

## The meta-regulation of European industrial relations: Power shifts, institutional dynamics and the emergence of regulatory competition

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**Abstract.** *“Meta-regulation” describes the transnational governance of industrial relations emerging from attempts to resolve conflicts between national collective agreements and EU Member States’ freedom to provide services and post workers abroad. The norm underpinning such meta-regulation is competition, not only between workers from different EU Member States but also between States’ labour regulations. Using the concepts of “structural power” and “social field”, the authors discuss judicial decisions that illustrate the gradual meta-regulation of industrial relations in the EU and show how the power asymmetry between labour and capital is growing in favour of the latter.*

The [European] “common” market implied competition between firms, but cooperation between states. This keystone of European construction was removed when member states and the Commission took up the project of a deregulated market, with the wholesale elimination of restrictions in any country or sector to the free circulation of capital and goods. Such an approach is bound to undermine solidarity between member states, creating competition between national legal systems – particularly in the sphere of labour law – within the EU itself. (Supiot, 2006, p. 118)

**O**n 21 February 2013, the European Parliament’s Internal Market Committee (IMCO) adopted its opinion endorsing proposals for a new directive initiated by the Employment and Social Affairs Committee. The proposed new directive concerns the enforcement of the Directive concerning the posting of workers (Directive 96/71/EC). The IMCO opinion was strongly criticized by the European Trade Union Confederation (ETUC) for placing the freedom to

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provide services in the EU above the protection and rights of posted workers. Veronica Nilsson, ETUC Confederal Secretary, stated that “this opinion is a huge disappointment and is unacceptable” and urged the Employment and Social Affairs Committee to “distance itself from this opinion and start a debate on how to tackle exploitation of workers and social dumping” (ETUC, 2013). In our view, the IMCO opinion and the tensions over the final version of the new directive should not be seen in isolation, but as instances of a long and ongoing power struggle over the emergence of “meta-regulation” as a mode of governing industrial relations across the EU. The final outcome of this struggle will define the conditions of work and the social rights of millions of European workers for many years to come.

We borrow the term “meta-regulation” from Morgan (2003), who nearly a decade ago used it to describe the increasing “economization” of regulatory politics of social welfare in Australia. For Morgan, meta-regulation refers to a mode of governance that “excludes competing ways of understanding regulatory policy choices, causing bureaucrats to ‘translate’ aspects of social welfare ... into the language of market failures or market distortion” (idem, p. 489). In this article, we apply this concept to the regulatory politics of European industrial relations. We explore the gradual emergence of meta-regulation as a novel, market-enhancing mode of governing industrial relations across and between EU Member States, and assess its implications for European labour.

Our starting point is an insightful observation by Supiot, who remarked that “there is already a glaring contradiction between the rules originating from the old common market project (aiming at the harmonization of member states’ laws, especially in the social and environmental fields) and those stemming from the new global-market project (aiming at setting national legal systems in competition with each other)” (Supiot, 2006, pp. 118–119). We demonstrate that, with regard to industrial relations, this “glaring contradiction” is currently being resolved on very unfavourable terms for European trade unions, and for European labour in general. In particular, we will show how a series of “top-down” political initiatives from the European Commission and “bottom-up” initiatives from the European Court of Justice (ECJ) have resulted in the gradual “economization” of the regulation of industrial relations in the EU. At the heart of this “economization” lies the regulation, at transnational level, of the interaction between the principles, norms and collective rights established in Member States’ employment laws and national collective agreements, on the one hand, and the principles, norms and rights relating to the free movement of services and the posting of workers across all EU Member States, on the other. We conclude by illustrating how the emergence of meta-regulation coincides with – and contributes to – the emergence of a transnational social field of action in the area of labour and capital in the EU in which, currently, labour’s capacity to exercise structural power is severely limited. Against this background, our work responds to the plea of Lillie and Greer (2007) that comparative industrial

relations should take seriously the connection between action at the national and transnational levels (see also Peck, 1996 and Langille, 1994, on the re-spatialization of the asymmetrical relationship between labour and capital). Further, our work complements the growing critical literature on: the direction of European integration (Nousios, Overbeek and Tsolakis, 2012; Streeck, 2012; Supiot, 2012); European labour law (Ales and Novitz, 2010; Novitz, 2010a, 2010b and 2008); the state of the European Social Model before and after the crisis (Moreau, 2011; Schulz-Forberg and Stråth, 2010); the neo-liberal transformation of industrial relations in Europe (Baccaro and Howell, 2011; Bieler, 2011); and the opportunities for transnational trade union action (Meardi, 2010).

