Action in response to the Laval judgment

Summary

STATENS OFFENTLIGA UTREDNINGAR

Swedish Government Official Reports
SOU 2008:123

SOU försätts S-format_eng.indd 1 2008-12-02 08:03:17

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Printed by Edita Sverige AB

Stockholm 2008

ISBN 978-91-38-23118-0
ISSN 0375-250X

Tryckort S-format_eng.indd 1 2008-12-02 08:04:53

Foreword

At the end of 2004, there was a blockade and sympathy action against the Latvian company Laval at a building site in Vaxholm, Sweden. Laval instituted proceedings in the Labour Court and requested that the industrial action should be declared unlawful.

Following the main hearing in the case in the spring of 2005, the Labour Court requested a preliminary ruling from the European Court of Justice regarding the meaning of the Community law rules in the area and on 18 December 2007 the Laval judgment, which explained that it was not compatible with Community law to allow industrial action in the situation in question, was passed.

Our inquiry was appointed by the Government in April this year. We have had an expert group from the Government Offices and the Swedish Work Environment Authority and also a reference group with representatives of the social partners linked to the inquiry. We have also visited officers of the European Commission and Government offices in a few other EEA countries and had discussions with professors in labour law and Community law at universities in Sweden and other Nordic countries.

The point of departure for our deliberations and proposals was, according to the Committee Terms of Reference, that the Swedish labour market model should as far as possible be able to be applied in relation to workers posted to Sweden from another country at the same time as Community law is fully respected.

This is a summary of our report, where we have conducted an analysis of the Laval judgment and presented proposals in accordance with the Committee Terms of Reference.

We have adopted an open approach in our report regarding our opinion on EC law and comprehensively explained the factors speaking for and against our conclusions.

The social partners have a great responsibility to ensure that our proposed model also functions in practice in a way that satisfies the requirements of Community law.

We expect that our report will be of benefit to the partners in their future work.

Stockholm, December 2008

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Contents

Summary

The inquiry's remit

According to the Committee Terms of Reference Consequences of and action in response to the Laval judgment (ToR 2008:38), our instructions were to present proposals for such changes in Swedish legislation as need to be made as a result of the Laval judgment.[1]

Lex Britannia

One task was to adopt a position on whether the 'Lex Britannia' in the Employment (Co-Determination in the Workplace) Act (MBL) should be amended, abolished or replaced by another regulation.

According to our Terms of Reference, the point of departure must be to avoid the discrimination situation identified by the European Court of Justice and to ensure that Sweden's commitments under the Posting of Workers Directive are fulfilled. At the same time, the right to maintain Swedish labour market conditions by means of industrial action should be retained as far as possible.

A particular question in this context is whether current rules can and should be applied in situations that fall outside the obligations following from Sweden's membership of the EU. One example of this could be industrial action undertaken in Sweden against a ship registered in a country outside the European Economic Area (EEA) for the purpose of bringing about an 'ITF agreement'.

[1] Judgment of the European Court of Justice in case C-341/05 Laval.

The Posting of Workers Act

The other major issue has been to consider whether any amendments need to be made to the Posting of Workers Act. In particular, we were assigned to examine whether it is possible to refer in the Posting of Workers Act to terms and conditions in collective agreements and, if so, in what way this can be done as regards the areas covered by the Posting of Workers Directive.

We have also been given the assignment of reviewing the Posting of Workers Act in light of the fact that the Act currently seems to refer to substantive areas in Swedish legislation over and above those covered by the 'hard core' of the Posting of Workers Directive.

Public policy (ordre public)

In addition, in the Committee Terms of Reference we were instructed to examine whether 'public policy' under Article 3 (10) of the Posting of Workers Directive can and should be used to a greater extent than at present to enable the application of terms and conditions of employment outside the 'hard core' of the EC Directive.

Liaison Office

Our remit has also included – with the social partners and the Swedish Work Environment Authority – discussing and possibly proposing improvements as regards the function of the Authority as a liaison office under the Posting of Workers Directive.

Measures that can be taken by the social partners

In the Committee Terms of Reference it was assumed that the social partners (labour market parties) intended to take measures to ensure that collective agreements, to be applied in relation to employers from other EEA countries, are in line with the criteria regarding predictability and transparency established by the European Court of Justice by the Laval judgment.

The Swedish model and Community law

Our considerations and proposals shall, according to the Committee Terms of Reference, be based on allowing as far as possible the application of the Swedish labour market model to workers posted to Sweden from another country. The objective must be to maintain the fundamental principle in the Swedish labour market: that the main responsibility for regulating pay and employment terms and conditions has been assigned to the social partners. At the same time, Community law, principally the provisions of the EC Treaty on the freedom of movement for services and the principle of non-discrimination on the grounds of nationality, and the Posting of Workers Directive (as these rules have been defined by the European Court of Justice) must also be fully respected.

Background

The Swedish model

The Swedish labour law system has features in common with corresponding systems in the other Nordic countries, but differs from the situation in other EEA countries. This difference is related to the prominent position the labour market organizations have traditionally enjoyed here in the Nordic countries.

In 2007, 73% of workers in Sweden were members of trade unions. This large membership and the absence of legal provisions limiting the operations of the organizations have promoted a high level of autonomy.

It is the social partners that are responsible for the formation of pay, and this is basically done without any involvement on the part of the governments. The centre of gravity of our system of rules is found in the collective agreements concluded between the active organizations. In 2007, about 91% of workers were covered by collective agreements.

The figures for level of trade union organization and level of coverage for collective agreements are on average higher in the building sector than for the labour market. The level of coverage for collective agreements for workers within the building sector was approximately 96% in 2007, and approximately 77% of workers were members of a trade union.

In an international comparison, there are few industrial conflicts in the Swedish labour market regardless of whether this assessment is based on the number of redundancies, industrial action taken or lost working days. During the period 2000 to 2007, the total number of lost working days due to industrial conflicts varied between 272 and 15,282 days, with the exception of 2003 when it exceeded 600,000 days owing to extensive conflicts in the local government area.

Sweden does not have any system for declaring collective agreements to be universally applicable. In certain areas, the terms and conditions of employment are governed by law. This applies, for instance, to the conditions for work periods, holidays and other leave. Such legislation is to a large extent non-mandatory, meaning that it can be set aside by agreements concluded by the social partners.

Collective agreements are legally binding for the contracting organizations and their members. This constraint applies within the scope of the agreement. An employer has an obligation in relation to the contracting employee organization to apply the agreement in relation to its workers.

Posting from other EEA countries

We have tried to establish a picture for what kinds of operations posting occurs and the scope of such posting. It has not been easy to gather information but, according to Byggnads[2], there were about 120 posting undertakings in the building sector during the autumn of 2008, with a total of about 1,050 workers. Elektrikerna[3] has estimated the number of posted electricians during the autumn of 2008 to be just over 280 workers. According to IF Metall[4], every year they conclude 30 to 50 collective agreements with undertakings from other countries that post workers to Sweden. IF Metall estimates that the said undertakings on average post 30 people per undertaking to Sweden over a period of 3 to 6 months.

