

The Directive on the Posting of Workers – the case of Sweden

Memorandum

The labour market system in Sweden

The average unionisation rate in the labour market exceeds 80 per cent. Collective agreements are estimated to cover over 90 per cent of all employees in the labour market. According to national legal principles, a collective agreement is applied to all employees within the field it covers, i.e. both to trade union members and unorganised workers.

Collective agreements are generally concluded between the social partners on the union level and they lay down, besides wages, a number of different working and employment conditions.

No governmental mechanisms or legislation exist that would extend the effects and scope of application of a collective agreement to other fields in the labour market than the one the agreement explicitly covers. Neither are there any governmental structures or legislation laying down minimum wages. Minimum wages, where they occur, are defined in collective agreements.

Thus, a collective agreement is normally a result of negotiations between employers' organisations and the trade unions within each sector.

The agreements concluded subsequently become valid in all companies and activities belonging to the employers' organisation in question. Companies that are not members of an employers' organisation can be included in the scope of a collective agreement by way of the trade union organisation concerned signing an individual agreement with the company, a so-called subsidiary agreement, which normally implies that a nation-wide collective agreement comes into force.

Hence, collective agreements never gain force automatically in a company, nor consequently in companies from other countries that operate in Sweden. The trade union organisation must see to it that each company that is not member of an employers' organisation signs the collective agreement to make it legally binding for this company. Monitoring the observation of collective agreements in the companies having concluded them is also a task

of the social partners exclusively. There is no legislation, governmental mechanisms or public authorities that guarantee the observance of collective agreements, it is a trade union responsibility only. The non-observance of existing collective agreements or legislation by a company must be registered by a trade union organisation. Only then the issue becomes a legal dispute, which, after negotiations, can be taken to the Labour Court.

As for the right to take industrial action, such as strike or blockade, there is an extensive right to take such action while the social partners are not bound by a collective agreement. When however a collective agreement is in force, such action is essentially forbidden, i.e the so called industrial peace obligation. The right to take national or international sympathy action is an exception to this fundamental principle.

The implementation of the Directive on the Posting of Workers is based on the application of the mechanisms and procedures described above even to foreign companies operating in Sweden. This means that a collective agreement must be signed between the trade union organisation concerned and the particular foreign company, which intends to have work performed in Sweden by employees from the country of origin. The accomplishment of the basic principles in the Posting of Workers' Directive therefore requires that it is possible to sign a collective agreement or a subsidiary agreement in cases like this.

The dispute in Vaxholm

Laval un Partneri Ltd. is a Latvian company located in Riga, Latvia. The company conducts activities within, among other things, the building sector. In June 2004, the company started a contract work involving the refurbishing of an old school in Vaxholm municipality north of Stockholm. The work was carried out by Latvian building workers posted in Sweden. On that occasion, the company had some 35 Latvian workers posted in the Stockholm region. According to information from Laval Un Partneri, some 65 % of the Latvian workers were members of the Latvian building workers' union.

When Vaxholm municipality made the public tendering for this contract work, a company associated with Laval un Partneri, as well as a number of Swedish companies, submitted tenders. As the Swedish companies calculate their tenders, among other things, on the basis that Swedish collective agreements are to be applied, their possibilities to compete with Laval un Partneri were small, as the latter had calculated their tender on the basis of Latvian wage levels.

Shortly after that the contract work for Vaxholm municipality had been started, Laval Un Partneri was contacted by the local branch of the Swedish

Building Workers' Union (Byggnads). The demands of Byggnads were that the partners should conclude a collective agreement for the school construction in Vaxholm. Negotiations on this agreement were conducted on several occasions starting on June 9, 2004.

During the negotiations, the company was not tied by any Latvian collective agreement. However, on September 14, the day before the fourth negotiations meeting between Byggnads and Laval, the company concluded a Latvian collective

agreement. This agreement only applies to members of the Latvian building workers' union.

As it is both unusual and unacceptable that foreign social partners conclude collective agreements which are to apply in other countries, the demand of Byggnads that the company should conclude a Swedish collective agreement remained.

Due to the company's refusal to do so, on October 19, Byggnads gave notice of industrial actions at the company's workplaces starting on November 2, 2004. The industrial actions included total work stoppage and strike, as well as that all jobs and workplaces in question would at the same time be put under blockade from the same date.

The day after the notice of industrial action given by Byggnads, on October 20, the Latvian collective agreement was supplemented in such a way that it was applicable only to Latvian workers posted abroad, but now to all posted workers, not only those who are members of the Latvian Building Workers' Union. Moreover it appeared from the supplemented collective agreement that the company may not sign any other collective agreement regulating the conditions of work for the posted workers. This was another part of the attempt to prevent the establishment of a Swedish collective agreement.

The industrial actions were launched on November 2, 2004 and on December 3, 2004 the Swedish Electricians' Union initiated a sympathy action in the form of a blockade against all electric installations performed at the workplaces of Laval un Partneri in the Stockholm area.

