

Summary

The remit and work of the Inquiry

The remit of the Inquiry

Directive 2014/67/EU of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), abbreviated as the Enforcement Directive, was adopted on 15 May 2014.

On 27 February 2015 we presented the interim report *The Enforcement Directive to the Posting of Workers Directive – Part I* (SOU 2015:13) to the Minister for the Ministry of Employment, Ylva Johansson.

This final report covers the remit in the expanded supplementary terms of reference (ToR 2014:150) that the Inquiry received from the Government on 27 November 2014. This part of the Inquiry's remit has been to submit the legislative proposals needed to adapt Swedish law to the Enforcement Directive regarding:

- better access to information about terms and conditions of collective agreements; and
- the introduction of subcontracting liability.

According to its supplementary terms of reference the Inquiry is to evaluate the application in practice of the provisions on the task of the Swedish Work Environment Authority to provide information and the obligation of the employee organisations to submit the terms and conditions of collective agreements to the Swedish Work

Environment Authority. The Inquiry is to base its deliberations and proposals on the Swedish labour market model.

According to its supplementary terms of reference, the Inquiry is also to analyse the need for a provision about subcontracting liability in Swedish law and propose a model in the light of the alternatives specified by the Enforcement Directive. As regards the alternatives specified by the Enforcement Directive, the supplementary terms of reference emphasis particularly that the Enforcement Directive contains supplementary provisions giving Member States the possibility of introducing more stringent subcontracting liability and provide scope for several different models regarding the scope and range of the liability and what industries it is to apply to. In addition, subcontracting liability can be replaced by other suitable measures. The Inquiry is to propose a subcontracting liability in the construction sector and consider in which other sectors there may be a need for such a liability. The Inquiry is also to assess which other measures may be suitable and to consider the need for a provision about exemption from liability for contractors that have undertaken suitable control measures and, if required, propose a provision on exemption from liability.

Work of the Inquiry

The Inquiry was staffed and was able to start its work at the end of August 2014. It is to present its final report on 31 March 2015. The work of the Inquiry has been intensive and taken place alongside the completion of its interim report. Its remit has included important and difficult questions that affect the social partners.

The Inquiry has also had the task of conducting dialogue with:

- the social partners (reference group);
- relevant agencies; and
- the Posting of Workers Committee (A 2012:03).

In addition, the Inquiry has been tasked with gathering relevant information from other countries that have provisions about subcontracting liability in their national law.

The Government has appointed a number of experts to serve on the Inquiry from the Government Offices and government agencies that the Inquiry is to conduct a dialogue with.

The Government has also appointed a reference group consisting of representatives of the social partners that the Inquiry is to conduct a dialogue with. The reference group has been offered the opportunity of including, at meetings with the Inquiry, additional representatives of the employer and employee side who have experience of these questions. Meetings have been held separately with representatives of the employee and employer side.

The Inquiry is now presenting a final report containing deliberations and proposals concerning its supplementary remit.

About the Enforcement Directive

The Posting of Workers Directive was adopted on 16 December 1996. It establishes that certain terms and conditions of employment that are applicable in the host state (the hard core) shall be applied when an employer posts workers in another Member State. However, the Posting of Workers Directive does not contain the material provisions that shall be applicable within the hard core since the content of the material provisions varies between Member States. Nor is the Directive intended to harmonise the content of the material provisions in the hard core in the different Member States.

The objective of the Enforcement Directive is to ensure the better and more uniform implementation, application and enforcement in practice of the Posting of Workers Directive by establishing a common general framework of appropriate provisions and measures. They are intended to guarantee an appropriate level of protection of the rights of posted workers in the framework of the cross-border provision of services, in particular the enforcement of the terms and conditions of employment that are applicable. The Enforcement Directive is intended both to guarantee protection for the rights of posted workers and to remove unnecessary barriers to the freedom to provide services.

Our proposals

Improved access to information about terms and conditions of collective agreements

The Inquiry proposes provisions that impose further information requirements on employee organisations so as to give foreign service providers and posted workers improved access to information.

The evaluation carried out by the Inquiry of the application of the present provisions in the Posting of Workers Act stating that employee organisations shall submit terms and conditions of collective agreements to the Swedish Work Environment Authority that the agency shall then provide information about shows that these provisions are not being applied as intended. Only a few collective agreements have been submitted to the Swedish Work Environment Authority by employee organisations.

The intention of the present provision in the Posting of Workers Act was to make the Swedish system of collective agreements transparent and predictable to foreign service providers and posted workers.

Both the Government and previous inquiries have made the assessment that it ought to be in the interest of employee organisations to ensure that the Swedish system of collective agreements is transparent and predictable. The Inquiry can conclude that these assessments have not been correct. The Inquiry considers that the six collective agreements that have been submitted to the Swedish Work Environment Authority since 2010 are not sufficient to meet the requirements for transparency and predictability.

Action therefore needs to be taken to implement the provision in the Enforcement Directive that that terms and conditions of employment set out in collective agreements are made available in an accessible and transparent way to foreign service providers and posted workers. One way of fulfilling the Enforcement Directive's requirements for transparency and predictability is to introduce a statutory minimum wage or to make a declaration that collective agreements are general and binding. The remit of Inquiry is to base its deliberations and proposals on the Swedish labour market model. It is no part of the remit of the Inquiry to make major

changes in the model chosen to implement the original Posting of Workers Directive in Swedish law. Introducing a minimum wage or declaring that collective agreements are general and binding are major changes and fall outside the remit of this Inquiry.

