Comments from the Swedish Confederation of Professional Employees (TCO) to the Green Paper on Modernising Labour Law (COM(2006)708)

The Swedish Confederation for Professional Employees (TCO) hereby submits its comments to the Commission’s Green Paper on Modernising Labour Law, COM(2006)708. The TCO comprises 17 affiliated trade unions. The 1.3 million members of these unions are professional and qualified employees who share a major responsibility for important functions in society, although in a wide variety of occupations. They work in all parts of the labour market, for example in the schools, healthcare, trade, the media, the police, industry, IT and telecom. Over 60 percent of the members are women. Approximately half of the members work in the private sector and half in the public sector.

Summary of views
TCO welcomes the decision by the European Commission to issue a Green Paper on labour law in order to launch a wide-ranging debate on how labour market regulations should be designed to best meet the challenges of the 21st century. Mainly, the welcoming concerns the debate on how Community level regulation should be designed. At the same time, however, TCO rejects crucial parts of the Commission’s analysis and some of the proposals presented in the Green Paper:

- It is a faulty analysis that new and better jobs can only be created by deregulating the individual rights of workers. TCO believes that both flexibility for enterprises and security for employees are needed if we are to succeed in forming a social Europe that creates more and better jobs.
- Labour law does not constitute an obstacle for labour market mobility but can, if devised in the right way, stimulate mobility.
- There is no need for any additional category of workers, between employees and self-employed. The fundamental rights of employees must not be weakened and the experiences from countries where this type of third category exists should be taken as a warning.
- The concept of employee should not be harmonised on European level as such a harmonisation would interfere with the core of national labour laws and violate the country-of-work principle.
To TCO, it is fundamental that labour law continues to be a competence mainly reserved for the Member States, as is the case today. Community level regulation should concentrate on preventing unfair competition and social dumping between Member States, through establishing minimum standards in such matters as working time and information and consultation. These rules must not stop Member States from establishing standards that are more favourable to workers. Another important field for EU labour law is equal treatment and non-discrimination, for example due to nationality and gender. Further, Community law must guarantee labour law legitimate exemptions from internal market rules, necessary for labour law to fulfil its purpose.¹

Community law must respect the different methods for regulating the labour market present in the Member States. National regulation must be judged more on its efficiency and less on its form. Swedish collective agreements and Swedish labour law are examples of methods of regulation that provide security for employees and flexibility for employers, as well as an effective supervision of compliance with the regulations. Supervision is effective due to the high degree of unionisation among workers and the high degree of affiliation of employers to employers’ organisations, as well as to the broad coverage of Swedish collective agreements (over 90 per cent of all workers are covered by a collective agreement). It is probably the case that this model, which is characterised by a trade union presence at the workplace and trade union supervision of compliance with the collective agreements, is far more effective than a system based on legislation and supervision by state authorities.

Security is a precondition for sustainable and fair growth. We need both development and transition on a labour market that is subject to the pressures of globalisation and where change is constant. When competitive pressures increase, so must the workers’ possibilities to adapt. Otherwise, change will be perceived as a threat. An important part of Swedish “flexicurity” is a generous “adaptation insurance” for workers who lose their jobs. Unfortunately, the unemployment insurance’s capacity to help workers adapt to change is currently being undermined through reforms by the Swedish government.

The Green Paper on labour law deals only with the effects of individual labour law. This is a general weakness, as trade unions and collective agreements play a fundamental role in asserting individual rights and in enabling flexibility and transition. Any vision for the modernisation of labour law at the EU level must therefore effectively incorporate, apply and respect fundamental trade union rights, including the right to organise, the right to bargain collectively, the right to conclude collective agreements and the right to take industrial action - including sympathy action. TCO therefore demands that the status of ILO standards be strengthened within the framework of Community labour law. This must, however, be done in a way which does not increase the powers of the European Court of Justice to rule on whether national industrial actions are compatible with Community law.

