REC Response to the European Commission’s Green Paper: Modernising labour law to meet the challenges of the 21st century

The Recruitment and Employment Confederation represents around 8000 recruitment agencies in the UK. The UK recruitment industry is largely made up of small businesses who place 1.2 million people into temporary jobs every week. Last year the industry also placed over 700 000 people into permanent positions in the workplace. The UK recruitment industry therefore makes a significant contribution to the successful UK labour market model.

Reaction to the Green Paper
The REC welcomes a debate at the European level about building successful labour markets and ensuring that workers receive their correct working rights. Our starting point in this debate is the diversity of European labour markets and their traditions. When considering the rights of temporary agency workers in particular it is important to view these rights within the context of national labour market conditions and national labour laws. Comments in the Green Paper relating to issues such as ‘segmentation of the labour market’, standard and non-standard contractual terms and even what constitutes flexible work may have very different resonance in different countries. It therefore becomes impossible to draw meaningful generic European conclusions to a number of the questions asked in the Green Paper.

The responses below reflect REC’s position from the UK perspective, particularly with regard to temporary agency workers. An Appendix details the legal relationship between employment agencies and temporary agency workers in the UK in detail. REC is an active member of our European association Eurociett and fully endorses Eurociett’s response to the Green Paper. REC’s response should be read as an addition to the Eurociett submission. This can be accessed at: http://www.euro-ciett.org/

1. What do you consider to be the priorities for a meaningful labour law reform agenda?

The UK Government recently considered UK employment rights in their paper ‘Success at Work’¹, March 2006. This paper concluded that workers in the UK have a sufficient number of employment rights and that focus should now be turned to vulnerable workers who are denied access to their rights. The REC fully supported the conclusions of this paper and has been actively working with the DTI to support their work on vulnerable workers. Currently the REC is in line with Government thinking on this matter and believes that the priorities for labour market in the UK are that of enforcement of current rules and raising the employment level to 80%.

In order to reach an 80% employment level REC is working with Job Centre Plus (the public employment service in the UK) to explore ways in which those on incapacity benefit can be helped back into work. The REC also supports the focus taken in allowing those in permanent employment access to more flexible ways of working through the right to request flexible working. This may help young mothers, for example, to find work which is flexible enough to meet their needs. Any system of flexible working for the permanent workforce needs to be underpinned by forms of more flexible work such as temporary agency, for this to be a viable option for employers.

¹ http://www.dti.gov.uk/er/successatwork.htm
2. Can adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes then how?

REC supports Eurociett’s assertion that temporary agency work should not be viewed as a segment of ‘outsiders’ in the labour market. Rather than being marginal, temporary agency work and other forms of employment contract which are not simply full time permanent work should be seen as being at the centre of a successful and inclusive labour market. This central role is reflected in the rights of these workers in the UK. Labour law in the UK allows for a number of different employment relationships whilst preserving a base of working rights for all workers. The REC considers this to be an effective way of ensuring that segmentation within the labour market does not exist on the basis of contract type. In addition there are relatively low barriers between temporary and permanent positions which allows for easy transition from temporary to permanent positions, when the worker wishes. By having a system where it is no more expensive to employ workers on permanent contracts (in fact it maybe a cheaper option) and it is not very costly to dismiss people when necessary, for example when there is a turn down in demand, a labour market is not truly segmented as workers can move between different contract types at ease. Where this choice is not available this is usually linked to regional or local economic reasons rather than foundation of working rights in UK labour law itself.

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?

The REC has no detailed comment to make regarding technological changes other than it is essential that employees have the opportunity to adapt and improve their skills so they can adapt to new positions in the labour market. It is also essential that businesses are afforded flexibility within their regulation so that they can adapt quickly to new realities.

With regard to SMEs, regulations should always be designed with them in mind as the employ the vast majority of workers in Europe. If regulations are too complex to implement, or do not allow for a small business to respond to critical changes in the market place swiftly they will simply go out of business, or ignore the regulations. In addition to the quality of the regulation itself, how it is communicated to SMEs and what tools SMEs are given to cope with the new regulation should also be considered.