[2] Svenska Byggnadsarbetareförbundet (The Swedish Building Workers' Union).
[3] Svenska Elektrikerförbundet (The Swedish Electricians' Union).
[4] Industrifacket Metall (Swedish Industrial Workers and Metalworkers' Union).

The case in the Labour Court

The dispute in the 'Vaxholm case' in the Labour Court originated from industrial action in the form of a blockade which had been taken at a building site in Vaxholm in November 2004. The reason for this industrial action was that Byggnads and its section Byggettan[5] had demanded a collective agreement with the Latvian undertaking Laval[6], which had posted building workers to Sweden. As no collective agreement was established, industrial action was extended in early December 2004 by sympathy actions on the part of Elektrikerna. A few days later Laval instituted proceedings in the Labour Court against Byggnads, Byggettan and Elektrikerna.

On 22 December 2004, the Labour Court rejected an interim application by Laval for the industrial action to be declared unlawful and on 29 April 2005, the Labour Court decided to obtain a preliminary ruling from the European Court of Justice.

The two questions referred for interpretation subsequently presented by the Labour Court in September 2005 were answered by the European Court of Justice by the Laval judgment on 18 December 2007. By the judgment, the European Court of Justice stated that Community law does not allow the kind of requirement for an agreement involved in this case (in conjunction with the industrial action referred to) in circumstances where the Posting of Workers Directive had been implemented in the way it had in Sweden. The European Court of Justice also explained that the provisions contained in 'Lex Britannia' are directly discriminatory in relation to providers of services from other Member States.

After the Laval judgment, the Labour Court has resumed its processing of the case, but it has not yet been determined.

Which country's law should apply?

The problems the inquiry has had to analyse emanate from issues relating to which country's law should apply regarding the terms and conditions of employment when an employer from one EEA country posts workers to another EEA country in order to perform a service. Should these conditions be governed by the provi-

[5] Svenska Byggnadsarbetareförbundet, Section 1.
[6] Laval un Partneri Ltd.

sions in the country where the employer is established, or should they be governed by the provisions in the host country?

A worker from one EEA country who goes to another EEA country in conjunction with the employer providing services there does not have the same right to equal treatment according to Community law as a person who is seeking or has employment in the other EEA country or goes to start or to conduct activities as a business operator there. The reason for this is that the person who is to perform such a service will only stay temporarily in the country where the service is to be performed and that the link to the country concerned will be neither strong nor permanent.

As regards the question of freedom to provide services, it is instead the undertakings that are to be treated equally. An undertaking from another EEA country may basically not be treated worse than undertakings that are established in the country where the service is to be performed.

According to the EC Treaty, it is not permitted to have impediments to the provision of services in the common market. This applies to both discriminatory and non-discriminatory impediments. It is only in exceptional cases that a Member State of the EU may have rules that make it more difficult for a party providing services from other Member States to perform services than it is for the nationals providing services.

If the host country also prefers to apply its own system of rules for posted workers, such provisions may in practice impede undertakings from other countries from performing services in that country. Such non-discriminatory impediments are only acceptable if certain preconditions are satisfied. Among other things, it is required that they are justified for 'overriding reason of public interest'. Examples of such interests are the need to protect posted workers and to counteract unfair competition.

The Rome Convention contains international private law provisions determining which country's law is to apply when an employment relationship has links to different countries. The point of departure is that an employment relationship should basically be regulated by the law in the country of origin and not by that of the host country.

The Posting of Workers Directive[7]

Through the Posting of Workers Directive that was adopted in 1996, the provisions that would otherwise apply according to the Rome Convention have been modified to some extent at EU level. One of the aims of the Posting of Workers Directive is to promote free movement. In order to counteract the difficulties that differences in pay between EEA countries may result in, the provisions have been written so that they will guarantee the posted workers reasonable conditions in the host country and so that they will be a protection for the host country's workers against unfair pay competition from undertakings from other EEA countries where the pay is lower.

Through the Posting of Workers Directive, the Member States are under an obligation to make some of their existing provisions for the protection of workers also applicable to posted workers from other EU countries who are temporarily engaged in their territory.

According to the Posting of Workers Directive, the legislation of Member States should be coordinated so that a nucleus of mandatory rules providing minimum protection can be established. When an employer from one EEA country posts workers for temporary work in another EEA country, the worker's terms and conditions of employment must lie within the framework of the 'hard core' of the host country's system of labour law rules.

Article 3 (1) of the Posting of Workers Directive states which terms and conditions of employment of the host country are to apply. These are conditions determined by law, regulation or administrative provision and/or collective agreements which have been declared universally applicable relating to certain operations (building operations) in the following areas:

a) maximum work periods and minimum rest periods;

b) minimum paid annual holidays;

c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

[7] 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.

d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

e) health, safety and hygiene at work;

f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

g) equality of treatment between men and women and other provisions on non-discrimination.

If a Member State does not have a system for declaring collective agreements or arbitration awards to be universally applicable, that State may instead, subject to certain preconditions, according to Article 3 (8), second paragraph of the Directive, base itself on:

- collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or
- collective agreements which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory.

Article 3 (10) of the Directive states that the Directive shall not preclude the application of terms and conditions of employment on matters other than those referred to in the 'hard core' in the case of public policy provisions. It is also stated that the Directive shall not preclude the application of terms and conditions of employment laid down in collective agreements which have been declared universally applicable within operations other than building operations.

Member States shall, according to the Directive, designate liaison offices that are to provide information about which terms and conditions of employment will apply to a posting. The liaison office shall cooperate with corresponding offices in other Member States.

Finally, it ought to be mentioned that a posted worker must be able to institute proceedings in the country of posting if the employer does not comply with the host country's terms and conditions of employment.

The Posting of Workers Act[8]

In Sweden, the Posting of Workers Directive was implemented in 1999 through the Posting of Workers Act. According to the Posting of Workers Act, employers from other countries must apply the legislation applicable in Sweden in the areas specified in the 'hard core' of the Directive in relation to posted workers, except as regards minimum rates of pay.

Sweden does not have any statutory provisions on minimum rates of pay, nor any system for declaring collective agreements to be universally applicable. The issue of implementation of the provisions of the Directive on minimum rates of pay was considered extensively in the *travaux préparatoires* for the Posting of Workers Act. The question of how the provisions on holidays and work periods contained in collective agreements were to be made applicable to posted workers was the subject of deliberations.

As the legislator upon the passing of the Posting of Workers Act assumed that the Posting of Workers Directive was a minimum directive and that Community law also allowed the trade unions to continue to have the right to take industrial action in order to establish customary collective agreements with posting employers from other EEA countries, no provisions were introduced in the Posting of Workers Act regarding minimum rates of pay. Nor were there any provisions included in the Act based on the conditions under the collective agreements regarding holidays, work periods, etc. The rules with which foreign employers were compelled to comply were only such rules contained in legislation regarding work periods, holidays, etc. that applied in Sweden within the areas specified in Article 3.1 of the Posting of Workers Directive.