On December 7, 2004, the company submitted a summons application to the Swedish Labour Court. This Court is the supreme and in most cases the only court to deliver judgements in labour disputes. The company claimed that the industrial actions taken by Byggnads concerning work stoppage, strike and blockade against work places are illegal and should be raised and that the sympathy actions concerning electric installations at the work places of the company, taken by the Swedish Electricians' Union, are illegal and should be stopped.

The company also claimed that the Labour Court through an interim decision for the period covering the remaining period until the dispute has been finally settled, shall declare that the workers' organisations involved

are obliged to raise the current industrial actions. The company has also required that the workers' organisations concerned shall pay general damages.

On December 22, 2004, the Swedish Labour Court rejected the claim, submitted by the Latvian company, that the blockade by Byggnads should be declared illegal and therefore stopped. The interim decision of the Court

signified that the blockade by Byggnads and the sympathy action by the Electricians' Union against the company could go on.

After the interim decision of the Labour Court, several other unions joined the sympathy actions.

The same day as the Labour Court announced its interim decision, work was stopped at the company's work place and the Latvian building workers went home to celebrate Christmas. The work has not been resumed since then. The municipality of Vaxholm has therefore cancelled the construction contract.

The other items contained in the summons application were examined by the Labour Court at the main hearing on March 11, 2005. One of these items concerns the Posting of Workers Directive in which the company makes reference to Article 3.1.c. This article implies, according to the company, that the Member States shall ensure that a minimum rate of pay is laid down in national legislation or in a generally applicable collective agreement. As Sweden has not introduced such rules on a minimum wage, there is no obligation for Laval or any other employer to pay a certain minimum wage.

The company also makes reference to provisions in the EU Treaty. In the first place, the articles referred to are No.12 (prohibition of discrimination on the ground of nationality) and No. 49 (restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the recipient of services). The trade union organisations concerned have rejected this, pursuant to EU legislation and national law.

At the main hearing the Labour Court decided that a preliminary decision will be obtained from the European Court of Justice. One of the court members protested against this decision, referring to the fact that there is no cause to accept the company's demand for preliminary decision, as EU legislation does not cover the right to take industrial action at any respects. In addition, he considered that the blockade against Laval could in no way contravene articles 12 and 49 in the EU Treaty or the Posting of Workers Directive.

While awaiting the ruling of the European Court of Justice, the proceedings have been stayed.

The standpoint of LO Sweden

LO fully supports the action taken in this case by the Swedish Building Workers' Union and other unions as well as their statement before the Labour Court. This opinion is based on the fact that Sweden, in the negotiations for membership of the European Union, strongly emphasised the issue of maintaining the Swedish labour market system.

Primarily, there were two issues of great importance for trade unions.

The first one was about the possibility of implementing EU legislation by means of collective agreements and the second one about the right to take industrial action in order to reach a collective agreement with companies from other countries.

The solution of the first one was to enter in the minutes from the negotiations for accession an article laying down that Swedish collective agreements shall be an adequate method for implementing Community law in Sweden. This was done in total unanimity between Sweden and the twelve Member States of that time. This was even confirmed by Sweden in a declaration annexed to the accession protocol.

The second issue was more difficult to solve. As a result from a ruling of the Labour Court in 1989, an amendment was made to the labour legislation on 1 July 1991. This amendment is called 'Lex Britannia', according to the name of the ship where the conflict arose. 'Lex Britannia' gives trade unions the right to take industrial action when a company from a foreign country with its own workforce refuses to sign a collective agreement. This right applies even if the company is bound by an agreement in another country.

'Lex Britannia' was introduced during a social democratic period of office. The right-wing parties however "promised" to revoke it if they gained the elections. In the autumn of 1991, they took over the government after a victory at the polls. As the same Government was also responsible, later on, for preparations for Sweden's membership of the EU, they had a great problem: there was a major risk that the result of a referendum on membership would be "no", if the Government impaired the labour law or

the system of collective agreements, which both have the backing of the Swedish people.

At the same time the Swedish Employers' Confederation (SAF) urged the Government to abolish 'Lex Britannia'. The solution was that the Government made a report on the 'Lex Britannia' at the initial stage of the negotiations on membership. In the reply to Sweden's application for membership, sent by the European Union later on, there were no objections or reservations with reference

to the 'Lex Britannia'. This has been understood as a proof that 'Lex Britannia' does not cause any problems in relation to the EU legislation.

