Response of the Institute of Interim Management to the EU Commission's Green Paper ‘Modernising labour law to meet the challenges of the 21st century’

We are writing as an Institute in response to the request for feedback in the above consultation paper.

The Institute of Interim Management (the “IIM”) is established as a membership organisation for professional Interim Managers (“IM”s), with the principle aims of establishing quality standards and best practice for its members, including a Code of Conduct regulating the way in which they source and fulfill assignments on behalf of their clients. Its membership is drawn mainly from Interim Managers resident in the UK (although their assignments can take them world-wide), with a small number of overseas members, principally from other EU Member States.

Interim Managers are experienced business executives, usually professionally qualified, who deliberately choose to work as independent suppliers of specific skills & knowledge to fee paying clients, either for a period of time or for defined scopes of work. Contractually, IMs operate through contracts for services (commercial contracts), rather than contracts of service (employment). Although not employees, IMs form part of (or possibly even lead) the client’s management team, and expect to have delegated and to exercise the appropriate line authority required to fulfil their role. Depending on the circumstances of the client and the assignment, this can include becoming an officer of the company through formal appointment as director and/or company secretary for the duration of the assignment.

It will be appreciated that IMs are a specialised sector of the economy, occupying a niche section of the much larger self-employed / freelancer / independent contractor market. On the one hand, their own personal businesses are small. However, because of the roles they undertake at their clients, IMs will, at any given moment, have line authority for aggregate turnovers of billions of pounds, may be based internationally, and will be balancing the needs of a variety of stakeholders, including thousands of employees.

Estimates of the size of the Interim Management market vary, but the figures most commonly quoted in the media are that fees earned in the UK are of the order of £400 to £500 million, with the same again in total for the remainder of the EU Member States. Interim Management has long been an established feature in Holland and Belgium, and the Institute has an established Chapter in Italy serving IMs there – however, given recent changes in employment legislation, the IM market in other EU countries is believed to be growing rapidly.

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

The diverse labour law and practices across the EU Member States, which are reinforced by different national cultures and psyches relating to employment, mean that it is very unlikely that any centrally imposed overarching structure will be acceptable at local level.

The most important objectives for all legislation must be clarity of purpose and clarity of definition. In the context of labour law, there is a tendency to use employment law to interfere with genuine, business to business, commercial arrangements between the self-employed and their customers/clients, especially where the supply is of services rather than goods. In this context it is essential to recognise that the terms ‘employee’ and ‘worker’ are not interchangeable, because many workers provide their services under commercial contracts, not employment contracts.
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?

Is labour market segmentation the bad thing the question implies? Jobs are only secure if the businesses providing those jobs can survive long term; survival requires businesses to be both competitive and profitable. With the business environment changing ever more rapidly as a result of technological change and globalisation, businesses and organisations in both the private and public sectors need to be able to make rapid adjustment to the size and skills balance of their workforce.

There will always be a need for the core ‘permanent’ staff, and rightly, such staff are entitled to the long term rights and benefits that their relationship with the employer demands. Within this, ‘internal’ mobility of permanent staff within businesses/organisations through redeployment and/or retraining should of course be preferred options, ahead of redundancy.

Equally important, there will frequently be occasions where the skill requirement is urgently needed but only for a limited time, or is specialised but not needed long term. In these circumstances, recruitment/redeployment of permanent staff is inappropriate – indeed, to offer ‘permanent’ contracts where there is only a time limited skills need would be dishonest on the part of the employer, because it creates unrealistic/unrealisable expectations in the mind of the employees that they are being offered long term job security. Businesses and organisations rightly therefore need to be able to turn to the self employed Interim/freelancer market to draw in the required resource.

In addition, if businesses and organisations are to behave in a in a responsible fashion when they implement social policies such as parental leave following the birth of a child, they have to have access to a pool of resource available on a short term basis – relying on the remaining staff to ‘cover’ for parental leave absences of others may be unreasonable, and their raised stress levels may even give rise to health and safety issues. And it will be appreciated that the pool of short term resource needs to encompass all levels from the boardroom downwards.

This problem of ‘cover’ is particularly difficult for SMEs, which have limited staff numbers (so to have even one absent is significant), and are usually not as well placed financially to fund a temporary replacement whilst at the same time paying for parental leave.