¹ Cf. Case C-67/96 Albany
1. INTRODUCTION – THE PURPOSE OF THE GREEN PAPER

TCO does not share the Commission’s basic view that the regulation of labour law, correctly designed, is an obstacle to increased employment and productivity. The Nordic countries are examples of Member States in which a relatively high level of security for employees combined with a high level of flexibility for companies also provide high levels of employment and productivity. The different types of “flexicurity” that exist in the Nordic region are made possible by a general welfare policy, including an active labour market policy, and a high degree of unionisation/affiliation on the part of employees and employers. Strong social partners conclude binding collective agreements that cover large parts of the labour market, and that can be adapted from sector to sector in line with the needs of the companies and the employees concerned.

TCO does not share the view that relaxing employment protection for the majority of the workers in the EU-25 who are in permanent employment is a solution to the challenges facing the labour market of the EU. TCO believes that both flexibility for the companies and security for the employees are needed to achieve a social Europe that can create more and better jobs. Reducing the security of the employees is a step in the wrong direction. The principles that formed the basis for the agreements of the social partners on fixed-term and part-time employment, which are reflected in the directives of 1999, are still highly relevant. Permanent employment on a full-time basis must be the norm, and workers in atypical forms of employment must be treated equally with permanent and full-time employees.

Employment protection is nonetheless not the only type of security in the labour market. Security can also be created by means of training, skills development and transition for employees within and outside the scope of labour law, and opportunities in this field should therefore be increased. This being the case, it is regrettable that the Commission has chosen to begin a debate on the most controversial aspect – labour law – in this consultation process and not on the wider context that will probably be addressed in the document on flexibility and security that the Commission intends to issue before the end of 2007.

TCO is concerned about the arguments presented in the Green Paper in two important areas. First, the Commission appears to have abandoned the treaty obligation relating to the upward harmonisation of workers’ individual rights and instead argues in favour of weakening the rights of permanently-employed workers. The Commission seems to argue that it is no longer the employees, but the companies (especially SMEs), that are in need of protection. TCO believes that the Commission has chosen to follow an incorrect and counterproductive route. Sustainable growth and change on the labour market require secure workers and flexible companies. This new route also conflicts with the Lisbon Strategy (see below).

The Commission now takes up terms such as the employment relationship and self-employment – an area that is in general not regulated at the EU level but is left entirely in the hands of the Member States. TCO is opposed to the harmonisation of the concept of employee in EU law to a greater extent than is the case today. We have several labour markets today, not just one – the EU is not ready for such a far-reaching reform.
The overriding objective – the Lisbon Strategy
The underlying theme in the Commission’s Green paper on labour law is how labour law can, at the EU and national levels, contribute to achieving the objectives set by the heads of government of the Member States in 2000 within the framework of the so-called Lisbon Strategy, a strategy that aims to make the EU the most competitive economy in the world by 2010.

In TCO’s view, the Green Paper focuses too much on growth and competition and too little on satisfying the social and environmental demands of the Lisbon Strategy. A precondition for sustainable and high growth and development in Europe, including high employment, is that the workers of Europe have confidence in the ability of the regulatory frameworks of the EU and the national labour market models to create these values in combination with social protection and cohesion. An important factor in this context is that the EU’s social and labour legislation is not permitted to counteract achievements at the national level. Labour market models within the EU vary. They differ in several respects with regard, for example, to the content of social and labour legislation and the shape and form of labour market policy, and with regard to structure, supervision and effective compliance with regulations.

The process of co-operation within the EU makes it possible, by means of political decisions, to steer development and prevent multinational companies from playing one country off against another. TCO believes that this joint political strength should, among other things, be used to guarantee workers’ civil and trade union rights. Fundamental human rights, including the right to organise, the right to freely negotiate with employers, the right to conclude collective agreements and to take industrial action should be respected under EC law. In the course of its activities, the European Court of Justice should be obliged to always take into account the civil and trade union rights of the workers of Europe. Human rights should carry more weight than economic rights.

2. LABOUR LAW IN THE EUROPEAN UNION – THE SITUATION TODAY
a) Developments in the Member States
In Sweden, there has long been agreement between all political camps that the labour market should primarily be regulated by collective agreements between the social partners. In this way the regulations can be strongly rooted in reality, be adapted to the situation in different industrial sectors and be given a balanced content that provides good protection for the workers. This system gives the workers more effective protection than a system based on public law and State supervision. Moreover, it also offers competitive advantages to business and industry in Sweden because it fosters a sense of responsibility, reduces conflict and permits flexible solutions. In its budget bill, the new Swedish government clearly states that “the Swedish Government upholds the Swedish model in which conditions on the labour market are primarily regulated in agreements between the social partners” and that “the Government believes that the foundations on which labour law rests should also remain unchanged in the future”.