Lex Britannia

The right to take industrial action in Sweden is constitutionally protected by Chapter 2, Article 17 of the Instrument of Government. Restrictions to this right can be made by an act of law or agreement.

Section 41 of the Employment (Co-Determination in the Workplace) Act prescribes that an employer and employee who are

[8] Posting of Workers Act (1999:678).

bound by a collective agreement may not initiate or participate in a stoppage of work (lockout or strike), blockade, boycott or other industrial action comparable therewith if the action is in breach of a provision on mandatory social truce (labour-stability obligation) in the collective agreement or where the action has as its aim certain objectives specified in the Section. Such industrial action is unlawful according to Section 41, second paragraph.

It follows further from Section 42, first paragraph of the Employment (Co-Determination in the Workplace) Act, that an employers' organization or an employee organization may not organize or in any other manner induce unlawful collective action. Nor may such an organization, through support or otherwise, participate in unlawful industrial action.

Consequently, mandatory social truce applies in relationships bound by collective agreements and under the case law established in the Labour Court. For example through the 'Britannia case' (Labour Court Report – AD 1989 no. 120), it is in principle prohibited to take industrial action for the purpose of circumventing a collective agreement already in existence.

The 'Lex Britannia' consists of three provisions that were introduced into the Employment (Co-Determination in the Workplace) Act on 1 July 1991. These provisions mean that:

- the scope of Section 42 of the Employment (Co-Determination in the Workplace) Act is limited so that the prohibition for employers' and employee organizations to organize or support an unlawful industrial action does not apply to industrial action other than such as is aimed at working conditions to which the Employment (Co-Determination in the Workplace) Act is directly applicable;
- a collective agreement that is invalid under foreign law as a consequence of it having been entered into following industrial action is, notwithstanding this, valid in Sweden if the industrial action was in compliance with the Employment (Co-Determination in the Workplace) Act (Section 25 a);
- a subsequent collective agreement shall have precedence over an earlier collective agreement concluded to which the Employment (Co-Determination in the Workplace) Act is not directly applicable (Section 31 a).

When Lex Britannia was introduced, it was intended that trade unions in Sweden would work to ensure that all employers, both domestic and foreign, apply rates of pay and other terms and conditions of employment that were in line with normal conditions in the Swedish labour market and that they would thereby be able to combat unfair pay competition. The aim was also to facilitate international solidarity actions within the merchant navy.

The Laval judgment

In the Laval judgment, the European Court of Justice laid down that it is not compatible with Community law for a Member State to allow industrial action under such circumstances as applied in the Labour Court's case, nor for a Member State to have provisions of such effect as Lex Britannia.

In the judgment, the European Court of Justice states that the Community legislature adopted the Posting of Workers Directive with a view to laying down the terms and conditions of employment governing the employment relationship upon postings (para. 58).

As regards rates of pay, the Court concluded that Sweden has not made use of the possibility provided for in Articles 3 (1) and 3 (8) of the Posting of Workers Directive to implement the Directive in that respect (para. 67). According to the Court, the Directive does not preclude another method than the methods provided in the Directive being used to determine terms and conditions of employment (para. 68). However, if the remuneration that a posting employer shall pay is to be determined by a collective agreement, there are requirements for predictability and transparency for the agreement that the employee organization wishes the employer to conclude (para. 71).

According to the Court, a Member State cannot on the basis of the Posting of Workers Directive demand that a foreign service undertaking applies conditions that go beyond the level prescribed by Member State's mandatory rules within the 'hard core' referred to the Directive (para. 80). Nor can a Member State on the basis of the Posting of Workers Directive demand that terms and conditions of employment, beyond those stated in Article 3 (1) (the 'hard core') or in the case of public policy according to Article 3 (10), shall be applicable to posted workers.

The social partners are not bodies governed by public law. They consequently cannot avail themselves of Article 3 (10) by citing grounds of public policy in order to maintain that industrial action intended to force an application of a collective agreement complies with Community law (para. 84).

The European Court of Justice has stated that industrial action constitutes a fundamental right. However, this does not mean that such action falls outside the scope of Community law under Article 49 of the EC Treaty on the freedom to provide services (paras. 95 to 96). Article 49 can be referred to by an undertaking against a trade union in this situation (paras. 97 to 98).

According to the European Court of Justice, the right to take industrial action in the way that was done in relation to Laval represents a restriction on the freedom to provide services according to Article 49 of the EC Treaty on the freedom to provide services (para. 99). However, such a restriction may be allowed if the industrial action aims to provide the workers in the host Member State such protection against social dumping that the action constitutes an overriding reason of public interest (para. 103).

In principle, an industrial action aimed at guaranteeing posted workers a certain level of terms and conditions of employment is deemed to have the purpose of protecting workers (para. 107).

However, industrial action with the aim of establishing a collective agreement where the conditions lie outside the 'hard core' of the minimum protection contained in the Posting of Workers Directive, or where the conditions for minimum rates of pay are not sufficiently precise and accessible, cannot be deemed to be justified with reference to the protection of workers (paras. 108 and 110), as the employer's obligations in these respects are coordinated within the provisions of the Posting of Workers Directive.

As regards Lex Britannia, the Court finds that the rules according to which consideration is not given to whether an undertaking from another Member State already is bound by an agreement in its country of origin, regardless of the content of such agreement, are discriminatory according to Community law. Such discrimination may be justified only on grounds of public policy, public security or public health – grounds that do not exist in this case (paras. 116 to 119).

Some conclusions from the Laval judgment

The first question referred

The question that, according to the Court, was to be answered was whether the Articles of the Treaty or Posting of Workers Directive in question, in a Member State where the Directive has been implemented in the way it was in Sweden, preclude a trade union being allowed to take industrial action in order to attempt to force a provider of services from another Member State to commence negotiations regarding rates of pay and sign a collective agreement containing more favourable rules than those resulting from the statutory rules referred in the Posting of Workers Act and which in addition also contain conditions in areas that are not specified in Article 3 of the Posting of Workers Directive at all.

The preliminary ruling of the European Court of Justice in this connection has an interpretation of the Posting of Workers Directive as its point of departure. The Court commences by explaining the purpose of the Directive as having been to coordinate which existing national rules on worker protection in the host country are to be extended and also applied in relation to workers who have been posted from another Member State.

According to the Court, it is only basically such conditions and requirements as specified in the 'hard core' of the Posting of Workers Directive, contained in Article 3 (1), that can be forced through in relation to employers from other Member States.

For it to be possible to force posting employers to apply kinds of conditions other than those included in the 'hard core', it is required that the conditions are subject to 'public policy'. Conditions that only follow from a collective agreement in the host State cannot be deemed to be covered by public policy. This is justified by the Court through the social partners not being bodies governed by public law.

In Sweden the 'hard core' of the Posting of Workers Directive, as far as it relates to all of the areas except minimum rates of pay, has been implemented through reference to the legislation applicable in the respective area.

There are no provisions contained in the Posting of Workers Act regarding extension of conditions of collective agreements. In such a situation, the Court concludes that it is not allowed to force through demands by reference to the Posting of Workers Directive

for a collective agreement that contains conditions better than the minimum level prescribed by the respective law.

