Green Paper: Modernising labour law to meet the challenges of the 21st century

The purpose of the Green Paper presented by the Commission is to launch and stimulate a debate on how labour law can evolve to support the Lisbon strategy’s objective of achieving sustainable growth with more and better jobs.

Europe faces a number of major challenges where the issue of demographic development and globalisation is of central importance. Successfully meeting these challenges and making use of the opportunities created require a shared determination. The Commission’s Green Paper is a welcome contribution to the ongoing discussion on such matters as how Member States are to promote a better balance between security and flexibility. However, labour law comprises only one of several important elements that affect the way the labour market functions. A discussion on how the different elements are formed and interact should be encouraged at both national and EU levels. Ultimately, however, it must be up to each Member State to determine the need for, and possible design of, reforms according to national circumstances and needs.

The Government’s view is that broader discussion, which also includes those individuals who are outside the labour market, is also necessary. Questions on how to reduce exclusion and lower thresholds so as to enable people to find employment are also relevant. Reforms are currently being carried out in Sweden aimed at putting more people to work and fighting exclusion from the labour market. It involves creating the conditions for more jobs in more and growing companies, and to strengthen the incentives to take the jobs that are available.

The Government’s position in the area of labour law is based on the fact that the Swedish model has proved to work well even in a more global context. A fundamental element of the Swedish model is that the social
partners regulate labour market conditions through collective agreements. Legislation in the area of labour law represents a framework that is supplemented by, or in certain cases replaced by, collective agreements between the social partners.

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

At present, the Government sees no need for reform in the area of labour law at Community level. Focus should be placed on efficient implementation of existing rules. It is possible that revision or simplification of some directives in the area of labour law could be considered. Further, efforts should be made to move ahead with the draft directives that have already been presented. It is, however, important to jointly identify challenges and discuss possible solutions, to continue to analyse and exchange experiences.

This does not exclude the possibility that reform may be needed at national level. However, each Member State determines the need for, and if necessary the design of, measures according to national circumstances and needs. This provides greater opportunities for solutions adapted to national systems, regardless of whether these are based on legislation or collective agreements between the social partners.

With regard to Swedish labour law and the labour law system, the Government considers that the current design of the regulations together with the opportunities for the social partners to enter into collective agreements are, in general, well suited also to be able to meet future challenges.

Currently, national reforms are being implemented aimed at breaking the pattern of exclusion from the labour market by creating conditions for more jobs in more and growing businesses. Within the area of labour law, certain changes were decided in 2006 regarding legislation on fixed-term employment. The Government’s goal is to carry out certain additional changes in 2007 so as to both simplify the regulations and to facilitate employing people on fixed-term contracts. The aim is to create conditions for more jobs.

2. Can the adaptation of labour law and collective agreements contribute to improved flexibility and employment security and a reduction in labour market segmentation? If yes, then how?

Collective agreements in particular are an important element in achieving and maintaining a proper balance between security and flexibility, as is labour law. They naturally also have a major impact on the incentive for companies to take on new employees and thereby on the issue of how to better reduce exclusion from the labour market as well. The design of
agreements and legislation in the area of labour law are, however, not the only significant factors; other elements are also relevant, such as the design of tax and compensation systems, and matching on the labour market.

It is also important to call attention to the role and responsibility of the social partners. Social dialogue and good relations between the social partners are at the centre of the European social model. Collective agreements are an instrument for adjusting the system to specific needs and creating flexibility in the system. The social partners also have an important role to play when it comes to influencing people’s attitudes to change.

Regarding the model that Sweden has chosen for regulating conditions in the labour market, the Government’s basic approach is that comprehensive changes to labour law legislation aimed at adjusting the balance between security and flexibility are not needed. However, certain changes in legislation on fixed-term employment will be carried out so as to simplify the design of the regulations and to facilitate employing people on fixed-term contracts. The aim is to ensure that, like today, there is scope to adjust regulations through collective agreements, thereby maintaining the flexibility that exists in the system.

