurity” approach described in the Green Paper entails both high levels of unemployment benefits and active labour market policies to force people back into work. PCG observes that it is tempting for some parties to seek to cherry-pick the parts of this approach that correspond most closely to their own agenda and cautions against advocating “flexicurity” on the basis of only part of its recipe.

This particular combination of measures may be suitable for some member states, perhaps depending on where they are in their economic cycles, but PCG does not support any suggestion that it is suitable to be imposed on all member states irrespective of their legal systems, their labour law and their traditions in respect of ways of working.

**ILO Recommendation**

In May 2006, the International Labour Organisation made a Recommendation on employment relationships. Although this document is not without its problems, PCG feels that it offers a useful perspective on some of the issues considered in the Green Paper and urges that the Commission pay close attention to the clarity the Recommendation achieved on numerous of these issues.

The most important clause is Clause 8:

“National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.”

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5 SME Statistics 2005, UK Small Business Service
6 Recommendation R198, 95th Session of the Conference
PCG concurs with this sentiment wholeheartedly and feels that it represents an invaluable contribution to the discourse. The principle that employment law should not interfere with commercial relationships must be at the heart of any and all actions in EU member states with regard to non-employment forms of working.

Other clauses also set out important principles which all member states should take fully on-board. Clause 1, for instance, states: “Members should... guarantee effective protection for workers who perform work in the context of an employment relationship” (emphasis added). The corollary of this is, in accordance with Clause 8, that such protection should not be forced upon workers who are not in an employment relationship.

Clause 3: “National policy should be formulated and implemented... in consultation with the most representative organisations of employers and workers.” PCG is pleased to note that consultation with all types of worker, not just employees, is advised here: this acknowledges the deficiency in social dialogue procedures, which represent only large employers and, via trade unions, employees. The subsequent references to social dialogues and collective bargaining processes in Clause 18 clearly contradicts this and are a product of the fractious nature of proceedings prior to the agreement of the Recommendation; PCG regrets that ILO procedures were inadequate to keep such contradictions out of the Recommendation.

The Recommendation also addresses disguised employment and the lack of clarity in many states over employment status in a very useful manner. Clause 4 states:

“National policy should at least include measures to:

(a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;

(b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due.”

Clause 10 adds:

“Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.”

Clause 17 further adds:

“Members should develop, as part of the national policy referred to in this Recommendation, effective measures aimed at removing incentives to disguise an employment relationship.”

Taken together, these clauses vindicate PCG’s advice to the UK Government that it should clarify employment status in the UK. We feel, however, that any attempt at a pan-European implementation of this advice would be far too difficult, owing to the differing traditions and legal systems of each member state.

These differences are illustrated by Clauses 11-13 of the Recommendation, which are clearly well-intentioned but ultimately not as helpful as other parts of the document. The list of possible criteria for establishing an employment relationship set out in 13(a) is not useful: in UK law, some of these criteria
are fundamental to establishing employment status, while others are of marginal importance and others still are irrelevant. The same will be true - but in different combinations - in every EU member state.

The options of a legal presumption of employment status (11(b)) and “deeming” of employment status (11(c)) are clearly impractical and ill-advised: a legal presumption would oblige the many non-employed workers who wish to maintain their status to expend time and effort in proving their status, which clearly runs counter to all principles of better regulation and creating an economic environment conducive to business; while the idea of “deeming” runs directly counter to Clause 8. It must be remembered, however, that these are presented as options and not as integral parts of the text: they are therefore overridden by Clause 8. The same point applies to Clause 12, which contains the fiction of economic dependence.

The ILO’s Recommendation is therefore something of a mixed bag, but PCG feels that its diagnosis of the various issues generally compares favourably to the Green Paper’s and that, on balance, it contains more good than bad.
APPENDIX: PCG responses to Questions in the Green Paper

1. What would you consider to be the priorities for a meaningful labour law reform agenda?
The most important requirement in labour law is clarity. The extensive differences between different
member states in terms of their legal systems, traditions and cultures mean that this must be achieved by
member states: an EU-wide programme of reform will not succeed.

All labour law should be formulated on the basis that employment law should not interfere with genuine
commercial arrangements: this is essential for allowing economies to operate flexibly while at the same
time ensuring protection for the vulnerable.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and
employment security and a reduction in labour market segmentation?
Probably not.

Collective agreements, between trades unions and employers, are of diminishing importance: with 40% of
the EU’s workforce operating outside the traditional model of full-time employment, and an ever-higher
proportion of smaller employers who will not be represented by traditional bodies, collective agreements
are no longer as useful as they once were. Self-employed people and freelancers, who operate
commercially, sit outside the scope of such agreements entirely.

