GMB Trade union Response to
EU Commission Green Paper – Modernising labour law to meet challenges of the 21st century (COM2006 708 Final)
March 2007

Summary of GMB Position:

• GMB believes there is a continuing need to establish core European labour standards taking account of the European Social Model;
• GMB calls for a labour law debate which properly balances the needs of workers with those of employers and which pays proper attention to collective rights;
• GMB believes that labour law already provides sufficient flexibility; what is now needed is security for all vulnerable and precarious workers currently excluded from employment protection legislation;
• GMB calls on the EU Commission and Member States to recognise and promote the right to take collective action as a fundamental right of all workers, not subordinate to free movement principles;
• GMB wants to see stronger information and consultation rights for workers and the removal of obstacles to collective bargaining and access to union representation;
• GMB calls for the adoption of the Temporary Workers Directive;
• GMB believes that there should be a legal presumption that employment protection legislation applies to those working for someone else;
• GMB believes that all workers should enjoy equal rights from day one; there should be an emphasis at EU Community level on raising standards and protection not on levelling down employment rights;
• GMB calls for an end to the individual 48 hour week opt-out under the Working Time Directive;
• GMB opposes weakening on-call protections and believes the interpretation of working time as clarified by the SIMAP and Jaeger European Court of Justice judgements is effective;
• GMB calls for work life balance to be included as a priority in working time organisation;
• GMB believes that better implementation and enforcement of all European Union employment protection legislation, and in particular the Working Time, Posting of Workers and Collective Redundancies Directives, is required.
Introduction

GMB, Britain’s general union, is the United Kingdom’s fourth largest trade union with around 600,000 members. We represent members in all sectors of the UK economy, in both the public and private sector. Our membership ranges from low paid workers, for example in the food and leisure industry, to highly paid, skilled, technical workers and those in managerial grades. Women account for 42% of our members. We also represent many workers on a huge variety of shift patterns, including 125,000 part time workers working less than 20 hours per week.

The European Commission’s Green Paper on Labour Law is billed as launching an EU wide public debate on how labour law “can evolve to support the Lisbon Strategy’s objective of achieving sustainable growth with more and better jobs”. It is essential in our view to stress at the outset that labour law has developed to protect workers from potential exploitation by their employers in view of the unequal balance of power that exists between the two. In the context of the Green Paper, labour law must be the guarantee that quality employment standards are not sacrificed in the creation of new forms of employment.

Rather than launching an open debate, the Green Paper reveals an existing agenda to push the argument that European labour markets need more flexibility. This unquestioning acceptance that ever more flexibility is required comes in the absence of a clear vision of:
- exactly what flexibility might be beneficial to economic growth and competitiveness,
- what employers would do with the increased flexibility, and
- how they would be accountable for ensuring resulting gains in terms of the quality job creation/growth agenda.
GMB is concerned that the consultation will be used as a smoke-screen to advance a deregulation programme.

GMB members aspire to a Europe that combines economic growth and prosperity with a corresponding improvement in living and working conditions for all. They have direct experience of the challenges of the 21st century labour market: of insecurity and vulnerability to job loss and unemployment. Many have seen their terms and conditions attacked due to privatization, restructuring, outsourcing, transfers and the activities of venture capitalists seeking quick returns at the expense of workers and customers.

The UK is often hailed as an example of the success of the flexible labour market approach. However despite the large degree of flexibility that already exists in the UK labour market, UK productivity is lower than that in France and Germany. Furthermore as the manufacturing workforce in Germany, Italy, Spain and several other Member States is showing significant increases, the UK manufacturing workforce is showing a worrying decline. Many of these countries have stronger employment protection than the UK.

Though the UK Government argues that flexible labour laws encourage employment and economic growth, in our view this promotes a “hire and fire” at will approach resulting in a lack of motivation, poor training and skills development and ultimately hampers productivity. The situation in the UK demonstrates the results of having flexibility without built-in security. UK labour practices have led to increasing numbers of vulnerable workers falling outside the protection of standard employment relationships. The growth in atypical working contracts, such as temporary agency workers, casuals and homeworkers, leaves many workers in a “grey zone”, often with restricted or no employment protection and other associated rights such as proper health and safety protection, holiday pay, pension rights etc.
Our members are all too aware of the competition UK industry faces from China and other growing markets. They are also however, conscious that many of these economies are thriving in the face of low wages, poor working conditions, restriction of trade union rights and often the denial of workers’ human right to freedom of association. Though willing to engage in constructive discussions on ‘if and how’ labour law at national and EU level needs to adapt to the challenges set out in the Green Paper, it is clear that GMB and its members would oppose measures which seek to reduce workers rights and which would ultimately amount to a “race to the bottom” in relation working conditions and employment protections. GMB firmly believes that any measures to improve flexibility must be accompanied by corresponding measures for employment security.