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

The Government’s assessment is that in principle, Swedish labour law and the system in the labour market do not prevent making use of opportunities to increase productivity and adjusting to new technologies and changes connected with international competition. The model that Sweden has chosen to regulate conditions in the labour market generally works well.

However, in order to meet the challenges that result from international competition, it is important to maintain an ongoing dialogue about them, both nationally and at Community level. The basis must be a positive outlook towards the opportunities that international competition provide and an open attitude towards change.

One problem for SMEs can be the handling of regulations as such. Alongside the better regulation strategy at European level, a major project to simplify regulations, extending over several years, is underway in Sweden with the aim of reducing the administrative burden on
companies by at least 25 per cent by 2010. Labour law is included among the regulations that will be reviewed. The effect of simplified regulations will probably not at least be of benefit to SMEs.

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?

The Government’s basic position is that there should be freedom of choice for both employers and employees regarding the forms under which a business is operated. Permanent contracts, fixed-term contracts and various forms of self-employment supplement one another and cover different needs.

The issue of recruitment deals with effective matching in the labour market as well as other measures. Improving matching in the labour market is one of the ongoing reforms launched by the Government. The Government has also introduced ‘new start jobs’, which involve a subsidy corresponding to the employer’s contribution for employers who employ people who are most detached from the labour market.

As discussed earlier, regulations regarding fixed-term contracts in Sweden have been subject to a certain amount of review. Regulations regarding the possibilities of reaching agreements on permanent contracts have not changed in the same way.

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?

It is important to continue discussion at Community level on how to strike a proper balance between security and flexibility. The Government welcomes an exchange of experience and broad discussion that in part can be used as a tool to develop a common understanding of the challenges we face. The Commission’s coming communication on ‘flexicurity’ will constitute a welcome contribution to the debate.

Without denying the need for reform that can exist at national level in the Member States, it should be stressed that reforms in the area of the labour market and in labour law are primarily a question for each Member State. Determining the balance between different measures for achieving a suitable combination of flexibility and security is a national issue. Conditions in the Member States vary depending on each country’s institutional framework and economic situation.
The Government’s basic position regarding the balance between flexibility and security is that it does not have to be a one-sided matter of more flexible labour legislation, compensated by higher unemployment insurance. As in Sweden, it can also be a matter of making the compensation levels more flexible and allowing the labour law system to make up the security. The decisive factor is instead the actual conditions and situation in each Member State. Security is thus achieved not only through measures in the other areas that are usually discussed in connection with ‘flexicurity’, i.e. active labour market policies, modern social security systems, lifelong learning and skills development, but is also accomplished through well-designed labour law.

Factors that are of major significance to employment trends are the way tax and compensation systems are designed. Another important factor is how well the labour market is able to match job seekers with job vacancies. Yet another important aspect is to stimulate lifelong learning.

The Government considers that Swedish labour law, along with the opportunities for collective agreements, in general provide good conditions for combining secure conditions in the labour market with flexibility. The system can be adapted to the varying conditions that exist in different parts of the business sector by means of collective agreements. Through their own initiative, the social partners can take responsibility for the development of a modern, efficient working life.

Most employees in the Swedish labour market have permanent contracts. Permanent contracts form the foundation of the labour market. But fixed-term contracts also play an important role. They are necessary so that employers can cover temporary needs for labour and are also an important bridge into working life for young people and others with little or no work experience. Reference has been made to the ongoing reforms in Sweden of legislation regarding fixed-term contracts under the reply to question 2 above.

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?

Both law and collective agreements are instruments to promote access to training and facilitate the transition between different contractual forms for upward mobility over the course of a working life. Further training and work-related training are important instruments for promoting increased mobility in the labour market. Investments in skills development are central to achieving the goals of the Lisbon Strategy and to meeting the challenges that face the Union.
Regarding the area of Swedish labour law in particular, the state, apart from the public education system that it provides, also provides legislation on such matters as the right to educational leave. This means that the individual can make use of the education system for further training during his or her working life.

The social partners have a very important role to play regarding competence development activities and measures for adjustments in working life, at both European and national levels. The Government considers that efforts by the partners to promote training and adjustments in the labour market through discussion and collective agreements are of central importance.