On the Commission’s own figures, those operating under ‘non-standard’ contracts of employment (ie the self-employed, temporary workers, etc) had reached nearly 40% of the EU-25 workforce in 2005. There needs to be greater recognition on the part of the Commission and national governments that a thriving market for these ‘non-standard contractors’ is an essential feature of a flexible and yet socially responsible market economy. At 40% of the total, they are as much a ‘standard’ feature as the ‘standard contract’ permanent employees with whom they are compared; to refer to ‘atypical’ workers and ‘outsiders’ is unhelpful and represents a distorted view and misunderstanding of the labour market and its workings.

3. Do existing regulations, whether in the form of law and/or collective agreements, hinder or stimulate enterprises and employees seeking to avail of opportunities to increase productivity and adjust to the introduction of new technologies and changes linked to international competition? How can improvements be made in the quality of regulations affecting SMEs, while preserving their objectives?

The SME sector in the UK makes a significant contribution to the UK economy, and yet over 60% of those SMEs are ‘one-person’ businesses consisting solely of the proprietor. Many of these are highly skilled and experienced ‘knowledge’ businesses, who take the risk and operate outside the ‘corporate umbrella’ out of choice, because they enjoy the challenges and risks of entrepreneurship, and the flexibility of being their own boss. For this large and growing body of people, this represents a positive life-style choice.

In order that their clients, and thus the economy, can benefit to the full, these knowledge businesses need the ability to go from client to client providing their services on a business to business basis under commercial contracts, not contracts of employment. However, so far as the UK is concerned, lack of
clarity in the law over employment status make it difficult for businesses to take on such workers with any certainty for either party that the contracts entered into on an arms length basis will be honoured by the taxation authorities or the courts.

As commercial businesses, the self-employed recognise the need to make their own financial provision for pensions, training, holidays, and sickness – and self-provision of these is their preferred option. Were their clients obliged to treat them as employees, the result would be that they would build up a fragmented and, in monetary value, small series of employment benefits across a number of different organisations – keeping track of benefits and claiming them would develop into an administrative nightmare.

In the UK however, the self-employed may find themselves in the worst of all possible worlds in the event that they fall foul of IR35, a tax provision which attempts to treat one-person knowledge businesses not as self-employed, but rather as disguised employees, taxing them as if employees but at the same time denying them tax relief for the expenditure of providing certain of their own ‘employee’ benefits – benefits which, had they been paid for by the client as ‘employer’ would have attracted tax relief in the employer’s hands. In consequence for example, knowledge businesses who find themselves in this position find that they have to undertake the relevant training to keep their skills on which their businesses depend up to date at their own expense, and yet get no tax relief for incurring that expenditure.

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?

As has already been mentioned, permanent contracts bring with them long term rights and obligations, including employment security and social protection, which, by definition, conflict with the flexibility to ‘hire and fire’ at short notice.

So far as temporary contracts are concerned, there needs to be recognition of the difference between temporary employees who are under the control and supervision of the employer, and Interim/freelance workers who are providing their services under commercial contracts. Where services are provided by Interim/freelance workers under commercial contracts, such contracts are ‘business to business’, not employment contracts, and therefore do not need employment security or social protection – that is the business risk of entrepreneurship.

This is a core understanding that underpins a large number of people's prosperity, and it is crucial that any changes to employment law do not interfere with this choice. It is hoped that this submission makes it clear that the large numbers of people working as Interims/freelancers do this from choice. They are not directly interested in employment law and employee rights. There is only concern that they do not become the unwitting recipients of “rights” they do not seek and would confuse an entire industry and way of life.

5. Would it be useful to consider a combination of more flexible employment protection legislation and a high level of assistance to the unemployed, both in the form of income compensation (i.e. passive labour market policies) and active labour market policies?

Such matters should be left to Member States, because what is appropriate depends on a variety of factors, including where they are in their economic cycles, national culture, etc.

However, allowing companies to discard and take on employees without penalty should encourage the hiring process and therefore reduce the numbers of unemployed. Whether it is beneficial to offer a high level of monetary assistance to the unemployed for anything other than a short period is less clear. There needs to be an appropriate counterbalance to reduced job security, but not to the extent that it discourages the unemployed from seeking work. The UK is currently staffing its skills shortage from other EU countries and elsewhere, whilst at the same time many thousands of UK nationals are claiming benefit and not taking up the jobs available.
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?