GMB shares some of the concerns outlined in the Green Paper, particularly regarding the detrimental effect of the proliferation of atypical contracts and the growth of the two-tier workforce. However we disagree with much of the analytical position put forward by the EU Commission in the Green Paper. Furthermore, GMB is concerned that the Commission appears to have already taken a position on key matters notably:

- that solutions to the challenges of the 21st century workplace should primarily be found through reform of individual/personal labour law,
- that employment contracts need to be more flexible, and
- that flexibility should be achieved by adapting or moving away from “standard employment” contracts.

Instead of encouraging debate, we fear that the commentary and questions in the document lack balance and restrict discussion to the parameters of the “flexicurity” debate: specifically the need for increased flexibility in the labour market primarily for the benefit of employers. The Green Paper gives only limited attention to the issue of security for workers. In addition to wage security, issues such as pensions, adequate social security safety measures, life-long training opportunities and proper work-life balance are all aspects of employment related to worker security measures which the Paper fails to adequately address.

Questions

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

The European Union now consists of 27 Member States, each with its own history of labour law development, with differing labour market conditions and contrasting legal and social security systems. However as the European Parliament has recently recognised there are shared common values between the Member States that underpin the European Social Model. As stated in the European Parliament’s own initiative report on the European Social Model “the EU needs to create an economic and social framework which allows Member States to implement reforms as necessary at national level, according to their own economic, social and political circumstances”. It is clear that in the pursuit of the Single Market, and the promotion of its principles such as the freedom of establishment and the freedom of movement of people and services, there is an important function to be performed at Community level. Free movement should ensure that standards are raised across Europe, not lowered down to the lowest common denominator.

Under its Treaty obligations the European Union has a duty to promote employment and secure improved living and working conditions for its citizens. There is an obligation for the EU Commission to develop core European labour standards, and to ensure their proper, effective

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1 A European social model for the future, INI/2005/2248 resolution adopted 06/09/2006
implementation and enforcement in the Member States. Many important workers' rights that are now taken as standard in the UK have been introduced as a direct result of action at European level, including for example the right to 4 weeks paid holiday, equal treatment for part-time workers, collective redundancy rights, TUPE and rights to parental leave. Additionally, the EU Commission has an essential role to play in ensuring that core principles such as non-discrimination and a respect for fundamental rights are pursued with as much vigour as internal market policies. Free movement principles should not be allowed to usurp social policy and labour law adopted at either EU or national level. Nor should community legislation be seen as a ceiling or used as an excuse for Member States not to provide living and working conditions which build on the established minimum.

**GMB Priorities**

**Balancing workers and employers needs**

As a starting point, GMB would like to see a shift in the emphasis of the debate away from the concentration on the needs of employers and business, towards a better balance with the needs of workers. In its introduction, the Green Paper refers to the possible role of labour law "in advancing a “flexicurity” agenda in support of a labour market which is fairer, more responsive and more inclusive". However, there is little in the body of the paper to foster debate on how this could be achieved. A priority must be tackling the growth of precarious contracts and insecure work. Additionally, the Green Paper contains little commentary on how to tackle persistent discrimination or on work-life balance issues, important elements for any debate on current labour law. Inequality and discrimination still prevails within the employment field. The gender pay gap ranges from 12% to 23% across Europe\(^2\). Though its reduction is included as part of the European Employment Strategy it is no longer framed as a specific target and there is no concrete timeframe for its elimination. Disabled people, those from ethnic minorities and older workers continue to face discrimination in relation to access to employment and opportunities for training and development. Though various measures have already been taken and others are currently underway (e.g. Framework Strategy for Non Discrimination, Community programme for employment and solidarity – PROGRESS 2007-2013, proposed EU Commission Communication on the gender pay gap) to effectively tackle these problems it is important to have an integrated approach.

**Collective representation**

GMB believes that any meaningful debate on labour law must include collective labour law issues. Together with our other European trade union colleagues, we are dismayed at the progressive 'airbrushing away' of the term trade union in EU Institution legislative proposals and texts. This is a major failing and ignores the central and vital role that trade unions can and do play in promoting growth and competitiveness in Europe. As a priority of any labour law reform agenda we would like to see clear and unambiguous recognition by the EU Commission and Member States of the fundamental rights of all workers to organise, collectively negotiate their terms and conditions and take industrial action, including strike action.