As regards minimum rates of pay, the Court concludes that the Posting of Workers Directive does not actually exclude a Member State choosing another method for extending conditions than one of the methods specified in the Posting of Workers Directive. Such an alternative method must, however, be compatible with the EC Treaty Article 49 on the freedom to perform services.

The above forms the point of departure for the European Court of Justice's consideration of the Swedish system with industrial action to force through collective agreement conditions. This consideration is conducted in relation to the EC Treaty Article 49 as regards the freedom to provide services. Here the European Court of Justice concluded that the kind of industrial action in question in this case constituted a restriction on the freedom to perform services according to the Treaty.

The consideration by the Court in relation to Article 49 on the freedom to provide services was conducted on the basis of earlier practice regarding what may comprise acceptable restrictions of the rights under the Treaty where there is an overriding reason of public interest.

This consideration led to the conclusion that a system that allows industrial action to force through such collective agreement as was in question in the Laval case, that is to say the Byggnads agreement, cannot be deemed to be compatible with the EC Treaty.

This was justified by the collective agreement containing: *first*, conditions that lay outside the 'hard core' of the Posting of Workers Directive without being covered by public policy; and *second*, conditions where, although they lay within the 'hard core' of the Directive, the level of protection for the posted workers exceeded the minimum level according to the legislation that is referred to in Section 5 of the Posting of Workers Act.

As regards minimum rates of pay, the Court concluded that the collective agreement anticipated negotiations before a minimum rate of pay could be determined, and it did not contain any sufficiently predictable minimum rate of pay. A system, such as the Swedish system, to force through a requirement for pay was considered under such circumstances not to be compatible with the EC Treaty's freedom to perform services.

However, it is important to emphasise that the position adopted by the Court is made on the basis of how the Posting of Workers Directive is implemented in Sweden, that is to say where the Posting of Workers Act does not contain any special rules regarding the extension of conditions under collective agreements.

The second question referred

In its answer regarding the second question referred, relating to Lex Britannia, the Court found that rules according to which, in contrast to the rules applicable for Swedish undertakings, account was not taken whether an undertaking from another Member State is already bound by an agreement in its home country, regardless of the content of the agreement, are discriminatory according to Community law.

Such discrimination may, according to Article 46 of the Treaty, be justified only on grounds of public policy, public security or public health. According to the European Court of Justice, there were no such grounds in this case. Lex Britannia was thereby found to be in contravention of the EC Treaty's Article 49.

The consequences of the Laval judgment

Regarding the possibility of through a collective agreement demanding conditions that lie outside the Posting of Workers Directive's 'hard core' or conditions that contain provisions regarding a higher level of protection than the legislation referred to in Section 5 of the Posting of Workers Act, the judgment of the European Court of Justice goes against the view on the meaning of the Directive propounded by, among others, the Swedish organizations on the employee side.

The interpretation of the Court of the Posting of Workers Directive may be said to mean that the Directive not only constitutes a 'floor' for the level of worker protection for posted workers, but also a 'ceiling' for what may be demanded in relation to the posting employer. The possibility of requiring, ultimately through industrial action, the application of a collective agreement in its entirety and demanding conditions that lie at an average or normal level according to the agreement is therefore more restric-

ted than what has sometimes been assumed to be the case by the unions prior to the Laval judgment being issued.

Another consequence of the Laval judgment is that Lex Britannia can no longer be applied as regards posting of workers to Sweden from another EEA country. In practice, this means that the legal situation in these situations reverts to that which applied before Lex Britannia was introduced. This means that it is no longer possible to ignore a collective agreement that a posting employer from another EEA country applies for the posted workers.

Deliberations and proposals

As regards the consequences of the position adopted by the Court, and similarly measures to rectify the problems for the Swedish labour market that the Laval judgment entails, the answers of the European Court of Justice to both of the questions referred are to a large extent interrelated. This is reflected in our proposals. The uniform solution we put forward is aimed at both setting boundaries for which requirements may be imposed with the support of industrial action in the situations now in question, and at regulating how terms and conditions of employment already applied by employers for posted workers are to be dealt with.

Choice of method to extend the application of conditions of collective agreements

According to our Committee Terms of Reference, we were assigned to examine the possibilities of extending the application of the conditions of collective agreements so that they also cover workers who have been posted to Sweden.

We have assumed that there are four different alternatives with regard to the choice of method for extending such terms and conditions of employment. These alternatives are: statutory rules for minimum rates of pay; a system for declaring collective agreements to be universally applicable; a model within the framework for Article 3 (8), second paragraph of the Posting of Workers Directive; and also what is now referred to following the Laval judgment as a 'fourth model', which does not follow any of the methods

referred to in the Posting of Workers Directive for extending terms and conditions of employment in relation to posted workers.

As regards minimum rates of pay by law and declaring collective agreements to be universally applicable, which are both methods referred to in the Posting of Workers Directive, we have interpreted our Committee Terms of Reference to mean that these solutions should be avoided if it is possible according to Community law to implement a less extensive solution as regards the autonomy of the parties in the labour market.

An introduction of statutory rules on minimum rates of pay would mean that the responsibility for the determination of the level of minimum rates of pay is transposed from the social partners to the government. Here, it ultimately becomes a political decision that determines the level of the minimum rate of pay instead of this level being established, as today, through negotiations between the employers' and employee organizations.

The above also largely applies as regards declaring collective agreements to be universally applicable. Such a system would mean that a particular agreement within a sector would, through a political decision, be selected to apply to all of the country's workers within the sector. The conditions of a collective agreement that has been declared universally applicable would virtually achieve the status of a statute and its application, for both national workers and workers posted to Sweden, would no longer solely comply with contractual grounds and principles.

An introduction of any of these systems, that is to say statutory minimum rates of pay or declaring collective agreements to be universally applicable, would consequently entail a major intrusion into the Swedish labour market model. However, this does not mean that the system does not have its benefits. Provided it were designed in the right way, it would be possible to achieve predictability for a foreign employer as regards applicable conditions, which is difficult to achieve through other methods. Moreover, this would also mean that Swedish and foreign employers would consequently be treated exactly the same in this respect.

However, we have found other models for the extension of collective agreement conditions, which are less intrusive to the function of the labour market and which we consider to be acceptable from the Community law perspective. We have therefore chosen not to proceed further with any proposals regarding the introduc-

tion by statute of minimum rates of pay or a system for declaring collective agreements to be universally applicable.

For countries that do not have any system for declaring collective agreements to be universally applicable, Article 3 (8), second paragraph offers two alternative methods by which the Member States, if they so decide, can base themselves on a collective agreement provided the agreement has certain attributes.

The collective agreement should either be generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned (*the first indent*), or have been concluded by the most representative employers' and labour organisations at national level and applied throughout national territory (*second indent*). The first indent is said to have been adopted to protect Swedish and Danish interests and consequently directed at the labour market models of these countries.

