Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?

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ABSTRACT

An inherent tension underlies the European project: between promoting the free movement of goods, capital, services, and labor (the single market) and maintaining social cohesion within and across its member states (the European Social Model). Tensions over these two conflicting logics heightened with EU enlargement. The "Polish plumber" has come to symbolize concerns held by many west Europeans that enlargement will exert downward pressure on existing wage and regulatory regimes, resulting in a European wide race to the bottom. While these concerns figured prominently in debates over a European Commission proposal to liberalize the service sector, meanwhile two related conflicts over liberalization of services were emerging within and around European courts: the "Laval" and "Viking" cases. At issue in both disputes was whether industrial action by Swedish and Finnish unions to prevent firms from taking advantage of lower cost Latvian and Estonian labor violates EU laws on free movement of services. In some respects the cases point to emerging divisions between new and old member state governments, with the former supporting the employers and the latter the unions. Yet the cases also create opportunities for social forces to mobilize transnationally around two alternative visions of the EU: one committed to furthering economic liberalization and the other to constructing an enlarged Social Europe.

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1. Introduction

In the preface of his *EU Enlargement versus Social Europe*, Vaughan-Whitehead (2003: *xiii*) asks: "In order to be able to accept former Communist countries from Central and Eastern Europe as quickly as possible, did we not risk diluting the original spirit and contents of the European Community?" As suggested by his title, the spirit and content to which he refers are principles underlying the so-called European Social Model. Five years after Vaughan-Whitehead posed these questions many critics of enlargement might argue his concerns were prescient. Some of the most contentious battles within the EU in recent years point to emerging political-economic fissures between old member states of western Europe and new member states to the east. The ubiquitous "Polish plumber" has come to represent fears that enlargement, by bringing in relatively poorer and less regulated post-socialist states, will spur a race to the bottom in wages and social protections within the enlarged EU. Such fears played a role in the 2005 failed French referendum on the European constitutional treaty. They also became central to opposition to a 2005 European Commission proposal, or the "Bolkenstein Directive," to liberalize the service sector. Raising particular concern was Bolkenstein's proposed "country of origin" principle that would allow a Polish plumber to set up shop in any EU member state while being subject to Polish laws and regulations. Arguments that the proposal would further undermine social and labor protections culminated in mass demonstrations in Brussels and Strasbourg. In 2006 the European Parliament ultimately passed a significantly watered down version of the directive, striking some of its most controversial elements and safeguarding national labor and social provisions.

Meanwhile two related conflicts over liberalization of services were emerging within and around the courts. The first case involved a Latvian construction company employing Latvian workers to refurbish a school outside Stockholm. When the Latvian firm refused to enter a collective agreement with the Swedish construction workers union, the Swedish unions organized industrial actions, eventually bankrupting the Latvian firm. After the Swedish labor court ruled that the Swedish unions' actions were legal, the Latvian firm appealed to the European Court of Justice (ECJ) to decide whether the boycott violated the free movement of services. The second case involved a Finnish ferry company, Viking Lines, which sought to re-flag one of its vessels to Estonia in order to take advantage of Estonia's lower wage rates. The Finnish Seamen's Union, supported by the International Transport Workers' Union, protested the decision, ultimately resulting in this case, too, being

brought before the ECJ. Debates around the two cases illuminate ongoing tensions within the EU between (a) the liberalization of the service sector and (b) preserving national labor and social standards. The cases also point to emerging political-economic fissures between new and old member states. In their analysis of the Laval case Woolfson and Sommers (2006: 50) suggest that the dispute is "the first gust in a cold, possibly poisonous, 'eastern' wind blowing across the industrial relations landscape of the new Europe."

This paper considers the relationship between enlargement, service liberalization and industrial relations in the enlarged EU through an in-depth analysis of the Laval and Vikings cases. Returning to Vaughan-Whitehead quote above, by conceiving of social Europe as a process, rather than something already realized, the paper shifts the question from whether or not new member states *will* try to change the spirit or content of social Europe to a question of *which actors* and *how*? The paper traces the processes through which different agents among new and old member states are engaged in struggles over the future political-economic trajectory of the EU. While the Laval and Viking cases involve conflicts between old and new EU members – Sweden/Latvia and Finland/Estonia – the paper suggests that political conflicts surrounding the cases do not necessarily conform to an old/new member state divide. Instead, the cases create opportunities for social forces operating within and above member states to mobilize around two alternative visions of the EU: one committed to furthering economic liberalization and the other to constructing an enlarged social Europe.

2. Between the Single Market and the European Social Model

An inherent tension underlies the European project: between promoting the free movement of goods, capital, services, and labor (the single market) and maintaining social cohesion within and across its member states (the European Social Model). To achieve the first task, European institutions seek to remove existing barriers to trade and investment across borders (or *negative* integration). To achieve the second, they seek to introduce new regulatory policies to correct market failures, creating supranational rules on consumer protection, environment, or health and safety at work (or *positive* integration). The ideal of the European Social Model, prevalent in both political and economic discourse alike, signifies a unique, i.e. European, compromise between promoting market liberalization while preserving labor and social protections embedded in European social welfare states. Yet the ESM is far from a complete or unified entity; it is a process, subject to constant contestation and change (Jepsen

and Pascual 2005: 232). This section offers a brief discussion of the role of different players – European institutions, member states, and social partners – in negotiating the tensions between single market and social goals, followed by a discussion in the next section of how EU enlargement might affect this balance.

