IS THE COMMISSION’S GREEN PAPER ON LABOUR LAW A TROJAN HORSE?

Irish Congress Trade Unions

Response to the European Commission’s Green Paper: Modernising labour law to meet the challenges of the 21st century.

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1. Introduction and Overview

In November 2006 the EU Commission launched an important debate on how labour law should evolve to meet the challenges of the 21st century. When launching the Green Paper, the Commission stated a desire to “launch a debate in the EU on how labour law can evolve to support the Lisbon Strategy’s objectives of achieving sustainable growth with more and better jobs”. The Irish Congress of Trade Unions believes there are strong reasons for strengthening labour law to cope with the modern world of work. In Ireland, our experience is that employment rights need to be safeguarded. More protection is needed for the growing proportion of workers in precarious forms of employment who routinely experience low pay, financial and job insecurity. Often they are excluded from basic employment rights including unfair dismissals, they have no access to career progression or training and no in work benefits such as overtime pay, sick pay, maternity pay or occupational pensions.

The European Union is committed under Treaty obligations to promote (i) employment, (ii) improved living and working conditions, (iii) dialogue between management and labour, (iv) high employment, (v) the reconciliation of work and family life, (vi) gender equality and (vii) the combating of social exclusion.

In the Green Paper the Commission have set out a number of objectives, these include, reducing labour market segregation, increasing flexibility for employers and workers, making atypical employment a more attractive employment option and increasing productivity. Reform of labour law that increases security for those employed on non standard contracts, that provides access to training, allows for more employee demanded flexibility, that ends discrimination and inequality in pay and prospects and gives a guarantee of a high level of social protection would all contribute to meeting the Commissions stated objectives.

2. A Trojan Horse?

There is no doubt that improvements to labour law are needed, so why is there so much unease about the Green Paper? The concerns mainly arise from the Green Paper being unhelpfully centred on a belief that the traditional model of the employment relationship is outdated and characterised by ‘overly protected terms and conditions1’ and that alternative less protected models should be developed. Although the Commission has avoided using the terms regulation and deregulation this does not detract from concerns that a deregulatory agenda may be being promoted and pursued.

This approach is prejudicial, it is a one sided analysis that does not take into account the reality of the modern workplace nor of the importance of securing a platform of rights not only for fair and decent work but also for supporting a productive economy, a well functioning labour market and a decent society. A certain level of employment stability of the workforce is “good” for firms, as it is needed for productivity, human capital investment and worker motivation.

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The Irish Congress of Trade Unions strongly disagrees with the general arguments advanced in the Green Paper that improved employment levels and labour market dynamism and innovation are dependant upon increasing atypical forms of employment and weakening employment protection. These views are not based on evidence.

In Ireland we have traditionally had a relatively lightly regulated work regime and a high level of flexibility is already available to employers. Indeed it is hard to see what further ‘flexibilisation’ of contracts could further usefully contribute, over and above the exacerbation of what is already a highly asymmetrical and unequal power relationship.

Despite the Commission’s belief that social partnership builds trust and continuity capable of sustaining viable ‘trade offs’, there really is no logic in expecting that lowering the level of employment protection for workers, essentially making it easier for employers to dismiss them, will lead to any increase in competitiveness, a reduction of the two tier labour market, or assist ‘outsiders’ to become ‘insiders’. In fact there is significant evidence to expect the opposite effect. Insecure employment conditions generate low training, lower productivity, and lower innovation. Likewise there is nothing to suggest that job opportunities will really increase for some by reducing the rights and protection for others, and certainly this will do nothing to support the Lisbon agenda of “more and better jobs!”. Ireland has a good employment record but our labour market is characterised by earnings inequality and a high level of ‘in-work’ poverty.

The Commission should be interested not only in flexible employment relationships, but also in stable ones. Workers and their unions would have less to fear if the Commission was promoting flexibility that was embedded in a framework of strong employment protection legislation combined with "protected mobility" that provides lifelong "employability" training and income protection to workers. From the ICTU’s point of view, labour market flexibility can only be accepted, when it does not equate to the reduction or loss of the standard employment relationship and is embedded in labour market security providing protected transitions that enhance rather than destroy workers’ welfare. Increasing productivity and adjusting to the introduction of new technologies and competition can only be achieved by workers who "feel good" about it. In practice, this requires the reforms to produce visible benefits for workers, such as job security, income security, worker participation and dialogue, rights to basic and further training, and the recognition of the need to balance the "work-family" relationship. Only when these ‘benefits’ are present, achieved via labour law, will there be a belief in a win-win situation for companies and workers alike.

3. What role for flexicurity in promoting employment/employability security?

ICTU agrees with the Commission that protected transitions are needed. Experience from Ireland reveals that vulnerability in the labour market is not limited to those employed on non standard contracts. The effects of restructuring, contracting out, agency work, and company closures have led to job losses and ‘insiders’ can quickly become ‘outsiders’. An issue of serious concern for ICTU is that many workers in employment lack a strong skill base, for example, only a quarter of those aged over 35 in work have a third level education.
In order to plan their lives and careers, workers need new kinds of security that help them remain in employment, and make it through all of their life changes. New securities must go beyond the specific job and ensure safe transitions into new employment. However the basic principles behind the flexicurity approach need to be in line with ‘Guideline 21 of the Employment Guidelines’ which stresses the need to promote flexibility combined with employment security.

There are important lessons which may be learnt from those Nordic countries where the concept of flexicurity originated, most notably Denmark. The Danish model of flexicurity combines generous social protection arrangements with employment protection measures. Danish workers facing economic dismissals have long notice periods providing them time to find another job before their existing job ends. They also have high levels of unemployment payments which guarantee a worker 80% of their working salary for 48 months. This means that Danish workers feel the highest degree of job security and job satisfaction in EU surveys in comparison to their other European colleagues.

These flexicurity models have coincided with a highly developed social dialogue, where social partners have played an essential role in negotiating the balance between flexibility and security on the labour market. ICTU looks forward to the forthcoming Commission communication on flexicurity which should be instrumental in preparing a range of pathways to find the right mix of policies.

4. There is a need to protect and promote collective bargaining in Europe.

The focus of the Green Paper is on the personal scope of labour law rather than on issues of collective labour law. Where collective bargaining in the Green Paper is mentioned, it is mostly as a possible instrument to provide for ‘flexibilisation’ of labour law provisions. As such the Green Paper sets out a role for collective bargaining that is much more limited than is anticipated by the Treaties. The concept that collective agreements would set labour standards is reflected in a number of EU Directives. In addition collective bargaining is recognised as a cornerstone of industrial relations in the Treaty provisions. ICTU believes that the reforms should respect, protect and promote social dialogue between management and labour and should improve the capacity of social dialogue and collective bargaining in Member States.