We have, in the course of the reasoning expounded in detail in our report, discussed extensively the meaning of Article 3 (8) second paragraph, primarily regarding the question of how, according to the Article, it would be possible to 'base itself on' a collective agreement and what is meant by the first indent's requirements for a collective agreement to be said to 'be generally applicable'. We have concluded that the Swedish collective agreement model can be classified as belonging to a system that falls within the first indent of the provision. This can be done through it being stated in an act, as a precondition for a trade union being allowed to take industrial action against an employer from another EEA country, that the collective agreement sought with the posting undertaking has certain attributes that correspond to those referred to in the indent in question.

One advantage with fitting in the Swedish model (with the right to industrial action) in this way under the framework for the Posting of Workers Directive is that, in accordance with the reasoning expounded in detail in our report, it would also be possible to require collective agreement conditions in relation to posted workers for areas covered by the list contained in Section 5 of the Posting of Workers Act, that is to say work periods, holidays, etc.

The 'fourth model', discussed as a result of the judgment of the European Court of Justice, was primarily based on the statement by the Court that methods for the extension of national conditions besides those specifically mentioned in the Posting of Workers Directive may also be used, provided such methods upon a consi-

deration based on Article 49 of the EC Treaty do not breach the principle of freedom to provide services. Such a fourth method basically corresponds to how Sweden has actually implemented the Directive, that is to say that it has been left entirely to the social partners to regulate the conditions of collective agreements for posted workers without having made any special regulation regarding this in the Posting of Workers Act.

The Court concluded that such a method, which is not contained in the Posting of Workers Directive, cannot be used to establish the application of collective agreement conditions in areas governed by the Swedish legislation. However, the method can be used in areas where there is no such regulation as in the case of minimum rates of pay. However, the relevant collective agreement was considered to be cumbersome and unpredictable as regards which minimum level would apply under the agreement.

In our opinion, a 'fourth model' could form the point of departure for regulation of the terms and conditions of employment for posted workers. However, the disadvantage in relation to a solution according to one of the methods specified in the Posting of Workers Directive is that it would not be possible to extend conditions under a collective agreement to areas also governed by the Swedish provisions referred to in the Posting of Workers Act. This method would consequently only be of relevance regarding minimum rates of pay and not as regards work periods, holidays, etc.

Our conclusion in this respect is that Sweden can and should choose a method for extension of collective agreements in relation to posted workers that falls within the framework of Article 3 (8), second paragraph of the Posting of Workers Directive. The method that we propose still allows collective agreements and the social partners to be given an active role through the conditions under collective agreements also being of relevance to areas where the conditions are governed by law. This solution is consequently the one that lies most in line with our Committee Terms of Reference.

The question of which conditions it may be allowed to demand with the support of industrial action

According to our interpretation of the Laval judgment, it is not allowed, according to Community law, to have a system that permits industrial action against an employer from another Member State with the aim of forcing through demands for collective agreements containing conditions that, without being subject to public policy according to Article 3 (10) of the Posting of Workers Directive, lie outside the 'hard core' of the Posting of Workers Directive.

As regards conditions that lie within this 'hard core', it is only minimum conditions that may be forced through in relation to an employer from another EEA country. This of course applies regardless of whether the conditions are regulated by law or through collective agreement. According to the judgment of the European Court of Justice in the Laval case, industrial action aimed at forcing through conditions at levels higher than the minimum level violates Article 49 of the Treaty regarding the right to perform services.

It follows from the European Court of Justice's judgment not only that collective agreement conditions that are to be forced through in relation to employers from other EEA countries should refer to the minimum level according the agreement – the conditions must also be plain and clear. The posting employer must be able to discern in a reasonable and simple way from the agreement the obligations that follow from the collective agreement within the 'hard core'. Industrial action in support of demands under collective agreements should consequently only be allowed if the conditions of the collective agreement are plainly and clearly stated and thereby predictable for an employer that posts workers to Sweden.

Questions linked to Lex Britannia

Considering the judgment of the European Court of Justice in the Laval case, Lex Britannia as currently formulated cannot be applied as regards posting within the EEA. However, some form of mechanism to be able to force through terms and conditions of employment in relation to employers from other Member States is needed if we are to continue to leave the regulation of terms and

conditions of employment to the social partners in these situations. However, such mechanism must not violate Article 49 of the EC Treaty on the freedom to provide services. Nor may it operate in the same way as Lex Britannia does today, that is to say in the way that the European Court of Justice found to be directly discriminatory against employers from other Member States.

A model that regulates the right to take industrial action against an employer from another EEA country would as such allow the setting aside of conditions and agreements that the employer already applies in relation to its posted workers. On the basis of the model we have discussed so far, one precondition for the right to take such industrial action is that only plain and clear minimum conditions within the 'hard core', according to collective agreements that satisfy certain requirements, are demanded in relation to the employer.

However, in our assessment this is not sufficient to guarantee that industrial action is not taken in some circumstances where this is not allowed according to Community law. According to case law of the European Court of Justice regarding Article 49 of the EC Treaty on the freedom to provide services and the statements of the Court referring to Lex Britannia in the Laval case, consideration must also be given to the conditions that the posted workers already have, for instance under a collective agreement in the home country or according to an agreement with the employer. Industrial action which restricts the freedom to provide services may only be taken if it is necessary to achieve the aim for which it is used. This implicitly requires, among other things, that the posted worker may be afforded a real advantage, that is to say basically better conditions than he or she already has.

According to the principle of mutual recognition, a Member State is also liable to respect the conditions and requirements a provider of services already applies in relation to its workers under the rules in its home country. If the service provider already applies the same or better conditions than those in the host country, we consider that no action restricting the freedom to perform services can be taken without this resulting in a breach of Article 49 of the Treaty.

The position we have adopted and our deliberations in this respect lead to two conclusions.

First, it ought not to be possible to force through demands for a collective agreement in Sweden with the support of industrial

action if the conditions of the collective agreement lie at the same level or a level lower than the levels according to the legislation that is referred to in Section 5 of the Posting of Workers Act.

Second, it should not be possible to take industrial action aimed at signing collective agreements if the posting employer has essentially at least such conditions as the employee organization demands. In such cases it can therefore not be deemed necessary and proportional to take industrial action and impede the performance of services in order to regulate the terms and conditions of employment for the posted worker.

In the course of our inquiry it has been asserted by the unions that it must at least be possible to require an employer from another EEA country, who claims that it applies particular conditions for its posted workers, to confirm these conditions by concluding a collective agreement with the relevant employee organization. The organization would thereby be given an opportunity to exercise supervision for true compliance with the conditions. Such a general right to always be able to demand a collective agreement is, however, in our opinion not compatible with Community law.

We are aware that the collective agreement is an important instrument for the trade unions as regards supervision and verification of the terms and conditions supplied by the employer. An effective instrument for a monitoring and verification function that would be compatible with Community law can, however, be achieved in another way through the rules we describe in the following.

A conditional right to take industrial action against employers from other EEA countries

As indicated by the basic position we have adopted, we are of the opinion that it is possible to find a solution to the problems that arose through the Laval judgment within the framework of the Swedish labour market model.

