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Abstract:

Together with a series of related ECJ cases (Viking, Rüffert), the Laval case became famous as a new display of the struggle between economic freedoms and social rights in the EU. But the European controversy is only one part of the story. Focusing on the Laval case, this article goes back to the place where it all started – Sweden – and tries to shed light on the missing link between the European controversy over posted workers and the challenges that the Swedish labour model is currently facing. The Swedish labour relations system has now to cope with legal uncertainty while the government, the employers and the Trade Unions are increasingly struggling over labour regulation. Beyond its juridical aspects, the Laval case is thus a landmark political event, as it unveils and increases the turmoil of the Swedish autonomous labour relations. It thus displays a new opportunity for reforming industrial relations and labour regulations in Sweden, in a time when they are as much pressured at home as they are admired abroad.

Résumé:

L'affaire Laval, liée à une série d'affaires de la CJCE (Viking, Rüffert), a été rendue célèbre à travers l'Europe comme étant un nouvel avatar des contradictions entre libertés économiques et droits sociaux. Mais la dimension européenne n'est qu'une partie de la controverse et cet article met en lumière les liens entre d'une part les débats européens sur les travailleurs détachés et d'autre part les enjeux qu'affronte le modèle suédois de relations industrielles. Au-delà de ses aspects juridiques, l'affaire Laval est un évènement politique majeur en Suède, puisqu'elle met en exergue et accentue les difficultés du système autonome de régulation du marché du travail par les partenaires sociaux. Elle offre en effet de nouvelles opportunités pour réformer les relations industrielles et les règlementations salariales, elles-mêmes qui sont autant menacées en Suède qu'admirées à l'étranger.

Keywords: Collective action – EC Law – Collective agreement – Laval case – Labour relations – Posted workers

THE LAVAL CASE AND THE FUTURE OF LABOUR RELATIONS IN SWEDEN[1]

In the end of 2004, Swedish Unions implemented a collective action against the Latvian construction company *Laval* because it temporarily posted Latvian workers to Sweden without signing any local collective agreement, setting up among others the wage level. *Laval* sued the Trade Unions for discrimination against foreign workers. The Swedish labour Court then referred the case to the European Court of Justice (ECJ), which ruled that the blockade was disproportionately infringing the Community provisions for free movement of workers – even though the fight against social dumping *"may constitute an overriding reason of public interest[2]"*. The Court stressed that one cannot impose an obligation on foreign service providers to respect any working standards which would go beyond the minimum standards set by the Posting of Workers Directive (PWD[3]). The collective action was thus deemed illegal, since Sweden does not have any legislation on a national minimum wage.

While the *Laval* case has strongly contributed to the heated debate over the future of a "social Europe", it seems useful to cast a first glance at its impacts on the Swedish labour relations and collective agreement system. Even though the domestic consequences of this decision are still unsettled, we argue that the *Laval* case has already impacted the Swedish labour relations – mainly by affecting the strategic environment of domestic actors. Building upon Europeanization studies, our research design follows a "bottom-up" pattern, as it checks how EC treaty rules and the interpretations that the ECJ makes of it change the opportunity structures for labour market reforms at domestic level (Olsen, 2002). This paper puts forward the agenda-setting dimension of European integration and relies upon the assumption that this process does not prevent national institutions or actors from making creative usages of the European changes (including the possibility to accommodate or avoid them; Jacquot and Woll, 2003). Indeed, a number of social scientists already pointed out the fact that actors can adapt domestic policies and produce change rather independently from pressures arising from institutional misfit. As underlined by Mark Thatcher, "*some actors may well already be seeking reform (…). Thus, from an actor perspective, EU requirements may not be a 'pressure' but rather an opportunity*" (Thatcher, 2004).

Referring to the *Laval* case, we argue that the European integration brings about legal pressures and political opportunities to reframe the power-balance between social partners and to review national labour regulations. The first part of the paper will be devoted to the Laval case itself and the controversies it triggered in Europe (1). In order to better understand what is at stake for the future of the Swedish labour model, we will then investigate the domestic background of *Laval* case (2) and the opportunities for reform that the judgement created in this particular context (3).

[1] The present paper derives from a presentation "*Is the Swedish Labour Model Challenged by the Laval Case? A National Controversy in the Context of Europeanized Labour Markets*" during the 2008 Oxford/Sciences-Po Doctoral Seminar on Regional and Global Institutions in the 21st Century (01/05/2008). I would like to thank Sophie Jacquot, Renaud Dehousse, Zaki Laïdi, Andrew Hurrell, Kalypso Nicolaïdis, Alex Betts and my Phd colleagues for their comments.

[2] European Court of Justice, Judgment in Case C-341/05(Grand Chamber), Laval un Partneri Ltd v Svenska *Byggnads*arbetareförbundet, 18 December 2007

[3] 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

1. THE APPLICATION OF COLLECTIVE AGREEMENTS TO POSTED WORKERS AND THE FIGHT AGAINST "SOCIAL DUMPING" WITHIN THE EU

According to the "*law on workers' participation in decisions" (MBL*[4]), Sweden displays a peculiar system of industrial relations which mainly relies on collective agreements (*kollektivavtalssystemet*[5]). Collective agreements belong to the field of private law, "*somewhere between law and contracts*" (Olsson, 2007). The overall pattern of the Swedish labour model dates back from the *Sältsjöbaden* agreement which paved the way in 1938 for tripartite industrial relations featuring strong and consensus-oriented social partners. Beside a strong commitment to a comprehensive and costly Welfare State, this system of industrial relations allowed the pursuit of a solidaristic wage policy together with a low-inflatory and productivist industrial policy (according to the *Rehn-Meidner model*, solidaristic wage policies move manpower from "sunset" to "sunrise" jobs; Gould, 2001). Fritz Scharpf notes that the system instituted by the "peace agreement" of *Sältsjöbaden* allowed Sweden to score highest on average wage level and equalization, with a comparatively low level of labour conflicts (Scharpf, 1991).
This well-known labour market model has evolved long before Sweden's membership to the EU. The central bargaining system broke down in the 1980s and social negotiations between the Unions and the employers are since then giving birth to sector and firm-based agreements on working conditions and wages (Jochem, 2000). Despite these major changes, the State authorities stick to a careful "hands off" policy, leaving labour market regulation to social partners and thus avoiding any comprehensive national legislation about minimum wage. The lowest wages are called *ingångslön* or *grundlön* (entry-wage or basic-wage). They are set up at local level and may vary from one industry to the other[6]. In fact, "entry-wages" are often directed to inexperienced workers and they are nothing more than a virtual starting point for further negotiations. There is nothing like a minimum wage in Sweden, there are only negotiated ones. Branch-wide and firm-based collective agreements covered about 90% of all the workers in 2007 and the right to take industrial actions is a central feature of this system[7]. Indeed, the wage level depends on negotiations and on legitimate measures of industrial action such as boycotts if negotiations break down (Merghi, 2006). This specific institutional nexus is only partly shared with Denmark and creates a specific "*autonomous collective agreements model*", as Ahlberg, Bruun and Malmberg call it (Ahlberg et al., 2006). The Laval case challenged precisely the compatibility of those arrangements with EC law in the context of cross-border labour mobility.

