Democracy as an obstacle for free movement within the EU

– is free movement of services compatible with the Swedish labour market model?

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Innehåll

1. Introduction

In recent years the conflict between the EU's economic freedoms – freedom of movement of goods, capital, services and persons protected by the Treaties – and basic trade union rights has become increasingly prominent in the European debate.

Research shows that the EU's deregulation agenda is having an increasing impact on the various national market economies in the EU. It concerns distinctive national economic characteristics such as regulation of the financial market, competition legislation, corporate governance and the organisation of the labour market.[1]

One example of a national variant of market economy is the Swedish system of regulating wages and terms of employment through collective agreements. The system emerged through a historical compromise of interests between trade unions, employer organisations and central government. It was developed in struggle and conflict at the end of the 19th century and beginning of the 20th century. The system of collective agreements is the result of the compromises and practice that emerged when two different interests – capital and labour – endeavoured to find a workable method of regulating the price of labour. Labour market regulations have evolved in the same way in the other EU Member States. The results vary as a consequence of the relative strength of the various stakeholders and the historical conditions.

This report – through a combination of studying the literature and examining current political and legal decisions within the EU – will endeavour to describe the mechanisms of the EU's constitutional structure that support a development in which the EU's deregulation agenda restricts national scope of action in an increasing number of areas.

The first part of the report attempts to describe what it is in the structure of the EU that turns it into an instrument of deregulation. Who are the dominant agents and how have they used the scope of action they have been given?

The second part will look more closely at two specific cases where the EU's political and legal institutions challenges labour market regulation in Member States with high requirements as regards to both wages and terms of employment.[2] The two examples are the Commission's proposal for a Council Directive on services in the internal market[3] and the judgment of the European Court of Justice in the Laval case[4].

The purpose of the third and final part of the report is to briefly study how the situation prevailing today can be dealt with. The answer to how the current situation should be dealt with depends on whether you view today's deregulation agenda as something basically positive or negative. The report will therefore start by examining two competing views of what type of cooperation the EU should represent.

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1 McCann, Dermot. The Political Economy of the European Union. Cambridge: Polity Press, 2010

2 In this report, that group consists of the Nordic countries, but also continental countries with regulated labour markets, for example Germany, Austria, Belgium and France.

3 COM(2004)0002

4 Case C-341/05, Laval un Partneri Ltd

2. The EU's double areas of conflict

Historically the EU is based on a division of functions between supranational institutions and the member states. Its foundation is the free trade community that in 1951 centralised power over coal and steel. The objective was to avoid new wars and protect free trade from excessive democratic intervention at national level by interweaving its member states' economies.

The Treaty of Rome (1957) created a union that was to endeavour to be a common market for capital, goods, services and people. To achieve this market, the Union was allocated certain powers while at the same time the member states retained control over issues of importance for the nation states, such as taxes and the structure of the welfare state, including labour law. In somewhat simplified terms, the power to deregulate was centralised, while the powers of taxation and redistribution remained national.[5] Over the following fifty years this historical solution gave rise to a constant battle over which of the two should take precedence.

Free trade, through its treaty-based position and the development of EU law, was promoted using the federal criteria of direct effect and priority in principle.[6] At the same time, total application of free trade is counteracted by political freedom and universal suffrage in the member states.

The tension between the two principles of free trade and national autonomy is ultimately about how far the principle of free movement should be applied. What type of "barriers" are acceptable, what type of decision can national parliamentary assemblies make? What are the constraints on tax-funded health care, labour market regulation, alcohol sales etc?[7]

The EU constitution – the Treaty – does not put forward any clear competence limits. EU law seems to be an easily moved goalpost undergoing constant change.

This has created a vertical line of conflict – besides the traditional horizontal right-left conflict – that is present in all European decision-making. Political parties and citizens are divided along the horizontal line of conflict depending on the extent to which they wish to regulate the market. One's position in this dimension of conflict does not, however, determine one's position in the vertical conflict.[8]

The vertical conflict is in many ways much more problematical than the traditional right-left conflict that exists at national level. The reason for this is that everyone involved at national level accepts the ground rules as given. If a political party loses the election the party and its supporters do not immediately start questioning the ground rules of national democracy, instead they prepare for the next election when there will be another chance to regain power.

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5 Gustavsson, Sverker, Hundra år efter Versailles. 2006, p. 304
6 Hix, Simon & Hoyland, Bjorn. The Political System of the European Union. 3rd ed.. London: Palgrave Macmillan, 2011, p. 84–86
7 Gustavsson, Hundra år efter Versailles., p. 305
8 Hix & Hoyland. The Political System of the European Union, p. 138–140

The vertical conflict is of a different nature than the horizontal. Ultimately it concerns the constraints of the EU free trade agenda in relation to democratically determined barriers to this free trade in member states.[9]

Decisions that affect the delimitation between the competences of the Union and of the member states may be very difficult to adjust and if the delimitation decision arises from the European Court of Justice's interpretation of the Treaty then an amendment to the Treaty is necessary.[10] The way the EU institutions handle this delimitation therefore assumes central importance, both for political outcomes and the democratic legitimacy of all EU cooperation.

2.1 Competing views

According to the German political scientist Fritz Scharpf, the European Union has two primary goals, which also make possible two different, partly competing views of what type of international organisation the European Union is.[11] The one view, "the free trade EU", chooses to regard market integration and free movement as the EU's main task. Economic development is to be promoted by removing barriers to business activity. This view makes the EU into an instrument of deregulation.[12]

According to the other view, the EU is a "policy community EU". This view sees the EU as an instrument for developing a political counterweight to corporate internationalisation and global capital movements. When firms and capital operate transnationally, politics must work in the same way. The EU becomes an opportunity for joint regulation of markets that can only be regulated with difficulty by the respective member state alone.[13]

If one views EU cooperation as primarily a free trade community, the position in the vertical conflict dimension will be relatively simple; that is, as few national barriers as possible should be allowed.

If instead one views the cooperation as a policy community, to regain democratic control lost within the framework of the nation state, then the perspective is different. From that perspective the removal of barriers to free trade has no intrinsic value and lost national influence over the financial market, for example, should be regained by re-regulation at EU level. Within this group – which includes the European trade union movement and social democracy – there is, however, a great discrepancy between the views of what should be regulated at national or supranational level.[14]

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9 Gustavsson, Hundra år efter Versailles, p. 305
10 Hix & Hoyland, The Political System of the European Union, p. 100–101
11 Scharpf, Fritz. Governing in Europe – Effective and Democratic? Norfolk: Oxford University Press, 1999. p. 44–49
12 Holke, Dan & Jonsson, Claes-Mikael, Negativ och positiv integration på den kollektiva arbetsrättens område – tankar och reflektioner med anledning av fyra domar från EG-domstolen. I Ahlberg, Kerstin et.al. (red), Vänbok till Ronnie Eklund. Västerås: Iustus förlag, 2010, p. 314
13 Holke & Jonsson, Negativ och positiv integration på den kollektiva arbetsrättens område – tankar och reflektioner med anledning av fyra domar från EG-domstolen., p. 315
14 Hix & Hoyland. The Political System of the European Union, p. 138–146

2.2 Negative and positive integration

To achieve their respective political objectives, different political groupings can use a number of political instruments. For the continued argument of this report two main types of EU integration will be distinguished; negative and positive integration.

