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**Title**

The meta-regulation of European industrial relations: Power shifts, institutional dynamics and the emergence of regulatory competition among Member States’,

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**Abstract**

The article comprises three parts. First, we discuss three key concepts used in our research; namely structural power, European social space and meta-governance. In the second and empirical part of the article, we examine attempts to institute market-enhancing modes of meta-governance. These attempts are exemplified either through the proposal of the Service Directive or through the rulings of the European Court of Justice (ECJ) on the cases of Laval, Viking, Luxemburg and Ruffert. We examine the response of the European Trade Union Confederation (ETUC) to these challenges, and discuss the tensions that arise from these rulings between labour and capital but also between national and European spaces of action. In the third part we put forward an alternative framework which allows us to elucidate the particular form of (emerging) meta-governance of industrial relations in the EU and the challenges that stem for unions within the European social space.

**Keywords:** Competition, ECJ, governance, meta-regulation, social space, power

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*The [European] 'common' market implied competition between firms, but co-operation between states. This keystone of European construction was removed when member states and the Commission took up the project of a deregulated market, with the wholesale elimination of restrictions in any country or sector to the free circulation of capital and goods. Such an approach is bound to undermine solidarity between member states, creating competition between national legal systems—particularly in the sphere of labour law—within the EU itself.*

Soupiot (2006: 118)

## **Introduction**

In this article we illustrate the emergence of what we define as the *meta-regulated* European social space, with special reference to industrial relations. We explore the gradual institutionalisation of meta-regulation as a novel, market-enhancing, mode of governance in the EU by discussing cases pertaining to labour law and industrial relations in the EU covering the period 2005-10. Meta-regulation concerns the governing the transnational interactions between a) the collective rights inscribed in member states' labour laws, and between b) the principles and norms embodied in these laws vs. the principles and norms regarding the regulation of the free movement of services in all EU Member States.

Our work used as its starting point an insightful observation by Supiot<sup>1</sup> when, as far back as 2006, he remarked that 'there is already a glaring contradiction between the rules originating from the old common market project (aiming at the harmonization of member states' laws, especially in the social and environmental fields) and those stemming from the new global-market project (aiming at setting national legal systems in competition with each other).' We argue that this 'glaring contradiction' is currently being resolved in terms unfavourable to European labour and provide an appropriate conceptual framework and empirical evidence to support our assessment.

Our paper comprises three parts. In the first part we define three concepts that are central to our analysis; namely, structural power, European social space and meta-governance. In the second and empirical part, our research examines five (5) cases that sign-post the gradual emergence of meta-regulation in the EU social space. In this way our work builds and expands from the research of Lillie and Greer on the European construction sector and in particular their plea that comparative industrial relations should take seriously the connection between action at the national and transnational levels.

The discussion of the first case concerns an early top-down attempt, the so-called Service directive. It is followed by discussion of four more recent cases, which we define as bottom-up attempts, namely, the cases of 'Laval', 'Viking', 'Rüffert' and 'Luxemburg' and the respective rulings of the European Court of Justice (ECJ). We consider the Service Directive and the ECJ rulings as representative attempts to institutionalise a hierarchy of norms by proxy, by making *competition* the main principle of regulating the

diversity of diversity of socioeconomic life in the European Union (EU). The ECJ cases demonstrate that the challenge for the governance of labour-capital relation in the EU is not solely over the competition of wages between workers but also over how EU institutions might favour the inclusion of other collective agreements than the existing national ones.

In the third part, the article discusses how these developments indicate not only a tendency to institutionalise downward competition between wages at EU level but also a tendency to institutionalise a downward competition between different national collective agreements within the (emerging) EU social space. We argue that what is, effectively, being created here is an EU ‘market’ of national regulations and that, fundamentally, the ECJ rulings are about the struggle over the ‘hierarchy of values’ that will frame the emerging European social space and its process of integration in the decades to come. This is a struggle in which, so far, European labour seems to be on the losing side and in our article we aim to explore not only what has happened and its implications but also provide, and test, a conceptual framework that may help us comprehend the scale and quality of changes in the landscape of industrial relations and public policy in Europe.