The Swedish collective-agreement model is based on civil law, not on public law. In our system, the trade union organisations must have tools and instruments, i.e. the legal right to negotiate with company representatives and the right to ultimately take industrial action to
conclude collective agreements with all employers. State control and monitoring exists only in the area of workers’ health and safety.

b. Action at the EU level
TCO welcomed the protection afforded temporary agency workers in the 2002 proposal for a directive on agency work, on condition that the regulations on non-discrimination, pay, etc were made semi-optional, i.e. that exemptions could be agreed on in collective agreements at the central level. Our demand for semi-mandatory regulations, which became a part of the proposal, is linked to the fact that pay and some other conditions in Sweden are regulated solely by collective agreements, not by legislation.

TCO is also very positive towards the development of the social dialogue at the EU level. At the moment, however, this is on the back burner. This is due in part to the low level of the Commission’s ambitions in the social field.

The Green Paper on labour law focuses only on the application of labour law to private individuals. This is a fundamental weakness as we are very aware of the role that the trade unions play in asserting and upholding individual rights and in enabling flexibility and change. These are institutional factors that are weak or even non-existent in the new Member States.

3. THE KEY POLICY CHALLENGE – A FLEXIBLE AND INCLUSIVE LABOUR MARKET
The key policy challenge facing the EU is the classic challenge – how should the EU’s labour market model be developed in order to achieve the basic objectives of the EU? Unfortunately, the Commission seems to have forgotten that Article 2 of the Treaty does not only refer to the development of economic activities but also to a high level of employment and social protection, equality between men and women, the raising of the standard of living and quality of life, and of economic and social cohesion.

No conflict between employee protection and business development
The Commission’s analysis of the impact of labour law on the possibility of companies and organisations to develop and cope with changing circumstances is flawed. It is claimed in the Green Paper, for example in sections 2 and 3, that labour law, in the face of technical development and globalisation, has become an obstacle to the possibility of companies to grow and develop. This is an incorrect conclusion, for two reasons.

First, it is a gross simplification to claim that there is a conflict between high levels of protection for employees on the one hand, and successful companies and economic growth on the other. Secondly, labour law has contributed to technical development and increased productivity. The fact that labour law and collective agreements have defined standard levels for pay and working conditions that employers may not go below means that employers have had to compete with high productivity, good products and good design, instead of reducing costs by imposing poorer working conditions.
The realisation that good working conditions and good opportunities for companies to grow and develop are not in conflict with each other is a cornerstone of the European social model. It is therefore highly regrettable that the Commission appears to have forgotten this.

TCO is in favour of an increase in self-employment but underlines the need for compulsory national legislation that affords effective protection against false companies, i.e. “companies” that in reality are created by employers themselves in order to circumvent national legislation and collective agreements and thus enable social dumping. The Commission’s reference to the “voluntary” creation of these “companies” does not bear examination in all sectors – as a trade union organisation we know that the fate of a job seeker or employee is totally in the hands of the employer in such cases unless equality between the parties is provided by legislation, collective agreements or a strong labour market.

Labour law is not an obstacle to employees who want to develop

Another recurring claim in the Green Paper is that labour law, particularly with regard to employment protection, prevents employees from adapting to changed circumstances. In section 2, the Commission says that “the traditional model of the employment relationship may not prove well-suited to all workers on regular permanent contracts facing the challenge of adapting to change and seizing the opportunities that globalisation offers.” In section 3, the Commission says that “Legal frameworks sustaining the standard employment relationship may not offer sufficient scope or the incentive to those on regular permanent contracts to explore opportunities for greater flexibility at work.”

This is illogical in that security of employment is not an obstacle to employees who wish to change jobs or begin studying instead. Employees can generally give notice without having to give a reason, and in most cases the period of notice is fairly limited. In actual fact, labour law can enhance the possibility of employees to handle changes on the labour market, for example by entitling them to take leave in order to study or to test another job or self-employment.