A brief presentation of the Laval case[8]

The Latvian building company *Laval un Partneri Ltd* ('*Laval*') was appointed on the 27th of May 2004 by the city of Vaxholm, a small town in the outskirts of Sweden's capital city Stockholm, in order to refurbish an old school building. The work was actually undertaken by a subsidiary company *Baltic Bygg AB* which hired Latvian posted workers appointed by Laval's head office. In June 2004, *Laval/Baltic Bygg* and the Swedish Building Workers' Union, (*Svenska Byggnadsarbetareförbundet*, '*Byggnads*[9]') initiated negotiations in order to

[4] Lag om Medbestämmande i arbetslivet, *MBL* (1976:580)
[5] Collective agreements are set up by the article 23 of the *MBL*
[6] http://www.eurofound.europa.eu/emire/SWEDEN/ANCHOR-MINIMIL-Ouml-N-SE.htm
[7] SOU 2008:123
[8] Case C-341/05
[9] '*Byggnads*' belong to the major Swedish blue collar Union, *Landsorganisationen Sverige*, 'LO'. Its local branch is named *Svenska Byggnadsarbetareförbundet avdelning 1*, 'Byggettan'

conclude an "application agreement" (*hängavtal*[10]) to the collective convention for the building sector. A number of meetings occurred between *Byggnads* and the representative for *Baltic*/*Laval* until contacts eventually collapsed on the 15th of September 2004[11]. As usual, wage negotiations were the most controversial item of the negotiation. No agreement could be reached, as *Laval* wanted to fix pay terms at SEK 109 per hour (on the basis of the legal entry-wage mentioned above), whereas *Byggnads* demanded at least SEK 145, a level which was said to be in line with the average wage level in the Stockholm region for building undertakings (based on publicly available quarterly statistics; Gerhardsson, 2006).

Usually, Swedish labour relations provide that the existing branch convention has to be signed first, laying down the basic requirements concerning unemployment insurance, safety at work, working hours and other legal conventions[12]. Wage negotiations must take place at a local level, only once the parties agreed upon the branch convention. During this phase, the Unions are bound to a 'social peace' clause (*fredsplikt*) and cannot take any collective action against the employer[13]. Yet, the negotiations between *Laval* and *Byggnads* were plagued by mutual distrust and *Laval* refused to sign a collective agreement without any preliminary agreement on wage level. *Laval* obtained these negotiations to be performed jointly and simultaneously. This explains why collective negotiations usually do not end up in such a deadlock as they did in Vaxholm.

When the negotiations collapsed altogether mainly because of the wage issue, *Laval* entered into an alternative collective agreement with the Latvian Trade Union of Construction Workers, to which 65% of the posted workers were affiliated. According to the Swedish legislation, the Swedish Union denied the relevance of a Latvian collective agreement, as the work has to be performed in Sweden. As *Laval* refused to sign a collective agreement with *Byggnads*, the Union implemented industrial actions on the 2nd of November 2004, blocking the access to the building site and depriving it from all supplies. The electricians Trade Union (*Elektrikerförbundet*) participated to sympathy actions, helping *Byggnads* to blockade the site. A proceeding was then brought by *Laval* to the Swedish labour Court (*Arbetsdomstolen*) on the 7th of December to obtain, first, a declaration that the collective action blockading *Laval*'s worksites is unlawful, second, an order that such action should cease, and, third, an order that the Trade Unions pay compensation for the loss suffered by *Laval*. The Swedish *Arbetsdomstolen* referred the case to the European Court of Justice on the 15th of September 2005[14]. A few weeks before, *Laval's* Swedish affiliated company was declared bankrupt and the posted workers returned to Latvia. The building of the school was later taken on by a Swedish company who signed the collective agreement and paid the workers about SEK 160 per hour.

The *Laval* case raised in the first place a prejudicial question about the right of Unions to take industrial actions against a foreign employer in order to get him to sign a local collective agreement, in the context of EU rules on freedom of movement to provide services[15]. *Byggnads* argued that the question asked to the Court is not relevant because it neglects the principle of subsidiarity by implying that EC law can restrict the application of collective

[10] "*Hängavtal*" refers to the type of collective agreement signed with employers who are not members of the Swedish employers' federation. They are a way for Trade Union to fight social dumping by applying to non-affiliated companies the same conditions to those applying to the whole branch.

[11] „Osakert om om facket har rätten på sin sida", *Dagens Nyheter*, 02-12-2004

[12] In the present case, the building branch convention has been signed by *Byggnads* and by the employers' organisation, *Sveriges Byggindustrier*

[13] Article 41 MBL

[14] AD aktbilaga nr. 133 i mål nr. A 268/04 ; AD 2005 No 49

[15] The questions to the ECJ reads: "1. Is it compatible with rules of the EC Treaty on the freedom to provide services [Article 49] and the prohibition of discrimination on the grounds of nationality [Article 12] and with the provisions of Directive 96/71/ECof the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services for trade unions to attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?"

agreements applying to posted workers in a Member State. The Court rejected this argument and ruled the case on the legal basis of the articles 12 and 49 EC, laying down the community law on discrimination and the freedom to provide services, as well as the Directive 96/71/EC specifically concerning the posting of workers in the EU. The Posting of Workers directive (PWD) compels foreign service-providers to comply to a nucleus of mandatory rules, that is "*minimum standards laid down by host Members State's law, regulation or administrative action, and/or by collective agreements which have been declared universally applicable*"[16]. The bottom line of the judgement is that the Swedish system does not fit to this legal framework, and thereby does not provide clear and predictable rules for foreign providers.