The terms "negative" and "positive" integration may require further explanation. Fundamentally, it is a matter of the legislator's policy when market regulation is moved outside the borders of the nation state. How should the various regulatory frameworks of the member states be integrated with each other? In this context negative integration means the abolition of customs tariffs, quantitative restrictions and other barriers to free and undistorted competition in the individual member state. Positive integration, on the other hand, means the creation of common rules that can be both regulatory and deregulatory within the context of the greater union of nation states.[15] EU agricultural regulation is a well-known example of such regulation.[16]

2.3 Political and legal decision-making

Put simply, two different categories of decision-making can be discerned in the EU.

The first is decisions by the political institutions, mainly in the form of regulations and directives, but direct amendments to the Treaty are also included here.

The second is case law, that is judgments of the European Court of Justice regarding preliminary rulings and actions for failure to fulfil obligations.

Decisions on positive integration can only be made in practice within the framework of the political decision-making process. The political decision-making process has many pitfalls when it comes to the EU regulating the market positively. An obvious reason for this is the strong culture of consensus that characterises the Council of Ministers. Even if the number of areas has increased in which the Council decides with a qualified majority instead of unanimously, the requirement for a strong consensus lives on.[17] The British political scientist Dermot McCann notes in addition that the EU's political structure makes it very difficult to form coalitions for revolutionary political reforms. Also, the effort often does not compensate for the expected outcome. This is particularly true when the opponents of the reform probably have a greater opportunity to mobilise to preserve the status quo.[18] Fritz Scharpf describes it as follows: *"In other words, Europe is capable of positive action if, and only if, there is a possibility of common gains."*[19]

Scharpf identifies three potential conflicts that are able to create a blocking minority against continued integration efforts within the framework of political decision-making. Firstly, non-compatible normative and ideological positions in the governments of the

15 Scharpf, Governing in Europe, p. 45
16 McCann, The Political Economy of the European Union, p. 26–28
17 Tallberg, Jonas et.al. Demokratirådets rapport 2011 – Makten i Europa. Stockholm: SNS Förlag, 2011, p. 72
18 McCann, The Political Economy of the European Union, p. 19
19 Scharpf, Governing in Europe, p. 74

various member states that preclude the creation of majorities that are competent to decide. Secondly, non-compatible vested economic interests. Thirdly, costs of adapting the national institutions and systems that have been developed over decades.[20]

The greatest driver of negative integration in the EU is currently the European Court of Justice, which does not have the same political deadlocks as the EU's political institutions. The Court always reaches a decision. The legal decision-making framework creates scope for individuals to challenge national legislation. Market regulations in the member states can be challenged with a procedural strategy. Simply and with relatively small resources, individual actors can have national provisions set aside on the basis of Community law and with the support of the courts.[21] Taken together, this leads to a strengthening of the EU system's deregulatory tendencies.

The background to the very strong position of the European Court of Justice in the EU system is clarified by the political scientists Simon Hix and Bjorn Hoyland.[22] The authors note that the Court's scope of action is in contrast with the probability that a political majority will introduce legislation to cancel the decision. In other words, the Court has a greater political scope of action in a political system such as the EU, where there are a number of actors able to block political decisions. Hix & Hoyland call them veto players. This scope of action becomes particularly great in politically sensitive issues, where it is not possible to create political majorities either for deregulation or reregulation.

In other words, the institutional balance within the EU creates more favourable conditions for negative integration than for positive integration. In that the legal part of EU cooperation is more able to make decisions, it is simpler to achieve deregulation than market regulation within the framework of European integration.

Fritz Scharpf has devoted considerable time to this and created a conceptual model that clearly illustrates the phenomenon.[23]

The model has two axes; member states are located on the horizontal axis according to how they regulate their capitalist societies (social regulation or liberalisation). The vertical axis measures the degree of European integration (national autonomy or Europeanisation).

In a situation where the EU does not exist, member states are lowest down on the vertical axis and located along the horizontal axis in accordance with national preferences. Scharpf uses two ideal national systems. In the model they are marked as SME (social market economy) and LME (liberal market economy). The first type of regime represents Nordic and Continental European systems, such as the German system. LME are characterised by the United Kingdom, Ireland and most member states from the former Eastern Europe.[24]

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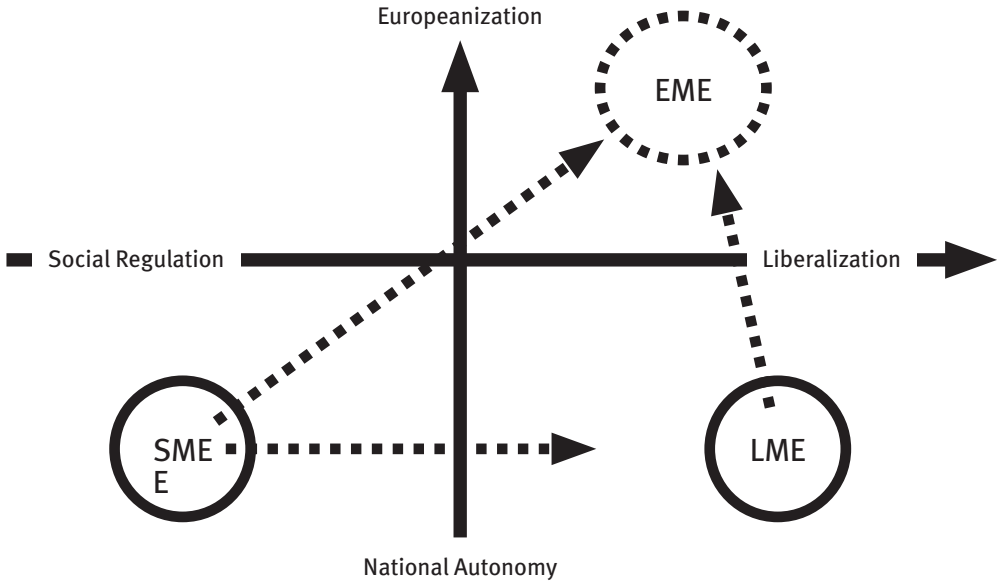
20 Ibid, p. 77
21 McCann, The Political Economy of the European Union, p. 116–117
22 Hix & Hoyland, The political system of the European Union, p. 100
23 Picture taken from: Scharpf, Fritz. The Socio-Economic Asymmetries of European Integration – or Why the EU cannot be a "Social Market Economy". Sieps European Policy Analysis, Vol. 2010:10epa, p. 6
24 Ibid, p. 6



Since decisions on regulation (positive integration) can only be made by the political institutions, in the absence of a political decision-making force the European Court of Justice, through negative integration, will drive development towards increased integration and liberalisation. This is illustrated in the figure by a movement towards EME (European market economy). This is not the result of a conspiracy among the members of the European Court of Justice but the result of their role in the constitutional structure of the EU.

In light of these illustrations, in the next section we will study how the European Court of Justice has dealt with the scope for interpretation that exists in the vertical conflict dimension. How has the Court acted within the framework of judicial decision-making?

