Book Section:
Papadopoulos, Theodoros and Roumpakis, Antonios (2012) Nordic social risk management and the challenge of EU regulation: labour market parity at risk. In: Sorsa, Ville-Pekka, (ed.) Rethinking social risks in the Nordics. Foundation for European Progressive Studies, Brussels, pp. 199-224.

Nordic social risk management and the challenge of EU regulation: labour market parity at risk

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Introduction

There has been a long-standing consensus among the employer and employee representatives to decide upon management of social risks in the coordination of labour market institutions in the Nordic countries. This consensus has been built upon the idea of *parity* in collective bargaining, or labour market parity, which refers to the reciprocal recognition of interests between labour market representatives and to parity-based negotiations and agreements in which a consensus can be reached (see Kettunen, 2010). The principle of labour market parity is, in part, related to the Nordic conception of democracy as one of the founding pillars of social risk-sharing, as the principle was entrenched to the Nordic societies with the extension of democratic rights. As Kettunen (2010, 31) argues, trade unions were supposed to extend democracy in two senses: both as a 'popular movement' and as one of the two 'parties' making parity-based agreements on the labour market – or, both as a part of the Nordic tradition of voluntary associations and as a labour market party. Both the institutional mechanisms of labour market bargaining between voluntary organisation representatives and the norm of parity-based

agreements are intrinsic to the Nordic model of organising power relations in the national governance of social risk management.

In this chapter, we argue that the recent developments within what we call 'the European social space' prescribe many challenges for the future of collective bargaining in Nordic countries. In terms of labour market parity as a norm, the Nordic model does not quite correspond to the current European policies but rather provides alternative policies and ideas for the future of European integration (see the discussion on 'flexicurity', Lisbon Treaty targets, etc.). While there has been much critical review of the normative contents of the Lisbon Treaty and EU employment targets (see e.g. Carmel, 2005), there has been yet much less attention to the institutional effects of the integration process. In this chapter, we argue that the European regulation of labour market bargaining poses direct institutional challenges for the Nordic collective bargaining institutions built upon the parity principle in particular and for the national governance of social risk management more generally.

Schematically, there are two streams of literature that discuss how the contemporary mechanisms of national collective bargaining have become under pressure in various economies. Many authors have highlighted the importance of globalisation as 'a temporal and spatial reconstruction of social practices' that widen power asymmetries between labour market actors and weaken the prerequisites for national social solidarity (e.g. Kettunen, 1999). Others have focused on changes in national labour market institutions and especially highlighted the employers' role in promoting decentralised forms of

bargaining, flexible wage negotiations and regulation of temporary work (e.g. Dolvin et al., 2010; Lindvall & Rothstein, 2006). In this chapter, we demonstrate that these streams can be feasibly combined when we look at transnational regulatory mechanisms. To be more exact, they also *ought* to be combined in order to provide rigorous understanding on how the European regulatory environment poses challenges to the national labour market agreements in the Nordic countries. We argue that the ability of trade unions to act as a collective actor in the European social space is significantly hampered by a particular form of (emerging) meta-governance. The chapter continues with a section that provides definitions for the three key concepts in this insight – structural power, European social space and meta-governance – after which the characteristics of meta-governance will be studied empirically in more detail.

In the third section of the chapter, we first examine what was regarded as a 'neo-liberal' attempt to integrate services market through the Services Directive (2006/123/EC). We consider this attempt a typical example of top-down models of regulating national industrial relations. Our empirical research then draws on the European Court of Justice (ECJ) decisions in the cases of 'Laval', 'Viking', 'Rüffert' and 'Luxemburg'. The Services Directive and the rulings of ECJ cases represent attempts to set competition as the main principle for regulating socio-economic life in the EU. The ECJ cases demonstrate that the main challenge for the governance of labour-capital relations in the EU is not solely the competition of wages between workers but rather how EU institutions might favour the inclusion of other collective agreements than the existing

national ones. In this way, there is not just a downward competition between wages, but also a competition between different collective agreements.