In Ireland, the State takes no responsibility for ensuring that employers participate in collective bargaining. While Ireland’s Constitution recognises the right of workers to belong to a trade union there is no national legislation requiring employers to recognise a trade union, nor is there any obligation on them to participate in collective bargaining or conclude collective agreements. It is left to the trade union to ask employers to voluntarily agree to participate in collective bargaining. The State has thus left it to employees themselves to safeguard their right to collective bargaining through their trade unions. This contrasts unfavorably with most other EU Member States and western democracies, who legally oblige employers to recognise trade unions.

This situation in Ireland is further worsened by the absence of an EU or national definition of ‘collective bargaining’. The lack of a statutory definition introduced uncertainty and unacceptable definitions have started to set in. For example, a recent judgment of the Supreme Court in Ireland2

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found that that a ‘dictionary definition’ of ‘collective bargaining’ should be used by the Courts. This has raised a spectre of collective bargaining being undertaken by a body of employees created by and dominated and controlled by the employer.

In effect this Supreme Court Judgement reduced to nothing the guarantees secured for workers when Ireland ratified the ILO Conventions3 in 1955. These Conventions define freedom of association as being genuine only when it is free from interference from employers. It will also undermine all confidence in collective bargaining being a tool to safeguard the interests of employees. As these ‘employees bodies’ being in the effective control of employers, would not be able to act with the same freedom and independence as trade unions. It is exactly in recognition of the unacceptability of such an imbalance in favour of employers that ILO Convention 98 excludes the possibility that negotiations between employers and employees under such unfair arrangements could ever come within the ambit or definition of ‘collective bargaining’.

This is a far from satisfactory situation and ICTU argues that these recent developments are contrary to the objectives of the EC Treaty, specifically Article 140 which assures respect for the “the right of association and collective bargaining” across the EU. Other Articles of the Treaties generally require Member States to support, promote and protect collective bargaining. These provisions are further reinforced in the Charter of Fundamental Rights of the European Union in Article 28, “Right of collective bargaining and action’ “Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”.

Given the strong recognition at EU level of a right to collective bargaining it is reasonable to expect the development of Community Law to guarantee this right. The ICTU strongly believes that the reform of Labour Law should include the development of EU law to secure the effective enforcement of Community rights, including the right of association and collective bargaining.

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4 Article 136, The Community and Member States shall have as their objectives the promotion of…dialogue between management and labour.

Article 137 “with a view to achieving objectives in 136 the community shall support and compliment …representation and collective defense of the interests of workers and employers including codetermination.”

5 ICTU does not believe that the exclusion provided in paragraph 5 of Article 137 is so wide as to exclude the development of Community Law to protect collective bargaining rights.

6 ICTU recognises that it is for national law, (in conformity with ILO Conventions) to specify matters such as what rules would apply to collective bargaining, and to specify the appropriate court, and remedies available to secure the enforcement of the rights.
ICTU believes that that measures are needed at EU level to ensure that every Member States is observing the rights conferred in the Treaties and that have in place adequate definitions, enforcement mechanisms and remedies to secure the ‘effectiveness’ of the right to freedom of association and collective bargaining. In addition across the EU any unfair collective bargaining rules, that is those contrary to the ILO Conventions should be declared illegal.

This request for action at EU level is consistent with the Commission’s own view stated in the Communication of May of last year (COM (2006) 249) on Promoting decent work for all - The EU contribution to the implementation of the decent work agenda in the world.

“The Community acquis in the fields of employment, social policy and equal opportunities in many respects goes beyond the international standards and measures which underpin the concept of decent work and incorporates the major principles of that concept. The ILO standards form the background to a number of policies, laws and collective agreements in the Member States and at European level. The standards and measures of the ILO also complement the acquis in areas which are not covered or only partly covered by legislation and Community policies, such as labour administration and inspection, trade union freedom, collective bargaining and minimum standards in terms of social security”.

Against the background of the forgoing, the Irish Congress of Trade Unions would also like the Commission to address the emerging situation where internal market and competition rules are increasingly interfering with the national autonomy in the social field. Despite collective bargaining and collective agreements being recognised in the Treaties as reflecting fundamental social objectives and values, they are insufficiently shielded from attack from competing objectives and values in Community law, in particular, those of competition law and ‘free movement’ principles. In Ireland, for example, the Competition Authority has concluded that a collective agreement made by the trade union, EQUITY/SIPTU with the representative employers group for advertising agencies, the Institute of Advertising Practitioners in Ireland was an unlawful agreement contrary to EU Competition rules8. Sweden’s collective bargaining based system is also under threat in the ‘Laval case’ and the European Court of Justice is currently considering the question of whether workers rights or economic freedoms will take priority in the EU.

5. Proper consultation should be provided to social partners.

The Irish Congress of Trade Unions wants to express its concern with the consultation procedure followed by the Commission. There can be no doubt that the subject of the consultation arising is

7 In EU Law there is a well established principle of effectiveness, which is a principle which applies whether or not the right is derived from a directive or from another source of Community rights. See Denvavit Case C-2/94 and Emmett Case C-208/90.

clearly in the heart of the ‘social policy field’ as mentioned in Article 138 of the European Treaty. Therefore Social Partners at European level importantly the ETUC, should be consulted in a different way, and with a clearly different weight, than the wider public, to allow them at an early stage to influence the direction of the initiatives to be taken, and to allow them to express their interest to take up the issue themselves for negotiation as provided under Article 139.

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

Meaningful labour law reform needs to recognise and address emerging threats to existing standards. Otherwise there is a risk that some employers will drive down employment standards, threaten social security systems, and gain unfair competitive advantage by paying workers less and giving them reduced conditions.

New rights are needed to ensure the achievement of the objectives of the EU Treaties and the realisation of the fundamental social rights enshrined in the Charter of Fundamental Rights. The Commission has a duty to promote and maintain the social dimension of the European Union through the reform of labour standards.