EU institutions play a key role in negotiating the demands of economic and social interests. Since the launch of the Single European Act the EU has continued to expand its scope: in economic terms through the expansion of the common market and the introduction of a single currency in 1999 and in social terms through the introduction of strategies on employment, social inclusion, and pensions. Yet as Scharpf (2002) argues, the driving force behind European integration remains deregulatory – abolishing obstacles to free movement rather than creating new regulatory institutions. In practice most "hard" legislation proposed and enforced by the Commission relates to furthering the single market, while social goals remain "soft," subject to voluntary coordination, benchmarking and best practices. This "constitutional asymmetry," according to Scharpf (2002: 647) reflects the prioritization of economic over social integration at the EU level. Increasingly the Commission leaves conflicts over market liberalization and social regulations to other EU institutions to mediate, namely the European Parliament and the ECJ (Leibfried and Pierson 2000).

A second contributing factor shaping the political-economic trajectory of the EU is relations between European institutions and its member states. Member states are not only the receiving end of EU rules and norms; they are also actively involved in shaping them. Diverse national institutional configurations – which underlie the social solidarity of the nation-state – shape the agendas states pursue to mediate common European (and global) pressures. In more liberal economies such as the UK, moves towards positive integration in the EU are often portrayed, in Margaret Thatcher's famous terms, "socialism through the back door." In more coordinated market economies such as Sweden, on the other hand, the negative integration agenda of the EU tends to be portrayed as "Anglo-Saxon capitalism through the back door" (Hix and Goetz 2000: 4-5). While member state positions on the wide range of economic and social issues before the EU cannot be mapped strictly according to its type of capitalism, we can observe general cleavages among member states over the degree to which the EU should balance economic and social demands – with Scandinavian states traditionally advocating stronger provisions for economic cohesion and social

protections and the UK and Ireland advocating less regulated markets (see Menz 2003; Marks and Steenbergen 2004).

A third group of relevant actors who shape the balance of economic and social interests are social partners – i.e. associations of labor and capital. Compromises reached by labor and capital, with varying degrees of intervention from the state, form the basis of European social welfare states. European integration can alter existing relations between domestic forces in several ways. While in principle the four freedoms underlying the single market promise the free movement of both capital and labor, in practice capital is far more mobile. That capital moves more freely than labor contributes to its systematic power vis-à-vis labor. Moreover, transnational capital, and associations that represent their interests such as the European Roundtable of Industrialists, have been active proponents of EU rules abolishing barriers to trade and investment (van Apeldoorn 2002). Labor associations, on the other hand, traditionally have been far more reactive than proactive at the EU level, more committed to preserving their national arrangements against external pressures than to investing in new social compromises at the EU level. Yet this is changing, by design or necessity, as trade unions increasingly focus their efforts on strengthening regulatory and social frameworks at the EU level. Through formal associations such as the European Trade Union Confederation (ETUC), transnational sectoral unions, as well as European labor protest movements, unions are mobilizing transnationally to mitigate against the adverse affects of market liberalization (Streeck 2001; Imig and Tarrow 2001; Hyman 2005; Bieler 2006; Gajewska 2008).

The construction of the EU has been shaped by ongoing tensions between the competing aims of creating a single market and promoting the ideal of an ESM that preserves economic cohesion and social protections. Put another way, the EU is portrayed both as a regional instantiation of global economic integration and, conversely, as a political-economic bulwark *against* globalization (Hyman 2005: 12-13; Pontusson 2005). Whether European integration maintains or undermines the principles underlying the ESM will, according to Scharpf (2002), be a matter of political contingencies rather than economic imperatives. Ongoing struggles among and between European institutions, member states, and social partners will play a key role in shaping alternative political economy trajectories of European integration. How might enlargement influence these struggles? Are, as Vaughan-Whitehead's 2003 title suggests, EU enlargement and the ESM mutually exclusive?

3. The impact of EU enlargement

While many observers of the EU focus on internal demographic changes, the introduction of a single currency and globalization pressures as main threats to the ESM, attention has recently turned to another potential threat: enlargement. The 2004 inclusion of eight new post-socialist states and the 2007 enlargement to Romania and Bulgaria are viewed as potentially undermining the ESM for at least three reasons. First, due to their lower wages and higher rates of unemployment, new member states threaten to put downward pressure on wages in the EU as a whole by western firms moving east and eastern workers moving west. Second, levels of regulation and social protection are considered far lower in new EU member states than in old members, contributing to popular fears of competitive deregulation and "social dumping." Third, EU member states are commonly considered to be far more enthusiastic supporters of free market liberalization and stronger critics of supranational regulation. The following section examines each of these arguments in more depth.

Enlargement is argued to place downward pressure on wages in two ways. First, with almost all barriers to trade and investment eliminated, west European-based firms will continue to take advantage of far lower wage costs and move production east. This places pressure, in turn, on western labor to reduce its costs in order to compete. Second, provisions for free movement of workers will spur mass migration of east European workers to seek higher wages in the west. Migration, according to this view, will lead to reduced wages and increased unemployment in West European states as employers lay off domestic workers and replace them with migrants willing to work at a lower rate of pay. Studies seeking to measure the impact of enlargement on western labor markets are inconclusive, documenting varying degrees of impact (see Saint-Paul 2007). Accurate assessments are difficult given that enlargement is so recent, transitional periods are still in effect, and migration data are incomplete. Yet elite and popular *perceptions* of this relationship between enlargement and labor markets may be as important as reality in setting the policy agenda. With the exception of the UK, Ireland and Sweden, most existing EU governments negotiated transitional arrangements limiting freedom of movement for new EU members for up to seven years (Donaghey and Teague 2006).[1] Restrictions are tighter for Romanian and Bulgarian citizens. Despite these transition periods, the emblematic "Polish plumber" appears in different guises in popular debates across the EU.