3. A judicial revolution – how the European Court of Justice became the engine of European integration

Through a number of important judgments the Court has not only moved forward its own position of power, but also moved the status quo in the balance between national autonomy and the EU's deregulating free trade agenda.

Hix & Hoyland note the following about the European Court of Justice: *"In the absence of a catalogue of competences, the ECJ gradually developed a power to police the vertical allocation of competences."*[25]

But this power is nothing that the Court established overnight, it is a consequence of a number of judgments that were central to the EU's development. The first were handed down as early as in the 1960s. In 1963 the Court established the principle of direct effect (citizens were given the right to invoke Community law)[26] and the year after the principle of precedence of European law[27].

In 1963 the distribution of competencies between the Community and member states was in practice abolished. When the European Court of Justice in Van Gend & Loos[28] established the principle of direct effect it was stated that *"the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals."*[29]

This was despite the fact that four of the then six member states and signatories of the Treaty protested against the argument.[30] The actual case concerned a private company in the Netherlands that invoked European law in relation to the national authorities. The judgment meant that Articles of the Treaty gained a direct effect in member states. The European Court of Justice subsequently widened this effect to regulations and directives through a series of judgments, though with restrictions for directives[31].

The revolutionary aspect of Van Gend & Loos is that the European Court of Justice, by means of case law, moved European law from international law to something akin to national law. In international law it is always the member states who are the subject; individual citizens cannot invoke international law unless it has been incorporated into national law. Through the Court's ruling the EU moved from being an intergovernmental organisation to a quasi-federal community.[32]

The development through case law continues in 1964 when in the case Costa v. ENEL

25 Hix & Hoyland. The Political System of the European Union, p. 88
26 Case C-26/62, Van Gend & Loos
27 Case C-6/64, Costa v. ENEL
28 Case C-26/62, Van Gend & Loos
29 Case C-26/62, Van Gend & Loos
30 Hix & Hoyland. The Political System of the European Union, p. 84
31 Hix & Hoyland. The Political System of the European Union, p. 84
32 Hix & Hoyland. The Political System of the European Union, p. 86

the Court had to deal with a situation where there was a clear conflict between European law and the national Italian legislation. The Court established that by giving the EU the power of determination in a series of areas, the member states had implicitly accepted the precedence of European law. The judgment referred to a limited number of areas, but with the development of the EU Treaties it is difficult today to see the areas of national law where the principle of precedence does not have an effect.[33]

Through the direct effect and precedence of Community law, European law was freed from the control of the member states. The governments could no longer unilaterally control national incorporation of the obligations that the agreements within the Community entailed. The Union's institutions gained an autonomous role and in particular the European Commission and the European Court of Justice gained a constitutional status that was not reflected in the Treaty.[34]

The national courts were not tardy in embracing the doctrine of the European Court of Justice. Judges in the national courts quickly realised that the European Court of Justice, supported by the Treaty, after a request for a preliminary ruling, could set aside provisions adopted by the national legislator. Likewise, an opportunity opened for the Commission, through infringement actions in the European Court of Justice, to bring about changes in member states' national laws. The basic premises for negative integration[35] were in place.[36]

Two important cases followed in the 1970s; the Dassonville judgment and the Cassis judgment. These rulings both confirmed the two judgments above and formed the basis of the European Court of Justice ruling in the Swedish Laval case more than thirty years later.

The Dassonville judgment was handed down in 1974.[37] The question the Court had to adjudicate concerned Belgian legislation. There was a rule in Belgium that prevented the sale of products such as Scotch whisky without a certificate of authenticity. A Belgian trader who had bought his whisky in France, where no such rule existed, solved the problem by producing his own certificate of authenticity. The trader was accused of forging the certificate and was found by the Belgian court to be in breach of the law. The trader argued that this represented a quantitative restriction on trade in the EU and was therefore in breach of the Treaty.

The matter may be thought to be of marginal importance but the principle ruling has had a major impact on EU cooperation. The court ruled that – *"all trading rules enacted by member states which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having effect equivalent to quantitative restrictions".*[38]

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33 Scharpf, Fritz, The Double Asymmetry of European Integration. MPIfG Working Paper 09/12. Cologne: 2009, p. 16–17

34 Neither direct effect nor the precedence of Community law is expressed in The Treaty of Rome.

35 In this case, negative integration means the abolishing of tariffs, quantitative restrictions and other regulations hindering free and undistorted competition in the separate Member State.

36 Hix & Hoyland. The Political System of the European Union, p. 89–95

37 Case C-8/74, Dassonville

38 Case C-8/74, Dassonville, para. 5

In other words all types of national laws and case law could be considered to be capable of hindering trade in the EU internal market. This is important, as anything that constitutes a hindrance – through negative integration – falls within the scope of EU law. The principle has subsequently been transferred to apply in principle to the EU's economic freedoms.

In 1979 the judgment in the Cassis de Dijon case[39] was handed down, concerning the fact that German law prescribed that only drinks with a minimum alcohol content of 25 per cent were allowed to be marketed as liqueurs. This prevented the marketing of the French beverage Cassis de Dijon, which has an alcohol content of 20 per cent.[40] The court established in its ruling that even non-discriminatory national legislation could constitute a hindrance – in this case to the free movement of goods – to the EU's economic freedoms. The principle of mutual recognition was born. In principle the sale of a product that is legally produced in one member state cannot be forbidden in another member state, even if its production is in accordance with technical requirements or quality requirements that differ from those imposed on the country's own products.[41]

Together with the Dassonville judgment, this would in principle make national legislation impossible. The Court realises that this is not sustainable and therefore creates a way out for itself in the Cassis judgment. The Court does this with reference to Article 36 of the Treaty, under which quantitative hindrances may be used as long as they are *"...justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants... "*.[42]

In other words obstacles to free movement can be acceptable under these given conditions. This has given the Court enormous influence as the adjudicator of the legality of obstacles. Put rather drastically you could say that all national legislation is an obstacle, but it may be an acceptable obstacle that can be justified if it is relevant and proportionate in relation to the EU Treaties. Whether it constitutes an acceptable obstacle is ultimately up to the European Court of Justice to decide.

3.1 Labour market regulation and the historical compromise

As regards labour market regulation and wage setting, under the Treaty the EU has extremely restricted competence. Article 153 of the Lisbon Treaty explicitly excludes pay setting from EU competence.[43] Political decision-making has limited possibilities of achieving regulation in this area. But demands concerning pay and working conditions can constitute an obstacle to free trade and free movement and consequently are not excluded from negative integration.[44]

Historically, national regulation of the labour market and trade union rights have been re-

39 Case C-120/78, Cassis de Dijon.
40 Hix & Hoyland. The Political System of the European Union, p. 86
41 Scharpf, The Socio-Economic Asymmetries of European Integration – or Why the EU cannot be a "Social Market Economy", p. 2
42 Ibid, p. 11
43 Treaty on the Functioning of the European Union – TFEU
44 Case C-341/05, Laval un Partneri Ltd, para. 88

garded as obstacles to the EU's free trade ambitions, but obstacles that could be justified.[45] This has also been an important premise for broad support for EU cooperation and forms the basis of a compromise that historically was the solution to the tension between free trade and national democracy.

