British Retail Consortium response to European Commission Green Paper

“Modernising labour law to meet the challenges of the 21st Century”

The British Retail Consortium (BRC) represents the whole range of retailers, from the large multiples and department stores through to independents, selling a wide selection of products through centre of town, out of town, rural and virtual stores. Membership includes all major multiples; a range of small and medium sized retailers plus various sector-specific and small business trade associations.

In the UK retailers have a history of providing innovative, flexible working schemes and the success of the UK retail industry is due, in part, to the types of working patterns that employees are able to choose. As a result, even though food retailers are increasing the number of stores that are open twenty-four hours a day and non-food retailers are extending their opening hours during the week, the majority of the 2.8 million retail employees work less than 48 hours a week, and can choose working patterns to suit their specific needs. In the UK, retail has consistently led the way in creating a flexible, supportive environment by investing heavily in training and development, recruiting and retaining a diverse workforce, creating jobs in deprived communities, supporting further education and offering excellent career opportunities for all employees regardless of contract type. The UK Retail Sector’s success in creating flexible, secure jobs is an example that should be recognised across the EU.

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

The BRC welcomes the Green Paper and the opportunity it presents to discuss “flexicurity” and the advancement of a European labour market which is “fairer, more responsive and more inclusive”1. The BRC believes that encouraging this type of discourse both within Europe and within Member States is of enormous benefit to the aim of delivering sustainable employment and ensuring that the framework is appropriate for both sides of industry.

The BRC agrees with the Commission that flexibility must be taken to mean a two way culture of choice and support. The benefits of cooperation between employer and employee are clear; for the employer it develops an adaptable workforce able to meet the demands of a competitive industry and for the employee provides the opportunity to choose working patterns according to their needs, steer their careers and provide care for their dependents. Security means demonstrating long-term commitment to employees, rewarding their hard work and loyalty, ensuring they are informed and consulted in relation to changes in the workplace and encouraging them to develop their careers by providing training and supporting further education. For debate to be meaningful it is vital that there is a common understanding of the underlying components behind both the terms flexibility and security.

Over 50% of retailers have attained the voluntary ‘Investors In People’ Standard which employers achieve by ensuring their employees are offered a range of flexible working opportunities to enhance their work-life balance. The BRC believes that guidance, standards and voluntary codes of practice can work as excellent solutions and would welcome further discussion on the practical operation of the options available. The fact that businesses have shown themselves amenable to pursuing voluntary standards demonstrates the success of non-legislative measures in enhancing working life. The BRC believes that regulation should be seen as the course of last resort in Member States

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1 Green Paper on Modernising labour law to meet the challenges of the 21st Century COM (2006) 708 section 1 page 4
where the employment framework is already saturated with regulation and that discussing alternatives to regulation should rank as a priority in the law reform agenda.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation and if so, how?

The BRC believes that combined, flexibility and employment security provide the optimum conditions for employment and that additional, burdensome regulation purporting to facilitate their operation serves only to hamper them. However well-intentioned additional regulation is, the UK employment legislative framework is already saturated and new regulation is likely to result in knock-on effects as employers spend time and money satisfying bureaucratic requirements (form filling etc). The effect of a saturated regulatory framework on SMEs is of course even greater. The BRC believes that it is counter-intuitive to implement more regulation in the name of achieving modernisation. The dynamic nature of the labour market means it requires flexible, adaptable solutions which entrenched burdensome regulation simply cannot achieve.

Retailers have demonstrated their ability to adapt to the needs of their workforces and ensure that their solutions are original and competitive. In the UK retailers invest heavily in training and have launched innovative schemes, providing their staff with access to professional or personal development plans. Low-skilled workers in particular benefit greatly from the opportunity to access training and enhance their skills base. Many retailers offer skills and development packages as standard to all employees regardless of length of service and go to great lengths to ensure there are a variety of original and accessible options available.

In terms of flexibility, employers in the retail sector work hard to ensure that those taking up flexible employment opportunities suffer no detriment and can request to transfer between employment types. Often those requiring flexible working patterns are those underrepresented in employment statistics generally – eg women, disabled people and older workers. The fact that the UK retail workforce comprises 62% women, 56% older workers, 12% disabled workers and 7% workers from ethnic minorities is testament to the fact that these practices have eliminated marginalisation within the UK retail labour market and achieved a well integrated, diverse workforce. Ensuring that employers are poised to adapt to changes and offer competitive employment opportunities is key and labour law must adapt to facilitate this. The BRC believes that a wealth of administrative requirements imposed by regulation will only hinder employers’ ability to respond quickly and positively to the changing needs of a modern workforce.

