

FORMULA

Free movement, labour market regulation and
multilevel governance in the enlarged EU/EEA
– a Nordic and comparative perspective

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The Age of innocence – and beyond

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The Age of innocence – and beyond

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Looking at things in the rear view mirror, it seems as if everything that decided Sweden's approach to the posting of workers and the Posting Directive up to the Laval judgment¹, happened even before Sweden joined the European Union. It was the result of a political campaign aimed at convincing the Swedish people to vote in favour of EU membership, a line of policy that Governments and policy makers within the trade union movement felt unable to abandon until they were forced by the ECJ.

This is not to say that they wanted to do so, only that there were qualified warning voices already at an early stage. And not only from hard core market liberals.

But let us not anticipate what happened:

1. Prior to the Posting of Workers Directive

1.1 The birth of Lex Britannia

It started with the reactions to the Labour court's judgment in the Britannia case (AD 1989/120). Britannia was a ship owned by a German shipping company but flying under Cypriot flag. It had a Philippine crew, covered by a collective agreement between a Philippine trade union and a Philippine temporary work agency. When Britannia called Gothenburg port in July 1988, the Seamen's Union and the Transport Workers' Union started a boycott against it, in order to force the captain to sign an ITF Special Agreement for the crew. In November 1989, the Labour court decided that the industrial actions was unlawful according to § 42 of the Co-determination Act (MBL)², as they aimed at setting aside a collective agreement with another trade union by which the employer was already bound.

The judgment made the Swedish Trade Union Confederation (LO) and the Swedish Confederation for Professional Employees (TCO) call for a revision of the MBL, because of fear that the trade unions' possibilities to act in an international context would be seriously restricted. To be precise, they referred partly to the possibility to participate in international solidarity actions at the request from a trade union International, partly to the possibility to enforce Swedish collective agreements for foreign contract work in Sweden. Thus, even if the campaign for decent working conditions for crews on ships under flags of convenience was the immediate cause for calling for a revision of the rules

¹ C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet.

² Lag (1976:580) om medbestämmande i arbetslivet.

on industrial action, the trade unions had also started to worry about the risk for social dumping by foreign service providers.³

The reason was that since a couple of years, the Government had started to take steps towards ever closer relations between Sweden and the European Economic Community (EEC), and the negotiations over the EEA Agreement were in progress. This had triggered a general debate over how this would affect working and employment conditions and industrial relations. Would it be possible to uphold the tradition of regulating working life through collective agreements? And would the incorporation of the *acquis communautaire* lead to lowered work environment standards and a downward pressure on terms and conditions of employment? The debate was intensified after the autumn 1990 when the Government announced that it planned to apply for full membership of the EEC. It was obvious that it would not be an easy thing to convince the Swedish people to vote in favour of accession in the (consultative) referendum that had to come.⁴

In order to secure the trade unions' support for its plans, the Government responded quickly to their demands for a revision of the rules on industrial action. The Government Offices worked out a memorandum with a proposal for a new provision which meant that, as an exception to § 42 MBL, industrial action aiming at setting aside a collective agreement by which the employer is already bound would not be unlawful, provided it is "a foreign" collective agreement.⁵ When the proposal was circulated for consideration, a majority of the respondents recommended that it should not be realised. Several reacted against the word "foreign" and argued that it was not in conformity with the prohibition on discrimination on grounds of nationality in EEC law. Also, some of them suggested that the exception from the main rule would not apply to any "foreign" collective agreement, but only to those with terms and conditions below a certain standard. However, all three trade union confederations declared their support for the proposal.

In the Government Bill presented in March 1991 all emphasis was put on the necessity to guarantee the trade unions' possibility to ensure that all employers who are active in Sweden apply wages and other terms and conditions of employment corresponding to what is customary here. International solidarity actions only came second. On one point, the Government had listened to the critique expressed during the consultation round. It agreed that it would not be appropriate to speak of "foreign" collective agreements. Instead, the main rule in § 42, that industrial action aiming at setting aside an existing collective agreement is unlawful, would apply only when action is taken by reason of employment relations falling directly within the scope of MBL. The idea was that employment relations which do not at all fall within the scope of MBL cannot be protected against industrial action by the same Act.⁶ Drawn up like this, the provision would not entail any discrimination on grounds of nationality, according to the Government, which stated that it attached the greatest importance to formulating national

³ Prop. 1990/91:162 Appendix 1, p.22.

⁴ Bylund (2001) p.35.

⁵ Prop. 1990/91:162 Appendix 1, p.20.

⁶ Prop. 1990/91:162 p.5.

rules in a way that would be compatible with EEC law and would not obstruct the integration efforts.⁷ However, it did not agree with the second point of critique. Thus, the new rule would apply irrespective of the standard of the terms and conditions in the collective agreement in question. The only decisive circumstance would be the employment relation's degree of connection to Sweden.

The Parliament rapidly pushed the Bill through, and the amended legislation came into force on 1 July 1991. It was called Lex Britannia, it did in practice allow industrial action against foreign employers in situations where a Swedish employer is protected against such, and it would later become known all over Europe through the Laval case.

1.2 Deliberations on the eve of EU accession

The very same day that Lex Britannia came into force, the Swedish Prime minister signed the application for EEC membership. Less than two months later, there was a change of government from social democrat to non-socialist. The new Government was subject to heavy lobbying from organizations that wanted Lex Britannia to be repealed.⁸ In May 1992, Sweden signed the EEA Agreement. In preparation of its coming into force on 1 January 1994, the Government commissioned a special investigator, Sven-Hugo Ryman, to analyse issues related to social dumping and Lex Britannia, especially the question if Lex Britannia was in conformity with Sweden's international commitments. The latter referred to obligations that would follow from the EEA Agreement but also to obligations stemming from ILO Conventions. For the Swedish employers had also complained to the ILO that Lex Britannia infringed the Conventions on freedom of association and protection of the right to organise (No 87), on the right to collective bargaining (No 98) and on minimum standards in merchant shipping (No 147).⁹

In parallel with Mr. Ryman's inquiry, important developments that influenced the Swedish debate took place at European level. The Maastricht Treaty came into force on 1 November 1993. With the Social Protocol to the Maastricht Treaty, eleven of the twelve Member States (the United Kingdom had opted out) were explicitly given competence to adopt EU level legislation in the labour law field.

In Denmark, it had taken two referendums before the new Treaty could be ratified. One reason for concern among the Danes was a fear that Denmark, which had a tradition of regulating the labour market almost exclusively through collective agreements, would be forced to abandon this tradition if the EU started to legislate in the labour law field. Judging from ECJ case law so far, Danish collective agreements would not have sufficient coverage for implementation of Directives. Similar concerns were occasioned by the first draft for a directive on posting of workers, which only acknowledged *erga omnes* collective agreements as instruments for regulating pay and other terms and conditions that could be extended to posted workers. Thus the debate was the same in Denmark as in Sweden.

⁷ Op.cit. p. 11 f.

⁸ Bylund (2001), p.38.

⁹ In the following, I will not treat the part dealing with ILO issues. It is suffice to say that the investigator found Lex Britannia to be in conformity with the Conventions.

In order to secure the Danish trade unions' support in the second referendum on the Maastricht Treaty, the Commissioner responsible for social policy and labour market, Pádraig Flynn, wrote a letter to the Danish Trade Union Confederation (LO) and also visited Denmark. In his letter Flynn foresaw that the Social Protocol would open up new prospects for implementation of EU legislation through Danish model collective agreements. He also declared that, as far as he was concerned, he would include collective agreements as implementation instruments in all new directives. As regards the Posting Directive, the Commission would present an amended draft, where it would add what is today the second indent in Article 3(8). And he assured that the Directive would have no impact whatsoever on the Member States' legislation on industrial action, or the social partners' practice in this respect. The only decisive circumstance was that foreign employers are treated equal with national employers who are in a similar position.

