ENHET
Enheten för Avtalsfrågor
HANDLÄGGARE
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DATUM
2020-11-23
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DIARIENUMMER
20200314
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Arbetsmarknadsdepartementet
103 33 Stockholm

Request for an opinion on the European Commission's proposed Directive on adequate minimum wages in the EU

Following the Commission's proposal for a Directive on adequate minimum wages in the European Union, the Government has requested an opinion providing an analysis of the proposal. In response to this request, the Swedish Trade Union Confederation (LO) submits the following comments and remarks.

Summary

- LO considers that the Commission's proposal constitutes a very serious attack on the Swedish collective agreement model. In the long term, the collective self-regulation model - in which the social parties have the primary responsibility of independently regulating conditions on the labour market - is at stake.

- LO would like to remind the government that competence to legislate on pay conditions, right of association, strikes and lockouts has not been transferred to the EU. LO considers that the Commission's proposal is contrary to the Treaty. LO believes that the government and the Riksdag must be clear that the proposal is contrary to the principle of subsidiarity.

- It has been claimed that Sweden is exempt from the Directive. This is not true. All Member States are equally covered by the obligations of the Directive. However, within the Directive framework, certain differences arise between Member States depending on whether they have a statutory minimum wage and/or systems for the general application of collective agreements. In this context, the Commission has attempted, imperfectly, to provide Sweden with some protection from the effects of the Directive.

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Landsorganisationen i Sverige

- LO considers that the proposed Directive creates unacceptable insecurity in several areas that are fundamental to the Swedish collective agreement model.

- LO would like to remind the government that the proposed Directive consists of generally-formulated articles of principle that will need to be interpreted and complemented by the European Court of Justice. In this way, the Directive must also be understood as a general invitation to the European Court of Justice to enter into an area where the Court has previously been cautious.

- LO's analysis is not an exhaustive analysis of the proposal. LO will, in various contexts, contact the government with further, in-depth analyses and arguments.

Some general considerations in connection with the proposed Directive

LO would like to emphasise at the outset that the proposal constitutes a very serious attack on the Swedish collective agreement model. In the long term, the collective self-regulation model in which the social parties are given the primary responsibility of independently regulating conditions on the labour market - is at stake. If the proposal is implemented as it stands, there is a risk that power over the labour market will become European in the long run. The Swedish legislators, and the social partners, may gradually lose control of the regulations that form the collective agreement model and that provide the preconditions for Swedish wage formation.

LO expects the government to mobilise all possible resources to prevent the Directive from being adopted. Only then can the protection of the EU Treaty on collective self-regulation be ensured in the long term. If the Government does not succeed and the EU acquires new powers in the area of wages, a complete national exemption must be obtained. This is the only manner in which the detrimental effects on the Swedish collective agreement model could be avoided, at least for the time being, and the preconditions for continued stable wage formation ensured.

The LO opinion first discusses the consequences of the Commission's proposal on the collective self-regulation model. This analysis is based on three questions:

• Firstly, is the Commission's proposal compatible with the EU Treaty?
• Secondly, it has been claimed that Sweden, together with Denmark, is excluded from the scope of the Directive, does the proposal mean an

exception for collective self-regulatory models such as those of Denmark or Sweden?
• Thirdly, what are the most important consequences of the proposal for the Swedish collective agreement model?

LO expects that the ongoing work with the Commission's proposal will cast light on further problems. The arguments against the proposal may also become increasingly precise in the future.

LO is also working, within the framework of the Labour Market EU Council, on a joint legal analysis that is expected to be completed shortly. LO's opinion should thus be regarded as an initial position. LO assumes that the Government's work will take place in very close collaboration with the social partners and that opinions can also be developed and expanded in that context.

The Commission proposal in brief

There is normally no reason to review the article texts of the proposal in an opinion submitted to Government. However, in order to illustrate the risks posed by the Commission's Directive proposal, in this case a certain examination of the article texts is required.

Article 1 states that employees in the EU shall be entitled to protection in the form of a minimum wage. Member States are not exempted from this obligation. This protection must be in the form of a reasonable minimum wage in law or collective agreement. Article 1 also states that the Directive will respect the autonomy of the social partners and their right to negotiate and conclude collective agreements. However, it is important to note that respect for party autonomy is not established under national law. The same applies to the meaning of collective agreement as defined in Article 3 (4). The Commission proposes that several concepts that are central to collective labour law be assigned an EU legal definition. Consequently, the European Court of Justice will ultimately determine what is meant by these terms. Definitions differ between Swedish law and the Commission's proposal. LO believes that this is an extremely serious issue as such double definitions risk creating unacceptable insecurity.

