1. The CBI is pleased to submit its response to the European Commission’s Green Paper on ‘Modernising labour law to meet the challenges of the 21st century’. The CBI welcomes the Green Paper’s recognition that EU labour markets need to become more flexible in order to raise employment and provide economic growth. In a fiercely competitive global market, business must adapt quickly to market changes and find staff with the necessary skills to compete.

2. However, employers are concerned at some of the Green Paper’s analysis and assumptions. In particular, the Green Paper paints an overly negative view of ‘atypical’ employment contracts, such as temporary agency work. It argues that individuals on these types of ‘precarious’ employment contracts and working patterns represent labour market ‘outsiders’, as compared to ‘insiders’ on permanent full-time contracts. The CBI believes this analysis is flawed and does not recognise that many individuals value the flexibility that these forms of working provide. Employers therefore do not accept that further employment legislation is appropriate or necessary.

3. In considering the Green Paper, CBI members;
   • welcome the Green Paper’s recognition that a flexible labour market is necessary for continued economic competitiveness is welcome – but ensuring employment security and improved labour market transitions is best served though improving access to training for employers and individuals
   • it is clear that the ‘flexicurity’ approach can mean all things to all people – the CBI urges caution if the Commission is minded to develop common principles for Member States to adopt.

4. The CBI has a number of concerns about the Commission’s approach, in particular;
   • the pejorative language used to discuss ‘atypical’ forms of work raises serious concerns
   • the introduction of a ‘floor of employment rights’ for all individuals is unnecessary as this already exists
   • the employment status of agency workers does not require further clarification and subsidiary liability is impractical
   • Working Time law needs reform to end confusion and over-regulation
   • undeclared work must be combated – but EU level intervention, other than assisting Member State co-ordination, is unlikely to be effective.
The Green Paper’s recognition that a flexible labour market is necessary for continued economic competitiveness is welcome

5. The CBI welcomes the Commission’s assessment that the flexibility of EU labour markets should be increased and that flexible forms of work benefit both employers and individuals. The CBI welcomes EU actions to promote labour market flexibility across Europe and the debate on the modernisation of labour law. Labour market flexibility has played a key role in making the UK an attractive place to do business and it is essential that it is not undermined through excessive employment legislation.

6. The UK has introduced balanced measures to meet both employers’ and employees’ flexibility needs. For example, parents of young children have a right to request flexible working arrangements with employers being able to refuse a request where there is a recognised business reason for doing so. The CBI/Pertemps Employment Trends Survey 2006 found that in 90% of cases, requests have been accepted by the employer or a compromise reached, with little differences in acceptance rates between large and small firms. This indicates the success of the approach which creates benefits for employees without creating undue burdens on companies. The right is being extended to carers of adults from April 2007.

– but ensuring employment security and improved labour market transitions is best served through improving access to training for employers and individuals

7. Labour law reforms must focus on facilitating the creation of new jobs rather than trying to preserve existing ones – together with the promotion of effective lifelong learning policies. The Commission is concerned with ensuring that labour and social security laws are appropriate in assisting workers in making transitions from one status to another – whether due to redundancy and dismissal or voluntarily through full-time education and training, caring responsibilities, career breaks or parental leave.

8. Whilst there is a need for more flexible employment protection legislation across Europe, the role of the Commission is to encourage Member States to introduce the necessary changes and organise exchanges of experiences so that different countries can learn from each other and adopt the mix of approaches most suited to them. There is a need for greater focus on education and training measures (not an area of EU competence) to assist individuals with their career development and transitions form unemployment or different forms of work – rather than relying on further employment regulation and social security provision to protect individuals. Reforms should therefore focus on supporting employers and individuals in adapting to market changes.

9. Ensuring employers and individuals have access to appropriate training is essential in maintaining levels of employability and upskilling the workforce to ensure business remains competitive and individuals have the skills required to find employment and adapt to a rapidly changing economy.