The inquiry on the Swedish *Lex Britannia* was finalised in December 1993.¹⁰ The report contains a penetrating and from many aspects competent analysis of EEA/Community law. However, the investigator Sven-Hugo Ryman also attaches much importance to what has happened in Denmark, and the Commissioner's reassurances to appease the Danes. It appears as if this is the reason why his conclusion on the crucial point is wrong. Mr Ryman concludes that from a strictly formal point of view one might arrive to the conclusion that *Lex Britannia* discriminates foreign employers. The possibility that the ECJ or the Efta court would do so cannot be ruled out. However, as he sees it, it is more likely that *Lex Britannia as such* will be deemed as not being in conflict with the prohibition on discrimination. Thus, there is no need to change the legislation on the ground that it is contrary to Sweden's international commitments.

But Sven-Hugo Ryman does not stop there. His "acquittal" of *Lex Britannia* is conditional. It is linked to the assumption that the Swedish Labour court will not approve of any industrial action against foreign service providers. In fact, he anticipates what the ECJ will do fourteen years later in the *Laval* case. Mr. Ryman notes that the effects of the legislation primarily is dependent on what standards the trade union wants to – and is allowed to – enforce through industrial action, and that many Swedish collective agreements include conditions that would restrict the freedom of foreign service providers to an extent that goes beyond what is justified by the legitimate aim of preventing social dumping. Thus, if a trade union tries to enforce this type of clauses against a foreign enterprise, the Labour court should deem the industrial action unlawful with application of the Articles on non-discrimination and free movement of services (4 and 36) in the EEA Agreement, Articles that have direct horizontal effect. If case law would develop in that direction, no decisive objections could be raised against *Lex Britannia*, Mr. Ryman argues.

Nevertheless, he has an additional proposition. As a practical solution that would facilitate life for foreign employers, he suggests that an impartial mediation body should be set up, to which they could turn in case they face disproportionate claims. This body would help the parties to come to a reasonable agreement, e.g. a modified version of the sectoral agreement. Here, Sven-Hugo Ryman mentions the Norwegian *Tariffnemnda* as a

¹⁰ Ds 1994:13.

model. Finally, he also addresses the trade unions and underlines that it is important that they prepare for an increasing activity from foreign enterprises by working out adequate forms for application agreements or other collective agreements.

Strange to say, the Summary of the report simply stated that there was no need to change Lex Britannia. Sven-Hugo Ryman's conditions for that conclusion were not mentioned. And the proposal that a special mediation body be set up was never realized.

Sweden's accession negotiations were proceeding. However, the opinion polls indicated that it would not be an easy match to secure a "yes" to EU membership. So, the Swedish Government too took help from Commissioner Flynn. The Minister of Labour, Börje Hörnlund, wrote a letter where he referred to the dialogue that Flynn had had with the social partners in Denmark and concluded "I would greatly appreciate it if you could develop your views on what the implications of the Maastricht Treaty would be for the Swedish system of determining conditions of work in collective agreements between the social partners, and for Swedish collective agreements as a means of implementing EC directives."¹¹

Flynn answered:

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Firstly, the Maastricht Social Protocol contains in Article 2.6 an explicit statement that this part of the Treaty shall not apply to "pay, the right of association, the right to strike or the right to impose lock out". This is a very important general principle which I think should allay concerns of the Social Partners. It is actually a principle already found in the "Social Charter" of 1989, and therefore carries considerable weight also in relation to the present Treaty.

Secondly, it is important to note that the Maastricht Protocol is closely modelled on the existing Swedish practice in that it opens the possibility for agreements between the Social Partners at European level to take the place of legislation.

Thirdly, it goes without saying that, if directives nevertheless are adopted, then duly notified collective agreements at national level would be one way in which to implement them. And Sweden would most probably chose this way of implementation as allowed for in Article 2(4). Non-compliance by firms or individuals could in this case be solved notably by recourse to the normal procedures in effect on the Swedish labour market

¹¹ The full text of the correspondence is published as an appendix to the Government bill Prop. 1994/95:19.

These three points taken together provide you with full assurances that the Maastricht Protocol would in no way require a change of existing Swedish practice in labour market matters. Quite the contrary: the Swedish labour market organizations may wish to become more active at the European level in order to promote their concept of harmonious labour market relations.”

This correspondence was presented to the public by the Government as a guarantee that the Swedish system for regulating working conditions through collective agreements would not be affected. The trade union confederations, who were in favour of EU accession, sided with the Government. LO expressed its satisfaction with the outcome of the negotiations which satisfied vital trade union interests and acknowledged Swedish labour law traditions. To the TCO it was especially satisfactory that the question of the position of the collective agreements had come to a positive result. The research institute Arbetslivscentrum agreed.¹² The correspondence was entered in the minutes of the Government Conference preparing the enlargement, and Sweden added a Declaration to the Final Act where it stated that it had received affirmations regarding existing practice as regards labour market issues and particularly the system for regulating working conditions through collective agreements.¹³

There were voices in the public debate underlining that this so called guarantee had several loopholes, but it was enough to convince a sufficient number. The referendum took place on 13 November 1994. 52.1 % voted yes, 46.9 % voted no and the rest of the votes were blank. The Parliament ratified the accession Treaty and on 1 January 1995 Sweden became a member of the European Union.

1.3. Bluff, ignorance or naivety?

Already when the memorandum on the projected Lex Britannia was circulated for considerations, doubts over its conformity with EU law were raised on several hands.¹⁴ Even more important, Sven-Hugo Ryman’s inquiry on the eve of EU accession is full of caveats. Certainly, there were lawyers and policy makers in the Government Offices as well as on the trade union side who were well aware that this was no guarantee in the true sense of the word. Pádraig Flynn was just a Commission official, whose words could not bind the EU institutions. Also, the Declaration to the Final Act was merely a unilateral

¹² Prop. 1994/95:19 p. 228.

¹³ Op. cit. Bilaga 11.

¹⁴ Bo Bylund, under-secretary of State in the Ministry of labour before the change of Government in 1991 and the person responsible for working out the Bill on Lex Britannia, gives an interesting insight in the conflicts within the Government Offices, where the Ministry of Foreign Trade as well as the Ministry of Justice were opposed to the draft in the Memorandum: “When I listened to the officials from the Ministry of foreign trade it was like listening to the prosecutor of the EC Commission before the European Court of Justice. It was a matter of interpreting the rules formally to the last comma and, *in dubio*, only solutions completely in conformity with EU law would be accepted. As usual, we Swedes should be top of the class in incorporating international rules to the letter. And is it not what has happened? But rules are seldom that clear, and the scope of interpretation is often wider than one believes.---Therefore, I feel that our country should stand up for and develop our legal traditions within the framework of our international commitments. Our labour law model must be defended as far as possible. Maybe, such an approach may occasionally lead to a lawsuit before the ECJ, but one has to put up with that if the question is important.” See Bylund (2001), p.36.

declaration made by the Swedish Government. Equally important in the light of the Laval judgment is the material contents of Flynn's dialogue with the Danish trade unions and with the Swedish Minister. When he endorses the Nordic model, it is obvious that he focuses primarily on the issue of private law collective agreements – in contrast to legislation – as instruments for labour market regulation and implementation of EU Directives. He is probably not even aware of the details of the law on industrial action in Sweden and Denmark.

And yet, two Governments of different political colour as well as the trade union confederations maintained that everything could go on as before after EU accession. How can one explain this? Of course, one cannot completely disregard the suspicion that some did in fact speak against their own better judgement in order to convince the hesitant to vote in favour of accession. However, it may well be that most of them really believed in what they said. That they were misled by a strong political wish combined with an over-confidence in the political development towards a more social Europe, with an institutional role for the social partners, that had come with the Social protocol. With two more Nordic member states in addition to Denmark, the development was likely to continue in the direction of the tangent. An expression of naivety no doubt, but not necessarily dishonest. But it would cause trouble within the trade union movement in the years to come.