A second and related issue is the impact of enlargement on economic and social cohesion. Commonly referred to as "social dumping" or "regime competition," this argument posits that new member states' lower tax rates, laxer environmental and labor standards, and weaker social provisions will lead to a European wide "race to the bottom" (see Kvist 2004; Sykes 2005; Bohle 2008). That is, in order to prevent capital from exiting, west European leaders will be motivated to slash taxes, weaken state regulations, and attempt to constrain wages. Tensions over social dumping erupted in a diplomatic imbroglio in 2005 when then Finance Minister Nicolas Sarkozy stated that if new member states could "afford" a flat tax – suggesting that such a tax would lead to subsequent decline in tax revenues – then they would not require financial help from the EU in the form of structural and cohesion funds. (Adding fuel to the fire, just weeks after Sarkozy's outburst, George W. Bush arrived in Bratislava to praise Slovakia's flat tax as a model for Europe). Chancellor Gerhard Schröder also criticized the new member states for taking aid from Brussels while reducing their tax rates to attract business from Western Europe, stating: "It is certainly unreasonable that we finance an unbridled tax competition among each other via the budget of the European Union" (*Deutsche Welle* 2005).

It was amidst these growing fears of social dumping and increased competition that the European Commission's proposal on the liberalization of services was met with strong resistance. At the crux of the conflict was the Commission's decision to introduce the "country of origin" principle. This principle stated that a service provider, whether a firm or individual working in another EU state, would be subject to the laws of its home state. This raised fears that companies would set up "letter-box" companies in new member states to take advantage of lower wages and weaker regulations. The issue was fuzzier in the case of labor policies. According to the 1996 posted workers directive (96/71/EC) firms employing foreign workers are subject to the host country's labor laws, including minimum wages. While the Bolkenstein directive sought to ease rather than overturn posted worker regulations, what the public took away from these debates was the directive posing a tangible threat to existing national wage agreements and labor laws. Overall, Nicolaidis and Schmidt (2007: 726) sum up a popular perception among west Europeans of the country of origin principle in practice: that "people [from new member states] coming to work here will carry their home rule on their shoulders, so to speak, like double agents operating in the European social space."

The third perceived impact of enlargement on the ESM is that because new member states are far more neo-liberal in orientation, they will join forces with member states like the UK and Ireland to push for further liberalization in the EU (Grabbe 2004). This view of new member states being more closely aligned to Anglo-Saxon than Continental values was reinforced in the lead up to the US invasion of Iraq where, in Rumseld's provocative distinction, "new Europe," along with the UK, supported the US despite overwhelming opposition to the invasion among "old" European states. This view also extends to economic ideals. Soon after the start of the Iraq war, Habermas and Derrida (2005) published a manifesto differentiating "core Europe" from the UK and new member states in many of its core values, including its social-democratic traditions. The perceived proclivity of new member states towards neo-liberal rather than social democratic ideals is often attributed to the legacy of state socialism, where decades under communist rule leave liberal reformers skeptical of state interventions of any sort. This tendency is also attributed to the program of "shock therapy" in the 1990s, a neo-liberal reform agenda largely introduced and overseen by US-based advisors (Gowan 1999; Wedel 2001). EU accession was promoted as a means to reunite Europe, not only in symbolic terms but to harmonize socio-economic rules and norms across the continent. Yet in practice, the harmonization of the single market proceeded faster than the harmonization of labor and social policies. Scholars have attributed this outcome to external factors, namely the Commission's prioritization of single market harmonization over and above softer social policies (Lendvai 2006), and to internal dynamics, namely the strength of transnational capital vis-à-vis labor in new member states (Bohle and Greskovits 2006). According to Meardi (2000) this outcome is also a matter of will on the part of post-socialist elites: rather than lagging behind old EU states in creating free markets, new member governments are at the vanguard of economic liberalization.

In sum, enlargement is viewed to pose a threat to the existing and future ESM by placing downward pressure on wages, spurring regime competition, and bolstering neo-liberal ideals. The ten new post-socialist members are commonly treated as a unified bloc: "new" Europe versus "old" Europe. However, like in Western Europe, we can observe a significant degree of variation among different new member states in terms of political-economic institutions. While some states followed a radical neo-liberal agenda of monetary stabilization, liberalization, and privatization, others fashioned a more gradualist strategy that used state power to build market economies and simultaneously preserve social cohesion. Instead of viewing transition as a path to capitalism writ large, scholars now examine how the process

of transition led to different varieties of capitalism across new member states. Bohle and Greskovits (2007) identify three variants of transnational capitalism among new member states: a "neoliberal" type in the Baltic States, an "embedded neoliberal" type in Czech Republic, Hungary, Poland and Slovakia, and a "neocorporatist" type in Slovenia. Given the diversity of post-socialist transition paths, will new member states, and actors within them, will indeed act as unified block in ongoing political-economic struggles in the EU? Or will actors within new member states align themselves with like minded actors within old member states, creating new trans-European political-economic constellations? The following two case studies consider these possible scenarios.

4. Between service liberalization and social models: the Laval and Viking cases

The key issue underlying the Laval and Viking cases concerns how EU law adjudicates between two fundamental but conflicting freedoms: the right to provide services across borders and the right to industrial action, including strikes, to protect collective interests. The first is inscribed in EU treaties (Article 49) and the latter within the 2000 Charter of Fundamental Rights of the European Union. At issue in both disputes is whether industrial action by unions to force firms to abide by national wage regimes violates EU laws on free movement of services. Given that both cases involved west European-based firms (in Sweden and Finland) seeking to employ workers from new member states (Latvian and Estonian) at lower wage levels, the cases also involved issues related to enlargement, namely the legality of actions taken by state and non-state actors to prevent "social dumping." The following case studies trace the process through which different actors – including EU institutions and national and European social partners across old and new member states – sought to influence and frame the political and legal issues at stake in the two cases.