According to Article 1 (2), Member States may choose to protect employees by ensuring that they are entitled to a minimum wage under collective agreements or by law. It is not necessary to achieve this objective by establishing a statutory minimum wage by law or by extending collective agreements, Article 1 (3). Nor should the Directive be interpreted as meaning that these effects should be achieved. This situation has been incorrectly described as Sweden being granted an exemption in certain contexts. LO's assessment is that Sweden has in no way been excluded from the scope of the Directive.

Article 2 states that the Directive applies to EU employees. The employee definition refers to national law and to the case law of the European Court of Justice. In practice, this means an EU legal definition of who is an employee. Point 17 develops the importance of atypical employees being covered by the rules and that national definitions apply as long as the concept of employee in EU law is respected.

Article 3 contains a number of definitions of terms not previously defined in EU law. As mentioned above, this means that basic issues concerning what collective bargaining agreements are, collective agreements and trade unions can be determined by the European Court of Justice. LO believes that these EU legal concepts risk undermining the foundations of Swedish collective labour law.

Article 4 obliges Member States to take measures to strengthen the capacity of the parties to negotiate wages at cross-sectoral or sectoral level. A threshold value of 70% coverage rate of collective agreements is proposed. If the coverage rate is below 70% at national level, there are requirements for frameworks to improve preconditions for collective agreements. An action plan is to be drawn up and notified to the Commission. LO considers that the practical meaning of the provision is unclear.

Articles 5 to 8 apply to Member States where wages are set by statutory minimum wage levels only. These regulations have no immediate consequences for the Nordic countries, but it may be noted that the section contains far-reaching rules on, for example, the criteria on which wages levels are to be set and on how they are to be revised. Nor can it be ruled out that the provisions may become interpretative data in the event that the European Court of Justice, in a future case, reviews the reasonableness of Swedish collective agreement minimum wages.

Article 9 obliges Member States to take appropriate measures to ensure that public sector contracts are combined with wage requirements in collective agreements in the relevant sector and geographical area and a statutory minimum wage. It is important to clarify that this does not imply an obligation on the Member States to require compliance with the terms of the collective agreement, by national definition, applicable to the operations to be procured. Instead, EU law here defines from which collective agreement the terms are to be derived. This is by no means reasonable and means that the EU is interfering in which collective agreement is applicable to a particular job.

Article 10 requires Member States to report collective agreement coverage and the level of fairness of wages. Member States must also ensure that

collective agreements are transparent in terms of both wages and other provisions. Wages will then be reviewed by the Commission and the Council's working group EMCO. LO considers that it is unreasonable for an authority to review whether the level of collectively-agreed wages is reasonable and that Member States should be required to report both the level of minimum wages and, even worse, the level of minimum wages for employees who are not covered by collective agreements.

Article 11 aims to give employees the right to dispute resolution and fair treatment. According to the provision, an employee must also be able to invoke rights from a collective agreement, regardless of whether he or she is a member of the contracting union/professional association. LO believes that the provision means that the Directive is intended to give individual employees the right to a minimum wage and that the provision also contravenes the foundations of the Swedish collective agreement model.

Article 16 states that the Directive does not prevent Member States from introducing legislation that provides more favourable terms for employees or that collective agreements more favourable to employees may be drawn up. The idea that trade union negotiations and collective agreements can only lead to improvements for employees (and conversely only to deterioration for employers) is foreign to the Swedish situation. LO believes that the article risks making union negotiations completely impossible and may overturn the preconditions for the collective agreement model.

Compatibility with EU Treaty

Article 153 (5) of the Treaty on the Functioning of the European Union (TFEU) explicitly excludes "pay, rights of association, strike or lockout" from EU legislative competence in the field of social policy. These issues are thus referred entirely to national competence. The Commission argues that the Treaty's prohibition of legislation covers wage levels only and that it is entirely possible to legislate that all employees should be entitled to a minimum wage. LO believes that the problem with this argument is that the consequences of the proposal in practice extend far beyond the right to a minimum wage. The proposal on the table entails far-reaching, detailed regulation to ensure that a minimum wage is reasonable and, in the case of wages in law, far-reaching regulations on which criteria must be taken into account when determining the level and how wage levels are to be updated. Since the proposal gives employees the right to "fair" minimum wages, it can also not be ruled out that the levels of collective agreement wages will be critically examined.