Already in connection with Sven-Hugo Ryman's inquiry on Lex Britannia, the blue-collar confederation LO had admitted that collective agreements that laid heavier burdens on foreign companies than on national employers would be in conflict with the prohibition on discrimination on grounds of nationality in the Treaty of Rome. However, according to LO, this did not mean that the Swedish rules on industrial action were unlawful, only that the collective agreement in question could be declared null and void with reference to EU law. On the other hand, LO continued, Swedish trade unions had never accepted that individuals or enterprises are discriminated on grounds of nationality. They defended Lex Britannia precisely because it gave them the opportunity to ensure that all companies that are active in Sweden compete on the same conditions and that all employees who work there were treated equally. Therefore, LO had declared, it was a matter of course that the right to take industrial action would not be used for discriminatory purposes.¹⁵

However, at the same time, Mr. Ryman had noticed that there was room for different perceptions within the trade union movement of what was meant by equal treatment. For example, the Building Workers' Union had persistently required that foreign companies paid contributions to all collectively agreed insurances, a practice that had caused complaints from Norwegian building enterprises.¹⁶ Thus, a couple of LO's affiliates would interpret the assertions that the Swedish model would not be affected very literally, and the advocates of EU membership could not very well start to shout "April's fool" to them after 1 January 1995. They had to uphold its old position to the outer world, and try

¹⁵ Ds 1994:13 p.257.

¹⁶ Op. cit. p. 337.

influence negotiators and ombudsmen – for many of whom arguments of EU law were all Greek – on the quiet.

2. Initial implementation of the Posting of Workers Directive

When the time for implementation of the Posted Workers Directive¹⁷ came, there had again been a change of government and the Social democrats were in power.

The implementation was prepared by a public inquiry. In its terms of reference the Government underlined that it was important that the Directive was implemented in a way that adhered as far as possible to the Swedish labour market traditions. Thus, it must fully consider the special position that the social partners and the collective agreements have.¹⁸ With this, the Government had in view, among other things, that collective agreements are the only instrument, with the exception of individual employment contracts, for the regulation of pay. Sweden has no statutory minimum wage and no system for extending the binding force of collective agreements. They are purely private (contract) law instruments, binding only on the agreement's signatories and their members.

2.1 Emphasis on prevention of social dumping

In its report the Inquiry stated that the Directive has two aims: to facilitate the freedom of establishment as well as the free movement of services and to prevent social dumping.¹⁹ Obviously, it did not see the protection of the posted workers as an aim in itself. Also, even if the report mentioned prevention of social dumping in the second place, it actually put main emphasis on this aim.

Nothing in the report indicated that the Inquiry even considered that the Directive might be a maximum Directive. It is obvious that it did not foresee any problems with obliging foreign service providers to apply more favourable conditions than the minimum, notably the standard terms and conditions of Swedish collective agreements. Thus, in addition to standard rates of pay, a foreign service provider could also be bound to apply Swedish standards on a number of matters that are not included in “the hard nucleus”.

In its judgment in the Laval case several years later, the Court of Justice of the European Union would state:

It is common ground that, in Sweden, the terms and conditions of employment covering the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71, save for minimum rates of pay, have been laid down by law. *It is also not disputed* that the collective agreements have not been declared universally

¹⁷ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

¹⁸ Dir 1997:84.

¹⁹ SOU 1998:52 p.9.

*applicable, and that that Member State has not made use of the possibility provided for in the second subparagraph of Article 3(8) of that directive.*²⁰ (Emphasis added)

It may be a matter of words, but this is not how it is understood from a Swedish perspective. The Inquiry gave due consideration to the interpretation of the second and third subparagraphs of Article 3(8) of the Directive, which were said to have been specifically invented to fit the Swedish and the Danish systems. Its conclusion was that Sweden could use this provision for allowing the social partners to use their normal means, including industrial action as authorised by Lex Britannia, to get posting employers to sign Swedish collective agreements, to the same extent as comparable national enterprises competing on the same market do, without specifically mentioning this in the legislation implementing the Directive.²¹ And there was complete consensus between the social partners that Sweden should not introduce either a system for making collective agreements universally applicable or a statutory minimum wage. Thus, the proposed Posting of Workers Act²² would not put any obligations whatsoever as regards pay or other terms and conditions regulated in collective agreements on the foreign employer.

Among the organisations and institutions to which the report of the Inquiry was circulated for consideration, there was massive support for this solution.²³ There was only one exception. Like the majority, the research institute Arbetslivsinstitutet supported the idea that foreign service providers should be obliged to apply Swedish collective agreements, but nevertheless, for two reasons, it advocated that this should be laid down in the Posting of Workers Act.

First it pointed out that even if the main reason for the coming into being of the Directive was to protect workers in the host state from foreign low wage competition, its formulation meant that focus had shifted to guaranteeing the foreign workers terms and conditions on a par with workers in the host state. And, according to Arbetslivsinstitutet, the proposal of the Inquiry was less apt to legally ensure foreign workers terms and conditions of employment of a Swedish standard. The reason was that, according to Swedish law, workers who are not members of the signatory trade union cannot themselves invoke the collective agreement as such. Also, if the employer has never applied the collective agreement, it is unlikely that it is deemed to have normative effect on the individual employment contract of the non-unionised worker. The consequence would be that in many cases foreign workers would lack legal means to secure terms and conditions according to Swedish collective agreements. Secondly, Arbetslivsinstitutet questioned whether Lex Britannia was in conformity with EU law. However, if the Posting of Workers Act would cover terms and conditions regulated in collective agreements as well, both concerns would be met, Arbetslivsinstitutet meant. The rights of the posted workers would be guaranteed, and the trade unions would not have to rely on Lex Britannia in order to force the employers to apply the collective agreement.

²⁰ C-341/05 paragraph 67

²¹ SOU 1998:52 p. 84 et seq.

²² Lag (1999:678) om utstationering av arbetstagare.

²³ Remissynpunkter i anledning av betänkandet Utstationering av arbetstagare.

The private employers' confederation SAF, whose successor Confederation of Swedish Enterprise would later support Laval before the Labour Court and the ECJ, agreed with the Inquiry's proposal that terms and conditions regulated in collective agreements should not be extended to posted workers through legislation. According to SAF, this approach was "natural". However, it took the opportunity to iterate its opinion that it was very uncertain whether Lex Britannia was consistent with EU law and that it should be repealed.²⁴ SAF also argued that it must be clearly stated that foreign employers must not be forced to pay double costs, for example for paid annual holiday, when they post workers to Sweden. This problem should not be left to the courts.

However, the Government was not influenced by any of these points of view.²⁵ It admitted that a non-unionised worker – irrespective of nationality – cannot require that his or her employer applies the terms and conditions in the collective agreement.²⁶ On the other hand, it pointed out, an employer who is bound by a collective agreement is obliged to apply at least its minimum conditions to non-unionised workers as well. This does not follow from legislation but is an obligation *towards the trade union*, implied in the collective agreement itself.²⁷ Also, the Government added, the foreign worker has a possibility to join the Swedish trade union. Since no Swedish employers are obliged by law to apply collective agreements, it would be very tricky to formulate a statutory provision that forced foreign employers to do so without discriminating them on grounds of nationality.²⁸ Therefore, the Government concluded, there was hardly a need for other means than those already used by the social partners to prevent social dumping, and the mechanisms and procedures at the disposal of the different actors and guaranteed in legislation would lead to a satisfactory realisation of minimum conditions laid down in the collective agreements. As regards Lex Britannia it referred to Sven-Hugo Ryman's conclusion six years earlier: most likely, there is no need to change the legislation on the ground that it is contrary to Sweden's international commitments.²⁹ Neither did the Government see a need to specify that posting employers must not be forced pay double costs. It simply stated that if a foreign employer is required to pay double costs, it can go to a court, in which case the court has to take ECJ case law into account.³⁰

2.2 Facilitation of free movement

Thus, the original Posting of Workers Act included only one indication that foreign employers *might* have to apply Swedish collective agreements. It was a provision that instructed the Work Environment Authority, which was designated as the liaison office, to refer to the social partners for information about what collective agreements that might

²⁴ Op. cit.