The historic compromise is that the EU is to have independent institutions in the area of free trade. However, in welfare related areas, including labour law and trade union rights, the idea is that member states should be autonomous to a great degree. Questions with a high political, social or economic stress potential are to continue to be dealt with within the framework of the member states' democratic systems. This is important for several reasons, but it is crucial that these questions form the core of national democracy. Ultimately it is welfare and labour market related questions that motivate people to vote.

In political science, respect for and protection of this compromise is likened to a "constitutional balance of terror", in which both sides (the supranational and the intergovernmental levels) know to respect each other. This balance is achieved through a mutual insight into each other's potential to destroy the other.[46]

The question of regulation of the labour market and wage setting is above what Scharpf calls the threshold of political visibility.[47] By this he means that labour market and wage questions are a political area in which decisions cannot be made without popular debate and endorsement. These are decisions with winners and losers and therefore cannot be treated technocratically. Consequently, this is a policy area the EU and its institutions have traditionally avoided, in order to preserve the informal pact of trust on which the effectiveness of the terror balance rests.

In the next section developments of the past years will be examined more closely. Two specific cases will be studied; the Commission proposal for a services directive and the Swedish Laval case. The question that presents itself is whether the historical compromise has been broken?

45 Holke, Dan. et.al. Parterna och EU. Bromma: Bilda Förlag, 2007, p. 72–74
46 Gustavsson, Hundra år efter Versailles, p. 305
47 Scharpf, Governing in Europe, p. 23

4. Is the historical compromise broken?

In recent years the historical compromise described in the previous section has been tested in the area of labour market regulation and wage setting. The Swedish Trade Union Confederation argues that the pact of trust is broken and that the European trade union movement's support for continued European integration can no longer be taken for granted.[48]

This discontent is also reflected in the former Commissioner Mario Monti's report on the continued strengthening of the internal market.[49]

The report focuses on the question of how the Commission is to succeed in creating broad support for continued strengthening of the internal market. According to the Commission, focusing on this question is important, as the internal market – to use Monti's own words – *"is less popular than ever, while Europe needs it more than ever"*[50].

Monti believes that the internal market can only continue to be strengthened if the EU's political institutions succeed in creating broad support for continued integration. Today support is tottering precariously; for various reasons large groups of society are suspicious of EU cooperation. According to Monti, one of the groups whose support is tottering is the European trade union movement, which in light of recent years' legal developments has become increasingly doubtful towards continued integration.

Historically the EU has been able to conjure up support from social democrats such as Willy Brandt and Jacques Delors, while at the same time finding support with conservative leaders such as Helmut Kohl and Jacques Chirac. The European trade union movement also belonged to this group of supporters. There were several reasons for this. Historically there has been a genuine and often self-experienced understanding of the horrors of war and the need, through economic and to some extent political integration, to bring nation states together in a way that would prevent future conflicts. But an equally important condition for broad support is the historical compromise, described in the previous section, on which EU cooperation rests.

4.1 Three phases of economic integration

What is it that has happened then? Fundamentally it is a change in the objective and instruments for European integration that has taken place in the past 10–15 years. According to the two German political scientists Martin Höpner and Armin Schäfer, it is a paradigm shift in which the creation of a market no longer only implies compliance with the non-discrimination principle but now means the removal of all potential obstacles to free movement.[51]

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48 LOs yttrande över kommissionens förslag "På väg mot en inre marknadsakt – att skapa en verkligt konkurrenskraftig social marknadsekonomi"

49 Monti, Mario. A New Strategy for the Single Market

50 Ibid, p. 6

51 Höpner, Martin & Schäfer, Armin. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé. West European Politics, Vol. 33, No.2, p. 344

Economic integration can be divided into three phases according to Höpner&Schäfer: co-existence, competition and convergence.[52]

In the first phase, from 1950 to the mid-1970s, EU cooperation was characterised by efforts to remove trade barriers in the form of tariffs and other quantitative obstacles. The idea was to create conditions for free trade between largely autonomous states. According to Höpner&Schäfer, during those years there was no real conflict between economic integration and national aspirations. Economic integration was regarded as a means to achieve political ends.[53]

The second phase started with the rulings in the Dassonville[54] and Cassis de Dijon[55] cases, which are treated in more detail in a previous section of the report. The authors choose to apply the epithet "competition" to the phase. The two judgments reduced the member states' room for manoeuvre. In addition, the opportunities for individuals and companies who wish to challenge national provisions have increased dramatically. In that the court in the Cassis de Dijon case establishes the principle of mutual recognition, member states can no longer regulate which goods may be sold in their respective markets.[56]

It was also in this period that the European institutions seriously developed into the independent actors and drivers of European integration, as Hix & Hoyland describe them in their book.[57] European integration, however, as described in the previous section, is associated with an asymmetry between negative and positive integration.[58] As long as the principle – of mutual recognition – is restricted to markets for goods this does not need to be incompatible with a system in which different variants of capitalist societies compete with each other. Liberalisation of the goods market in Europe leads to intensified competition between firms in different member states. This could, however, just as easily lead to a strengthening of the differences between different countries and regions. The reason for this is that different national systems can create specific comparative advantages that make it possible for just that country to retain its competitiveness.[59]

In other words, the competition situation that has arisen do not have a given winner and could result in a greater number of social models managing to be competitive, but with widely differing results regarding such things as distribution of economic gains. The Belgian professor André Sapir states that it is possible to discern four European social models, or – to stick to the report's terminology – four different variants of market economies: Continental, Nordic, Mediterranean and Anglo-Saxon. According to Sapir only two of these, the Nordic and Anglo-Saxon, are competitive in the modern economy. In other

52 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 349
53 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 349
54 Case C-8/74, Dassonville
55 Case C-120/78, Cassis de Dijon
56 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 349–350
57 Hix & Hoyland. The Political System of the European Union
58 Scharpf, Governing Europe, p. 43–83
59 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 350

words, the other models will not survive but must be reformed. However, according to Sapir it is possible to choose either the Nordic or the Anglo-Saxon path. Both models can create economic growth but give different redistribution policy outcomes.[60]

The ambition here is not to assess Sapir's estimate of different social models' relative competitiveness. Instead, Sapir's thoughts can function as an illustration of the second phase – the competition phase – that Höpner & Schäfer describe. In this phase the EU's integration agenda does not take a position on the choice of social model, but economic competition can be assumed to lead to the member states, within the framework of their national democratic systems, adapting their societies to keep them economically competitive.[61]

According to the authors, the third phase, that has been designated "convergence" means that European integration no longer creates competition between different types of capitalism, but actively advocates the Anglo-Saxon model. Höpner & Schäfer summarise this as follows:

"Commission initiatives no longer create a level playing field among EU countries or simply strive for unhindered competition between national welfare and production models. Instead, the Commission promotes the modernisation of European economies along the lines of the Anglo-Saxon model."[62]

A telling example of this is the Commission's original proposal for the Services Directive.[63] If the Commission's proposed "country of origin principle" had been accepted by the Council and the European Parliament, the member states would have given away a considerable part of their powers to regulate economic activities within the borders of their own country. Höpner & Schäfer use the Services Directive and the subsequent Laval case as examples of this third phase of European integration.[64] This report will only deal very briefly with the Services Directive, moving on to focus on the Laval case and its principle effects on the Swedish and other regulated labour markets in the EU.