The Irish Congress of Trade Unions believes that the following principles and objectives should underpin the approach to labour reform by the Commission:

- The reforms should recognise and rebalance the unequal power relationship which exists between employers and workers.
- The reforms should ensure that employers who increase workers security and employability are rewarded and protect from unfair competition from less scrupulous employers.
- The reforms should respect, protect and promote rights and freedoms, (in particular freedom of association, the right to be represented by your trade union, the right for trade unions to organise, to bargain collectively and to organise collective action, including cross border action).
- The reforms should promote social dialogue between management and improve capacity of social dialogue and collective bargaining.
- The reforms should improve the Living and Working Conditions for those workers on atypical/non-standard employment contracts and reduce the level of precariousness and lack of rights and protection in those contracts.
- The reforms should outlaw discrimination on the basis of employment contract and work towards upward harmonisation so that agency workers and other workers on non standard contracts have a right to equal treatment with workers on standard contracts.
- The reforms should provide for an EU definition of ‘worker’ to include freelancers and other economically dependant workers.
- The reforms should provide for a legal presumption of employment. So in the case of dispute, the burden of proof is on the employer to prove that an individual is not an employee.
- The reforms should improve the quality of jobs offered on non standard contracts.
The reforms should safeguard the principle of job protection and protection from unfair dismissal.

The reforms should increase protection from exploitation and arbitrary treatment by employers.

The reforms should protect migrant workers from exploitation and discrimination.

The reforms should promote work life balance and the better reconciliation of work and family life.

The reforms should increase flexibility by increasing the level of flexibility that is in the control of workers,

The reforms should guarantee rights to paid training and life long learning for workers,

The reforms should improve social welfare systems to provide a replacement income and support increased labour market flexibility and transitions.

**Question 2. Can 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?**

As previously stated, in Ireland a high degree of flexibility is already available to employers and the trend is to systematically use non standard contracts rather than to use them for the occasional use they were designed for. ICTU believes that that the Commission is wrong to believe that the solution to labour market segmentation lies in making the standard contract more flexible. Making existing standard contracts more ‘flexible’ by reducing rights, conditions or security would not decrease labour segmentation in any desirable way. Rather such an approach would simply increase the vulnerability and number of workers not properly covered and protected by basic employment protections.

It is not more employer flexibility but more security for all workers, including those on non-standard contracts which are urgently needed.

ICTU notes that the Commission wants to improve rather than increase flexibility. ICTU is calling on the Commission to adopt an approach which aims to improve the situation of those on non standard contracts by encouraging member states to:

a) closely monitor and report on the use of non standard contracts;

b) introduce regulations to restrict the use of non standard contracts to the ‘occasional’ or ‘specific purpose’ use they were originally designed for;

c) extend employment rights to cover all those working under non standard contracts and

d) guarantee equal treatment so that non standard workers are treated at least equally to their counterparts on standard contracts.
This will ensure that companies still have the necessary flexibilities but abuses will be avoided and staff on non standard contracts will be guaranteed employment security and compensation.

**Question 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?**

Trade unions in Ireland have in partnership with employers, facilitated workplace change and innovation. Through collective bargaining unions have supported the transformation of some Irish workplaces into 'workplaces of the future'. These transformations have improved performance and contributed to the productivity and competitiveness of the company while at the same time increasing the standards and quality of employment for the employees.

Numerous examples can be put forward to demonstrate that collective agreements and regulations do not hinder productivity and competitiveness. ICTU calls on the Commission to encourage Member States to support the development of greater organisational capacity, for collective bargaining that anticipates and manages change.

ICTU reminds the Commission that European workers are among the most productive in the world, per hour worked, and Europe remains highly competitive in world markets both in goods and in services. ICTU believes that European social rights and labour market systems are the foundations of this high rate of productivity.

Research shows that there are strong links between length of tenure and productivity. An analysis of data for European countries has revealed that employment stability has a positive effect on productivity until 13.6 years. Considering the much lower productivity rates for workers on lower tenure, there always remains a productivity benefit in retaining the workers beyond the 13.6 years. In addition the analysis shows that increasing the share of workers with very short tenure will have a negative effect on productivity.

The situation in Spain is demonstrative. The excessive use of fixed term contracts in Spain, which has been higher than any other EU member state in recent years, has been directly linked with poor productivity and a lower level of international competitiveness than other EU countries. The 2006 Collective Agreement concluded by the social partners and government commits to reversing this trend.

Stable employment relationships can help an economy by ensuring a steady and growing purchasing power and stimulating consumer demand. It is also worth reminding the Commission that in Ireland, a secure employment relationship based on a permanent contract of employment is a prerequisite for

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the vast majority of workers who want to secure a mortgage for a home. Similarly decisions about starting a family often depend on the extent of security in employment.

ICTU believes it would be counter productive to use labour market deregulation as a mechanism to promote small and medium enterprises. Blocking access to employment rights for workers in SMEs is unacceptable and will do nothing to attract workers into the sector.

Across Europe we need to build the capabilities of collective bargaining in SMEs and re-affirm the pivotal role of a partnership approach at the level of the enterprise as a key mechanism that will deliver real gains for the European economy and society. The management and HR practices adopted by SMEs will determine their competitiveness. Key among these are the level of quality of work, security in employment, communication and consultation, training, and reward systems.

**Question 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?**

It is not clear what is being asked by the Commission in this question. For reasons previously stated, the ICTU does not accept that there is any need to encourage the use of temporary or fixed term contracts. Neither is any more flexibility desirable within these contracts.

Improved security and working conditions are the only acceptable way to increase the attractiveness of non standard temporary contracts. Therefore the ICTU is calling on the Commission to ensure that labour law:

- Ensures temporary workers are guaranteed equal treatment to their counterparts on standard contracts;
- limits the use of temporary or fixed term contracts to bona fide situations and place a requirement on employers to objectively justify a decision to recruit on a temporary or fixed term basis;
- put in place a legal framework for transition pathways from temporary and other non standard contracts so that workers can move with certainty to a standard, permanent (indefinite duration) contract.

Working people need to see a major shift in the way work is organised to accommodate the demands of their lives outside of the workplace. All workers must enjoy a legal right to flexible working if a genuine work-life balance is to become a sustainable reality.
Question 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?

ICTU does not accept the Commission’s view that there is a trade off between reducing employment protection on one hand and increasing social security benefits on the other. Increasing assistance to unemployed workers cannot be put forward, in any credible way, as sufficient justification for reducing employment protection legislation.

