



Asteriti, A. (2013) Social dialogue, laval-style. *European Journal of Legal Studies*, 5 (2). pp. 58-79. ISSN 1973-2937

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Title: Social dialogue, *Laval*-style

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Source: European Journal of Legal Studies, Volume 5, Issue 2 (Autumn/Winter 2012/13), p 58-79

Abstract:

The article provides an analysis of the Laval Judgment in light of Habermas' theory of discursive practice and compares the European social model and the Swedish system of collective agreements in light of this theory. In this context, the article argues, the comprehensive dismissal by the European Court of the carefully constructed and balanced Swedish system of social dialogue between management and labour is truly the most disturbing aspect of this controversial judgment. For all the supposed importance placed on discursive practices and social dialogue for the European social model, when confronted with the Swedish system of social dialogue, the Court retreats in the familiar territory of hard law and statutory obligations. In doing so, it wilfully misunderstands the function of collective bargaining, by effectively decoupling its process from its function, and leaving social dialogue with the hollow role of a deliberative practice devoid of any finality.

SOCIAL DIALOGUE, *LAVAL*-STYLE

Alessandra Asteriti*

TABLE OF CONTENTS

1.	INTRODUCTION	59
2.	COLLECTIVE BARGAINING, DELIBERATION AND SOCIAL DIALOGUE	60
2.1	The Theory – Jürgen Habermas	61
2.2	The Practice at EU Level: The European Social Dialogue	62
3.	THE SWEDISH SOCIAL MODEL.....	64
4.	THE LAVAL CASE	66
4.1	The Facts.....	66
4.2	The Law	66
5.	THE DECISION OF THE COURT.....	68
5.1	The Background	68
5.2	The Judgment of the Court.....	70
6.	THE AFTERMATH.....	74
7.	CONCLUDING REMARKS.....	77

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1. INTRODUCTION

Ever since the ECJ delivered its *Laval* judgment on 18 December 2007, the name of this small Latvian company has become notorious. The sole mention of ‘*Viking* and *Laval*’ has become short-hand for those critical of a certain idea of Europe giving primacy to economic considerations to the detriment of ‘social Europe’. This article intends to go back to the original *Laval* judgment to reconstruct its history and deconstruct its myth.

The *Viking* and *Laval* judgments have been criticised for using freedom of establishment and freedom to provide services respectively as ‘trumps’ against the fundamental right of freedom of association and collective action¹. What protection for the right to strike after what the Court decided, one was inclined to ask? Were we going to see social dumping become the norm, a race to the bottom that would see Eastern European workers compete against their Western counterparts by offering their low labour cost as their best asset? These are crucial questions and they have justly been discussed extensively elsewhere. This article will only consider the *Laval* judgment, and will explore a different angle, by taking as its starting point Habermas’ theory of discursive practices as guarantees for a democratic outcome and offering the Swedish system of collective agreements as a substantiation of such practices. In this context, the article will argue, the comprehensive dismissal by the Court of the carefully constructed and balanced system of social dialogue between management and labour is truly the most disturbing aspect of this controversial judgment. For all the supposed importance placed on discursive practices and social dialogue for the European social model, when confronted with a successful example of such model, the Court retreated in the familiar territory of hard law and statutory obligations. In doing so, it wilfully misunderstood the function of collective bargaining, by effectively decoupling its process from its function, and leaving social dialogue with the hollow role of a deliberative practice devoid of any finality, the very openness of which both signifies and nullifies its democratic credentials.

The article is structured as follows: Part I provides the theoretical grounding for the argument, by considering how discursive practices have influenced our conception of democracy, including in the area of industrial relations. Part II focuses on the development of social dialogue in European law, from its introduction in the Single European Act in 1986 to arts 154–155 TFEU. Part III considers how the Swedish social model puts in practice the theory of social dialogue in its system of collective agreements, heavily dependent on deliberative practices between management and labour, and with a minimal statutory framework. Part IV summarises the facts of the case brought by the Latvian company *Laval un Partneri* against the Swedish building and public works trade union. Part V analyses the decision of the Court, concentrating on the value judgment made by the Court of the system of collective agreements described above and its continued viability following Directive 96/71 (the Posted Workers Directive). Finally, Part VI considers the aftermath of this decision at the national level, with the passing of the ‘*Laval* Law’ by the Swedish government in 2010, and at the European level, with the issuing by the Commission of a draft new Directive on the Enforcement of Directive on Posted Workers in March 2012, before offering some concluding remarks.

¹ More comprehensively, *Laval* belongs to a ‘quartet’ of cases decided in rapid succession by the ECJ along similar lines, comprised of C-341/05 *Laval un Partneri* [2007] ECR I-11767; C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union* [2007] ECR I-10779; C-346/06 *Rüffert* [2008] ECR I-1989; and C-319/06 *Commission vs Luxembourg* [2008] ECR I-4323, hereafter referred to as *Laval*, *Viking*, *Rüffert* and *Luxembourg*.

2. COLLECTIVE BARGAINING, DELIBERATION AND SOCIAL DIALOGUE

According to John Dunlop's system of industrial relations², a tripartite structure, including workers, employers and the State, is engaged in a framework of collective bargaining where the speaking positions reflect opposing, and to a certain extent, irreconcilable viewpoints, and the goal is to reach a compromise where all partners engage in the discussion using the 'weapons' at their disposal; in the case of the workers or employees, this is the tool of the withdrawal of labour, or the threat of industrial action.

In contrast, deliberation as a form of discursive practice in Habermasian terms, or 'civil dialogue', can be conceptualised as a more open framework, where a consensus can be reached by actors engaged in the dialogue in a non-confrontational form, 'through exchanges of arguments accepted as valid by the participants in the public debate'³.

Social dialogue, defined as the 'institutionalised consultation procedure involving the European social partners, [or also] the processes between social partners at various levels of industrial relations⁴, seems to sit uneasily between these two extremes, sharing elements of both, and, seemingly, failing to provide any of the benefits of its two more established predecessors. Its openness to deliberative processes is coupled with an integrative thrust to the given of the Single Market project to the exclusion of alternative paths, in a misguided effort to accommodate the 'social' to the reality of the market, never the other way around. This logic of commitment, through social dialogue, to a predetermined outcome risks undermining any advantages conferred by the deliberative ethos to the bargaining process⁵.

The following table summarises the differences between the frameworks. Attention is called particularly to the difference in mode, means, goals and outcome; in these, social dialogue distinguishes itself by its *soft* nature, with reference to the lack of bindingness of the outcome as well as the way in which deliberation is structured; its *targeted deliberation*, in the sense that the dialogue is not 'free-flowing' but channelled through approved paths and rigidly constructed 'givens'; and its *predetermined consensus*, because the rupture of the framework is not an option, as exemplified by the *outcome* category, where the potential conflict is neither defused, nor resolved, but simply *denied*.

² John Dunlop, *Industrial Relations Systems* (Harvard Business School Press 1993).

³ Claude Didry and Annette Jobert, 'Deliberation: a New Dimension in European Industrial Relations', in Jean De Munck and others, *Renewing Democratic Deliberation in Europe, The Challenge of Social and Civil Dialogue* (Peter Lang 2012) 171, 171.

⁴ From the Eurofound website, <www.eurofound.europa.eu/>, accessed 12 October 2012.

⁵ The point is made also by Ruth Dukes and Emiliios Christodoulidis, 'Habermas and the European Social Dialogue: Deliberative Democracy as Industrial Democracy?'(2012) 18(4) *Industrial LJ* 21.

Table I

FRAMEWORK	PARTICIPANTS	MODE	MEANS	GOALS	OUTCOME
Collective bargaining	Employers Workers State	Rigid	Industrial action	Compromise	Conflict defusal and deferral
Civil dialogue	All affected parties	Flexible	Deliberation	Freely obtained consensus	Conflict resolution
Social dialogue	Tripartite or Bipartite	'Soft'	Targeted deliberation	Predetermined consensus	Conflict denial

2.1 The Theory – Jürgen Habermas

The influence of Jürgen Habermas in democratic theory cannot be underestimated. His communicative model provides the testing ground and legitimisation tool for normative statements in a democratic context⁶. His co-originality theory of private and public autonomy, whereby rights and democracy are seen as reflexively underpinning each other, is in itself dependent on a working framework where discursive practices involve all participants under ideal speech conditions⁷. In these, the openness of the discourse guarantees a democratic outcome and the inclusiveness of the participation results in the development of what he calls the 'social perspective of the first-person plural'⁸, in which all affected persons are given a stake in the result of the dialogue and at the same time, bind themselves to that result. Arguably, the bindingness of the result constitutes the problematic element in the model, being more prone to capture. However, in the case of industrial relations, where the expressed *telos* of bargaining between the social partners is defusal or deferral of the conflict by means of a binding agreement, this bindingness is organic to the system⁹, and it is other elements upon which one should concentrate the critical attention, and these are the procedural guarantees and the substantive rights within that procedural framework. Indeed, it is important to note that, in the context of industrial relations, it is crucial not to lose the capacity of the social partners to create binding agreements, and furthermore, not to lose the bargaining tools that allow that bindingness to be established (in the case of workers, the right to undertake industrial action).