A. The Laval Case

In 2003 a Riga based firm Laval un Partneri Ltd (hereafter "Laval") won a contract through its Swedish subsidiary (L&P Baltic Bygg AB) worth nearly 2.8 million euros to refurbish and extend a school in the Stockholm suburb of Vaxholm. Between May and December 2004 Laval posted 35 Latvian workers to carry out the contract. In June 2004 the Swedish construction union (Svenska Byggnadsarbetareförbundet, hereafter "Byggnads") contacted Laval to argue that the Latvian posted workers should fall under existing Swedish national collective agreements for the building sector. By September 2004, Laval had not agreed to

Byggnads demands. At the same time Laval announced that it had signed a collective agreement with the Latvian Building Workers' Union, of which approximately 65 percent of the Latvian workers posted to Sweden were members. Under this agreement, Laval agreed to pay the Latvian workers approximately nine euros per hour, in addition to covering accommodation, meal, and transport costs. This wage was nearly double the average pay for construction workers in Latvia. Yet it was nearly half the rate of pay for Swedish construction workers in the Stockholm region. Under the Swedish national collective agreement, Swedish workers at the same site would make approximately 16 euros per hour, in addition to 12.8 percent holiday pay.

In October 2004, five months after its first meeting with Laval, Byggnads announced it would initiate a blockade of the Vaxholm site. Laval organized a demonstration at the Swedish parliament on December 3 to protest the impending action. But to no avail. A day later the blockade commenced, with Byggnads members preventing workers and deliveries from entering the site and picketing the premises with signs reading "Swedish laws in Sweden." In December the Swedish electricians union (or Svenska Elektrikerförbundet) launched a solidarity strike and unionized cement suppliers ceased deliveries to the site. A month in to the blockade, Laval went to the Swedish Labor Court (or Arbetsdomstolen) to argue that the Byggnad blockade and the electricians' solidarity strike were illegal and should cease immediately and requested compensation for damages. Two weeks later the Court rejected Laval's claims, ruling that the blockade was legal under Swedish labor law. In January 2005, other unions launched sympathy actions, including a threatened boycott of other Laval sites in Sweden. By February 2005, the Vaxholm municipality requested to terminate its contract. A month later L&P Baltic Bygg AB declared bankruptcy.

The industrial dispute immediately took on a larger diplomatic dimension. Just days after Byggnads first contacted Laval in June 2004, the Latvian deputy prime minister met with the Swedish ambassador in Riga to request that the Swedish government intervene to prevent discrimination on the grounds of nationality and "attempts to restrict freedom of competition and the free movement of services" in the EU (quoted in Woolfson and Sommers 2006: 55). Latvian Foreign Minister Artis Pabriks claimed the action "goes against our understanding of why we joined the EU" (James 2006). Then Swedish Prime Minister Göran Persson, leader of the Swedish Social Democratic Party, claimed that Swedish unions had the "right to take

retaliatory measures" in order to "ensure the survival of collective agreements" (Centre for a Social Europe 2004, quoted in Woolfson and Sommers 2006: 55).

Swedish and Latvian employer associations condemned the industrial action. The Latvian Construction Contractors Association sent a letter to Byggands and the Swedish ambassador to Latvia threatening to boycott Swedish construction companies operating in Latvia (Karnite 2005). Svenskt Näringsliv, the Confederation of Swedish Enterprise that represents 54,000 Swedish companies, also supported Laval's position, eventually contributing thousands of euros towards Laval's legal fees in bringing the case to Swedish court (Jacobsson 2007). Why Swedish employer associations and some Swedish opposition parties aligned themselves with the Laval position might be explained in part by internal factors. Swedish employers have long sought to secure more firm-level autonomy in wage bargaining (Pontusson and Swenson 1996) and increase the flexibility of the Swedish labor market more generally. Thus the Laval case presented an opportunity for Swedish employers to challenge existing national arrangements. To counter claims made by both Swedish and Latvian critics that the unions' actions discriminated against Latvian workers in Sweden (and foreign workers more generally), Byggands stressed that the action was designed to protect the rights of all workers to fair wages and working conditions – taking out a full page advertisement in a Latvian newspaper displaying two hands clasped in solidarity (Woolfson and Sommers 2006: 55). Latvian unions were largely silent throughout the dispute. Representatives of the Latvian Union of Construction Workers, which represented the Latvian workers in Vaxholm, did express concerns, however, that Byggands neglected to inform them of the industrial action.

In April 2005, the Swedish Labor Court requested a preliminary ruling from the European Court of Justice. With this step the Vaxholm dispute became a European issue. The Swedish Labor Court asked the ECJ to rule on three matters. First, whether the right to industrial action falls within the scope of community law, including Article 49 on free movement of services. Second, whether Swedish law, which leaves it to social partners to define the terms and conditions of employment, constitutes adequate implementation of the 1996 posted workers directive (96/71/EC). That is, with the posted worker directive mandating that foreign workers be protected under the host state labor laws, does the Swedish voluntary collective bargaining model provide adequate legal protections for foreign posted workers? And third, in light of the first two questions, whether trade unions can use industrial action,

which are legal under national laws, to compel a service provider from another member state to provide comparable terms and conditions of employment.