The article is structured in three parts. In the first part, we define two key concepts that underpin our analysis, namely, “structural power” and “social field”. In the second, we examine a number of empirical cases that illustrate a near decade of attempts to gradually institutionalize the meta-regulation of industrial relations in the EU. The first, the Directive on services in the internal market (Directive 2006/123/EC) is analysed as an early top-down attempt at meta-regulation. It is followed by discussion of five important judgments handed down by the ECJ, analysed as bottom-up initiatives resulting in meta-regulation by means of case law. The final case, the “Monti II” Regulation, is analysed as a recent top-down, unsuccessful attempt at politically legitimizing the outcomes of the ECJ judgments. In the third part, we consider the implications of these cases for the governance of European industrial relations and, more generally, European labour, paying special attention to their impact on labour’s capacity to exercise structural power over the re-embedding of the labour–capital relation in Europe. We conclude that, intentionally or not, meta-regulation results in the creation of a “market” of national industrial relations regulations, in which capital rather than labour will exercise “consumer sovereignty”. Fundamentally, these attempts – particularly the ECJ judgments – are about the struggle to establish the hierarchy of norms and values that will underpin the governance of the emerging transnational field of industrial relations in the EU in the decades to come. This is a struggle that, so far, European labour seems to be losing. In this context, our article sets out not only to describe developments thus far, and their implications, but also to test a conceptual framework to facilitate our understanding of the scale and nature of recent changes in the institutional landscape of European industrial relations.

## Two key concepts: structural power and social field

First, when we use the concept of power, we intentionally distinguish between power as a dynamic relation and power as a resource. Instead of referring to social actors having power (i.e. the more colloquial use of the term), we

understand social actors as exercising power by mobilizing power resources.<sup>1</sup> The concept of “structural power”, as opposed to relational or discursive power, is used in our analysis to refer to the “instituting” capacity of social actors, similar to what Hay (2002) describes as the “context-shaping aspect of social action”. Social actors have the capacity to maintain or alter the “rules of the game” by accumulating and mobilizing power resources in order to influence how these resources are distributed. Against this background, we see institutions and modes of governance, such as those regulating industrial relations, as “structurations of power and residues of conflict” (Korpi, 2001); that is, as both outcomes of, and frameworks for, the exercise of structural power. Consequently, we view changes in the mode of governance as empirical manifestations of changes in the power dynamic between social actors. They are temporary outcomes of the struggles over the mode of governance and how this mode of governance is reproduced and legitimized in a given social field.

Second, we use the term “social field” to refer to a spatially and temporally specific, socio-historical entity created by a power dynamic between social actors. For example, the national regulation of industrial relations is part of its (national) social field defined by the power dynamic between social actors representing labour and capital. The term is inspired by Bourdieu (1985) but draws also on Fligstein and Stone Sweet (2002), who applied it to the study of European integration. A social field is a space of social action combining at least three elements: the social actors with their power resources, the particular mode of governance of the social field (rules, processes, underpinning regulatory norm) and the historical time envelope within which social actors interact in accordance with the particular mode of governance. In any social field, the territorially and temporally contingent mode of governance, and its underpinning regulatory norm (e.g. competition, cooperation, redistribution or solidarity), determine how power resources will be allocated between the social actors.

Being of different regulatory levels (e.g. local, national or transnational), social fields also relate to one another hierarchically. Establishing this hierarchy is part of the struggle over the governance of social fields. This is especially evident in transnational entities like the EU, where the governance of one policy domain involves not only governing the interplay of different national regulations within that particular domain, but also governing the interplay between

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<sup>1</sup> The exercise of power, as we see it, involves the mobilization of power resources in any – or all – of three dimensions: structural, relational and discursive. Exercising relational power involves one or more social actors mobilizing material resources within a social field of action in order to force other social actors to behave in ways they would be reluctant to accept if the distribution of material resources were different. Exercising discursive power involves one or more social actors mobilizing ideational/discursive resources in order to achieve cultural hegemony over the processes of social signification in one or more social fields; and – by controlling the ways other social actors recognize, understand and interpret social categories, including their own interests – to legitimize or alter the respective mode of governance in these social fields. Consequently, power resources have relational, structural and discursive properties (see Papadopoulos, 2005). This conceptualization of power draws its inspiration from Lukes (1974), Hay (2002) and Bourdieu (2005).

different domains across national boundaries (e.g. national collective agreements, on the one hand, and the provision of services and posting of workers across EU borders, on the other). This is a deeply political act which, in the case of industrial relations in the EU, also signifies the emergence of a new regulatory terrain. A transnational social field is emerging from the attempts to regulate the conflict between national collective agreements and the freedom to provide services and post workers across borders in the EU.

Against this conceptual background, we apply the term “meta-regulation” (Morgan, 2003) to describe a particular mode of transnational governance of industrial relations in the EU. The norm underpinning this mode of governance is competition, not only between workers from different Member States but also between the Member States’ national regulations. In the following section, we present a case-by-case analysis, of how the underpinning logic of competition is gradually being established as a norm in this area of transnational governance. We follow this with a section outlining the implications of these cases for European labour, discussing how the capacity of trade unions to act as a collective actor in the emerging European social field is being significantly hampered by meta-regulation.