The Green Paper, in the main, only addresses collective labour law issues in the very narrow context of how collective agreements can be used to facilitate flexibility. Its focus on individual labour rights is a failure to acknowledge collective rights as a vital aspect of labour law and employment relationships. It ignores the positive role that trade unions, through collective

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agreements and otherwise, already play in assisting business to remain competitive whilst ensuring decent working standards for workers. With this omission, the EU Commission is missing a crucial opportunity to demonstrate a genuine commitment to social dialogue and the European Social Model.

Workers have organised themselves into trade unions in order to redress the unequal bargaining power between themselves and their employers. Through their collective strength, they can negotiate with the employer, supported by collective action where necessary. Workers are sensitive to the economic climate within which the companies, large and small, they work for have to operate. They are the very people most likely to be affected by globalisation, economic downturns and also the most likely to have practical ideas for improvements to working practices. Effective ongoing and timely information and consultation of workers, rather than their exclusion from proper participation in finding solutions to workplace challenges, will often produce effective and realistic solutions.

Trade union laws in the UK are among the most restrictive in Europe. In fact UK trade unions now have fewer freedoms than they did 100 years ago. Additionally, the UK is in breach of a number of its international obligations on trade union rights and freedoms. The right to take industrial action is a fundamental human right recognised by international law. Under UK law there is no right to strike and such action amounts to a breach of contract. Workers taking industrial action can lose statutory protection from dismissal after 12 weeks. GMB believes that all workers should have the right to strike lawfully without the fear of losing their jobs. GMB members are particularly concerned that s127 of the Criminal Justice and Public Order Act 1994 remains in force which prevents us from calling on our prison officer members who work in the private sector to take industrial action. As a condition of repeal the Government requires the unions to sign a binding collective agreement not to call on members to take industrial action – an unacceptable fettering of trade unions’ ability to protect their members.

In addition, UK unions face unnecessary hurdles when trying to organise lawful industrial action as the rules relating to industrial ballots are still too heavily weighted in the employer’s favour. Not only are trade unions required to give notice before they hold a ballot as well as notice prior to any action, the rules and information required are unjustifiably onerous and complex. There is no obligation on employers to furnish information which they have in their possession. Failure to provide the precise information, however inadvertent, exposes the union to the risk of civil action for damages.

GMB also believes that all workers should have the right to collective representation and bargaining by a trade union on their behalf if they so wish. Current UK legislation on statutory recognition does not apply to employers employing less than 21 employees. As a result millions of UK workers in small companies are denied the right to have a trade union collectively represent them.

Additionally it is too easy for employers to circumvent legislation prohibiting the use of agency workers during industrial action. Agencies are prohibited from knowingly supplying labour to replace striking workers, however there is no duty on the employer not to use agency workers for that purpose nor to inform an agency of industrial or strike action.

GMB were very concerned that in its submissions to the European Court of Justice on the Viking case, the UK government advanced the view that Community Law does not recognise or protect the right to take industrial action, including the right to strike. Though thankfully, the UK was something of a lone voice in taking this stance, we would like to see the EU Commission and
Member States unreservedly recognising and promoting the right to take collective action as a fundamental right of all workers, not subordinate to free movement principles.

Adoption of Temporary Agency Directive

GMB believes that clear priority should be given to getting the stalled Temporary Agency Workers Directive adopted. The Directive was meant to give agency workers the same basic rights as permanent employees. Europe has already acted to ensure equal treatment for part time and fixed term workers and it is high time that the same guarantee of equal treatment is provided to agency workers. In the UK, temporary and agency workers are excluded from a raft of employment rights for example unfair dismissal protection, the right to paid notice on termination of employment, the right to maternity and paternity leave and other flexible working rights. There is much evidence demonstrating that these workers frequently suffer lower wages and exclusion from company benefits such as pension provision, access to training and skills development opportunities, rights to holiday pay and sick pay. Frequently there are increased health and safety risks, where agency workers have not been given any or adequate health and safety information or training. The lack of access to pension provision exposes them to an increased risk of poverty in retirement.

GMB acknowledges that temporary work may have a role in the labour market. However the lack of equal treatment gives a green light to some unscrupulous employers and agencies to exploit temporary agency workers. Temporary agencies should not be allowed to compete in the labour market by providing cheap labour and undercutting the terms and conditions of other workers. Permanent jobs should not be undermined by favouring the use temporary contracts under the guise of “flexibility” when in fact, employers are only seeking to avoid employment protection legislation designed to achieve fairness and balance between them and their workers.