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 BRC does not believe that imposing regulation is always appropriate in the employment context. It hinders productivity by costing employers’ time and money and restricts an employee’s ability to choose working practices. If European businesses are to be successful on the world stage their workforces must be able to adapt to the needs of a variety of clients and suppliers. Furthermore, retailing is an area where the UK has produced a number of worldclass companies who have proven their ability to meet and service customer needs to outstanding levels in the UK and abroad. These companies will only be able to compete abroad successfully with a firm and sustainable platform domestically. This is a key strand of the EU’s Lisbon Strategy as well as the recently announced Global Europe strategy from DG Trade.

\footnote{For further info and examples please see BRC Brochure which accompanies this paper}

\footnote{Nomis data February 2007}
The BRC feels that ensuring consistent interpretation across Europe would achieve real improvements to the welfare of workers and ensure that European markets are able to compete on a level playing field. As an example, the BRC is concerned that the provisions within the Working Time Directive are not currently being applied equally across Europe. The application of the weekly hours provisions in some Member States to contracts, rather than workers, bypasses the protection afforded by the Directive. The interpretation of ‘autonomous worker’ in the same Directive must also be aligned across Europe so that all workers below an agreed level are protected. Member States which use this term as a ‘catch all’ fail to adequately protect the majority of their workers.

Where regulation is inevitable, the BRC believes that employee protection can be enhanced through clearer phraseology in the Directives. However ultimately, the BRC believes that guidance, voluntary codes of practice and standards can work as adequate solutions to regulation and should be utilised more often. The impact of regulation on SMEs is especially onerous – understanding their administrative obligations including taking advice, and ensuring record keeping and form filling requirements are met involves time and money. Where different obligations apply to smaller and larger business, it is imperative that categorisations are applied in a uniform manner so that those the tiered system aims to relieve of further burden do in fact benefit, and employees are afforded the protection they are owed. The BRC believes that using alternatives to regulation can alleviate the majority of these problems and enhance the employment regime for both employer and employee.

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?

Retailers in the UK work hard to ensure their standard contracts incorporate opportunities for flexibility (as their work to achieve voluntary standards demonstrates) and this is a key incentive in the recruitment process. Options such as working flexi-time (working an average rather than a set number of hours per week/day), taking career breaks, compressed work, dependency leave, enhanced paternity leave, additional maternity leave, study leave, store swap and shift swap procedures can be found in many retail contracts. As well as incorporating flexibility into standard permanent contracts, contracts which are by nature flexible are also available – part-time and shift work, job sharing arrangements and home working. Many retailers also go well beyond the prescribed statutory flexibility in relation to maternity and paternity leave. Employers are legally bound to ensure that employees making use of flexible opportunities suffer no detriment in terms of security and can request to transfer between forms of employment if they wish. In fact many retailers go well above this threshold by actively supporting employees and providing them with many additional opportunities (please see our accompanying booklet for examples).

In the UK retail sector 34%4 of employees who begin on short term or temporary contracts go on to full time permanent contracts. Individual staff surveys indicate that the remainder are satisfied with their contracts and do not wish to become permanent members of staff. The mechanism for the ability to move between contract types exists within the contractual framework and, due to the appeal of these opportunities, works as an incentive in recruitment and retention. Competition between retailers therefore serves to constantly raise the bar across the industry removing the need for further regulation.

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 and active labour market policies?

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4 Nomis data February 2007
The social security model chosen by Member States is of course a matter for respective governments. However, many retailers make considerable contributions to raising employment levels in areas of high unemployment by actively engaging with local communities and creating jobs where they are needed. Some of these initiatives include identifying training gaps, providing job guarantees and community partnerships. In the last five years alone more than 343,200 jobs have been created.

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

As above, retailers in the UK are investing heavily in training and skills development to encourage upward mobility. The opportunities for flexible working take forms which are themselves flexible—such that employees are able to request transfer between these options. The BRC believes that commercial competition will compel businesses to offer well-developed training packages and to continue to devise original working options. Any successful business would apply the same logic.

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?

The definitions of employment and self-employment (or contracts for services) and the issue of disguised self-employment, and how to facilitate bona fide transition between the two are distinct matters. The BRC agrees with the Commission that the most constructive direction in which to take the matter of definitions is by opening up an EU-wide discussion in which Member States share the rationales behind their definitions, consider when to protect freedom of contract and allow parties to exclude employment protection and examine how and why harm is caused. Regulation often presupposes that there are clear distinctions between contractual types that do not exist in practice and in any case however tight the definition there will always be controversy at the margins. In the UK, the statutory definition of employment (or contracts of service) requires reference to a common law test which looks at an indeterminate list of factors including the degree of control exercised by the employee, the extent to which the employee is integrated with the employer’s organisation and the allocation of risk.

The European Court of Justice has held that the precise scope of the term “employment relationship”, used in many European Directives, is a matter for national law and this is in line with the wording of the Directives themselves which often include the statement “This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship”. The English Courts have demonstrated their commitment to ensuring that the existence of a contract and its provisions is a true reflection of the actual relationship between the parties and have found an employment relationship where contracts and tax codes expressly identify the claimant as self-employed. The BRC agrees with the Commission that there is a real need to protect workers who are forced into involuntary self-employment in order to exempt them from benefits and security which they would otherwise attract, and believes that initiating a debate as an opportunity to learn from experiences across the EU would be invaluable.