In the fourth and last section of the chapter, we discuss the implications that stem from the creation of competitive markets at the European level to the future of the European industrial relations in general and to the Nordic industrial relations in particular. We argue that, fundamentally, the ECJ rulings are about the struggle over the 'hierarchy of values' that could frame the European social space and its process of integration. This is a struggle in which, so far, European labour seems to be on the losing side. In this section, we also explore what kinds of effects the power asymmetries within the European labour markets produce to the collective bargaining mechanisms that mediate labour market partners' interests to social risk management in Sweden and Finland (with the Laval and Viking cases, respectively). We conclude the chapter with a reflection on the challenges that competition and market-based principles pose for the Nordic model of social risk-sharing and to the potential attempts to apply the 'labour market parity' principle beyond the national levels of action.

Structuring politics and contextualising action: power, social spaces and meta-governance

The purpose of this section is to provide definitions for three key ideas and concepts used in the following sections of the chapter. The first one is *structural power*, which is crucial

for understanding the nature of labour market relations in different settings, in our case the difference between the Nordic labour market parity and the European labour market paradigms. When we use the concept of power we refer to a dynamic *relation* between social agents. We have intentionally distinguished power as a dynamic relation and power as a resource. Instead of referring to actors having power (i.e. the more colloquial use of the term), we understand social agents as *exercising power* by mobilising power resources in any or all of the dimensions of power: structural, relational and discursive power.[1] The dimension addressed here is structural power, which can be seen similar to what Hay (2002) describes as the 'context-shaping aspects' of social action. Exercising power in this dimension is achieved by mobilising power resources in order to defend or alter the institutions and/or the mode of governance that regulates the distribution of the power resources – the rules of the game, that is.

By exploring this dimension, analysis can potentially 'capture' the instituting capacity of social agents. Power asymmetries are observable as differences in the capacity of social agents to maintain or alter the 'rules of the game'. In addition, changes in the form and content of institutions follow changes in the agents' capacity to mobilise structural power resources. In this context, structural power is the dynamic relation between social agents intending to defend or alter how regulatory processes are consolidated institutionally. The outcome of this dynamic relation 'translates' into both the contents of the institutions and

[1] Besides structural power discussed in the text, relational power is the ability to force a social subject to do something that otherwise s/he would be reluctant to do, and discursive power the way that society recognises, understands and interprets social categories within the existing power-relations. Discursive power thus refers to the concepts, assumptions and perceptions of reality that are hegemonic in one or more social spaces of the society. Consequently power resources have relational, structural and discursive properties (see Papadopoulos, 2006). This conceptualisation of power is a theoretical synthesis drawing inspiration from Lukes (2005), Strange (1994), Hay (2002) and Bourdieu (2005).

the modes of instituting them. Institutions are here understood as "structurations of power and as residues of conflict" (Korpi, 2001, 8).

The second key concept in this chapter is *the European social space*. By 'social space' we refer to a spatially and temporally specific combination of a mode of governance, corresponding institutions, interacting agents and their power resources. The term is inspired by Bourdieu (1985) who used it to define a multidimensional field of social action created and institutionally (re)constituted by the power dynamics between social actors. A social space is regulated by a (territorially and temporally contingent) mode of governance, whose institutional architecture (as well as its logic of instituting) determines how power resources will be redistributed in the social space and, consequently, how the relational power dynamics between the social actors will be exercised.

Although social spaces are of different regulatory scales (e.g. local, national or transnational), they are also linked to each other, often hierarchically. Thus it is not only the character of social spaces of action at different scales (for example the different types of national employment models, national production regimes or the 'European social model' etc.) but also how they relate to each other and how and at which scale their relationship is regulated that one must address here. In this sense, this chapter examines how the structural power asymmetry between unions and employers is currently articulated in the shifting levels of governance and spaces of action in the EU by examining how the interaction between national social spaces is regulated at the European level. It is argued that the locus of the power dynamics between labour and capital in the

EU is shifting from national social spaces into an emerging European social space. The latter is not merely a summation of national social spaces nor merely 'European' in the sense of supra-national but primarily a social space *cum* mode of governance that regulates the interaction between these two levels of social action.