In our view ensuring equal treatment would not undermine flexibility nor “damage the UK economy and British business” as the Recruitment and Employment Confederation have claimed in response to a recent UK private members Bill to secure equal treatment for temporary agency workers. Instead, increased protection could make agency work more attractive to many workers. An employer who genuinely requires the use of temporary agency workers for its business and is not merely seeking to obtain “cheap labour” is unlikely to be deterred by the fact that these workers have a right to fair and equal treatment.

In Britain, the use of temporary agency workers is increasing both in the private and public sectors. GMB represents thousands of public service workers who have seen thousands of hours of permanent jobs outsourced to agencies. A recent GMB study showed that in the year 2005/06, 434 local councils in the UK spent over a £1,546 million on agency and temporary staff. The employment agencies take a considerable amount of this money for their administration fees and profits, (often paying the temporary staff less than permanent staff) yet the councils pay more to the agency than it would cost to employ the workers directly. Council spending on temporary and agency staff generally represents very bad value for money for the public, not only due to the cost but because of the resulting loss of commitment, loyalty, experience and continuity.

GMB has first hand experience of problems caused by increasing price competition between temporary recruitment agencies in London. Competition for lucrative local authority contracts often results in agencies tendering at rates which make it very difficult for them to offer workers good pay rates and working conditions. In response GMB is working on a project which would involve establishing a single publicly owned agency supplying workers to the 33 London local authorities. Workers would be paid the same rate for the job as a permanent employee. Each
local authority would be involved in the management of the agency. In addition to being far more cost effective, this would provide these workers with a greater sense of involvement in their work environment, and therefore increase motivation and commitment. It would also give them access to the local government pension scheme.

In addition to unequal treatment faced by many agency and temporary workers, GMB has experience of employers deliberately using agency staff to undermine trade union activity. For example, in some cases where we have tried to gain trade union recognition in a workplace, the employer has employed large numbers of agency workers to reduce our membership figures within the bargaining unit, thus preventing us from achieving the majority required to gain recognition. The use of agency workers during official industrial action is also of particular concern and was an issue for GMB in our high profile disputes with ASDA Walmart and JJB Sports, highlighting the inadequacies of UK legislation prohibiting the supply of agency workers during industrial action.

**Employment protection for all non “standard” workers**

GMB shares the EU Commission’s concerns regarding the detrimental effects of the rising trend of atypical or non standard working contracts – many of these workers are caught in a cycle of poor quality, low-paid jobs, with limited prospects which severely affect the quality of their working lives. Flexible forms of work can have a direct bearing on people’s abilities to make life choices – planning a family, securing a home and planning for the future, which will also affect their quality of life in retirement. The increasing segmentation of the labour force, into those with secure employment and good working terms and conditions and those without cannot be allowed to continue unchecked.

In considering the growth of atypical contracts and forms of work, as well as looking at why employers may favour these types of jobs, it is important to consider why workers take on these jobs in spite of the insecurity often associated with them. Many atypical jobs (agency work, part-time working, home working, zero hour contracts etc) are taken up by women, young and old people, those from ethnic minorities and migrant workers, who may find it difficult to secure employment under more standard contracts. GMB believes the EU Commission should also consider, within the remit of this debate, measures required to improve employment opportunities for these groups of the labour market clearly discriminated against and who need flexible solutions in their favour.

**Better enforcement of European Union directives**

As a further priority we would like to see the proper implementation and enforcement of existing Directives, specifically on Working Time, Posting of Workers and Collective Redundancies.

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?**

In order to reduce labour market segmentation the reasons for the phenomenon need to be addressed. Issues such as educational qualifications, level of skills and training, social background and family circumstances all affect access to employment and the types of employment opportunities available. Improving the employment prospects of the most disadvantaged, who are most likely to end up in low skilled, low pay jobs on non-standard contracts, is a necessary requirement to reducing labour market segmentation.
The Green Paper acknowledges that the proliferation of non-standard working contracts is contributing to labour market segmentation. Though employers may argue that these types of contract bring them “flexibility” in truth they are often used to reduce labour costs. As previously stated, GMB does not support the view that more flexibility is required. However it is clear that there is a need for action to protect a growing number of precarious and vulnerable workers excluded from employment protection legislation. GMB firmly believes that labour law and collective agreements have an important role to play in this.

Collective agreements already contribute to workplace flexibility and employment security. In Sweden for example, the collective agreement for temporary workers which ensures equal treatment with comparable permanent staff, gives companies the flexibility to use agency staff when required whilst providing corresponding employment security and compensation to the workers.