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 REC, and the UK Government in their March 2006 paper Success at Work, believes that the current balance between flexibility and employment security and social protection has been reached in the UK market. UK temporary workers receive all of the basic working rights. There are no restrictions on contract length and type in the UK recruitment market – thus allowing for maximum flexibility. Employment security is preserved in the UK labour market through ease of entry into the labour market (for example through recruitment agencies) and through a steady supply of jobs. More could be done to improve the skills training of some in the UK labour market, the link between skills levels and security of work is well proven.
5. Would it be useful to consider a combination of more flexible employment protection legislation and a high level of assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

The balance between unemployment assistance and active labour market policies is set in the UK by our Government. The REC has been supporting the public employment service, Job Centre Plus, in getting ‘work ready’ candidates into work in a number of ways. December 2005 saw the launch of a joint Diversity Pledge for the industry which encourages recruitment agencies to seek more diverse pools of candidates and gives them the tools to do it through an online toolkit. On a local level many recruitment agencies advertise their vacant positions through Job Centre Plus and large agencies work with Job Centre Plus on national projects. Finally the REC is building regional links to job centre plus to ensure that the private recruitment industry is doing as much as possible to support the UK Government’s active labour market policies.

6. What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

See comments to question 2 for a response on transitions. Regarding training recruiters can play a useful role in identifying areas of skills shortages in the labour market. This can be used by Governments to tailor their skills training to the labour market need. A great deal of informal and formal training is conducted on the job in the UK. It is right for employers to support this as when they perceive there is a need. REC is also exploring ways in which recruitment agencies can actively support apprenticeships and other training schemes which are supported by our Skills Councils.

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?

This matter is currently being considered by the UK Treasury and Her Majesty’s Revenues and Customs (HMRC) with regard to workers who work as limited company contractors, and are therefore self-employed for tax purposes, through managed service companies. As this matter is in the process of being addressed by the UK Government, with the REC making lengthy representations on the way in which the new framework will work, further comments will not be made in response to the Green Paper. What is certain is that this is a very complex matter which needs to be addressed at the Member State level as it has implications for both employment and tax law, which vary greatly between Member States.

The REC strongly defends the right for contractors to operate as limited company contractors when this is appropriate. Recruitment agencies may facilitate the placement of limited company contractors onto assignments. It is vital that any system of identifying employment and self-employment allows for this type of transaction to continue. Typically it benefits end users who need highly skilled contractors at short notice and benefits contractors, who may be at the end of their career, but want to continue working on a more flexible basis.

It is worth noting that REC supports fully open labour markets in the EU as the current transition periods may lead to inappropriate use of self-employed status for immigration reasons. This subject is new to the UK as it only concerns citizens of Bulgaria and Romania, but it is one REC will continue to monitor.
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 the protection of workers?

The UK has a set of working rights that apply to all workers. This allows for companies to engage people on non-permanent contracts when it is needed for business reasons without it creating a ‘2 tier’ work force with respect to comprehensive basic rights. Companies should still be able to, for example, reward long-standing employees with extra rights, eg extended holiday leave, which go above the statutory minimum. The REC considers that the current base of working rights in the UK is sufficient and does not have a detrimental effect on either job creation or the protection of workers.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in ‘three-way relationships’?

It is essential to recognise when considering ‘multiple employment relationships’ that the case of temporary agency workers is different from other forms of multiple employment relationship. As Eurociett clearly states in their response to the Green Paper the relations between client, worker and employment agency are clear in the EU. In the case of the UK the Employment Agencies Act very clearly sets out how this triangular relationship should be managed. The EAA and the associated conduct regulations tightly regulates the relationship between the agency and the client company and the agency and the worker. If these regulations are breeched this can be investigated by the Department for Trade and Industry’s Employment Agency Standards Inspectorate, which if appropriate can prosecute the agency concerned. Ultimately Directors of employment agencies can be prohibited from running employment agencies for a number of years. Alternatively if the relationship between the worker and the agency breaks down on a matter of employment law this can be referred to an Employment Tribunal. In addition to this the worker receives all working rights (see Appendix 1 for further information).