²⁵ Prop. 1998/99:90.

²⁶ Op. cit. p. 27 et seq.

²⁷ This practice, that obviously seems paradoxical – if not inconceivable – for observers from countries with other industrial relations traditions, is based on the trade unions' conviction that it is in their own interest, since it prevents under-cutting of the collective agreement. Employers who don't respect this obligation are regularly faced with claims from trade unions. Especially the Building Workers' Union closely monitors what the employers pay their workers.

²⁸ Prop 1998/99:90 p. 27.

²⁹ Op. cit. p. 28.

³⁰ Prop 1998/99:90 p. 29.

be applicable. This was meant to satisfy the foreign employers' need to be able to foresee what costs the posting would involve.³¹ It is symptomatic that neither the Inquiry report nor the Government Bill mentions the posted workers' interests of being informed of the terms and conditions that may become applicable to them.

When it comes to terms and conditions regulated in collective agreements, the only task of the Authority was to forward information provided by the social partners. For example, it would not have competence to interpret collective agreements and inform how they should be applied in case the interpretation was unclear.

2.3 Other issues

During the legislative process, very little attention was paid to "technical" issues that seem important seen in retrospective, such as the scope of application of the Act or control and enforcement of its provisions. With very few exceptions, it appears as if the actors concerned saw this as unproblematic

For example, the definitions of the concepts "posting" and "posted worker" in the Posting of Workers Act were almost a blueprint of the text of the Directive, and did not contain any further specification or presumption of what is meant by a limited period or the state in which the worker normally works. The Government bill refers to the Rome Convention and its concepts "the country in which the employee habitually carries out his work" and "temporarily employed" and states that it will be necessary for the employer to consider before each case of posting if the Posting of Workers Act will be applicable, or if the employment contracts are so closely connected with Sweden that Swedish labour law will be applicable in its entirety from day one.³²

Also, information, declaration, notification or registration requirements for posting service providers were not even considered. Referring to their experience from the 1980's and 1990's, the Building Workers' Union and the Construction Federation assured the Inquiry that they were well informed both of which foreign companies that were active in Sweden and under what conditions they pursued their activities. Thus the social partners had a good control and were able to ensure that the collective agreements were applied.

2.4 An age of innocence

To sum up: Again, the Government, the Parliament and the social partners had almost unanimously concluded that, in principle, everything could go on as before. The "Swedish model" would not be affected. The fact that EU law might not permit Member States to extend every condition in a collective agreement to posted workers was only hastily dealt with, and did not occasion any legislative measures.

It is not hard to understand why everyone took for granted that the Directive was a minimum Directive in the usual sense of the word. Other Member States too made the

³¹ SOU 1998:52 p. 89; prop 1998/99:90 p 28.

³² Prop. 1998/99:90 p. 17 et seq.

same interpretation until the ECJ told the world that this was a mistake. But how come that nobody listened to the qualified dissenting voices on Lex Britannia?

The answer may lie in two new questions: Had it been possible for the politicians to even think of deviating from the line of policy that they had pursued five years earlier when they wanted to convince Sweden's citizens to vote in favour of EU membership? And why would the social partners suddenly start listening to the legal experts, when the politicians gave them the message they wanted to hear?

More surprising, though, is the social partners' starry-eyed image of how the *reality* would remain the same as it had always been – as if Sweden were a Garden of Eden that would remain unruffled, irrespective of the forces of the internal market. However, this may explain why they did not pay much attention to the “technical” issues mentioned above. If they are confident that all foreign companies will apply the same collective agreements as Swedish employers do, it is not necessary to worry about the scope of application of the Posting of Workers Act. And if they continue to be well informed of which foreign companies are active in Sweden, there is no need for administrative provisions on notification or registration.

3. From implementation to Laval

3.1 Most employers sign

However, in the years following the implementation of the Directive, the social partners' predictions came true on one point. Most of the posting employers did actually undertake to apply Swedish collective agreements. Some of them were bound by temporarily joining Swedish employers' organisations, but the majority signed so called application agreements directly with the trade unions, engaging themselves to apply the central agreement for the sector in question. Also, the vast majority did so without the question of industrial action had even arisen.³³ Thus even if legal experts had long questioned whether Lex Britannia was in conformity with EU law, industrial action in connection with posting of workers was not a big issue in practice before Laval.

Certainly, the mere existence of the prospect of industrial action may have contributed to this. However, a more important explanation seems to be that if the receiver of the service or the main contractor is a Swedish employer bound by the relevant collective agreement, it is normally easier for this employer if all subcontractors are bound by a collective agreement as well. This is due to a mechanism in the MBL: the trade union's right to negotiate and eventually put a veto on the engagement of a certain contractor. It works as follows: When an employer plans to engage someone to work without that person being an employee, the employer must first take up negotiations with the trade union, provided that they are both bound by a collective agreement for the work in question. During the negotiation the employer has to give the trade union all kinds of information that it may need in order to decide whether the contractor is an employer that fulfils its duties towards its employees and the society. If the realisation of the employer's

³³ Statistics from the National Mediation Office's annual reports for 2003 – 2009.

plan to engage the contractor would entail violations of legislation or of a collective agreement by which either the employer or the contractor is bound, the trade union has the right to put a veto on it. In sectors where subcontracting is frequent, such as the building sector, the social partners have agreed on simplified procedures that may be used as an alternative to the statutory procedure. The individual employer makes up a list of contractors that it may want to engage, and hands it over to the trade union. And as long as the trade union does not object the employer is free to engage any of these contractors without having to negotiate each time. This possibility to free itself of the duty to negotiate gives the employer an incentive to select reliable contractors – and contractors who are bound by collective agreements. It is true that the trade union cannot put a veto on a contractor only because it is not bound by a collective agreement, but it will not be accepted on the list (unless it is a genuinely self-employed contractor without employees). Thus, if the employer wants to engage a contractor that has no collective agreement, it has to follow the more cumbersome procedure laid down in the MBL. As a consequence, it will encourage all subcontractors to join the employers' organisation or to sign an accession agreement. According to the collective agreements for the building sector, the receiver of the service or the main contractor is also obliged to report all new workplaces to the trade union. This enables it to start negotiations on application agreements with all employers that are not already bound.

3.2 Problems with control

However, if the social partners were right that, on the whole, foreign service providers would accept to enter into Swedish collective agreements, they had overestimated their power from another aspect. In line with the consequent private law approach, there is no public monitoring of compliance and enforcement of collective agreements in Sweden. This is a matter exclusively for the social partners. Now they realised that it could be difficult to control that foreign employers actually gave their workers terms and conditions according to the collective agreements, when the posted workers were not members of the Swedish trade union. In some sectors, such as the building sector and the transport sector, the collective agreement itself obliged the employers to provide the trade union with information on individual workers' wages, irrespective of whether they were organised or not. But in other sectors employers had no such contractual obligation to inform the trade union, and there was no statutory provision that the trade union could rely on.

Thus, in connection with EU enlargement on 1 May 2004, the Government and the Parliament agreed that it was of vital importance to ensure that the monitoring of compliance with collective agreements was effective.³⁴ In June, the Government set up an inquiry that were to propose rules allowing trade unions to monitor compliance with collective agreements even when it had no members at the workplace.³⁵

³⁴ Regeringens skrivelse 2003/04:119; betänkande 2003/04:SfU15.