In the UK, the exclusion of many atypical workers from employment rights restricts their access to collectively bargained terms and conditions and hampers the union’s ability to effectively represent them. Employers have little incentive to include non standard workers in their occupational schemes and benefits which in turn makes it more difficult for unions to negotiate their inclusion in collectively bargained terms and conditions – the classic “vicious circle”. Employers are frequently hostile to union organisation of these groups of workers and they can exploit the lack of unfair dismissal protection to deter the workers from exercising their right to union membership. GMB has examples of employers taking on agency or casual staff only to dismiss them once they join a union.

Lifelong training and skills development would contribute to both flexibility and employment security. A skilled and motivated workforce is likely to be more productive and more adaptable to change both within and external to a particular business. Where workers have developed transferable skills, this will assist them in finding alternative employment either by choice or when faced with redundancy.

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?

Collective agreements bring clear benefits and advantages to both workers and employers. Unionised workplaces with collective bargaining agreements in place are safer, workers are better paid, and have better access to training and development programmes. Workers with good terms and conditions and who are given a collective voice in how their workplace operates are more committed and have higher moral which ultimately results in higher productivity.

GMB believes that stronger information and consultation of workers and removing obstacles to collective bargaining and access to union representation would better assist businesses and workers in meeting the challenges of the modern workplace.

GMB also believes that rather than focusing specifically on SMEs, there should be a general focus on how the quality of legislation can be improved to the benefit of all. SMEs do face particular challenges in that they do not have the financial or other resources frequently available to larger companies to help them wade through complex legislation or keep them abreast of developments. They are however not unique in this position. Far too many workers are confused by the complexity of employment regulations and lack awareness of their rights.
considering what assistance can be provided to SMEs to help them meet their legal obligations, the role of trade unions should not be overlooked. Unions have a wealth of experience in disseminating best practice on a wide range of issues and most devote much of their resources to ensuring that they are up to date on issues likely to affect their members. In our view, promoting better partnership working between SMEs and trade unions and the removal of restrictions such as the UK's exemption of businesses with less than 21 workers from statutory recognition procedures, would bring concrete and cost effective rewards.

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?

This question is badly phrased and lacks clarity which makes it difficult to answer clearly.

GMB is not persuaded of the need for more flexibility within permanent or temporary contracts. Providing all workers with fair, non-discriminatory, secure terms and conditions of employment should not, in our view, hamper recruitment. Workers must not be treated as expendable labour to be hired, fired and traded at the whim of an employer.

In relation to temporary work, the most common form of temporary work is fixed-term contracts. There is already European legislation in the form of the Fixed Term Work Directive, transposed in the UK by the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002. Although we believe that the UK government has inadequately transposed the Directive by limiting protection to “employees” rather than “workers”, this at least ensures that where they have the status of employee, those on fixed term contracts are protected from less favourable treatment.

Casuals and agency workers are the next most common form of temporary work. These workers are increasingly concentrated in low skilled, often repetitive jobs, in sectors such food production, manufacturing, hotel and catering and local government. Improving the quality of the work available and the working conditions would make this type of work more appealing to a larger number of workers, thus facilitating recruitment.

We do not accept the view that the increase in the use of atypical contracts is due to the rigidity of standard or permanent contracts and that these should be subject to deregulation. Extending employment rights to atypical workers would prompt employers to reconsider their use of these types of contracts. Whilst many employers use temporary and casual workers to manage unpredictable operational issues, such as temporary absence, many seek to exploit the loophole afforded and to gain the benefit of labour without any return investment. GMB has experience of agency workers who have worked for the same employer or end user, doing the same job for several years. There are also cases where employers use agency workers to cover what are in fact permanent jobs. In these cases it is clear that rather than seeking flexibility the employer is seeking to avoid the employment protection that a permanent contract would bring.

Proper collective consultation with the workforce could deliver forms of flexibility which benefit both the employer and the workers. Involving trade unions in decision to use agency workers can assist in delivering appropriate flexibility, whilst ensuring adequate standards of employment security as demonstrated by the Swedish collective agreement on temporary agency work previously referred to.
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?

GMB believes that existing employment protection legislation is already sufficiently flexible and that what is now needed is protection for the growing number of precarious workers who fall outside these protections. Though the question refers to “more flexible employment protection” we believe that in reality what is being promoted is a deregulation agenda.

Though employers and governments continue to press for more labour market flexibility they have not had to account for what this flexibility would deliver – i.e. what jobs would be created as a result. It seems to be blindly accepted that employment flexibility is the way to increase Europe’s competitiveness; however there is a lack of discussion as to what standards will be used to quantify flexibility and measure any achievements. Employment security must be built into an overall strategy – any flexibility measure should have a corresponding security measure built in.