It is clear in the UK that matters such as anti-discrimination and health and safety are a joint responsibility of both the agency and the end client. REC believes that this joint responsibility reflects the nature of the three-way relationship. In also means that the worker should be doubly protected as both the agency and the end user are ensuring these rights.

Temporary agency work is an example where the relationship between the worker and more than one company is very clearly regulated.

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

The REC support’s Eurociett’s view that the employment status of temporary agency workers is clearly defined at the national level.

Employment status is a matter which needs to be considered at two levels, employment status for taxation purposes and employment status for employment rights purposes. As both of these matters have a strong national focus it is most relevant to analyse the employment status of temporary workers at the national level.
In the UK temporary agency workers are usually engaged on a contract for services. They are employees of the temporary work agency for tax, national insurance and immigration purposes.

With respect to employment rights they have a large number of working rights but are not employees of the agency or the client company. In practice this means they receive number of rights including to the national minimum wage, working time, health and safety, anti-discrimination, health care coverage. They do not, however, receive the right to claim unfair dismissal after a year working with the agency, they have no right to redundancy pay (eligibility for statutory redundancy pay in the UK is earned after 2 years service) and the right to return to the same position after maternity leave (this would make no sense in the temporary staffing market and agencies frequently assist returning mothers back into the labour market).

The UK Government considered the question of the employment status of temporary agency workers from 2002-2006 and concluded in March 2006’s publication Success at Work that the status was clear and no further legislation is needed in this area. The REC has best practice guidance on its online legal reference guide for members to ensure that agencies understand how to engage temporary workers correctly.

It is worth noting that some temporary work agencies do engage their temporary workers on zero hours contracts of employment. This therefore avails the temporary workers of the employment rights outlined above. However should the end user effectively treat their temporary worker in a way similar to an employee an employment relationship could still be found between the temporary worker and the client company in a tribunal.

11. How could minimum requirements concerning the organisation 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 organisation of working time should be tackled as a matter of priority by the Community?

Temporary agency workers are usually employed and paid on an hourly basis – it is therefore simple to track their working hours. The REC is happy with the current working time arrangements in the UK and does not call for action on behalf of its members by the Community.

12. How can the employment rights of workers operating in a transitional 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 definition of a worker is largely defined by national employment law (see Appendix 1 re the UK definition). A more convergent definition of a worker in EU Directives, would presumably require a revision of these Directives. Considering the current political environment and the lack of agreement on social legislation in the Council this seems to be an unrealistic suggestion.

A harmonised definition of ‘worker’ would not be welcomed by the REC, which believes that difficulties relating to cross-border working should be tackled through the correct implementation of the Posting of Workers Directive rather than other means. Additionally the REC does not believe that a harmonised definition of a worker would provide clarity for workers or employers in the future. Working rights can be attached to national taxation and
social security regimes and so a harmonised definition at the European level would not, in itself, make sense.

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 co-operation?**

Greater administrative co-operation could assist in tackling abuses in the cross-border posting of temporary agency workers and would be welcomed by the REC. National enforcement regimes should exchange information on licensing and other requirements for temporary work agencies. In addition much could be gained through greater cross-border sharing of intelligence on agencies who operate in more than one country. Both sides of industry should be able to feed into the process of cross border co-operation. For example greater knowledge of the REC’s Code of Professional Practice could help authorities when dealing with UK recruitment agencies who are operating abroad.

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 EU can contribute to the debate on the battle to combat undeclared work. Firstly if Member States reduce restrictions on legitimate forms of flexible forms of work, such as temporary agency work, this would allow for employers to have access to the flexible workforce they need without resorting to undeclared work.