Habermas' model of participatory democracy is predicated on three essential elements: an effective framework, equal speaking positions for all participants – effective participation – and openness of outcome. It is not the place here to comprehensively critique the viability of this model, when faced with the relentlessness of predetermined structures and their power to close down possibilities, which is at its strongest precisely in a functioning democratic framework, as counterintuitive as this might seem. Rather, this brief introduction to Habermas' discursive practices theory serves to illustrate the convergence between this theory and the practice in the Swedish model of industrial relations. To my knowledge, this

⁶ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, Polity Press 1996). Also, more recently, Jürgen Habermas, *Between Naturalism and Religion* (Ciaran Cronin tr, Polity Press 2008).

⁷ *ibid* 118 ff, especially 122; also 106: 'Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses'.

⁸ *ibid* 92.

⁹ As part of the recognition of the fact that the conflict is organic to the model, and therefore necessarily present.

convergence has not been noted before, which is particularly surprising given the contractual nature of his co-originality thesis¹⁰. On the contrary, the influence of his theories on the development of the European Social Dialogue (ESD) is evident and has received much attention¹¹.

2.2 The Practice at EU Level: The European Social Dialogue

The history of the creation of ‘social Europe’ as a project in parallel to ‘economic Europe’ has been interpreted as an exemplification of Karl Polanyi’s ‘social embeddedness theory’, whereby ‘the initial decoupling of the economic from the social economic constitution in the design of the integration project and the later strive for competitiveness through the “completion” of the internal market programme can be interpreted as disembedding moves [which] provoke countermoves directed at a re-embedding of the market’¹².

Others have remarked on the ‘dysfunctional relationship’ between the European Social Model and the Single Market project¹³; regardless of how ownership of the social is interpreted (as an internal move by the market to pre-empt disruption, or as a genuine countermove, still subject to the risk of appropriation by the market), the development of the European Social Dialogue took place precisely when the social model and the market model came to confront each other in what seemed like a case of binary and irreversible choice.

It was at the *Val Duchesse* talks, organised by the Delors Commission in 1985, that the ESD between employers and trade unions was launched, under the auspices of the Commission¹⁴. Shortly thereafter, the ESD was given statutory presence by art 21 of the Single European Act¹⁵, which amended the EEC Treaty via the addition of art 118(a) and 118(b). Art 118(a) established the possibility of adopting directives by Qualified Majority Voting¹⁶; art 118(b) recited as follows:

¹⁰ As explicitly stated by Habermas (n 6) 122, referring to ‘[...] a horizontal association of free and equal persons [...] prior to any legally organized state authority from whose encroachments citizens would have to protect themselves.’

¹¹ An interesting theoretical approach to ESD, especially in light of the well known controversy between Habermas and Luhmann on societal structures (which started following their joint work in Niklas Luhmann and Jürgen Habermas, *Theory of Society or Social Technology: What Does Systems Research Accomplish?* [Suhrkamp 1971]) is by Christian Welz, *The European Social Dialogue under Article 138 and 139 of the EC Treaty* (Kluwer Law International 2008). In it, Welz adopts Luhmann’s and Teubner’s theories in order to argue for ESD to be understood as an autopoietic subsystem of the European Union.

¹² Christian Joerges and Florian Rödl, ‘On De-formalisation in European Politics and Formalism in European Jurisprudence in Response to the “Social Deficit” of the European Integration Project – Reflections after the Judgments of the ECJ in *Viking* and *Laval*’, (2008) 4(1) *Hanse Law Review* 3; the reference is obviously to Karl Polanyi’s seminal work *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 1944).

¹³ John Foster, ‘The Single Market and Employment Rights: From a Dysfunctional to an Abusive Relationship?’, Institute of Employment Rights Conference, 21 March 2012, *Developments in European Labour Law*. Thanks to Professor Charles Woolfson for having brought this contribution to my attention.

¹⁴ Information on the Val Duchesse process is available on Eurofound website <www.eurofound.europa.eu> accessed 12 October 2012.

¹⁵ Single European Act [1987] OJ L 169/1.

¹⁶ ‘Article 118A (now Article 137(1) EC) was inserted by the Single European Act, which allowed for qualified majority voting for proposals ‘encouraging improvements, especially in the working environment, as regards the health and safety of workers’. From the Eurofound website <www.eurofound.europa.eu/> accessed 12 October 2012.

The Commission shall endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

The policy was expanded and embedded further in the Treaties with the Protocol on Social Policy annexed to the Maastricht Treaty¹⁷, where the ESD is mentioned in art 1 (programmatic article) and arts 3 and 4:

Article 3

1. The Commission shall have the task of promoting the consultation of management and labour at Community level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.
2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action.
3. If, after such consultation, the Commission considers Community action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.
4. On the occasion of such consultation, management and labour may inform the Commission of their wish to initiate the process provided for in Article 4. The duration of the procedure shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

Article 4

1. Should management and labour so desire, the dialogue between them at Community level may lead to contractual relations, including agreements.
2. Agreements concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 2, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.
The Council shall act by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas referred to in Article 2(3), in which case it shall act unanimously.

These arts became incorporated in the EC Treaty as arts 138 and 139¹⁸ and are now arts 154 and 155 TFEU¹⁹.

Since its inception in 1985, the ESD has created a substantial amount of literature dedicated both to its initiatives, including its successes and failures, and to critical reflections and analysis, both country-specific and more general in approach²⁰. Issues of process and result intersect with domestic patterns of industrial relations, raising several questions: what is ESD for, and how is it supposed to interact with national models? Are we confronted with substitution, where ESD comes to replace industrial relations conducted at the domestic level, or validate them at the European level, or something else? This article is premised on the assumption that the Swedish model of industrial relations successfully accomplishes what Habermas envisioned as the function of discursive practices in guaranteeing a

¹⁷ Treaty on European Union Protocol on Social Policy [1992] OJ C191/1.

¹⁸ Treaty Establishing the European Community [2006] OJ C321 E/5.

¹⁹ Treaty on the Functioning of the European Union [2010] OJ C83/49.

²⁰ The output is considerable: 'institutional' information is available from several EU websites, such as <www.eurofound.europa.eu>, and <http://ec.europa.eu> accessed 12 October 2012; a recent study by the Policy Department of the DG for Internal Policies was published in 2011, *Cross-border Collective Bargaining and Transnational Social Dialogue*, IP/A/EMPL/ST/2010-06; see also Welz (n 12) and Jean De Munck and others (n 3).

democratic outcome in the shadow of the law. The assumption holds, one would like to think, if there is a balance between the democratic nature of the discursive practices and the framing and the binding provided by the law. Crucial for this balance is that the discursive practices cannot just be a procedural value, but have to have substantive content, and that this has to be reflexively present at practice level: in other words, the social partners have to have the power to determine the content of the binding rules, and they have to be aware of this power²¹. For now, it will suffice to note that, with all its limitations, in the Swedish model this substantive reflexive power is conferred on the social partners.

3. THE SWEDISH SOCIAL MODEL

The Swedish model of industrial relations is based on a collective agreements framework with a robust procedural structure and extensive powers granted to the social partners to come to collective decisions as to their substantive rights and obligations under private law contracts, with minimal legislative involvement²². The *telos* of this model is exemplified by the absence of a law on minimum wage in Sweden, since the rate of pay is agreed within the collective agreements negotiated by the employers and trade unions at the sectoral level. The main statutory provisions are contained in the 1974 Employment Protection Act (LAS) and the 1976 Co-determination Act (MBL)²³, and include the obligation to maintain ‘industrial peace’ when a collective agreement is entered into (s 41 MBL). These pieces of 1970s legislation have been seen as an attempt to crystallise in statutory form (and therefore constitutionalise) certain substantive and procedural advantages for unions, while maintaining the traditional system of collective negotiated agreements²⁴. Collective agreements are applicable to trade union members directly (in Sweden about 70% of workers belong to a trade union and 90% of working relationships are covered by a collective agreement²⁵) and indirectly through subsidiary agreements to non-unionised workers and employees. Additionally, the social partners enter into basic agreements establishing the procedural rules to be followed in the negotiations; these are modelled on the *Saltsjöbaden Agreement*, signed in 1938 between the then Swedish Employers’ Association and the largest Swedish Trade Union Confederation, LO, and still applicable to most negotiated agreements. The law gives the trade unions exclusive powers to conclude

²¹ I am here conflating authorship, as intended by Habermas (n 6) 120, and power in the sense of creative legislative power.