### **Three key concepts: structural power, social space, meta-governance**

First, when we use the concept of *power* we refer to a dynamic *relation* between social agents. We intentionally distinguish between 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 mobilizing *power resources* in any, or all, of three dimensions - structural, relational and discursive<sup>ii</sup>. The most relevant aspect for the purposes of our article is structural power, similar to what Hay (2002) describes as the *context-shaping* aspect 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 regulate the distribution of these power resources, i.e. by influencing the rules of the game.

By exploring this dimension, analysis can reveal the *instituting* capacity of social agents. Power asymmetries can be observed as differences in the capacity of social agents to maintain or alter the ‘rules of the game’, given that changes in the form and content of institutions usually follow changes in the capacity of agents to mobilize structural power resources. In this context, structural power is the dynamic *relation* between social agents in their attempt to defend or alter how regulatory processes are consolidated institutionally. The outcome of this dynamic relation ‘translates’ into both the contents of institutions and the modes of instituting them. Institutions, in this context, are understood as “structurations of power and as residues of conflict” (Korpi 2001: 8).

Second, with the term *social space* we refer to a spatially and temporally specific combination of two elements: a mode of governance with its corresponding institutions, and the interacting social agents with 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, of which the institutional architecture and its corresponding *core instituting norm* (e.g. competition, co-operation, solidarity) determines how power resources will be redistributed in the social space. Although social spaces are of different regulatory scales (e.g. local, national, transnational), they are also linked, often related hierarchically. Of interest to us 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. In this context, our article examines how the structural power asymmetry between unions and employers is currently articulated in the shifting levels of governance and spaces of action in EU, by examining how the interaction between national social spaces is regulated at the European level. We argue that the locus of the power dynamic between labour and capital in EU is shifting from national social spaces into an emerging European social space. The latter is not merely the summation of national social spaces plus the EU institutional layer – the set of supra-national and intergovernmental arrangements – but, crucially, an emerging social space of action for actors who use the opportunities provided by the mode of governance that regulates the interaction between these two levels of social action.

Finally, our article 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 also Carmel and Papadopoulos 2003). However, in trans-national institutional formations, like the EU, governance is not limited to the mode of governing at one level of social action but also about the governing of the interplay between different modes of governance and between different levels of social action. To avoid conceptual confluences 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 the re-articulation of powers and a re-territorialisation of social relations (Brenner *et al.* 2003), *meta-regulated* to favour capital and the market rationale.

Drawing from recent events in the development of EU labour relations our article examines in the next session the attempts to institute market-enhancing modes of meta-governance either through the proposals of the European Commission or through the ECJ rulings. 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 and we empirically explore the characteristics of the latter.

The article continues with what was regarded as a 'neo-liberal' attempt to integrate services market through the Service directive and is presented as a typical example of an attempt to regulate models of national industrial relations.

### **Regulating labour relations in the European social space: From harmonisation to competition**

The Service Directive has its origins in the guidelines named after the Dutch Commissioner for internal market issues in the EU, Frits Bolkestein, which aimed to liberalise the provision of services in the European social space and attempted to further integrate the services market as stated in the Lisbon strategy. According to the Bolkestein guideline, services could be bought depending on the wage prices of the country of origin of the service provider. The initial plan of this 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 cancel the national collective bargaining and simultaneously provide the necessary regulation to promote downward wage competition between EU citizens.

The proposal sparked fierce protests in countries with ‘coordinated market economies’, a term that we borrow from the Varieties of Capitalism literature (see Hall and Soskice 2001; Menz 2005). Despite the political clout in several countries, the succeeding Commissioner McGreevy and the Commission President Barroso were willing to put through their reform agenda and the Service Directive was at the heart of this attempt. However, the Service Directive was not welcomed and the example of the ‘Polish plumber’ that would undermine 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 Service Directive attracted a lot of attention, enough to halt the approval of the European Constitution.

Almost ten months later, the Service Directive passed through European Parliament but with significant amendments limiting the impact of ‘harmonisation’. The split of employers’ interests along with the ETUC lobbying for the amendment of the proposal, paved the way for a distinct alliance of interests within the European parliament (Dølvin and 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 and the conservative parties from Great Britain, Spain, Netherlands, Poland, Hungary and the Czech Republic rejected the revised proposal. Left wing and communist parties voted also against the proposal. The voting was very much based on “a mixture of a ‘left-right divide’ and a ‘clash of capitalisms’” (Höpner and Shäefer 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.