10. Improvements to training systems are the responsibility of individual Member States and employers are clear that the UK system must continue to improve, putting employers’ and individuals’ needs at its heart. The CBI has welcomed initiatives such as ‘Train to Gain’ which are helping to develop a more demand-led approach to training and continues to lobby strongly for young people to enter the labour market with employability skills to ensure that they are successful in the workplace.
11. Legislation is not the right instrument to influence training and learning behaviour. At European level, agreements between the social partners have played a useful role in promoting a life-long learning culture. For example, the CBI was involved – through BUSINESSEUROPE (formerly UNICE) – in developing the framework of actions on the life-long development of competences and qualifications. Subsequent implementation reports have shown that agreeing on a common approach to life-long learning contributes to changing attitudes. It is clear from examples across the EU that the key is to create the conditions that will induce companies and individuals to invest financial resources, time and efforts to upskill.

12. The competence to modernise labour law lies first and foremost with the Member States. Most of the measures to enable employment security and improved labour market transitions will therefore need to be taken by national players. The role of the EU should be to organise exchanges of experiences between Member States and monitor national reforms using the instruments of the European growth and jobs strategy. Taking a top-down legislative approach at the EU level is likely to be counter-productive for national reforms.

It is clear that the ‘flexicurity’ approach can mean all things to all people – the CBI urges caution if the Commission is minded to develop common principles for Member States to adopt

13. The Green Paper’s promotion of the concept of ‘flexicurity’ - characterised as ‘balancing flexibility and security’ - in the operation of labour markets is a welcome addition to the debate on this issue. CBI members understand there to be four general principles underpinning flexicurity:

- relatively unrestricted access to hire and dismiss, and to fix wages
- an economic safety net in the event of unemployment
- an active labour market policy which assists the unemployed who are unable to find a new job immediately
- a focus on lifelong learning to ensure individuals remain employable.

14. Although these principles appear to be a sensible basis for labour market policy, they are open to interpretation in practice. Individual Member States have different views and approaches to flexibility in their labour market – depending on their individual circumstances. It is therefore crucial that any common flexicurity principles that are developed remain capable of adaptation to Member States’ individual needs. It would be inappropriate to impose a rigid template on Member States – particularly those such as the UK which have achieved consistent success through a flexible labour market, producing high employment rates (71.7% – one of only four Member States to beat the Lisbon target of 70%) and strong growth.

15. The CBI therefore believes it is vital that the ‘subsidiarity’ principle is respected on these matters – the UK is not seeking to impose its model on other countries, just as another model being imposed on it would be unacceptable. The CBI believes that flexicurity should not be forced upon Member States through binding common principles – rather these principles should be non-binding and suitably non-specific. The UK should not have to adapt its successful labour market policies to fit in with an overly rigid flexicurity agenda from the Commission.
The pejorative language used to discuss ‘atypical’ forms of work raises serious concerns

16. The Green Paper provides an overly negative view of atypical forms of work – such as fixed term employment, part-time work, temporary agency work and self-employment. It argues there is a risk that this part of the workforce becomes trapped in a succession of short-term, low quality jobs with inadequate social protection leaving them in a vulnerable position – although such jobs may in fact serve as a stepping-stone in enabling individuals to enter the workforce.

17. The Green Paper appears to classify only those employed on permanent, full-time contracts as labour market ‘insiders’, with those on other, more flexible employment contracts viewed as ‘outsiders’ in need of further protection. This is a flawed use of the insider-outsider concept. ‘Outsiders’ should instead be the unemployed.

18. Evidence from CBI members and from other sources shows that atypical work can have significant advantages for workers. Reports on the motivations behind agency work, for example, have revealed that temporary work can often suit individual lifestyle choices. Casual and freelance workers also benefit from not having to commit themselves to one employer and being able to work for a number of companies in the same industry. Employers in the journalism industry, for example, have commented that freelance journalists value being able to work on a number of different assignments for different organisations, thus expanding their portfolio.