Collective agreements provide flexibility

TCO agrees with the Commission that the social dialogue can help to improve the ability of working life and business and industry to adapt to changed circumstances. The social partners at the national level must have great scope to conclude agreements on pay and working conditions, and EU labour law should in certain cases be semi-mandatory, i.e. it should offer employers and representative trade unions the possibility to deviate from detailed legislated regulations through agreements on national or sectoral level.

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

On the EU level, it is important to have fundamental directives which set minimum standards for employee protection, but at the same time allows Member States to have a higher level of ambition. This work should be given priority by the EU. EU labour law should to a greater extent contain semi-mandatory regulations that enable those countries that have representative trade unions to conclude collective agreements that permit exemptions and adaptation to the situation in a particular sector without undermining the security of the individual.
The position of ILO instrument on the right to organise, the right to bargain collectively and
conclude collective agreements and the right to take industrial action should be strengthened
in EU law. The right to take cross-border sympathy action – a fifth freedom – should also be
introduced. The right to take cross-border sympathy action must not, however, increase the
powers of the European Court of Justice to rule on whether national industrial actions are
compatible with Community law.

The directive (2004/14/EC) on information and consultation (co-determination) is too weak to
guarantee the retention or growth of a high level of employee influence. This also applies to
the directive (94/45/EC) on European Works Councils. The EU’s social model is based on
strengthening this influence, particularly in the new Member States. The trend in EU company
law with regard to employee influence has unfortunately taken the opposite direction.

**Question 2.** Can the 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?

With regard to our view of EU labour law, see the response to question 1.

The Swedish collective-agreement system and Swedish labour law in general provide
flexibility for companies and security and transition rights for employees. The adaptation of
collective agreements is a matter for the parties to these agreements alone – not a matter for
the Swedish State or the EU.

Labour law represents a compromise between partly conflicting interests. This applies to both
EU legislation and national regulations. In this context, the EU should give priority to job-
creation measures at the macro level. Full employment counteracts segmentation and enables
flexibility.

**Question 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?

Labour legislation and collective agreements are not obstacles in these respects as long as
they observe a correct balance between the companies’ legitimate needs for flexibility and the
employees’ legitimate needs for influence and protection against arbitrary treatment and
discrimination. Semi-mandatory legislation that allows for adaptations on sectoral basis in
binding collective agreements is a part of the solution in the latter case.

TCO believes that exempting employees in small companies from protection regulations in
social legislation will increase the risk that these employees are treated arbitrarily and make it
more difficult to recruit key personnel, especially in situations where there is a shortage of
labour.
Question 4. How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreements, 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?

See response to question 3.

4. MODERNISING LABOUR LAW – ISSUES FOR DEBATE

a) Employment transitions

The Commission’s analysis has many strong points and TCO shares the conclusion that regulations on security of employment and severance payments or systems that provide financial support to the unemployed are not sufficient to give workers the security they need on the labour market of today. Opportunities for retraining and lifelong learning, in the course of employment and in the event of unemployment, are needed to give workers a sense of security in the face of change.

Question 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?

Sweden has relatively good experience of a system in which income-related unemployment benefit goes hand in hand with active labour market policies. The public employment service gives the unemployed the opportunity to improve their chances of getting a new job by providing labour market programmes, matching services and pay subsidies. The public system has been complemented by transition agreements between the social partners at the national level. A certain percentage of total pay is set aside and can then be used to fund measures in the event of unemployment. These measures may include assistance in finding a new job or starting one’s own company, coaching or training.

The existence of this type of system should not, however, be used as a pretext to undermine employment protection on a broad front. First, dismissals on economic or organisational grounds, often referred to as collective dismissals, are already accepted in most Member States without further examination. The authorities and the courts accept the employers’ decisions on the organisation and orientation of the operations concerned. Second, it is important that this type of dismissal is not confused with dismissal on grounds related to the employee personally. The demand for a just cause for dismissal is not only important in protecting the personal integrity of workers and combating discrimination, it is also one of the cornerstones of labour law as a whole. Without protection against arbitrary dismissal it will in practice be extremely difficult to enjoy any of the other rights provided under labour law, as there is a risk that the assertion of such a right will lead to dismissal.