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?

The use of the term “worker” within European legislation provides a basic minimum set of employment rights. Workers are covered by all Minimum Wage and Health and Safety legislation.

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5 Please see accompanying brochure for examples
6 EG Acquired Rights Directive 77/187, Article 2.2
7 See for example, Lane v Shire Roofing Company (Oxford) Ltd [1995] IRLR 493 (CA),
including the Working Time legislation and are also protected by the Employment Relations Act 1999 and provisions in the Employment Rights Act 1996. Statutory protection has also been extended in a variety of situations to new starters without a qualifying period\(^8\). The BRC believes that the current minimum protection strikes the right balance between protecting freedom of contract and ensuring employee welfare. This debate focuses on the need for Labour Law to be appropriate for the 21\(^{st}\) Century and able to adapt to emerging new forms of work, which it recognises as becoming increasingly mainstream. The BRC believes that restricting the available forms of contract further would serve to hamper job creation and stifle entrepreneurship.

9. Do you think the responsibilities of the various parties within multiple employment relationships should be classified 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 the “three way relationship”?

Pinpointing responsibility in multiple employment relationships in the UK is a matter for the courts assessed by reference to a range of factors. The end-user has frequently been held responsible for compliance with employment rights and while the BRC believes that has resulted in harsh consequences it also believes that requiring prescriptive contractual forms, and/or imposing liability as standard (e.g. subsidiary liability in the case of sub contractors) will not resolve this difficulty. The specific circumstances will indicate where the responsibilities lie and this is the case notwithstanding the purported contractual relationships and, again, the UK courts have demonstrated willing to look beyond the contract. While it is right that not too great a focus is given to formalities, neither should they be completely disregarded. Stripping away formalities in analysing the relationship will create uncertainty between all parties which is ultimately in the interests of no one.

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

The BRC believes that the employment status of short term temporary agency workers could be clarified to ease the burden on employers and employment agencies. The DTI is currently looking at ways in which to ease the requirements relating to the provision of information for short assignments and the BRC welcomes this proposal. Aside from this, and in relation to longer-term assignments, the BRC fully supports the principle of protecting agency workers from discrimination but believes that this must be balanced so as to preserve the use of agency workers and retain business flexibility.

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?

Employers would benefit from greater clarity in terms of the scope of their time-keeping obligations. The UK Government feels retaining the opt-out is appropriate to allowing business and individuals to operate flexibly and the BRC is supportive of this position. The BRC feels that any overall ‘hard cap’ must be sufficient to allow for flexibility on hours and should be applicable to all Member States whether or not they have made use of the opt-out. Recent proposals effectively allowing Member States who have not opted out to work any hours so long as they average a maximum of 48 hours per week over 12 months but restrict Member States who have opted out to a 60 hour maximum referenced over three months are clearly counterintuitive.

The matters arising from the SiMPAP and Jaeger judgments concerning the definition of ‘on-call’ time obviously needs clarification. Some Member States are also interpreting “autonomous worker” so as to catch most workers. Those workers are therefore deprived of the protection to which they

\(^8\) For example unfair dismissal for discrimination or reasons relating to working time and minimum pay
are entitled under the Working Time provisions. Similarly some Member States have chosen to apply the working time provisions relating to working week to each contract, rather than each worker. The BRC believes that these matters should be addressed as a matter of urgency in order to safeguard the health and safety of all workers.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier work, 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 States where they work? Or do you believe that Member States should retain their discretion in this matter?

The ECJ and many European Directives refer the definitions of employment contract and worker to national law and the BRC agrees with this approach. Aside from the fact that, as discussed, a base “floor of rights” exists across the EU to protect the welfare of workers any further definitions must be appropriate for the each member state. On a practical level, the BRC also believes that any attempt to converge the definition would be extremely difficult and unlikely to succeed.

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 the social partners in such cooperation?

Discussion and exchange of experiences is the most effective way to promote effective administration, however, ultimately this is a matter for national law. Member States must of course ensure their administration of EU labour law is appropriate for their domestic circumstances as well as lawful, clear and accessible. To facilitate this, the EU must ensure that its legislative measures are clear, as simple as possible and all terms are properly defined to eliminate scope for ambiguity and inconsistent implementation across the EU.

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

Undeclared work is more prevalent in some Member States and some sectors than others and domestic measures should be taken to resolve these difficulties as and where they arise. Clearly further EU legislation will have a very limited effect because those involved in these practices by definition disregard legal requirements. Again this is an area where open dialogue between Member States should be encouraged in order to facilitate exchange of experiences.