1. **Introduction: The Green Paper**

Under the heading ‘Three way relationships’, the Commission’s Green Paper addresses two separate situations:

- Triangulated relationships (typically the temping situation)
- Chains of sub-contracting

As the Commission recognises, ‘similar’ (but unidentified) problems arise with both, primarily in identifying who is the responsible ‘employer’ when things go wrong. The Commission then asks at questions 9 and 10:

9. *Do you think the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights? Would subsidiary liability be an effective and feasible way to establish that responsibility in the case of sub-contractors? If not, do you see other ways to ensure adequate protection of workers in "three-way relationships"?*

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

For the purpose of this discussion, I think we can agree that the problem identified by the Commission is correct. It is certainly not in the individual’s interest that there is uncertainty over (1) the identity of their employer and (2) probably, their own status. This particularly acute in the British context where in triangulated relationships control and mutuality of obligation are split (the user undertaking has control over the temp’s day to day activities but no contract with the temp; the agency has a contract with the temp but no control over his day to day activities while working for the user, although there may
possibly be mutuality of obligation between temp and agency, in the narrow sense at least). Analysed in this way, there is a chance that the individual has no contract of employment with either the agency or the user.¹

The uncertainty as to the identity of the employer and the status of the individual, while possibly good in the name of flexibility, also generates costs for employers, not least in defending litigation.

In the time allocated to me, I should like to do two things:

• identify a number of techniques used in the national systems to address this problem; and then

• consider whether the EU can/should adopt those techniques, requiring them to be extended to all 27 states.

2. Techniques used in the national systems to address the problem

2.1 Identifying the employer

(a) Legislative

One possibility is where the legislature takes the bull by the horns and identify who the employer is. This approach can be seen in some more recent British legislation. For example, Regulation 36 of the Working Time Regulations 1998 provides:²

36. - (1) This regulation applies in any case where an individual ("the agency worker") -

(a) is supplied by a person ("the agent") to do work for another ("the principal") under a contract or other arrangements made between the agent and the principal; but

(b) is not, as respects that work, a worker, because of the absence of a worker’s contract between the individual and the agent or the principal; and

(c) is not a party to a contract under which he undertakes to do the work for another party to the contract whose status is, by virtue of the contract, that of a client or customer of any profession or business undertaking carried on by the individual.

(2) In a case where this regulation applies, the other provisions of these Regulations shall have effect as if there were a worker’s contract for the doing of the work by the agency worker made between the agency worker and -

² There is an equivalent provision in s.34 of the National Minimum Wage Act 1998.
(a) whichever of the agent and the principal is responsible for paying the agency worker in respect of the work; or
(b) if neither the agent nor the principal is so responsible, whichever of them pays the agency worker in respect of the work,

and as if that person were the agency worker’s employer.

In Singapore, the legislation goes further. S.131 Employment Act, 1996 – provides:

In all proceedings under Part XV, the onus of proving that he is not the employer or the person whose duty it is under this Act or under any regulations made thereunder to do or abstain from doing anything shall be on the person who alleges that he is not the employer or other person, as the case may be.

(b) Judicial

British tribunals have shown some creativity in implying a contract of employment between , most notably in the decision in *Dacas*.

In that case an action was brought by the individual temp against the agency for unfair dismissal. She had been working as a cleaner for the user, a local authority, for 4 years but was recruited by the temp agency and was paid by the agency. When she was rude to a visitor to the user’s premises the user asked the agency to withdraw her from the contract and the agency told her that no more work would be found for her. She sued both the agency and the user for unfair dismissal but the ET found that since she had no contract with the user, she could not sue it and since her contract with the agency was not a contract of service she was not an employee and so could not bring a claim against it. She appealed, but only in respect of her claim against the agency.

The EAT overturned the ET’s decision. On appeal to the Court of Appeal, the user was joined as a respondent to the appeal at the court’s own motion, in the light of the possibility that the court would allow the agency’s appeal that the temp had been employed by the user. It did. The Court of Appeal found:

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3 *Dacas v Brook St Bureau* [2004] ICR 1437.
1. that there was not sufficient mutuality (in the broad sense) between the temp and the agency for there to be a contract of employment, nor was there any control; but

2. if the decision in respect of the user had been appealed, the case would have been remitted to the tribunal to determine whether there was an implied contract and that it was a contract of employment between the temp and the user.4

This approach was confirmed in *Cable and Wireless v Muscat*,5 the facts of which were more unusual since the temp in that case was previously directly employed by the user before becoming indirectly employed through an agency, at the user’s request.