While the ECJ considered the case, political debates continued outside the courts. In December 2005 then EU Commissioner for the Internal Market and Services, Charles McCreevy, announced during a visit to Stockholm that he would oppose the Swedish government and Byggand position in the ECJ case, arguing that the Swedish unions' action against Laval violated free movement of services (Jørgensen 2005). McCreevy's comments provoked outrage among trade unions across Europe, as well as among Swedish and Danish social democrats. Given that Denmark's industrial relations model is quite similar to Sweden's – based on voluntary collective bargaining rather than mandatory minimum wages – Danish actors weighed in on the impending decision. Former Danish Prime Minister Poul Nyrup Rasmussen suggested that McCreevy's comment had seriously undermined Swedish and Danish support for the EU (James 2006). This view that the dispute might have wider implications for Swedish support of the EU more generally was reinforced by the Swedish Employment Minister's comment that the question of Sweden's withdrawal from the EU would be raised. "There are a lot of people out there," he said, "who voted for EU entry in the belief that the Swedish model would stay intact" (James 2006). When the ETUC asked European Commission President Jose Manuel Barroso to clarify whether McCreevy's comments reflected the view of the European Commission as whole, Barroso responded that "In no way are we going against or criticizing the Swedish social model" (James 2006). When asked in a European Parliament hearing on the dispute to expand on his position, McGreevy remarked: "Latvian trade union members are entitled to have their interests defended as much as Swedish trade union members…The real issue to me is what we mean by an internal market" (EurActiv 26 October 2005).

On 9 January 2007 the ECJ held a hearing on the case. In addition to the two plaintiffs (Byggands and Laval), the European Commission, 14 member states, Iceland and Norway, and the EFTA Surveillance Authority submitted observations. According to a ECJ official, "While it is difficult to give an average of the number of Member States intervening in a case, it would be safe to say that very few cases generate the number of interventions seen in these two [Laval and Viking] cases" (Personal interview March 2008). Figure 1 plots the positions of the 20 submitted observations based on the extent to which they sided with the Laval (free movement of services) or Byggands (right to industrial action) position.

[Insert Figure 1 here]

Observations submitted on behalf of member states did cluster around new and old member states, with Estonia, Latvia, Lithuania, Czech Republic and Poland arguing that the Byggand action was neither compatible with free movement of services (Article 49) nor the posted workers directive. Yet new member state positions differed in some respects. While Latvia and Lithuania stressed that industrial action cannot be taken if a collective agreement was already reached in another member state, Estonia, Czech Republic and Poland stressed that industrial action cannot be justified where national legislation, like in Sweden, lacks specific provisions on mandatory wage rates. Thus, whereas the Latvian and Lithuanian observations supported a broader "country of origin" principle (where regulations of firm's home state should prevail), the later observations concede that acceptable national justifications may exist to limit the free movement of services. The UK and Ireland also shared the position of new member states, but with the UK taking an unequivocal position in support of freedom of services and Ireland conceding that some exceptions should be allowed. Most old member states, on the other hand, argued forcefully that free movement of services cannot infringe on the right to industrial action to enforce wage agreements or national social policies more generally. The European Commission observed that both principles must be upheld but it was up to national and ECJ courts to decide which principle should prevail on a case by case basis.

On 23 May 2007 ECJ Advocate General Paolo Mengozzi released his opinion on the case. Mengozzi argued that industrial action does fall within the scope of freedom of services. Trade unions can use collective action to compel service providers from another member states to provide equivalent terms and conditions of employment, provided that collective action is motivated by public interest objectives such as protection of workers or attempts to combat social dumping. Since the Swedish union's collective action was designed to contribute to the protection of the Latvian posted workers, according to Mengozzi, it was neither discriminatory nor disproportionate.

In their December 2007 decision, the ECJ recognized that the right of trade unions to take collective action is a fundamental right under Community law – and that the right to take collective action for the protection of workers against social dumping might constitute an overriding reason of public interest. However, departing from Mengozzi's opinion, the ECJ

deemed that in the Laval case the Swedish unions' boycott violated the principle of free movement of services since the unions' demands exceeded minimal protections under national labor law. The ECJ decision thus marked a boost for unions' recognized right to take industrial action under EU law, but a blow to Sweden's voluntary collective bargaining system. The Swedish government expressed disappointment in the ruling. Swedish employment minister Sven Otto Littorin told the *Financial Times* that the center-right government, which had supported the unions in the dispute, would now have to amend the law. "I'm a bit surprised and a bit disappointed by the verdict," he said. "I think things are working well as they are" (*Financial Times* 19 December 2007). The legal representative for the Swedish government in the ECJ case, Andres Kruse, remarked: "The free movement of services cannot take precedence over such fundamental rights as negotiating a collective agreement or staging an industrial action" (BBC 9 January 2007).

Supporters of Laval's position voiced satisfaction with the ruling. The key counsel for Laval, Anders Elmér, remarked in the Swedish daily *Dagens Nyheter* that the ruling vindicated Laval's opposition to the blockade (Carp 2008). Svenskt Näringsliv also welcomed the decision. Its vice-president, Jan-Peter Duker, said: "This is good for free movement of services. You can't raise obstacles for foreign companies to come to Sweden" (Jacobsson 2008). Latvian public officials also weighed in on the debate. Latvian European Parliament member Valdis Dombrovskis of the centre-right EPP-ED Group suggested that the EU should consider putting protective mechanisms in place to safeguard companies that post workers from the "arbitrary and unjustified demands of trade unions" (EurActive 27 February 2008). Jorgen Ronnest of the employers association BusinessEurope struck a more cautious note. While the ECJ ruling will contribute to "improving the development of an internal market" by forcing legal clarity, Ronnest argued, policymakers should first "wait for member states to draw their own conclusions on what [the Laval and Viking judgements] mean for their national systems" – and "only then we can see whether something has to be done at EU level" (Ibid.).