Notwithstanding these concerns, the Irish Congress of Trade Unions believes there are strong arguments in favour of “protected flexibility” or flexicurity arrangements for labour market transitions that combine a fair degree of secure employment relationships with an active commitment by the State to act as provider to displaced workers. ICTU is calling on the Commission to encourage member states to increase social security benefits and assistance to unemployed and vulnerable workers. Such measures have been shown to increase workers’ feelings of job security, encourage worker mobility and result in greater flexibility.

Denmark is a good example in this regard. Although employment stability in Denmark is relatively low - 8.3 years in 2001 – (Ireland is 10.5 years); Denmark's "mediated" labour market provides a higher degree of employment security. In job security rankings cited by the OECD, Denmark ranked second in 2000, out of a total of 17 countries. (By comparison, the UK which has a similar framework to Ireland has the worst job security ranking).

The OECD comes to similar conclusions: “there is a positive relationship between expenditure on (passive) labour market policy per unemployed person and perceived employment security that holds for both permanent and temporary workers perception of employment security (OECD 2004)”.

The negative effect of losing employment can be mitigated when unemployment benefit provides for a significant replacement of income and where the worker believes they have a realistic chance of securing another job on similar pay, terms, conditions and prospects as their previous job.

At over 5 per cent of GDP, Danish expenditures on labour market policies are the highest in the European Union. Though more than half of this expenditure is on passive measures, the Government has placed considerable emphasis on the participation of the unemployed in active measures, a policy that has been dubbed "learnfare." After a period of passive receipt of benefit, unemployed workers participate in training and educational programmes to improve matching in the labour market.

Social Security rights are built up over time and agency, temporary and other workers on non standard contracts are particularly vulnerable to falling outside of adequate insurance coverage. This is often the case in respect of disability or sick schemes and particularly the case for occupational pensions. Agency and Temporary workers are also more likely to experience periods of unemployment, while the self employed are often outside the scope of systems altogether unless they are experiencing deprivation below poverty lines.
When this happens the costs are borne by the workers themselves and social security (benefit and assistance) schemes and it is worth asking if it is fair that employers who reduce or cut out social security costs altogether through the use of non standard contracts should be able to avoid contributing to the social security systems.

Given the increased risk that employers availing of non standard contracts will terminate the contracts should a higher social security charge apply. This would ensure that employers who systemically use non standard employment contracts cannot compete on an unfair basis with those employers who do not cut costs in this way.

**Question 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?**

The development and maintenance of skills is a core priority for unions and workers. The growth of knowledge-intensive work will be one of the most important influences shaping work and workplaces in the coming years. The Irish Congress of Trade Unions is committed to encouraging participation in further education and training and equipping all individuals with the skills needed in a rapidly changing labour market.

Access to training is fundamental for improving the chances of all workers on the labour market. Yet the lack of training provisions for workers, particularly those on non standard contracts is endemic. For those working in sectors that are continuing to experience structural change due to technological change and globalisation access to training is critical. However experience has shown that life long learning and access to personal skill enhancement has remained outside the grasp of the majority of the workforce. In Ireland employers do not devote sufficient resources to training. Compulsory requirements on employers to provide access to training are clearly necessary. ICTU is calling for the introduction of Statutory Rights which can be complimented through collective agreements.

Both law and collective agreements can play a role in promoting access to training and education. Legislation is needed to frame the negotiation arena allowing for complementary collective agreements. Member states should be required to introduce a right to training for workers. In Ireland this would require new legislation to;

a) provide that workers are to be guaranteed a number of paid hours for professional and vocational training;

b) set out the obligations on employers to provide access to personal skill enhancement training and guidance

c) guarantee the right to re-training when unemployed.

This ‘Right to Professional and Vocational Education and Training’, should be reinforced and complimented by providing that the objectives established in the legislation can be reached through collective agreement at company or sectoral level. To ensure against abuse and for comprehensive coverage, the legislation will need to establish the minimum training rights that will apply in
circumstances where collective agreements are not concluded. Specific safeguards should be developed to ensure that those on non standard contracts and other groups who are at risk of being excluded, are adequately provided with rights.

**Question 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?**

It used to be the case that it was obvious whether a worker was an employee or self employed. But increasingly the difference between an employee and an independent contractor is being deliberately blurred. Within the category known as 'self-employed', there are workers in ambiguous relationships with a client who in reality is more or less an employer. In these cases, the law treats the relationship as being between two independent contractors but in reality the relationship amounts to a contract of employment within which the worker is dependent for all or most of his or her work upon a client who is much more like an employer in the power they hold over the worker. In Ireland, not everyone working as a self employed person chose to do so employment from a strong labour market position, many are pressured or forced to give up their employed status and the rights associated.

Being categorised as self employed or an employee is important as employees, provided they have sufficient service, fall within the scope of all employment protection legislation. Self employed workers are only covered by some employment protection legislation, such as health and safety. Employers are responsible for making social insurance payments for their employees' whereas the self employed must shoulder this burden alone.

As the differences in treatment of workers and the self employed have expanded, the more attractive it has become for companies to evade directly employing people. In some sectors self employed are quickly becoming the majority rather than the exception as employers eager to avoid rules give their workers the status of self employed.

Through social partnership, Ireland has developed a Code of Practice in Determining Employment Status. The Code was developed because of a growing concern that there may be individuals, categorised as self employed when an employee status would be more appropriate. The Code sets out criteria on whether an individual is more correctly categorised as a self employed person. If the criteria in the Code are not met clearly, then the person may be classified as an employee. A key question in the code is “Is the person a free agent with an economic independence of the person engaging the service?”

In our most recent social partnership agreement, Towards 2016 we have agreed to rigorously apply the criteria on employed/self-employed set out in the Code and ensure that workers are clearly either self-employed or employed.

Our approach would benefit significantly from the implementation in Ireland of ‘ILO Recommendation 198’. This Recommendation sets out that member states would provide for a legal presumption of employment. So in the case of dispute the burden of proof is on the employer to prove that an individual is not a worker. In our view, the presumption should be that someone in an ambiguous working relationship or with ambiguous employment status should be presumed to be an
employee and that employment protection legislation would apply to them unless it were proved that they were genuinely self-employed.

Some self employed are correctly categorised as ‘workers’. The term 'worker' appears in many member state’s legislation, International Conventions, and the EU Treaties. While it has not been given a legal meaning in the treaties, ECJ case law and national case law proves that the term may be used to denote and include both ‘workers’ who are employees and ‘workers’ who are self employed.

