

# **Comments from the Norwegian Government to the commission green paper on modernization of labour law**

## General comments

### *Introduction*

The Norwegian Government appreciates this opportunity to comment on the Green Paper: Modernising labour law to meet the challenges of the 21st century (COM (2006) 708), and in this way participate in the ongoing debate about the further development of labour law in Europe. The Norwegian government is positive to the goal and the general idea behind formulating a Green Paper concerning these issues, in order to ensure a wide debate on how labour law should develop, and how labour law can “evolve to support the Lisbon Strategy's objective of achieving sustainable growth with more and better jobs”. The process around this Green Paper is an opportunity to put several already well known and well documented challenges and initiatives, as well as some new ones, on the agenda both in Norway and in Europe as a whole.

The debate concerning “flexicurity” and the balance between flexibility and employment security is not an entirely new debate. Even so, it is important to continuously assess these questions, especially related to the evolution of the labour market and the society as a whole. One major problem in this debate is that the concepts discussed have different meaning in the various countries and for the various participants and interest groups participating. Concepts or terms like flexibility or employment security are unclear or vague – and mean very different things to the different participants. This makes it hard to succeed in making the debate fruitful and relevant.

Further complicating the discussion is the fact that working life, labour market and working conditions, the challenges and problems, the strengths and the elements one wishes to preserve, obviously are not the same around Europe. Policies and regulations that work in one country can not be transferred automatically to another country with the same positive effect. With these reservations in mind, and in large a degree because of them, the recommendations and proposals for policy will be very different even though the goals behind the proposals might have similarities.

### *Flexibility and employment security*

The basic principle from the Norwegian Governments' standpoint is that there is no contradiction between productivity, growth and flexibility and a reasonable employment security for the individual employee. This means that it is possibly misleading to discuss flexibility and employment security as if this is a question of finding the right “balance” between these considerations. On the contrary, experience suggests that a well developed system or regulations for employment security are important prerequisites for the employees' adaptability to change and an even eagerness for change, and hence economic growth.

We believe the Norwegian model for work life and welfare society is designed in a way that take into account the considerations about flexibility and employment protection/safety of

employment based on the needs and traditions of Norwegian working life. This applies among other things to:

- a. The enabling of enterprises and possibility for change and ability for change and adjustments to the market enterprises have
- b. The willingness to adapt and to change both the workforce and the labour market
- c. The strength of the employment protection
- d. The system for social rights and economic safety that must be in place when workers lose their jobs because of necessary changes, downsizing, or in case of unemployment, sickness etc, and the free or low-cost publicly financed welfare services like health or education that limits the economical impact of losing ones job
- e. The degree of active labour market policies encouraging unemployed or inactive people to have a new chance at the labour market

The Norwegian Government wishes to underline the importance of long term and open ended employments relationships as beneficent for the employees, not the least with regards to reducing insecurity concerning personal economy and future employment. The principal rule in Norwegian labour law is permanent employment contracts. This is confirmed in the new Working Environment Act from 2005, and this regulation has proven to be effective and positive for the competitiveness and strength of Norwegian business.

The Norwegian experience is that strong employment protection that is stable and predictable is an advantage for the enterprises ability to change. A rule for employment security give the worker a better sense of security in their employment and increases the workers willingness to adapt and change and contributes to more and better productivity. Furthermore employers have a tendency to use more resources on education and training when the workers have more permanent employment.

The Norwegian Labour Inspection Authority, the state agency responsible for administrative, supervisory and information responsibilities in connection with the Working Environment Act and for ensuring that the enterprise maintains a healthy and safe working environment, has in it's input to this response, stated concern about the prospect that increased flexibility and less stable work force in the labour market can imply weaker employment protection in an health and safety perspective. The Norwegian Labour Inspection Authority underlines the importance of permanent and stable employment relationships as the best basis for necessary training, introduction to and understanding of instructions, routines and so forth, given the time necessary to learn, understand and apply such information.