The Directive 96/71/EC was transposed into Swedish law by the act on posted workers passed by the *Riksdag* on the 9th of December 1999[17]. All items referring to the terms and conditions of employment listed by the PWD thus apply in Sweden, save for the minimum pay rates which continue to be determined by collective agreements (Merghi, 2006). This way to set up wages is not infringing the Directive, as long as it displays non discriminatory rules. Yet, the Court pointed out that Sweden does not have a legal or regulatory system allowing the collective agreements to be considered as automatically generally applicable ('*erga omnes'* effect). Therefore, as long as *all* the local companies are not bound to a collective agreement, Swedish Trade Unions cannot compel foreign employers to do so. Beside the absence of minimal wage and the lack of a general application of collective agreements, the Court noticed that several conditions included in the collective agreement proposed by *Byggnads* were not in line with the Directive on posted workers, such as the requirement for the employer to pay to *Byggnads* a fee amounting to 1.5% of the wages bill (*Granskningsavgift)* and to subscribe to an insurance (*AFA försäkringar*[18]; Ismal, 2007). The industrial action pursued by *Byggnads* against *Laval* was thus discriminatory with regard to EC treaty rules, given that *Byggnads'* claims exceeded the minimal working conditions listed by the directive (§85).

Having clearly stated that LO-*Byggnads'* collective action against *Laval* did not fall outside of the scope of article 49 EC (§51[19]) and exceeded the minimum conditions led by the PWD, the ECJ then turned to a less limpid reasoning about the legality of the collective action with regard to EC free movement rules. The ambiguity of the judgment is striking: on the one hand, the Court recognizes the right to take collective action as a fundamental right (§95), but on the other hand it has to be proved proportionate and compatible with EC law. Any infringement to the freedom of movement must thus be justified by "*overriding reasons of public interest*" (§101 & 103). As regards LO-*Byggnads'* industrial action, the Court considers that such action in the form of a blockade of sites constitutes a restriction on the freedom to provide services, which is disproportionate with regard to the public interest aim of protecting workers.

The second part of the judgment concerns the compatibility between the EC law and the Swedish labour law which regulates more specifically the provisions for legal collective actions against foreign companies[20]. As mentioned above, the article 42 of the MBL prohibits

[16] 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, OJ 1997 L18/1
The "core" of minimum standards concerns a) working time; b) days off; c) minimum wage; d) working conditions; e) safety, security and health on the working place; f) protection for pregnant women and young people g) non-discrimination

[17] Utstationeringslagen 1999:678

[18] The insurance-fee provided by the collective agreement amounts up to 5,66 % of the global wages bill

[19] The ECJ rejected its *Albany* argument which stated that collective actions fall outside the scope of the article 49 EC, an argument which was put forward both by Trade unions and the Swedish government (§89), see also ZAHN, Rebecca, "The Viking and Laval Cases in the Context of European Enlargement", 3 Web JCLI, 2008 and BARNARD, Catherine, "Employment rights, Free movement and the EC Treaty and the Service Directive", in RÖNNMAR, M. (eds.), *National Industrial relations vs EU industrial relations,* Kluwer, 2008, forthcoming

[20] The question to the ECJ reads: *"2. The Swedish Medbestämmandelagen (Law on workers' participation in decisions) prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the lex Britannia, only where a trade union takes measures in respect of industrial relations to which the*

the starting of a collecting action as soon as the social partners are bound by a collective agreement (the so called "social peace" clause). In order to limit to risk of social dumping after a national law case in 1989[21], an amendment was added 1991 by the Parliament, allowing Trade Unions to implement collective actions against a foreign employer who would not comply with a Swedish collective agreement because he is already bound by a less protective collective agreement at home[22]. According to the ECJ, this *Lex Britannia* amendment displays unfair competition between national and foreign companies too.
The national Court will finally decide whether *Laval* is entitled to compensations due to unfair treatment[23]. Preliminary negotiations set up by the Labour Court in order to come up with an agreement on the amount of the compensations have not been successful yet, while LO is still opposing the idea of having to pay a fine to *Laval*[24].

Balancing economic freedoms and social rights in the EU[25]

Before addressing the effects of the *Laval* case on the Swedish labour system, we must first account to the reasons why it has become, together with similar cases on the posting of workers[26], one of the most controversial issues in recent European industrial and labour politics.
Ten new Member States mainly belonging to the Central European area joined the EU on the 1st of May 2004, with their wage levels and labour provisions being respectively lower and weaker than those applying in the 15 Member States[27]. This imbalance created concerns about the risk that the full appliance of EC treaty rules on free movement to the new Member States would lead to "social dumping"[28]. The *Laval* case was thus depicted by Trade Unions and Left parties as a warning against the dangers of a full-fledged European-wide labour market.

Medbestämmandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition on discrimination on grounds of nationality and the provisions of Directive 96/71 constitute an obstacle to an application of the latter rule — which, together with other parts of the lex Britannia also mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded — to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?"

[21] Arbetsdomstolen, law case *Lex Britannia*, 1989, n°120: the prohibition of collective action by the "social peace rule" applies to collective actions in Sweden affecting collective agreements passed outside Sweden

[22] Lag (1991:681) om ändring i lagen (1976:580) om medbestämmande i arbetslivet

[23] "Bakläxa för Sverige I EU:s domstol, *Dagens Nyheter,* 19-12-2007

[24] Secret negotiations have not been successful yet, Laval's claim could amount to SEK 2,8 millions, and 2 millions for the proceedings, "Laval vill ha EU-domslut", LO, 2008-09-17

[25] To rephrase quotations by Rebecca Zahn: "the delicate balancing between economic freedoms and social rights" or Norbert Reich, "Free Movement v. Social Rights in an Enlarged Union - the Laval and Viking Cases before the ECJ"

[26] The Laval case is not the only decision affecting the balance between the provisions for free movement of workers and national social protection in the past months. A similar case, Viking Line, was ruled on the 11th of December 2007[26], a couple of days before Laval. The Viking case deals with the posting of workers (here for a ferry-boat company) and the right for Trade Unions to take collective actions in order to prevent social dumping. The *Viking line* judgement is very much in line with the Laval case's one, since the Court said that any collective action – although legitimate – must not preclude the fulfilment of article 43 EC which guarantees the free movement of workers. A more recent case, Rüffert, has been ruled in a similar direction on the 3rd of April 2008 by the ECJ. The German *Land* of Niedersaxen was convicted for displaying uneven conditions for competitive bidding, since local authorities asked foreign companies to comply with wage levels upon which social partner did not agree by a general available collective convention.