In Ireland, a definition of ‘worker’ is provided in the Industrial Relations Act 1946. “any person aged 15 years or more who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, whether it be expressed or implied, oral or in writing an whether it be a contract of service or of apprenticeship or a contract personally to execute any work or labour including in particular, a psychiatric nurse employed….

And these categories of self employed persons, that is those who contract personally to execute work or labour have repeatedly been found to be included in the term worker for the purposes of Employment Rights legislation, recently these workers were found to be covered by the scope of legally enforceable collective agreement s (REAs) which included pensions. Points of interpretation of the term ‘worker’ have been comprehensively argued by Mr. Justice Murphy in Building and Allied Trades and Valentine Scott v The Labour Court and The Construction Industry Federation and Gerry Fleming High Court, Unreported, 15th April 2005. In that case Murphy J interpreted the term "worker" as including, a sub-contractor providing services personally under a contract for service.

In addition Mr. Kevin Dufy, Chairman of the Labour Court in Ireland has stated “On a true construction of the said Section 23 a natural person providing services personally to another on a contract for service is a ‘worker’11.

This is in recognition that there are differences between self employed people. Some self employed people are not entrepreneurs creating their own work. Rather they are dependant upon contracting companies and employers. Although categorised as self employed, they have, in reality, none of the flexibility of the self-employed nor the legal protections of the employed. One of the questions raised by the Green paper is whether or not a new category of worker, somewhere between self-employed and employed, perhaps to be defined as economically-dependent should be created. It seems to us that the creation of such a new category may be ill-advised, the best solution would be to apply the definitions of worker already accepted in international law in a more systematic way, and to define ‘worker’ at EU level as including some self employed workers.

10 For social security see: Henry Denny and Sons (Ireland) v Minister for Social Welfare [1998] IR34

11 See Full Recommendation of the Labour Court CD/05/533 DECISION NO. 0595.
The Irish Congress of Trade Unions is therefore calling on the Commission to provide for an EU definition of ‘worker’ to include some self employed. These workers would be entitled to employment rights protection and brought within the scope of social security systems.

Importantly the Commission should immediately act to confirm that these workers are not ‘undertakings’ for the purpose of Competition Law. Such clarification is urgently needed as the Competition Authority in Ireland have found that under EU Competition Law self employed workers do not have any rights to freedom of association and they are prohibited from participating in collective bargaining. This situation is unacceptable to ICTU and contrary to the rights provided to workers and the protection for collective bargaining in the EU Treaties.

Question 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?

ICTU believes that all workers should be entitled to the full range of employment rights, whatever the contract form.

ICTU is against the creation of a lower tier of rights for non standard contracts rather we believe that legislative measures should be introduced to close any loopholes and ensure that all workers have the same set of rights. In addition the equal treatment principle must be respected and workers on non standard contracts should be provided with the right to equal pay, conditions and treatment as workers on standard contracts in the organisation or sector.

As far as the impact on job creation is concerned there is no evidence that employment rights have a negative impact on job creation. In addition the EU is committed to the creation of high quality jobs, not jobs at any price.

Question 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?

Workers sometimes find themselves at the end of a long subcontracting chain. This can give rise to problems not only in securing a fair and just wage, as there is heavy price pressure at the end of the

12 The experience of Italian trade unions reported by UNI europa is instructive in this regard. The creation of a special pension scheme for economically dependant workers (lavoratori parasubordinati) in 1995, has recently been repealed due to the fact that it promoted the engagement of people as contractors rather then employees as the new category was guaranteed a smaller package of rights.
chain because every contractor contracting out work to a subcontractor keeps a certain percentage of the sum contracted (usually between 2% and 10%) but also long contracting chains can make it difficult for workers to establish who is the employer responsible for securing their rights.

Because of this development ICTU successfully negotiated a commitment in our new national agreement, Towards 2016 that goes part of the way to addressing this problem by placing responsibility for ensuring employment rights compliance on the main contractor (in the context of public procurement).

When fully implemented the provisions will ensure that the contractor must have regard for how the price for a contract is determined and a ‘value for money’ objective cannot ‘trump’ employment rights and compliance objectives. Contractors are now required to satisfy themselves that all employment rights legislation is being complied with along with payment of the enforceable rates.

“The parties are agreed on the importance of public procurement policy as a mechanism for contributing to the maintenance of employment standards and norms, including in respect of wage levels, while also ensuring competitive tendering and value for money in public expenditure.

(a) In the construction sector, contractual conditions in the new suite of Standard Forms of Contract will require compliance with employment law generally, including, for example, the relevant Registered Employment Agreements, existing statutory requirements such as the national minimum wage, legally binding determinations under the Industrial Relations Acts, health and safety legislation and equality legislation relating to employment.

(b) Public contracting authorities will be obliged to seek an appropriate certification of compliance with the requirement at (a) from contractors at suitable intervals. If non-compliance with the pay and pensions terms of an REA occurs, contracting authorities can take whatever corrective action is considered necessary and appropriate, within the terms of the contract, including the proportionate withholding of payments, to ensure compliance.

(c) Public authorities will retain their existing rights under contract to access data and records. In respect of capital works projects in excess of €30 million and with a contract duration in excess of 18 months, contracting authorities will provide in their contracts for random checks of the records of contractors and subcontractors to assess compliance with the requirements of the Registered Employment Agreement, as appropriate. Contractors are responsible for ensuring that proper records are available to facilitate this process”.

(d) If certification is not received, the proportionate withholding of payment in respect of the non-compliant contractor or subcontractor will be provided for.

In order to create a transparent and open internal market, ICTU recommends that the Commission consider the adoption of a European directive to set out the ultimate liability of general contractors and clients with a view to ensuring compliance with and application of provisions governing pay and working conditions, social security and tax liabilities in a subcontracting chain. Such a directive would close any legal loopholes whereby subcontracting is used to get around tax, social, statutory and contractual obligations, thereby distorting the market and removing protection for workers.

Main contractors not only in the Public but also in the Private sector should be made responsible for the whole supply chain. Introducing forms of client liability or joint and multiple liability for wages and working conditions can be very effective to make employers and their organisations accountable for.
and to make them take action; those that ‘know or could have known’ that the products or services they were buying from their agencies or subcontractors have a price that indicates they are far below official market prices and wages should be held responsible.

This recommendation is in line with, the European Parliament report on the application of Directive 96/71/EC relating to the posting of workers (2006/2038(INI)) which “calls on the Commission to create a European legal framework to regulate joint and several liability for general or principal undertakings, in order to deal with abuses in the subcontracting and outsourcing of cross-border workers and to set up a transparent and competitive internal market for all companies.”.

