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

In no particular order, the following areas need addressing:

- The application and operation of the Acquired Rights Directive (“ARD”) across borders within the EU/EEA and to countries outside the EU/EEA e.g. India. This includes:
  a) Whether and the extent to which the ARD applies when the economic unit is transferred across borders both within and outside the EU/EEA;
  b) Whether the receiving country employer has any responsibility for the acquired rights of the transferring employees;
  c) How the preservation of acquired rights in country A can be reconciled with the existing employment rights, collective agreements and social provision in (the receiving) country B;
  d) How collective rights (e.g. employee representation structures) are capable of transfer between jurisdictions where the collective agreements and industrial relations infrastructure are very different; and
  e) The position where a Member State’s law implementing the ARD (in respect of the transferor) go wider (e.g. on its applicability) than the equivalent law applicable to the transferee located in another Member State. For example, in the UK the revised Transfer of Undertakings (Protection of Employment) Regulations 2006 include within its scope some transfers of service provisions which would not be covered by the ARD.

2. Whether the definitions of “worker” and “employee” remain adequate for the diverse range of working arrangements that subsist within the EU and whether this is an issue that now requires community-wide legislation. Academic research into “Personal Work Contracts in European Comparative Law” is currently being carried out in the UK at Oxford University by Professor Mark Freedland which is described at Volume 35 No 1 Industrial Law Journal (March 2006). What we can evidence as practitioners, as is also reflected in the Green Paper, is that the existing dichotomy between worker and employee is neither satisfactory nor adequate. This is illustrated by the following two current problems:

- a) Who employs agency workers? This covers the issue of tripartite arrangements where there is often a lack of clarity on which entity is responsible for labour/employment protection law compliance.
- b) When are “self-employed” consultants/workers to be treated as employees and therefore protected by local employment protection legislation and/or collective agreements? This might include, for example, where their services are provided through the consultant’s/worker’s own service company. Clarity on all of these issues would be helpful as the labour marketplace continues to see an increasing amount of segmentation by the creation of a multitude of different “shapes” of worker. Matters for consideration might
include:  a) Who is a worker who gets “full” employment protection and benefits?  b) whether there should be a second category of worker who, in return for a minimum “floor” of employment rights and benefits, should be employed on a basis giving the employer greater flexibility (e.g. in respect of termination of employment); and  c) Whether workers should be able to choose between two tiers of status: (i) a full range of employment protection rights during employment, but with lesser rights on termination;  or  (ii) limited employment rights during employment, but stronger rights on termination of employment.  

3. Employers’ obligations for training of their employees. Reducing unemployment and the creation of a skilled workforce should continue to be a major priority of social policy. The EU Commission may wish to consider how this might be achieved without imposing unrealistic burdens on businesses, such as providing fiscal advantages for employers who provide skills training in addition to those necessary to enable workers to do their jobs.

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<th>2(a). Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation?</th>
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<td>Yes</td>
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<th>2(b). How?</th>
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<td>The past policy of encouraging the social partners to agree provisions to reflect their respective interests on job flexibility and security was useful and is generally seen as having been quite successful. But, there is always a tension on how far employee relations matters should be regulated, whether by collective agreement or the law. Consent of the social partners is preferable and more likely to lead to a more enduring framework. However, one needs to be realistic about this. For example, we saw last summer how such a measure in relation young workers in France produced riots. Protections achieved by, or on behalf of workers, are keenly guarded and are not easy to remove. Workers and their representatives need to be persuaded that there is an upside to increasing flexibility and adjusting security. Over recent years employers and Governments in some Member States have not been particularly successful in presenting the argument that more job flexibility can, and usually should, end up with greater employment opportunities. The segmentation of the labour market, whilst presenting benefits to both workers and employers in terms of flexibility, has created an environment where workers engaged in atypical work patterns appear to have a lower standard of employment protection that those who might be called “standard” employees. This increase in the “segmented” atypical workforce is likely to continue its upward trend.</td>
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<td>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?</td>
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<td>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?</td>
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<td>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?</td>
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<td>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?</td>
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In principle, yes depending on where one wants to “draw the line”. This is essentially a political question on which the ELA cannot comment. 

Our answer here is the same as for 2(B). The past policy of encouraging the social partners to agree provisions to reflect their respective interests on job flexibility and security was useful and is generally seen as having been quite successful. But, there is always a tension on how far employee relations matters should be regulated, whether by collective agreement or the law. Consent of the social partners is preferable and more likely to lead to a more enduring framework. However, one needs to be realistic about this. For example, we saw last summer how such a measure in relation young workers in France produced riots. Protections achieved by, or on behalf of workers, are keenly guarded and are not easy to remove. Workers and their representatives need to be persuaded that there is an upside to increasing flexibility and adjusting security. Over recent years employers and Governments in some Member States have not been particularly successful in presenting the argument that more job flexibility can, and usually should, end up with greater employment opportunities. The segmentation of the labour market, whilst presenting benefits to both workers and employers in terms of flexibility, has created an environment where workers engaged in atypical work patterns appear to have a lower standard of employment protection that those who might be called “standard” employees. This increase in the “segmented” atypical workforce is likely to continue its upward trend. 