²² For a historical review, see Ole Hasselbach, ‘The Roots – the History of Nordic Labour Law’, (2002) 43 Scandinavian Studies in Law 11.

²³ The *Lag om Anställningsskydd* (Official Gazette 1982:80) and the *Medbestämmandelagen* (Official Gazette 1976:580).

²⁴ Hasselbalch (n 23) 32. A divergent look at the history of social relations in Sweden by Svante Nycander, with more emphasis placed on the shift from a model of ‘collective *laissez faire*’ as described by Otto Kahn-Freund (who believed Sweden to be the most accomplished example of this model), accompanied by the ‘spirit of *Saltsjöbaden*’, to a much more interventionist and State-led policy, exemplified by the legislative activity of the 1970s. See Svante Nycander, ‘Misunderstanding the Swedish Model’, in *Collective Bargaining, Discrimination, Social Security and European Integration: Papers & Proceedings of the 7th European Regional Congress of the International Society for Labour Law and Social Security Law, Stockholm, September 2002* (Kluwer Law International 2002) 437.

²⁵ As sources for the data, see *The Swedish Model – The Importance of Collective Agreements in Sweden*, leaflet produced by the Swedish Trade Union Confederation (LO) <www.lo.se> accessed 12 October 2012; and the Report produced by the Swedish Government, *Action in Response to the Laval Judgment – Summary*, Swedish Government Official Reports, SOU 2008:123. The coverage for the building sector is even higher, with collective agreements covering 96% of workers, of which 77% belonged to a trade union. All data refer to the year 2007. However reassuring or frankly enviable these numbers might seem from a UK perspective, there has been a downward trend, from a high of 85% in the early 1990s to the current numbers, as reported by Charles Woolfson, Christer Thörnqvist and Jeffrey Sommers, ‘The Swedish Model and the Future of Labour Standards after Laval’, (2010) 41(4) Industrial Relations J 333.

agreements and a powerful negotiating tool in the constitutional protection granted to the right to engage in industrial action²⁶. Once an agreement is reached, there is, as noted, an obligation on the parties to a social truce. This obligation is given statutory strength in Section 42 MBL:

Employers' or workers' associations shall not be entitled to organise or encourage illegal collective action in any way whatsoever. Nor shall they be entitled to participate in any illegal collective action by providing support or in any other way. An association which is itself bound by a collective agreement shall also, in the event of a collective action which its members are preparing to take or are taking, seek to prevent such action or help to bring it to an end.

If any illegal action is taken, third parties shall be prohibited from participating in it.

The Swedish Labour Court (*Arbetsdomstolen*) interpreted para 1 of Section 42 to apply also to industrial action taken in Sweden against foreign undertakings; the judgment²⁷ concerned a company that owned a ship, *M/S Britannia*, flying a flag of convenience and employing a Filipino crew covered by a collective agreement under Filipino law; the interpretation became known as the *Britannia Principle*. As a consequence of this judgment, the Swedish government immediately approved a legislative amendment to the MBL²⁸, adding three paragraphs, including a third paragraph to Section 42, to the effect that: 'The provisions of the first two sentences of the first paragraph shall apply only if an association takes collective action by reason of the terms and conditions of employment falling directly within the scope of the present law'²⁹. The amendment excluded industrial action against employers having concluded agreements out with Swedish law, effectively allowing industrial action against foreign employers and employers of posted workers covered by collective agreements under the home state law. The amendments became in turn known as *Lex Britannia*, devised by the Swedish parliament as a way to counter the risk of social dumping³⁰. This is the same stated purpose of the Posted Workers Directive³¹: the crucial difference is that, in the Swedish model, the social partners, and specifically, the trade

²⁶ Ch 2, s 17 of the Swedish Instrument of Government (*Regeringsformen*, the Swedish Constitution): 'A trade union or an employer or employers' association shall be entitled to take industrial action unless otherwise provided in an Act of law or under an agreement'; the Swedish Labour Court (*Arbetsdomstolen*), which acts as a court of last instance for industrial disputes (except where the Court sentence is alleged to be a grave violation of fundamental rights and where recourse to the Constitutional Court might be allowed), has interpreted this provision to apply horizontally and to entail civil liability (*civilrättslig verkan*). Constitutional protection for trade union rights, including the right to industrial action, is not unusual in Europe, as noted by AG Mengozzi in his *Laval* Opinion, paras 31-33.

²⁷ *Britannia Case* AD 1989, No 120.

²⁸ Official Gazette 1991:681, Government Bill 1990/91: 162.

²⁹ The other two amendments stipulate that a foreign collective agreement that is invalid under foreign law is valid under Swedish law if it complies with the MBL (s 25a) and that later collective agreements will trump an earlier collective agreement that does not comply with the MBL (s 31a).

³⁰ As stated in the Government Bill, 5ff.; of particular relevance, in light of the proportionality analysis performed by the ECJ to the detriment of the collective right of industrial action against the individual right of provision of services, the report stated that: 'This regulation [*lex Britannia*] is based on the idea that employment relationships which in no way fall within the scope of the MBL, cannot, reciprocally, be given the special protection it provides. *The starting point must be, rather, the constitutional rules on the freedom and the right to take industrial action*' [emphasis added]. See also Ronnie Eklund, 'A Swedish Perspective on *Laval*', (2008) 29 Comparative Labour L and Policy J 551, 554. Social dumping can be defined as '[the] practice involving the export of goods from a country with weak or poorly enforced labour standards, where the exporter's costs are artificially lower than its competitors in countries with higher standards, hence representing an unfair advantage in international trade.' (Eurofound website <www.eurofound.europa.eu> accessed 12 October 2012).

³¹ See Preamble of 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.

unions, are *entrusted* with the tools necessary to avoid social dumping and maintain fair competition in the Swedish labour market.

4. THE *LAVAL* CASE

4.1 The Facts

The facts of the case are well known. Laval un Partneri Ltd (Laval) won a contract for the renovation of a school in Vaxholm, Sweden, through its fully owned Swedish subsidiary L&P Baltic Bygg AB (Baltic). Between May and December 2004, Laval posted 35 Latvian workers to work on the project. In June 2004, Byggettan³² started negotiations with Laval and Baltic with the intention of entering into a collective agreement for the posted workers. Following the beginning of negotiations, Laval entered into an agreement with all its posted workers³³. In November 2004, with the negotiations stalling, Byggettan started industrial action against Laval, by blockading the construction site. In December 2004 a conciliation hearing was held at the *Arbetsdomstolen*, in which Laval refused a final offer by Byggettan and requested an interim injunction to stop the industrial action, claiming that it was in violation of arts 12 and 49 EC. The request was refused by the *Arbetsdomstolen* on 22 December 2004. The hearing on the merits took place on 11 March 2005; in it, Laval petitioned the *Arbetsdomstolen* to request a preliminary ruling from the European Court of Justice (the “ECJ” or “the Court”) under art 234 EC, in addition to demanding damages from Byggnads and Elektrikerna for a total of SEK 600,000³⁴.

4.2 The Law

The Swedish legislative framework has been reviewed in Part 3; this section contains a review of the EU and international law applicable to the decision by the Court. The necessary historical background to the applicability of EU legislation to Swedish labour disputes is certainly the position that Sweden took with respect to its own model of social relations when negotiating its accession to the EC in 1994. At the time, Sweden appended a declaration to its accession protocol, to the effect that ‘In an exchange of letters between the Kingdom of Sweden and the Commission, [...] the Kingdom of Sweden received assurances with regard to Swedish practice in labour market matters and notably the system of determining condition of work in collective agreements between the social partners’³⁵. Equally, the *Lex Britannia* already discussed in pt 3 engendered a reaction at the international level, following the Swedish employers’ organisation’s claim that this law breached ILO’s Conventions C.87, C.98 and P.147³⁶. This claim was rejected both by the Swedish government at the time and eventually by the ILO Committee of Experts

³² The three unions involved in the case were Svenska Byggnadsarbetareförbundet (the Swedish building and public works trade union, “Byggnads”); Svenska Byggnadsarbetareförbundet avdelning1, Byggettan (the local branch of Byggnads, “Byggettan”); and Svenska Elektrikerförbundet (the Swedish electricians’ trade union, “Elektrikerna”).

³³ Byggnads claimed that this agreement was no more than ‘a device for the Company to try to avoid signing a Swedish collective agreement’ (*Arbetsdomstolen* Judgment no. 49/05, Case no A268/04, Byggnads’ submission to the Court).

