THE SWEDISH LAVAL CASE

A historic clash between Swedish trade unions’ right to industrial action and the European right to provide cross-border services in the EU

By Martin Agell, Lindahl Law firm, legal counsel of Laval un Partneri Ltd

On May 1, 2004, Estonia, Latvia and Lithuania, became members of the European Union. Sweden did not adopt any transitional provisions restricting the free movement of employees and service providers from those new Member States.

In the summer of 2004, “Laval un Partneri Ltd”, a company based in Riga, Latvia, posted around 35 Latvian workers to work on a building site in the town of Vaxholm, just outside Stockholm. The site was operated by a Swedish subsidiary to Laval, Baltic. The Swedish Building Workers’ Union contacted Laval and demanded it to sign a Swedish collective bargaining agreement, to be applied by Laval on the Latvian workers. Laval could not accept to sign the Swedish collective agreement, primarily since it already had agreed on pay and remuneration with its workers. Signing a collective bargaining agreement is voluntary in Sweden.

To force Laval to sign the collective agreement several trade unions started a blockade. None of the Latvian workers participated in the blockade. The blockade gradually prevented Laval from working since Swedish members of the participating Swedish trade unions, refused to deliver goods and services to the working site. Laval started proceedings before the Swedish Labour Court, seeking a declaration that the blockade was illegal. Laval argued that the blockade was a violation of Laval’s right under EC law to provide cross border services from Latvia to Sweden. The Labour Court dismissed Laval’s application for an interim order that the blockade be brought to an end. Laval could not finish the work and left Sweden. The Labour Court, however, made a reference to the European Court of Justice for a preliminary ruling on the interpretation of Community law, especially about Article 49 EC Treaty on the freedom to provide cross-border services in the EU and the Directive 96/71/EC on the posting of workers in the framework of the provision of services.

The Directive 96/71/EC means in short that, workers, who as part of a service arrangement, for a limited period of time carry out work in the territory of an EU Member State other than the State in which they normally work, should be guaranteed minimum terms and conditions of employment with regard to pay, work periods, health and safety among other things.

Sweden has no provisions on minimum pay and did not adopt any such provisions when the Directive 96/71/EC was incorporated. Instead, in Sweden the protection against social dumping is taken into account by trade unions which, by means of industrial action, force employers to sign collective agreements. Such actions may include secondary actions from a large number of unions. No principle of proportionality restricts industrial actions in Sweden.

In its judgment on 18 December 2007, the ECJ, in unusually clear words, ruled that the blockade was in breach of Article 49 EC (the freedom to provide services) and Directive 96/71/EC. According to the ECJ, the provisions of the collective agreement that the blockade aimed Laval to sign, was too complicated and not foreseeable. The blockade was also unlawful since the collective agreement contained provisions that were more favourable than
the minimum terms and conditions set down in the Directive 96/71/EC and also relating to other matters than those mentioned in the Directive 96/71/EC.

The Laval-judgment from ECJ is important in several ways. Firstly, the ECJ establishes that article 49 EC has direct horizontal effect between private parties. Secondly, it states that trade union activities, such as a blockade, may constitute a restriction on the freedom to provide services. Consequently a company offering cross border services in the EU can invoke article 49 EC against trade union actions that restrict the company’s right to provide services. Thirdly, the interpretation of the Directive 96/71/EC restricts the terms and conditions that both Member States and private entities, such as trade unions, may impose on service providers offering cross border services in the EU. The Directive 96/71/EC thereby must be understood as a minimum directive as well as a maximum directive. The ECJ has clarified, that the Directive fulfils two purposes; on one hand to prevent social dumping in the Members States with regard to employment terms and conditions and on the other hand to prevent social protectionism. The latter will facilitate for companies from “new” Member States to offer services by posting employees to “old” Member States without being required to offer posted employees unduly expensive terms and conditions of employment.

In December 2009 the Swedish Labour Court in the national context delivered its final judgment. Laval had made claims for financial and punitive damages for the breach of EU law that the blockade constituted. As to the obligation of the trade unions to pay damages for the blockade in breach of EU law, the Labour Court stated that no explicit legal base could be found in Swedish law. Such an obligation had ultimately to be based on EU law. The Labour Court stated that Article 49 EC had horizontal direct effect and that the trade unions could be held accountable for the breach of the freedom to provide services. With reference to the principle of effective enforcement of EU law, the Labour Court applied Swedish national rules on damages. The trade unions were ordered to pay punitive damages and Laval’s litigation costs. Although entitled to financial damages in principle, the claim for financial damages was not approved since Laval had not provided sufficient evidence of its financial loss. The judgment was not unanimous.

The judgment of the Labour Court is an important step forward of EC law. Probably for the first time in the history of EU, trade unions have been held liable in damages for unlawfully restricting a company’s freedom to provide cross border services in EU. Even though the decision is delivered in a Swedish context, it together with the judgment of ECJ, constitutes a strong indication that European trade unions, violating EU law can be held liable in damages.