Action on undeclared work at the European level could include:

- The promotion of temporary agency work and other forms of legitimate flexible work to combat undeclared work.
- Assistance in greater co-operation between labour and taxation authorities when tackling cross-border undeclared work.
- The EU can also assist in sharing best practice in the field of undeclared work.

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Appendix 1

Temporary agency work in the UK: the legal framework

Temporary agency work in the UK is facilitated in a unique set of circumstances. The UK model provides a successful solution for workers who want more flexible work options and employers who need temporary resourcing. The REC has a great deal of information about why temporary workers in the UK chose to work through agencies, why clients use temporary workers and on the profile of temporary workers. This briefing however looks at the legal framework for temporary agency work in the UK.

Temporary work agencies in the UK are governed by a specific set of regulations attached to the 1973 Employment Agencies Act. These were updated in 2003 and closely regulate the three-way relationship between the agency, worker and end user.

A temporary agency worker in the UK is not usually an employee of the employment agency. Rather they are engaged under a contract for services. This reflects the fact that there is no mutuality of obligation between the agency and the temporary worker. The worker may chose to leave the assignment at any time without notice or liability and the agency may terminate the assignment at any time in a likewise fashion. Another feature which illustrates that a temporary agency worker is different from an employee is that a temporary agency worker may work through several employment agencies at any one time. Their relationship to the agency is not an exclusive one.

It is worth noting that whilst temporary agency workers are not engaged as an employee, their primary relationship is always with the temporary work agency. The worker’s contractual relationship, their terms and conditions are with the agency. These terms and conditions are governed by the provisions under the Employment Agencies Act and those attributed to the worker by virtue of them being a worker. In both cases these rights are governed by labour law and breeches can be addressed through the employment tribunal system. These relations are not governed by commercial law.

The regulations under the Employment Agencies Act (EAA)² govern aspects of the worker’s relationship which are exclusive to the triangular relationship. Some examples include:

- the information an agency should give a worker about the assignment,
- the fact that the agency cannot charge a worker for work seeking services,
- the fact that an agency should warn a worker of any health and safety concerns in the workplace of the end user,
- the fact that the agency should only place a worker who is qualified to complete the assignment,
- the obligation for an agency to pay a worker for the work completed, even if the agency has not been paid by the end user.

The temporary agency worker also has a great many rights through being defined as a worker. This is explained in more detail below.

Definition of employee and worker in English law

In order to explain the relative positions of an employee under a contract of employment and a worker under a contract for services in English law, it is helpful to look first at the statutory definitions of both employee and worker in section 230 of the Employment Rights Act 1996:

“230. -
(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)-
   (a) a contract of employment, or
   (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
   and any reference to a worker’s contract shall be construed accordingly.
(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
(5) In this Act "employment"-
   (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
   (b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.”

Workers engaged by employment businesses in the UK fall into the definition in Section 230(3)(b) above and as such derive their working rights from this.

Employee and worker rights under English law

The vast majority of employment rights are also assigned to workers in the UK. A list below outlines the key rights attached to workers engaged by agencies.