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

The Irish Congress of Trade Unions believes that an EU wide set of minimum standards are needed to create a level playing field and that the draft directive on temporary agency work should be adopted without further delay so that agency workers are provided with equal treatment with their counterparts in user enterprises from day one. In addition we are calling for restrictions on the use of agency work.

**Ensure equal treatment for agency workers with comparable staff in user enterprises.**

The vast majority of EU member states (75%) have dealt with the problem of employers using agency work as a means to pay less and introduce lower standards by introducing laws to provide for equality of employment between agency workers and comparable permanent staff. Referred to as the ‘non discrimination principle’ the majority of laws around Europe provide that agency workers must receive the same terms and conditions as comparable permanent employees in the user enterprise.

- In Belgium, agency workers must be paid the same and give same terms and conditions as permanent workers in the user enterprise.
- In Spain, the law was modified in 1999 to ensure pay parity with that of the collective agreement of the sector to which agency worker is assigned.
- In Portugal, the law establishes pay and conditions parity with permanent workers.
- In Greece, an agency worker’s pay must not be lower than that set by the relevant collective agreement applying to the user company staff.
- In the Netherlands, the equal wages clause can be varied but only by a collective agreement within the employment agency.
- In France, the pay of an agency worker is linked to what a post probationary permanent employee with the same qualifications would earn in that post. Agency workers are also eligible for an end of assignment 10% of gross pay earned during the assignment and compensation equivalent to a further 10% in lieu of paid holidays which they are not entitled. In addition there is a compulsory levy of 2% of payroll costs for training.
In Germany, since 2004, agencies are obliged to guarantee their workers the same pay and employment conditions as permanent staff in the user enterprise unless a collective agreement is made to the contrary.

Not just ‘old’ member states but also the majority of new member states have introduced laws to guarantee equal pay and treatment for agency workers, including Poland, Romania, Slovakia, Czech Republic, and Slovenia.

Only the UK, Hungary and Ireland have not respected the non discrimination principle and legislated for equal pay and conditions between agency workers and comparable employees in the user enterprise. This is further exacerbated in Ireland by the fact that there is nothing ‘temporary’ about agency work. There are no restrictions on how long a post can be filled by agency work which can leave workers in a permanently precarious situation.

**Ensure that agency work is not used for ‘equality avoidance’ purposes.**

In Ireland the absence of the right to equal treatment for agency workers is undermining other EU objectives and rights. This is particularly the case with the principle of equal pay guaranteed in Article 141 and other equality/ non discrimination rights. Employment agencies are, in some circumstances, being used by employers as a means of equality avoidance and are undermining equal pay and equality legislation.

This happens where an employer employs their staff on an ongoing basis through an employment agency, in these circumstances the employee does not have an entitlement to the same terms and conditions as the other workers they are working with due to provisions in national legislation. The ‘comparator’ requirements set out in the equality legislation state that agency workers must compare themselves to other agency workers rather than the workers they are working beside. The race discrimination case heard by the Equality Tribunal (DEC-E-2004-0019) confirms that Section 8 (2) of the Employment Equality Act 1998 means that agency workers must compare themselves with other agency workers and cannot compare themselves with the workers within the company where they are placed.

ICTU believes that this has the effect that the protections against unlawful discrimination can be defeated simply by employing workers through an agency. This is an unacceptable situation and should not be allowed to continue as it has the potential to undermine the provisions of the EU treaties aimed at addressing discrimination at work.

The Community prohibition on discrimination does not admit exceptions or areas of tolerance that would shelter violations; discrimination must always be rejected. In addition, protection from unlawful discrimination of the nature described above falls within the protection of *Jus Cogens*. *Jus Cogens* establishes that some rights are so fundamental that no nation may ignore them or allow individuals to contract out of them.

Taking into consideration the characteristics of the general obligations of States under general international law and international human rights law, specifically, with regard to *jus cogens*, States must develop, as stated in OC-18/2003, specific actions of three mutually complementary types: a) they must ensure, by legislative and other measures – in other words, in every sector of State attributes and functions – the effective (and not only nominal) exercise of the human rights of workers on an equal footing and without any discrimination; b) they must eliminate provisions,
whatever their scope and extent, that lead to undue inequality or discrimination; and c) lastly, they must combat public or private practices that have this same consequence. Only then, can it be said that a State complies with its obligations of *jus cogens* and only then would the State be protected from international responsibility arising from non-compliance with international obligations.

**Adopt the EU Directive on Temporary Agency Work.**

The stalled Directive on Agency Work has the stated objective of providing a minimum level of protection for temporary agency workers. The proposal establishes the principle of non-discrimination in working conditions, including for pay, between temporary agency workers and comparable workers in the user enterprise as soon as the temporary agency worker has completed [6 weeks’] work in the same user enterprise. The Irish Congress of Trade Unions believes that an EU wide set of minimum standards are needed to create a level playing field and that the draft directive on temporary agency work should be adopted without further delay so that agency workers are provided with equal treatment with their counterparts in user enterprises from day one.

There should be no qualifying period for the application of the equality principle, this would lead to a levelling down in those member states which already guarantee equal treatment from day one and would provide a loophole for avoidance.

**Limit the Use of Agency Work**

Many member states further reinforce the equal treatment/‘non discrimination principle’ with additional measures to ensure that agency work is used for bona fide reasons. The Irish Congress of Trade Unions believes that an EU level approach to limiting the reasons for use of agency worker to genuine flexibility requirements is needed. In this regard we are recommending that the Commission draw on practice around the EU where the use of agency workers are prohibited. For example:

- seven member states define in law specific reasons for which an employer may have recourse to agency workers,
- five limit the duration of agency work.
- four set limits to the sector and occupation usage

In Spain, agency work is prohibited in certain sectors, including the public service sector and for ‘dangerous’ work. In Poland, legislation was introduced in 2003 to provide that the maximum employment period is an aggregated 12 months over a period of 36 consecutive months. In Portugal and Belgium, the maximum permitted duration for use of agency workers is connected to the reasons for use. In Portugal where the justification is the temporary substitution of permanent workers then the duration must correspond to the duration of the justifying cause. In Greece, a user company may not employ agency workers for a total period of over eight months, if the period is exceeded the contract between the agency worker is automatically transformed into an open ended (contract of indefinite duration) between the agency worker and the client firm. While in France, neither the objective nor the outcome of agency working can be to fill a post for a ‘lengthy period’ of the client company and the maximum duration in any case is 18 months renewals included.