Swedish labor unions, Swedish opposition parties, and the ETUC condemned the ruling. While many commentators made a point of emphasizing that the ECJ had upheld the fundamental right to strike – as well as to take actions to preserve national protections against social dumping – they concurred that the ECJ ruling presented a setback to the Swedish collective bargaining system and the European Social Model more generally. The ETUC

released a statement expressing their "disappointment" over the challenge the ruling "poses to the very successful flexible Swedish system of collective bargaining and those of certain other Nordic countries – the models for flexicurity currently being promoted by the European Commission" (ETUC 18 December 2007). The Latvian unions had been relatively silent during the course of the dispute. Yet after the ruling, the president of the Latvian Free Trade Union Confederation, Peteris Krigers, remarked that the ECJ ruling would require unions to improve their cross-border communication channels (Whittall 2008).

On February 26, 2008 the European Parliament's Employee and Social Affairs Committee held a hearing to "exchange views" on the Laval and Viking cases. In front of a packed audience, ETUC General Secretary John Monks argued that the Laval case challenges "by accident or by design" the European Parliament's position that the services directive places fundamental social rights and free movement of services on an equal footing. He remarks:

> The idea of social Europe has taken a blow. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the actions they take against those employers' tactics. That is both wrong and dangerous. Wrong because workers' rights to equal treatment in the host country should be the guiding principle. Wrong because unions must be autonomous. And dangerous because it reinforces those critics of Europe who have long said that liberal Europe would always threaten the generally excellent social, collective bargaining and welfare systems built up since the Second World War (European Parliament 26 February 2008).

Leading up to and immediately following the ECJ rulings the ETUC had taken a wait and see approach. Yet Monks used the hearing to ratchet up the political stakes of the ruling. Just as "Bolkestein derailed the EU Constitutional Treaty," Monks argued, the Laval case "could damage the ratification of the EU Reform Treaty as awareness of its implications spreads" (ibid.)

B. The Viking Case

In October 2003, Viking Line, a Finnish ferry company, gave the Finnish Seamen's Union (or Suomen Merimies-Unioni, hereafter referred to as FSU) notice of its intention to reflag its passenger vessel *Rosella*. One of seven Viking vessels, *Rosella* runs routes from Sweden and

Finland through the Baltic Sea archipelago to the Estonian capital Tallinn. Viking argued that in order to compete with other ferries operating on the same route, it intended to register the vessel in Estonia, where it had a subsidiary, and employ an Estonian crew. Replacing the Finnish crew with an Estonian one would greatly reduce Viking's labor costs due to the far lower levels of pay in Estonia than in Finland. Once the existing collective agreement between Viking and the FSU expired on 17 November 2003, the FSU was no longer under the Finnish legal obligation to maintain industrial peace and soon after gave notice of its intention to strike in order to prevent the reflagging. The union put forth two conditions to renew the collective agreement: (1) that regardless of a possible change of flags on *Rosella* Viking would continue to follow Finnish laws and Finnish collective bargaining agreements; and (2) that any change of flag would not lead to any redundancy and lay-offs of current employees or change in terms and conditions of employment without union consent. The FSU justified its position in press statements by arguing that they were seeking to protect Finnish jobs.

The dispute soon took on a transnational dimension. Responding to a request for support from FSU, in November 2003 the London-based International Transport Worker's Federation (ITF) distributed a circular to its all of its affiliates requesting that they refrain from negotiating with Viking line and threatening a boycott of all Viking Line vessels if they failed to comply. ITF, which represents 600 affiliated unions in 140 countries, had long campaigned against the use of "flags of convenience" (or FOC). This policy seeks to establish genuine links between the nationality of ship owners and the vessel flag – in other words, combating the prevalent use of flags from tax and regulatory havens – and to enhance the conditions of seafarers on FOC ships. When Viking learned of the ITF circular it immediately sought an injunction to restrain ITF and FSU from the strike action. In the course of conciliation meetings Viking agreed that any reflagging would not lead to layoffs. Yet the ITF and FSU refused to withdraw its circular.

A year later, in November 2005, Viking Line brought a case against the ITF in the UK courts. Viking could bring the case before the UK courts since its main objection was against the boycott threatened by ITF, which is headquartered in London. Viking claimed that the ITF, by threatening a boycott, infringed on Viking's right of establishment with regard to the reflagging of the Rosella. The UK commercial court ruled in Viking's favor, granting an injunction against the unions. The ITF and FSU appealed the decision in the UK Court of

Appeals, which subsequently lifted the injunction and referred a series of questions to the ECJ to resolve. The questions were twofold: (1) whether collective action falls outside the scope of Article 43 – that is, whether the free movement of maritime services supercedes or is constrained by the right to take collective action; and (2) whether Article 43 has a "horizontal direct effect," in that private companies can appeal to Article 43 in disputes with trade unions. In essence, the UK Court of Appeals asked the ECJ to decide, like in the Laval case, how to strike an appropriate balance between the right to take collective action and the fundamental freedom to provide services. ITF summarized the stakes of the case as involving "an essential issue: whether, and to what extent, industrial action by unions in order to prevent the imposition of lower wage rates and terms and conditions of employment is permissible when ships transfer flags within Europe" (ITF 10 January 2007).

The ECJ held a hearing on 10 January 2007. Fifteen states and the European Commission submitted observations in the case. ITF General Secretary David Cockroft commented: "The number of submissions shows how many states have recognized just how deep the impact of this case could be, and we applaud the court's determination to settle it" (ITF 10 January 2007). He continued:

> What's at issue here could hardly be more fundamental. The right to defend your job against the right of a business to do what it takes to up its profits; a Europe for the powerful or a Europe for its citizens. This is not about new entrants, or labor costs. It is about the rights and basic beliefs that most of us have always believed underpinned the European Union (ibid.).