[27] The average wage level was about 11 and 25% lower in the new MS in 2004 – Medlingsinstitutets årsrapport, *Avtalsrörelsen och lönebildningen 2004*, p. 220

[28] Most of the older member States coped with this growing anxiety by setting temporary measures in order to only gradually open their markets to the potential flow of east-European workers. Sweden was in 2004 one of the few countries - together with Ireland and the UK - to restrain from setting temporary barriers against workers coming from new Member States

The *Laval* case added to the political confusion throughout Europe, as the judicial proceedings occurred while the highly controversial directive on services was being drafted[29]. The first draft of the services directive was strongly deregulatory, triggering massive protests from Unionists, MEPs and governments[30]. The main bone of contention was the establishment of "the country of origin principle". This clause stated that a foreign provider coming from any EU State should have access to another Member States' market according to its home country rules, which was seen as opening the doors to a "run to the bottom" of labour legislations. This proposal was withdrawn from the final version of the directive, following the amendments agreed upon by the European Parliament and the Council. The 'Bolkenstein' draft initially amended the posted workers' directive, but the final version clearly distinguished both directives[31]. The temporary posting of workers remains thus unaffected by the directive 2006/123 EC on services. Nevertheless, the challenges and issues posed by the 'Bolkenstein' directive are similar to the ones the ECJ dealt with in its *Laval* ruling. The judgement does not explicitly imply that the Latvian labour law should apply to the Latvian workers who are posted in Sweden, but the labour law expert Stéphane Rodrigues fears that the Court's decision could "*bring back [the country of origin principle] via the backdoor*" by restricting the instances were the host Member State is allowed to regulate the posting of workers on its own territory[32].

Furthermore, the *Laval* case raises more general questions about the implementation of the EU legislations and its autonomy against primary EC law (i.e. treaties; Cavallini, 2007). The directive 96/71/EC on the posting of workers was indeed intended at protecting posted workers rights and enhancing host Member States' labour legislation, but its scope is limited and its implementation appears to be uncertain. The Court's judgement ruled that the scope of the directive cannot be extended beyond the set of minimum protection listed by the directive. If collective agreements exceed the list of minimum protection laid by the PWD, they have to pass the test of proportionality with regard to the fundamental freedoms and competition rules laid by the treaties. In this sense, the European Trade Union Confederation (ETUC) argues that the directive does not actually provide a floor of protection that the host states must apply to the posted workers. It instead establishes a ceiling of employment conditions that the host states are allowed to extend to the posted workers[33]. Following the same line of thinking, EP Employment Committee's rapporteur on "Challenges to collective agreements in the EU" Jan Andersson (PSE, SE) said he was worried that the minimum conditions set out in the posting of workers directive might become maximum conditions[34].

The ECJ has displayed a strong commitment to guaranteeing the right to implement collective action in Europe as a way to protect fundamental rights, a stance that was welcomed by ETUC and by the main European parties[35]. Yet, many EC law experts voiced concerns about the Court's reference to proportionality requirements when it comes to implement collective actions (Bercusson, 2007). One can indeed wonder what does proportionality actually mean when dealing with contradictory fundamental rights such as free movement on the one hand and protecting workers rights on the other. Although ECJ judges indicate that fundamental freedoms and fundamental rights need to be 'balanced' against each other, there still seem to be a clear hierarchy between the former and the latter: those exercising a freedom of movement do not have to justify their actions, whereas collective bargaining and collective actions have to be proven justified and proportionate to the fundamental rights they aim at protecting. Catherine Barnard provides an interesting long

[29] Directive 2006/123/EC, Also called 'Bolkenstein' after the name of former Internal Market Commissioner Frits Bolkenstein

[30] The Swedish social-democratic Labour Minister voiced his fear that the Swedish Model would be at risk against "social dumping", quoted by Catherine Barnard, *ibid.*

[31] For a thorough investigation on the links between the posted workers cases and the service directive, see Catherine Barnard, *ibid*.

[32] Stéphane Rodrigues, « Le retour de l'affaire Bolkenstein ? », www.Telos-eu.com, 09-01-2008

[33] "European social model challenged by Court rulings", www.EurActiv.com, 27 February 2008

[34] 26/02/2008 Members of the Employment Committee debated today with experts and representatives of trade unions and employers associations the European Court of Justice Rulings on the Laval and Viking cases.

[35] "Viking and Laval cases", Explanatory Memorandum for Executive Committee of the ETUC, 4 March 2008

term analysis of the ECJ law case related to employment rights and free movement which helps us to understand this structural imbalance: "*The real challenge to national regulatory autonomy came with the gradual adoption by the Court of the so-called 'market access' test*" (Barnard, *forth*.). This principle goes beyond the fight against discriminatory rules and increases the ECJ scrutiny, as the Court checks if a national regulation is "*liable to prohibit or otherwise impede the activities of a provider of services established in another Member State (…)"*[36]*.* The same approach has been used by the Court in the *Laval* case (§99), marking a substantial hierarchy between economic and social rights.

Securing collective agreements in the EU

The ECJ judges knew about the stakes of this landmark decision on the balance between EC freedoms and national employment rights and the Court itself was certainly strongly divided on this ruling. The conclusions of the General Advocate[37] and the ambiguity of the reasoning prove that the Grand Chamber came up with a tricky compromise[38]. Given the political turmoil around this case and the uncertainty regarding its long-term effects, one might thus expect a legislative response at EU level in order to secure national labour regulations and to bring politics back into this Court-led integration process. Yet, the reaction by Member States' representatives was more cautious about the possibility of redrafting the Posted Workers Directive than a majority of the European Parliament was. Interestingly, Sweden was among the most reluctant Member States.

During the whole procedure however, the Swedish Trade Unions were officially supported by the Swedish government, but also by 15 Member States, most of them belonging to the former 'EU 15'. Latvia, Lithuania and Poland were amongst the countries which complained about the hindrance to the community law on free movement[39]. It is not surprising that some Member States, especially the new ones, do not feel strong incentives to protect the Nordic collective agreements. The reaction of the new Swedish government (elected in September 2006) is more puzzling at first glance. Despite their open support to LO-*Byggnads* when they took over the proceedings, Swedish officials urged their partners at the Council to refrain from taking hasty initiatives and the Swedish Government responded with utterly discretion, simply asking the Commission to implement the Court's decision smoothly[40]. Sweden and Denmark also expressed their commitment to improving the administrative mechanisms in order to fully implement the Posted Workers Directive[41]. "*I welcome the constructive attitude of Sweden and Denmark*", Commissioner Vladimir Špidla said[42].

The relations between the Swedish authorities and the Commission improved significantly since 2005. Back then, the Internal Market Commissioner McGreevy openly criticized the Swedish labour legislation, while the social-democrat Minister of the economy Thomas Östros threatened to oppose the services directive if the Commission did not show more support to its collective agreement system during the ECJ proceedings[43]. The *Laval* dispute was a major issue for Nordic social-democrats, like the President of the socialist group at the European Parliament who feared that this case could open uncertainties about the respect of

[36] Säger case, C-76/90 (1991) ECR I-4221, para. 12

[37] This decision is at odds with the preliminary judgement made in May 2007 by the Advocate General Paolo Mengozzi, which held that the collective action was proportionate.