In Slovenia, agency workers cannot be used by the user firm ‘continuously’ or, to replace striking workers or in circumstances where there have been collective redundancies in the past year or in other cases determined by sectoral agreement. In the Czech Republic an agency may assign an
employee to the same user for a maximum of 12 calendar months, unless the employee requests a longer period. Finally in Sweden, collective agreements are concluded with representative organisations of agencies, by sectors. Typically collective agreements provide that 75% of full monthly salary must be paid whether the agency work is engaged in work or not. The white collar agency agreement provides for 80% of their normal weekly wage.

Who is the employer?
A vital question remains in terms of who is the legal employer of the agency worker. In the main, across Europe it is the employment agency who is the employer, at least for the initial period. Employment contracts are with the agency and the agency is responsible for ensuring that the agency worker is given the same pay and conditions as the comparable permanent employee in the user company.

In Ireland we have a unique situation created by our common law where both the end user employer and the agency will claim not to be the employer. In mid eighties a decision taken under Irish case law, the Minister for Labour v PMPA Insurance Co. under administration, (1986) deemed that the agency temp was not an employee of the hiring company and thus did not have the protection of legislation.

The Unfair Dismissals Amendment Act 1993 overturned this decision but only for the purposes of unfair dismissals and provided that the end hirer/user is to be considered as the employer for the purposes of unfair dismissals Acts. So for the purpose of the Unfair Dismissals Acts the employer is the person for whom the agency worker works, i.e. the end user.

However in other employment legislation – e.g. the Terms of Employment, the Maternity Protection Act 1994, Organisation of Working Time the person who pays the wages is considered to be the employer – usually the agency.

Other Acts, such as the Fixed Term Act specifically remove rights from agency workers so the issue of who is the employer does not arise.

This has lead to a very unsatisfactory situation in Ireland, leaving the Irish Congress of Trade Unions with no option but to seek to make the end user enterprise the employer as a means to ensure that agency workers are provided with equal pay and treatment.

The Irish Congress of Trade Unions believes that the adoption and implementation of the Temporary Agency Work Directive which includes the equal treatment principle would address many of the difficulties being experienced in Ireland and lead to coherence in the approach across the EU.
Question 11. How could minimum requirements concerning the organisation of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers health and safety? What aspects of the organisation of working time should be tackled as a matter of priority by the Community?

ICTU is surprised that the Commission has chosen to raise this question in the context of the Green Paper. The failure of the Council negotiations on the proposed amendments to the Working Time Directive was due to those amendments moving too far from the objectives of the Directive on worker health and safety so any modifications must move towards greater protection for worker health and safety.

In Ireland the existing legislation gives ample room to provide for the flexibility needs of enterprises without compromising worker health and safety, as has been demonstrated on a number of occasions. ICTU recommends the approach adopted in our national legislation which allows for the modification of the Acts provisions by means of collective agreement with the oversight of the Labour Court. This provides a good example of legislation establishing a framework which can be modified through collective bargaining rights13. There are safeguards for workers in that the agreement must be concluded by a trade union and other provisions to ensure that the Directives objectives have been achieved.

ICTU supports the ETUC, the TUC and other unions around Europe in calling for

- An immediate end to the individual opt-out permitted in a limited number of Member States.
- The incorporation into the Directive of ECJ case law (SIMAP & JAEGER) which has found that all time which is not at the free disposal of workers should be treated as working time.

It is worth noting again here ICTU call for recognition of employee requested flexibility. The ETUC have campaigned for the inclusion in the Directive of a right to flexible working arrangements at the request of the employee. In Ireland, ICTU is campaigning for;

- The right of workers to be able to request a flexible work arrangement option
- Employers to be obliged to seriously consider the request
- Refusals of the employees request to be permitted only where there is a sound business case for the refusal.

13 Section 24 of the Organisation of Working time Act 1997 provides: The Labour Court shall not approve of a collective agreement unless the following conditions are fulfilled as respects that agreement, namely—

( a ) in the case of a collective agreement referred to in section 4, 15 or 16, the Labour Court is satisfied that it is appropriate to approve of the agreement having regard to the provisions of the Council Directive permitting the entry into collective agreements for the purposes concerned,
( b ) the agreement has been concluded in a manner usually employed in determining the pay or other conditions of employment of employees in the employment concerned,
( c ) the body which negotiated the agreement on behalf of the employees concerned is the holder of a negotiation licence under the Trade Union Act, 1941, or is an excepted body within the meaning of that Act which is sufficiently representative of the employees concerned,
( d ) the agreement is in such form as appears to the Labour Court to be suitable for the purposes of the agreement being approved of under this section.
As previously stated, ICTU is disappointed that the Commission has not prioritised employee requested flexibility.

**Question 12. How can the employment rights of workers operating in a trans-national 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 on this matter?**

The differences in national definitions and categories particularly of employee/self employed is increasingly causing difficulties and calling into question systems which extend solidarity and protect all workers regardless of status. Likewise differences in the rights provided to workers on non standard contracts are leading to forum shopping by some employers in search of ways of avoiding responsibilities.

In the case of cross-border work, the basic rule must apply; that the labour laws of the country of employment take priority, unless the country of origin provides better protection. As a central principle, ICTU believes that at a minimum, the employment rights of the country where work is carried out should be available to all workers within its territory regardless of the country of origin of the worker or where the employer is based. Where workers are denied these rights there should be access to an effective enforcement regime for workers and unions.

The Commission should have particular regard for the situation of transport workers and ensure that international laws and ILO Conventions protecting transport workers are respected. In addition the Commission should encourage Member States to ratify the ILO Convention No 185, on Seafarers Identity Documents.

**Question 13. Do you think it is necessary to reinforce administrative cooperation between the relevant authorities to boost there effectiveness in enforcing Community labour law? Do you see a role for social partners in such cooperation?**

The cross border mobility of workers, enterprises and services in an enlarging Europe poses serious questions about how we ensure respect for rights in a transnational context with just national labour law. The Commission should be actively supporting the coordination of national employment rights enforcement authorities and labour inspectorates. The experience of ICTU is that there is little cooperation in existence at this time and workers experience significant difficulties in seeking to have their rights enforced due to a lack of effective investigation, complaints and redress mechanisms.

This is already a complicated and difficult area, labour inspection and enforcement has been made more difficult and existing weakness exacerbated by the Commissions Guidance.