At the same time employment protection and an emphasis on permanent employment contracts cannot imply employment regardless of the challenges or circumstances an enterprise faces. A business or an enterprise must have the opportunity to evaluate the need for labour, and downsize if it is necessary and have a justifiable ground. Workers cannot be guaranteed employment if the enterprise has a viable reason for downsizing, but the dismissal or downsizing must not be arbitrary, based on a non-justifiable basis like for example discrimination, and in accordance with rules about length of notice in regulations or collective agreements.

Curtailement of production/operations and downsizing, restructuring and change is necessary in a modern economy. As a consequence it is of vital importance to ensure better employability through active measures like training and lifelong learning. Both the individual employee, the employers and the authorities must have an active role in securing further education, adult education, re-education etc. And it is of vital importance that there is a sufficient minimum economic safety net for the worker who is laid off.

In the debate concerning flexicurity there is often made a distinction between employment security and job security/employability as a means for economic security. Economic security is of vital importance for a flexible and functioning labour market. Even though a strong employment security is important for the individual worker, disproportionately stringent rules concerning employment security can have unwanted consequences for the enterprises and make it impossible for the enterprises to adapt to a changing economic situation, and make the cost of restructuring too big.

One main objective with the work connected to the flexicurity debate is to preserve legislation with strong employment protection. A discharge must be justifiable. There has to be a system of economic security for workers who are laid-off, and there must be active measures that enables, helps and to a certain degree pushes the person back to a new job as quickly as possible.

There is evidence to suggest that the cooperation between employee and employer is easier in enterprises in the Nordic countries than many other parts of Europe. In Norway there are few examples of conflict concerning investment in new technology because of fear of losing employment. Quite the opposite is often the case where the workers are actively encouraging or asking for new investment so as to make the enterprise more robust in the intense competition many businesses face. The adaptations in the different Nordic countries are very much the same, even if rules and regulation are different. Employment protection is for example strongly rooted in labour law in Norway, Sweden and Finland, but not in Denmark. In Denmark however it is the collective agreements that regulate the possibility for enterprises to fire employees. This negotiation position that the employment protection offers the employee can cause the enterprises to go to greater lengths to ensure their employees interests in cases of restructuring. The economic safety net – the unemployment benefits and other more permanent social security schemes also makes it easier for employees to accept rationalisations and restructuring. This safety net may induce a sense of false security, which requires constant attention to counter.

#### *The importance of social dialog*

The importance of social dialog has been stressed in the EU for a long time. The dialog between employees and employers and their respective organisations is central in many aspects, and on several levels in the labour market. The Nordic model, if one can identify one, that has as one goal to safeguard the interests of the employee, but at the same time enhance flexibility, puts a major responsibility on the social partners through the system of collective agreements.

Experience over a long period makes it easy to recommend collective agreements as a good tool for solving problems and challenges in the labour market. There exists a Nordic tradition we believe has merits on this area and that is perhaps suitable as an example in relation to the flexicurity debate. Collective agreements can serve as a supplement or as a substitute for

legislation (one example of this is the Basic Agreement between NHO (the largest employer organisation) and LO (the largest employee organisation in Norway). These kinds of collective agreements could to a greater extent be concluded at the EU-level, on a sector level or at the level of individual enterprises.

The cooperation between the authorities and the social partners is also of vital importance for finding adequate solutions to concrete problems in the labour market. One example of such a tripartite cooperation about labour market challenges in Norway is the agreement about Inclusive Work Life.

The labour organisations play a major role in safeguarding the interest of and improvement of the situation for the employees. A strengthening of social dialog and of the social partners is therefore important. It is essential to encourage support for the organisations in the social dialog, as well as improving the participation and codetermination of the employees and their organisations in the individual enterprise.

One interesting possibility or supposition would be to increase the attempts to establish collective agreements and wage agreements at an EU-level.

#### *Labour law at a national- or EU-level and the need for minimum rights*

The Norwegian Government believes that the responsibility of legislation concerning labour law primarily should rest at the national level. The Green Paper does not, as far as the Norwegian Government understands it, point out any major changes in the distribution between the national and the EU level concerning labour law.

Most initiatives should be initiated and adopted in the individual country in accordance with local needs and wishes. Comprehensive further common labour legislation and regulation at the EU-level is not a major answer to the challenges facing Europe.