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

Access to training and opportunities for upward mobility on the labour market are areas in which collective agreements can play an important role, partly because the circumstances and
needs vary from one sector to another, and partly because collective agreements, given their link to pay, offer opportunities for funding the measures concerned. As mentioned above, Sweden is a good example of this.

In both law and collective agreements, the right to take leave in order to study, try out another job or start a company may be one way of improving the opportunities of workers to adapt to change on the labour market. States can also promote studies by means of tax subsidies or training accounts etc. Another way that changes in labour law can promote mobility on the labour market is to avoid linking rights or benefits to long qualification periods with one and the same employer as in the case, for example, of statutory employment protection in the UK, as this may lead to individuals refraining from changing their employer for fear of losing earned rights. Mobility may therefore be promoted by reducing the period an individual must have been employed by a particular employer in order to be covered by employment protection regulations and by ensuring that supplementary pensions are not linked to a particular employer and that dormant rights are protected when a worker changes his or her employer.

b. Uncertainty with regard to the law
TCO firmly believes that the best way to ensure rights for working people and avoid a segmented labour market is to allow the concept of employee to develop. All who perform remunerated work on behalf of an employer must benefit from the presumption that they are employees, regardless of factors such as the short duration of their employer or the professional independence they enjoy while carrying out their work.

The fact that there are great similarities between certain employees and individuals who are self-employed is not a new phenomenon. The boundary between these groups has been a central issue in national labour law ever since it came into being in the late nineteenth and early twentieth century. Individuals who personally carry out work but who in one way or another deviate from the traditional industrial worker that became the archetype have always existed. Over the course of the 1900s, the legal response from the courts and legislators has been to gradually extend the term “worker” to cover, for example, white-collar workers, managers, professionals such as doctors, accountants and journalists and certain taxi drivers and shop managers. Employment on a part-time or temporary basis is also no longer an obstacle to being regarded as a worker. The concept of the worker, which bears many similarities in the various Member States, has proved to be very capable of handling changes on the labour market and in society at large.

TCO does not accept the Commission’s analysis that the legal boundary between workers and the self-employed makes it more difficult for workers who want to become self-employed. A real problem on the other hand, as the Commission also notes, is that in many cases it is too easy for employers to create the illusion that a person is self-employed despite the fact that this person should really be classified as a worker.

TCO finds it remarkable that the Commission in its analysis (footnote 34) refers to the civil law concept of parasubordination in Italy as a legislative measure to protect the legal status of economically dependent and vulnerable self-employed workers. The category concerned, which was abolished in 2003 and replaced by another arrangement, serves rather as a good
example of how legislation that is intended to protect the self-employed can in fact encourage abuse.

In 1995, Italy introduced a special pension system for lavoratori parasubordinati, a category of contractors who personally carried out work on behalf of a client within the framework of a continuous collaborating relationship. Compared with employees, the system entailed lower employers’ contributions but also lower pensions for those who did the work. Between 1996 (the first year for the new system) and 2001, the number of lavoratori parasubordinati increased from just over 850 000 to almost 1.9 million, which was well above the net increase in employment in Italy in the same period. 91 per cent of these worked for only one employer over the course of a year, and a further 7 per cent for no more than two employers. The reason for the rapid increase was that the new system gave the employers the possibility to contract labour that they could control to almost the same degree as employees while at the same time they did not need to pay such high contributions or follow other legal regulations. In everyday terms, registration in the pension system for subordinati also created a strong presumption for the workers concerned to be considered as contractors rather than self-employed workers.

**Question 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?**

TCO believes that the basis for the Commission’s question is incorrect. Any legal uncertainty that exists for employers who employ labour in the grey zone between employees and the self-employed is a natural and inevitable consequence of the fact that the concept of employee is mandatory, which in turn is a result of the fact that labour law as such constitutes mandatory protective legislation. The only way to guarantee employers complete legal certainty would be to allow binding agreements on whether a person is an employee or self-employed. The consequence, however, would be to abolish labour law as mandatory protective legislation, as employers would be free to contract out of it. Seen from this point of view, the legal uncertainty that exists for employers who choose to use self-employed workers under conditions that closely resemble those relating to employees is eminently reasonable, and necessary.