Finally, our chapter adopts an analytical definition of governance to refer to both the content of institutions in a social space and the mode of instituting it (see Carmel & Papadopoulos, 2003). However, governance is not only the mode of governing at one level of social action but also about governing the interplay between different modes of governance and between different levels of social action. To avoid conceptual conflations, we adopt Jessop's concept of *meta-governance* to refer to the emerging mode of governance of the European social space (as defined above). We argue that the aforementioned shift from national social spaces into an emerging European social space is accompanied by 'a re-articulation of powers and a re-territorialisation of social relations' (Brenner et al., 2002), which is *meta-regulated* to favour capital and the market rationale of governance. Drawing from recent events in the development of EU labour relations, we argue that the ability of trade unions to act as a collective actor in the European social space is significantly hampered by the particular form of (emerging) meta-governance, whose characteristics we will next explore in more detail empirically.

Regulating labour relations in the European social space: from harmonisation to competition

The Services Directive has its origins in the guidelines named after the Dutch Commissioner for internal market issues in the EU, Frits Bolkestein. The directive aimed at liberalising the provision of services in the European social space and at further integrating the services market as stated in the Lisbon strategy. According to the Bolkestein guidelines, services could be bought depending on the wage levels of the country of origin of the service provider. The initial plan of the guideline was to 'harmonise' the internal labour market by withdrawing market distortions (national agreements) in the service sector in the European social space. Apart from 'harmonisation', the possible adoption of the guideline would have cancelled the national collective bargaining and simultaneously provided the necessary regulation to promote downward wage competition between EU citizens. The proposal sparked fierce protests in countries with 'coordinated market economies', a term borrowed from the Varieties of Capitalism literature (see Hall & Soskice, 2001; Menz, 2003).

Despite the political clout in several countries, the succeeding Commissioner McGreevy and the Commission President Barroso were putting through the reform agenda of the Commission, the Services Directive being at the heart of this agenda. The Services Directive was not welcomed warmly by the member countries. The idea of the 'Polish plumber', an example of undermining the wage and working conditions of French plumbers, managed to mobilise a majority that rejected the adoption of the European

Constitution. It was clear with the French *non* in March 2005 that the Services Directive had attracted very much negative attention – so much that it in part halted the approval of the whole European Constitution.

Almost ten months later, the Services Directive was passed in European Parliament but with significant amendments limiting the impact of 'harmonisation'. The split of employers' interests, along with the European Trade Union Confederation (ETUC) lobbying for the amendment of the proposal, paved the way for a distinct alliance of interests within the European parliament (Dølvin & Ødergård, 2009). In terms of voting, the social democratic parties and the Christian democratic parties voted in favour of the amended proposal. In contrast, liberal parties expressed their concern that the proposal is not meeting the needs for a 'harmonised' labour market. The conservative parties from Great Britain, Spain, Netherlands, Poland, Hungary and the Czech Republic rejected the revised proposal. Left wing and communist parties also voted against the proposal. The voting was very much based on "a mixture of a 'left-right divide' and a 'clash of capitalisms'" (Höpner & Schäefer, 2007, 14).

In the end, the Commission presented a proposal that incorporated the amendments voted by the Parliament and the European Council of Economic Ministers accepted unanimously the ratified proposals. ETUC was satisfied with the abolishment of the 'country of origin clause' and regarded the end result as a 'success'. However, ETUC remained less sceptical about the abolishment of the 'respect for fundamental rights' and its replacement to the respect of the Community law (European Trade Union

Confederation, 2006a). The 'country of origin' clause was abolished but replaced by the 'freedom to provide services', which, as we will show, effectively introduces elements of downward wage pressures to the coordinated market economies. The replacement of the 'country of origin clause' with the 'freedom to provide services principle' was neither thoroughly examined nor thoroughly understood by relevant actors. For example ETUC celebrated the exclusion of the 'country of origin clause' but, at least publicly, failed to capture the implications of the new legislation for the service providers in the private sector.

The new legislation approved by the European Parliament links the Member States' labour and workers' protection to be interpreted in their compliance with the Community law by the European Court of Justice (ECJ) on a 'case by case' basis (European Union, 2006, 11). Essentially, the right to collective action was not undermined directly by the Services Directive but was subjected to the approval of the ECJ doctrine on the proportionality of restrictions on the freedom to provide services (Novitz, 2008). Some have argued that ECJ rulings are not so much about labour rights protection but the ECJ is known rather for promoting business and competition-friendly rulings, while others have highlighted that the Community law as such is not about protecting labour rights (see Davies, 1997).