The European Trade Union Confederation (ETUC) was satisfied with the abolishment of the ‘country of origin of clause’ and regarded the end result as a ‘success’. However, ETUC remained rather less sceptical about the abolishment of the ‘respect for fundamental rights’ and its replacement to the respect of the Community law (ETUC). The ‘country of origin’ clause is abolished but it is 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 abolishment of the ‘country of origin clause’ and its replacement with the ‘freedom to provide services’, was not thoroughly

examined or 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 that was approved by the European Parliament links the Member states’ labour and workers protection to be interpreted by the European Court of Justice (ECJ) and its interpretation on a “case by case” basis, in compliance with the Community law (European Union 2006: 11). Essentially the right to collective action was not undermined directly by the Service Directive but subjected to the approval of the ECJ doctrine on the proportionality of restrictions on the freedom to provide services (Novitz 2008). Suffice to say, ECJ rulings are not known for their protecting but rather its promoting business and competition friendly decisions, while others argue that Community law itself is not protecting labour rights (see Davies 1997).

As Supiot writes, the European Commission (CEM 2005) in its paper for ‘Better Lawmaking’ stated that EU’s ‘regulatory environment’ should further promote European competitiveness through the creation of an ‘expert committee’ that would assess and filter policy proposals that harm European competitiveness. According to the guidelines on impact assessment, new legislation both at national and European level has to be thoroughly scrutinised for its impact at economic and competition aspects. 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 (CEM 2002; 2005; 2006). Further regulatory attempts should be kept at minimum level, locking thus the ability of new legislature into a framework that promotes the market rationale. The market rationale thus “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 the policy making, setting in motion a regulatory mechanism that would reject any policy that might harm competition and would only allow through its filter, policy proposals that are taken within 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. Not only does this translation tend to silence certain critical modes of demanding justice, particularly those that rely on moral or distributive values, but the *institutional* solutions which bureaucrats advance to secure the ‘translated’ social welfare values render them politically vulnerable” (Morgan 2003:2).

These attempts to ‘economise’ social spaces using ‘top-down’ means are witnessed 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. As it will be shown, European firms based on the EU legislation are effectively driving a competition between national labour laws (Supiot 2006). As it will be shown in the next section, the ECJ rulings explicitly did not touch upon harmonisation but instead opted to consolidate

competition between state regulations as they key principle for regulating socioeconomic conditions within the European social space.

### **Collective action vs ‘freedom to provide services’: The ‘Laval’ case**

All of four ECJ cases resemble significant turning points to the competition between state regulation and the role of nationally based collective bargaining between labour and capital. In the Laval case, 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 be under the Swedish Labour law and thus Swedish trade unions should participate in the collective agreements.

Laval initiated negotiations with the Swedish construction union (‘Byggnads’) but did not accept the terms and wage rates complied by Swedish collective bargaining regulations and instead employed Latvian workers that would be posted to Sweden. Laval suggested that it had the right to negotiate wages according to Latvian collective agreements. On their behalf, ‘Byggnads’ exercised their right -in accordance with Swedish labour law- and reacted with industrial action and a blockade.

It is of interest to note, that the first collective agreement in Latvia came in 2004 and was covering only the members of the trade unions. Since ‘Laval’ workers were not unionised, the company could not state that it followed the Latvian collective agreement. However, soon a second national collective agreement became effective in Latvia that provided coverage to all employees while it issued that workers in Latvian companies can only be legally represented 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 through the alteration of collective agreement’s coverage was both reflexive and strategic; it manifests how important is the role of the state 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 at least pay to workers according to the national minimum wage. The crucial point here is that Swedish collective bargaining is not binding for all workers and employers and neither is the state enforcing such agreements<sup>iii</sup>. Due to well organised trade unions and employers, the Swedish collective bargaining achieves a great coverage and problems of collective action are thus dealt through peak and sectoral organisations. Despite their extensive legislative framework and application, the Swedish industrial relations do not declare a minimum wage. Part of unions strength stems from their negotiating power in determining wages with employers, therefore the existence of a minimum wage would undermine their power as organisations and as social partners. Laval pointed out that since there is no minimum wage and the application of agreements



are not binding, then there are not obliged to pay the wage that is determined among Swedish social partners (Woolfson and Sommers 2006: 59). While the unions were backed up by the Swedish centre-right government, the Confederation of Swedish Employers (SN) supported and funded Laval's case before the court (ibid: 61). Laval referred the case to the Swedish Labour Court and the latter 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 the various actors involved. Certainly, the Confederation of the Swedish Enterprise (SN) were delighted with the rulings on Laval;

“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' (ETUC 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)” (ECJ 2007a, Point 99, parenthesis added).