The task facing labour law on a European level would primarily be to secure some level of minimum rights. The Norwegian Government is engaged in this question on several points. There is a need for minimum rights in the interest of securing employees in countries that at the present time may not have adequate employment protection or regulations concerning working conditions or working time. This might be relevant when discussing workers in different countries, but also when some types of employment is not covered by national law or workers operating in a transnational context.

Minimum rights can also contribute in making the conditions in a very competitive market more equal, and reduce the importance of the lack of good working conditions and employment protection as an unreasonable advantage for enterprises in some countries.

It is, however, essential that the any minimum rights are not set at a level that weakens the protection of workers, and that reduces the protection in countries that have build up a functioning labour market and where both employment protection and the needs of the enterprises are taken in to account.

Furthermore it is also of great importance that the conditions in the various countries are so different that a more extensive common regulation would be hard to bring about, and any prospective minimum rules or other legislation within labour law could become so imprecise

and wage so as not to be practical. The development of labour law in Europe should not contribute to a “race to the bottom”, where lowest possible taxation and cheapest social/welfare systems is a competitive advantage.

The Green Paper is mostly about the individual labour law. In the Nordic countries and in Norway the social partners have, as already mentioned, a tradition for extensive collective agreements. The Norwegian government would emphasize that a closer scrutiny on the roles of the social partners and the system of collective agreements should have been a more central topic in the Green Paper. A modernization of labour law requires participation and deep involvement from the social partners.

The important question of gender equality is not mentioned in the Green paper. This was pointed out especially by the Norwegian labour organisations in the hearing held in Norway about the Green Paper

#### Comments to some of the major questions in the Green Paper:

##### *Questions related to employment transitions, uncertainty and triangular relationships.*

In Norwegian labour legislation as well as in the legislation, in the other Nordic countries, there are no definitions of an employment relationship. An employee is any person who performs work in the service of another. All elements of the relationship shall be reviewed together to determinate the existence of an employment relationship. Basic characteristics of an employment relationship according to case law are the workers subordination and that the worker is economically dependent of the employer.

The experience of the Norwegian Government is that the determination of an employment relationship based on a general judgment based on all relevant facts is a flexible way to determinate an employment relationship, that also meets the need of clarity and predictability.

There is an ongoing discussion whether there has been an increase in the “so called” new forms of employment, and if this requires new labour and social legislation. This is a complex issue, and there are several discussions relevant to this issue.

Firstly, it is a matter of whether or not one should accept the description that “new forms of employment” are really new. Apart from “self-employed” people, Norwegian labour law differentiates only between employee and employer. We suspect that many of the “new” forms of employment in reality are still just that – employment. It is still a relationship between an employer and an employee. One example is where a “self-employed” person or a freelancer only has one client that employs the person fulltime and the timeframe is unlimited – in our view this is not an alternative form of employment. It is only a way to avoid the rights and duties derived from labour law, and therefore should be looked upon as an employment relationship.

Secondly Norway wishes to emphasize that we believe that the provisions concerning what constitutes an employer and an employee are adequate in our national law. We have some misgivings whether possible “new” regulations can change what we regard as straight forward employer/employee relationships into other and less acceptable regulated forms of contractual

relationships. There are potential problems arising from new or looser forms of regulation for example that it may reduce the job security of workers and the clear cut responsibility employers have for safety and health precautions at the workplace. These problems will arise especially if the “minimum” standard is too much of a minimum, and not an incentive for better working conditions as discussed earlier.

Yes, there is a need for flexibility. But, to be flexible, workers have to feel safe and protected against arbitrary treatment. Both social and labour legislation must at all times be evaluated and adjusted, but in our view with the clear objective in mind of an inclusive working life and a good balance between the needs of the employer and the needs of the worker.

At the same time it is necessary to point out that legislation and regulations must be flexible and not unreasonable and overly bureaucratic so as to dampen or hinder innovation and entrepreneurship.