³⁴ 55,000 GBP at July 2012 exchange rate.

³⁵ Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden, OJ C241, 29.8.1994.

³⁶ Freedom of Association and Protection of the Right to Organise (adopted 9 July 1948, entered into force 4 July 1950) 68 UNTS 18; Right to Organise and Collective Bargaining (adopted 1 July 1949, entered into force 18 July 1951) 96 UNTS 258; and Protocol of 1996 to the Minimum Standards of Merchant Shipping Convention (adopted 22 October 1996, entered into force 10 January 2003) 2206 UNTS 106.

(CEACR)³⁷; consequently, the ILO reaffirmed the compliance of Swedish labour legislation with internationally-agreed standards.

The 'Posted Workers Directive' was adopted by the Social Affairs Council on 24 September 1996 with the contrary vote of only Portugal and the UK³⁸; the Swedish parliament adopted the relevant implementing legislation in May 1999, to the exclusion of collective agreements on pay, as per domestic labour policy³⁹. Specifically, Section 5 of the Act contains the provisions on the conditions of employment, as per art 3(1) of the Directive, which covers the minimum rates of pay at 3(1)(c).

In a way, the Directive departs from the international private law rules on the applicability of employment contracts for temporarily deployed workers as stipulated in art 6 of the 1980 Rome Convention on the law applicable to contractual obligations⁴⁰, which states that the laws of the country of origin (home country) apply to the employment relationship⁴¹. Instead, in order to avoid social dumping and guarantee fair competition in the labour market, the Directive adopts the device of a 'core' of labour guarantees ('a nucleus of mandatory rules for minimum protection'), listed at art 3, as 'laid down by law, regulation or administrative provision, and/or by collective agreement or arbitration awards which have been declared universally applicable'. According to para 8 of the article, this refers to 'collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession of industry concerned'. Where there is no system for collective agreements of universal application (as is the case in Sweden) the Directive allows for 'collective agreements or arbitration awards 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', with the proviso that their application will guarantee equal treatment to the undertakings involved.

The Directive was not applicable to the dispute between Laval and the three trade unions, as a consequence of the fact that Directives do not have horizontal direct effect and so cannot be relied upon in a dispute between private parties or create rights and obligations directly enforceable by national courts or by the ECJ⁴². However, this does not prevent the

³⁷ The complaint was initiated by Swedish representative for employers Johan von Holten at the ILO conference in 1991; the complaint was rejected both by the Swedish government, which distanced itself from it, and by the CEACR; the information is taken from the LO website, <[www.lo.se/home/lo/home.nsf/unidView/.../\\$file/waxholm.pdf](http://www.lo.se/home/lo/home.nsf/unidView/.../$file/waxholm.pdf)> accessed 12 October 2012.

³⁸ (n 32) Since the Directive was adopted according to Qualified Majority Procedure under art 189b EC, there was no power of veto available to the UK and Portugal. The choice of legal base, current arts 53 and 62 TFEU, was made precisely to avoid the necessity of a unanimous vote in the Council; see Paul Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' (1997) 34 Common Market L Rev 571.

³⁹ Act on the Posting of Workers, *Official Gazette* 1999:678, Government Bill 1998/99:90.

⁴⁰ Council 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 / Consolidated version CF 498Y0126(03), OJ L266/1.

⁴¹ As noted also by Advocate General Mengozzi in his *Laval* Opinion, para 132[which case????]. Conversely, the ECJ had already established in Case C-113/89 *Rush Portuguesa Limitada v Office National d'Immigration* [1990] ECR I-1417, that 'Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory [...]'.

⁴² The applicability of dirs is not as clear cut as the general rule seems to imply; the ECJ has pronounced numerous times on their effect; see mainly Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 148/78 *Pubblico Ministero v Tullio Ratti* [1979] ECR 1629; Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891; Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health*

Court from taking directives into consideration when examining a case, and this the Court did do extensively in its Judgment, nor does it exempt national courts from interpreting their national laws in conformity with EU law, including Directives, therefore ensuring their indirect effect.

Laval argued that the MBL, and specifically Section 42(3), was in breach of EU law by discriminating against foreign undertakings and by unlawfully violating the freedom to provide services protected under art 49 EC. Both in the case of the Directive and in the case of art 49, restrictions are allowed either for public policy reasons, or for the protection of a legitimate interest. In both cases, the Court did not accept that the right to engage in collective bargaining between private parties could be affected by a public policy exception, because of the lack of involvement of the State in the Swedish model of industrial relations⁴³; nor did they accept that the protection of legitimate interests justified the restrictions imposed by the MBL on the freedom to provide services, judging it disproportionate to attain its scope. The Court set the bar extremely low in its standard of review of the proportionality of the action, by stating that,

‘[...] the right of trade unions [...] to take collective action [...] is liable to make it *less attractive*, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC’ [emphasis added]⁴⁴.

5. THE DECISION OF THE COURT

5.1 The Background

The background to the Judgment of the Court is crucial to understanding its outcome. Three elements are worth mentioning: the decision of the *Arbetsdomstolen* to request a preliminary ruling; the opinion given by Advocate General Mengozzi⁴⁵; and the judgment issued by the ECJ only one week previously in *Viking*⁴⁶.

Laval had claimed in its submission to the *Arbetsdomstolen* that the industrial action was unlawful under Section 42(1) of the MBL; additionally, it had claimed that Section 42(3) (the *Lex Britannia* amendment) constituted a violation of the principle of non-discrimination on grounds of nationality, protected under art 12 EC, and of the freedom to provide services under art 49 EC and to post workers under the Posted Workers Directive. For its part, Byggnads claimed that, since the right to take industrial action is not regulated at Community level⁴⁷, national governments retained competence in this area, as reiterated in Recital 22 of the Posted Workers Directive. Without prejudice to this, they also claimed that restrictions of art 49 can be justified if undertaken in the public interest (such as

Authority (Teaching) [1986] ECR 723; Case C-188/89 *Foster and Others v British Gas plc* [1990] ECR I-3313; Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135; Case C-201/02 *The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723; Cases C-397-403/01 *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835.

⁴³ *Laval*, para 84.

⁴⁴ On the application of proportionality in the context of collective bargaining, see Brian Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) 13(3) *Eur L J* 279, 304.

⁴⁵ Delivered on 23 May 2007.

⁴⁶ The two cases were joined and the judgment on *Viking* was issued on 11 December 2007.

⁴⁷ As expressly stated in art 137(5) EC.

measures taken for the protection of employees and to avoid social dumping)⁴⁸. The union claimed that Laval workers had been paid SEK 20-35 per hour and made to work 56 hours per week, in contrast with the union's request of an hourly wage of SEK 14.5, with a fall-back rate of SEK 109 in case of lack of agreement by the parties⁴⁹.

The *Arbetsdomstolen* accepted that the industrial action undertaken by Byggnads was unlawful under Section 42(1) of the MBL; it held however that, Section 42(3) of the same Act being applicable, the industrial action was therefore lawful under Swedish law. On the question of Community law, it accepted the request of a preliminary ruling from the ECJ advanced by the Company in order to clarify the lawfulness of the industrial action under arts 12 and 49 EC and under the Posted Workers Directive. The Company had argued that the Court had competence, notwithstanding art 137(5) EC, to decide the dispute insofar as, first, the industrial action constituted a disproportionate and unlawful restriction of a fundamental freedom and, second, when national law is in conflict with Community law, the latter one takes precedence.

The *Arbetsdomstolen* therefore referred the dispute to the ECJ, seeking clarification on the following two points: 'the issue of the compatibility of the industrial action with the rules on free movement of services and the prohibition against discrimination on the ground of nationality; and, 'the conditions under which legal rules which in practice discriminate against foreign companies carrying out activities temporarily in Sweden with labour from their own country [*lex Britannia*], are compatible with the rules on free movement of services and prohibition against discrimination on grounds of nationality.'

Subsequent to the request for the preliminary ruling, Advocate General (AG) Paolo Mengozzi delivered his Opinion on 23 May 2007. This is not analysed in detail in this article; it is worth noting however that markedly different approach taken by the AG in his analysis of the Swedish model of industrial relations and the weight that this is attributed in drafting the Opinion. To this effect, it will suffice to provide two quotes: the first one is from para 61 of the Opinion, in the Preliminary Observations (Legal Analysis section), where AG Mengozzi states that:

... if the application of the freedoms of movement provided for by the Treaty, in this case the freedom to provide services, were to undermine the very substance of the right to resort to collective action, which is protected as a fundamental right, such application might be regarded as unlawful, even if it pursued an objective in the general interest.