However, one precondition for this is that the model is modified in posting situations so that it is in compliance with Article 49 regarding the freedom to provide services according to the EC Treaty, and does not otherwise have a discriminatory effect in relation to undertakings from other countries within the EEA.

Set against this background, we propose that a special rule be introduced regarding the right to take industrial action against an employer from another EEA country.

This rule, which we propose be introduced into the Posting of Workers Act, contains three components. All components must be satisfied for it to be allowed to take industrial action for the purpose of regulating conditions for posted workers through a collective agreement.

The *first component* of the provision aims to qualify the Swedish collective agreement model so that it falls within the scope of Article 3 (8), second paragraph, first indent of the Posting of Workers Directive. It follows from this component that the terms and conditions of employment must, in order to be forced through with the support of industrial action, correspond to the conditions contained in a collective agreement concluded by an employee organization and an employers' organization at central level and applied generally throughout Sweden regarding corresponding workers in the sector in question.

What is meant by such an agreement is a nationwide sector agreement that regulates terms and conditions of employment for the category of workers to which the workers posted to Sweden belong. Such a sector agreement in the Swedish labour market can, in our opinion, be said to be applied generally by Swedish employers in the sense referred to in the Posting of Workers Directive.

The *second component* of the provision regulates the kinds of conditions and what relative level of such conditions may be demanded with the support of industrial action against an employer from another EEA country.

As regards kinds of conditions, these should relate to pay and/or such conditions covered by the list in Section 5 of the Posting of Workers Act. They should consequently be conditions falling within the 'hard core' of the Posting of Workers Directive.

For conditions also regulated by such legislation as referred to in the Posting of Workers Act, the level of protection in the collective agreement should lie at a level higher than according to the Act. For instance, the number of paid holidays demanded with the support of industrial action must be more favourable than the rules of the Annual Leave Act. Similarly, that demanded regarding work periods and rest periods must involve a situation better for the worker than according to the provisions of the Act.

As regards the level of conditions according to the collective agreement, these must involve minimum conditions. Only the minimum level as regards rates of pay or other conditions that follow from the central sector agreement may consequently be demanded with the support of industrial action.

According to the Posting of Workers Directive, it is up to the different Member States to decide what is meant by 'minimum rates of pay'. In Sweden it should therefore not only be the basic pay that can be regarded as comprising a minimum rate of pay. It ought to be possible for this term to include other remuneration that is usually provided, for instance overtime rates, supplements for inconvenient working hours and night work and also shift work supplements. Moreover, the basic pay may be differentiated on the basis of the workers' work tasks, their experience and competence and the responsibility the work involves.

On the basis of these principles it may be left to the trade unions, in consultation with the relevant employers' organizations or on their own initiative, to determine in detail what is to be deemed to constitute such minimum rates of pay and other minimum conditions within the 'hard core' that are to be applied for a particular category of posted workers according to the central and nationwide collective agreement applicable to the sector. Here the trade unions could conceivably make use of some form of ancillary agreement, with references to relevant provisions in the sector agreement, or use a specially worded standard agreement that in these areas reflects the provisions applicable under the sector agreement. Under the heading 'The Swedish Work Environment Authority's role as liaison office', we present a further proposal aimed at ensuring that agreements of this kind are submitted to the Swedish Work Environment Authority.

With this solution it can be said that a nationwide sector agreement forms a kind of reference agreement as regards which conditions and requirements may be imposed with the support of industrial action in relation to employers from other EEA countries. It is therefore only possible to force through conditions that, as regards minimum levels, correspond to those applicable under the sector agreement.

The *third component* of the provision means that an industrial action may not be taken without regard being taken to the conditions the posted worker already enjoys according to, for example a collective agreement or a separate contract of employment in their

home country. Here an obligation is placed on the posting employer to show that the conditions applied in relation to the posted workers already lie at the same level as the conditions demanded or as conditions under another applicable sector agreement.

The employer can be obliged to present documentation in the form of information on rates of pay, collective agreements or individual contracts of employment to satisfy the evidential requirement. This evidential requirement can be imposed on the employer throughout the duration of the posting.

The aim is that the trade unions would receive a tool to verify and monitor that these terms and conditions of employment correspond with the provisions of the Posting of Workers Act and with such provisions in a sector agreement that lies in the framework of the 'hard core'. At the same time, the requirements imposed by Community law for regard to be taken to the conditions that the posted worker already enjoys according to some regulation in their home country are satisfied.

Conditions outside the 'hard core' of the Posting of Workers Directive (public policy)

Article 3 (10) of the Posting of Workers Directive affords the Member States an opportunity of requiring posting undertakings from other Member States to comply with provisions on terms and conditions of employment outside the 'hard core' of the Directive if the provisions relate to public policy.

According to the case law of the European Court of Justice, the term 'public policy' means provisions that are so critical for the protection of political, social or economic order in a Member State that it is necessary that they apply for all people and for all legal relationships within the Member State.

Based on Article 3 (10), foreign, posting undertakings are currently obligated to comply with the provisions of the Employment (Co-Determination in the Workplace) Act on the right of association and right of negotiation. In the Terms of Reference, we were urged to examine whether Article 3 (10) should also be employed to facilitate the application of further conditions of employment outside the 'hard core' of the Directive.

We have not found any provision regarding the terms and conditions of employment in the Swedish legislation that can be

deemed to fall in under the above-mentioned definition of the term 'public policy'. We therefore do not propose any such amendment to the Posting of Workers Act.

Does the Swedish Posting of Workers Act refer to conditions that lie outside 'hard core' of the Directive?

The Posting of Workers Act states the provisions in Swedish law with which foreign, posting employers must comply. These include provisions regarding the Working Hours Act and three other laws on work periods. There are rules on night work, rights to pauses and rights to be given notice of changes to the scheduling of work periods some time in advance. These provisions do not, in our opinion, form part of the 'hard core' of the Posting of Workers Directive. Undertakings from other EEA countries should not be compelled to comply with them. We therefore propose that the references in the Posting of Workers Act to these provisions be removed.

What should apply in the event of posting from a third country?

Our Committee Terms of Reference refers to the specific issue as to whether Lex Britannia can and should be applied in situations that fall outside the obligations ensuing from Sweden's membership of the EU.

From Article 1 (4) of the Posting of Workers Directive it is indicated that undertakings that are established in a non-member State may not be treated more favourably than undertakings that are established in a Member State. The Swedish Posting of Workers Act is therefore also applicable to postings from countries outside the EEA. In the event that at least the same requirements are not demanded upon a posting from a third country, undertakings from non-member States would be treated more favourably than undertakings from EEA countries.

However, there is no legal impediment to treating an undertaking from another Member State more favourably than an undertaking from a non-member State.

Consequently, in our assessment there is no impediment to the current system applying as regards postings to Sweden from coun-

tries outside the EEA, and the application of our proposed rules is limited to cover industrial action against employers from other EEA countries.