There are various permutations on this *Dacas* approach by lower courts. For example, in *Motorola v Davidson*6 the EAT found sufficient control by the user to support a finding by the ET that the temp was the user’s employee and in *Ncube*7 the ET found that the temp (a nurse) could be the employee of the agency, although the facts again were rather specific (the close management and disciplinary control exercised by the agency and its obligation to provide regular training and the agency workers’ obligation to undertake it).8 The more common position is, however, laid down by the Court of Appeal in *Bunce v Skyblue*9 that there was insufficient mutuality between the parties and the agency did not have day-to-day control over his activities. That said, in the context of a tort case, *Hawley v Luminar Leisure*10 the Court of Appeal found the user undertaking (a nightclub employing a ‘temp’ bouncer who serious injured the claimant) to be vicariously liable for the temp’s action because the user exercised detailed control over what the temp did and how he did it. Hallet LJ noted that the nightclub was ‘well able to employ and train their own door staff… They chose to use the services of

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4  See also *Franks v Reuters* [2003] IRLR 423.
7  *Ncube v 24/7 Support Services* ET/2602005/05.
8  *McMeechan v Secretary of State for Employment* [1997] ICR 549.
10  [2006] IRLR 817
security organisations partly as a device to get round employment laws which they believed might inhibit their ability properly to control their clubs’.

(c) Voluntary
The Communications Workers Union (CWU) is the trade union which has been most prominent in securing rights for agency staff. Its involvement dated back to the days when BT (British Telecom) started contracting out many of its functions, often to staff employed through agencies which had recently been made redundant by BT. In the early days BT used up to 8 agencies to provide staff at all skills levels. The CWU, already used to working with BT, negotiated an Agency Best Practice Code I (2001), covering equal opportunities and disciplinary and grievance procedures, aimed at creating consistency of approach in promoting Best Practice among agencies across the industries. The success of this measure was followed up by a second phase covering best practice in the fields of health and safety, welfare, parental maternity, paternity and adoptive leave, working time regulations, recruitment, training and appraisals (but noticeably not dismissals). BT has since reduced the number of agencies that it has used.

In addition, the CWU has entered into a partnership agreement with a number of the larger employment agencies, such as Kelly Services and Manpower.\textsuperscript{11} The Manpower Agreement contains a commitment to active participation in the CWU Agency Forum and to use Agency Best Practice.

The TUC has also been interested in the issue of Agency Work. In its survey ‘Working on the Edge’ (2006) it discussed the parlous position many agency workers found themselves in, especially in respect of the difficulties claiming unfair dismissal and redundancy. It did however provide a list of examples of workplaces that have negotiated on the use and pay of agency workers:

- Civil service (4% agency): Agreement that the agency will waive "temp to perm" fees if the temp has been with the service for 14 weeks'

\textsuperscript{11} See further Policy Studies Institute, a report for the TUC, The Hidden One-in-Five: Winning a Fair deal for Britain’s Vulnerable Workers (2006), 12.
continuous employment; and on pay, agrees with the agency the level of temp required which dictates the level of pay.

- Communications: Agreements on agency best practice, partnership agreements on agency terms and conditions (procedural and facilities), and information and consultation.

- Manufacturing (25% agency staff): Union 'third party' agreement with parent company regarding the use of temporary employees.

- Manufacturing (2% agency): if agency worker is engaged for 3 months or more the company must take them on permanently or employ a permanent worker; on pay, must not undermine national pay rates.

- Manufacturing (2% agency): Temporary Agency Labour agreement (production workers) promising consultation with the unions ‘at the earliest opportunity’ when temporary labour is required. The text provides for a meeting with union representatives every three months when temporary labour is employed on site "to discuss the number and type of temporary workers to be used". The agreement contained commitments on the security of permanent employees while "temporary workers of a comparable skill group are employed on site"; that they will be given preference on "more skilled activity", shift working and the allocation of overtime; that the use of agency labour will be jointly reviewed every three months, "with a view to directly employing this labour at the earliest opportunity"; that agency workers will be employed on a maximum 37 hour week and receive agreed overtime and shift premia; safeguards on the use of new shift patterns; and opportunities for permanent employment to be advised initially to "directly employed temporary labour" before they are advertised to "agency labour" and external candidates. It specified a pay rate for temporary employees that would be "reviewed in conjunction with the annual pay review".
• Manufacturing (25% agency staff): Any temp who has been there more than 12 months should be paid the equivalent of "grade 4" which is one grade below permanent staff.

• Transport (30% agency): Agreement/policy that agency staff be paid no more than permanent staff.

It also listed other workplaces that have negotiated on the use of agency workers only:

• Engineering (10% agency staff): Agreement to limit ratio of agency workers to full-time employees.

• Local government (15% agency staff): All agency staff with more than one year's continuous placement with the council must be offered appointment to a directly employed job.

• Manufacturing (10% agency staff): At time of survey, seeking recognition agreement with a migrant workers agency (voluntary); and ‘TUC learner reps discussions ongoing including agency staff’

• Manufacturing (public sector) (25% agency): Agency workers have to be given a minimum of 4 hours work if they arrive on site (company employees contracted for 8 hours per day).