## The meta-regulation of the labour–capital relation in the European social field: From harmonization to competition

### *Directive on services in the internal market (Directive 2006/123/EC)*

The first case we will consider is the Directive on services in the internal market (Directive 2006/123/EC), the origins of which can be traced back to the 2004 proposal<sup>2</sup> by Frits Bolkestein, then European Commissioner for the internal market and services. His proposal aimed to further liberalize the provision of services within the EU in an attempt to create a single market for services, as envisaged under the Lisbon Agenda launched in 2000.<sup>3</sup> Under Bolkestein’s proposed directive, services would have been allowed to be bought in any EU country, using the wage rates of the service provider’s country of origin. Adoption of the “Bolkestein directive” would have severely undermined national collective bargaining and simultaneously created a regulatory framework that would have set in motion downward wage competition across EU Member States.

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<sup>2</sup> Proposal for a Directive of the European Parliament and the Council on services in the internal market (COM(2004) 2 final), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004PC0002:EN:HTML> [accessed 18 April 2013].

<sup>3</sup> Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000. Available at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/00100-r1.en0.htm](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm) [accessed 18 April 2013].

The proposal sparked fierce protests, especially in Member States with “coordinated market economies” (see Hall and Soskice, 2001; Menz, 2005). Despite the controversy, the subsequent Commissioner for the internal market and services, Charlie McCreevy, and subsequent President of the European Commission, José Manuel Barroso, placed the adoption of the Directive on services in the internal market at the heart of their reform agenda. However, the “Bolkestein directive” was clearly unpopular, especially in France, where the image of the “Polish plumber” coming to France and undermining French plumbers’ wages and working conditions haunted the debate in the run-up to the French referendum on the adoption of the European Constitution. Indeed, the French “*Non*” of May 2005 confirmed the extent of the hostility to the proposed European Constitution.

In February 2006, after a protracted period of mobilization and lobbying to recast the proposal, in which the ETUC played a leading role, the Directive on services in the internal market (Directive 2006/123/EC) was voted on by the European Parliament, with significant amendments to limit the impact of the “harmonization” (Dølvik and Ødergård, 2009). The Social Democrat and Christian Democrat parties voted in favour of the amended proposal. In contrast, Liberal parties expressed their concern that the proposal would not meet the requirements of a “harmonized” labour market, and the Conservative MEPs from the Czech Republic, Hungary, the Netherlands, Poland, Spain and the United Kingdom rejected the revised proposal. Left-wing and Communist parties also voted against the proposal. The voting was to a large extent based on a mixture of a left–right divide and a “clash of capitalisms” (Höpner and Schäfer, 2007). Eventually the Commission presented a directive incorporating the amendments voted by MEPs, which in December 2006 was unanimously accepted by the European Council. Satisfied with the removal of the “country of origin” clause, the ETUC considered that there had been a successful outcome, though it was sceptical about the introduction by the Council of “ambiguous language with regard to ... the exclusion of labour law and respect for fundamental rights” (ETUC, 2006a). This scepticism was not without justification. Directive 2006/123/EC, as approved by the European Parliament, left any conflicts between Member States’ labour laws, particularly over the right to “industrial action ... which respect[s] Community law”, to be resolved by the European Court of Justice (ECJ) on a “case by case” basis (European Union, 2006). While the right to collective action was not directly undermined by Directive 2006/123/EC, it became subject to ECJ case law on the proportionality of restrictions on the freedom to provide services (Novitz, 2008). However, a closer look at the history of ECJ judgments (see Höpner and Schäfer, 2010) reveals a series of pro-business and competition-friendly decisions that call into question the Court’s competence to rule on cases with crucial political implications for the labour–capital relation in the EU. If we also accept the argument that Community law itself does not protect labour rights (see Davies, 1997), then we can only conclude that the amended Directive on services in the internal market was a Pyrrhic victory for European

labour. The underpinning regulatory norm – competition – was sanctioned, while the dispute settlement mechanism bestowed upon a judicial institution the right to take what are in effect important political decisions, using the market rationale as the compass for its judgments.

Attempts were made elsewhere to introduce the same underpinning regulatory norm. In its communication on Better Regulation for Growth and Jobs in the European Union (COM(2005) 97 final),<sup>4</sup> the European Commission stated that “better regulation is crucial for promoting competitiveness both at EU level and in the Member States”. To that end, the Commission proposed that assessment of the economic impact of new legislation should be deepened to include the aspect of competition, and that the Impact Assessment Guidelines should be updated accordingly. A group of high-level experts would be set up to facilitate the development of better regulation measures in this way, at both national and EU levels. The impact assessment criteria prioritized competition and effectively pre-empted any significant attempts to challenge the dominant rationale of competition. Further regulatory attempts were to be kept to a minimum and placed within a framework that promoted the market rationale. Thus, as Supiot rightly concluded at the time, the market rationale “is no longer limited to the realm of the economy; it is now the organizing precept of the juridical sphere” (2006, p. 116). In this way, competition becomes the driving rationale of policy-making, setting in motion a regulatory mechanism that would reject any policy proposals perceived as harmful to competition, allowing solely those that are consistent with the market rationale. This meta-regulation (Supiot, 2006) is the equivalent at the EU level of what Morgan (2003), using the same term, described as the rationale behind the regulatory politics of social welfare in Australia:

[Meta-regulation] tends to exclude or dominate competing ways of understanding regulatory policy choices. It institutionalises a presumption in favour of market governance, and this causes bureaucrats to reframe or “translate” aspects of social welfare that previously may have been expressed in the language of need, vulnerability or harm into the language of market failures or market distortion. Not only does this translation tend to silence certain critical modes of demanding justice, particularly those that rely on moral or distributive values, but the institutional solutions which bureaucrats advance to secure the “translated” social welfare values render them politically vulnerable. (Morgan, 2003, p. 490)

By sanctioning the ECJ as the dispute settlement mechanism, Directive 2006/123/EC opened the door for the use of case law as a mechanism for regulating the conflict between national industrial relations systems and the right to provide services and post workers across Europe. A new transnational social field had emerged, and it was only a matter of time before the relevant actors began to struggle over its governance. In the next section we consider the most important of the bottom-up attempts to consolidate the “economization” of this new social field.

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<sup>4</sup> See also COM(2005) 462 final.

### *Collective action vs freedom to provide services: The ECJ Laval case (C-341/05)*

In 2004, following a bidding process for the renovation of a local school, the Council of the City of Vaxholm in Sweden selected the Latvia-based company “Laval un Partneri Ltd” to carry out the work. The agreement signed by the two contractors stated that, in order for the collective agreement between the firm and its employees to be effective in Sweden, collective bargaining should be under Swedish labour law and involve Swedish trade unions.

Laval initiated negotiations with the Swedish construction union (Byggnads) but did not accept the terms and wage rates established under Swedish collective bargaining regulations. Instead, Laval decided to post Latvian workers to Sweden, asserting that it had the right to negotiate wages on the basis of Latvian collective agreements. On the workers’ behalf, Byggnads exercised its right to collective action, in accordance with Swedish labour law, and reacted with industrial action and a blockade of Laval’s worksites.

That year, Laval had signed an initial collective agreement with the Latvian building sector’s trade union, which covered trade union members only. However, since the Laval workers were not unionized, the firm was unable to claim that it was applying the agreement. The firm therefore signed a second collective agreement in Latvia. The second agreement, which covered all employees, provided that workers in Latvian firms could only be legally represented by Latvian trade unions, and that any collective agreement had to comply with Latvian law (Byggnads, 2005). The Latvian Government’s strategic decision to extend the coverage of the collective agreement demonstrates the important role played by the State in furthering its competitive advantage and pursuing its capital interests.

The Latvian firm was able to exploit the confusion between Swedish labour law and EU law. Under EU law, and the principle of freedom of establishment, all employers must pay workers at least the national minimum wage. In Sweden, however, the industrial relations system has not defined a minimum wage. Part of the Swedish unions’ strength stems from their negotiating power in determining wages with employers; the existence of a minimum wage would undermine their power as organizations and as social partners. In addition, Swedish collective agreements are not binding in respect of all workers and employers, and the State does not enforce them.<sup>5</sup> Nevertheless, owing to well-organized trade unions and employers, Swedish collective agreements have – or used to have – extensive coverage, while problems of collective action are dealt with by apex and industry organizations. Laval argued that, since there was no minimum wage, and since Swedish collective agreements were not binding in respect of its workers, it was not obliged to pay the wage agreed on by the Swedish social partners (Woolfson and Sommers, 2006). In December 2004, the firm commenced proceedings before the Swedish Labour

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<sup>5</sup> The same is true for collective agreements in Denmark and Germany.



Court (*Arbetsdomstolen*), seeking a declaration that the blockading of its work-sites was illegal and an order that such action should cease. While the unions were backed by the Swedish centre-right Government, the Confederation of Swedish Enterprise supported and funded Laval's case before the courts. The Labour Court referred the case to the ECJ, asking whether the Swedish trade unions' right to collective action was incompatible with the freedom to provide services.

The ECJ judgment of 18 December 2007<sup>6</sup> met with mixed reactions. For its part, the Confederation of Swedish Enterprise was delighted with the ruling, stating: "This is good for free movement of services. You can't raise obstacles for foreign companies to come to Sweden" (*Financial Times*, 2007). The ETUC, on the other hand, expressed its "disappointment" at the ECJ judgment, considering the decision to pose a challenge to the successful Nordic model of flexicurity (ETUC, 2007a). It is clear from the judgment (para. 99) that the ECJ prioritized competition and the freedom to provide services over the right to collective action:

... it must be pointed out that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector – certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment ... – 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.