As regards the question of whether it is appropriate to retain the current regulations in relation to countries outside the EEA, it may naturally be questioned whether, in order to counteract what is usually termed 'social dumping', we should do this when the European Court of Justice has declared that the rules go beyond what may be deemed allowed according to the fundamental principles of Community law. It may be claimed that a transnational trade in services on such conditions as apply to undertakings within the EEA cooperation yields socio-economic gains when it is based on certain pay competition, and that trade on such conditions should be accepted even when a service provider is established in a country outside the EEA.

However, the point of departure of our Committee Terms of Reference is that we should endeavour to retain the Swedish model with regulation of the conditions in the labour market by collective agreement. The least intrusion possible should be made to the model, and the measures proposed should aim to resolve the situation that arose as a consequence of the Laval judgment.

Set against this background, we are not prepared to propose that industrial action in conjunction with postings from third countries should also be covered by the proposed regulations in the Posting of Workers Act. Nor do we consider that there is reason to propose further amendment of Section 42 of the Employment (Co-Determination in the Workplace) Act than those that result from our proposal to introduce a special rule on industrial action in relation to employers from other EEA countries.

Possibility for posted workers to claim rights according to a collective agreement

According to Swedish law it is not possible for a posted worker to base any rights on a collective agreement concluded between the Swedish trade union and the posting employer, unless the posted worker is a member of the contracting trade union. This is, in our opinion, an inadequacy in relation to the requirements of the Posting of Workers Directive.

We propose that a new provision be introduced into the Posting of Workers Act whereby rules on terms and conditions of employment in a collective agreement entered into between a Swedish employee organization and an employer that is established in another EEA country and which posts workers to Sweden are possible to claim by a posted worker even if he or she is not a member of the contracting organization. The employee should, according to the proposed provision, be able to refer to the collective agreement for the duration of the posting.

The Swedish Work Environment Authority's role as liaison office

We propose two measures as regards the function of the liaison office, which aim to simplify matters, both for foreign employers and workers, regarding the obtaining of information about the conditions and requirements applicable upon a posting to Sweden.

One of the measures is to prescribe in the Posting of Workers Act that terms and conditions of employment that an employee organization intends to present with the support of industrial action are submitted to the Swedish Work Environment Authority by the employee organization. A service provider or posted worker from another EEA country can thereby find out in a simple way which requirements may be forced through with the support of industrial action.

It is obviously desirable that such an adapted collective agreement is drawn up in consultation with the employers' side. If it is not shown that there has been consultation, the documents submitted should be forwarded for information to the employers' partner in the central agreement containing the conditions in question. By doing this, the legitimacy of the system is enhanced. No obligation should be prescribed for the employers' side to express views regarding conditions.

Through the requirements that can be directed towards a posting employer being submitted to the Swedish Work Environment Authority, there will be an increased predictability for a service provider within the EEA who intends to perform a service in Sweden. It would become significantly easier to estimate the costs that may be involved. From the perspective of the worker it will also be possible to verify in a simple way whether the employer applies

conditions that lie at least at the minimum level applicable according to the relevant sector agreement in Sweden.

We do not propose that any sanction be linked to this proposed provision. The fact that a trade union has not submitted the conditions presented in relation to an employer from another Member State should consequently not influence the assessment of whether any industrial action is unlawful or entails a liability in damages on other grounds.

The point of departure of our proposals is that the social partners will assume responsibility for our proposed regulations satisfying the requirements of Community law. This requires compliance with the obligation to submit collective agreements although no sanction is linked to the provision. It should be emphasised that it should not be the duty of the liaison office to interpret and qualify the conditions that have been submitted.

The second measure is to prescribe a more active role for the liaison office as regards assisting a foreign employer with information about which requirements may be imposed upon a posting to Sweden. Today the Swedish Work Environment Authority can, according to Section 9 of the Posting of Workers Act, only refer to the social partners as regards any applicable collective agreement conditions. This role of the Swedish Work Environment Authority is in our assessment too passive.

We propose instead that the liaison office should actively provide assistance for foreign employers and workers to ascertain which conditions apply according to collective agreements in Sweden. As regards postings from another EEA country, we propose that the liaison office should assist by providing information about which requirements may be demanded in relation to an employer from another EEA country under our proposed provisions on industrial action.

Proposals have been presented in various contexts during the course of the inquiry for the National Mediation Office to be the authority to take over the responsibility that currently lies with the Swedish Work Environment Authority. For several reasons, primarily of course because it cannot be deemed to form part of our assignment, the inquiry has not adopted any position on the question of which authority should function as a liaison office in the future.

International conventions

In the report we have briefly dealt with Sweden's obligations under international conventions relating to the right of association and right of negotiation and the right to strike.

The situations in which the provisions proposed by us may be referred are cases where the applicable law for the contract of employment, without applying the Posting of Workers Directive, would be the law of the home country because the contract has a stronger legal link to that country.

Our proposed rules only relate to the right to take industrial action to regulate conditions of employment to workers posted to Sweden. This does not influence the right for the posted workers to take industrial action according to the rules of their home country for the area. Nor does it influence the right to take industrial action in situations where the employer is actually established in another EEA country, but where the employment relationship nonetheless has such a link to Sweden that Swedish law applies to the full extent.

Set against this background, we consider it unlikely that the proposals we present would be incompatible with any of the conventions referred to in the report. However, it is not possible to absolutely exclude such incompatibility. However, we are of the opinion that our proposal is necessary in order to regulate in Sweden the right to take industrial action so as to be compatible with Community law.

If it should transpire that Community law imposes requirements on the Member States that are incompatible with the obligations ensuing from the fundamental conventions in the area, we are of the opinion that this in the first instance represents an issue between the EU and the international organization to which the convention belongs.

Concluding views

Our proposal means that the Swedish labour market model can be applied to a great extent as regards regulating terms and conditions of employment for posted workers, at the same time as Community law is, in our opinion, fully respected. The proposal thus lies completely in line with our Committee Terms of Reference.

It cannot be emphasised enough that great responsibility is placed on the social partners as regards ensuring that the model proposed by us functions in practice and in a way that satisfies the requirements of Community law.

In this context, reminder must be given that trade unions in the Swedish labour market are, by our proposals, given a role that basically corresponds to functions that in many other countries lie with public authorities. Such a role is also accompanied by a corresponding responsibility to deal with the situations now in question in a manner that is, not least from the Community law perspective, correct.

As regards the State, our proposal requires a more active role for the Swedish Work Environment Authority as a liaison office, as regards making it easier for foreign providers of services to find information and quite generally to enhance predictability regarding which terms and conditions of employment are to apply upon a posting to Sweden. However, the social partners also have a very great responsibility for this more active role of the liaison office also having a practical impact.

Proposed legislation

1 Proposed amendment to the Posting of Workers Act (1999:678)

It is hereby prescribed, regarding the Posting of Workers Act (1999:678)

first that Sections 5 and 9 shall be worded as follows,

second that five new sections, Sections 5 a–d and 9 a, shall be introduced into the Act, worded as follows.