4.2 The Services Directive

Free movement of services is not a new goal for the European Community but was included as one of the four freedoms already in the Treaty of Rome.[65]

At the time when the Services Directive was being drawn up, the Treaty stipulated the following:

"Without prejudice to the provisions of the chapter relating to the right of establishment, the

60 Sapir, André. Globaliseringen och de europeiska sociala modellernas reformering, p. 24–30
61 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 350
62 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 350–351
63 COM (2004)0002, The Commissions proposal for a Directive on services in the internal market
64 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 352–354
65 The Treaty of Rome, Treaty establishing THE EUROPEAN ECONOMIC COMMUNITY, Article 3

person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."[66]

Thus the Treaty allows a person providing a service the right to temporarily work in a member state other than where the enterprise is established. However, this is to be under the same conditions as apply to domestic service providers in the member state where the service is provided. The contrast between this principle in the Treaty and the proposal presented by the Commission on 13 January 2004[67] could hardly be greater.

In article 16 of the proposed directive the Commission establishes the "country of origin" principle. It states for example:

(1) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.[68]

(2) The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State.[69]

The Commission is trying to severely restrict the member states' control over the national labour market. A country of origin principle would put a group of workers active in the national labour market entirely out of the control of the nation state. Höpner & Schäfer argues that what the Commission is trying to do is transfer the principle of mutual recognition, established in the goods market by the European Court of Justice, to the service market[70]. The idea was that a Polish plumber would be able to work in France for Polish wages and under Polish working conditions.[71]

Not unexpectedly, this proposal met with opposition, particularly from countries with relatively regulated labour markets such as Austria, Belgium, France, Germany and Sweden.[72]

In February 2006 the European Parliament, through a majority of 394 to 215 members, succeeded in reaching a compromise in which the country of origin principle was removed. Instead a system was introduced where the member states would be forced to justify any obstacles to free movement. How this will be used is at present impossible to predict. The European Parliament's compromise, after a few small adjustments, then came to be the compromise that was finally adopted by the Council in December 2006.[73]

A year later, in December 2007, the European Court of Justice again raised the question of the country of origin principle in the now famous Laval case.[74]

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66 Treaty establishing the European Community, TEC, Article 50
67 COM(2004)0002
68 COM(2004)0002, Paragraf 16(1)
69 COM(2004)0002, Paragraf 16(2)
70 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe, p. 353
71 Hix & Hoyland. The Political System of the European Union, p. 201
72 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europe, p. 353
73 Ibid, p. 354
74 Case C-341/05, Laval un Partneri Ltd

4.3 The Laval case

The Laval case is a clear example of a case where one or more actors try to have national provisions set aside by invoking Community law. This is by no means limited to national labour market regulations.[75] Just as for the Swedish labour market, at the start of the 1990s there were established and apparently stable structures in the German financial market. However, these were challenged by a number of private banks that were of the opinion that the German system improperly favoured the "Landesbanken", which had their own system of financial guarantees from the respective states. The system had been in place for many years and should reasonably have been regarded as unfair for a long period. EU development, however, gave their opponents the chance to contest the system. Or as McCann puts it, if the conditions are right, national actors can leverage EU law and policy to strengthen their position within the institutional structures of the national political economy.[76]

The Laval case can be seen in the same way. The fact that the Confederation of Swedish Enterprise financed the Latvian company Laval's litigation costs cannot be seen any other way than as an attempt to strengthen its position in the national system. The case refers more specifically to the foreign company being given the right to pay lower payroll costs than the member organisations of the Confederation of Swedish Enterprise – it is not possible that this is the long-term motive.

The judgment in the Laval case was handed down on 18 December 2007. A week earlier the Viking case ruling had been handed down and in spring 2008 the Court ruled in a further two cases concerning posting of workers: the Ruffert case and the Luxembourg case.[77]

This report will only study the Laval case in detail, but all the judgments concerned the balance between basic social and trade union rights and the EU's economic freedoms; in other words how far the EU free trade agenda should be able to restrict national autonomy. McCann describes it as follows: *"The clash between the liberal economic principles informing European integration and the purpose of national social models was stark."*[78]

4.3.1 The conflict

In this case, at the beginning of June 2004 a Latvian company, Laval un Partneri Ltd, had started construction work on contract at a school in Vaxholm. The work was carried out by Latvian building workers, employees of Laval but posted to Sweden. Not long after the work had started the Swedish Building Workers' Union, wanted to sign a Swedish collective agreement for the Latvian building workers. However, Laval refused to agree to this, referring among other things to the fact that the company was already bound by a Latvian collective agreement.[79]

75 McCann, The Political Economy of the European Union, p. 113–117
76 McCann, The Political Economy of the European Union, p. 117
77 McCann, The Political Economy of the European Union, p. 117
78 McCann, The Political Economy of the European Union, p. 161
79 AD 2005 nr 49

Consequently, the Building Workers' Union gave notice of industrial action, which was put into effect in November 2004. Shortly thereafter the Swedish Electricians' Union also gave notice of sympathy action, at which Laval's building site was blockaded. Laval considered that the industrial action taken restricted the free movement of services, and that it was also discriminatory, since the company had already signed a Latvian collective agreement. Laval therefore demanded an immediate lifting of the industrial action and damages.[80]

On 22 December 2004 the Swedish Labour Court made an interim decision in which it stated that the industrial action was legal and could continue. In February 2005 the Latvian company lost the contract for completing the school. The main hearings in the Swedish Labour Court started on 11 March 2005. The court established that without doubt the Building Workers' Union had followed Swedish law. However, in the opinion of the Swedish Labour Court there were uncertainties in relation to EU law. The court therefore decided to ask for a preliminary ruling from the European Court of Justice.[81]

4.3.2 European consequences of the judgment

The European Court of Justice decided that the use of industrial action in order to protect posted workers was not allowed, if the industrial action was taken to push through demands for working conditions in excess of the minimum protection in the Posting of Workers Directive[82]. Moreover, the court considered that it could not be regarded as compatible with EU law to take industrial action for the purpose of circumventing an existing collective agreement, without regard to the contents of the agreement.[83]

The Posting of Workers Directive was previously regarded as a "minimum directive" in the sense that it contains a "hard core" of compulsory rules for minimum protection that the member states must guarantee to temporary foreign workers[84]. The Posting of Workers Directive does not, however, rule out a system of higher protection. The reasons for this were primarily Article 3.7 of the Directive: *Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.*[85]

However, the European Court of Justice changed this when it declared that Article 3.7 of the Posting of Workers Directive *"cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection."*[86] This

80 AD 2005 nr 49
81 AD 2005 nr 49
82 The Posting of Workers Directive is EU law regulating posting of workers within the EU. Posting of workers means that a company established in a certain country temporarily brings employees to another EU Member State and has work done there.
83 Case C-341/05, Laval un Partneri Ltd
84 Article 3.1 of the Directive contains rules concerning maximum work periods and minimum rest periods. – minimum paid annual holidays. – minimum rates of pay. – health, safety and hygiene at work. – protective measures with regard to the terms and conditions of employment of pregnant women. – equality of treatment between men and women and other provisions on non-discrimination.
85 **Directive 96/71/EC**
86 Case C-341/05, Laval un Partneri Ltd, para. 80

makes it impossible for national trade unions to demand equal pay for equal work in the domestic labour market, and restricts the task of trade unions to guaranteeing minimum conditions.