It is clear from this quote that AG Mengozzi does not take as his starting point the presumption that the right to collective action is to be intended as a possible restriction to a fundamental freedom, and therefore has to be proportionate in order to be lawful, which is the approach taken by the Court. Rather, he opines that the fundamental right against which possible restrictions have to be assessed for proportionality is the collective right to industrial action. The approach of the Court is of course dictated by the case as presented, since the Court is asked by the claimant to decide on a breach of the freedom protected in art 49; however it is noticeable that AG Mengozzi seems to at least entertain a possible *categorical approach* to the question posed, where the right to industrial action is found to

⁴⁸ As established by the ECJ in Case C-164/99 *R. v. Portuguesa Construções Limitada* [2002] ECR I-787, para 19.

⁴⁹ According to interviews granted under condition of anonymity by Laval workers and published by *Byggnadsarbetaren* magazine <www.byggnadsarbetaren.se/> accessed 12 October 2012.

fall ‘outside the scope of the freedoms of movement’⁵⁰, rather than the *balancing approach* used by the ECJ, where inevitably one of the two rights is seen to *cut into* the other one and the role of the Court is to assess the proportionality of this infringement.

It is well known that AG Mengozzi concluded that art 49 did not preclude industrial action to force a foreign employer to accept a collective agreement guaranteeing better conditions for the posted workers, provided the collective action was motivated by public interest goals (inclusive of the prevention of social dumping). I would like to point out another aspect of his Opinion, and specifically his more sophisticated and nuanced understanding of the Swedish social model, as exemplified by para 260:

However, those circumstances [unforeseeable results when entering the negotiations, or excessive wage claims] are inherent in a system of collective employment relations *which is based on and favours negotiation between both sides of industry* and, therefore, contractual freedom, rather than intervention by the national legislature [emphasis added]. I do not think that, at its present stage of development, Community law can encroach upon that approach to employment relationships through the application of one of the fundamental freedoms of movement provided for in the Treaty.

It is my argument, and I am not alone in this, that this encroachment was precisely the strategic decision undertaken by the Court and further, that in order to execute this strategy, the Court had to wilfully disregard that very system of social relations even while upholding the rhetoric of social dialogue⁵¹.

Finally, the *Laval* Judgment has to be read in the context of the developing jurisprudence of the Court on the right of collective action, and specifically, *Viking*. As stated in the Introduction, it is not my intention to compare the two cases⁵², and even less, to use them as symbols. But it is nonetheless important to note that the Court did overstep its own mark in delivering the *Laval* Judgment, by arrogating to itself the task of establishing the proportionality of the interference with the fundamental freedom involved, a task that it had left to the national court in *Viking*⁵³.

5.2 The Judgment of the Court

Many elements of the *Laval* Judgment have created a considerable amount of debate. To start from where we ended in the previous section, the proportionality analysis performed by the Court has been criticised, as downgrading the fundamental right of collective action and representation to the exercise of the freedom of movement protected by the Treaty⁵⁴.

⁵⁰ Para 60. This categorical approach is ultimately rejected in favour of a balancing exercise, paras 78ff of the Opinion.

⁵¹ See for example para 105 of the Judgment.

⁵² Both cases have been analysed extensively, including by way of comparison; see Joerges and Rödl (n12); Alain Supiot, ‘L’Europe gagnée par « l’économie communiste de marché » Revue du MAUSS permanente (30 janvier 2008), <www.journaldumauss.net/spip.php?article283> accessed 12 October 2012; Norbert Reich, ‘Free Movement v. Social Rights in an Enlarged Union – the *Laval* and *Viking* Cases before the ECJ’ (2008) 9(2) German Law Journal 125; Rebecca Zahn, ‘The *Viking* and *Laval* Cases in the Context of European Enlargement’ (2008) 3 Web Journal of Current Legal Issues <<http://webjcli.ncl.ac.uk/2008/issue3/zahn3.html>> accessed 12 October 2012; Roger Blanpain and Andrzej Świątkowski (eds.) *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia* (Kluwer Law International 2009).

⁵³ At para 87 of its Judgment, the Court stated: ‘As regards the question of whether or not the collective action at issue in the main proceedings goes beyond what is necessary to achieve the object pursued, it is for the national court to examine...’

⁵⁴ See for example Bercusson (n 43).

Equally, the horizontal application of art 49, and the consequent liability of the trade unions for breaches of EU law, has been investigated extensively. *Laval*, *Viking*, *Rüffert* and *Luxembourg* have been taken as an authoritative view of the Court on the status of fundamental rights, at least pre-Lisbon, against the four freedoms, and the exemplification of the economic model defended by the Court against social policies, at the European and national level.

This article is investigating the significance of this Judgment through the prism of the discourse of social dialogue at the European level, and how this interacts and cuts across national policies on industrial relations, taking the example of the Swedish system as the one that the Court itself adjudicates upon. To this effect, particular attention will be paid to the language adopted by the Court in explaining the rationale for its decision. A couple of preliminary points need to be made: the first one is the determination of the Court to focus its analysis on the interpretation of the Directive on Posted Workers, which could not be relied upon by *Laval* in its claim in the Swedish courts. This approach has been ‘puzzling’ for many authors, but explained by the wish of the Court to ‘express its views on the role and interpretation of the Directive’⁵⁵; arguably, more is at play here, because effectively, the Directive is used to give substance to the general principle protected by art 49 (freedom to provide services). Second, it has been suggested that the Court transformed the ‘floor’ provided by the Directive in its nucleus of minimum requirements to a ‘ceiling’ by making them into the maximum standards instead⁵⁶; to this, it is important to add that this is accomplished by effectively tying the principle of freedom of establishment to the specific criteria listed in the Directive, even while defending in principle the sovereign right of States to apply more generous criteria.

The very framing of the Court’s decision to the exclusion of any meaningful engagement with the particularity of the Swedish system of industrial relations is evident by the way in which the Court rearticulates the first question posed by the *Arbetsdomstolen* wilfully changing its scope⁵⁷. The *Arbetsdomstolen* had posed the question in these terms:

Is it compatible with EU rules [...] for trade unions to attempt, by means of collective action, to force a foreign provider of services to sign a collective agreement in the host country [...] if the legislation to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?’⁵⁸

The Court rephrased the question as follows:

The national court’s first question must be understood as asking [...] whether Articles 12 EC and 49 EC, and Directive 96/71, are to be interpreted as precluding a trade union [...] from attempting, by means of collective action in the form of blockading sites [...] to force a provider of services established in another Member State to enter into negotiations with it on the rates of pay for posted workers, and to sign a collective agreement, the terms of which lay down [...] *more favourable conditions* than those resulting from the relevant legislative provisions....’⁵⁹.

⁵⁵ ACL Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’, (2008) 37(2) Industrial Law Journal 126, 127.

⁵⁶ Study produced by the EU Parliament, Employment and Social Affairs Department, DG Internal Policies, ‘The Impact of the ECJ Judgments on *Viking*, *Laval*, *Rüffert* and *Luxembourg* on the Practice of Collective Bargaining and the Effectiveness of Social Action’, IP/A/EMPL/ST/2009-11 (May 2010) 7.

⁵⁷ As Joergens and Rödl (n12), put it at 16, n 61, ‘The Court simply ignores Swedish policy’.

⁵⁸ *Laval*, para 41.

⁵⁹ *Laval*, para 53.

With this reframing, the Court shifts the focus of the question from the issue of non-discrimination, to that of the freedom to provide services unencumbered by national legislation protective of social rights.

When adopting the implementing legislation for the Posted Workers Directive, the Swedish government had dealt with the requirement of art 3(1) of the Directive not by means of collective agreements applicable *erga omnes* but through the possibility provided by art 3(8)(2), justifying its approach in the following terms:

Legislating to require posting employers to comply with the applicable collective agreement without creating discrimination against them as compared to Swedish employers who are not required by law so to do would mean that there is actually only way to avoid a declaration of the universal applicability of collective agreements. That is for the legal text to have approximately the same wording as the Directive, namely that posting employers must comply with collective agreements to the same extent that Swedish companies in a similar situation do. This would entail always needing to make a comparison of each individual case. Such a solution would obviously seem alien to the Swedish tradition⁶⁰.

In other words, the Posted Workers Directive and its implementation could not be used to determine two different categories of collective agreements under Swedish law, and this was the same rationale underpinning the *Lex Britannia*. However, the intention of the Court is to internationalise collective agreements, and at the same time to deprive the unions of their power to use industrial action as a negotiating tool for anything above the minimum level guaranteed by the Directive. And to do so, it rephrases the question so as to make its focus the *more favourable conditions*, rather than the technical issue raised by the *Arbetsdomstolen* with respect to the applicability of art 3(8) when the law of the host state does not allow for the applicability of collective agreements *erga omnes*.