Yes. The employment market in the EU contains an element of sub-conscious resistance to changing jobs or having a number of jobs throughout a worker’s working life. The concept of “job security” appears to be linked to security in the same job or with the same employer, rather than security in being employed in another job with another employer. If the infrastructure is to increase flexibility in employment protection legislation, it must be accompanied by adequate programmes and job creating initiatives to lessen workers’ concerns about job security. This is because workers will want to know that there will be other suitable jobs to go to. The shift in attitude which such a re-alignment would entail should not under-estimated. 

This is essentially a political question on which the ELA cannot comment.
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?

Yes: In most Member States, the question of whether a worker is an employee is a question of fact. But (as discussed above) there is a considerable lack of clarity and difference of approach in the assessment of any particular case. Transitions from an employed to a self-employed status raise a number of complex issues. A degree of flexibility for employers to do this should be retained, but there should be an objective justification where such a transition is proposed. Otherwise this is open to abuse by employers. There should be some degree of protection for workers who are put in the position that they either change to self-employed status or they lose their job. (This leaves outstanding the issue of which rights should be restricted to those with employment status and which should apply to all workers.) The incentive for employers doing this may be reduced by a number of “devices” such as:- a) Such a transition of a worker from employed to self-employed status must be limited where the nature of his job functions has materially changed; and/or b) There must be an objective justification for the change; and c) There is still a “floor” of minimum rights applicable to a self-employed worker, particularly on termination of the relationship (perhaps following the model similar to that in the Commercial Agents Directive). A more difficult issue is whether there should be similar restrictions on employers from engaging workers on a self-employed basis from the start.

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?

Yes, please see our responses to Questions 2(b) and 7. The impact of such a floor of rights would depend on what those rights were and would probably involve a high degree of subsidiarity. The level of that floor of rights is a question of degree and a political issue which the ELA cannot answer. Rightly or wrongly, many employers perceive that the higher the floor of employment rights, the less willing they are to create job opportunities. Since job creation should be a key priority for the EU Commission to facilitate, a realistic balance needs to be struck between protecting such workers and encouraging job creation.

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”?

The answer to this is dependent on the decisions reached on the categories of relationships that might be recognised by labour law and the rights to be associated with each category. The identity of the “employer” and the relationship between the “user” and “supplier” of the worker’s services is one of the many issues requiring clarification. In the commercial contract between them, the user and supplier entities are capable of apportioning between themselves any liability owed to the worker. The subsidiary liability of sub-contractors could be used as a “long stop” in the event that the “employer” (as clarified) of the worker does meet its employment protection obligations towards the worker. Again, the contractor and sub-contractor can apportion the costs of any such liability towards the worker between them in their commercial contract.

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

Yes.
11. How could minimum requirements concerning the organization of working time be modified in order to provide greater flexibility for both employers and employees, while ensuring a high standard of protection of workers' health and safety? What aspects of the organization of working time should be tackled as a matter of priority by the Community?

The opportunities for doing this are likely to be quite limited because, clearly, since the Working Time Directive is aimed at protecting workers' health and safety, there must be a minimum floor of protection which cannot be derogated from. Some relief might be considered in respect of: a) less stringent averaging rules e.g. by lengthening the reference periods; b) permitting “opt out” of the “48 hour maximum working week” where this is contained in a collective agreement or workplace agreement which meets certain specified standards; and/or c) Permitting an employer who does not recognise a union to go to a designated body in the relevant Member State to obtain approval for such derogation or a particular working hours pattern.

12. How can the employment rights of workers operating in a transnational context, including in particular frontier workers, be assured throughout the Community? Do you see a need for more convergent definitions of 'worker' in EU Directives in the interests of ensuring that these workers can exercise their employment rights, regardless of the Member State where they work? Or do you believe that Member States should retain their discretion in this matter?

This is essentially a political question on which the ELA cannot comment. The Employment Lawyers Association is an unaffiliated group of specialists in employment law in the United Kingdom that includes those who represent both employers and employees. It is not the ELA’s role to comment on the political merits or otherwise of proposed legislation but rather to make observations from a legal standpoint.

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

This is essentially a political question on which the ELA cannot comment.

14. Do you consider that further initiatives are needed at an EU level to support action by the Member States to combat undeclared work?

The control or enforcement of action against undeclared work should be left to individual Member States. Undeclared work is already illegal in most (if not all) Member States. It seems unrealistic for this to be monitored or focused on at EU level. The issue is one of more effective enforcement which, in practice, can only be achieved locally.