The social partners can still agree voluntarily on more favourable conditions, but the trade union movement cannot fight for this. The European Court of Justice later clarified this in the judgment; *"the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71[the Posting of Workers Directive]."*[87]

In other words, what was regarded as a minimum directive in practice has become, through the court's interpretation, a "maximum directive".

In the opinion of Höpner & Schäfer what the court has done is to introduce the country of origin principle that the EU legislators rejected when dealing with the Services Directive. For all rules that are outside or above the hard core of the Directive it is now the country of origin principle that applies.[88] National pay agreements can thus be undermined for posted workers, and posted labour is allowed to have worse working and employment conditions than domestic labour.

McCann establishes that even though it is not yet possible to assess the final consequences of the judgment, it is clear that it has severely restricted the protection afforded by trade union industrial action in the Treaty.[89]

4.3.3 Consequences for the Swedish labour market

As a consequence of the Laval judgment and the subsequent legislative changes in Sweden, at least five changes affecting the national ability to regulate the domestic labour market can be discerned.

In the first place, the fact that the European Court of Justice has made the hard core of the Directive into a ceiling for the conditions that may be demanded, means that the trade union organisations are forbidden to sign agreements with the help of industrial action in other areas than those in the hard core. This applies, for example, to accident insurance.[90]

In the second place it is forbidden to demand a higher level than the minimum level of the central collective agreement in the industry. As regards wages, for example, this means a clear discrimination of foreign workers, as the lowest wage in many collective agreements is considerably lower than the normal wage in the industry.

It is true that the trade union may put forward requests for more favourable terms but

87 Case C-341/05, Laval un Partneri Ltd, Paragraf 81
88 Höpner & Schäfer. A New Phase of European Integration: Organised Capitalisms in Post-Ricardian Europé, p. 354
89 McCann, The Political Economy of the European Union, p. 160
90 Prop 2009/10:48 p. 34

may not take industrial action to achieve them. And to quote the Belgian labour law professor Roger Blanpain, *"the right to negotiate without the right to take industrial action is just the right to collective begging"*[91].

In the third place, the changes that the Riksdag adopted to adapt Swedish law to the requirements of EU law meant that the trade union organisations in some cases are entirely deprived of the right to try to regulate working conditions through collective agreements achieved with the help of industrial action.[92] If the foreign employer can show that the employee – within the framework of the hard core – has conditions that in all essentials are at least as favourable as the terms of a Swedish collective agreement, no industrial action can be taken at all. The trade union organisations maintained during the work of investigation[93] that led to the amendments to the Swedish Posting of Workers Act and the Act on Co-determination at Work[94] that it should be possible to require a written agreement with the Swedish trade union organisation from the foreign employer confirming the application of the conditions of employment that the employer had stated.[95] The reason for this is that without such an agreement there are no legal grounds for the trade union organisations to require that the employer meets its obligations. In principle there is no risk to the employer to present one agreement to the trade union organisations and then apply another. However, the legislator did not consider this to be compatible with EU law.[96]

In the fourth place, the preparatory works to the Swedish legislation show that it makes no difference whether the trade union organisation has members at the workplace or not. In other words, Swedish trade union organisations are prevented from representing their members equally. [97]

In the fifth place, through the judgment handed down by the Swedish Labour Court in the Laval case, a principle has been established in which EU law is given retroactive effect with tort liability for the trade union organisation. Not even the circumstance that the industrial action in the Laval case was lawful under Swedish legislation then in force had any significance for the tort liability. The trade union organisations were ordered to pay damages for taking a measure that the Swedish legislator expressly stated to be allowed.[98] The Swedish Labour Court considered that the trade union organisations should themselves have understood that the Swedish legislation was not compatible with EU law. Nor does it seem to have any significance for the tort liability that the Swedish Labour Court in an interim order declared that the industrial action was lawful. Therefore it is impossible for a trade union organisation to obtain an answer in advance as to whether particular industrial action is lawful and that there is therefore no risk of tort liability.

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91 Blanpain, Roger. European Labour Law, The Netherlands: Kluwer Law International, 2008, p. 159
92 Lag (1999:678) om utstationering av arbetstagare § 5a, st 2
93 SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen
94 Lag (1976:580) om medbestämmande i arbetslivet
95 Gemensamt remissyttrande avseende förslag med anledning av Lavaldomen (SOU 2008:123) från Landsorganisationen i Sverige (LO) och Tjänstemännens centralorganisation (TCO)
96 Prop 2009/10:48 p. 35–36
97 Prop 2009/10:48 p. 41
98 AD 2009 nr 89

In practice this is a severe restriction on trade union rights. An error of judgment over the lawfulness of industrial action may cause a trade union organisation financial ruin, as the employer can demand full financial compensation for its loss.[99]

All in all, Swedish trade union organisations can no longer guarantee equal treatment of workers in the Swedish labour market. In other words, it is no longer possible to maintain the pay cartel on which trade union work is based. The Swedish Trade Union Confederation often chooses to describe this through the trade union vow that forms the foundation of the collective agreement and all other trade union work:

"We do solemnly swear that we will never under any circumstances work for lower wages or under worse conditions than what we now promise one another. We make this Vow, in the secure knowledge that if we all are true to our pledge the employer will be forced to meet our demands."[100]

European integration has thus restricted Swedish trade union organisations' ability to uphold collective agreements. Respect for member states' autonomy in regulating the labour market is destroyed.

99 AD 2009 nr 89

100 Göransson, Ingemar & Holmgren, Anna. Löftet – löntagarna och makten på arbetets marknad. Stockholm: Bilda Idé, 2000, p. 9

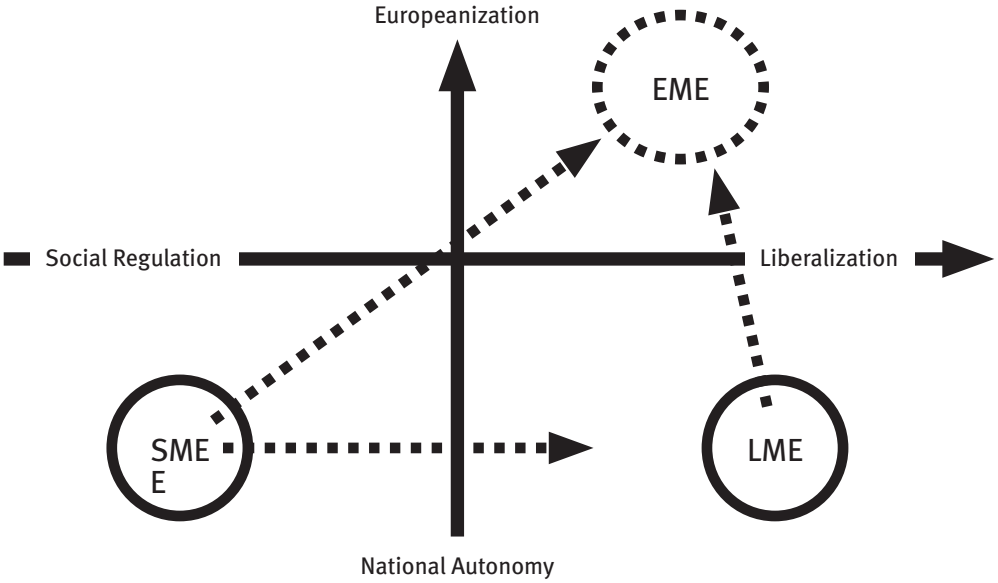
5. Conceivable solutions

For the individuals and organisations that regard the EU as a policy community, within the framework of which the member states join together to create a counterweight to the market, the development of recent years should have led to an awakening.