Once rephrased in the above fashion, it is not difficult for the Court to further its argument on the basis that forcing more favourable conditions is not allowed by the Directive, which only protects the *voluntary* decision by the social partners to enter into more favourable conditions of employment with respect to posted workers. This is a typical move, where the diversity of the speaking positions is masked by the apparent equality of choice. So the Court can state both that Recital 17 of the Directive holds, which states that ‘[...] the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers’ – as well as Recital 22, ‘[...] this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions’ – and contextually decide that ‘Article 3(7) of Directive 96/71⁶¹ cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection’. It seems irrelevant to the Court that the Swedish system does nothing of the sort in its legislation, leaving the matter to the social partners⁶². This, it seems, is a freedom too far for the Court. What then remains of the right of industrial action if it can be exercised only to obtain the observance of the minimum standards already guaranteed by the Directive or through its mechanisms?

⁶⁰ As cited by the *Arbetsdomstolen* in its Judgment (n 33) 31.

⁶¹ Which states that ‘[...] paragraphs 1 to 6 [on minimum requirements] shall not prevent application of terms and conditions of employment which are more favourable to workers.’

⁶² With the proviso that the horizontal application of the *acquis* might require the social partners to be subject to the same rules tying Member States.

After effectively depriving the right of collective action of its main function, the Court moves on to question more widely the Swedish system of social dialogue. Let us remind ourselves that, in Habermasian terms, the equality of speaking positions is crucial, and the Court has already dispensed with that. Equally essential is the openness of outcome. AG Mengozzi had remarked, as we had seen, that this is a structural, physiological and unavoidable element of collective bargaining⁶³. If the outcome is predetermined, what is the value of the dialogue? This framing condition depends organically on the ‘equality of arms’, in the sense that both social partners are equally exposed to the openness of the outcome: the worker as well as the employer enter into pay negotiations in Sweden without certainty of outcome, except two, very important provisos: the rate of pay is supposed to reflect the general rate of pay applicable for a similar job in the same geographical area, and, if an agreement is not reached, the fall-back rate will be applicable (which is probably lower than the employees wish to get and higher than the employers want to pay)⁶⁴. In another blow to meaningful social dialogue, the Court asserts that:

‘[...] collective action [...] cannot be justified in the light of the public interest objective [...] where the negotiations on pay [...] form part of a national context characterised by a lack of provisions, of any kind, which are *sufficiently precise and accessible* that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay[emphasis added]’.

Apart from being a misrepresentation of the Swedish model, because of the two conditions outlined above on pay negotiations, one cannot help but despair for the complete and wilful misunderstanding of bargaining and dialogue in conditions of democracy. The openness *is* the virtue of the system, not its vice⁶⁵.

And so on to the third element of an effective social dialogue in Habermasian terms, the framework for the dialogue to take place under conditions of equality (procedural equality, as opposed to the substantive equality of speaking positions discussed above). With this, in its answer to the second question posed by the *Arbetsdomstolen*, the Court returns to the issue of discrimination. The framing for social dialogue is in Sweden guaranteed by the MBL, in its post-*lex Britannia* incarnation, designed to guarantee an equal framework for domestic and foreign undertakings with respect to the right to engage in industrial action.

The Court however interprets this rule to the effect that ‘collective action is authorised against undertakings bound by a collective agreement subject to the law of another Member State in the same way as such action is authorised against undertakings which are not bound by any collective agreement’⁶⁶ and finds consequently the rule to be unjustly discriminatory (by equating domestic undertakings that have not entered into a collective

⁶³ Para 260 of his Opinion.

⁶⁴ Eklund (n 30) 552.

⁶⁵ *ibid* 551. By doing so the Court is exposing, maybe unwittingly, the hypocrisy of the rhetoric of ‘flexicurity’ at EU level; see for example, *Towards Common Principles of Flexicurity: more and better jobs through flexibility and security* - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, adopted on 27 June 2007, COM (2007) 359. Flexicurity, for the Commission, has to include ‘flexible and reliable contractual arrangements’ (at 20); without irony, the documents notes that: ‘Active involvement of social partners is key to ensure that flexicurity delivers benefits for all. It is also essential that all stakeholders involved are prepared to accept and take responsibility for change. Integrated flexicurity policies are often found in countries where the dialogue – and above all the trust – between social partners, and between social partners and public authorities, has played an important role’ (at 18).

⁶⁶ Para 113.

agreement with foreign undertakings covered by a foreign collective agreement). This is only half the story; as we know from amended Sections 42(3), 25(a) and 31(a) MBL, the rule only applies to collective agreements that violate the MBL. In any case, the *Arbetsdomstolen* clearly stated that ‘the industrial action would have been lawful if the Company had been a Swedish company’ so that it is neither a question of ‘circumvention’ nor of ‘special treatment’. Furthermore, the *Arbetsdomstolen* clarifies the scope of the MBL amendment to the effect that, since the MBL guarantees a ‘social truce’ under conditions of respect of the legislation, this privilege cannot be extended to foreign undertakings that do not otherwise respect its provisions. In other words, the Court subverts the very rationale of Section 42 MBL, to guarantee social peace provided negotiations are entered in good faith and within the umbrella (the procedural framing) of the MBL, into a prohibition to engage in industrial action. Stripped of the crucial framing, all that remains, for the Court, is the prohibition to strike once a collective agreement (any collective agreement) is entered into⁶⁷. So set adrift from its supporting legislation, the prohibition stands in for the opposite of what it was intended to be, i.e., a consequence of the collective agreement binding in compliance with Swedish law, not a free-standing right to be protected from industrial action and from any duty to engage in social dialogue.

6. THE AFTERMATH

The *Laval* Judgment’s repercussions were felt at the political level in Sweden, with new legislation being passed; at the domestic legal level, with the Judgment by the *Arbetsdomstolen*⁶⁸; and finally at the EU level, with negotiations on an amended directive on the posting of workers and the initiation of a complaint procedure by the LO and the Swedish Confederation of Professional Employees (“TCO”) against Sweden to the European Committee of Social Rights⁶⁹.

As a consequence of the Judgment of the Court, a Committee was appointed by the Swedish government in 2008 [at the time, a centre-right coalition] in order to ascertain what legislative action should be taken, in the form of amendments to the *Lex Britannia* and the Posting of Workers Act; in its report, the Committee clarified the provisions of art 3(8)(2) indent one, whereby, in the absence of *erga omnes* application of collective agreements or arbitration awards, ‘Member States may [...] base themselves on collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned [...]’. As for the necessary compliance with art 49, the report suggested that the right to strike in order to determine the employment conditions of posted workers could be retained under the following conditions: the disputed terms and conditions of employment must correspond to the conditions contained in a collective agreement which complies with art 3(8)(2); the terms and conditions must ‘[fall] within the “hard core” of the Posting of Workers Directive’ (with the proviso that, as concerns minimum rates of pay, it should be left to the trade unions to determine what constitutes said rate, to the inclusion of overtime etc.); the burden of proof that the condition of employment of the posted workers are equivalent to the

⁶⁷ This is apparently the rational underlying the new *Lex Laval*, see below.

⁶⁸ For the domestic repercussions, see in general Mia Rönnmar, ‘*Laval* returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms’ (2010) 39(3) *Industrial Law Journal* 280; for a very good, and critical, review of the Labour Court’s judgment in light of EU law, see Elisa Saccà, ‘Nuovi scenari nazionali del caso *Laval*. L’ordinamento svedese tra responsabilità per danno “da sciopero” e innovazioni legislative (indotte)’, *Working Papers* Centro Studi di Diritto del Lavoro Europeo “Massimo D’Antona” 86/2010.

⁶⁹ Complaint No. 85/2012, registered on 27 June 2012, available on the Committee’s website, <www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp> accessed 12 October 2012.

conditions demanded by the trade unions rests with the posting employer. Other procedural amendments were also proposed to improve transparency and communication, always respectful of the principle, at least on paper, that ‘the social partners will assume responsibility for [the] proposed regulations satisfying the requirements of Community law’⁷⁰. The new *Lex Laval*, adopted on 15 April 2010 by the Swedish Parliament, in addition to accepting the proposals of the Commission, qualifies the right to resort to industrial action accordingly, by stating that ‘An employees’ organisation may not use industrial action to achieve a Swedish collective agreement if an employer can show that the employees are already included in terms and conditions (regardless if stipulated by collective agreement, employment contract or managerial decision) that are at least as good as those in a Swedish central branch agreement.’⁷¹ The short paragraph reveals a subtle but fundamental shift from a dialogic model of industrial relations to a situation in which all the partners have to do (and in this case, crucially, the employer) is to show that the working conditions are comparable to the terms agreed at a local level. Not surprisingly, the amendment was immediately criticised by the LO and a request was made for the ILO to examine its compliance with the conventions on the right to union membership and collective negotiations⁷². The Committee in its 2010 Report refers to the case in the following terms: ‘[...] the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised’⁷³. This of course raises the question of a possible normative conflict between the obligations arising under the *acquis communautaire* and Sweden’s (and the other EU countries) international obligations under the ILO Conventions. Equally, the spectre of fragmentation and normative dissonance has been raised with respect of the jurisprudence of the European Court of Human Rights on the right of association, which is going in an opposite direction to the ECJ’s stance in the *Laval* quartet⁷⁴.

