Key Points

- The lack of employment protection legislation for agency workers in the UK has created a two-tier workforce where agency workers receive inferior pay to permanent employees for equal work and are excluded from access to permanent jobs and training opportunities.

- In the UK, end user companies of agency workers do not have to meet the normal hurdles of being an employer, and many companies have exploited this situation by using agency workers on a long term basis in workstreams that are frequently permanent in nature.

- The absence of employment status for UK agency workers weakens the contract between the worker and the end user company, giving less incentive for the company to invest in its agency workforce which has a direct negative impact on productivity.

- There should be a level of responsibility given to the end user company of agency workers which removes their ability to avoid employment rights such as unfair dismissal, rights to redundancy pay and working time rules.

- There is a need for a ‘floor of rights’ to ensure equality of employment rights for workers irrespective of the form of their contract and evidence suggests this could have a positive impact on flexibility and job creation.

- Employment protection legislation for agency workers would make agency work a more attractive option and increase the pool of flexible workers available, as well as encouraging motivation and improving productivity.

- Penalising agency workers through their pay and conditions entitlement is unnecessary for employers to realise the key benefits of using agency workers, such as filling temporary positions and meeting peaks and troughs of demand.
The Communication Workers Union (CWU) is the UK’s largest communications union representing approximately 250,000 members in the postal, telecoms and financial services industries. CWU members are employed in such companies as Royal Mail Group, BT, 02, the Alliance and Leicester, Virgin Media and Computacenter, with expertise in engineering, computing, clerical, mechanical, driving, retail, financial and manual work.

The CWU represents around 10,000 agency workers and has worked with a number of employment agencies for many years, including Manpower UK, Kelly Services LTD, Search Consultancy, Hays, Adecco and Blue Arrow. This gives the CWU direct experience of the temporary agency market and the problems that agency workers face.

The current situation in the UK concerning temporary workers employment rights is one of confusion, inconsistency and unfairness, where the issue of employment laws and to whom they apply are unclear and where there is a reliance on tribunal cases to set employment standards rather than the framework of employment law.

The CWU welcomes the EU Green Paper and the opportunity to participate in the consultation. In debating the broad challenges of the flexible labour market with the need to resolve the protection needed for temporary workers, the CWU is concerned that this should not be interpreted as an excuse to either or both undermine the position of workers that are directly employed or delay negotiations on the Temporary Agency Workers Directive.

We are also concerned with what appears to be the premise of the paper that deregulation is the route to competitiveness and flexibility. Conversely, the CWU believes that competitive success relies on regulation geared towards highly trained, motivated work forces to drive productivity. Vulnerable workers with limited employment protection and low earnings will undermine productivity and act as a disincentive for employers to invest in that workforce. We contend that employment protection legislation for vulnerable workers would reduce in work poverty and increase employer investment in training resulting in better productivity, whilst still maintaining the flexibility required to compete in a global environment.
Q1 What would you consider to be the priorities for a meaningful labour law reform agenda?

- The CWU believes trade union members in the UK should be afforded at least the same benefits as colleagues in the wider European trade union movement. As part of the British TUC, the CWU has asked for the introduction of a positive framework of rights set out in a Trade Union Freedom Bill. The CWU supports the TUC policy on Fairness at Work which calls on the Labour Government to prioritise a positive framework of legislation, which will conform to the UK's obligations under ILO Conventions and the European Social Charter.

- The CWU is critical of the negative attitude adopted by the UK Government towards European Directives, which has had the effect of excluding UK workers from the same entitlement to decent workplace rights enjoyed in other parts of the EU. We have called on the UK Government to support the development of EU employment rights including the passage and proper implementation of the Posting of Workers Directive and the Temporary Agency Workers Directive. In addition we have called on the Government to end the individual opt-out from the Working Time Directive including in the transport sector, and to require employers to give bank/public holidays in addition to the statutory four weeks leave entitlement.

Q2 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?