As Supiot (2006) argues, the European Commission stated in its paper for 'Better Lawmaking' (Commission of the European Communities, 2005) that EU's 'regulatory environment' should further promote European competitiveness through the creation of

an ‘expert committee’, which would assess and filter policy proposals that harm European competitiveness. According to the guidelines on impact assessment, new legislation has to be thoroughly scrutinised for its impact on economic and competition aspects at both national and European levels. The adoption of these assessment criteria prioritise competition and effectively pre-empt any significant attempts of new legislations to challenge the dominant logic of competition (Commission of the European Communities, 2002, 2005, 2006**)**. Further regulatory attempts should be kept at minimum level, thus locking the abilities of new legislature into a framework that promotes the market rationale. The market rationale “is no longer limited to the realm of the economy; it is now the organising precept of the juridical sphere” (Supiot, 2006, 116).

In this way, ‘competition’ becomes the main principle of policy making, setting in motion a regulatory mechanism that rejects any policy that might harm competition and only allows policy proposals that are compatible with this logic. This ‘cata-regulation’ or ‘meta-regulation’ (Supiot, 2006) provides a new mode of governance that

> 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. (Morgan, 2003, 2.)

These attempts to ‘economise’ social spaces using ‘top-down’ means are witnessed strongly in the case of the ‘Bolkestein proposal’ and the EC directives. However, the

pressures do not stem just from the bureaucratic and political elites in the EU. European firms based on the EU legislation are effectively driving a competition between national labour laws (Supiot, 2006). As it will be shown next, many ECJ rulings did not explicitly touch upon harmonisation but instead opted for consolidating competition between state regulations as the key principle for regulating socioeconomic conditions within the European social space.

Collective action vs. 'freedom to provide services': the Laval case

All of the four ECJ cases discussed below illustrate significant turning points in the competition between state regulations and in the shifting role of national collective bargaining between labour and capital. The first case discussed here is the so-called Laval case, in which the City of Vaxholm in Sweden was interested to renovate a school and the city council selected the offer of the Latvia-based company Laval. In the agreement signed between the two contractors, it was stated that in order for the collective agreement between the firm and its employers to be effective in Sweden, collective bargaining should happen under the Swedish Labour law and the Swedish trade unions should thus participate in the collective agreements. Laval initiated negotiations with the Swedish construction union (*Byggnads*) but did not accept the terms and wage rates set by Swedish collective bargaining regulations and instead employed Latvian workers that would be posted to Sweden. Laval stated that it had the right to negotiate wages according to the Latvian collective agreements. Byggnads exercised their right – in accordance with Swedish labour law – and reacted with industrial action and a blockade.

The first collective agreement in Latvia came in 2004 and covered only the members of the trade unions. Since Laval workers were not unionised, the company could not have legally stated in the Vaxholm case that it followed the Latvian collective agreement. However, soon after the first agreement, a second national collective agreement became effective in Latvia. It provided coverage to all employees and issued that workers in Latvian companies can be legally represented only by the Latvian trade unions and therefore any collective agreement should be in accordance with the Latvian laws (Byggnads, 2005). The response of the Latvian government, the alteration of the coverage of the collective agreement, was both reflexive and strategic. It outright manifests how important the role of the state is in facilitating competitive advantages for national capital interests.

The Latvian company was able to exploit the confusion between the Swedish labour law and the EU laws. According to the latter and the freedom of establishment, every employer should pay workers at least the national minimum wage. The crucial point here is that the Swedish collective bargaining is not binding for all workers and employers, and the state will not enforce such agreements.[2] Due to well-organised trade unions and employers' associations, the Swedish collective bargaining achieves a great coverage and problems of collective action are thus dealt by the central and industry-level organisations. Despite their extensive legislative framework and application, the Swedish industrial relations do not declare a minimum wage. Part of the unions' strength stems

[2] The same applies for Danish and German collective agreements.

from their negotiating power in determining wages with employers. Therefore the existence of a minimum wage would undermine their power as actors and as social partners.