The repercussions extended at the domestic legal level, with a new judgment by the *Arbetsdomstolen*. As a consequence of the preliminary ruling by the ECJ, *Laval* raised its demand for damages to three million SEK⁷⁵, while the trade unions argued that there should not be liability for damages resting on the trade unions, as the breach of EU law was attributable to the Swedish State⁷⁶, and in any case the trade unions’ action was legal in Swedish law at the time it was taken, questioning the retroactive application of the ECJ’s ruling to a dispute between private parties in order to establish civil liability. The *Arbetsdomstolen* disagreed on both grounds (liability for damages under EU law, for violation

⁷⁰ Report of the Swedish Government, note 25, 35.

⁷¹ Prop 2009/10:48. The new bill amends the Posting of Workers Act by adding Section 5a. Additionally, the *Lex Britannia* could not be applied to any undertaking posting workers to Sweden, including those from outside the EU. An exception of constitutionality was argued for the proposal by the opposition parties, but rejected by the Supreme Court (see Rönmar (n 67) 286).

⁷² For a summary of the LO’s objections to the Committee, see the text of the Complaint submitted to the European Committee of Social Rights, note 68, 20). The Committee pronounced on the cases in its Report of the Committee of Experts on the Application of Conventions and Recommendations (2010) ilox nr 062010GBR087; the Report is available on the ILO website, <www.ilo.org/> accessed 12 October 2012; see also Kerstin Ahlberg, ‘Will the Lex Laval work?’ Nordic Labour Journal, 2 November 2010.

⁷³ At 209; this statement was in response to a request raised by the British Airline Pilots’ Association (BALPA).

⁷⁴ *Demir and Baykara v Turkey*, App no 34503/97 (ECtHR 12 November 2008); and *Enerji Yapi-Yol Sen v Turkey*, App no 68959/01 (ECtHR 21 April 2009) reaffirming that the right to strike and collective bargaining is protected under art 11 of the Convention. See Keith Ewing and John Hendy, ‘The Dramatic Implications of *Demir and Baykara*’ (2010) 39(1) Industrial Law Journal 2.

⁷⁵ 283,000 GBP.

⁷⁶ Ss 54 and 55 MBL provide the rules on liability for breaches of the MBL; the rules were applied by analogy by the Court to assess the damages for the breach of EU law.

of art 49⁷⁷, and under Swedish law, for breach of the MBL⁷⁸), and with the minimum majority required (four judges out of seven) established that the unions were liable, establishing the amount at 700,000 SEK in punitive damages and two million SEK in litigations costs⁷⁹. As noted previously, there is no right of appeal from the *Arbetsdomstolen*, safe for miscarriage of justice resulting from an ‘obvious’ and ‘grave’ mistake in law⁸⁰. This the trade unions have done, requesting a ruling from the Supreme Court⁸¹; the Supreme Court, maybe predictably, refused their request⁸². Calls were made for the Swedish State to pay the damages⁸³, but they were ultimately paid by the Swedish trade unions to the administrator of the company, Laval having declared bankruptcy. It may be superfluous, in this context, to remark on the chilling effect of the *Arbetsdomstolen* judgment on the right of trade unions to resort to industrial action, given the extension of liability for action deemed legal by the *Arbetsdomstolen* itself at the time it was taken. Suffice to notice that the *Arbetsdomstolen* imposed punitive damages on the trade unions for having failed to predict that their action would have fallen foul of EU law, when the *Arbetsdomstolen* itself was not certain that this was the case, so much so that it refused the demand for an injunction by Laval and it requested a preliminary ruling from the ECJ on that very question. In fact, the *Arbetsdomstolen* was able to impose damages under Swedish law only by disapplying the *Lex Britannia*, which was the object of the second question posed to the ECJ.

The repercussion at the European level include the joint report produced by the European Social Partners at the invitation of the European Commission⁸⁴, which highlights the chasm between the partners on the assessment of the consequences of the ECJ rulings, with the employers’ representative favourably commenting on the interpretation of the ECJ being ‘helpful to avoid uncertainty [...] and to assure a ground of fair competition; on their part, ETUC remarked that ‘the argument of “legal certainty” cannot be used as an excuse to

⁷⁷ Following the case law of the ECJ on horizontal direct effect in the area of competition law, eg Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297 and applying the criteria for Member State liability established in *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, joined Cases C-46/93 and C-48/93 [1996] ECR I-1029. Even in the absence of any precedent on liability for damages for breaches of art 49 by private parties (horizontal direct effect), the *Arbetsdomstolen* did not think it necessary to request a preliminary ruling from the ECJ on this point, even if the parties had request so at the time of the first request for a preliminary ruling in 2005.

⁷⁸ As the ECJ had established in its ruling the *Lex Britannia* to be unlawful under art 49 EC, the *Arbetsdomstolen* was bound to apply the *Britannia Principle* instead, under which the industrial action was found to be unlawful, with again ss 54 and 55 of the MBL applicable for establishing liability and punitive damages.

⁷⁹ Niklaas Bruun, ‘The Laval case, act III – Sweden’s Labour Court rules union must pay high damages, Nordic Labour Journal, 12 January 2010. The *Arbetsdomstolen* delivered its judgment on 2 December 2009 (*Arbetsdomstolen* AD 2009:89).

⁸⁰ Note 26.

⁸¹ Kerstin Ahlberg, ‘Swedish unions want annulment of Laval judgment’, Nordic Labour Journal, 18 May 2010.

⁸² Kerstin Ahlberg, ‘Curtain fall for the Laval case’, Nordic Labour Journal, 31 August 2010.

⁸³ The decision to assign liability for punitive damages to the unions for having exercised their right to resort to industrial action disregards the primary characteristic of this right, which is the immunity from civil liability (taking into account that the action was legal under Swedish law, as recognised by the same court in its 2005 judgment). See Tonia Novitz, ‘Labour Rights as Human Rights: Implications for Employers’ Free Movement in an Enlarged European Union’, in Catherine Barnard (ed), (2007) 9 Cambridge Yearbook of European Law 357; Filip Dorssemont, ‘The Right to take Collective Action Versus Fundamental Economic Freedoms in the Aftermath of Laval and Viking: Foes are Forever!’, in Marc De Vos and Catherine Barnard (eds.), *European Union Internal Market and Labour Law: Friends or Foes?*, (Intersentia 2009) 45. The *Arbetsdomstolen* could have interpreted EU law so as to exclude or limit liability for individuals because the unlawfulness of the action is only the first step to establish liability, and it is not quite clear that damages would have been granted as a matter of EU law; additionally, the Court could have applied s 60 of the MBL, which allows to reduce or waive damages if deemed reasonable under the circumstances.

⁸⁴ *Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases*, of 19 March 2010, available on the European Trade Union Confederation (“ETUC”) website <www.etuc.org/> accessed 12 October 2012.

interfere with the essential features of national labour law and industrial relations systems' and concluded that 'The sustainability of industrial relations has been threatened.'

On a legislative level, negotiations have been ongoing on a Directive on the enforcement of the Posted Workers Directive, first suggested by President Barroso in 2009; an amendment proposed by the Employment and Social Affairs Committee of the European Parliament under the Ordinary Legislative Procedure is currently awaiting its first reading. A parallel proposal for a Council Regulation under the Consent Procedure on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services is at preparatory phase in Parliament⁸⁵.