A crucial source of economic flexibility is people who work on a commercial basis and are therefore highly
mobile and flexible. For these people employment security is unnecessary and unwanted: it should
therefore not be imposed. Instead, governments should concentrate on providing an economic
environment conducive to commercial activity.

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?
Existing regulations and laws are more often a hindrance than a stimulus. In the UK, a complex tax regime
and an obscurity in employment status are making it difficult for companies to engage workers on
commercial terms with any confidence that these terms will be respected by the courts.

Some of these laws, for instance the “intermediaries legislation”, also known as IR35, arise from a
misunderstanding of legitimate commercial ways of working: it is wrong to assume that their objectives
should necessarily be preserved.

To improve the formulation of laws and regulation, there must be full monitoring of the impacts of all
measures following their implementation, and remedial action must be taken if they are not meeting
expectations. Regulations should be utilised only as a last resort. Laws and regulations must be clearly
formulated.

4. How might recruitment under permanent and temporary contracts be facilitated, whether by law
or collective agreement, so as to allow for more flexibility within the framework of these contracts
while ensuring adequate standards of employment security and social protection at the same time?
The question is unclear, as it does not define “permanent and temporary contracts”. If it is referring to
commercial contracts, it is wrong to imply that employment security should be made part of such
contracts: they are not employment arrangements.
Greater and better-informed use of commercial arrangements can enhance economic flexibility. PCG provides template contracts and extensive advice to its members and their clients on best practice, to ensure that their working relationships are genuinely commercial and mutually beneficial. Paying greater attention to best practice in this way will therefore enhance flexibility.

To ensure adequate standards of employment security, disguised employment must be made impossible. This must be done by member states. The solution is to target measures at employers who seek to hire disguised employees: in the UK, such employers are ultimately liable for employment rights. This must be made clearer so that the vulnerable can access their rights more easily and highly-skilled freelance professionals are not hampered by commercial uncertainty arising from a lack of legal clarity over this point.

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? These must not be mandated at EU level. They may be suitable for some member states at varying stages of their economic cycles, but it is not possible to generalise usefully about this.

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?

Collective agreements negotiated between the social partners are of limited and diminishing importance. With 40% of the EU’s workforce operating outside the traditional model of full-time employment, and an ever-higher proportion of smaller employers who will not be represented by traditional bodies, collective agreements are no longer as useful as they once were. Self-employed people and freelancers, who operate commercially, sit outside the scope of such agreements entirely.

Transitions between different contractual forms can indeed be very important to upward mobility and career progression. Many freelancers take the decision to work for themselves after many years as employees: having acquired a strong range of experiences and skills, they find they take greater satisfaction from work when working for themselves and being in business.

This is a process that arises without the need for any collective agreements or other outside forces, though the legal framework must be in place for workers to be able to go freelancing without any hindrance.

These transitions bring a further benefit: they are an important way of coping with demographic change. People commonly move into freelancing when they have amassed experience and expertise, and find that they can derive greater satisfaction from their work by working for themselves on a commercial basis. At the same time, it is difficult for workers aged much over 40 to secure new employment, while the traditional “job for life” is no longer at all common. The majority of PCG’s members are aged over 45. Freelancing is therefore an important way of retaining older workers in the workforce. These transitions do not require further law or collective agreements – they work satisfactorily already.

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?

Yes – at member state level. Employment status in the UK has become confused. As part of this, workers are often uncertain of their exact status when they move into freelancing: some continue to think of their clients as “employers”, for instance.

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?

No.

The imposition of employment rights on workers who do not need or want them would be disastrous: clients would no longer be willing to engage freelance workers because they would owe the workers employment rights, even though such rights are inappropriate for a commercial relationship.

The UK’s targeted approach of having different categories of “workers” and “employees” is successful in providing basic rights to most workers without imposing a “floor” of employee-like rights on everyone whether it is appropriate or not. Self-employed professionals who neither need nor desire such protections are rightly unencumbered by them.

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”?

Responsibilities in employment relationships involving multiple parties should be clarified by member states; the EU should not act in this matter. In the UK, the logic of recent court cases such as Cable and Wireless v Muscat, that end-users are responsible for employment rights where an employment relationship exists, must be made much clearer and included in statute.

Such clarification should not intrude on commercial relationships involving multiple parties.

Subsidiary liability may be appropriate in some member states - PCG would not wish to generalise on this point, but feels that the preferable approach in the UK would be the one outlined above.

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

In the UK, the status of temporary agency workers is clear except in cases of disguised employment, where the law should be clarified as outlined in response to question 9. This is not an area suitable for EU-level intervention.

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?

Attempting to harmonise definitions of “worker” would be extremely difficult, given the wide variations in legal systems and customary practices between member states, and also extremely contentious. It should not be attempted.

Member states should retain their discretion in this area.

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?

No and no.

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

No.
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