With the decline in large scale manufacturing and the shift to high value added people skills – whether in technology, financial or service sectors – the importance of collective agreements is diminishing, and there is probably a need for greater representation of SME organisations in the social dialogue. At the very basic level, national governments must ensure that no one should be unemployable through illiteracy or inadequate communications skills, and must provide a safety net of skills training to equip the unemployed to get into (or back into) work, provided such training is genuine re-skilling and not merely a device for removing those not in work from the unemployment statistics. Beyond that, governments must create the right legislative framework, economic environment, and taxation incentives, to encourage and enable businesses to invest in people, and to foster entrepreneurship in individuals, as envisaged by the Lisbon Accord.

An important feature of this environment is ensuring that regulation does not of itself prevent individuals from making the transition between contractual forms whenever it is appropriate to move.

Interim managers, for example, do not normally enter the sector until their 40s, by which time they have built up considerable skills and experience during their career as employees, and have achieved a degree of financial independence which allows them to take on the risk and rewards of working for themselves without compromising family responsibilities. To make the transition successfully, they need a legislative framework which allows them to set up their new business rapidly and at minimal cost, but no collective agreements or other external intervention is required. For this growing sector of workers, any additional regulation imposes extra administration where it is unnecessary and not wanted.

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?

Any attempt to clarify the definition of employment and self-employment should be principles based, not based on arbitrary criteria of the sort of presumptive rules referred to in the Green Paper, such as those found in the Dutch Flexibility and Social Security Act.

In the UK, such principles include mutuality of obligation (whether the employer has a duty to provide work and the employee a duty to accept that work), the degree of supervision and control exercised by the organisation, who bears the financial risk if the work is not properly performed, whether the contractor has a right to substitute himself with a colleague or to involve subcontractors, use of own tools, etc. Although not normally included in the tests in the UK, one might also ask whether the organisation provides any employment rights – inappropriate in a commercial contract with an Interim/freelance worker.

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?

One of the difficulties in the Green Paper is that the terms ‘worker’ and ‘employee’ are used interchangeably, when in fact they have different meanings. A self employed worker enjoys the same general protections as the overall population – for example, to do with discrimination on the grounds of race, disability, sex etc. However, he is responsible for providing his own ‘floor of rights’ as he is his own employer and therefore responsible for providing his own ‘employee’ benefits.

The self-employed would not want an obligation imposed on their clients to provide a floor of rights – it would only serve to make them a less competitive resource, and, as previously mentioned, would lead to a plethora of fragmented and, in monetary value, small series of employment benefits across a number of different organisations. The imposition of a floor of rights would simply add more cost to the client organisations to provide something that is not needed or wanted.
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 subcontractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?

There is a need for clarity in multiple employment relationships as to who is the employer responsible for providing the employee with their employment rights, possibly by imposing a statutory presumption that the end user is the employer, or by imposing a requirement on end user and agency intermediary to provide the employee with a binding written statement at the commencement of the employment contract as to which of them is the employer.

Where the relationships of workers (rather than employees), clients and intermediaries are governed by commercial contracts, then there is no need to identify the employer – all rights and obligations flow from the commercial contracts, rather than being imposed by statute.

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

No comments, other than those already given to Question 9.

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?

No comments, provided no change is made which would affect the current exemption from the working time rules of Interims/freelancers as self-employed or as otherwise being able to determine for themselves what hours to work.

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?

Member states should retain their discretion in this matter, recognising that it is an issue for employers and employees, not for organisations and workers whose relationships are governed by commercial contracts.

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?

Illegal immigration and people trafficking remain cross-borders issues which are fuelled by and impact on labour markets, and require cross-border co-operation.

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 occurs for a number of reasons, including high levels of taxation (a matter for Member States) and illegal immigration (see the answer to question 13). A consequence of undeclared work can be over-regulation of legitimate businesses/organisations and workers, which has a negative impact on the economy generally.
Contact Information

Tom Brass
Deputy Chairman
Institute of Interim Management

Dolphins
Elmstead Road
West Byfleet
Surrey KT14 6JB
United Kingdom

T: +44 (0) 870 242 0814
E: tom.brass@ioim.org.uk