In seeking to roll-out the “flexicurity” model, the political, social and institutional framework of countries in which it is deemed to have been a success, for example Denmark, Netherlands, Finland and Sweden, cannot be ignored. Flexicurity is primarily a Nordic model which has suited those countries well in the context of their strong social security systems, well developed social dialogue and the prevalence of collective bargaining which in many of these countries is the backbone of their labour rights and employment protection systems.

In addition to adequate income compensation for the unemployed, measures to facilitate re-entry into the labour market must also be put in place. As well as skills retraining which might be undertaken during periods out of the labour market, the importance of in work skills development and training must not be overlooked. Despite wanting workers to be flexible and adaptable there is still a lack of proper investment in training by both by employers and governments. The EU Commission’s recently adopted Joint Employment Report highlights the Member State’s lack of progress in increasing participation in lifelong learning, with the rate running at just 10%. Worse still, in 20 out of 25 Member States the rate has either fallen or failed to rise3. As we set out in our response to Question 6, trade unions in the UK are already playing a major role in promoting training and learning in the workplace but are prevented from doing more by the lack of effective rights to collectively bargain on training.

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

Trade unions have long advocated, promoted and facilitated the training and development of workers, recognising the benefits that improved skills bring for both workers and the companies they work for. Improved skills and training assists worker mobility, facilitating transitions between jobs and also access to better quality and higher paid employment. A highly skilled and trained workforce will be more productive and better able to respond to the demands of global competition. In many cases unions have also helped in organising retraining and development following redundancies and company closures, thus assisting the workers to find alternative employment. GMB regrets that European Member States have never collectively endorsed the good practice of some Member States in establishing sectoral or company training levies.

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In the UK unions have demonstrated their expertise in this area by developing a range of union learning programmes and creating Union Learning Representatives (ULRs). In providing ULRs with statutory rights to paid time off for training and to carry out their roles, the UK Government has recognised the benefits they bring to both workers and employers. ULRs have a unique advantage in that they are independent from the employer and their members know they can trust them. Many workers may find it easier or less embarrassing to reveal and discuss a training need with a ULR than their employer. URLs are often able to reach those who generally miss out on training, such as older workers, those from ethnic minorities and part-time workers.

However despite the clear benefits that unions can bring in this area there is no statutory right in the UK for unions to collectively bargain on training and development. Many employers remain resistant to union involvement and in three quarters of workplaces employers do not even inform employee representatives of their training plans. Additionally, although UK trade unions have been given a stakeholder role within the vocational educational and training system, for example with formal representation on the Learning and Skills Council, their role is much weaker than in many other European countries.

The lack of training and development opportunities for those on non-standard contracts has already been highlighted. Granting employment rights to this group of workers would go some way to addressing these needs.

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?

In the UK the increased use of outsourced or subcontracted labour and the lack of legal clarity on employment status has led to confusion over what constitutes a self-employed worker. There are a growing number of workers who fall into this grey zone between those who are employed and the genuinely independent self-employed. Increasingly employers will seek to engage an individual as a contractor or “self-employed” to circumvent employment protection legislation and applicable collective agreements. GMB has experience of such practice in the construction industry and among our professional drivers. Often the reality of the relationship is that the worker is economically dependent on the employer and has little or no autonomy regarding the organisation of working time, rates of pay, when and how the work is done etc. In essence, the employer is seeking to avoid the costs of direct employment.

The use of bogus self-employment contracts also allows employers to avoid the rules governing the internal market for services and leads to a distortion of competition. It also drives down standards and wages for all workers. There is therefore a need for action to close the loopholes which allow such exploitative practices.

GMB believes that there should be a legal presumption that employment protection legislation applies to those working for someone else. In the event of a dispute, the burden of proof should fall on the employer to show that an individual is genuinely self-employed.

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?

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4 British Trade Unions and the Learning and skills agenda: an assessment, Caroline Lloyd & Jonathan Payne, SKOPE Cardiff University December 2006.
5 As above.
There is a wide variation of employment standards and protections across the EU27, particularly in relation to some of the newer Member States, and it is vital that core standards are adopted and enforced to avoid social dumping and maintain social cohesion. An approach based on a “floor of rights” should not be interpreted as a “ceiling of rights” rather than minimum standards to be improved on by the Member States. The emphasis should be on raising standards and protection rather then levelling down employment rights.