The social partners at European level have entered into a framework agreement on lifelong development of skills and qualifications. This is a welcome initiative.

One example of the responsibility taken by the social partners nationally is security/adjustment agreements. These help workers who have been given notice due to shortage of work to find new jobs by means of adjustment measures and financial support. Employers are also given advice and support in the adjustment process. By supplementing the efforts of the public employment service, the agreements help improve the way the labour market functions, to the security of workers and to geographic and professional mobility in the labour market. In this way, the necessary structural change will be more readily accepted by the employees concerned. All employees in the collective agreement area that the adjustment agreement is meant to cover are included, regardless of whether they are union members or not. If an employee is given notice, the Security council/foundation will take action and give the employee personal help to find a new job. Beyond advice, support and guidance, the Council/foundation usually offers financial support for skills development and retraining.

7. Is greater clarity needed in Member States’ legal definition of employment and self-employment to facilitate bona fide transitions from employment to self-employment and vice versa?

The definitions under labour law of the different categories in the labour market and the distinction between them should remain a question for the individual Member States. The definitions have strong links to the structure of the different legal systems and their traditions. New definitions can easily lead to new demarcation problems, which in turn can be difficult to solve within the frameworks of current national systems.

Swedish labour law does not contain any legal definitions of the term worker/employee. Instead, it has developed through practice. The term
worker (arbetstagare) has a relatively broad field of use. Sweden most recently considered the question of the distinctions between the terms worker and contractor, and the possible need for a ‘third category’, in 2002. At that time, the inquiry found that there were no problems of such a serious nature as to require legislative action regarding adjustment in the distinction of the field of application for labour legislation, and considered that the problems that did exist could best be solved by means of case law. That assessment remains unchanged.

The Government feels that both various types of employment and self-employment have their place in the labour market. Enterprise and entrepreneurship are an important means of creating new jobs and growth. More and growing companies, also small ones, help create flexibility in the labour market.

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?

As the Green Paper also establishes, there are differences in systems and traditions regarding the design of regulations for working conditions between the different Member States. This also applies to the scope of protection. It can be noted that there are already certain rules regarding, for example, part-time employment and fixed-term employment at Community level. At present, the Government sees no need for additional rules.

From a Swedish perspective, it can be stated that the term worker developed through case law and the accompanying protection is relatively extensive. Even self-employed have a certain amount of protection, for example in the area of the work environment.

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 protections of workers in “three-way relationships”?

The view of temporary work agencies and the system for regulating them varies greatly between the different Member States. The need for regulation is therefore also different. It has been difficult to reach agreement on the draft directive proposed by the Commission on working conditions at temporary work agencies, probably for this reason. It is therefore important that effective solutions can be found for
the specific situation in each Member State, i.e., they are allowed to be regulated nationally.

Unlike in other Member States, employees at temporary work agencies generally do not enjoy a special position in the Swedish labour market. Labour law applies in the same way as for other employment and fixed-term contracts are the basic form of employment. Accordingly, the main principle is that the division of responsibility between employer and worker applies in the area of labour law. Even if ‘three-way relationships’ naturally mean that in some situations, it can be more difficult for an employer to take his or her employer responsibility, the main principle remains. There are, however, exceptions on shared responsibility for user undertakings and employers since under law, the temporary user undertaking also has certain responsibility for the temporary workers. This applies, for example, under the Work Environment Act, where a protection responsibility besides regular employer responsibility is introduced for those who employ temporary workers.

The social partners have signed a collective agreement in the area, and have also developed an accreditation system for temporary work agencies. This is an example of a situation where parties with a common view of the issues regulate areas where flexibility and security need to be combined.

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

There is no need to clarify the employment status of temporary agency workers at EU level. It is up to each Member State to determine such issues in their national legislation or system. It is, however, important that clarity exists for workers in the industry so that they can feel the same security as other workers.

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?