³⁵ Dir.2004/98.

3.3 Contents of collective agreements called into question

From the perspective of the posting employers', practice in Sweden confronted them with two types of problems.

First, the information provided by the Swedish liaison office was poor, to say the least.

Second, when the employers had found out what collective agreements they were supposed to apply, some of them objected to their contents, even if they were not in principle opposed to being bound by a collective agreement. First and foremost this concerned the obligation to pay contributions to all the insurances regulated in the collective agreements for the building sector, which they meant would lay double burdens on them.³⁶

In June 2004, a negotiator from the Building Workers Union contacted the Latvian company Laval un Partneri Ltd. in order to induce it to enter into a collective agreement for work at a building site in the city of Vaxholm. The company did not accept the contents of the agreement, and the dispute ending with the Laval judgment had started. In December Laval instituted proceedings before the Labour Court.

3.4 Social partners try to resume control

The prospect that the Labour Court would refer the case to the ECJ for a preliminary ruling confronted the Swedish trade union movement with a dilemma. On the one hand, all three confederations definitely wanted to defend the Swedish model as such. On the other hand, some suspected that Laval was not the ideal case to be tried before the ECJ, because of the contents of the building workers' collective agreement and the trade union's demand that Laval should accept it in its entirety. Outwardly, the blue-collar confederation LO ardently defended the actions of the Building Workers Union. At the same time, it took practical measures which seemed to indicate that it was not completely satisfied with how the trade union had played its cards.

Thus, on 30 August 2005, LO and the Confederation of Swedish Enterprise, reached an agreement with a recommendation to their affiliates to adapt their collective agreements to the situation of foreign employers that become temporary members of Swedish employers organisations. The day after, the Confederation of Swedish Enterprise and the bargaining cartel for salaried employees, PTK, agreed on a similar recommendation. The recommendation specifically pointed to the need to adapt the application of the rules on pay, working time and paid annual holidays to employers with temporary activity in Sweden. The affiliates were also recommended to include clauses that would give the trade union access to the workplaces and allow it monitor the application of the collective agreement.

As already said, this was a recommendation to the confederations' affiliates, as they are the masters of the sectoral collective agreements. It could not in itself adapt the agreements. However, the confederations' negotiators had done their utmost to secure the

³⁶ Annual report for 2005 of the National Mediation Office, p. 143.

approval especially of their affiliates in the building sector before the recommendation was signed. Formally, it only concerned the application of the collective agreements to the small share of foreign employers who become bound through membership in a Swedish employers organisation. But the idea was that once the collective agreement had been adapted, it could also be used when the trade union asked an employer to sign an application agreement.

In addition to this recommendation, LO, PTK and the Confederation of Swedish Enterprise agreed to modify the terms of the insurances that employers are obliged to pay when they are bound by the sectoral collective agreements, in order to protect foreign service providers from having to pay twice for the same type of insurance. The insurance terms are regulated directly in a collective agreement between the three organisations which meant that this change had immediate effect.

Two weeks later, the top negotiators of LO and the Confederation of Swedish Enterprise wrote a joint letter to the Minister of Labour Hans Karlsson and suggested that the Inquiry on the monitoring of compliance with collective agreements should be withdrawn. Matters related to the system of collective agreements are best solved by the social partners, and after the two organisations' agreement on how to adapt the collective agreements for foreign employers, the primary reason for establishing the enquiry is cleared away, they argued.³⁷ In fact, the Inquiry had already worked out draft legislation. In great hurry, it modified the report that it was about to publish and added that, with consideration to the recommendation between LO, PTK and the Confederation of Swedish Enterprise which was partly intended to regulate the issue covered by the Inquiry's remit, it was highly doubtful whether there was still a need to regulate it through legislation.³⁸ Even though it was not evident what impact the recommendation would have in practice, again the social partners convinced the legislator to stay out of the collective agreements system.

3.5 New Government follows its predecessors

In the 2006 elections, the Social Democrats lost government power. The question was if the new Government, a coalition between liberal and conservative parties, would defend Lex Britannia and the Swedish implementation of the Posting of Workers Directive before the ECJ. One of the parties had demonstrated an almost hostile attitude to trade union activities. But the biggest party declared that it wanted to preserve the collective agreements system, which had served Sweden well for years. Thus the new Government pursued the line of its predecessors.

4. Post Laval

The ECJ's preliminary ruling in Laval on 18 December 2007 made four things clear:

- Lex Britannia was discriminatory under EU law and could not be applied any more.

³⁷ Ahlberg (2005).

³⁸ SOU 2005:89.

- Private subjects like trade unions cannot force foreign service providers to apply national rules on other matters than those listed in Article 3(1) of the Directive, i.e. the “hard nucleus”.
- As regards the level of protection, posting employers can only be forced to apply the minimum laid down in legislation or collective agreements.
- Minimum rates of pay must be defined in a way that gives posting employers a possibility to ascertain what they are to pay to their workers.

In April 2008 the Government set up an inquiry that was to propose how the legislation should be changed as a consequence of the preliminary ruling.³⁹ Two other processes were running in parallel with the work of the Inquiry: the implementation of the Services Directive and the final proceedings in the Swedish labour Court.

4.1 “Lex Laval”

Unlike by the initial implementation of the Posted Workers Directive, when there was almost complete consensus, the “reimplementation” was characterised by furious political controversies. All actors agreed that the Swedish labour market model must be preserved to the greatest extent possible, but there was no agreement on how radical changes the Laval judgment made necessary. Therefore, the new legislation was not in place until more than two years after the ECJ’s ruling – and it is still controversial. The opposition has announced that it will repeal “Lex Laval” if it wins the general election in September this year.

SFS 2010:228, which is the official notation for “Lex Laval”, came into force on 15 April 2010 and amended the Posting of Workers Act and the Co-determination Act (which is the general legislation on industrial action, including Lex Britannia).

4.1.1 Restrictions to the right to industrial action

The amended Posting of Workers Act still does not put any obligations as regards pay or other terms and conditions regulated in collective agreements on foreign employers. As before, it is based on the assumption that, as a rule, foreign employers will still be bound by the normal Swedish collective agreements, either through temporary affiliation to a Swedish employers’ organisation or as signatories to an “application agreement”. The novelty is that the Act introduces restrictions on the trade union’s right to take industrial action in order to bring the foreign service provider to sign a collective agreement if it does not do so voluntarily.

Thus, Section 5 a of the Act lays down four conditions that must be fulfilled:

Industrial action for the purpose of regulating conditions for posted workers through a collective agreement may be taken only if the conditions demanded

³⁹ Dir. 2008:38 (Committee terms of reference 2008:38 Consequences and action in response to the Laval judgment, unofficial translation published in SOU 2008:123 p. 369).

1. correspond to conditions contained in a central collective agreement that is applied throughout Sweden to corresponding workers within the sector in question⁴⁰ and
2. refer solely to minimum rates of pay or other minimum conditions in matters referred to in Section 5 of the Act (i.e. “the hard nucleus”) and
3. are more favourable for the workers than those following from Section 5.

However – this is the fourth condition – industrial action must not be taken if the employer “shows” that the posted workers have conditions that are in all essentials at least as favourable as the conditions in the collective agreement referred to above. It is not necessary that these terms and conditions are regulated in a collective agreement in the worker’s home state (which was the case in Laval), an employment contract is sufficient.