Laval pointed out that since there is no minimum wage and the application of agreements is not binding, the company is not obliged to pay the wage that is determined by the Swedish social partners. While the unions were backed up by the Swedish centre-right government, the Confederation of Swedish Employers (*Svenskt Näringsliv*, SN) supported and funded Laval's case before the court. (Woolfson & Sommers, 2006, 59-61.) Laval took the case to the Swedish Labour Court and SN took it to the European Court of Justice (ECJ) with the question whether the Swedish trade unions' right to collective action is at odds with the 'freedom to provide services principle'.

In December 2007, the rulings of the ECJ were received with conflicting emotions from various actors involved in the case. SN was delighted with the rulings and stated that "this is good for the free movement of services. You can't raise obstacles for foreign companies to come to Sweden" (Financial Times, 2007). The ETUC received the ECJ ruling with 'disappointment' and regarded the decision as a challenge for the successful 'models of flexicurity' (European Trade Union Confederation, 2007a). It is clear from the rulings that the ECJ prioritised competition and the freedom to provide services over the right to collective action:

> It must be pointed out that the right of the 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 (i.e. provision of services). (European Court of Justice, 2007a, Point 99, parentheses added.)

Coordinated action vs. 'freedom to establish': the Viking case

The case of the Finnish ship Rosella, or its owner firm Viking Line to be more exact, is another court case that illustrates how EU is mediating a competition between different state regulations. The Finnish firm that operates the ship route from Helsinki to Tallinn discovered that if the ship was under the Estonian and not the Finnish flag it could benefit from lower wages and thus enhance its competitive advantage over other firms. The Finnish Seamen's Union (*Suomen Merimies-Unioni*, FSU) contacted the International Transport Workers' Federation (ITF) about the intentions of the Finnish shipping firm. The ITF advised FSU that according to the Flags of Convenience policy, wages and conditions of employment are to be decided upon the Finnish national agreements irrespective of the company will to employ Estonian workers because the ship is owned by a Finnish firm. At the same time as the negotiations for collective agreement between the Viking Line and the FSU occurred, the company applied to the Court that no agreement would have an immediate effect (European Court of Justice, 2006). As a response, FSU declared a warning for industrial action in November 2003.

Viking Line appealed to the Finnish Courts in order to cancel the industrial action of the trade unions and also to ask for compensations. In December 2003, both actors re-entered negotiations and a new revised agreement was reached. However, in 2004, Viking Line addressed the UK Commercial Court since the ITF had its base in London. The judge's decision was against the coordination of action on behalf of the trade unions. The decision stated that trade unions could result in industrial action for the re-flagging of the ship. The judge forced ITF to withdraw all letters to affiliated trade unions. The rationale of the decision was that the actions of the FSU and ITF was against the EU law and hampered competition. The Finnish unions appealed and the case was referred back to the ECJ.

In the Viking case, the ECJ recognised a fundamental the right to collective action if all other means of protest are exhausted and if the action does not harm the freedom to provide services (European Court of Justice, 2007b, point 44-5). The vagueness of this ruling is rather obvious. (Can a right be both fundamental and restricted by conditions, especially if the latter are not clear?) The judgement of the ECJ is not denying the unions' right to collective action in the national spaces of action but subjects it to certain conditions: 1) the action has to be a last resort and exhaust other means that do not harm operation of the firms and 2) that actions to block 'the freedom of establishment' are justified if they result in worse working conditions.

While the rulings on the Viking case were received with more enthusiasm by ETUC, they missed a significant point in our opinion. The ECJ is safeguarding employees' right to collective action as much as it is willing to prevent a coordinated action on behalf of

national unions within the European social space. The ECJ pre-empts abilities of unions to show solidarity through blockades in Europe since such action is deemed to exercise discriminatory effects on the freedom of movement for persons and to provide services (European Court of Justice, 2007b, points 57-66; see also Achtsioglou, 2010). The ruling of the Viking case manifests how the ECJ prevents coordination of union action across European social space and instead prioritises competition over the right to collective action.