[38] For a deeper study of the functioning of the ECJ, see Dehousse, 1998

[39] "EU ger Vaxholmsbesked i veckan", *Dagens Nyheter,* 20-05-2007

[40] One of the reasons why Sweden is reluctant to bring this issue back on the EU-agenda is certainly the ratification of the new treaty by the Parliament, which is scheduled in September 2008

[41] In the recent years, the Commission has increased the pressure on member States in order to improve the implementation of the posting directive. The Commission warned member States on several occasions that this widespread lack of compliance will shortly lead to infraction procedures, Communication from the Commission 11052/07 20th of June 2007

[42] „EU-debatt efter Lavaldom hettar till", *Dagens Nyheter*, 23-04-2008

[43] Carsten Jørgensen, 30-11-2005 http://www.eurofound.europa.eu/eiro/2005/11/feature/dk0511102f.htm

collective actions in general[44]. Swedish Unions urged the Council to amend the posting directive in order to secure the collective agreements in the Nordic countries[45], a demand which has been taken over by several Swedish MPs during a public debate at the Riksdag in April 2008[46]. Thereafter the Swedish MEP Jan Andersson (PSE, SE) was appointed to draft a report on the "challenges to collective agreement in the EU[47]". The final report, which was adopted by the European Parliament on the 22nd of October 2008, shows a clear political commitment to adapt the EC legislation to the specificities of collective agreements regimes. The EP calls on the Commission to "*prepare the necessary legislative proposals which would assist in preventing conflicting interpretation in the future*" (recital 26)[48].
Already in June, the critical stance of the European Parliament's Committee on Employment and Social Affairs [49] urged the Commission to invite MEPs to a Forum organised on the 9th of October 2008 in order to tackle pending questions left by the ECJ decisions. But then again, the Swedish government tried to cool down the debate. The ministers of France, Luxemburg and Sweden unanimously stated that the labour rules must be policy-driven and shall not be left to the ECJ. Mr Biltgen from Luxembourg and the French Minister Xavier Bertrand called upon the Commission to publish a communication that would clarify the scope and the aims of the PWD. Although he said that Sweden was not willing to give up its model of labour relations, the Swedish Minister Sven-Otto Littorin was again elusive about those political initiatives, reminding that the ratification of the Lisbon treaty would provide a sufficient legal basis for protecting Member States against "social dumping". The Minister did not call on the Commission to launch a review of the EC legislation, but rather proposed to find a compromise with the ECJ[50].
As the next section will show, an investigation into Sweden's domestic labour market politics could be very helpful in order to better understand the "low-profile" attitude of the Swedish government at EU level while defending its collective agreements model. Likewise, an investigation into Sweden's internal affairs could be helpful in order to understand why the *Laval* case became for the social-democrats and the Trade Unions such a dramatized fight for the survival of "their" labour relations model.

2. LAVAL IN THE NATIONAL CONTEXT: THE NOT-SO-HEALTHY LABOUR RELATIONS IN SWEDEN

The intrusion of EC law sparked off a lively debate about the future of the Swedish labour relations (Eklund, 2008). The *Laval* dispute contributed to escalade distrust among social partners, while the government has to cope both with the combativeness of social democrats and with the heterogeneity of its centre-left coalition on such issues. Beyond the legal consequences of the Court's decision, the *Laval* case is a landmark dispute because it unveils and increases the turmoil of the Swedish autonomous labour regulations model itself. It highlights the current evolutions towards increasingly controversial social and industrial relations that could lead to the substitution of corporatist schemes either by a state-driven regulation or by a deregulation of the labour market. As many Europeans are looking to Scandinavia as a model of harmonious balance between competitiveness and social progress, these domestic issues give therefore to the *Laval* case a disastrous symbolic dimension.

[44] « Les syndicats frustrés par l'arrêt de la Cour sur les travailleurs détachés », www.EurActiv.com, 19-12-2007
[45] "Lavaldomen kan tvinga LO att ändra lönepolitik", *Dagens Nyheter*, 18-01-2008
[46] „Lavalmål väcker heta känslor", *Dagens Nyheter*, 23-04-2008
[47] A6-0370/2008
[48] Although the final report has been slightly watered down by two amendments made by the Internal Market committee (recital 13 and recital 28)
[49] Committee on Employment and Social Affairs, Draft report on the application of Directive 96/7/EC on the posting of workers (2006/2038(INI)), Rapporteur: Elisabeth Schroedter
[50] http://www.euractiv.com/en/socialeurope/eu-states-eye-political-response-laval-court-ruling/article-176245

Corporatist labour relations: the fading pillar of the 'Swedish Model'

Above all, the Court's decision is a dramatic political and symbolic setback for the Swedish Trade Union LO and its ally the Social Democratic Party (SAP). Commenting on the ECJ decision, a person involved in both LO and the SAP said that "*whatever happens now, the balance between employers and Unions is shifting away from us*[51]".
LO and its affiliates strongly committed themselves in this dispute, pouring their prestige and extensive political resources (rallies, campaigns, expertise) in this fight. Despite the support of a large share of the public[52] and Sweden's main political party, they made several mistakes which indubitably benefited to the employers' Union[53]. By asking *Laval* to comply to Stockholm's region medium wage (instead of an approximate of the minimum wage), and by implementing a massive blockade, they had in fact little chance to convince the European Court that their action was both appropriate and necessary. Already in December 2004, Niklas Bruun, lecturer in EU-labour law was sceptical about the chances of LO-*Byggnads'* claims to be accepted by the Court[54]. Politically, the Swedish Unions appeared inflexible and dogmatic, far from the virtuous image of Swedish Unionism abroad. Moreover, LO and the former social-democrat labour Minister Hans Karlsson clearly did not quite get how much what they genuinely saw as a legitimate fight against social dumping was actually understood as sheer protectionism on the other side of the Baltic Sea. For example, LO-*Byggnads* did not find it necessary to cooperate from the beginning of the dispute with the Latvian workers' Union, a move which would have decreased the suspicion of protectionism[55]. *Byggnads* made then clear that "*the threat is not coming from the outside (…) but uncaring Swedish employers are taking advantage of the provisions for free movement of services, at the expense of posted workers' rights*[56]", but it was probably too late. Business organisations and liberals, although structurally weaker, suddenly had a say in the public debate, as they could voice their support to the discriminated-against Latvian posted workers[57]. The Swedish employers' confederation (*Svenskt Näringsliv*) provided lawyers and juridical assistance to the Latvian company during the entire trial. Although *Svenskt Näringsliv's* spokesman Anders Elmér kept saying that the purpose of this action was not to jeopardize the Swedish labour model[58], the employers' confederation tried to take advantage of the decision in order to make the case that Unions were given an exorbitant power over industrial relations in Sweden.
This dispute is thus likely to have further disturbing impacts on labour relations, especially as the social partner are going in the coming months to renegotiate the general labour convention "*Saltsjöbadsavtalet*", which is the cornerstone of the Swedish labour model[59]. The relations between unions and employers were already mitigated, "*since the Laval case, they are literally freezing out*", an employers' Unionist said[60]. The shrinking of Trade Unions' positions in industrial relations goes along with the wane of consensual labour regulations between social partners and the growing distrust between social partners. The Trade Unions have indeed much more to lose than the employers. According to LO, the Court's decision is a major risk for the corporatist system, since employers are now expected to seek confrontation instead of "buying out" social peace to the Unions (the term is used by LO). LO