Current wording *Proposed wording*

Section 5[1]

An employer shall, irrespective of which Act would otherwise apply to the employment relationship, apply the following provisions for posted workers:

– Section 2, Section 5, second and third paragraphs, Section 7, first and second paragraphs, Sections 16, 17, 24, 27–29, 31 and 32 of the Annual Leave Act (1977:480),

– Section 2, Section 4, first paragraph and Sections 16–22 of the Parental Leave Act (1995:584),

– Sections 2–7 of the Prohibition of Discrimination of Employees Working Part Time and Employees with Fixed-term Employment Act (2002:293), and also

– Chapter 1, Sections 4 and 5, Chapter 2, Sections 1–4 and 18 and also Chapter 5, Sections 1 and 3 of the Discrimination Act (2008:567).

[1] Wording according to Swedish Code of Statutes – SFS 2008:573; enters into force on 1 January 2009.

In connection with foreign posting, the provisions of the Working Hours Act (1982:673), the Working Hours for Certain Road Transport Work Act (2005:395), the Work Environment Act (1977:1160), the Working Hours, etc. of Mobile Workers in Civil Aviation Act (2005:426) and the Driving and Rest Periods for International Railway Transport Act (2008:475) and also, *as regards employers who conduct hiring-out of workers*, Sections 4, 6 and 7 of the Private Employment Agencies and Temporary Labour Act (1993:440) apply.

The provisions of the first and second paragraphs do not prevent the employer from applying terms or conditions that are more favourable for the worker.

In connection with foreign posting, the provisions of

– Sections *1–11, Section 13, first paragraph, Sections 13 a–16 and Sections 18–32 of* the Working Hours Act (1982:673),

– Sections *1–15, 17, 18 and 20–32* of the Working Hours for Certain Road Transport Work Act (2005:395),

– the Work Environment Act (1977:1160),

– the Working Hours, etc. of Mobile Workers in Civil Aviation Act (2005:426), *though with the limitation as regards the provision contained in Section 1, second paragraph that for such staff the other provisions of Sections 1–11, Section 13, first paragraph, Sections 13 a–16 and Sections 18–32 of the Working Hours Act (1982:673)*,

– the Driving and Rest Periods for International Railway Transport Act (2008:475), *though with the limitation as regards the provision contained in Section 1, third paragraph that Sections 1–11, Section 13, first paragraph, Sections13 a–16 and Sections 18–32 of the Working Hours Act (1982:673) otherwise apply,* and also,

– Sections 4, 6 and 7 of the Private Employment Agencies and Temporary Labour Act (1993:440) apply *if the employer conducts hiring-out of workers.*

Section 5 a

An employees' organisation may make demands for an employer to apply conditions according to a collective bargaining agreement in Sweden in relation to its posted workers.

Section 5 b

Industrial action against an employer established in another EEA country for the purpose of regulating conditions for posted workers through a collective bargaining agreement may only be taken if:

1. the conditions demanded correspond to the conditions contained in a collective bargaining agreement concluded by an employees' organisation and an employer's organisation at central level that are generally applied throughout Sweden to corresponding workers within the sector in question;

2. the conditions do not refer to anything other than a clearly defined minimum rate of pay and also to clearly specified minimum conditions that are more favourable for the worker than those prescribed by the statutory rules referred to in Section 5, of the Posting of Workers Act; and

3. the employer does not show that the posted workers have essentially at least such conditions as referred to in item 2 and which are regulated in such a collective bargaining agreement as referred

to in item 1.

Section 5 c

The provisions of Sections 5–5 b do not prevent the employer from applying terms or conditions that are more favourable for the worker.

Section 5 d

Work and employment conditions in a collective bargaining agreement entered into between a Swedish employees' organisation and an employer established in another EEA country and which posts workers to Sweden can, for the duration of the posting, also be claimed by the posted worker even if he or she is not a member of the contracting organisation.

Section 9[2]

The Swedish Work Environment Authority *shall* be the liaison office and provide information about the work and employment conditions that may become applicable upon a foreign posting in Sweden.

For information about collective bargaining agreements that may be applicable, the Swedish Work Environment Authority shall refer to the parties of the collective bargaining agreement involved.

The Swedish Work Environment Authority *shall* also

The Swedish Work Environment Authority *shall* be the liaison office and provide information about the work and employment conditions that may become applicable upon a foreign posting in Sweden.

The Swedish Work Environment Authority shall provide employers and workers with information about the conditions that may become applicable under a collective bargaining agreement upon a posting to Sweden and, in the case of a posting from another EEA country, about the

[2] Most recent wording 2001:65.

collaborate with the corresponding liaison offices in other States within the EEA and in Switzerland.

conditions that a trade union, according to a collective bargaining agreement, may demand with the support of industrial action according to Section 5 b.

The Swedish Work Environment Authority *shall* also collaborate with the corresponding liaison offices in other States within the EEA and in Switzerland.

Section 9 a

Conditions according to a collective bargaining agreement which an employees' organisation may, with the support of industrial action according to Section 5 b, ultimately force through in relation to an employer established in another EEA country shall be submitted by the employees' organisation to the Swedish Work Environment Authority.

This Act enters into force on 1 April 2010. If a posting is ongoing upon entry into force, Section 5 d shall be applied for the duration of the posting thereafter.

2 Proposed amendment to the Employment (Co-Determination in the Workplace) Act (1976:580)

It is hereby prescribed as regards the Employment (Co-Determination in the Workplace) Act (1976:580)

first that Sections 25 a and 42 shall be worded as follows,

second that a new Section 41 c shall be introduced into the Act, worded as follows.

Current wording	*Proposed wording*
Section 25 a[3]	
A collective bargaining agreement that is invalid under foreign law as a consequence of it having been entered into following industrial action is, notwithstanding this, valid in Sweden if the industrial action was in compliance with this Act.	A collective bargaining agreement that is invalid under foreign law as a consequence of it having been entered into following industrial action is, notwithstanding this, valid in Sweden if the industrial action was in compliance with this Act *or the Posting of Workers Act (1999:678)*.
	Section 41 c
	Section 5 b of the Posting of Workers Act (1999:678) contains special provisions on the permissibility of industrial action against employers from another EEA country with the aim of governing through a collective bargaining agreement the conditions for posted workers. Industrial action taken in contravention of these provisions is deemed

[3] Most recent wording 1991:681.

to be unlawful.

Section 42[4]

An employers' organisation or an employees' organisation may not organise or in any other manner induce unlawful industrial action. Nor may such an organisation, through support or otherwise, participate in unlawful industrial action. An organisation that is bound by a collective bargaining agreement shall also be obliged, if unlawful industrial action if imminent or is being taken by a member, to attempt to prevent such action or to endeavour to achieve a cessation of such action.

Where any person has taken unlawful industrial action, no other person may participate in such action.

The provisions contained in the first and second sentences of the first paragraph shall only apply where an organisation resorts to industrial action as a consequence of a working condition to which this Act is directly applicable.	The provisions contained in the first and second sentences of the first paragraph shall only apply where an organisation resorts to industrial action as a consequence of a working condition to which this Act is directly applicable. *However, this does not apply when industrial action is unlawful according to Section 41 c.*

This Act enters into force on 1 April 2010.

[4] Most recent wording 1991:681.