Counting losses: ECJ rulings on the Rüffert and Luxemburg cases

Apart from the two cases that were discussed in detail above, two more cases ended up in the ECJ, whose decisions significantly challenged national collective bargaining and labour law across Europe. The Rüffert case refers to the ability of a Polish subcontractor to provide constructing services at 46.5 % of the wage rate that the German workers were entitled to. Similar to the Laval case, the ECJ declared that due to the lack of a minimum wage in Lower Saxony and to the lack of a universally (nationally) applicable collective agreement, any obligation for improving wages and working conditions under the German public law is not applicable but restrictive to the fundamental freedom to provide services (Schalchter & Fischinger, 2009).

In a recent judgment by the European Court of Justice (dated 15 July 2010) the German state was condemned 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 (European Trade Union Confederation, 2010). The ECJ ruling refers to the precedent of Laval and Viking cases in arguing that the right to collective bargaining is withheld in order to secure the freedom to provide services and of establishment with the European social space. In the ruling of the Rüffert case, it takes a step further to question Member States authority on determining 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. (European Court of Justice, 2010.)

In the Luxemburg case, the European Commission suggested that the Luxembourgian application of the Posted Workers Directive (PWD) was too extensive. Luxemburg, in accordance with the PWD, set mandatory conditions under which posted workers can provide their services and effectively incorporated these changes under public policy provisions. The conditions were the following:

- requirement of a written employment contract or a written document established in accordance with Directive 91/533
- automatic indexation of remuneration to the cost of living
- the regulation of part-time work and fixed-term work

- respect of collective agreements

The ECJ issued that the Members States' demands over posted workers' wages and working conditions, as posed by the country of destination, are restrictive to Article AC 49 and the 'freedom to provide services' principle. The ruling of the ECJ goes to suggest that "national mandatory agreements are applicable only when they do not violate the freedom to provide services" (European Court of Justice, 2008). In other words, the ECJ ruling in the Luxemburg case touches upon Member States' jurisdiction on what consists of a public policy provision since the ECJ ruled that national mandatory agreements are applicable only when they do not violate the freedom to provide services (ibid.).

The responses of the European Trade Union Confederation

Before the ECJ rulings the ETUC, which represents the vast majority of unions across EU member states, called Commission President Jose Manuel Barroso for a

> carefully *balanced approach* (…) ETUC is not opposed to the development of the internal market or the free movement of goods, capital, services and workers. Nor does it promote protectionism. On the contrary, it seeks a level playing field between Member states, based on fair treatment and upward harmonisation of workers' rights and conditions. (European Trade Union Confederation, 2006b, our italics.)

The ETUC responses to the rulings of the ECJ differed in the two cases. While it welcomed the decision of the Viking-case ruling since it recognised the right to collective action as fundamental (European Trade Union Confederation, 2007b), the decision for the Swedish unions was received with 'disappointment' (European Trade Union Confederation, 2007a). Almost two months after the rulings, the ETUC publicised its position stressing the importance of the cases and the need for Europe to 'repair this damage' (European Trade Union Confederation, 2008a). For the first time, ETUC stated in public that the right of collective action comes second after EU's free movement provisions. It is clear that the plea for a balanced approach was not enough to prioritise social protection over competition rules, a hierarchy that should not come as a surprise since ETUC is not holding any significant structural power over EU decision making and clearly remains under the hegemonic vision of EU-elites.

It was only after the outcome of all four cases that the European ETUC (2008b) changed its discourse and its secretary John Monks admitted: "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". ETUC recognised that these cases were fundamental not only to the ability of unions to defend labour standards (e.g. wages and working conditions) but also in the sense that collective bargaining and national labour law came second to the freedom to provide services and firms' right to establishment. As the ETUC recognised,

> 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 organised 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'. […] The ECJ interprets the Posting Directive in a very **restrictive** way. On the one hand, it **limits the scope for trade unions** (in the *Laval* case) to take action against unfair competition on wages and working conditions […] On the other hand, it **limits Member States** (in the *Rüffert* case and *Commission vs. Luxemburg* case) in applying their public procurement law or public policy provisions on situations of posting to prevent disruption of their labour markets and unfair competition between local and foreign service companies. (European Trade Union Confederation, 2008b, bold and italics in original).

The response of the ETUC as well as its analysis of the ECJ cases admitted not only that the main European trade union originally underestimated the challenges that the Service Directive and the application of the Community Law posed but mainly that the ECJ decisions on these four cases clearly sets a hierarchy of norms and priorities regarding the instituting logic of the emergent European social space.