[51] " Efter Lavalmålet - Regeringen kan inte gömma sig bakom EU", *LO*,18-01-2008
[52] According to a recent pool, 78% of the Swedish public believes that "it must be up to Sweden and not the EU to organise its own labour market", although the least one can say is that this question is far from being neutral… Source: Sifo, quoted by "Säger nej till EU-inblandning", *LO,* 2008-09-11
[53] „Domen påverkar svensk arbetsrätt", *Dagens Nyheter,* 18-12-2007
[54] " Osakert om om facket har rätten på sin sida", *Dagens Nyheter*, 02-12-2004
[55] After having ignored the Latvian Unions, LO organised a join-meeting with its Latvian counterpart LBAS on the 17th and 18th January 2005 in Riga in order to show its commitment to defend Latvian workers as well as its Swedish affiliates.
[56] "Hotet kommer inte utifrån", *Byggnads* 03-12-2007
[57] "Bäst at lugna sig", *Dagens Nyheter* 20-12-2007
[58] "Laval case indicates better Swedish labour law", Svenskt Näringsliv, 05-07-2007
[59] „Domen påverkar svensk arbetsrätt", *Dagens Nyheter,* 18-12-2007
[60] „Låsta positioner efter Lavaldom", *Dagens Nyheter*, 20-12-2007

general secretary Hans Tilly said that he is concerned about the fact that an increasing number of Swedish building companies are already unwilling to comply local collective agreements. Indeed, while Trade Unions tend to become less influential, the employers' confederation has almost entirely withdrawn from tripartite corporatist bodies. We will now turn to the political context which is also of critical importance in order to understand the effects of the ECJ judgment.

A political strategy to crush the Unions?

Before he was elected Prime Minister in September 2006, the leader of the conservative party Fredrik Reinfeldt called *Byggnads'* action *"a shame for LO"* and accused the building Union to keep wages artificially high. His coalition partner Göran Hägglund, leader of the Christian-democratic and now Minister of social affairs, spoke about a "mafia"[61]. Disappointment was therefore high among Swedish liberals and the employers' federation when the new appointed Prime Minister chose to follow the footsteps of his social democratic predecessor and gave a full support to the Unions in the *Laval* case. Ever since this U-turn, there have been many conjectures about the true intentions of the government. The adverse judgement for the Swedish labour model gave to this question a critical importance, as the government is now given the opportunity to further reform the Swedish labour model.
The relationship between the conservatives and the Trade Unions is rather ambiguous since Fredrik Reinfeldt turned the Party into a "new moderate" party (*Nya moderaterna)*. Learning from the 1994 electoral defeat, Reinfeldt softened his neo-liberal attacks against the Welfare State and promoted a "*blairist*" model of workfare instead. However, social-democrats and Trade unionists voiced their suspicion about a so-called 'hidden agenda' against Trade Unions, especially when the government increased the fees for unemployment benefits which made Union-membership less attractive for workers[62]. Subsequently, more than 200 000 persons left the Unions in a couple of months. During the past decade, Union-membership figures have already dropped significantly from 85% to roughly 75% of all the workers[63]. The Swedish Unions have long been able to cope with workers disaffection, mainly by providing pecuniary advantages and services such as unemployment insurances (*A-kassan*). This reform was thus seen by many unionists as an explicit attempt to further weaken their organisations. The spokesman of the white-collars Union TCO, Sture North, lamented on the ongoing domestic changes affecting the Unions: "*Our provisions to protect workers are solely based on collective conventions (…) it only works if we [the Unions] are influential enough*[64]". Indeed, the *Laval* decision hits Swedish Unions at a time when they are suffering one of the most acute crises of their history. In this context, we will now try to investigate its consequences for the governance of labour regulations in Sweden.

3. THE *LAVAL* DECISION AS AN OPPORTUNITY TO REFORM LABOUR MARKET REGULATIONS

Swedish labour regulations will have to be adjusted to EC law in response to the ECJ ruling. But how far? Our argument is that the ambiguity of the ruling – as it is often the case – allows the domestic actors to make an extensive usage of Europe and to claim more changes that are actually made necessary by the judgement. Likewise, the absence of domestic legislative reaction could also be another usage of Europe by undermining the position of Trade Unions on the longer run.
The *Laval* case opens new opportunities for those who advocate a broad reform of the labour market. The liberal columnist Per Dahl believes that "*it is time to break Unions' monopoly on*

[61] „Osakert om om facket har rätten på sin sida", *Dagens Nyheter*, 02-12-2004
[62] "Svenska modellen riskerar falla sönder", *LO*, 2008-10-17
[63] "Laval-domen illustrerar Fackets försvagning", *Affärsvärlden*, 18-12-2007
[64] "Svart år för facket", *Dagens Nyheter,* 03-01-2008

social relations" and sees the *Laval* judgment as an opportunity for Sweden to get closer to the "European model"[65]. Nevertheless, it remains to be seen if the Swedish authorities will use the *Laval* 'momentum' in order to alter the autonomous collective agreement model and to introduce a sort of system shift towards either an 'Anglo-Saxon' deregulation, a 'continental' state-led regulation of the labour market, or a 'hybrid collective agreement model' like in other Scandinavian and Nordic countries. The latter option is favoured by the *Laval* Committee which was appointed by the government and remitted its report on the "*changes in Swedish legislation (that) need to be made as a result of the Laval judgment*[66]*".* Whatever decision will finally be made by the government following the case, it will not be neutral on the longer run for the power-balance between Trade Union and employers on the one hand and between social partner and the State on the other.

Collective action under scrutiny: how to translate the EC proportionality principle into domestic labour regulation?