The Commission's proposal also addresses legal issues on the right to association. The proposal defines what constitutes a collective agreement and negotiations on a collective agreement. The issues that are negotiable

between the parties - the extent of autonomy if you will - ultimately depends on the extent of the rights of association. Exactly what the parties may negotiate and regulate through collective agreements may vary from country to country. In Sweden, for example, according to Chapter 23 of the Co-determination Act (MBL) the parties may negotiate and enter into a collective agreement "on terms of employment for employees or on the relationship in general between employers and employees". The Commission's definition is much narrower: “working conditions and terms of employment”. In addition to the significant legal insecurity as to how the autonomy of the parties can be understood, it is clear that the Commission's proposal has repercussions on rights of association in breach of Article 153 (5) TFEU. A similar consequence for the right of association also arises from Article 16 of the proposal, which obliges the Member States to adopt a collective labour law that only allows collective agreements that provide more favourable conditions for employees. The proposal constitutes a fundamental step towards collective agreement negotiations, which means that improvements in certain areas may lead to deterioration in other areas. Here, too, it becomes clear that the consequences for the right of association will be far-reaching in a manner that is incompatible with Article 153 (5) TFEU.

With regard to collective rights, such as the rules in the proposed Directive that encourage collective bargaining in various ways, the Treaty also contains a specific legal basis in Article 153 (1) (f). Representation and collective protection of the interests of employees and employers, including co-determination, may be regulated by the EU but only by unanimous decision. Even in that respect, the proposed Directive appears to be in breach of the Treaty because the proposal was incorrectly attributed to another basis in the Treaty.

One important consequence of the Commission's proposal going beyond the competences transferred to the EU is that the principle of subsidiarity may be considered to have been violated. The purpose of the subsidiarity test is actually to determine demarcation in matters where the EU and the Member States share competence. The question is asked whether an issue really needs to be regulated at EU level or whether it can be better regulated at national level. However, with regard to pay, rights of association, strike and lockout, competence belongs exclusively to the Member State. The outcome is given here, in matters where the EU does not even have competence there is no reason to regulate at EU level. The proposal must then be rejected as contrary to the principle of subsidiarity. Another important component of a subsidiarity test is that the planned measure cannot be achieved successfully by the Member State alone. In Sweden, we must therefore ask ourselves whether we are incapable of ensuring basic wage protection for employees and whether we need the Commission's help in the achievement of this goal. For LO, the obvious answer to that question is no. LO believes that the

government and the Riksdag must be clear that this proposal is contrary to the principle of subsidiarity.

LO would like to remind the Government that competence to legislate on pay conditions, rights of association, strike and lockout has not been transferred to the EU. These are issues that must be regulated in each country. The treaty thus protects collective self-regulatory models such as the Swedish model. In this context, it may be worth recalling that treaty protection was crucial for LO and the LO unions' mainly positive basic approach on EU co-operation in connection with the referendum on membership in the mid-1990s. The Flynn letters were then perceived as guarantees for the collective agreement model.

No exception from the Directive for Sweden
Sweden is not excepted in the Directive. All Member States are covered equally by the obligations of the Directive. However, within the framework of the Directive, certain differences may arise between Member States depending on whether they have statutory minimum wages and/or systems for the general application of collective agreements.

The Commission has attempted to establish protection for Sweden. Article 1 (3) states that the Directive does not impose an obligation on Member States with collective agreements only to introduce a declaration of universal application or a statutory minimum wage. Sweden is thus not directly obliged to introduce a statutory minimum wage or a system of universal declaration as a consequence of the proposed Directive. However, all other legal consequences that may arise on the basis of the Directive do include Sweden and the purposes of the Directive must be fulfilled in other ways.

Article 1 (b) states that employees must have "access to minimum wage protection". Articles 2 and 11 give employees rights under the Directive. The Directive cannot be interpreted in any other way than that all Member States must ensure that all employees are covered by a minimum wage. According to general jurisprudence, there is also no other way to understand legislation. The obligations of directives are general, unless otherwise stated.

This brings significant insecurity for the Swedish situation. Many basic, vital issues arise. For example, what does the requirement of “fair wages” (or “adequate wages”) mean practically for collective self-regulation? Can the wage levels of collective agreements be judged by the European Court of Justice? From a trade union perspective it is, in principle, unacceptable that the wage levels of collective agreements be examined politically. Even less acceptable is the fact that individual employees are given the opportunity to have collective-bargained wage levels tried in court. LO believes that the proposal risks the complete undermining of the

preconditions for the social parties' independence and erodes the parties' autonomy. It is also not compatible with the Swedish model that employees are entitled to invoke rights under a collective agreement when they are not members of the contracting union/professional association.