The assessment of whether one condition is more favourable than another should be made by objective criteria, but based on how the workers’ side appraises the conditions.⁴¹ In its bill, the Government comments on how a trade union is to compare conditions in its own collective agreement and the conditions that the posted workers already have, for the purpose of deciding whether it can take industrial action.⁴² In principle, the conditions should be compared separately for each matter within “the hard nucleus”. For example, an employer who applies inferior conditions as regards one matter, e.g. holiday pay, should not be able to free itself by showing that it applies better conditions in another area, e.g. pay. However, in certain cases it may be appropriate to take other types of conditions into consideration, especially conditions on pay in relation to conditions on working time, where the level in one area is related to the level in the other. It adds that regulation of certain matters, such as annual leave, sometimes differs between countries without any of them being “inferior” or “more favourable”. In these cases, the comparison may be more overall and summary. If this comparison leads to the conclusion that the posted workers have “in all essentials” at least the same protection as according to Swedish minimum standard, industrial action should not be allowed.

Naturally, it will sometimes be difficult to make such a comparison, the Government concludes. Ultimately decisive in the practical application should be if the result of an overall assessment in its entirety stands out as appropriate in relation to the object of the provision, which is to give trade unions the possibility to uphold a Swedish minimum standard without discriminating against foreign service providers and restricting the free movement of services in a way contrary to EU law.⁴³

The fourth condition is one of the most controversial elements of the new legislation. The critics mean that the trade union should at least be allowed to require that the employer

⁴⁰ This description is meant to identify collective agreements with a sufficient coverage for being “generally applicable to all similar undertakings” within the meaning of the first indent of the second subparagraph of Article 3(8) of the directive, see SOU 2008:123 p. 252 et seq. and prop. 2009/10:48 p. 28 et seq.

⁴¹ Prop. 2009/10:48 p. 58.

⁴² Op. cit. p.59.

⁴³ Op.cit. p. 60.

confirms the conditions by signing a collective agreement. Then they would have a contractual right to control what the employer has actually paid to its workers, and a collective agreement that it can invoke before a court. With the new rule, the trade unions' ability to monitor and enforce the rights of the posted workers will be considerably impaired, they argue. In case the employer presents a fake contract to show that it applies the conditions in the collective agreement, the trade union will probably not even reach to collect enough evidence to prove the opposite until the posted workers have returned to their home countries. The Government acknowledged the problem, but deemed that it would not be consistent with EU law to allow industrial action only to satisfy the interest of monitoring and control.⁴⁴ The problem with fake contracts could be solved by requiring evidence of "comparably high reliability", the Government added without further specification.⁴⁵

It adds to the critique that the trade unions are prohibited from taking industrial action even if the posted workers are members of the Swedish trade union.

Another controversy concerns the interpretation of what is included in "the hard nucleus". According to the three trade union confederations trade unions should be allowed to require that foreign employers apply the terms on certain insurances in the collective agreements, notably those on compensation for accidents at work and the occupational group life insurances, as they are terms covering health, safety and hygiene at work (Article 3(1) (e) in the Directive). Again, the Government deemed that this is not consistent with the ECJ's statements in the Laval judgment.⁴⁶

4.1.2 Minimum rates of pay and other minimum conditions

In order to define what conditions trade unions may force through with the support of industrial action one has to "filter" or "strip" the normal collective agreements and sort out conditions that are not such minimum conditions. This exercise too is left to the social partners, and in practice to the trade unions, as they are the ones that may have a reason to take industrial action and hence to know what conditions they are allowed to require. Here the structure and substance of today's collective agreements cause special problems.

Although collective agreements on wages are negotiated at sectoral level, their substance has changed considerably – in some cases dramatically – during the last decades. Looking at the number of employees covered, most collective agreements today explicitly aim at, or in practice lead to, individual wages, albeit in a collective framework. Today's sectoral agreements contain fewer figures and more principles and procedures for bargaining at local level, where wages are negotiated to an ever increasing extent. There are even sectoral agreements with no figures at all – i.e. nothing that could be seen as a "minimum wage" in the context of posting of workers.

⁴⁴ Op. cit. p.35 et seq.

⁴⁵ Op. cit. p.37.

⁴⁶ Op. cit. p. 34.

With this said one has to add that collective agreements without figures are exceptions and only exist in sectors where posting of workers is still a rarity. Most sectoral agreements lay down some kind of pay minima – but they seldom use the term “minimum wage”.⁴⁷ They speak of “starting wage”, “basic wage”, “commencing wage” and the like, indicating that this is a wage for very young workers or those with their first job in the occupation in question, and they all imply that wages are to increase alongside with the workers’ experience. Thus, a Swedish employer who is bound by this type of collective agreement is not allowed to pay all its employees this minimum, unless they all are in fact very young and/or inexperienced. Only, the “minimum wage” for more experienced workers is set through collective bargaining at local level and may not emerge from the sectoral agreement. This is hardly controversial in a national context. However, when it comes to workers posted from other member states, it is debated whether “starting” wages, “basic” wages or “commencing” wages are minimum rates of pay in the meaning of the Posting Directive, or if anything else can be included.

The Posting of Workers Act itself says nothing about that. According to the preparatory works, the minimum wage is not necessarily synonymous with “basic” (etc) pay, but can include other types of remuneration that are usual in Sweden, such as overtime pay and bonuses for unsocial hours, night work and shift work. Also, nothing prevents from differentiation based on e.g. the worker’s tasks, education, experience, competence and responsibilities. The Government bill adds that the minimum wage for posted workers can be different depending on where in Sweden they work, if the central agreement differentiate between geographical areas.⁴⁸

Against this background, the confederation for blue-collar unions, LO, is carrying out a project together with its affiliates in order to help them identify the elements that can be included in the “minimum rates of pay” in the meaning of the Directive and the Posting of Workers Act. When these principles are established, each trade union will apply them on their own collective agreements.

4.1.3 Transparency

In order to ensure transparency for the posted workers and their employers, the trade unions are to submit the conditions which they may force through with the support of industrial action to the Work Environment Authority, which is the Swedish liaison office. However, as before the role of the Authority is restricted to forwarding this information. It is not competent to interpret the provisions or inform how they should be applied in case the interpretation is unclear. Thus when foreign service providers or their workers have such questions, the Authority is to direct them in the first place to the parties to the agreement.⁴⁹

It remains to be seen how this will work. As the trade unions’ primary goal still is to convince foreign service providers to sign normal Swedish collective agreements

⁴⁷ SOU 2008:123 p.339.

⁴⁸ SOU 2008:123 p. 279 et seq. and prop. 2009/10:48 p 57 et seq.

⁴⁹ Prop. 2009/10:48 p. 60 et seq.

voluntarily, some of them think that it is bad tactic to give a lot of publicity to the minimum conditions and prefer to wait. There is no sanction if they refrain from submitting the minimum conditions to the Authority. According to the Government bill, it should in fact not even affect the legality of industrial action taken, as this would be a too far reaching restriction of the right to collective action. The Parliament concurred with this opinion.⁵⁰

4.1.4 Monitoring and enforcement

The monitoring of compliance with collective agreements and the enforcement of the rights of non-unionised posted workers is still left exclusively to the social partners. As indicated above, this task may be more difficult with the new legislation. No new mechanisms are introduced to compensate for this.

The Inquiry had suggested that posted workers should be given a special right to claim terms and conditions according to Swedish collective agreements even if they are not members of the signatory trade union.⁵¹ Then trade union side did not object to this idea, even if they pointed out that it would be an anomaly in the Swedish system. However, the Labour court and one of the leading employers' organisations objected, the latter pointing out that such a rule would discriminate foreign employers.⁵² The Government listened to these objections and the proposal was never realised.

4.2 Implementation of the Services Directive

The Services Directive⁵³ was implemented through a new national horizontal statute named the Act on Services in the Internal Market.⁵⁴ In consequence with Sweden's line during the negotiations in the Council over the Directive, the Act does not touch upon labour law matters.