The need for greater clarity in the legal definitions that actually exists concerns instead situations in which labour law is circumvented in various ways by classifying individuals as self-employed instead of as employees. Registration or classification for purposes not relating to labour law, especially for tax and social insurance purposes, often affects how the parties act in the labour law context too, despite the fact that the person concerned should, in labour law terms, be regarded as an employee. In order to maintain labour law as mandatory social-protection legislation it is vital that this type of classification, which is determined ex-ante, is not permitted to have any decisive influence on whether a person is regarded as an employee or self-employed in a labour law sense, a decision that must be made ex-post facto, based on the realities of the relationship between the parties.

It is particularly important to avoid situations in which registration in the trade register or for tax or social insurance purposes is used to make presumptions when determining labour law issues. The fact that there is an irresolvable conflict between such regulations and the mandatory nature of labour law was noted, for example, by French courts in connection with the subsequently abolished Loi Madelin.
In France in 1994, the Loi Madelin\(^2\) created a presumption against the existence of a contrat du travail in cases where the worker was registered as an independent contractor in the social security registry. The Loi Madelin was in response to criticism from employers that judges’ re-qualification of contracts inserted an uncertainty into the relationship between employers and independent contractors. The provision in the Code du Travail stipulated that “natural persons registered in the Registre du commerce et des sociétés […] are presumed not to be under a contract of employment for the activity for which they are registered.” The existence of a contract of employment could, nonetheless, be established if the person provided services to an employer “under conditions which created a bond of permanent legal subordination” vis-à-vis the employer.

In the courts, the issue quickly became one of how the words “bond of permanent legal subordination” should be interpreted. Did the inclusion of the word “permanent” indicate that the relationship between the worker and the employer had to be of a permanent duration, making it practically impossible to break the presumption? Or did “permanent” refer to the legal subordination, in which case the law would not have changed compared to earlier? In 1998, the Cour de cassation decided in favour of the second option, rending the presumption created by the Loi Madelin meaningless.\(^3\) The presumption created by the Loi Madelin was formally abrogated in 2000.

In the case of economically dependent workers, the best strategy would be to classify these as employees to the greatest possible extent. This would be a natural development of the employee concept in a situation where the way that employers exercise their right to manage and supervise work has changed because employees now have more knowledge and are given more responsibility, and because working life and society in general have become less hierarchical.

In Sweden, dependent contractors have come to be regarded as employees. As early as the 1940s, it was stipulated in certain labour legislation that the legislation also covered dependent contractors. In subsequent decades, the employee concept developed in such a way that it now covers dependent contractors without this being specifically mentioned in the legislation. In practice, this means that when Swedish courts are asked to determine whether a person is an employee or self-employed they can find that individuals who have a relatively high degree of freedom in how they carry out their work can still be regarded as employees if they also demonstrate a high degree of dependence.

In this context, it is also important to warn against having too much faith in what can be achieved by means of legislation. Most countries have, with good reason, refrained from incorporating detailed definitions of the terms employee and self-employed in their legislation. Working life is far too diversified to permit meaningful legal definitions that suit all the various sectors of business and industry and all types of jobs. One possibility, however, is to include statements by the parties on what they believe should be specifically taken into account when determining whether an individual in the sector concerned should be regarded as an employee or self-employed in national collective agreements at the sector level.

**Question 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?

TCO maintains that the best way to combat abuses and assure rights to those in need of protection is to ensure that the concept of employee is not limited but allowed to develop. For those individuals who nevertheless fall outside the scope of labour law the protection

\(^3\) Crim. 31 mars 1998 D.1999, p. 137.
provided by standard contractual law should be reviewed, for example with regard to the adjustment of unfair contracts.

As far as rights that apply to all workers irrespective of their form of contract are concerned, there are already examples of such rights today. In the field of the work environment, for example, many Member States already impose an extended responsibility on those who control the physical workplace for the physical safety and work environment of contracted workers when these are at the workplace concerned. The basis for this is that the self-employed are exposed to the same risks as employees and they can suffer a fall or exposure to a toxic substance in the same way. The same applies to agency workers or the employees of sub-contractors. TCO would like to see a clarification of the division of responsibility in this area so that responsibility for the work environment is placed on those who actually can take measures to protect those working at the workplace concerned.