19. The UK Government has recognised that flexible working arrangements do not automatically equate to more vulnerable workers. As the Government’s 2006 ‘Success at Work’ policy document states, fewer than one in ten people who work part-time do so because they cannot find full-time employment.

20. Temporary agency workers provide a valuable source of labour to the UK economy, used by firms to meet fluctuating demands in workload or to cover staff absences. Temporary agency work is a key aspect of the UK’s flexible labour market and benefits both employers and workers. Agency work can act as a stepping stone from unemployment to employment, and from agency work to permanent employment. Equally, other workers prefer to work as agency temps as such working arrangements offer individuals a wide variety of work and working patterns to suit their individual lifestyles and aspirations. Agency work therefore enables more people to work – including parents of young children, older workers and students. Data from the Recruitment and Employment Confederation (REC) suggests that up to half of agency workers are not seeking a permanent job. REC research (2005) shows that over half (52%) of agency workers choose temporary work for positive reasons such as increased flexibility, better pay or to gain valuable work experience and 20% use temporary work as a route into a permanent job.

The employment status of agency workers does not require further clarification and subsidiary liability is impractical

21. Triangular employment relationships – in particular those involving temporary agency workers – are also addressed in the Green Paper, with reference to the currently stalled Temporary Agency Workers Directive. The Green Paper argues that further clarification is required about accountability for compliance with employment rights.

---

1 REC (2005) Satisfaction levels amongst temporary agency workers.
22. UK employers are clear that the agency worker’s primary relationship is with the agency. User companies do not get involved in the details of an agency worker’s terms and conditions and it would not be acceptable for employment responsibilities to be passed to the user company. User companies are not prepared to take responsibility for upholding the working rights of temporary workers, apart from with respect to rights in the workplace, e.g. those related to non-discrimination and health and safety, and will only contract with a temporary agency on the basis that the agency guarantees the rights of its temporary agency workers.

23. Providing agency workers with an employment relationship with the user company would remove the benefits contracts for services and would completely change the UK model of agency work. Administration and costs for the user company would increase, removing the incentive for companies to contract with temporary agencies for work. This would result in significantly fewer agency workers engaged. The UK would see the removal of vital employment opportunities and the restriction of important labour market flexibility. The UK Government concluded in its 2006 ‘Success at Work’ policy statement that no further clarification was needed on the employment status of agency workers, and the CBI supports this position.

24. The Commission is also concerned with the protection of workers under sub-contracting arrangements. Sub-contracting, which is essentially a commercial relationship with contractual obligations but no subordination between the client and the service provider, must not be confused with temporary agency work.

25. Subsidiary liability – where any claim can only be brought against the main contractor in the event of non-compliance by sub-contractors – is proposed as a means to deal with establishing responsibility in the case of sub-contracting. However, this solution is unlikely to be effective. All sub-contractors must ensure that they follow relevant labour law when dealing with their employees – contractors and user employers must therefore be able to expect that sub-contractors are fulfilling their responsibilities and cannot be held accountable for circumstances in which sub-contractors have not fulfilled their responsibilities. Companies using sub-contractors should be able to rely on the fact that those sub-contractors have to fulfil their labour law responsibilities – ensuring their sub-contractors comply with the law is not their responsibility.

26. The subsidiary liability principle could also place a considerable burden on the main contractor. SMEs in particular do not have the administrative resources to make a thorough examination of their subcontractors, let alone situations where there is a chain of subcontractors. The main contractor is not in a position to control compliance in practice.

27. The Green Paper suggests that the emergence of diverse forms of non-standard work has made the boundaries between employment law and commercial law less clear, with the traditional distinction between ‘employees’ and the independent ‘self-employed’ no longer an adequate depiction of the economic and social reality of work in Europe.

28. The Commission argues that there could be a need for greater clarity in Member States’ legal definitions of employment and self-employment and all those individuals not on a standard employment contract could benefit from a ‘floor of rights’. The Green Paper
also suggests a new concept of ‘economically dependent work’, which would cover situations falling between the two established concepts of employment and independent self-employment. In such situations, workers are formally self-employed but are economically dependent on a single client or employer for their source of income and could therefore be considered ‘vulnerable’.