To use one of political scientist Sverker Gustafsson's arguments; it has been shown that one cannot rely on politicians, Commission officials or judges in the supranational structure to have the sound judgement necessary to safeguard the "historical compromise".[101]

If the situation is as we have already established in this report, is it then even possible to replace the national regulation that has been lost through negative integration with EU-wide regulation through positive integration? The answer to the question is of utmost importance to the groups that wish to use the EU as a political counterweight to the market. The groups in society that see the EU as a tool for deregulation do not need to worry about this to the same extent.

To find an answer to the question we return to Fritz Scharpf's figure.[102]



As stated in the report, the European Court of Justice, through negative integration, is driving development towards increased integration and liberalisation. This is illustrated in the figure by a movement towards EME (European market economy).

Given this, there are two alternatives for action for those who believe in the EU as a policy community.

If you believe it is possible to recreate the welfare state at European level you should en-

101 Gustafsson, Sverker. Myntunion utan fiskal union – hur är en sådan möjlig? I Bernitz, Ulf et.al. (red), Överlever EMU utan fiskal union, Europaperspektiv 2011. Tallin: Santérus Förlag, 2011, p. 46–47

102 Picture taken from: Scharpf, Fritz. The Socio-Economic Asymmetries of European Integration – or Why the EU cannot be a "Social Market Economy". Sieps European Policy Analysis, Vol. 2010:10epa, p. 6

deavour to achieve re-regulation of the labour market at European level, in the same way as has taken place in the environmental legislation area. You then move towards the upper left hand corner.

However, there is a great problem with this strategy. The problem is the fact that the countries that Scharpf calls liberal market economies do not have any reason to accept such a development. Countries such as the United Kingdom can accept a movement towards increased integration as long as it is a matter of deregulation. A move from the lower right-hand corner to the upper right-hand corner involves no or only a small sacrifice.

In the same way as a number of the member states that belong to the SME group could prevent the country of origin principle of the Services Directive from being adopted, a group of LME countries can prevent EU legislation from moving European integration to the upper left-hand corner. Just as Hix & Hoyland describe, the Court is changing the status quo, and in some controversial policy areas the political institutions are incapable of restoring it.[103] This means that of the two social models advocated by Sapir, it is the Anglo-Saxon model that is favoured and the Nordic that is forced to adapt.

If one sees this obstacle as insurmountable and does not believe it possible to move up to the upper left-hand corner, the answer should be to preserve the possibility of national regulation. This is also the solution Scharpf himself recommends.[104]

Or to use his own words: *"A European social market economy cannot come about, and social market economies at the national level will be destroyed, unless the politically uncontrolled dynamics of (negative) "Integration through Law" can be contained"*[105].

103 Hix & Hoyland. The Political System of the European Union, p. 75–78

104 Scharpf, Fritz, The Double Asymmetry of European Integration. MPIfG Working Paper 09/12. Cologne: 2009

105 Scharpf, The Double Asymmetry of European Integration, p. 34

6. Conclusions in summary

The report shows that the idea of a balance of power between national and supranational interests that is only informal is no longer sustainable. The EU, as other federal structures, needs to establish clarity between national and supranational competences. The member states need to put on paper where the boundary lies for supranational competences. The European Court of Justice and negative integration must be given a clear framework and constraints in the same way as political decision-making.

If this is not done and the European Court of Justice is allowed to continue to be the engine of European integration then the EU, as the report shows, will move towards increased integration and increased liberalisation. This means integration that favours labour market models with relatively few regulations, such as the Anglo-Saxon model, and disfavours labour market models such as the Swedish model.

As described in the previous chapter, there is an alternative method to safeguard regulated labour markets. By transferring competence in the area to the EU it would be possible, with the help of positive integration, to recreate at supranational level the regulation lost at national level. The main reason for not advocating such a transfer of labour market regulation to the European level in this report is that it would require a series of changes that are neither practicable nor desirable. If European regulation of the labour market is to replace national regulations the possibility of political decision-making must be facilitated, for example by means of decision by majority rather than decision by unanimity in the Council. The Treaties would need to allow maximum regulations, not just minimum regulations; in other words increased harmonisation would need to be accepted. This in an area that is part of the core of what constitutes national democracy. If such decisions are made at European level it would first be necessary to deal with the democratic deficit that the Union's decision-making is characterised by.[106] This is also a process that requires popular support, which will take time to build up.

Instead, the influence of the European Court of Justice and negative integration should be constrained on the basis of the compromise that has long benefited EU cooperation. The historic compromise is that the EU is to have independent institutions in the area of free trade. However, in welfare related areas, including labour law and trade union rights, the idea is that member states should be largely autonomous. Questions with a high political, social or economic stress potential are to continue to be dealt with within the framework of the member states' democratic systems. If this is not done, there is much to indicate that EU countries with labour market regulation with high requirements as regards both wages and terms of employment, such as Sweden, will successively have to succumb to an Anglo-Saxon model.

Since the Laval judgment, a concrete demand bearing on the structural problem dealt with in the report has attracted particular attention, namely the demand put forward by the Swedish Trade Union Confederation and the rest of the European trade union movement for a social protocol. Such a protocol would strengthen fundamental trade union rights in relation to the EU's economic freedoms. The idea is that EU law, just as other

106 Hix & Hoyland. The Political System of the European Union, p. 130–131

mature legal systems, is to proceed from respect for fundamental human rights, which include trade union rights. It should only be possible to restrict these rights for an overriding reason of public interest, in accordance with current international law. The short-term profit interests of individual companies can never constitute such a public interest.

The Swedish Trade Union Confederation considers that the demand for a social protocol is important to guarantee respect for trade union rights. It should, however, be emphasised that this will not solve the tensions between negative integration and nationally determined obstacles to free movement. The conflict between EU economic freedoms and national regulation may be brought to the fore in areas other than labour market regulation. Which restrictions regarding tax-financed medical care, public housing or the sale of alcohol can be regarded as acceptable obstacles? To avoid a restriction of policy and the trade union movement's scope of action by the European Court of Justice in more areas a broader Treaty amendment is necessary to create a clearer definition of the respective EU member states' competences.