In this context, LO would like to recall the fundamental insecurity that also arises for national collective labour law when a directive establishes a framework for parallel collective labour law at EU level. It must be assumed that the Directive gives individuals the opportunity to invoke the rights stated in it. Sweden cannot be said to be protected from individual workers, who are covered by the Directive, asserting their rights according to the Directive. Since this is EU regulation that Sweden as a country has an obligation to comply with, it can be assumed that rights under the Directive will take precedence over national law.

Some practical problems for self-regulatory, collective agreement models

LO considers, as mentioned above, that it cannot be ruled out that the Directive grants individual rights. When employees are given the opportunity to invoke the rights stated in the Directive in relation to national provisions, countless issues arise. This is the most serious consequence of the Commission's choice to move forward with directives as legal instruments. If the Commission had chosen a recommendation, these legal issues would not have arisen, as individuals cannot base any rights on a recommendation and thus cannot assert rights against the Member State or in court.

In this context, LO wishes to highlight some examples of basic issues that may create insecurity for collective self-regulation models. Collective agreements bind the parties' members. In Swedish law, this basic relationship is stated in Sections 26-27 MBL. Only members are encompassed by the scope of the collective agreement. As a general rule, individuals who are not members do not have the right to invoke the provisions of the collective agreement. An employer who has signed a collective agreement has an obligation to apply collective agreements to non-union member employees, but only in relation to their trade union counterparts. Examples of possible interventions by the European Court of Justice in these relationships are legion. The proposed Directive does not prevent the European Court of Justice from deciding that the opportunity to invoke collective agreements should apply not only to members of trade unions.

Another example concerns the possible effects of the proposed Directive on the scope of collective agreements. It cannot be ruled out that the Directive may lead to cases where the European Court of Justice decides what constitutes a trade union who may enter into a collective agreement (and

thus regulate the minimum wage). An action may also be brought against what happens when two or more collective agreements compete to regulate the same area of the labour market. With the current wording in Article 1, the European Court of Justice could, without hindrance, interpret which collective agreement wages are to be applied, which in Sweden may risk LO's organizational plan or, for that matter, the demarcation between white-collar and blue-collar employees. The proposed Directive thus opens up for issues on applicable collective agreements in the LO area to be determined by the European Court of Justice instead of in the LO Board. Similar reasoning applies to public procurement in Article 9. Even there, the proposed Directive gives the European Court of Justice the opportunity to indicate collective agreements, or parts of agreements, which would not normally be the applicable collective agreement.

LO believes that the proposed Directive creates unacceptable insecurity in several areas that are fundamental to the Swedish collective agreement model. In LO's opinion, the problems discussed here are merely a selection of possible issues that may be determined by the European Court of Justice. LO would like to remind the Government that the proposed Directive consists of generally-formulated articles of principle that will need to be interpreted and complemented by the European Court of Justice. Consequently, the Directive must also be understood to be a general invitation to the European Court of Justice to enter in full force into an area where the Court has previously been cautious.

Other observations

LO supports the Commission's description of the problems within the EU. Working conditions are poor in far too many countries. Working is not profitable enough. Wages must be increased. The promise of a better future must be restored, not least in Eastern and Southern Europe. But the proposed cure - binding EU rules on wage levels - is the wrong way forward.

LO realises that the Commission has attempted to construct protection for Sweden and Denmark. But this protection is legally ineffective and in practice constitutes political lip service only. In this context, it is important to recall that EU cooperation is held together by legal regulation. Directives cover all the citizens of the Union and also create rights for domestic employees. For the Swedish collective agreement model, where unions and employers negotiate wages and terms of employment, fundamental uncertainties are created.

The problem with the Commission's cure - binding rules on wage levels - is that it generates different consequences in different countries. Sweden, with almost twenty years of real wage increases and a mostly well-functioning wage formation system, will be subject to essentially the same rules as

countries where wage formation does not function. The labour market looks very different in the various parts of Europe. At best, the cure will exert some effect in some Member States. But a definite effect is that the well-functioning labour markets, such as those in the Nordic countries, risk serious harm.

Through this proposed Directive, the EU institutions take a major step towards increased supranationalism in areas that the social parties in Sweden mainly manage themselves, and the EU will acquire new competence in areas that, according to treaty, should never be regulated at EU level. The proposal lays the foundation for an EU labour market model through its regulations regarding collective agreements and that states must promote collective bargaining. The proposed Directive is contrary to the EU treaty and creates significant legal insecurity for the foundations of the Swedish collective agreement model. LO believes that a certain degree of insecurity must be accepted in a cooperative organisation such as the EU, however this proposal creates a level of insecurity that cannot be tolerated.

Regards
Swedish Trade Union Confederation (LO)

Susanna Gideonsson Claes-Mikael Ståhl