Responding to ECJ ruling in the Rüffert case, John Monks, the General Secretary of the European Trade Union Confederation (ETUC) made the following statement:

> This is another damaging judgement for social Europe. [...] This judgment ignores the public authorities' independence when they are acting as employers. More worryingly, it also confirms the supremacy of economic freedoms over fundamental social rights. The dark series initiated by the Viking and Laval cases is far from being over. (European Trade Union Confederation, 2010.)

The response of the ETUC leaves no doubt that power imbalances are widening but at the same time demonstrate the weak position in which the ETUC is placed in terms of 'balancing' policy making within the European social space. Furthermore, the interpretation of the PWD subscribes to a minimum core of labour rights and allows foreign service providers to circumvent collective bargaining as set by the host country's labour institutions (Cremers, 2008).

The impact of meta-regulation on national labour institutions and trade unions: the end to Nordic labour market parity?

We have highlighted at least two tensions that arise from the ECJ rulings. First, the power asymmetries between labour and capital are widening. It is clear in the ECJ cases that unions and employers strategically aimed at exercising their power not at their national or EU levels but, more importantly, within the emerging European social space of action. Firms such as Laval and Viking Line were willing to exploit the confusion among EU and national labour laws while the SN strategically aimed at undermining the institutional context that is meant to be facilitating its competitive advantage. Therefore employers mobilised their power resources at both the national and European spaces of action.

The ability of the unions to respond to these pressures through collective action in the national social space was condemned for harming competition and for violating the

'freedom to provide services' principle in the case of Laval in particular. In the Viking case, unions were able to act in coordination and effectively form a pan-European blockade that did not allow the Finnish firm to operate with Estonian wages and working conditions. The ability of unions to act in a coordinated manner across the European social space was, however, interpreted as a 'discriminatory action' against firms 'freedom of establishment'. Therefore the ability of unions to protect wages and working conditions from the logic of market competition is hampered by what Wood (2004) calls the 'extra-economic', or an effort mostly concerned with the regulation of the economic, political and juridical coercion on social relations.

Secondly, the emerging European social space is indeed challenging national labour and political institutions. The first two ECJ cases discussed above illustrate the role of EU as framing different institutional orders for domestic actors. The literature on European integration so far stresses either the importance of nation states as the key actors (Moravcsik, 1993; Martin, 2004) while others (e.g. Fligstein & Sweet, 2002) prioritise the importance of European institutions in driving European integration. We argue that focusing on the national or/and the European level (the EU) is not adequately capturing the process of European integration. The process is equally much about the criteria and the hierarchy of norms underlying the process of institutionally constructing the European social space that could effectively undermine the perpetuation of national market economies and their labour market institutions.

The ECJ cases demonstrate that the challenge for the governance of the European labour markets is not solely related to the competition of wages but also to how EU institutions might favour the inclusion of other collective agreements than the existing national ones – especially so in countries where no minimum wages are set as universal and mandatory, which effectively introduces an attempt for regulation of competition between (national) state regulations. This *meta-regulation* is mediating the decisions of the power imbalances between regimes to the national space of action. These 'attempts aim not only to 'economise' social spaces (Morgan, 2003) but also, crucially, to make competition the dominant mode of instituting that space.

In essence, the ECJ recognises both social rights and market freedoms as fundamental for the regulation of the European social space. However, when these two principles collide, as they did in the cases discussed above, the ECJ decided to set a hierarchy of norms that puts competition as the superior principle for socio-economic instituting of the European social space (see Achtsioglou, 2010). In conclusion, the ECJ has exercised its juridical power to

- prioritise the freedom to provide services over unions' ability for collective action both in private (Laval case) and public undertakings (Rüffert case)
- hamper the ability of unions to act in solidarity within the European social space (Viking case)

- challenge the EU Member States' right to define public policy provision (Luxemburg case) and procurement law (Rüffert case) within their own social space

These rulings may produce significant challenges for national collective bargaining and public policy to address social risks that are generated and present in the European and national social spaces. This, as such, can be considered a major social risk – the risk of failing to respond to changing social risks. This risk is essentially structural and at the heart of the European integration project. It concerns the role of European juridical institutions and their ability not only to set a 'hierarchy of norms' but also to question national collective bargaining agreements and the ability of nation states to determine public policy provision. Inferring from the rulings discussed in this chapter, it is clear that the ECJ prioritises market principles over the right for collective action to tackle social risks.