### *Coordinated action vs freedom of establishment: The ECJ Viking case (C-438/05)*

The case involving the Finnish ship *Rosella* and its owner, the Finnish firm "Viking", is another case illustrating how the EU is in effect promoting competition between the regulations of different Member States. In October 2003, Viking, which operated the ship's route from Helsinki to Tallinn, sought to reflag the ship by registering it in Estonia, on the basis that if the ship were to sail under the Estonian flag rather than the Finnish flag Viking could pay lower wages and thus enhance its competitive advantage over other firms. In November 2003, the Finnish Seamen's Union (FSU) contacted the International Transport Workers' Federation (ITF) questioning the lawfulness of Viking's plans. The ITF advised the FSU that, according to the "Flag of Convenience" policy, the ship's wages and conditions of employment should be based on a Finnish collective agreement, regardless of whether it employed Estonian workers, since the ship was owned by a Finnish firm. In accordance with ITF policy, only the FSU had the right to conclude collective agreements

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<sup>6</sup> Case C-341/05 – *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*. Judgment available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0341:EN:HTML> [accessed 20 April 2013].

with the ship's owner. On behalf of the FSU, the ITF sent a circular to its affiliates, asking them to refrain from entering into negotiations with Viking, on the basis of the principle of solidarity between trade unions. Talks between Viking and the FSU began, with Viking promising that the reflagging would not render Finnish workers redundant. Nevertheless, in November 2003 the FSU gave notice of industrial action, in accordance with its "constitutional right to freedom of association, as protected by Article 13 of the Finnish Constitution" (ITF, 2007, p. 5). In December 2003, both actors reached a new, revised agreement, with Viking undertaking not to recommence reflagging prior to 2005.

On 18 August 2004, Viking appealed to the UK Commercial Court, given the ITF's London headquarters, requesting the court to declare that the action taken by the ITF and FSU was contrary to Article 43 EC, to order the withdrawal of the ITF circular that asked affiliated unions to refrain from entering into negotiations with Viking – which remained in force – and to order the FSU not to infringe the rights which Viking enjoyed under Community law. The UK court found in favour of Viking, on the grounds that the actual and threatened collective action by the ITF and FSU imposed restrictions on Viking's freedom of establishment, contrary to Article 43 EC. The Finnish unions appealed and the case was referred to the ECJ.

In its judgment of 11 December 2007,<sup>7</sup> the ECJ stated that a private undertaking may rely on its right to freedom of establishment (Article 43 EC) in the event of labour disputes with a trade union or an association of unions.<sup>8</sup> At the same time, in paragraphs 44 and 45 of the judgment, the Court recognized the right to collective action, including the right to strike, as a fundamental right – provided that all other means of protest had been exhausted and that the action did not harm the freedom to provide services. The contradiction inherent in the judgment is immediately apparent: how can a right be fundamental and at the same time be subject to restriction, especially when the grounds for restriction are not very clear?

The *Viking* judgment was received more enthusiastically by the ETUC. However, in our opinion, this enthusiasm was misplaced – a very significant, strategic power resource had in fact been undermined. While the ECJ in theory protected the right of employees to collective action, in practice the Court was willing to prevent coordinated collective action by national unions within the emerging European social field, since it ordered that unions could not take action to show solidarity through the use of blockades in Europe, considering

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<sup>7</sup> Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti*. Judgment available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005CJ0438:EN:HTML> [accessed 20 April 2013].

<sup>8</sup> As a result of the judgment, firms can now threaten unions with injunctions and effectively prevent collective action, especially in countries with limitations on industrial action. An interesting example was set by British Airways, when they referred to the *Viking* and *Laval* judgments in order to prevent the British Airways pilots' association from calling for a strike when the company announced its plans to set up subsidiaries in other EU States (Szyszczak, 2009). Following this case, the ILO Committee of Experts observed with "serious concern" the "practical limitations on the effective exercise of the right to strike" in the United Kingdom (ILO, 2010, p. 209, bold in the original).

that such action would compromise freedom of movement for persons and freedom to provide services (see paras 57–66 of the ECJ judgment; see also Achtsioglou, 2010). The *Viking* judgment shows how the ECJ prevents coordination of union action across the European social field of industrial relations, by placing the requirements of competition above the right to collective action.

### *Dirk Rüffert (C-346/06), Commission v Luxembourg (C-319/06) and Commission v Germany (C-271/08)*

Three further cases of interest were brought before the ECJ, with very similar results. The first one, the *Dirk Rüffert* case, concerned the right of a Polish subcontractor to provide construction services in Germany, employing workers at 46.5 per cent of the wage German workers were entitled to. The ECJ, in its judgment of 3 April 2008,<sup>9</sup> found – as in the *Laval* case – that because there was no minimum wage in Lower Saxony, and no universally or nationally applicable collective agreement, legislation requiring employers to guarantee minimum wages and working conditions was not valid, and constituted a restriction on the fundamental freedom to provide services (Schlachter and Fischinger, 2009).