GMB believes that all workers should enjoy equal rights from day one of employment. Job creation should not be pursued on the basis of the erosion of workers’ terms and conditions. The Lisbon Strategy aims to make the EU “the most dynamic and competitive knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010”. Though references are frequently made to the need for “high quality jobs”, increasingly the focus of the EU Commission and Member States is on flexibility and deregulation as the means to achieve jobs growth and increased productivity. However the case for increased flexibility translating into higher productivity and competitiveness has not been proven and is based on shaky ground.

In attempting to boost job creation, we must not lose sight of the quality of jobs being created. Too many workers still work in poorly paid, low quality jobs. GMB would have liked more of focus in the Green Paper on how labour law can support decent jobs for all, rather than seeking the “easy” solution of deregulation couched as flexibility.

As previously stated, GMB believes there is a need to establish core European labour standards. All workers should benefit from decent wages, proper health and safety protection, opportunities for training and skills development, a good work-life balance, and protection from discrimination, exploitation and arbitrary actions by their employers. Despite assertions that the introduction of improved employment rights such as the minimum wage, paid holiday, equal treatment for part-time and fixed term workers, restrictions on working time, would hamper economic growth and job creation in the UK, this has not been the case.

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"?

All workers have a right to know their terms and conditions of employment and who their employer is. The lack of clarity regarding responsibility for compliance with employment rights in multiple employment relationships leaves many workers in a precarious and vulnerable situation.

This situation can also impact on workers wanting to take industrial action and unions trying to organise such action. In the UK the balloting rules regarding industrial action require the union to notify the employer of the workers being called upon to take action. In the case of multiple employment relationships, it is often difficult to determine who the employer is – however a failure to correctly identify the employer can have serious repercussions for both the worker and the union.

In our response to Questions 10 we set out the problems temporary agency workers have in relation to employment status and the need to clarify the situation.
It is vital that with the growing use of outsourcing, subcontracting and transfers, effective measures are taken to ensure that workers' employment right are assured and not lost in the “fog” of subcontracting. This could be achieved via subsidiary liability. There should also be an obligation on the contracting party to verify in the tendering process that measures are in place to ensure compliance with employment standards.

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

GMB firmly believes there is a need both to clarify the status of temporary agency workers and ensure that they are given the right to equal treatment with comparable permanent staff.

In the UK a two-tier workforce has arisen divided into “employees” who benefit from full employment rights and protection and “workers” with limited protection. Entitlement to unfair dismissal protection, redundancy and notice pay, certain maternity and parental rights all hinge on having employee status. Though workers are covered by legislation on the national minimum wage, working time and holiday, and health and safety, often due to the precarity of their employment situations it can be difficult for them to secure even these basic rights. The uncertainty created by the different categories of rights is neither good for employers nor the workers.

Temporary agency workers can often find it difficult to enforce the rights that they do have as frequently both the end user and the agency will deny that they are the worker’s employer. Due to the lack of legislation on the status of temporary agency workers in the UK it has been up to the courts to determine the status of agency workers following disputes. Before any determination on whether the individual employment rights have been infringed or not, the tribunal first has to determine the agency worker’s employment status. Though case-law has established that contracts of employment can be implied between the worker and the end-user, this has to be decided on a case by case basis, which can lead to inconsistencies, which in turn creates uncertainty. The need for recourse to tribunals involves high cost in terms of expense, time and the associated stress, for both the worker and the employer.

Often the agency workers are performing the same functions as the permanent workers they work alongside but are denied the same treatment as their permanent colleagues; this can include basic rights such as the ability to raise a grievance about working conditions. GMB case studies include a member denied access to a company’s grievance procedures in relation to a bullying complaint and removed from the site by the agency on the same day.

GMB concerns centre on the ‘involuntary non-employed’ because they are vulnerable to becoming trapped in a vicious circle where they cannot progress from peripheral jobs to permanent stable jobs due to a lack of training, difficulty in obtaining references and in some cases, an erratic employment record. We are not seeking to restrict the freedoms of the ‘voluntary non-employed’.

In a recent UK case involving the employment status of an agency worker, the Employment Appeal Tribunal has commented that the state of the law regarding the status of long term agency workers is unsatisfactory and requires legislation to change it.6

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

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6 Craigie v London Borough of Haringey, UKEAT/0556/06/JOJ
GMB is concerned about the inclusion of this question, clearly added following lack of agreement on the revision of the Working Time Directive. We see it as a potentially divisive means to circumvent the procedures under the Directive in influencing working time policy.

It is essential to stress that the Working Time Directive was adopted as a health and safety measure to establish minimum standards in relation to working time and protect workers from the dangers of excessive working hours. The Directive already allows for sufficient flexibility through the use of reference periods and the possibility of derogations made by collective agreement, but needs to be strengthened not weakened.