The key question in the national contexts is how far market principles will continue to undermine and restrict rights that are considered fundamental in the national political economies. Some European national governments have already responded to the ECJ rulings. New German labour law withdrew the obligation for remuneration from collective agreements that are not generally applicable, Luxemburg exempted foreign service providers from the requirements of public policy provision (see Silva, 2010) and some states that have not set minimum wages, including Sweden and Denmark in the Nordics, are reforming their national labour laws.

It is clear that so far the ECJ has played a pivotal role in determining the priorities between social rights and market freedoms and demonstrated how European institutions challenge national governments' authority to determine public policy procurement. That said, we do not expect nation states' modes of instituting and models of political economy to wither away (Menz, 2003). However, what currently emerges from these rulings is a process of Europeanisation that emphasises regulatory competition among member states – a market for state regulations. The future of European national political economies and, in this respect, the future of all kinds of national institutional configurations in Europe is directly related to the institutional configuration of the emerging European social space. This space is not external to the development of the variety of welfare capitalisms and market economies.

The Nordic model is not an exception to these pressures. For example, the ECJ poses a direct challenge for the Nordic model of social risk management via collective bargaining in one thematic area: the minimum wage. The ECJ allows member states to declare minimum wages that are generally applicable in order to allow variation (and therefore competition). At the same time, through the interpretation of the Posted Workers Directive (PWD), it suggests that posted workers' wages and working conditions cannot be determined through collective bargaining institutions of the host member state but is subject to the minimum core of wages and working standards declared nationally in the member state. As a result, the ECJ undermines the institutional role and the rationale of social risk management, since it encourages employers to bypass national collective

agreements and prescribes competition as the main principle for instituting labour relations.

The ECJ rulings touch upon the cornerstone of labour market parity: the determination of wages based on the recognition of reciprocal interests by both the workers' and the employers' representatives. At the normative level, it could be suggested that the ECJ rulings place the interests of employers' first and regard unions as representing only a particular group within the society. At the institutional level, the declaration of a minimum wage in the Nordic countries 'distorts' the mechanisms of labour market regulation, since it essentially provides disincentives for employers to enter into negotiation and for unions to represent workers' interests in the first place.

Towards European labour market parity?

As it was noted in the beginning of this chapter, the Nordic labour market parity principle can be regarded as an alternative to the current European mode of organising industrial relations. The alternative resembles the early position of ETUC, which requested for a *carefully balanced approach* to ensure level playing field between Member States and aimed at the fair treatment and upward harmonisation of workers' rights and conditions. The plea of the ETUC can be seen as an extension of the labour market parity principle at the European level through the recognition of reciprocal interests between member states as well as between European-based labour market actors. The ETUC plea did all but lead to this kind of outcome. The outcome of the process was one of a great power struggle,

which ETUC tended to somewhat neglect. We have not yet witnessed a similar struggle to institute the parity principle at the European level.

As we have showed, the shifting of governance and scale of action should be a strong signal for trade unions to react by re-orienting their actions to the emergent European social space. Unions' responses at the national level alone are deemed ineffective and any attempt to promote protectionist measures will promote welfare nationalism at best. It is clear that it is this new social space in which trade unions – among other social groups – should coordinate their actions and seek alliances. For example, the attachment of a 'progressive social protocol' that will safeguard social rights over economic freedoms in European treaties, as suggested by the ETUC, could be extended to address not only trade unions interests but also other social groups (e.g. agrarians). The ETUC proposal aims at prioritising social rights over market freedoms but the call for such a protocol has, at least so far, fallen on deaf ears.

For us, it is certain that the potential counter-movement cannot be exhausted in the role of organised labour or at the national level of action. It is in the thin new European social space that European trade unions among other social groups should coordinate their actions and expose socio-political character of the 'economic' and provide proposals for an alternative institutional order in Europe. For trade unions, it is also necessary to retain the effective capacity to operate as agents of social change in the emerging European social space in the first place.

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Word count: 7981