### **Coordinated action vs 'freedom to establish': The case of 'Viking'**

The case of the Finnish ship 'Rosella' and its owner firm 'Viking' is another case that illustrates how EU is mediating a competition between different state regulations. The Finnish firm that operates the route from Helsinki to Tallinn realised that if the ship was under Estonian and not Finnish flag it would benefit through lower wages and thus enhance its competitive advantage over other firms. The Finnish Seamen Workers Union (FSU) contacted the International Transport Workers Federation (ITF) for the intention of the Finnish shipping firm. The ITF advised FSU that according to 'Flags of Convenience' policy, wages and condition of employment are to be decided upon the national agreements of Finland since the ship is owned by a Finnish firm irrespectively of its will to employ Estonian workers. At the same time as the negotiations for collective agreement between the 'Viking' and the FSU occurred, 'Viking' applied to the Court that any agreements would not have an immediate effect (ECJ 2006). As a response, FSU declared a warning for industrial action (November 2003).

'Viking' appealed to the Finnish Courts in order to cancel the industrial action of the trade unions and ask also for compensation. In December 2003, both actors entered again negotiations and a new revised agreement was reached. However, in 2004, 'Viking' 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 while 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 to the ECJ.

In the Viking case, the ECJ recognised as fundamental the right to collective action, if however all other means of protest are exhausted and the action does not harm the freedom to provide services (ECJ 2007b, point 44-5). The vagueness of this ruling is pretty obvious; can a right be fundamental and be restricted under conditions, especially when the latter are not that clear? The judgement of the ECJ is not denying the ability of unions for collective action in the national space of action but under 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, in our opinion, they missed a significant point. 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 any ability of unions to show solidarity through blockades in Europe since such an action is deemed to exercise discriminatory effects on the freedom of movement for persons and to provide services (ECJ 2007b, points 57-66; see also Achtsioglou 2010). The ruling of the case of Viking 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 Ruffert and Luxemburg cases**

Apart from these two cases that were discussed in detail, two more cases ended up in the ECJ jurisdiction and significantly challenged national collective bargaining and labour law across Europe. The 'Ruffert' case referred to the ability of a Polish subcontractor to provide constructing services at 46.5% of the wage 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 the lack of a universally (national) applicable collective agreement, any obligation for improved wages and working conditions under the German public law is not applicable and restrictive to the fundamental freedom to provide services (Schalchter and 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’ (ETUC 2010).

The ECJ ruling (2010) refers to the precedent of Laval and Viking cases in order to argue 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”.

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 incorporating these changes under public policy provisions. These 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 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’. 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” (ECJ 2008).

In principle, in the Luxemburg case the ECJ ruling touch upon Member States jurisdiction on what consists 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 (ECJ 2008).

In essence, the ECJ recognises both social rights and market freedoms as fundamental for the regulation of the European social space but when these two principles collide, as they did in these cases, 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). Therefore the ECJ 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) and also.
- challenge Member States right to define public policy provision (Luxemburg case) and procurement law (Rüffert case) within their own social space.

The article moves on and discusses critically the response of the ETUC on the ECJ cases, as the confederation represents the vast majority of unions across Member States.

### **The response of the European Trade Union Confederation**

Before the rulings the ETUC 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” (ETUC 2006b, our italics).

The ETUC responses to the rulings of the ECJ differed in the two cases; it welcomed the decision of the Viking-case ruling (ETUC 2007b) since it recognised the right to collective action as fundamental, while the decision for the Swedish unions was received with ‘disappointment’ (ETUC 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’ (ETUC 2008a). ETUC for the first time 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 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 to the ability of unions not only to defend labour standards (e.g. wages and working conditions) but also 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” (ETUC2008b, bold 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 on the Rüffert case, John Monks, 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.” (ETUC 2010).