If it is nevertheless decided, at the national level, to extend the coverage of labour law to individuals other than workers, such an extension should be based on two principles that aim to ensure that there is a balance between rights and obligations in the relationship between the employer and those who perform the work:
1. The rights provided should reflect the characteristics of the actual relationship between the employer and those performing the work. If it is the employer who de facto controls the work environment then it is also the employer who should be responsible for the health and safety of those doing the work.
2. The rights extended should, where applicable, be identical to those that apply for employees. This will avoid situations in which an employer can, for example, gain the same control over a contractor that he has over an employee while not being required to provide the same rights.

One consequence of these principles is that the creation of formal intermediate categories between employees and genuinely independent self-employed workers should be avoided. As the example of the Italian lavoratori parasubordinati above illustrates, this can lead to an imbalance between rights and obligations.

c. Three-way relationships

**Question 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”?

Multiple employment relationships must never become a way for employers to avoid responsibility for legislated or contractual rights. The starting point must therefore be that workers in such multiple relationships are covered by the same rights as other workers, and that the primary responsibility for this lies with the agency. At the same time, the company that uses labour from an agency should have the same responsibility for the agency workers as for its own employees in areas where the company exercises effective control. This applies,
for example, to the work environment, a fact that is already reflected in the legislation of many Member States.

A subsidiary liability on the part of user enterprises in other areas, for example for ensuring that pay is in accordance with valid laws and agreements, could be a way to combat the use of shady temporary work agencies.

With regard to other ways of ensuring that workers in three-way relationships are adequately protected, TCO would like to underline the fact that collective agreements are absolutely the best alternative. In Sweden, employment agencies have signed collective agreements that guarantee their employees 80-90 percent of their monthly salary, even when they are not leased out to a user enterprise.

TCO welcomed the 2002 proposal for a directive on the protection of agency workers, on condition that the central regulations of the directive were made semi-mandatory, in order not to have adverse effects in Member States where the sector has been successfully regulated through collective agreements.

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

As mentioned above, the starting must be that workers in multiple employment relationships are covered by the same rights as other workers, and that primary responsibility for this lies with the agency. This responsibility can in certain cases be complemented by a subsidiary liability on the part of the user enterprise, or be extended from a principal contractor to a sub-contractor. At the same time, the legislation must be designed so that it is easy for authorities and courts to “see through” sham employment relationships and find the real employer.

**d. Organisation of working time**

**Question 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?**

The heading “Organisation of working time” constitutes an unfortunate limitation. When discussing working time, a distinction is usually made between the duration and the organisation of working time. The fact that the Green Paper here takes up the organisation of working time as an important issue may be interpreted to the effect that the duration of working time should not be subject to regulation at the European level. TCO believes otherwise. European labour law should stipulate regulations that set limits for working time, both in terms of duration and organisation. These regulations should reflect the value that the political system attaches (high or low) to the protection of workers in an economy based on free competition.

As the existing terms and conditions on the labour market and the way that these are regulated vary greatly throughout the Union, it is practical and effective that EU regulations that limit working time are expressed as minimum levels and minimum requirements that all of the
Member States must accept. Within the framework of these minimum levels there should then be great scope for national deviations with regard to levels and the way that these should be achieved and regulated.

The major stumbling block, i.e. the question of individual exemptions, is crucial. If this principle is permitted in one Member State it will inevitably lead to social dumping in the field of working time as the Member States will then be forced to compete in terms of which country has the best working time regulations for the employers (and the worst for the employees). This means that in reality there will be no ultimate limit for working time in Europe (although the EU treaty stipulates that there must be such a limit). The principle of individual exemptions is not consistent with the ambition to create a social Europe.