In the *Commission v Luxembourg* case, the Commission argued that, in applying the Directive concerning the posting of workers (Directive 96/71/EC), Luxembourg had imposed obligations that went beyond those laid down by the Directive; the Member State had established mandatory provisions governing the employment of posted workers, asserting that they were public policy provisions. The mandatory provisions concerned: the requirement of a written employment contract or a written document drawn up in accordance with Directive 91/533/EEC; automatic indexation of remuneration to the cost of living; the regulation of part-time work and fixed-term work; and respect for collective agreements.

The ECJ found that Luxembourg's mandatory provisions relating to posted workers' wages and working conditions in the country of destination were restrictive to Article 49 EC and to the freedom to provide services. In its judgment of 19 June 2008,<sup>10</sup> the Court stated that such mandatory provisions were applicable only when they did not violate the freedom to provide services. This finding relates directly to Member States' jurisdiction over their public policy provisions. The Court's interpretation of the Directive concerning the posting of workers subscribes to a finite set of labour rights, allowing foreign service providers to circumvent collective bargaining arrangements in the host country (Cremers, 2008). In essence, while the ECJ recognizes both labour rights and market freedoms as fundamental for regulation of the

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<sup>9</sup> Case C-346/06, *Dirk Rüffert ... v Land Niedersachsen*. Judgment available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0346:EN:HTML> [accessed 20 April 2013].

<sup>10</sup> Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*. Judgment available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006CJ0319:EN:HTML> [accessed 20 April 2013].

European social space, when the two principles clash, as they did in this case, the Court holds that market freedoms must come first (see Achtsioglou, 2010).

Finally, in the *Commission v Germany* case, the Court “condemned Germany over the practice of local authority employers to award contracts for pension services on the basis of a selection laid down in collective agreements. ... The Court ruled that although the right to collective bargaining is a fundamental right, the European public procurement rules should prevail” (ETUC, 2010). In its judgment of 15 July 2010,<sup>11</sup> in paragraph 43, the Court referred to the precedents set by the *Laval* and *Viking* cases in order to argue that “the right to bargain collectively may be subject to certain restrictions” in order to secure the freedom to provide services and freedom of establishment within the European Union. But in this case, the judgment went further, calling into question Member States’ authority to determine public procurement law:

... while it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.

As we have seen, in the above five cases brought before the ECJ, the Court exercised its judicial power in order to: prioritize freedom to provide services over unions’ ability to take collective action, with regard to both private and public undertakings (*Laval* and *Dirk Ruffert* cases, respectively); hamper unions’ ability to act in solidarity in the emerging European social field (*Viking* case); and challenge Member States’ right to establish public policy provisions (*Commission v Luxembourg* case) and public procurement law (*Commission v Germany* case) within their own national territory.

The policy responses to the ECJ judgments could be characterized, in essence, as “fire-fighting”. The rationale underpinning the judgments – competition — and the political role played by the ECJ were never called into question. In the case involving Germany, the main response was to remove the obligation for tenderers to commit to the wages specified by local collective agreements not declared as universally applicable. Following the case involving Luxembourg, foreign undertakings were exempted from a number of requirements that could not be justified on the basis of public policy provisions, while governments of Member States that had not set minimum wages, such as Sweden and Denmark, amended their national labour law (Silva, 2010).

In conclusion, these judgments established a hierarchy of norms – the top-ranking of which was competition – for regulating industrial relations in the emerging transnational European social field. Below, we discuss how the ETUC, representing the vast majority of unions across EU Member States, responded to the ECJ judgments.

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<sup>11</sup> Case C-271/08, *European Commission v Federal Republic of Germany*. Judgment available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008CJ0271:EN:HTML> [accessed 20 April 2013].

### The response of the European Trade Union Confederation

While the ETUC welcomed the *Viking* judgment (ETUC, 2007b), since it recognized the fundamental right to collective action, it expressed its “disappointment” at the *Laval* judgment (idem, 2007a). Some two months after the rulings, the ETUC issued a press release, calling for Europe to “repair the damage” caused by both cases (idem, 2008a). In the press release the ETUC publicly acknowledged, for the first time, that the right to strike had been “superseded” by the European rules on freedom of movement, contrary to ETUC’s earlier plea to Manuel Barroso for the Commission to adopt a “carefully balanced approach” when submitting its views on the *Viking* case to the ECJ, based on fair treatment and upward harmonization of workers’ rights and conditions (idem, 2006b). This should not have come as a surprise, given the ETUC’s limited capacity to exercise any significant structural power with regard to EU decision-making.