The response of the ETUC leaves no doubt that power imbalances are widening but at the same time demonstrate the weak position that 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). We now move on to discuss how these power imbalances between labour and capital are regulated within the European social space.

## **ECJ rulings on the regulatory environment and the governance of labour-capital relation in EU**

We highlight 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 to exercise their power not at their national or EU levels but more importantly within the emerging European social space of action. Firms such ‘Laval’ and ‘Viking’ were willing to exploit the confusion among EU and national labour laws while the SN (Confederation of Swedish Enterprise) strategically aimed in 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 unions to respond to these pressures through collective action in the national social space was condemned, in the case of Laval, for harming competition and in particular the ‘freedom to provide services’. In the case of Viking, 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 coordinated manner across the European social space however was realised as a ‘discriminatory action’ against firms ‘freedom of establishment’. Therefore the ability of unions to protect their wages and working conditions from the logic of competition is hampered by what Wood (2004) calls the ‘extra-economic’; an effort mostly concerned with the regulation of the economic, the political and juridical coercion on social relations.

Second, the emerging European social space is challenging national labour and political institutions. Both ECJ cases illustrate the role of EU as framing different institutional orders for domestic actors. The literature on European integration so far stress either the importance of nation states (Moravcik 1993; Martin 2004) as key actors while others (Fligstein and Sweet 2002) prioritise the importance of European institutions in driving European integration. We argue that focusing on the national or/and the European level (ala EU) is not adequately capturing the process of European integration.

It is 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 institutions. For a start, national governments responded to the ECJ rulings; 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) while governments of nation states that have not set minimum wages are revisiting their national labour law (Sweden, Denmark).

It is crucial to highlight here that the ECJ is not attempting to harmonise labour relations across the European social space *per se* but instead set competition as the main principle of social instituting this space. For example, the ECJ allows member states to declare themselves what consists minimum wage and working conditions standards (allowing therefore variation) while at the same time, it rules that posted workers are not subject to favourable terms (interpreted as ‘extensive’ by the ECJ) that may apply in the host

country. The ECJ rulings therefore reverse the logic of the PWD and instead of allowing posted workers to equally participate with favourable terms and conditions, it limits their rights to a minimum set of wage and working standards as set by national labour law in the countries that have set such a minimum.

We continue to discuss how the rulings of the ECJ are attempting to consolidate competition within the emerging European regulatory social space as they principle for instituting socioeconomic life in EU.

### **The impact of ‘meta-regulation’ on national labour law, institutions and trade unions**

The ECJ rulings are attempts to render competition as the hegemonic ‘rationale’ of institutional-making in the emerging European social space. The competition between state regulations that was exemplified through the strategic and reflective action of the Latvian government to change collective bargaining agreements captures only part of the picture. The ECJ cases demonstrate that the challenge for the governance of the labour–capital relation in the EU is not solely the competition of wages between workers but how EU institutions might favour the inclusion of other collective agreements than the existing national ones, especially in countries where no minimum wages are set as universal and mandatory.

As we discussed earlier, EU is more a social space of action rather than a supranational state *per se*. The struggle placed in this social space exemplified with the Service Directive, is an attempt for regulation of competition between (national) state regulations. Thus, this *meta-regulation* is mediating the decisions of the power imbalances between regimes to the national space of action. The outcome of this struggle is not solely a move to an enhancement of the market economy rationale, but also an attempt to cancel out established agreements in the national level between labour and capital as well as to consolidate a competitive labour market inside the European social space. These ‘attempts aim not only to ‘economise’ social spaces (Morgan 2003) but crucially to make competition (if you prefer ‘economisation’) the dominant mode of *social instituting* of that space.

What has been described is thus an attempt for regulation of competition between state regulations, which simultaneously undermines any notion of national sovereignty and pulls the rug under of the national space of action together with its historical battles. In this way space and time are co-opted in this new different scale of power and authority, distinct from any borderline and history. This re-articulation of power and a re-territorialisation (Brenner *et al.* 2004; Jessop 2004) of social space displaces the relation between labour and capital at different levels of action. This conceptualisation of ‘meta-regulation’ bridges the notion of ‘economisation of politics’ (Morgan 2003) as the mode of instituting and the competition of labour law (Supiot 2006) as the content of this form of governance which is viable through institutional innovation in the European social space of action.