<table>
<thead>
<tr>
<th>Temporary workers’ rights</th>
<th>Further information</th>
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<tbody>
<tr>
<td>Pay</td>
<td>National Minimum Wage Act 1998: Temporary workers have to be paid for all time worked at least at the national minimum wage. The Conduct of Employment Agencies and Employment Business Regulations 2003 (the Conduct Regulations): Temporary workers must be paid at the agreed rate for all time worked irrespective of whether the client company has paid the agency for the service. Employment Rights Act 1996: No unlawful deductions may be made from a temporary worker’s pay.</td>
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3 Please note that this briefing is set in the context of English law. English law applies fully in Wales. In Scotland and Northern Ireland similar provisions apply however slightly different case law may apply.
<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
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<tbody>
<tr>
<td>Pay slip</td>
<td>Temporary workers should always receive a pay slip detailing their pay, tax and national insurance contributions.</td>
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<tr>
<td>Working time rules including overtime,</td>
<td>Working Time Regulations 1998 and amendments: Working time rules apply to temporary workers as to any other worker/employee in the UK labour market including sector specific working time rules, for example in the road transport sector. Temporary workers are usually paid by the hour. These hours are recorded on a time sheet.</td>
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<td>work breaks, rest periods and night work</td>
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<tr>
<td>Holiday entitlements</td>
<td>Minimum of 20 days a year (as part of the working time regulations). This will be extended to paid public holidays (a further 8 days a year being rolled out over 2007-2008).</td>
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<td>grounds of sex, race or ethnic origin,</td>
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<tr>
<td>disabilities, religion, beliefs, age or</td>
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<tr>
<td>sexual orientation</td>
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<tr>
<td>Health and Safety coverage</td>
<td>In English law an employer has a common law duty of care for all people on their site, whether they are employed by them or not. All European Health and Safety Directives apply equally to temporary workers in the UK. Employment Agencies have a duty, under the Management of Health and Safety at Work Regulations 1992, the Gangmasters Licensing Standards 2006, the Gangmasters (Licensing Conditions) Rules 2006 and the Conduct Regulations, to inform a temporary worker of the health and safety risks at their work place, the steps a hiring employer is taking to control or minimise those risks and to agree between them the management of the ongoing health and safety of a worker's working environment during the course of an assignment.</td>
</tr>
<tr>
<td>Sick pay</td>
<td>Temporary workers are entitled to Statutory Sick Pay subject to the normal qualifications applicable to employees.</td>
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<tr>
<td>Maternity, paternity and adoption pay</td>
<td>Temporary workers are entitled to Statutory maternity, paternity and adoption leave pay subject to the qualifications as applicable to employees.</td>
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<tr>
<td>Trade union membership and recognition</td>
<td>The laws governing trade union relations apply equally to temporary workers.</td>
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<tr>
<td>rights</td>
<td></td>
</tr>
<tr>
<td>Training</td>
<td>This is dealt with by the Sector Skills Councils in the UK. For example in Construction employment agencies often pay the skills levy to the Construction Skills Council.</td>
</tr>
<tr>
<td>Temporary to permanent fees</td>
<td>These are governed by Conduct Regulation 10 which prescribe the limits within which such fees are enforceable.</td>
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</tbody>
</table>
**NB:** Temporary workers have full access to health services in the UK. The UK’s comprehensive National Health Service is free at the point of use for residents who have permanent right to remain in the UK and EU citizens who reside in the UK. Access is not related to levels of contributions to tax revenues or the National Insurance scheme.

Rights which temporary workers do not have in the UK and the Government’s assessment of these rights in relation to temps:

- Protection from unfair dismissal: workers receive this after 12 months in the UK. It was not considered necessary to extend this to temporary agency workers as contracts are usually shorter than 12 months.
- The right to redundancy pay: workers receive this after 2 years, again it was not considered necessary to extend this to temporary agency workers as contracts are usually shorter than 12 months.
- The right to maternity leave: temporary workers receive statutory maternity pay. After returning from leave the worker has every right to be registered for work with their former agency or many other agencies.

**Enforcement of worker rights in English law**

In the event that a temporary worker has a claim against either an employment business or a client hirer arising out of an assignment or series of assignments, such claims are brought in the Employment Tribunal in the same way as an employee would bring any claim arising out of his/her employment to an Employment Tribunal.

**Conclusion**

Whilst temporary agency workers are usually engaged under a contract for services their rights as workers mean that they are rarely treated differently to an employee with respect to statutory rights. Essentially the definition of worker under the Employment Rights Act 1996 gives temporary agency workers, and many other workers on differing contract types, a ‘floor of rights’.

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4 Success at work, March 2006, pages 16-17.