LO-*Byggnads* lost the ECJ case against *Laval* because its collective action was deemed disproportionate with regard to its objective of protecting the workers. Beyond this particular case, Isabell Olsson pointed out the differences between the EC principle of proportionality and the customary "assessments of proportionality" as driven by the Swedish Courts (Olsson, 2007). The transposition of the EC principle of proportionality into the Swedish labour relations poses a threat to the autonomous collective agreement system. As Brian Bercusson pointed it, "*it's in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise […] At what stage of this process and against what criteria is the test of proportionality to be applied?"* (Bercusson, 2007). The *Laval* case could thus open new opportunities for those who were dissatisfied with the customary way to assess the proportionality of collective agreements.
The employers' confederation *Svenskt Näringsliv* has for a long time called on governments to limit the scope of collective actions, and especially the so-called "secondary" or "sympathy" actions (*sympatiåtgärder*) [67], which means blockades and strikes implemented by other Trade Unions or workers in order to make a specific action more efficient (art. 41 MBL). Sympathy actions are most of the time implemented by LO-affiliates, as it was the case with the electricians' Union helping *Byggnads* to blockade *Laval* although it was not part of the dispute in the first place. Already in 2005, before the ruling of the case, the employers' confederation *Svenskt Näringsliv* released a report "*Den Svenska modellen har kantrat*" ('the Swedish model changed direction') which listed seven measures in order to limit to possibilities for Unions to implement an industrial action[68]. By chance, one of the propositions deals with the implementation of a "proportionality rule" with would control the effects of a collective action on social partners and third persons. Liberals and conservative tried to change to labour regulations when they came to office. The labour market Commission (*Arbetmarknadsutkottet*) recently released a report on the introduction of an operative "principle of proportionality" which would be able to balance the objectives of collective actions and their actual effects on the economy[69]. Any attempt to introduce a more restrictive "principle of proportionality" in the Labour law has been unsuccessful so far[70]. Beyond the question of proportionality, let us turn to the practical reforms of the Swedish labour legislation that could be implemented in response to the *Laval* judgement and to their possible consequences for the future of the collective agreement model.

[65] "Domen i Vaxholmsfallet viktig, tydlig, nyanserad och avgörande", *Barometern.se,* 08-01-2008
[66] SOU 2008:123
[67] "Svenska modellen riskerar falla sönder", *LO*, 2008-10-17
[68] Svenskt Näringsliv, "Den Svenska Modellen har kantrat. Konfikt Sexton exempel på obalansen på den svenska arbetsmarknaden och sju förslag på vad som kan göras för att återfå balansen", April 2005
[69] Arbetsmarknedsutskottet betänkande 2006/07:AU9
[70] e.g. the public report SOU:141

To act or not to act? The Swedish labour governance at the crossroads

Only a few collective conventions are directly put under pressure by the ECJ decision, namely those dealing with posted workers. Sweden will now have to grant a better access of posted workers to its collective agreement system. It is now unanimously acknowledged that the Swedish collective convention system is lacking transparency, especially for foreign companies. As an example, the local agreement that *Laval* refused to sign was a 170 pages long document. Moreover, the "*Lex Britannia*" amendment will have to be abrogated, as it is too obviously discriminatory against foreign employers. This is enough to have potential disruptive effects on the whole system of labour market regulation. The Trade Unions demand sufficient guarantees about the appliance of collective agreements to foreign companies. The key question is now whether the authorities will be able to control on a non discriminatory basis the posting of foreign workers without affecting the autonomy of social partners.

According to Sture North, the compliance to the *Laval* decision is an interesting issue because it forces the government to take a clear stance and to decide whether or not it is willing to support the corporatist system: "*If it is what the government wants, so can we easily deal with [the ECJ decision]*[71]". After having stated that the government is not going to take any decision soon, the Minister of labour Sven Otto Littorin faced the criticisms from unionists and social-democrats who urged the Swedish government to launch a legislative process in order to cope with the decision. According to LO's Wanja Lundby-Wedin and Erland Olauson, "*if the governments hides behind the ECJ, it would lead to a deregulation of the labour market and so will the opposition between workers an employers increase significantly*[72]". Sven Otto Littorin replied that "*something has to be done with the Lex Britannia amendment. But it is also true that this could not only be solved by the government. Social partners will have to take into account the Court's decision and take initiatives in order to adapt the Swedish model*[73]".

Since the ECJ judgement in December 2007, the labour minister changed slightly his attitude and promises that the whole Swedish law on the posting of workers will be revised, and not only the *Lex Britannia* amendment. But he is still very quiet on the type of changes that are needed[74]. A *Laval committee* (*Lavalutredningen*) has been set up in on the 10th of April 2008, with the assignment to review the different options that could bring the Swedish labour relations in line with EC law. The blueprint that has been given to the *Laval Committee* is the following: "*the Swedish model has to be adapted as much as possible to the posting of foreign workers. The rapporteur will review the laws which may have to be changed and take a special look at whether the so called Lex Britannia shall be revised, abrogated or replaced*. *He will also assess the possibility to include collective agreements in the law on the posting of workers*[75]".

The Laval Committee and the three ways out

How to bring the Swedish labour law system in line with Posting of Workers Directive? This could be done either by creating statutory rules for minimum rates of pay or by setting up a system for declaring collective agreements to be universally applicable, both methods that are validated by the Directive.

The employers' federation *Svenskt Näringsliv* is in favour of the introduction of a legal minimum wage[76], while Trade Unions made clear that they would strongly oppose any kind of minimum wage: "*They [the employers'] will have to choose a line. They cannot say that*

[71] "Lavaldomen kan tvinga LO att ändra lönepolitik", *Dagens Nyheter, 18-01-2008*
[72] Interpellation, 2007/08:483 Utredningen med anledning av Lavalmålet
[73] " Lagändring utreds efter Lavaldomen", *Dagens Nyheter,* 28-01-2008
[74] "Utredning tillsätts efter Vaxholmsdomen", *Dagens Nyheter*, 28-01-2008
[75] "Claes Stråths direktiv rör om", *Lag & Avtal*, 11-04-2008
[76] "Vaxholmfallet kan kräva en ny facklig strategi", *Europaportalen*, 15-02-2007

they want to keep the Swedish model, and in the same time propose a minimum wage[77]". Labour law experts are almost as divided as social partners on the minimum wage issue. Some believe that minimal wage provisions could be integrated to the Swedish corporatist system without endangering the collective negotiations[78]. The labour market researcher Svante Nycander does not share this optimistic stance. According to him, the introduction of minimal wage standards would necessarily recast the corporatist system into a state-regulated labour market as it is the case in France or a court-driven system as in Britain[79]. Referring to the famous "free rider" theory, Nils Karlsson and Henrik Lindberg fear that an increased input of politicians on wage regulations would accelerate the decline of Unions' membership and thus lead to the destruction of the social consensus[80].