In light of inter alia the problems that the European Court of Justice case-law has involved for Member States, a review of the Working Time Directive has been underway for the past four years. The Council is currently deadlocked with regard to these negotiations. As a result of the case law that the Court has developed in cases such as SIMAP and Jaeger, Sweden has been confronted by serious problems in several sectors. This includes inter alia such important sectors to society and to citizens as medical care, fire services, and energy production and
distribution. The ongoing review of sections of the Directive cannot be allowed to stagnate.

However, the Government does not take a negative view to the possibility of a more comprehensive review of the Directive alongside of this. Simplification of the Directive’s complex structure would be welcome, even if it can be expected that such simplification would be difficult to carry out, in light of the political sensitivity of the Directive.

12. How can the employment rights of workers operating in a transnational context, including in particular frontiers 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?

At present, there is a Community-wide legal definition of the term worker as regards freedom of movement in accordance with the Treaty. However, as regards the ‘substantive’ labour law standards at Community level, the Member States themselves have the right to define the term worker. The Government considers that this system should continue.

The definition of worker as regards ‘substantive’ labour law standards can be expected to vary somewhat between Member States. In some Member States, as in Sweden, there is no statutory definition of worker as the legal definition of the concept has instead been developed in case law. Several government-appointed inquiries have considered whether it would be appropriate to codify the definition of worker in law. After each such inquiry (the most recent was presented in 2002, called Hållfast arbetsrätt – för ett föränderligt arbetsliv [Sustainable labour law – for a changing working life] Ds 2002:56), the Government has concluded that such a measure is not appropriate for a number of reasons. The point of view itself – that the issue should not even be regulated in Swedish law but instead should continue to be determined by case law – shows that the Government does not consider that the definition should be regulated at Community level.

A common definition of worker as regards freedom of movement is necessary in order to safeguard this freedom. The substantive rules in Community labour law do not however require a common definition of worker in the same way. In this context, it should perhaps also be noted that Community regulations in the area of labour law are not particularly extensive. The majority of all labour legislation is based on national rather than Community law. This, too, weighs against introducing a common definition, since it can be assumed that national law is based on the definition of worker that each Member State applies. In addition, it
must also be taken into account that other nationally regulated fields of law use the labour law definition of worker and would therefore be affected in an unforeseen manner if this definition were changed (cf. definitions of worker and entrepreneur in tax law, etc). This would be an unfortunate development.

13. Do you think it is necessary to reinforce administrative cooperation 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 an important question to discuss. For some time, work has been carried out to strengthen administrative cooperation within the framework of the Posting of Workers Directive. This is welcome.

However, there is no specific public authority in Sweden that supervises labour law issues. Such supervision is primarily a responsibility for the social partners. The State provides a regulatory framework, which the partners can make significant deviations from through collective agreements. There are certain institutions for dispute resolution, such as the National Mediation Office, which mediates in collective conflicts, and courts (such as the Labour Court), which settles disputes in individual cases.

The Swedish Work Environment Authority supervises work environment issues in accordance with the Work Environment Act and the Working Hours Act. The Swedish Work Environment Authority is also the liaison office as set out in the Posting of Workers Directive.

In the area of discrimination legislation, there are also a number of ombudsmen. They are to ensure that the legislation on prohibiting discrimination is complied with in areas relevant to the ombudsmen, and they can bring action before the Labour Court if they feel that discrimination has occurred in an individual case.

Considering the way in which the Swedish labour market system is constructed, it would seem difficult to recommend closer cooperation between public authorities operating strictly in the area of labour law.

Regarding closer cooperation between public authorities supervising areas that in some way concerns undeclared work (such as social security authorities and tax authorities), the Government is not opposed to further discussion of the issue should it be brought up. In which case, it is important that a programme of this kind carefully identifies the areas and agencies that are to be included.
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 Government considers that further dissemination of good examples and improvement of information exchanges in the area of direct taxes is needed. It should be possible to accomplish this within the framework of the Fiscalis programme and through Council Directive 77/799/EEC (the Mutual Assistance Directive). The area referring to the automatic exchange of information according to the above mentioned Directive needs to be extended.