However, in addition to the new Act, acts of existing legislation that included requirements for authorisation and prior examination etc. concerning the establishment and provision of services were amended, in order to secure that they are compatible with the Directive. When the first draft⁵⁵ was submitted for consideration, LO, TCO and Saco drew attention to a proposal that would indirectly affect trade union activities. At that time, the Foreign Branch Offices Act⁵⁶ included a provision saying that business activities pursued in Sweden by national or foreign citizens residing in another country must have a manager who is resident in Sweden. According to the memorandum, this provision was not consistent with EU law and should be amended to be applicable only to business activities pursued by persons residing outside the EEA. The three

⁵⁰ Prop. 2009/10:48 p. 48; Arbetsmarknadsutskottets betänkande 2009/10: AU5 p. 34.

⁵¹ SOU 2008:123 p.319 et seq.

⁵² Prop. 2009/10:48 p. 50.

⁵³ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market

⁵⁴ Lag (2009:1079) om tjänster på den inre marknaden.

⁵⁵ Ds 2008:75.

⁵⁶ Lag (1992:160) om utländska filialer.

confederations, which meant that this would impair the trade unions' chances for negotiating collective agreements with foreign enterprises, suggested that instead of a manager residing in Sweden, the firm should be obliged to register a person with a Swedish address, who is authorised to represent the firm and has legal capacity. However, the Government deemed that it was uncertain if such a rule would be consistent with EU law and was not ready to propose legislation to this effect.⁵⁷

Nevertheless, the Government as well as the Parliament acknowledged that the trade unions' chances to establish contact with foreign service providers should not be unnecessarily impaired, and that there was reason to further investigate the matter. Thus, the Government set up an Inquiry to investigate whether it would be in conformity with EU law to introduce provisions in the Foreign Branch Offices Act that would oblige foreign service providers to designate a representative in Sweden in line with the proposal of the trade union confederations.⁵⁸ It was also instructed to propose amendments that would elucidate the distinction between establishment and temporary provision of services, as the Act was only meant to cover the first-mentioned.

The Inquiry presented its report on 30 June 2010.⁵⁹ The Inquiry noted that it is not always easy to decide if a foreign business operator provides services temporarily in the country or if it is in fact established in Sweden, especially not when it posts workers here. Therefore it proposed that, in order to meet the justified demand for legal certainty and predictability, the Act should be supplemented with guidelines for determining what is an establishment, and what is a temporary provision of services. Second, the Inquiry considered that it cannot be left entirely to market actors to assess whether the provision of a service in a particular case is temporary, and consequently not covered by the provisions on establishment. Thus, in order to enable independent control and to contribute to the correct application of the Posting of Workers Directive, foreign enterprises should be obliged to notify the Swedish Companies Registration Office in certain cases. If it has employees in Sweden and the operation will last more than eight days, it would also have to designate a contact person with address in Sweden. On the basis of the information provided by the enterprise, the Companies Registration Office would decide whether the business operation qualifies as an establishment or if it is a case of temporary provision of services. The decision should be appealable to an administrative court.

This is not exactly what the trade unions have asked for. A contact person is not synonymous with a person who has legal capacity and is authorised to represent the firm. The Inquiry did not completely rule out that legislation to this effect might be in conformity with EU law, but meant that this had to be investigated further. In any case, if such requirements need to be introduced, they should be added to the Posting of Workers Act, not the Foreign Branch Offices Act that is not applicable to temporary provision of services, the Inquiry concluded.

⁵⁷ Prop. 2008/09:187, p. 76

⁵⁸ Dir. 2009:210.

⁵⁹ SOU 2010:46.

4.3 The Labour Court's judgment

After the ECJ's preliminary ruling in the Laval case, it was beyond dispute that the blockade at the building site in Vaxholm was unlawful according to EU law. The only matter left for the Swedish Labour Court to decide was whether the trade unions were liable to damages.

Laval had claimed punitive damages and damages for economic loss of nearly 2,8 million Swedish krona (around 280 000 euro) taken together. The trade unions argued that they should not pay any damages at all, as they had acted according to an unequivocal provision of Swedish law that explicitly allowed them to take industrial action. Both sides asked the Labour Court to refer the matter to the ECJ for a second preliminary ruling rather than deciding in favour of the opposite party.

On 2 December 2009, five years after the proceedings had started, the Labour Court gave its final judgment.⁶⁰ Without asking the ECJ it had come to the conclusion that "it may [...] be considered established that there is a general legal principle within EU law" that damages may be awarded between private parties upon violation of a Treaty provision that has horizontal direct effect. Here, the trade unions had seriously violated the Treaty, and this violation was sufficiently clear for them to be liable for damages, the court stated. Laval was awarded punitive damages of 500 000 Swedish krona (around 50 000 euro). Economic damages was denied since Laval had not proved that it had lost the amount it claimed.

The case was decided with the least possible majority. Three of the seven judges – two of the three neutrals – were of a dissenting opinion. The judgment is controversial among the experts as well.⁶¹ The trade unions have applied to the Swedish Supreme Court to have the judgment reopened, according to an extraordinary procedure in the Code of Procedure.

5. *Beyond the age of innocence*

The age of innocence is past. The Swedes have learned that EU law does not accept the application of traditional Swedish practices in transnational situations, and that it does affect national law even in matters that where the EU has no competence to adopt secondary legislation. The Swedish legislator has made a fair try to loyally adapt the legislation to these new insights. Of course there are still voices arguing that this is not enough. For example, the Confederation of Swedish Enterprise and the Law Faculty at Lund University claim that it can never be allowed according to EU law to take industrial action against foreign enterprises with a view to reaching a collective agreement.⁶²

On the other hand, one may ask if the penitence has not lead to an overreaction in the opposite direction on some points, for fear of another backlash in the ECJ. For example:

⁶⁰ AD 2009 no 89. An unofficial translation into English is available at <http://arbetsratt.juridicum.su.se/>

⁶¹ See, for example, Kruse (2010).

⁶² prop. 2009/10:48 p. 27.

is it actually obvious that a trade union cannot be allowed to take industrial action to protect the interests of posted workers even if they are members of that union?

5.1 Loss of control

The social partners have also learned that their pre-accession/pre-enlargement experiences that guided the initial implementation of the Posting of Workers Directive are not really valid today. Some trade unions, for example the Building Workers Union and the union for workers in the forestry, have gradually realised that they are incapable of negotiating application agreements with an increasing number of foreign service providers. Typically, they are smaller enterprises posting workers for two – three months, to work on projects where neither the receiver of the service nor the main contractor are bound by the relevant collective agreement. Often, the trade unions are not even able to identify a person who has the competence to negotiate on behalf of the employer. In case they do, they normally have to search for this person in the sending state, which makes it very difficult to even start negotiations before it is too late.⁶³

Still, till now most foreign service providers have been bound by Swedish collective agreements. However, a direct effect of Lex Laval may be that they will not sign collective agreements to the same extent as earlier. Roughly said, there are three types of service providers in this context:

- Those that do not compete with wage costs in the first place, but with quality and productivity. These enterprises should have no problems with paying according to Swedish standards and are likely to continue to join the employers' organisations or sign normal Swedish application agreements.
- Law-abiding enterprises that want to do everything by the book, but which are not prepared to give their workers more than minimum pay and other minimum conditions. They should not have problems with signing collective agreements with Swedish minimum conditions – if only the trade unions get on with it and define what they are. Here, the trade unions have a dilemma. In the first place, they want the employers to sign normal Swedish collective agreements, not minimum agreements. Therefore, they may not want to give very much publicity to the latter. On the other hand, if they do not show their cards, foreign service providers who know that they are not obliged to pay more than minimum wage may not sign collective agreements at all. There are already examples where enterprises feel that they do not have time to wait for the trade union to make up its mind. And the Swedish Construction Federation is waiting for the first case where a subcontractor to one of its members refuses to sign a collective agreement even at minimum level.
- The third category are enterprises that are in for exploiting the right to free movement of services as much as they can on the workers' expense. They are less likely to join Swedish employers' organisations and they will certainly know that they cannot be forced to sign an application agreement as long as they "show"

⁶³ Memorandum by Annett Olofsson, LO/TCO Rättsskydd.

that they already give their workers terms and conditions in all essential as favourable as those called for by the Swedish trade union.