The observations submitted by 14 member states, plus Norway, mirrored the constellation of positions in the Laval case. The Czech Republic, Estonia and the UK used some of the strongest wording to argue that the unions' actions violated EU law. According to the Czech observation: "The *mere threat* of collective action may constitute a restriction of the parent company's right to establishment under Article 43 EC [my emphasis]" (ECJ 2007b: 11). The UK observation stated: "There is no legally binding 'fundamental social right to take collective action' in Community law." (ibid: 19) Estonia argued neither "protection of the fundamental right to take collective action nor protection of workers may be relied on under the heading of protection of public policy" (ibid.: 14). The Latvian, Lithuanian and Polish government positions concurred with this view. Those states expressing unequivocal support

for the right to collective action included Germany, France, Italy, Finland and Sweden and Norway. Those states supporting the right to collective action, but subject to certain conditions, include Belgium, Denmark, and Ireland. The European Commission argued that Article 43 does not have horizontal direct effect, meaning that private companies cannot resort to EU law to prevent unions from taking collective action against them (ibid.: 19).

[Insert Figure 2 here]

On May 23, 2007 Advocate General Miguel Poiares Maduro delivered a preliminary judgement. Concerning the fundamental point of whether collective industrial action falls outside the scope of Article 43, Maduro took a compromise position, arguing that EU provisions on establishment and freedom to provide services are "by no means irreconcilable with the protection of fundamental rights or with the attainment of the Community's social policies" (ECJ 2007d: 2). Maduduo expressed the view that trade unions could take collective action to dissuade a company from relocating within the EU, so long as it did not partition the labor market along national lines or prevent a relocated company from providing services in another member state. Departing from the Commission's submitted opinion in the case, Maduduo argued that Article 43 provisions do have a horizontal effect, giving an employer the right to pursue a claim against a trade union for violating free movement of services and the right of establishment. However, Maduduo argued that Article 43 does not necessarily preclude a trade union from taking collective action to protect the interests of its workers, even if the result of the action might restrict free movement of services. The question of the legality of particular actions should be left to national courts to decide, according to Maduro, provided that there is no difference in the treatment of national and foreign companies. In a press release following Maduro's opinion, the ITF welcomed affirmation of the right of trade unions to take industrial action, but also expressed concerns that the ruling "might encourage businesses to believe that they can override those rights through a kind of cross-border hopscotch" (McKay 2007).

On December 11, 2007 the ECJ handed down its eagerly awaited judgment. The ECJ stated, consistent with Maduro's opinion, that collective action may be legitimate if its aim is to protect jobs or working conditions and if all other ways of resolving the conflict were exhausted. Concerning horizontal direct effect, the ECJ argued that private companies can appeal to Article 43 in seeking relief from industrial actions. With respect to the Viking case,

however, the court ruled that the strike action threatened by the two unions to force the employer to conclude a collective agreement amounted to a restriction of Viking's freedom of establishment as set out in Article 43. According to the Court, FSU's demands to force Viking to abide by Finnish collective agreements made reflagging pointless, given that the aim of reflagging was to reduce *Rosella's* labor costs. Put another way, if Viking was prevented from reflagging its vessel to Estonia, then Viking, through its Estonian subsidiary, was denied the freedom to compete with other Estonian-based companies doing business under Estonia's lower minimum wage rates and laxer regulations. Yet the Court ruled that ITF's policy of combating the use of flags of convenience could, in general, be interpreted as a legitimate restriction of the right of freedom of establishment. The Court left it to the national courts to determine whether the objectives of collective action can be deemed to proportionate to protecting workers' jobs and employment conditions and/or whether the action is in the public interest. If so, then collective action can infringe on the right of establishment and freedom to provide services. The ITF and FSU and Viking settled out of court in March 2008, the terms of which were not disclosed.

5. Conclusions

Three main sets of conclusions can be drawn from the analyses of the two cases on the relationship between enlargement, service liberalization and the European Social Model. The first concerns the role of European institutions. The European Commission is commonly viewed as the main driver of market liberalization, a popular perception bolstered by Bolkenstein's proposal to liberalize the service sector. Yet the Laval and Viking cases point to internal tensions within the Commission. While Commissioner McGreevy declared his support for the Laval position early on in the case, the Barroso Commission offered assurances that it was not criticizing the Swedish social model. The Commission observations submitted in both cases represented a compromise position, neither privileging the free movement of services nor the absolute freedom of the right to collective action. If the Commission increasingly looks to the courts to adjudicate contentious issues related to the market and social protections, the ECJ becomes an increasingly relevant player in determining the future of the ESM. Tarrow and Caporaso (2007) argue that the ECJ interprets EU legislation in an increasingly *social* way, cognizant of the need to embed markets in societies. Yet in the Laval and Viking cases, the ECJ judgements can be interpreted as privileging market liberalization over prevailing national social models. Like

in the Bolkenstein case, the European Parliament assumes a mediating role in seeking negotiated compromises between market liberalization and social protections – in these cases quickly calling for special hearings and public forums to assess their legal and political impact.