The TUC also said that some workplace representatives explained how they were trying to secure agreements to ensure that temporary agency workers were not used as temps indefinitely but had access to permanent positions after a given period of time. A representative from a manufacturing workplace with 40% agency workers said: ‘We have consistently pushed for agency (staff) to be made fulltime employees and recently some have been appointed permanent employees.’

2.2 Identifying the status of the individual temp

It may perhaps be artificial to distinguish between identifying the employer and identifying the status of the individual, but at least in theory, the agency might argue that it is the employer but still argue that the individual is neither an employee nor a worker due to the absence of sufficient mutuality.
(a) Legislation

One possibility is for the legislature to prescribe the employment status of the individual, as Reg 36 of the Working Time regulations 1998 does. Two examples from abroad (taken from draft ILO guidance on Recommendation No. 198) demonstrate how this might be done:

**New Zealand** Employment Relations Act, No. 24 of 2000

Section 6 (1) - In this Act, unless the context otherwise requires, employee —

(a) means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and

(b) includes: (i) a homeworker; or

(ii) a person intending to work; but

(c) excludes a volunteer who:

(i) does not expect to be rewarded for work to be performed as a volunteer; and

(ii) receives no reward for work performed as a volunteer.

Section 6 (2) - In deciding for the purposes of subsection (1)(a) whether a person is employed by another person under a contract of service, the Court or the Authority (as the case may be) must determine the real nature of the relationship between them.

Similarly, in South Africa Labour Relations Act, 1995 & Basic Conditions of Employment Act, 1995, as amended, Section 200A & section 83A make certain assumptions as to who is an employee:

Presumption as to who is employee.

(1) A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present:

(a) The manner in which the person works is subject to the control or direction of another person;

(b) the person’s hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person is a part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(e) the person is economically dependent on the other person for whom that person works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.
(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3).

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3), any of the contracting parties may approach the CCMA for an advisory award about whether the persons involved in the arrangement are employees.

In Slovenia specific provision is made in the Employment Contracts Act, 1 January 2003 about the relationship between the user and the temp.

Article 61 (Agreement Between the User and the Employer, Referral of the Worker)

(1) Before the worker starts working, the user must inform the employer about all conditions which have to be fulfilled by the worker for the provision of work, and shall submit to the employer the assessment of risk of injuries and health damages.

(2) Before the worker starts working with the user, the employer and the user shall conclude an agreement in writing in which they shall in greater detail define mutual rights and obligations as well as the rights and obligations of the worker and of the user.

(3) In accordance with the agreement between the employer and the user, when referred to work with the user, the worker must be informed in writing about the conditions of work with the user as well as about the rights and obligations which are directly related to the provision of work.

Article 62 (Rights, Obligations and Responsibilities of the User and of the Worker)

(1) The worker must carry out the work pursuant to the user’s instructions.

(2) In the period of the worker’s work with the user, the user and the worker must take into account the provisions of this Act, of collective agreements obligating the user, and/or of the user’s general acts, with regard to those rights and obligations which are directly related to the performance of work.

(3) If the user violates the obligations pursuant to the previous paragraph, the worker shall be entitled to refuse to carry out the work.

(4) If the worker violates the obligations pursuant to Paragraph 1 of this Article, these violations shall be a possible reason for the establishment of the disciplinary responsibility or for the termination of the employment contract with the employer.

(5) The worker shall take the annual leave in accordance with the agreement between the employer and the user.

In the Netherlands on call workers (mostly women working in shops, hotels, restaurants, hospitals, food factories either get no employment contract
at all because they are free to refuse the call or they get a so called “zero-hour” contract) enjoy the benefit of the reversal of the burden of proof: if the employment is regular and continuous, the burden of proof is reversed and it is for the employer to prove that the person is not an employee.

UK Law has not gone so far as to prescribe the status of the individual. Agency work has been regulated by the Employment Agencies Act 1973 as amended and the Conduct of Employment Agencies and Employment Businesses Regulations 2003. The Conduct Regulations merely provide that an agreement between an employment business (agency) and temp must specify whether the temp ‘is or will be employed by the employment business under a contract of service or apprenticeship, or a contract for services’. Manpower is a particularly interesting example. Not only does it recognise CWU but it also has an ‘Employee handbook’ which it gives to its staff, making it clear that it is the employer of the temps who are ‘employees’ with contracts of employment with all the employment rights (outlined above) that entails.