- The CWU believe that the lack of employment protection legislation in a whole number of areas distorts the EU labour market and ensures that "opportunities to enter, remain and make progress in the labour market" vary considerably. As a consequence, the degree of flexibility and employment security also varies sharply between EU member states. In the UK, we have seen the development of a two tier workforce where agency workers are excluded from access to permanent jobs and training opportunities that go with permanent employment.

- One of the main aims of the TUC's campaign for rights at work over recent years has been to bring UK labour law into line with ILO Conventions and with the
European Social Charter. It was therefore disappointing that the UK Government concluded in its recent Success at Work strategy that there was no case for legislative change and that any such changes could damage labour market flexibility and reduce overall employment. However, responses to the consultation showed a broad consensus among unions, voluntary sector organisations and legal experts that the present legal framework lacks certainty, often leads to injustice for workers and is interpreted unpredictably by the courts and tribunals.

- The CWU believes that the unfair treatment of agency workers in the UK, sustained by the legal framework, tilts the market too heavily in the employer's favour. Adaptation of labour law and collective agreements can provide a positive framework of legal rights at work that can improve flexibility and employment security. As independent representatives of workers' interests, trade unions have a crucial role to play in negotiating and implementing the formal agreement between management and workforce. In those firms where the 'high-road' to competitive success has been most successfully adopted it is not surprising there is a strong trade union presence.

- An example of where labour law was changed in the UK was the introduction of the minimum wage and this did not affect flexibility, impact on competitiveness or increase unemployment. To the contrary the number of people in employment has increased significantly since its introduction.

Q3 Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employers seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition?

- Workers' rights are crucial for both economic efficiency and social justice. Properly constituted workers' rights create a balance of power in the workplace, in organisations and in wider society. This in turn, improves the creation, development and use of productive resources and prevents their dissipation in unemployment and poverty. As a result it is necessary to have laws which legitimise and promote the role of trade unions and collective bargaining on the one hand and establish legally binding minimum terms and conditions of employment on the other. The CWU thus sees the need for regulations that perform two functions:
one productive - which creates the conditions to realise the full productive potential of working people - and one protective - which prevents the abuse of working people by guaranteeing them and their representatives a sufficient platform of rights.

- Existing UK regulations deny temporary and agency workers employment status and allow user enterprises to dismiss them without obstacle or justification. These rules weaken the contract between the worker and the end user company, and consequently there is less incentive for the company to invest in its agency workforce. As a result, less training is given to agency workers and this has a direct negative impact on productivity. The absence of training opportunities combined with the lack of employment status and job security, gives agency workers less incentive to be motivated and committed, or to demonstrate the same level of discretionary effort as permanent employees, which further compromises productivity.

- Statistics from the OECD show that the UK’s deregulated labour market has not delivered strong productivity. GDP per hour worked in the UK is one of the lowest in the EU, and in 2002 the UK’s productivity by this measure was 88.3% of the EU15 average. This indicates that the lack of employment protection legislation and workforce investment associated with a deregulated labour market may in fact damage productivity levels. The UK has a reasonable overall level of GDP but this is essentially because of the relatively long hours worked. Other EU states, including Italy, Belgium and the Netherlands which have some of the highest employment protection legislation in Europe, also have some of the highest levels of GDP per hour worked.

- Agreements between unions and employers brought about through the process of collective bargaining have shown to bring better access to training, which consequently boosts productivity levels. The UK 2003 Labour Force Survey showed that whereas 39% of union members had on average done some training in the previous three months, only 26% of non-union members had.
Q4 How might recruitment under permanent and temporary contracts be facilitated, whether by law or collective agreement, so as to allow for more flexibility within the framework of these contracts while ensuring adequate standards of employment security and social protection at the same time?

- The CWU believes that the adoption of legislation guaranteeing equal treatment for temporary and agency workers would make agency work a more attractive option and is likely therefore to increase the pool of flexible workers available. It would also encourage motivation and commitment amongst agency workers, thereby aiding productivity and resulting in lower attrition rates.