A second option for reshaping the Swedish labour law in accordance with EC community law would be, following other Nordic countries, to set by law an automatic application system of collective conventions[81]. This system seems to be the nearest to the current Swedish model and would thus allow a minimal change in order to comply with the ECJ decision. The former Prime Minister Göran Persson already referred to this option as a possible "fall-back strategy" if the Swedish system was turned down by the Court. Whereas a legal automatic extension of collective agreements is expected to be less endangering the labour relations, some Trade Union leaders and social scientists claim with Bo Rönngren that "*both alternatives are going to undermine the Unions' influence on the labour market*"[82]. They believe that workers would not feel the urge to be member of a Trade Union in order to benefit from the general applicable collective agreement system. Taking France as an example, Svante Nycander argues that this cognitive shift would lead to a "free rider" mechanism too. As the Trade Unions' membership will drop, their political stance will necessarily become less consensual, and Unions will tend to only defend "insiders" interests, as it is allegedly the case in France[83].

The *Laval* Committee's rapporteur Claes Stråth finally presented its propositions on the 12th of December 2008. Following its Terms of Reference, the *Laval* Committee made clear that *"An introduction of any of these systems, that is to say statutory minimum rates of pay or declaring collective agreements to be universally applicable, would consequently entail a major intrusion into the Swedish labour market model*. (…) *these solutions should be avoided if it is possible according to Community law to implement a less extensive solution as regards the autonomy of the parties in the labour market*[84]*"*. A third method, the Committee argued, is thus to reinforce the responsibility of social partners in the regulation of social relations. The *Lew Britannia* amendment shall be abrogated and the principle of mutual recognition must apply fully to foreign collective agreements. The law on labour regulation (MLB) would be left almost unchanged. Only the items that are not included in the "hard core" of the Posting of Workers Directive (e.g. night shifts, working hours, breaks…) would be withdrawn from the collective agreements applicable to foreign companies (and thus could not lead to a collective action in case of non compliance). However, social partners will continue to be set up and enforce minimum rates of pay and other minimum conditions within the 'hard core' that are to be applied for a particular category of posted workers according to the central and nationwide collective agreement applicable to the sector. Foreign employers would thus be asked to comply with the Swedish collective agreements, while Swedish Trade Unions would have to set more predictable and transparent rules on wage-setting. In order to help them in this task, the Committee's proposes to reinforce the role of the "liaison office", the Swedish

[77] "Arbetsgivare vill att minimilöner synas", *LO*, 2008-09-24
[78] "Utländska företag måste få veta kraven", *Dagens Nyheter*, 18-12-2007
[79] "Ny lag om kollektivavtal stryper facket i egen snara", *Dagens Nyheter*, 20-12-2007
[80] "Den svenska modellen kan knäckas av EG-rätt", *Dagens Nyheter,* 17-10-2008
[81] Ronnie Eklund, law lecturer at Stockholm University, points out at the Finnish model where all the sector agreements are binding to all the employers. Another option would be the Danish one, according to TCO's expert Ingemar Hamskär: "the law is made such as the best conditions always apply to the employees".
[82] Bo Rönngren, "Utstationeringsdirektivet – Vaxholmsfallet i Sverige", LO, Förklarande PM till EFS styrkommitté den 20050210
[83] "Ny lag om kollektivavtal stryper facket i egen snara", *Dagens Nyheter* 20-12-2007
[84] *Förslag till åtgärder med anledning av Lavaldomen, SOU 2008:123*

Work Environment Authority, which *"aims to simplify matters, both for foreign employers and workers, regarding the obtaining of information about the conditions and requirements applicable upon a posting to Sweden*[85]*"*.
The *Laval* Committee clearly chose to support the autonomy of Trade Unions. But this proposal provides a thin guarantee to prevent another ECJ reference. It mainly builds upon the responsibility of the Swedish Trade Unions and could thus be a two-edged sword for the autonomous labour system if they do not fulfil the need for transparency and openness. We pointed out above that the *Laval* case did not arise at random, but in a very specific context of increasingly conflicting labour relations. One can thus argue that trust amongst labour market organisations can hardly be decided from above. The tensions that caused the *Laval* case are thus likely to arise again soon or later unless/until the Directive on Posted Workers is redrafted.

CONCLUSION

Although the *Laval* case is most likely to trigger a formally limited reform of the Swedish labour regulations in the short run, we pointed out that it is a factor of toughening the relations between the State, the employers and the Unions. Following Ferrera and Rhodes' analysis on the Welfare State (Ferrera and Rhodes, 2000), we argue that a "recasting" of industrial relations is occurring in Sweden, combining European constraints and incentives as well as domestically generated social and political changes. Jonas Malmberg expressed this idea with dramatic words during his hearing at the European Parliament: "*In the shadow of the internal market a territorial struggle is in progress over where labour law ends and economic rules take over*[86]". Indeed, this article pointed out the juridical constraints, the political opportunities and the mechanisms of interaction which explain why the trade-off between EC economic and social rights at EU level directly affects the domestic balance between the State, the employers and the Trade Unions.
The main result of this investigation is that the *Laval* judgment created new incentive for reforming labour regulations in Sweden, firstly because it accelerates the decline of Trade Unions which are the central actors of autonomous collective agreements. Secondly, it creates an immediate opportunity to change the Swedish labour regulations, beyond the legal adjustments that the judgement requires. The ambiguity of the ruling and the complexity of the Swedish labour model opened a wide range of political choices for the government. If the labour Minister follows the final report of the *Laval* committee that he commissioned in April 2008, the government is rather unlikely to implement a system shift either towards the continental or the Anglo-Saxon models. The usages of the *Laval* case by social actors and by the government are a decisive factor for the future of the Swedish labour model. We highlighted at least two strong patterns so far: the employers and the government made a spectacular political breakthrough in promoting a stronger legal supervision over labour relations, while Trade Unions and social-democrats seem to be trapped in a dilemma. On the one hand, a more active State intervention would put Trade Unions at risk of loosing their role as a central institution of labour regulations. But, on the other hand, there is a risk of juridical uncertainty and potential social dumping if the Swedish labour law is not thoroughly revised.
To the eyes of many European observers, the *Laval* case highlighted the inner troubles of the Swedish labour model and the need for a more coherent EU social legislation. But will Nordic Trade Unions and social-democratic parties become less reluctant to the idea of a continental-inspired "social Europe" featuring a pan-European minimum wage[87]? There is simply so far no evidence that the *Laval* case had any impact in that respect.

[85] *SOU 2008:123*
[86] Jonas Malmberg, Meeting with the European Parliament's Committee on Employment and Social Affairs, 26 February 2008
[87] See "L'Europe social est de retour" by Marc Clément, http://www.telos-eu.com/fr/article/le_dumping_social_est_il_de_retour, *Telos*, 16-05-2008

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