Statute also has the power to intervene: s.23 of the Employment Relations Act 1999 gives the government the power to extend the protection of employment rights to these individuals by secondary legislation, a power

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12 The Act gives power to make delegated legislation on the way in which and the terms on which services may be provided by persons carrying on such agencies and businesses but this power has been used primarily to require employment businesses to be transparent in the terms on which they deal and it does not restrict the freedom of the employment business to determine that the worker will be regarded as an independent contractor. The tx legislation requires these workers to be treated as employees (s.134 Income and Corporation Tax Act 1988 and SI 1978/1689 Social Security (categorisation of Earners) regulations 1978, SI 1978/1689).
13 SI 2003/3319
14 Reg. 15(a).
15 Section 23(4) states that an order under the section may:
   a. provide that individuals are to be treated as parties to workers’ contracts or contracts of employment;
   b. make provision as to who are to be regarded as the employers of individuals;
   c. make provision which has the effect of modifying the operation of any right as conferred on individuals by the order;
   d. include such consequential, incidental or supplementary provisions as the Secretary of State thinks fit.

The power in Section 23 applies to any right conferred on an individual under the following legislation:

- The Trade Union and Labour Relations (Consolidation) Act 1992;
- The Employment Rights Act 1996;
that (amongst others) Buckley LJ urged the DTI to use in Montgomery v. Johnson Underwood. The government has not yet used this power. It has put the matter out for consultation but the responses have been mixed and predictable and in its Success at Work policy statement the government does not propose any changes to the law.

(b) Judicial
As we saw above, the courts, applying the standards tests of mutuality of obligation, control etc may well decide that the individual is an employee or a worker. Usually, if they find the user to be the employer, it is likely that the court will also find that the individual temp is an employee

(c) Collective agreements
The ILO Employment Relationship Recommendation 198 of 2006 stresses social dialogue as the ideal means to achieve consensus on finding solutions to questions related to the scope of the employment relationship at the national level. It also aims at promoting best practices. Albeit not in the specific context of triangulated situations, the ILO reports that:

In Ireland, the difficulty of distinguishing between dependent and independent workers has prompted an approach based on consensus between the Government and the employers’ and workers’ organizations. The Irish system of industrial relations is based on broad social partnership reflected in a national agreement which fixes wage increases and other aspects of policy. In the context of the negotiations on the agreement for 2000 to 2002, called the Programme for Prosperity and Fairness (PPF), it was agreed to establish an Employment Status Group with the task of devising a uniform definition of “employee”. In the absence of a statutory definition of “employed” or “self-employed”, there was growing concern that the number of people classified as “self-employed” was increasing, despite evidence that in their case the status of “employee” would be more appropriate. The resulting Code of practice for determining employment or self-employment status of individuals is a good example of a multiple criteria approach. The Employment Status Group formulated a set of indicators for determining which workers were employees and which were self-employed (see below). With these indicators in mind (even though not all of them may apply in every case) and taking into

- The Employment Relations Act 1999;
- Any instrument made under section 2(2) of the European Communities Act 1972;

16 [2001] IRLR 269, para. 43.
17 DTI, Discussion Document on Employment Status in Relation to Statutory Employment Rights, URN 02/1058
18 DTI, Employment Status Review: Summary of Responses, March 2006
consideration the person’s work as a whole, including the conditions of work and the real nature of the relationship, it should be easier to determine the employment status of the individual.

3. Should the EU respond to this problem?

We have now seen examples as to how different states and different actors have responded to what appears to be a global problem. The question for the EU is should the EU intervene. The simple answer would be yes – on the view that it would be easy, and that instinctively lawyers like legislation as a way of responding to a particular difficulty. The problem is that an EU Directive that says (1) user undertakings are responsible for compliance with employment rights for those they employ for – say - more than 6 months, the agency in all other circumstance, and that temps are employees of the user after 6 months, employees of the agency before that is a rather blunt instrument. I was struck by the bluntness of this approach when considering Article 8 of Directive 91/383. It has posed considerable problems in terms of both the interpretation of the provision and the conflicts between what is legally possible and practically desirable. The British Health and Safety Executive takes the view that while it is legally possible to impose duties on the user undertakings, it may be more desirable to impose certain requirements on the temp agency who has a longer term interest in the well-being of the employee (eg the provision of appropriate footwear).

One possibility would be for the EU to encourage soft law cooperation between the states on this point, through some sort of OMC methodology which the Green paper appears to envisage on p.6. I am not at all convinced that OMC translates well in areas of essentially hard employment law, as opposed to policy. Furthermore, the ILO is already doing a lot of good in this area – why replicate it? I am, however, more attracted by the temp agencies and users being forced to work out solutions which are suitable to them and their industry. The CWU’s approach shows an interesting way forward. Would it be worthwhile considering some sort of reflexive law approach, as seen in I&C Directive 2002/14, where the social partners and the government
are obliged to work out a solution failing which minimum standards, laid down in the annex, would apply? Such an approach might be all the more effective when allied to the fundamental rights laid down in the Charter.