- Research shows that temporary agency workers often value the flexibility of their position. However, research also shows that temporary agency workers generally receive inferior pay and conditions to their permanent counterparts. This injustice is keenly felt amongst agency workers, the majority of whom feel exploited in their position.

- The CWU fully recognises the value of temporary agency work. It can be beneficial to those entering or returning to the employment market, and those who need to balance family life or caring responsibilities with their work. However, the CWU believes there is no reason to penalise agency workers through their pay and conditions entitlement. It is entirely unnecessary in maintaining the key benefits to employers of using agency workers, such as filling temporary positions and meeting peaks and troughs of demand.

- The CWU believes that the introduction of adequate standards of employment security will create the right kind of flexibility in the temporary and agency workforce based on equal treatment and skills development. This will encourage the growth of a flexible workforce that is treated fairly and consistently, benefiting the worker through improved pay and conditions, and the employer through access to a larger pool of flexible workers who are more committed and motivated. The effect will be to achieve productivity improvements based on equality and a sense of mutual trust and loyalty in the employment relationship.

- The alternative of promoting flexibility through deregulation and a reduction in employment protection legislation will only serve to de-skill and demotivate workers,
whilst encouraging employers to exploit atypical workers on a long term basis purely in a drive to cut costs. Not only will this situation make temporary and agency work less attractive, it will serve to compound the problems of workplace discrimination and inequality that affect women, ethnic minorities, the young and the old who make up a significant proportion of the agency workforce.

Q6 What role might law and/or collective agreements negotiated between the social partners play in promoting access to training and transitions between different contractual forms for upward mobility over the course of a fully active working life?

- Collective agreements between social partners have an important role to play in promoting better training and providing for real career development opportunities. Research has consistently shown that where unions are recognised they 'add value' to the business by providing for improved productivity, proper training and skills and genuine upward mobility and career development.

Q7 Is greater clarity needed in Member States’ legal definitions of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

- Yes. A new, broad definition of ‘employee’ is needed which covers agency workers, homeworkers, ‘casual’ workers, officeholders, freelancers and the nominally ‘self-employed’ who are economically dependent. The present definitions of ‘employee’ and ‘worker’ can unfairly exclude certain groups from employment rights and make it more difficult for workers to access rights. The current definitions ‘incentivise’ employers to set up employment relationships deliberately to preclude workers from qualifying for the legal status of employee or to deny responsibility.
Q8 Is there a need for a “floor of rights” dealing with the working conditions of all workers regardless of the form of their work contract? What, in your view, would be the impact of such minimum requirements on job creation as well as the protection of workers?

• Employment rights across Europe are highly uneven and the CWU believes that specific legal measures are necessary to ensure equality of employment rights for workers irrespective of employment status. Such a “floor of rights” should include provisions in terms of pay, working time rules, holiday entitlement, protection against discrimination, access to grievance disputes procedures with the end user company and should not be subject to a qualifying period.

• There is no evidence that minimum employment rights had any adverse impact on the flexibility of their labour markets or on job creation. On the contrary minimum employment rights for workers will rein in flexibility from the current extremes that allow exploitation while maintaining the elements of adaptability that bring most benefits to employers such as easy access to labour, lower administrative costs and the ability to manage peaks and troughs of demand. France, for example, is the largest market for global temporary agencies Manpower and Adecco, despite having one of the strictest regulatory frameworks for the treatment of agency workers.

• The UK Department of Trade and Industry (DTI) carried out a Regulatory Impact Assessment on the subject of the now stalled Temporary Agency Workers Directive (TAWD) and found that improved working conditions would increase the attractiveness of agency work, thereby increasing the pool of people who want to undertake this sort of employment. Temporary work agencies would therefore be able to offer a wider range of qualifications and provide a highly selective response to the needs of client companies.
Q9  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”?

- The CWU contends that there is an urgent need to clarify the responsibilities of the various parties in multiple employment relationships. In the UK, for example, there is no requirement in law for agency workers to be employed either by the agency or by the client company. Most agency workers in the UK are not employed by the agency or by the client company. This differs from the situation in most EU Member States where the agency worker is, in law, an employee of the temporary work agency and enjoys the same or similar protections and rights as any other employee.