If posting employers will not conclude collective agreements to the same extent as today, it gets even more difficult than before to monitor that posted workers are given the terms and conditions that they should have. With no contractual relation to the foreign service provider neither trade unions nor employers organisations' will have any means of control and enforcement.

5.2 Competition with tax and social security contributions

The public debate on posting in Sweden has almost exclusively dealt with labour law aspects. But there is another aspect that deserves more attention: there is a lot of money to earn on competition with social security contributions and tax rules.

There are enterprises, especially temporary work agencies, which set up businesses in countries where the social security contributions are low, in order to post workers to states with high costs. According to the Regulation 883/2004 on the coordination of social security systems, posted workers can remain in the home state's social security system for two years. The worker or his/her employer simply asks the competent authority in the sending state to certify that the worker is subject to that state's social security. This is quite in order, provided that the worker has actually lived there before he or she is posted to another country. However, the system gives room for fraud. The host state's authorities are bound to respect the certificates issued by the sending state as long as they are not revoked by the latter, even if they have issued the certificates without properly controlling the information given by the employer.

In Sweden the Social Insurance Agency checks the certificates submitted to it and decides to which state's social security system the worker belongs. Indirectly, this monitoring is also a matter for the Tax Agency, which is the competent institution for levy of social security contributions. In a joint project 2007 they identified two examples of how the rules can be misused in order to evade application of the host state's social security system.⁶⁴ The investigation included certificates for around 240 Polish workers who were posted to work in a large infrastructure project in southern Sweden by temporary work agencies established in Ireland and the UK. In the Irish case 93 workers had certificates saying that they should continue to be covered by Irish social security. According to the certificates they had been living in Ireland for approximately two months before they had been posted to Sweden. However, the Social Insurance Agency discovered that 45 of them had earlier been posted from Poland to work for the same Swedish company, and, strange to say, 38 of them was said to have moved to Ireland during the same period as they had been working in Sweden as posted from Poland. Another conspicuous fact was that the 93 workers were residing only at six addresses in Ireland – 46 of them even at one single address, which was not an apartment block. The course of action was the same in the British case. Thus the Swedish authorities concluded that the workers had in fact never lived or worked in the said countries and called the

⁶⁴ Kontroll av socialförsäkringstillhörighet vid utsändning till Sverige.

certificates into question before the Irish and British authorities. By the time that they had managed to establish contacts with these authorities, they had already received new certificates from Cyprus for some of the workers concerned.

In the project report the two authorities point out that these practices are not only a problem for the Swedish state, which may fail to secure tax and social security contributions that it should have, but also a real problem for the posted workers, who may be deprived of their social security rights.⁶⁵

Competition with lower social security contributions and tax, and the lack of instruments for controlling that the service providers fulfil their obligations in this respect in their home states, is a problem for the Swedish employers as well. In an article in Sweden's leading business magazine, the owner of a Swedish "Gazelle" enterprise claims that the debate so far has focussed on the wrong issues. Wage competition, he argues, is not the big problem, but competition with uncontrollable tax dodging. From the annual report of Laval, the author concludes that it had had most of its activities in Sweden for several years, and that it should therefore have paid social security contributions in Sweden. He has also studied the annual reports of 15 other randomly selected companies and found that none of them had paid tax and social security contributions as they were obliged. In some countries, annual reports do not even make this type of control possible. For example in Romania, annual reports are classified information and not disclosed at all, and in Lithuania annual reports do not specify tax, social security contributions and wage, according to the author.⁶⁶ In January 2010 the author filed a motion to the Federation of Swedish Forestry and Agricultural Employers, proposing that it should enhance its routines for controlling foreign companies before they are allowed to be members of the organisation.

Competition with tax and social security contributions also induce Swedish enterprises to search for means of reducing their labour costs within the borders of what is legal. A solution proposed by a big multinational temporary work agency, A, may serve as an example. A Swedish building company, B, hired Polish workers who were employed by A Sweden, which is bound by the collective agreement between the Swedish Staffing Agencies and the trade unions affiliated to LO. The workers, who had joined the Swedish Building Workers' Union, discovered that they were paid less than workers directly employed by the user company B. According to their employer, this was in line with the collective agreement as the Polish workers were not comparable with the Swedish workers. Yet, after negotiations, A agreed to the trade unions claims and to pay almost half a million Swedish krona (around 50 000 euro) retroactively for the time that the Polish workers had worked for the lower wage. However, shortly after, A submitted a petition for negotiations to the trade union. A declared that it had to reduce its costs in order to be competitive and made the following proposal: The Polish workers should be dismissed from A Sweden because of redundancy, and be reemployed by A's business in Poland where the pay roll tax is more advantageous for the employers and where the workers themselves pay part of their social security contributions. They would then be

⁶⁵ Ibidem.

⁶⁶ Sundin (.2009).

posted from Poland to do the same work as before in Sweden. They would also receive the same gross salary as in Sweden. Only, their net salary would decrease as they would pay part of their social security contributions themselves. The Building Workers' Union meant that the proposal was contrary to the collective agreement and did not accept it.

5.3 Wanted: Overall perspective

From one aspect, Sweden is a true paradise for enterprises that want to make use of the free movement for services. In comparison with other countries, Sweden has very little administrative control of service providers that post workers in the country. There are no general information, declaration, notification or registration requirements that must be fulfilled by posting employers.

If the individual worker is posted in Sweden for less than 184 days during a twelve months period, his or her employer can be active in the country without having to notify any of Sweden's authorities. Only if the worker is posted more than 183 days, the service provider has to register with the Tax Agency.

If the employer does not want to pay Swedish social security contributions, it has to submit certificates from the authorities of the sending state to the Social Insurance Agency. Normally this is in the employer's own interest.

There are cases where employers neither submit social security certificates nor register as employers with the Tax Agency. If the authorities are aware of their presence in Sweden, for example after the trade unions have drawn their attention to it, they will be kindly asked by the Tax Agency to clarify to what country's social security scheme their workers belong.⁶⁷

Apart from this, there is nothing.

Instead, the Swedish legislator has relied on private monitoring and enforcement through the social partners. The strength of self-regulatory system and especially the trade unions has been the prerequisite for the absence of public intervention and administrative control.

With Lex Laval, the social partners' chances of securing posted workers' rights will not be the same as before, without any administrative measures compensating for this having been introduced. This may be more in line with EU law on free movement of services than before. But will it work in practice to fulfil the other two aims of the Posting of Workers Directive: to guarantee the rights of posted workers and to prevent social dumping? Or will those who look back ten or fifteen years from now say that the age of innocence continued?

As I see it, it is time to consider the regulation of matters concerned with posting of workers from an overall perspective, taking all aspects into account, labour law as well as

⁶⁷ Kontroll av socialförsäkringstillhörighet vid utsändning till Sverige.

social security and tax aspects, the interrelation between legislation in different areas and the balance between private and public control. The Inquiry on the Foreign Branch Offices noticed that there is a “regulation loophole” in the Swedish system in that it does not put any obligations whatsoever on foreign service providers to announce their presence on the Swedish market. While awaiting the overall review, the Inquiry’s proposal that a neutral institution should investigate whether a business operation is in fact a temporary provision of services or rather an establishment – in which case it should apply Swedish labour law in its entirety – would be one step. Today, business operators’ own assertions that they are temporary service providers are seldom called into question⁶⁸ With Lex Laval, this distinction will be more important.

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⁶⁸ One of the trade unions’ arguments in defense of its action in Laval was that Laval was in fact established in Sweden.

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