However, it was only after the cumulative outcome of the *Laval*, *Viking*, *Dirk Rüffert* and *Commission v Luxembourg* cases that the ETUC’s change of position became clear (2008b), with ETUC General Secretary John Monks admitting: “The score at the moment is ECJ 4, European trade unions 0; and I do not exaggerate when I say that we are reeling at the score.” The ETUC was forced to recognize that in these cases, which concerned the fundamental issue of unions’ ability to defend labour standards (e.g. wages and working conditions), the judgments placed firms’ freedom to provide services and freedom of establishment above collective bargaining and national labour law. According to the official ETUC position:

The ECJ seems to confirm a **hierarchy of norms** (in the *Viking* and *Laval* cases), with market freedoms highest in the hierarchy, and collective bargaining and action in second place. This means that organized labour is limited in its response to the unlimited exercise of free movement provisions by business which apparently does not have to justify itself. Any company in a transnational dispute will have the opportunity to use this judgement against trade union actions, alleging that actions are not justified and “disproportionate” (ETUC, 2008b, bold in the original).

Characteristic of the mood in the ETUC was its response to the ECJ judgment in *Commission v Germany*, which John Monks described as “another damaging judgment for social Europe” that confirmed “the supremacy of economic freedoms over fundamental social rights”. He concluded that “the dark series initiated by the *Viking* and *Laval* cases is far from being over” (ETUC, 2010). Such responses on the part of the ETUC leave no doubt that the power asymmetry between labour and capital is growing in the EU, demonstrating the weakness of the ETUC’s position in the emerging transnational social field of industrial relations. But also, and perhaps more fundamentally, the ETUC’s responses undermine its role of “social partner” in the EU decision-making process. What sort of partnership is it if one partner is always losing out?

### *The unsuccessful “Monti II Regulation”: A compromise that never was*

In September 2012, the ETUC welcomed the European Commission’s decision to withdraw its proposal for a Monti II regulation, a proposal that had previously been rejected since it restricted the right to take collective action (ETUC, 2012a and 2012b). The proposal had been tabled on 21 March 2012 by Mario Monti. While its full title was “Proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services” (COM(2012) 130 final), its colloquial title was a reference to “Monti I” – the informal title of Council regulation (EC) No. 2679/98 on the functioning of the internal market in relation to the free movement of goods among Member States, drafted by Monti in 1998. The proposal for the Monti II Regulation was, in theory, aimed at providing a framework for resolving any conflicts that arose between the exercise of economic freedoms within the EU and the exercise of fundamental social rights, using the principle of proportionality. In his earlier explanatory report, submitted to Commission President Barroso on 9 May 2010,<sup>12</sup> Monti had proposed a number of solutions to “balance” economic freedoms and the right to strike, which included two elements: a guarantee of the right to strike, subject to Community law, and a mechanism for the informal solution of labour disputes concerning the application of the Directive concerning the posting of workers. Aside from the fundamental issue that applying the principle of proportionality does not comply with international law, and the practical limitations on the exercise of the right to strike arising from the omnipresent threat of an action for damages that could bankrupt a union (Bruun and Bucker, 2012, p. 3), two key problems were raised by legal scholars (Novitz, 2012). First, the wording of provisions on the protection of labour rights continued to make the right to strike subject to Community law. In other words, it made it subject to the same hierarchy of values that the ECJ judgments established, which can hardly qualify as a “balanced” approach. Second, as Novitz asked, “what role would the ‘informal solution of disputes’ mechanism have on the issue of proportionality, in terms of unions’ ability to take lawful industrial action?”, the implication being that this informality severely weakened unions’ capacity to exercise their rights effectively. The proposal for the regulation was eventually withdrawn, bringing an end (for now) to what can be seen as a top-down attempt to legitimize key aspects of the ECJ judgments. However, the withdrawal of the proposal had little effect on the fundamental principles established by the ECJ judgments. At the time of writing, no solution is in sight. To use John Monks’ phrase, European labour is still “reeling at the score”.

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<sup>12</sup> Available at: [http://ec.europa.eu/bepa/pdf/monti\\_report\\_final\\_10\\_05\\_2010\\_en.pdf](http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf) [accessed 20 April 2013].

## Implications of the meta-regulation of labour–capital relations in the EU

Two implications of the cases of meta-regulation described thus far become immediately apparent. First, the power asymmetry between labour and capital is growing in favour of the latter. Within the emerging European social field of industrial relations, firms such as Laval and Viking exploited the confusion between EU law and national labour law, while the Confederation of Swedish Enterprise strategically set out to undermine the national institutional context that had been supposed to serve its competitive advantage. The EU's highest court found against the unions, for responding by taking collective action in their national social fields. In the *Laval* case, the reason given was that it harmed competition, particularly the freedom to provide services. In the *Viking* case, the Court found that the attempt by unions to act in a coordinated manner across national borders, effectively forming a pan-European blockade, harmed firms' freedom of establishment. As a result, the capacity of unions to protect wages and working conditions in the national social field – particularly their right to mobilize their key power resource, the right to strike – has been severely undermined.