At the level of the nation state modes of instituting across models of political economy maintain to a large degree their differences and we do not expect them to wither away (Menz 2003). However, the mode of instituting at the European level of action which frames the national spaces of action, is increasingly biased in favour of the market-competition principle. Effectively, 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 the European national political economies and in this respect the future 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. It is constitutive of their trajectories and defines the terms under which their clash will be played out. What is at stake is therefore how EU integration transforms the institutional context, within which varieties of national capitalism operate and, ultimately, who governs the emerging European social space. In that respect our work seconds Lillie and Greer (2007) argument that comparative industrial relations should take seriously the connection between action at the national and transnational level and how actors “draw on rules and resources from supranational contexts and new configurations of interest” (2007: 576). In our view a shift of analytical focus is necessary to understand the current changes and therefore we conclude with some proposals for future research directions.

### **Conclusion: the social embeddedness of (labour) markets and the possibility for ... instituting of the emerging European social space**

The aforementioned developments resemble the historical construction of the national labour markets (see also Dale 2010), a process that accelerated during the late 18<sup>th</sup> and 19<sup>th</sup> century and involved the explicit dislocation of human beings to become low wage labourers as well as the introduction of significant regulation attempts (e.g. New Poor Law). Approached as instituted processes, markets cannot be seen separately from the context that regulates the conduct within them (a context which itself cannot be marketised) and as such, markets are continuously constituted by the dynamic between the market conduct and the regulation of this conduct. As Polanyi demonstrated, the idea that the economic realm can be separated from the political, an idea that was at the heart of what effectively was the *political* construction of national market economies, is based on a fallacy that economic and political spheres of social life can be institutionally separated (Polanyi 1944: 74).

We argue that a similar process is now taking place within the European social space, though it is not taking the form of a uniform European labour market but rather it is an attempt to consolidate a European market of state regulations and labour relations, with competition as the main principle for organised socio-economic life. Our analysis of the cases and the rulings of the European Court of Justice leads us to conclude that not only the power imbalances between trade unions and capital both within and between the EU



member states are widening in favour of capital but a process of radical re-embedding of the labour-capital relation is underway in an emerging post-national *European* social space. Indeed, it is the power dynamic of this relation that will actually determine the type of 'embeddedness' of socio-economic relations in societies that have markets (Block and Evans 2005) and especially in market *societies*, i.e. those societies in which the market principle is hegemonic in the sense that it has become the dominant mode of *social instituting*.

As Polanyi argued the potential counter-movement cannot be exhausted in the role of organised labour or in the national level of action. The shifting of governance and scale of action should signal trade unions to react to this institutional innovation of capital, by re-orienting their action in the new emergent spaces and territories. Whether their reaction will be defensive (protect established national socio-economic rights for labour), offensive (demand pan-European socio-economic rights for labour) or both remains to be seen. Currently, a response to the institutional innovation (meta-regulation) is still missing, allowing the 'market imperative' to subordinate the social needs and undermine the social protection rights of European citizens. It is in this new social space that EU trade unions among other social groups should coordinate their actions and confront the capital. One of the role of the potential counter-movements in Europe would be to expose the socio-political character of the 'economic', provide proposals for an alternative institutional order in Europe and not least, for trade unions, to retain their capacity as social agents in the emerging European social space.

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<sup>i</sup> Ibid, 118-9.

<sup>ii</sup> *Relational* power is the ability to force a social subject to do something that otherwise s/he would be reluctant to do. *Discursive* power is the way that society recognises, understands and interprets social categories within the existing power-relations; to put it simply, whose concepts, assumptions and perceptions of reality are hegemonic in one or more social spaces. Consequently power resources have relational, structural and discursive properties (see Papadopoulos 2006). This conceptualisation of power is a theoretical synthesis that draw its inspiration from Lukes (1975), Strange (1994), Hay (2002) and Bourdieu (2005).

<sup>iii</sup> The same applies for Danish and German collective bargaining.