The issue of on-call time is, despite its apparently pragmatic nature, also an important matter of principle. Ultimately it is a question of the definition of working time. Our view is that all of the time the employee is at the disposal of the employer should be regarded as working time. All other time is free time. This means that on-call, stand-by and emergency working hours should be counted as working time over and above normal working hours. The basis for this is that the freedom of the employees and the conduct of their lives are restricted in connection with on-call and emergency work. The discussion of on-call working hours has mainly focused on the working hours of doctors. Employers in the healthcare system envisage major problems in manning their activities as a result of the decisions of the ECJ. It is clear, however, that all employers have an incentive to redefine what should be included in working time in the event that the concept of working time is relaxed by the introduction of, for example, the concept of passive on-call working hours as has been suggested. All experience shows that this leads to an increase in working time.

The regulation of working time in Community law should aim to create: 

* A framework for the protection of health and safety* that contains a clear and coherent definition of working time, absolute limits for the duration of working time and absolute minimum regulations for working time in those areas that are essential to the protection of health and safety, i.e. the duration of weekly working hours, night work, daily rest, weekly rest and the degree of flexible scheduling (average calculation).

* Regulations that promote flexibility and competitiveness, including new regulations that make it easier to combine working life and family life (e.g. by giving employees more influence over the scheduling of a certain percentage of working hours); regulations that encourage childbirth, e.g. the right for workers with small children to reduce their weekly working hours; and regulations that enable learning and competence development, e.g. the right to take study leave.*

National deviations should be permitted within the framework of the stipulated limits for working time that the EU must have in order to uphold and maintain the protection of workers. Deviations are permitted on the basis of national legislation, collective agreements between the social partners or other equivalent forms of regulation.
e. Mobility of workers

**Question 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?

TCO believes that the country-of-work principle, i.e. that employment relationships should be governed by the law in the country where the work is performed, is a fundamental principle and a natural consequence of the fact that labour law is mandatory. As the concept of “worker” or “employee” is an integral part of labour law, it is also a logical consequence of the country-of-work principle that it is the definition used by the country concerned, or any other stipulated limitation of the group of individuals covered by labour law, that should apply. Allowing another country’s definition “employee”, or of the liable employer in a multiple employment relationship, to determine the application of the legislation of the country of work would therefore be inconsistent with the country-of-work principle. It is particularly important that registrations or other classifications made in advance by another Member State are not allowed to influence how a relationship is assessed in the country of work as this would contravene both the country-of-work principle and the mandatory nature of labour law.

It is also vital that Community legislation is applied in the same way in all Member States. It should not be possible for a Member State to avoid its obligations under the treaty or secondary legislation by applying a restricted definition of “worker” or any other terms that define the areas in which Community labour law applies. It is, however, entirely possible to reconcile this wish with the country-of-work principle.

With regard to the free movement of labour as addressed in Article 39 of the treaty, the term “worker” should, in accordance with the practice of the ECJ, have a meaning in Community law that is interpreted uniformly and extensively as this relates to the one of the treaty’s basic freedoms. This also applies to the secondary legislation that aims to realise this principle by fully harmonising the legislation of the Member States. The secondary legislation that aims to approximate the legislation of the Member States takes the form of minimum directives. In these cases, the definition of “worker” in Community law should be seen as a minimum level that offers the Member States the opportunity to apply a more far-reaching definition.

**f. Enforcement issues and undeclared work**

**Question 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?

So-called undeclared work is often linked to economic crime and should be combated in all its forms. However, this is not primarily a matter for the social partners but for state authorities,
not at least the police. This work should, as the Commission proposes, lead to greater co-
operation between the Member States and, as far as the responsibility of the social partners is
concerned, to a deeper discussion between UNICE/UAPME, CEEP and the ETUC in the
context of their work programme for 2006-2008.

In Sweden, the supervision of working conditions is mainly regulated in collective
agreements under civil law. Compliance with these regulations is managed by the social
partners. This supervision is very effective and most legal disputes and conflicts of interest are
resolved directly between the social partners, which is beneficial for both the employees and
the company concerned, as well as for society at large. In this respect, therefore, we neither
require nor desire further support from state authorities or the EU. On the other hand, even the
trade unions can benefit from information on the fact that foreign labour, in the form of
enterprises or workers, is carrying out work in Sweden and on the conditions under which this
work is being carried out.

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

TCO does not consider that there is a need for any further initiatives. Increased administrative
cooperation between various authorities and bodies in the Member States should be tested
first.