29. In the UK, employment tribunals, HMRC, the Benefits Agency and courts use a wide range of tests to determine the employment status of an individual. There is a wide range of case law on this issue and it appropriate for Member States to clarify legal definitions rather than having EU intervention in this area.

30. The Green Paper recognises the UK’s employee-worker distinction as an example of a ‘targeted approach’ in dealing with employment status issues. Workers receive core employment rights but not the full range of labour law entitlements associated with standard employment contracts. All workers are therefore covered by the majority of employment legislation, including the National Minimum Wage, working time legislation, health and safety and social security provisions (such as maternity and sick pay). Part-time workers have the same rights as full-time workers on, for example, pay, access to pensions and bonuses, and fixed-term workers must also be treated in the same way as comparable permanent employees.

31. Whilst there are some reports of abuse and a lack of knowledge about existing rights for some workers, there is no basis for changing the framework of rights in the UK – a position which has been accepted by the Government. The UK system conferring core employment rights on ‘workers’ is working well. Workers provide a valuable resource to the economy because they are flexible and can be deployed easily to where work is available. This is possible because such individuals are employed on contracts for services, as opposed to contracts of employment. Under contracts for services, there is no mutuality of obligation – rather the work provider is under an obligation only to consider the individual for any work that becomes available.

32. Whilst it is welcome that the Green Paper is not explicitly calling for an extension of all employment rights to all individuals regardless of their employment contract, what the Commission means by a ‘floor of rights’ is unclear. UK employers would be concerned if the Commission wished to introduce legislation that is not compatible with the UK approach. Furthermore, the Green Paper suggests that harmonising definitions of ‘workers’ across Member States could assist in ensuring that so-called ‘frontier workers’ are able to exercise their employment rights regardless of the Member State in which they work.

33. The UK approach to providing employment rights to workers has been successful and there are positive aspects to atypical work for individuals. However, the terms and conditions of employment of workers are best defined by Member States and existing EU law – including protection of workers against forms of discrimination – already amply covers what could be legislated for at EU level.

34. The role of the Commission is to facilitate the sharing of experiences of national initiatives to deal with these issues so that Member States can learn from one another, rather than a European level generalisation of new legal categories of ‘economically-dependent workers’ and harmonising (whether explicitly or implicitly) national definitions of employees and the self-employed.
Working Time law needs reform to end confusion and over-regulation

35. The Commission briefly raises working time as an issue in the Green Paper and asks what aspects of the legislation should be tackled as a priority. The CBI believes that, in the UK, overcautious interpretation combined with a fear of infraction proceedings by the European Commission has led to the excessive regulation that characterises the UK implementation of the Directive.

Undeclared work must be combated – but EU level intervention, other than assisting Member State co-ordination is unlikely to be effective

36. The issue of enforcement of employment rights, particularly around undeclared work, is also raised in the Green Paper. The Commission believes that undeclared work – often associated with cross-border labour movements – is responsible for both the exploitation of workers and for distortions in competition. It is important to note that undeclared work appears to primarily be a problem for certain countries – primarily the new Member States – with others, including the UK, having comparatively few concerns.

37. The EU Social Partners have identified undeclared work as an issue to be addressed as part of ensuring a balance between flexibility and security in reforming labour law in the work programme for 2006-2008. The Commission suggests that there should be more effective co-operation between different government enforcement agencies.

38. However, effective enforcement of existing European labour law as transposed into national legislation and combating undeclared work lies first and foremost in the hands of national authorities. The EU can play a useful role by organising exchanges of experiences between national labour inspectorates as is already done. Furthermore, technical assistance and co-operation between Member States to help new Member States efforts to enforce the EU legislation can also be useful.

CBI Human Resources Policy Directorate
March 2007