ICTU believes that a priority action for the Commission should be to amend Communication COM(2006) 159 “Guidance on the posting of workers within the framework of the provision of services” which is working against the effective enforcement of labour law by Member States.
The Guidance needs to be amended in two key areas to specifically allow Member States to;

- Require the retention of documents in the country where the workers are working and
- Require an identifiable employer within the country where the worker is working, who has legal responsibility for compliance with labour law.

The above provisions are entirely consistent with the objective of the Directive on the Posting of Workers which requires member states to ensure compliance with labour law.

Ireland’s new National Agreement Towards 2016 commits that “New legislation will be published as necessary, consistent with the EU Treaties; during 2007 to provide that every employee must have an identifiable employer within the State who has legal responsibility for compliance with all aspects of the applicable Employment Rights legislation”.

It will be unacceptable to ICTU if the Commission’s ‘Guidance’ were to become an obstacle to the introduction of this legislation and fulfillment of this and other similar compliance and redress commitments.

There is undoubtedly a need for improved labour inspection. The Commission should promote the structured involvement of unions in labour inspection as a key way to improve labour inspection.

Across Europe penalties for companies breaching labour standards need to be increased to provide a real disincentive to bypassing the rules.

Finally ICTU also recommends that the European Parliament proposals on the creation of a European labour inspection office should be revisited by the Commission.

**Question 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 must be combated; it encourages unscrupulous employers, fosters illegal mobility and has highly hazardous implications for worker safety, health and welfare.

The Commission should encourage member states to focus on removing the demand for undeclared work among employers. Measures aimed at reducing the demand for undeclared work among employers will be more effective than measures aimed at employees. In this regard ICTU calls on the Commission to ensure that Member States do not address undeclared working by blocking access to employment rights for the workers.

Another vulnerable group in need of protection is non EEA migrant workers. In this regard it is ICTU’s strong view that the Commission should encourage Member States to ratify and incorporate the provisions of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. The Convention provides a comprehensive legal framework for protecting migrants both documented and undocumented. It establishes minimum

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14 This is the responsibility of unions in a number of countries e.g. Sweden
standards of protection for migrant workers and their families that are universally acknowledged. Applying the Convention’s provisions will allow Member States to bring their legislation in closer harmony with recognised international standards. The ratification of the Convention is important for a number of reasons:

In the Convention migrant workers are viewed as more than just economic entities. They are seen as social entities with families and have rights accordingly;

   a) The Convention provides for an international definition of a migrant worker and for standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families;

   b) The Convention sets out that States must provide sanctions against persons or groups who use violence against migrant workers employ them in irregular circumstances, threaten or intimidate them;

   c) Fundamental Human Rights are extended to Migrant Workers and additional rights recognising their unique situation, in particular the right to equality of treatment with nationals of states in employment and in other legal, economic political, social and cultural areas;

Ratifying the Convention would be a significant leap forward for Ireland in the prevention and elimination of the exploitation of migrant workers and their families.

The Commission should also encourage member states to avoid introducing measures which have the effect of making a workers permission to live and work in the member state dependant on their staying with one particular employer and likewise the renewal of permission to remain in a member state should not be dependant on the worker remaining with a single employer. The experience of ICTU has been that any provisions that have the effect of linking a migrant workers right to reside very closely with their staying with one particular employer can make workers vulnerable to exploitation and abuse. It is essential that workers are able to change their employer.

The Irish Congress of Trade Union is calling on the Commission to ensure that having an invalid or absent employment permit would not destroy a workers rights in employment, undocumented working should never be fought by blocking access to employment rights and other work related rights, (including their right to trade union, freedom of association and collective bargaining), regardless of their residency or permission to work status. Undocumented migrant workers who want to escape from situations of irregularity and exploitation should be granted a certain legal space to complain about their situation, to sue their employer for unpaid wages, and to receive redress and payments due to them, without being expelled in advance. Procedures could be simplified and mechanisms developed (such as a legal presumption about unpaid wages, which can be refuted by the employer, or the granting of temporary residence permits to those who report exploitation) to make sure that migrant workers do not bear the brunt of punishment for their exploitation and to allow migrant workers and their representatives to collect evidence.

Female undocumented migrants are especially vulnerable and are often the victims of forced labour. Complaint procedures and measures to tackle irregular employment in highly feminised sectors such as domestic work should therefore be designed in such a way as to provide women with proper protection.
Finally all individuals residing on the European Union territory, regardless of their legal status, are human beings and as such are the subjects of fundamental human rights. When they are performing work, they are subjects of fundamental rights at work, as acknowledged in the European Charter of Fundamental Rights, and in other international instruments. The Commission's reforms of labour law must recognise and promote these rights.

7. Concluding Remarks

The Irish Congress of Trade Unions would like to re-emphasise the importance of modernisation of labour law as a means to improve the quality of working life experienced by workers. We have outlined how employee involvement particularly in an environment of properly respected collective bargaining builds competitive advantage for EU companies in a very real and tangible sense. We have called for the reforms to address the persistent ‘opportunities divide’ in the Irish workplace by introducing new rights for workers importantly the introduction of an EU wide right to paid learning leave and for the recognition of a right to employee controlled flexibility.

We have highlighted concerns about the lack of rights experienced by agency workers and called for the adoption of the Temporary Agency Work Directive and the implementation of the equality principle. We have shown the importance of introducing forms of client liability or joint and multiple liability for wages and working conditions. We have exposed the dangers of allowing the growth of bogus self employment and called for an EU definition of worker. We have requested that any modifications of the Working Time Directive would move towards greater protection for worker health and safety and demanded an end to the individual opt out. We have asked for the amendment of the Commission's Guidance on the posting of workers and called for improved rights for migrant workers in the EU.

Importantly we have called for development of Community Law to define and guarantee respect for the right to freedom of association and collective bargaining.

Finally, the ICTU recommends to the Commission not adopt a minimalist approach of coordination of employment policies not to rely on using the ‘open method of co-ordination’ as the means through which the EU employment rights objectives would be developed. Congress is concerned that this approach will not be an effective mechanism to improve employment standards. In addition such an approach is unlikely to bring about the type of radical improvements achieved in the past through employment directives that vested rights in individuals either against the state, other individuals or companies.

For further information contact
Esther Lynch
Legislation and Social Affairs Officer
Irish Congress Trade Unions
31/32 Parnell Square
Dublin 1
Ireland

Telephone: 01 8897777