The Norwegian Government understands that there might be a need for a common definition of employment and self-employment as a means to harmonize the rules inside EU. It will, however, be difficult to reach an agreement on this question. The definition of employee in Norwegian labour law encompasses a wide range of situations (anyone who carry out work in someone else’s service). A common regulation that narrows this definition is not a good solution. In addition, a regulation that aim at clarifying a common definition, could result in a to static and adequate definition.

Over the past few years, Norway has experienced a sharp increase in the number of foreign workers taking up employment in Norway. The large majority of these workers come from those countries who gained membership of the European Union in 2004. These workers provide a much needed supply of labour, and without them the activity of the Norwegian economy could not have been at the current level. However, the huge influx of foreign workers has created somewhat of a paradox in the Norwegian labour market. We now see an increasing number of incidents where foreign workers are given employment contracts, pay or working conditions not in line with Norwegian law or collective agreements.

We do also see a trend towards creative ways of organising employment in ways to bypass the rights and duties laid down in labour law, for instance as false self-employment. These different practices of providing unacceptable working conditions to foreign workers are in the Norwegian debate referred to as social dumping. Through offering unacceptable working conditions, some companies try to gain a cost advantage and competitive edge over those who behave responsible and follow Norwegian laws and regulations of the working life. These practices therefore constitute a threat to our model of “flexicurity” and our goal of creating an inclusive work-life for all.

The Norwegian Government has initiated several measures to tackle social dumping; protecting the workers’ rights and making all employers behave socially responsible. Recently, wage agreements have been given general application in the building sector. The Government has also proposed a set of measures, including the tightening of control on companies hiring out workers and placing a clearer responsibility on the principal contractors to “see to” or control that legal pay and working conditions are followed also among sub-contactors.

The reasons for taking a tough position against social dumping are two-fold: Firstly, to secure the rights of all employees, also those from other countries who take up work in Norway. Secondly, to maintain and develop a labour market which is inclusive and have room for all employees.

With regard to the question of whether the responsibilities of the various parties within multiple employment relationships should be clarified to determine who is accountable for compliance with employment rights we wish to underline that according to Norwegian law, even though a person is hired in to an enterprise for a limited period and thus is not regarded as being employed by this enterprise, this does not mean that the person does not have the protection afforded such person as an employee under the Working Environment Act.

Employers can hire employees for a limited time period from temporary employment agencies or as defined in the Working Environment Act law: "an enterprise that has as its purpose to hire out". Employees can also be hired in for a limited period from other enterprises from "an enterprise that does not have as its purpose to hire out". The main rule is that the person that is hired out shall be permanently employed by the hiring-out enterprise, whether this is a temporary employment agency or a production company. It is thus the hiring-out enterprise that has the employer responsibility that follows from the Working Environment Act. This means, for example, that the person hired out shall have a written employment contract with the enterprise hiring out, that the person has the job protection that follows from the Working Environment Act, and that the enterprise hiring out is responsible for payment of wages and other benefits that follow from the employment contract to the person hired out. The enterprise hiring in will also have an employer responsibility vis-à-vis the person hired in. For example, the enterprise hiring in will have an independent responsibility for providing the person hired in with the necessary training in and introduction to internal procedures, and for ensuring itself that the person hired in has the necessary qualifications, certifications, etc. that are required for the person's position. In addition, the enterprise hiring in is normally the first in line to ensure that working environment and safety requirements in the Working Environment Act are safeguarded in relation to the person hired in.

#### *Working time*

The Norwegian government has followed the debate concerning the working time directive and the discussions regarding the proposals to change some of the provisions in the directive. We had hoped that an agreement could have been reached, and that a new directive solving some of the difficult issues could be adopted. The working time directive is a good basis for a common minimum regulation of the working time with the explicit aim to attain a better level of health and safety for the employees and a better balance between work and family life.

Norway recognizes the importance of adapting the directive to accommodate the problems following the result of the Simap and Jäger cases, and the need to limit the opening for some workers to work unhealthy long weekly working hours.

Norway wishes to emphasize the need for further initiatives at the EU-level to reach and agreement concerning these question, and be able to adopt a new revised version of the working time directive that will help ensure a reasonable and good safety and health standards while taking both the employers and the employees need for flexibility into account.