Second, the governance architecture of the emerging European social field of industrial relations is undermining whatever limited capacity labour had to exercise structural power at the EU level. The role of the ECJ is pivotal here, since the political and policy implications of its rulings help to strengthen the market imperative by making competition the dominant rationale of the regulation of European industrial relations. It is crucial to highlight here that the ECJ is not attempting to harmonize labour relations across the European social field per se; rather, the Court established competition as the main principle governing this field. For example, the Court allows Member States to decide on minimum wages and working conditions themselves (therefore allowing variation), but at the same time rules that posted workers are not subject to favourable terms that may apply in the host country (described by the Court as “extensive”). The ECJ judgments therefore reverse the logic of the Directive concerning the posting of workers; instead of allowing posted workers to participate equally with favourable terms and conditions, it limits their rights to a finite set of wage and labour standards.

The implications of the ECJ judgments go further. In line with Menz (2003) and Höpner and Schäfer (2010), the heterogeneity of welfare and production systems and the specific type of economic federalism emerging in the EU fosters competition between heterogeneous Member States. The emergence of competition between States' regulations is now a reality. The ECJ cases demonstrate that, from the point of view of European labour, the challenge for the governance of labour–capital relations in the EU does not solely concern competition over workers' wages. The challenge is also about how the meta-regulation of industrial relations steers reforms in national collective agreements, especially in countries where no universal, mandatory

minimum wages are set. In this context, we argue that one of the implications of the cases described here is the emergence of a unique process of European integration that emphasizes regulatory competition between Member States. Indeed, a market in State regulations is in the making.

Against this background, the future of the European national political economies, and thus the future of the national governance of industrial relations, are directly related to the governance of the *transnational* social field of industrial relations in the EU. This field is bound up with the future development of the heterogeneity of “welfare capitalisms” and market economies in the EU; indeed, it is constitutive of their trajectories. The meta-regulation of this field shapes the terms on which the clash of national capitalisms will be played out, and affects the distribution of power resources that social actors are able to mobilize, both nationally and transnationally. What is at stake, therefore, is how European integration transforms the institutional context within which varieties of national capitalism operate and, ultimately, whose interests are served by the meta-regulation of labour–capital relations in the EU. In that respect, our work endorses the argument by Lillie and Greer (2007) that comparative industrial relations should take seriously the connection between action at the national and transnational level and that actors should draw on rules and resources from supranational contexts and new configurations of interest. In our view, a shift of analytical focus is necessary in order to understand the current changes; we therefore conclude with some proposals for future research directions.

## Conclusion: The power of labour in the emerging European social field of industrial relations

Like other authors (Caporaso and Tarrow, 2009; Höpner and Schäfer, 2010; Lindstrom, 2010), we have stressed in this article the importance of the judicial sphere – in particular the role of the ECJ – in the process of European integration. However, our research findings stand in contrast to Caporaso and Tarrow’s assertion that, to use the title of their paper, “Polanyi [is now] in Brussels”, and that as a result of the ECJ judgments, the process of European integration has moved into a new phase, whereby the market is becoming socially embedded. We are closer to Höpner and Schäfer’s (2010) argument that the rulings demonstrate a Hayekian rationale in the current project of European integration rather than a (transnational) Polanyian embedding of the market. Our analysis leads us to conclude that not only is the power asymmetry between labour and capital – both within and between the EU Member States – growing in favour of capital, but also that the national embeddedness of labour–capital relations is in the process of being radically undermined. The meta-regulation of the European social field of industrial relations is a catalyst in this process.

While authors like Lindstrom welcome the “‘protective reaction’ among social forces mobilizing at the national and European levels to preserve and



strengthen social rights and protections in the enlarged EU” (2010, p. 1324) the fact remains that, a few years later, a strategic challenge to meta-regulation is still lacking. The stakes for all social actors are high but, so far, European labour seems to be on the losing side. For example, the ETUC’s call for a “social progress protocol” that will safeguard social rights over economic markets continues to fall on deaf ears (ETUC, 2012b). However, the creation of IndustriAll, a new EU-level trade union, representing 8 million workers, is probably a step in the right direction. We conclude that, unless strategically challenged, meta-regulation will consolidate a European “market” of national labour regulations, in which capital will exercise consumer sovereignty across national jurisdictions. The latter, in turn, will compete to offer the most “flexible” package of industrial relations to firms. If this regulatory competition is institutionally consolidated and politically sanctioned, it will severely undermine labour’s capacity to exercise structural power in both the national and transnational social fields, with very negative implications for wages and social rights. Based on our analysis, we argue that it will only be possible to establish another “hierarchy of values” in Europe if trade unions meet the challenge of coordinating their actions, resources and alliances, both nationally and transnationally. Their capacity to act as social agents in shaping the direction of European integration and defending their hard-won, nationally embedded rights is seriously at stake.

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