This should not be interpreted as criticism of EU cooperation, but as criticism of the current form of cooperation. In the areas where the EU is given competence after drawing up such a definition, decision-making should be democratised and EU institutions given greater influence. Regulation of the financial market and the fight against climate change are two examples of policy areas in which national decision-making is not sufficient and EU policy cannot be dictated by the least willing member state. But this was not the issue this report intended to address.

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Appendix 1

In the course of six months, the European Court of Justice passed four judgements, which in different ways deal with the conflict between trade union rights and economic freedoms. One of these was the Laval case. Short presentations of the other three are given below. You will find more information on these three cases at the website of the European Trade Union Confederation (www.etuc.org).

Viking Case

The shipping company Viking Line ran ferry traffic in the Baltic Sea with the ship Rosella which in those days sailed under Finnish flag. However, Rosella was run at a loss, whereupon Viking decided to register the ship in Estonia. By doing so, Viking could take on an Estonian crew and negotiate about lower wages than the prevailing wage level in Finland. If the wage costs were reduced, Rosella would, according to Viking, have a chance to compete with other ferries that operated the route.

However, the trade union Finnish Seamen's Union, FSU, opposed this procedure and issued, through the International Transport Workers' Federation (ITF), a circular letter in which Estonian trade union organisations, under the threat of sanctions, were banned from negotiating on collective agreements with Viking. The Finnish Seamen's Union at the same time dictated certain terms in order to have the ruling agreement for the crew's conditions renewed, among other things, that Viking should be obliged to comply with Finnish labour law also in the future, and gave notice of industrial action.

The industrial action, which had been taken, made it pointless for Viking to register Rosella in Estonia, as it implied that the same wage levels as in Finland had to be observed. Viking could thus not compete on the same conditions as other companies in Estonia, and the company therefore maintained that their freedom of establishment had been violated.

The European Court of Justice stated in its argumentation that "the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy". With this statement, the European Court of Justice established that the Treaty stipulations on the freedom of establishment also include trade union industrial action, which is taken by a union organisation to induce a company to sign a collective agreement and may discourage a company from making use of its freedom of establishment. Consequently, the European Court of Justice was of the opinion that the industrial action taken constituted a restriction of the freedom of establishment.

Consequences of the judgement

Through the judgement in the Viking case, the ECJ allocates Treaty rules on the right of establishment a direct horizontal effect. In more explicit terms, this means that employers

in Europe have a powerful instrument for opposing all collective agreements and industrial action that have a cross-border impact.

The reasoning of the ECJ gives that trade union action is to be regarded as a hindrance to the economic freedoms. In order to be considered as compatible with EU law, obstacles to economic freedoms must represent a legitimate interest and must not be disproportionate in relation to their purpose. Consequently, industrial action must be justified in order to be recognised as compatible with EU law.

Thereby, the autonomy of collective bargaining in relation to the EU competition rules is not extended to cover the free movement. This can create ambiguity about the rules in the labour market. In addition, the European Court of Justice risks being overloaded with cases, since all companies involved in a transnational dispute, have the possibility of using this ruling to oppose industrial action taken and to claim that this action is "disproportionate". The ECJ's analysis was however not so detailed in the Viking case and the court provided scope for the national social partners to reach an agreement, which they also did.

Rüffert case

The question submitted to the ECJ for referral was to determine whether it is compatible with the free provision of services to demand that a foreign employer should pay wages according to the collective agreements applied in the specific place where work is performed, and not only the national minimum rates defined in the generally applicable collective agreements.

According to the law of the German federal state Niedersachsen, companies that tender for public construction projects exceeding a certain sum, must commit themselves to pay wages that correspond, at least, to the rates of the collective agreement in the place where the work is done. In addition, they must ensure that their subcontractors do the same. The case concerns a public procurement procedure where the successful tenderer engaged a Polish subcontractor whose employees were paid less than half of the wages stipulated in collective agreements. When the breach of contract was discovered, the federal state suspended the contract. In the subsequent legal dispute, the German Court of Appeal referred to the ECJ applying for a preliminary ruling.

In its opinion the Court established that the federal state, when awarding contracts to work, cannot demand that the companies must pay wages according to the collective agreements that are valid in the place of work. Instead, the companies can only be required to pay minimum wages according to the national standard. In the Court's opinion, foreign companies would otherwise be deprived of the competitive advantage they have by paying lower wages. In other words, the Court reaffirms the opinion it adopted in the Swedish Laval case.

Consequences of the judgement

The European Court of Justice once again reaffirmed the interpretation of the Posting of

Workers Directive it had made in the Laval case. The explanation of the interpretation was however developed further. The ECJ considers that the Directive cannot be interpreted to the letter, since such an interpretation would contradict the intent of the Directive, which in the Court's opinion is the free provision of services, not the protection of workers.

Furthermore, the judgment is in glaring contrast to the ILO Convention 94, which says that states that ratified the Convention are to ensure that their public contracts include clauses by which employees are guaranteed terms of employment in compliance with the collective agreement prevailing at the place of work. Eleven EU states have ratified the Convention, most of them as early as 1950s, so they have applied it since long. These states were in the majority among the states that were EU members at the time the Posting of Workers Directive was adopted. This makes it hard to believe that the interpretation now made by the ECJ corresponds to the intent of the Posting of Workers Directive at the time of its adoption. The fact that the ECJ does not observe the ILO Convention 94 may even hinder future ratification of the Convention.

Neither does the ECJ recognise the ILO Conventions 87 and 98, in which it is established that restrictions on the right to take industrial action as well as limitations of fundamental rights can be justified only on grounds of health, law and order and similar interests.

Luxembourg case

The European Commission took the Member State Luxembourg to the ECJ due to the fact that the country had implemented Articles 3.1 and 3.10 of the Posting of Workers Directive wrongly. Luxembourg had with reference to Article 3.10 laid down that posted companies were obliged to comply with a number of national laws and collective agreements. Moreover, it had been laid down that documents necessary for the purpose of supervision should be kept in Luxembourg. The Commission meant that these rules constituted an obstacle to free movement.

In the case, the ECJ once again confirmed its interpretation of the Posting of Workers Directive as merely covering minimum conditions. In §19 of the judgment, the ECJ maintains that "the host Member State is to regulate rates of pay only as regards minimum rates".

Furthermore, the ECJ rejects the demand to oblige foreign companies to have a representative resident in Luxembourg who can present insurance documents and agreements.

Consequences of the judgement

The ECJ lays down that the individual member state cannot itself determine the essence of Article 3.10 and what demands can be put upon a company with reference to "ordre public" or a mandatory public interest.

The question that must be asked is who is to determine what constitutes a mandatory

public interest if not the member state itself. Especially considering the fact that, according to the Treaty, the EU does not have competence to impose rules on wage formation in the labour market.

The ECJ declared furthermore in the Luxembourg case that it is the responsibility of the authorities of the member state where the company in question is established to ensure that the provisions of the Directive are observed. In other words, it is the Polish authorities that are responsible for wage and working conditions being followed when Polish companies perform temporary work in Luxembourg. This makes it of course more difficult for national authorities to monitor compliance with national laws and rules. In Sweden where trade unions assume the responsibility for the monitoring, there is a risk that it will be even more difficult as controls are to be carried out through another country's authorities.

Trade unions and the EU:
Democracy as an obstacle for free movement within the EU

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