- GMB calls for the end of the individual 48 hour opt-out as a matter of priority. The UK Government’s argument that the labour market flexibility of working excessively long hours would improve the competitiveness of the UK economy has not proved to be true. Despite being high in the European long hours working league, the UK remains well down on productivity levels.

- GMB opposes weakening on-call protections and believes the interpretation of working time, as clarified by the SIMAP and Jaeger European Court of Justice judgments is effective, and does not wish to see the Court’s judgments undermined by the introduction of a third category of working time – so-called “inactive on-call time”. Often the concerns found by the Member States in relation to the impact of the Court decisions are over-exaggerated and could be tackled by re-rostering arrangements as has been successfully done in some Member States. The solution lies in strengthening collective bargaining and social dialogue at all levels to address the issues. The social partners should be left to negotiate around this issue at sectoral level, as well as on the issue of compensatory rest.

- GMB calls for work life balance to be included as a priority in working time organisation. We regret that the Commission failed to pursue this. Work-life balance and working time are clearly linked though the UK government will not accept this at EU Community level.

- In our view the position adopted by the European Parliament on 11 May 2005 in response to the EU Commission’s Communication on the revision of the Directive effectively balanced the protection of workers’ with flexibility measures – a true example of “flexicurity”. GMB opposes any attempts by the EU Commission or Member States to undermine protections under the Working Time Directive.

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?

GMB believes that a first step in assuring transnational workers’ rights would be the strengthening and proper implementation of the Posting of Workers Directive, ensuring respect and protection for collectively bargained terms and conditions. There is a pressing need for improved information for posted workers and employers to raise awareness levels regarding their respective rights and obligations. Additionally, the lack of effective mechanisms for cooperation and information sharing among Member States hampers compliance monitoring and undermines the aims of the Directive. In the UK, for example there is limited awareness of the Directive due to the lack of separate regulations implementing the Directive. The absence of a
Government agency to gather information on the numbers of posted workers in the UK and a lack of effective procedures to monitor compliance further compounds the problem.

This is another area where trade unions can and do play an important role. GMB has an agreement with AMEC which ensures that all migrant workers engaged for work in the UK, including those who are sub contracted, are paid in accordance with the agreed terms and conditions, and receive travel, accommodation and subsistence costs. However the lack of legally enforceable sector agreements in some industries can undermine and hamper the ability of unions in this area.

Information sharing, joint working and partnership projects among unions in the Member States are important tools in the protection of transnational migrant workers. Raising migrant workers’ awareness levels of their employment rights, and the working conditions that exist in the host State before they travel helps to reduce the scope for exploitation and prevents employers undermining terms and conditions of local workers. An example of this is the agreement between GMB and Solidarność Śląsko Dąbrowski to work together to tackle the exploitation of Polish workers in the UK. Information on UK employment rights in Polish and English is available in leaflet format and through both unions’ websites, along with application forms to join GMB.

In view of the different definitions of what constitutes a worker under the national definitions in the Member States it is vital that Community employment protection legislation defines the term “worker” as widely as possible. We would not like to see further promotion of the two-tier workforce, as is currently the case in the UK, by having large groups of workers left uncovered by the definition. As previously stated, other than the genuinely self-employed, employment protection legislation should apply to all workers. Workers should benefit from the employment protections applicable in whichever country they work, subject to the minimum standards set out in Community legislation.

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 cooperation?

GMB believes that there is clearly a need for co-operation between the relevant authorities to ensure the proper and effective enforcement of labour law both at Community and national level, so that workers are protected and working standards are improved and also to avoid unfair competition.

In particular the Posting of Workers Directive must be more rigorously enforced so as to protect migrant workers. Action is also need to end the continued infringements of the Working Time Directive and national rules implementing the Directive. Appropriate penalties are also necessary to act as a disincentive for abuse or non compliance with labour law.

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 drives down standards, is highly dangerous and creates a vulnerable underground workforce likely to be subject to the worst exploitation. There must be a co-ordinated approach to combating undeclared work which rather than focusing on measures which may ultimately cause most harm to the workers, effectively tackle the causes of undeclared work. This would include initiatives at EU level which focus on the situation both within and outside EU borders. Priority should be given to combating human trafficking, in pursuing policies to assist poorer countries in the development of their economies and in
promoting measures to ensure that employers who exploit these workers face stringent penalties by way of a deterrent.

GMB also believes that more needs to be done to combat the exploitation of and discrimination against migrant workers and would support a framework of improved rights for migrant workers as advocated by the ETUC and ILO ‘Resolution concerning a fair deal for migrant workers in a global economy’ calling for a rights based approach to labour migration.