- When hiring agency and temporary workers, third parties do not have to meet the normal hurdles of being an employer, and many companies have exploited this situation by using agency workers on a long term basis in workstreams that are frequently permanent in nature. In doing so, companies are effectively participating in labour law arbitrage by buying labour at low cost but not reflecting that in the rate at which they sell their products and services. The purpose of temporary and agency work, and the primary business benefit, should be to fill temporary positions and to meet peaks and troughs of demand. It is counter productive for companies to use agency workers simply to drive down overhead costs, because of the resultant negative impact on labour turnover, absenteeism, staff morale and performance.

- The CWU would like to see a level of responsibility given to the end user company which removes their ability to avoid employment rights such as unfair dismissal, rights to redundancy pay and working time rules. The fact that none of these currently applies means that the end user has the freedom to dismiss agency workers without warning or justification, and without obstacle or recourse. This leaves agency workers in a situation where they can suddenly be released with no notice period and no financial compensation, and they and the temporary work agency are powerless to challenge such a decision.
• The CWU also wishes to see a legal presumption of employment with the burden of proof on employers to demonstrate that an individual is not employed.

• The benefits of a flexible workforce can be enjoyed by both workers and employers, without the need to exploit atypical workers by paying them at lower rates or subjecting them to inferior terms and conditions to those received by permanent employees. The CWU recognises that many agency workers value the flexibility of their situation, but flexibility is mutually beneficial to both workers and employers, and is no justification for denying agency workers the right to equal pay and conditions. The experience of many other European countries shows that the benefits of using agency workers are such that employers are willing to pay rates that allow for equal pay. Employment protection legislation in France means that agency workers are paid a higher rate that reflects the insecurity of their position, and this has not damaged the ability of the agency sector to operate there. France has a higher percentage of agency workers than the UK and Manpower and Adecco respectively do 34% and 36% of their business there.

Q10 Is there a need to clarify the employment status of agency workers?

• The CWU is firmly of the view that the status of agency workers has to be clarified. Temporary agency workers are amongst the most vulnerable in the UK, often found in lower paid jobs, particularly in the catering, call centre and care sectors. The agency workforce is also significantly younger than the average. Studies have shown that compared to people in permanent employment, agency workers currently lose out in terms of pay, holidays and family-friendly entitlements. The CWU supported the proposals for an EU Directive on Temporary Agency Work believing it would set minimum standards for the treatment of agency workers across the EU, enhance the quality of agency work and improve the skills base of the whole workforce.

• The draft Directive set out the principle of non-discrimination stating that agency workers shall be given at least the same conditions as those that would apply if they had been recruited directly by the company to occupy the same job. In 2002, average weekly income of agency workers was found to be just 68% of the average weekly income for all UK employees. Temporary agency workers were also found
to receive less training, have fewer career development opportunities and a higher rate of workplace accidents.

- Many EU Member States, both old and new, have already introduced measures giving agency workers equal treatment rights. There is no evidence that this has had any adverse impact on the flexibility of their labour markets. TUC research has shown that fourteen out of 20 EU Member States have introduced legislation giving temporary agency workers the same pay as directly employed workers doing the same or similar jobs, as well as parity with regards to some working conditions. The working conditions offered to temporary agency workers vary between countries but tend to include such things as sick pay, vocational training and protection from unfair dismissal. The UK is not one of these fourteen countries and does not guarantee equal pay for agency workers, or any of the basic conditions listed above that other member states provide. In a further two Member States – Finland and Sweden – legally binding collective agreements assure that temporary agency workers receive working terms and conditions (including pay) which are comparable to those of directly employed workers.

- TUC research also shows that only four out of 24 EU Member States do not currently have licensing requirements for temporary work agencies. The UK is one of those 4 countries without licensing requirements, meaning that UK temps currently have no protection from exploitation by unscrupulous job agencies.

CWU
16th March 2007