The Inquiry therefore proposes that the present regulation in the Posting of Workers Act of the task of the Swedish Work Environment Authority to supply information and the obligation of employee organisations to submit terms and conditions of collective agreements to the Swedish Work Environment Authority be supplemented in the following way:

- Employee organisations shall also be obliged to report a contact person to the Swedish Work Environment Authority.
- The Swedish Work Environment Authority shall provide information about the contact persons reported.
- A clarification that the obligation of employee organisations to submit terms and conditions of collective agreements to the Swedish Work Environment Authority also applies to situations where no industrial action is being considered.
- The Government should create conditions for mediation, the appointment of a working group or similar action in order to try to get the social partners to reach agreement on the terms and conditions that are to apply to posted workers.

The Inquiry's proposal means supplementing the present provisions in Section 9 a of the Posting of Workers Act to the effect that employee organisations shall submit collective agreements to the Swedish Work Environment Authority with an obligation for employee organisations to also report a contact person to the Swedish Work Environment Authority. The contact person shall supply information about the terms and conditions that may be demanded or may be applied in the case of a posting in Sweden. The Swedish Work Environment Authority shall supply information and details about the contact persons that employee organisations have reported to the agency.

The Inquiry also proposes that the Government consider appointing a mediator or a working group for certain industries with the remit of trying, as was the intention under *Lex Laval*, to

get the parties to make their own analysis of their collective agreements and to get the social partners to reach agreement on the terms and conditions for posted workers in relevant industries.

Subcontracting liability

The Inquiry's proposal means that the protection of rights of posted workers will be improved.

The Enforcement Directive requires that posted workers in construction activities are given protection to ensure their minimum rate of pay. The protection shall consist of a subcontracting liability in a stage of a chain so that the party who can be liable is the contractor to whom the employer of the posted workers is a direct subcontractor.

The Inquiry can conclude that the employer side and the employee side are not in agreement that a subcontracting liability shall be introduced into Swedish law and how it shall be framed, if introduced.

The Enforcement Directive and the Posting of Workers Directive are intended to ensure protection for and information about minimum rates of pay in relation to posted workers and foreign service providers. It is not clear what the minimum rate of pay is in Sweden. In Sweden there are no legal provisions on minimum rates of pay. Any provisions about minimum rates of pay are to be found in collective agreements.

The Swedish labour market model means that the main responsibility for determining terms and conditions regarding pay, in particular, has been transferred to the social partners without government involvement. As indicated above in the section on improved access to information, information about minimum rates of pay and the terms and conditions of employment in collective agreements is not sufficiently clear and predictable. The purpose of the Enforcement Directive is to ensure the remuneration of the posted workers who are, in many cases, far down a subcontracting chain and who have difficulty asserting their rights on account of their vulnerable situation. Such workers may neither be covered by a collective agreement nor be able to invoke such an agreement. If the subcontracting liability were to presuppose that terms and

conditions are regulated in a collective agreement, the subcontracting liability would not protect this specific group of workers that it is intended to protect.

Under the Enforcement Directive, Member States may provide for more stringent rules under national law regarding the scope and range of subcontracting liability. In order to ensure the protection of the rights of posted workers in the Swedish system, the Inquiry makes the assessment that posted workers should, instead, be able to assert their right to the agreed rate of pay.

The Inquiry proposes the following:

- It should be made possible for natural and legal persons conducting business activities to be subject to subcontracting liability. This shall also apply to a client who conduct business activities and is a contractor at the same time.
- A subcontracting liability shall be introduced for posted workers in the construction and civil engineering industry.
- It shall be possible to assert the subcontracting liability in all stages of a subcontracting chain and that liability shall cover the agreed rate of pay.
- The subcontracting liability shall be strict in the sense that a contractor shall not be able to cite due diligence in order to escape liability.
- The subcontracting liability shall be semi-discretionary, i.e. exemptions regarding subcontracting liability may be provided for in a collective agreement made or approved by a central employee organisation. Exemptions may only be made from the Act if they do not mean that less favourable terms and conditions than those that follow from the Enforcement Directive shall be applied to workers.
- Contractors are liable for the remuneration of posted workers if the employer does not pay the remuneration that the worker is entitled to for work as a subcontractor. The contractor's liability is subsidiary in relation to the employer but is joint and several for the contractors. This means that once a posted worker has shown that the employer has not paid, the worker

can address their demand at anyone at all in the subcontracting chain.

- A posted worker shall first present their demand to their employer. If their employer does not pay the demand, the worker may present the demand to someone else who can be liable in the subcontracting chain. The demand shall be in writing.

In order for posted workers to be able to find out what they need to do to be able to assert their rights, the Swedish Work Environment Authority needs to provide accessible information to posted workers about what they should do.

Summing up, the Inquiry's proposal means supplementing the Posting of Workers Act with a provision to the effect that in the case of posted workers some other party than the employer can be responsible for the posted workers' remuneration. Subcontractor liability is only applicable once it has been established that the posted worker has not received any remuneration from their employer. The posted worker can then address any other party in the subcontracting chain.

The Inquiry has also had the task of assessing what other measures may be appropriate. The Inquiry makes the assessment that another appropriate measure may be provisions in a subcontracting agreement concerning:

- a) an obligation to withhold a certain part of the contract amount as security for workers' remuneration; and
- b) a price deduction or a financial penalty in the event that the subcontractor does not pay remuneration to their workers.