Finally, as mentioned above, the Swedish LO and TOC have submitted a complaint to the European Committee of Social Rights against Sweden, requesting that the Committee pronounce on their claim that the *Lex Laval* violates Sweden's obligations with respect to arts 4, 6 and 19.4 of the European Social Charter⁸⁶ and ILO C.98 (art 4) and C.154⁸⁷. The complaint has just been lodged and there is no way of knowing how it will be assessed. It is interesting to note how the trade unions turn the ECJ's argument about the lack of clarity of the pay agreements on its head, by remarking that the new legislative framework makes it impossible for trade unions to predict if their industrial action will be deemed lawful, or if it will attract punitive damages and they conclude with the following gloomy prediction, worth quoting in full:

The combination of the new rules on industrial peace and full financial tort liability without a negligence requirement has led to great wariness on the part of the trade union organisations as regards signing collective agreements with foreign employers. The fear felt by the trade union organisations of doing the wrong thing by mistake and putting the organisation at risk of being forced to pay high levels of damages has meant that there has been a severe fall in the number of collective agreements signed as regards foreign companies carrying on business in Sweden. This means that foreign workers are entirely without protection as regards reasonable terms and conditions of pay and employment when they are working in the Swedish labour market and that Swedish workers are exposed to competition from workers with very low pay and wretched employment conditions. In the long term there is a risk that this will have negative repercussions for the entire Swedish labour market model⁸⁸.

7. CONCLUDING REMARKS

⁸⁵ See information on the website <www.europarl.europa.eu/committees/en/empl/work-in-progress.html#menuzone> accessed 12 October 2012. The ETUC has already issued a position on the proposed Directive, which requests major revisions to address its shortcomings, outlined in the position paper, see <www.etuc.org/a/10037> accessed 12 October 2012. The proposed Council Regulation, on its part, has resulted, in July 2012, in the first 'yellow card' from national parliaments (including the Swedish one), under art 7.2 of Protocol 2 to the Lisbon Treaty; as per procedure, the draft regulation will now have to be reviewed by the Commission, but there is no legal obligation of amendment or withdrawal (<<http://extranet.cor.europa.eu/subsidiarity/news/Pages/Early-Warning-System-First---yellow-card-.aspx>> accessed 12 October 2012).

⁸⁶ European Social Charter (opened for signature 18 October 1961, entered into force 26 February 1965) CETS No. 035; the articles concern the right to a fair remuneration, the right to bargain collectively, and the right of migrant workers and their families to protection and assistance (non-discrimination in remuneration, working conditions and employment matters, including trade union participation).

⁸⁷ For C.98 see n 36; ILO Convention 154, Promoting Collective Bargaining (adopted 3 June 1981, entered into force 11 August 1983) 1331 UNTS 268.

⁸⁸ Complaint to the European Committee of Social Rights (n 68) 28.

It is important to improve working conditions and wages in competing countries, in order to raise the floor⁸⁹.

The above quote is from an interview with a Swedish trade unionist on the subject of the ESD at sectoral level; when uttered, the Court had not delivered its *Laval* Judgment, with its well-known transformation of the floor provided by the Posted Workers Directive into a ceiling of what is obtainable through industrial action. One is left to wonder what this trade unionist would make of the sleight of hand by the Court.

The reverberations of this Judgment go well beyond the low numbers involved, as is often the case: 35 Latvian workers involved in the actual dispute, and a total of posted workers in Sweden at the time of the dispute estimated to be at about 2,200, inclusive of about 1,050 in the building sector⁹⁰. Charles Woolfson has rightly noted that Latvia might have used the dispute, and *Laval* instrumentally, in order to ‘prise open new markets in the EU’ and certainly the facts of the dispute, and especially its political background, give support to this hypothesis⁹¹. To this, further strategic considerations can be added, that have to do more with *prising open* the legal structure of industrial relations that Swedish workers have developed in cooperation with capital over almost a century. This strategy of legal disruption has domestic and European elements. It is public knowledge that *Laval* was supported financially, in bringing its case in the *Arbetsdomstolen*, by the Confederation of Swedish Enterprise, who had, as once again Woolfson noted, ‘long argued in favour of reducing the scope of trade union industrial action, especially with regard to sympathy action affecting so-called “third parties”’⁹². The legislative changes at the domestic level have been investigated in depth throughout this article and bear out the impression that it is more than the destiny of a limited number of foreign workers posted in Sweden to be the concern and the real target of the statutory intervention, as pointedly noted by the trade unions in the closing paragraph of their complaint reported above.

At the European level, it will be useful to remind the reader that Swedish law already contained, in Sections 54 and 55 MBL, the imposition of economic *and* punitive damages for breach of the social peace after the conclusion of a collective agreement. In the strictly private law relationship established between the parties, the Swedish State intervenes to punish the unions for unlawful resort to strike action under limited conditions. In a double move of *deracination* or de- and re-localisation, the ECJ and the Swedish Labour Court (applying EU law, or maybe misapplying it) have localised to Sweden EU law by embedding the restrictions of the Posted Workers Directive and giving it the force of hard law in a model of industrial relations predicated upon ‘soft’ methods of dialogic exchange, and Europeanised the Swedish imposition of punitive damages for unlawful industrial action,

⁸⁹ Interview with a Swedish trade unionist on the topic of European Sectoral Social Dialogue, as reported by Sofia Murhem, ‘Implementation of the Sectoral Social Dialogue in Sweden’, in Anne Dufresne, Christophe Degryse and Philippe Pochet (eds.), *The European Sectoral Social Dialogue. Actors, Developments and Challenges* (Peter Lang 2006) 281, 292.

⁹⁰ The numbers are taken from the Eurofound website, <www.eurofound.europa.eu/> accessed 12 October 2012; the website offers a clear disclaimer on the accuracy of the figure, as no official data is collected. Similar statistics, collected by the unions, are provided in the Swedish Government Official Report, note 25, 10.

⁹¹ Charles Woolfson and Jeff Sommers, ‘Labour Mobility in Construction: European Implications of the *Laval* un Partneri Dispute with Swedish Labour’ (2006) 12(1) *European Journal of Industrial Relations* 49, 56. Some interesting background on the political dimension of the dispute in Alban Davesne, ‘The *Laval* Case and the Future of Labour Relations in Europe’, *Les Cahiers Européens de Sciences Po*. No 01/2009, Paris: Centre d’études Européennes.

⁹² Woolfson and others (n 26) 15. The quote refers to information provided in Jan Peter Duker, ‘Ett arbetsgivarperspektiv på medling’, in Anne-Marie Egerö and Birgitta Nyström (eds.), *Hundra år av medling i Sverige: Jubileumsskrift: Historik, analys och framtidsvisioner* (Medlinginstitutet 2006) 184.

which is inconsistent with any other model of labour law that does not include the substantive guarantees under a meaningful social dialogue that the Swedish model provides⁹³. In doing so they set adrift the Swedish prohibition to strike under penalty of punitive damages and allowed it ‘to strike’ in quite a different way, as the members of the British Association of Airline Pilots (“BALPA”) found out when their employer British Airways decided to seek an injunction in the English courts on the basis of the unlawfulness of a proposed strike action, and to seek punitive damages to the order of 100 million GBP per day were the strike to take place⁹⁴.

In its complaint to the European Committee of Social rights⁹⁵ the LO puts it succinctly but clearly: ‘[...] in these cases⁹⁶ *collective agreement free zones* are created in the Swedish labour market, where it is only possible to conclude a collective agreement if the employer accepts it voluntarily’ [emphasis added]⁹⁷. Similarly to the Export Processing Zones (“EPZ”) that are a common feature in developing countries⁹⁸ these zones signify the transformation of the Western labour market in the direction of a *de-westernisation* and they do so by depriving the trade unions of their speaking position and reducing them to passive listeners.

⁹³ Europeanisation is not intended here in the traditional sense of ‘an incremental process of re-orienting the direction and shape of politics to the extent that EC [EU] political and economic dynamics become part of the organisational logic of national politics and policy making’ (see Robert Ladrech, ‘Europeanisation of Domestic Politics and Institutions: The Case of France’ (1994) 32 *Journal of Common Market Studies* 69, 69 as quoted in Zahn, note 51); rather it is intended to convey the concept of a policy or law deracinated, that is, taken out of its local context, and re-embedded both in its national context, but having been decontextualised, and in a new international or, in this case, European context.

⁹⁴ BALPA called off the strike but submitted a complaint to the ILO Committee of Experts, see supra note 71 and appealed against the interim injunction granted by McCombe J dated 17 May 2010. For the appeal in the courts see *British Airways PLC v Unite The Union* [2010] EWCA Civ 669.

⁹⁵ Note 68, 22.

⁹⁶ Where, by application of the new Section 5(a)(2) of the Posting of Workers Act, collective action is not lawful if the employer has shown that the minimum conditions of employment are respected, even without a binding agreement.

⁹⁷ This voluntariness constitutes the Habermasian element of the Swedish system only insofar as it does not extend to the meta-level of the framework; in other words, it has to be accepted by the social partners that the voluntariness does not include the possibility *not* to enter into a dialogue at all, and to impose labour conditions derived from exogenous sources (such as the hard statutory provisions that form the object of the LO criticism).

⁹⁸ Information on the EPZs at <www.ilo.org/public/english/support/lib/resource/subject/epz.htm> accessed 12 October 2012.