Moreover, the Minister of European Affairs Ulf Dinkelspiel made the following statement on 21 December 1993, during the final stage of the negotiations on membership: *"This Swedish system and the Swedish traditions with freedom for the social partners to negotiate and settle conditions of work in collective agreements for all work carried out in Sweden and also, if need be, take industrial actions, is in our view, well in line with what is foreseen for the future in the Social Protocol".*

However, the Swedish employers' organisation, the Confederation of Swedish Enterprise (former SAF), has all the time had another opinion on 'Lex Britannia'. Already during the ILO Labour Conference in June 1991, the Swedish employer representative Johan von Holten filed a complaint with the aim that the ILO should appoint a so-called Commission of Inquiry as regards Sweden. Mr Holten claimed that the implementation of 'Lex Britannia' would conflict with the ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organise), No. 98 (Right to Organise and Collective Bargaining) as well as No. 147 (Minimum Standards for Merchant Shipping). The complaint was however rejected by the newly elected right-wing government, which claimed that 'Lex Britannia' was not against the above conventions and, moreover, that this law counteracted social dumping. The government went thus against the Swedish employers' organisation SAF.

Later on, the ILO independent Committee of Experts (CEACR) arrived at the conclusion that 'Lex Britannia' did not violate anyone's freedom of association or otherwise conflict with the above ILO standards. Neither did Mr Holten's complaint lead to any ILO action against Sweden.

As all EU Member States are at the same time members of the ILO, it would be most peculiar if the European Court of Justice should – let be on other grounds – arrive at another conclusion. This would signify an obligation for the EU Member States to observe and respect, simultaneously, two contradictory decisions by two different international systems that the countries are affiliated to.

As regards the Directive on Posting of Workers, we should bear in mind the political agreement on the introduction of a social dimension, as a balancing

factor against the accomplishment of the internal market. This makes the Posting Directive a protective law, for the benefit of workers who are posted to other countries, but serving even as a protection against dumping of wage and working conditions in the country where work is performed. Neither should we forget that another motive behind the Directive is to encourage fair competitive terms between companies, which can also be clearly seen in the wording of the Directive.

A protective law of this kind cannot imply that countries with a well-functioning labour market tradition would be forced to change the entire labour market structure in order to meet the requirements of the EU legislation. In cases such as the present one, this would lead to the reverse effect, i.e. Sweden would lose the possibility of equal treatment of companies and workers from other countries.

In addition to the fact that a general right for Sweden to use collective agreements to implement EU Directives has been recorded in the Treaty on accession, the very Directive on the Posting of Workers, article 3.8, lays down that such a possibility must exist.

Losing this case would mean that our model of negotiations no longer would work. Sweden would thereby open up for a variety of collective agreements from different countries.

Ultimately this can lead to the fact that the industrial peace obligation, today established by the signing of a collective agreement, would lose its significance. The employers would of course show less interest to sign an agreement with no such effect.

The argument of Laval un Partneri regarding Articles 12 (prohibition of discrimination on the ground of nationality) and 49 (restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the recipient of services) of the EU Treaty is - in LO's opinion - both incorrect and hasty. As to Article 12, the Swedish trade unions as a matter of fact work for equal treatment of foreign companies and foreign workers in Sweden. We have made this clear on several occasions.

When demanding that everybody who works in the Swedish labour market and all companies that compete with each other in our country should do so on equal terms, we comply with Article 12 of the Treaty. All companies get a level playing field, which means that competition is founded on productivity, quality, competence etc and not on different wage and employment conditions. As regards the equal treatment of labour, it leads to increased equality in working life. In this way we can for instance live up to the principle of equal pay for equal work.

When referring to Article 49 of the Treaty, the company seems to be of the opinion that the country of origin principle in the Services Directive already applies. This approach confirms LO's opinion that the principle's application to wage and working conditions is entirely unacceptable.

The company's opinion that Community Law should – in general – entail significant limitations of the trade union right to industrial action is difficult to

understand. The development of the EU and its internal market has – on the contrary – motivated that such fundamental rights must be protected.

The Draft Constitutional Treaty, which incorporates the Charter of Fundamental Rights of the European Union, proclaimed in Nice, is an excellent example for this. The right to collective action is otherwise not regulated by the Treaty in other way than such rights are protected. Already the Maastricht Treaty was provided with an article stating that the social clauses of the Treaty should not to be applied to matters regarding right of association, right to strike, right to lockout as well as wages.

In compliance with the above, the new rules in later directives and recommendations have been formulated so that for example the right to strike should be respected. In the introduction to the Posting of Workers Directive, item 22, it is laid down: *“This Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.”*

Likewise, it is laid down in the so-called Monti Regulation on the free movement of goods that the established intervention measures shall not be used against lawful trade union industrial action and the definition of the term “lawful trade union measures” shall be determined by every Member State.

When the proceedings in the Vaxholm Case are launched in the European Court of Justice, there will be not only Sweden’s and Latvia’s governments submitting their statements. All EU Member States will have an opportunity to intervene in the matter. The purpose of this memorandum is to describe the course of the events in the case as well as the values that have served as guidelines for the Swedish trade unions’ positions in the case.

Hopefully, this memorandum can therefore be a support and a foundation for all who share these values and who have an opportunity to intervene or otherwise influence this case.

Everybody should be aware of the fact that the result will not only affect trade unions in Sweden; a failure would be a hard blow to all who hope and believe that an internal market without social dumping is possible.

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