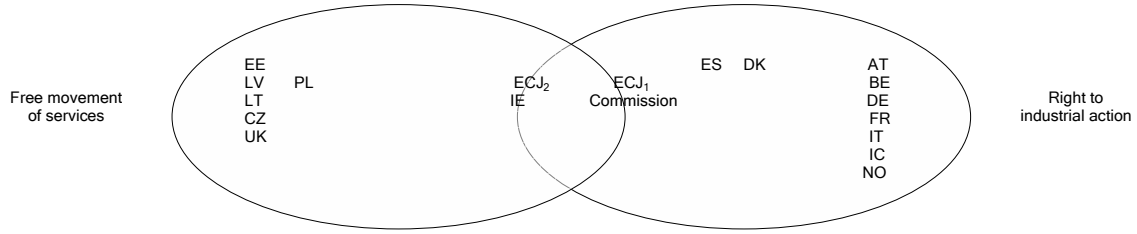
The second set of conclusions concerns emerging political cleavages among member states in the enlarged EU. While the ECJ can act autonomously from member states, it is also a political actor, cognizant of and responding to political concerns (Conant 2007). That the ECJ decisions in the Laval and Viking cases diverged from the positions of dominant EU member states such as Germany and France challenges claims that ECJ decisions typically reflect the preferences of the most powerful states (Garrett 1995). Analyzing ECJ observations submitted by the member states, the results support Grabbe's (2004) prediction that in most economic policy matters new member states will join forces with more liberal states such as the UK, Ireland and The Netherlands. Indeed, the positions submitted by new member states were most closely aligned with more liberal existing EU members. Yet it is notable that the most politically mobilized new member states in these cases – Latvia and Estonia – are two of the most "neoliberal" according to Bohle and Greskovits's (2007) categorization of varieties of transnational capitalisms in CEE. Notably absent in ECJ hearings, or larger political debates, was "neocorporatist" Slovenia or "embedded neoliberal" states such as Hungary or Slovakia. This suggests that one of the most important emerging transnational constellations in terms of member state positions in the enlarged EU may be among its most neoliberal members. In other words, states with the strongest commitment to a liberalizing agenda, the UK and The Baltics, are finding themselves like-minded allies within the EU. Yet if ECJ verdicts have policy implications only when they accurately reflect a policy consensus, then the Laval and Viking cases, which illuminated significant divisions among member states on the appropriate balance between service liberalization and social protections, may result in "contained compliance" at the national level (Connant 2007).

Yet this will depend not only on member states, but the responses of social partners. ECJ cases provide opportunities for individuals and groups to challenge national policies at the EU level or provoke political responses. In the Laval and Viking cases, each company appealed to the ECJ to intervene in industrial relations disputes – Laval against Swedish trade union actions and court judgements that supported them, and Viking against Finnish and international union actions. The companies did not pursue their cases in isolation. The most

explicit evidence that employers seized on the opportunities presented in the case to challenge existing labor laws was the Swedish employers association, Svenskt Näringsliv, funding Laval's case in front of the Swedish labor courts. This provides some basic support for Kelemen's (2003) claim that the combination of EU-driven economic liberalization and fragmented national regulatory traditions is leading to "adversarial legalism" in the EU whereby private actors are increasingly pursuing their regulatory or anti-regulatory agendas through the courts. That the ECJ ruled that free movement of services and right to establishment has direct horizontal effects provides legal grounds for firms to seek legal redress against union actions.

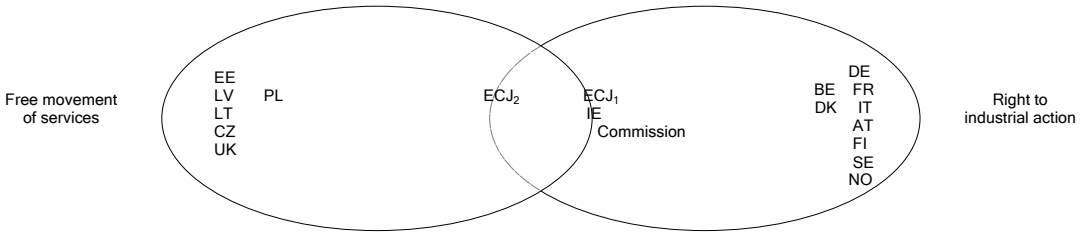
Concerning the role of trade unions, the disputes could at first glance be read as a case of national unions acting to protect their national arrangements against the pressures imposed by the liberalization of service and labor markets. Yet in both cases the union actions assumed a transnational dimension, with the Swedish union Byggands framing its actions as representing all workers and the Finnish seaman's union immediately joining forces with its international association. The ETUC also intervened at all stages of the case – in the beginning pursuing a wait-and-see strategy and ratcheting up the political stakes after the decision, with its president, John Monks, threatening that the decisions could threaten national ratifications of the reform treaty. The ETUC response can interpreted as a part of an ongoing strategy on the part of unions to protect the right to industrial action and preserve labor and social protections against further market liberalization (Hyman 2005; Bieler 2007). Yet such a strategy can only succeed through meaningful coordination among unions from new and old member states. Whether coordination is possible depends in part on interests. While the interests of old member state unions in preventing social dumping are clear, increasingly trade unionists from new member states recognize that they are not immune to similar pressures coming from lower wage, weaker regulated states like Ukraine or Moldova further east. Coordination also comes down to trust. The limited communication between Swedish and Finnish labor unions and their Estonian and Latvian counterparts in the Laval and Viking cases suggest that establishing solidarity among old and new member state remains a key challenge for transnational collective action surrounding service liberalization in the enlarged EU.

Figure 1: Observations submitted to January 2007 ECJ hearing on the Laval case (C-341/05)



Notes: ECJ_1 refers to the final ECJ judgement of 18 December 2007. ECJ_2 refers to the Opinion of the Advocate General P. Mengozzi of 23 May 2007. **Source:** European Court of Justice 2007a.

Figure 2: Observations submitted to the January 2007 ECJ hearing on Vikings case (C-438/05)



Notes: ECJ_1 refers to the final ECJ judgement of 11 December 2007. ECJ_2 refers to the Opinion of the Advocate General M.P. Maduro of 23 May 2007. **Source:** European Court of Justice 2007b.

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[1] Under the so-called "2+3+2" arrangement member states had two years (2004 to 2006) either to open up domestic labor markets or use national legislation to restrict migration from the eight new East European states. In the next three years states could either end the initial arrangements or keep them in place. The final two year escape clause allowed states to defer lifting restrictions if migration is deemed to pose a threat to domestic labor markets. But by 2011 citizens from all EU member states must have full freedom of movement.