

**A LANDMARK DECISION:
THE LAVAL-CASE AND ITS FURTHER JUDICIAL QUESTIONS**

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1. Introductory thoughts

How is it possible to keep the balance between the application of the so-called free movement rules of the European Union and the fundamental social rights, with the preservation of the national social systems? Could the application of fundamental rights by the trade unions – such as collective actions – means the violation of the single market’s principles? Reversing the question: could the literal compliance with the acts of the European Union mean – in certain cases – the restriction of those rights which are ensured to workers, employers, organisations by the European Charter of Fundamental Rights? Could the regulations on the single market be interpreted less strictly in order to ensure the collective rights in national social systems? Is there a balance between European economic-interests and social rights of employees? If yes, where is that balance? If the balance is not reached yet, how could we manage to reach?

In the next few pages I intend to present the European Court of Justice’s (hereinafter referred to as: ECJ) answers to these questions on the one hand, and the arguments of the stakeholders at issue on the other hand, through the analysis of the *Laval*-case.¹

2. The core of judicial questions: the legally relevant facts of the *Laval*-case

Few days after the accession of Latvia to the European Union (hereinafter referred to as: EU) in 2004, a Latvian construction company (*Laval un Partneri Ltd.*) contracted to build a school in Vaxholm. However, every region of Sweden has fixed minimum wages regulated in collective bargainings and *Laval* accepted to undertake the work for lower wages than in the collective contracts. The majority of the workers posted to Sweden from Latvia were members of trade unions in Latvia, and *Laval* had signed collective agreements with the Latvian building sector’s trade union.

¹ C-341/05 – *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others*, request for preliminary ruling from the Arbetsdomstolen (Swedish Labour Court). ECLI:EU:C:2007, 809, 18. 12. 2007.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=71925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=496104> [Consulted: 30. 09. 2015]

The Swedish trade union wanted *Laval* to accept their rules, which would have meant an “accession to the collective agreement for the building sector, which includes a process for negotiating salaries. If agreement cannot be reached, there is a fall-back minimum wage provided under the regional collective agreement of SEK² 109/hours.”³ (approximately 11 euros per hour) The Latvian workers earned less money, therefore this deal did not worth it for *Laval Ltd.*

This resulted in the Swedish trade unions protest against the situation and they applied blockades on the location of the constructions. After their action, other trade unions commenced solidarity, so they joined the worker’s “campaign”. In a few months’ time, there were no contracting partners for *Laval Ltd.* in the whole country of Sweden. As a result, the construction-processes came to a halt, the subcontractor company (called: *L & P Baltic Bygg*) went bankrupt, and Latvian workers lost their jobs.

“In the light of the trade unions’ collective action, *Laval* brought a case against the construction and electricians’ unions seeking a declaration, that their actions were unlawful and compensation for the damage caused to its business. The Swedish court decided to refer the issue to the Court of Justice for an interpretation of EC law”⁴ within the frames of the preliminary ruling procedure under the Article 267 of the Treaty on the Functioning of the European Union.

The core of the complex judicial questions is the collision of two principles of the EU. On the one hand, Article 56 (ex Article 49 TEC) of the Lisbon Treaty prohibits any restriction applied by the member states against the nationals of other member states who are not established in that member state where the person for whom the service is to be intended.⁵ We can see, that *Laval Ltd.* lived with its right to provide services in a different member state by undertaking to build a school in Vaxholm. According to the abovementioned single market regulation, the action of the trade unions violated one of the main principles of the single market. On the other hand, Article 28 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as: Charter of the Fundamental Rights/European Charter of Fundamental Rights) declares the right of collective bargaining and action.⁶ Under

² Currency of Sweden: Swedish Krona.

³ BELL, Mark: *Understanding Viking and Laval: An IER Briefing Note*. The Institute of Employment Rights, Liverpool, point 21, page 6.

⁴ BELL, Mark: *Understanding Viking and Laval: An IER Briefing Note*. The Institute of Employment Rights, Liverpool, point 23, page 6.

⁵ Article 56 of the Lisbon Treaty: “*Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.*”

⁶ Article 28 of the Charter of Fundamental Rights of the EU: “*Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*”

the scope of this title, trade unions have the right to collective actions, when their interests are threatened or violated. This right is a fundamental right, thus it has to be respected by everyone – also by the acts of the single market. The collective action includes strike also, therefore the trade unions lived with their rights provided by another European document, namely the abovementioned Charter. This raises another collision, notably the collision of the economically motivated perspective of the European Union and the social issues of national labour law. In the next chapter I examine the collisions which make the case more complex and remarkable.

3. Collision of interests, collision of values, collision of laws

As I previously noted, the collision of different interests cause a complex legal case in issue. Free movement of services as a requirement of the European single market is a very strong economic interest of the EU. According to the objectives of the single market, the free movement rules intended the economical development, financial growth and the improvement of the welfare of Europe. By abolishing the borders among the countries of the Schengen-zone, European market of goods, services, employment, capital got the opportunity to improve sustainably and unstoppably.

While we concern with economic interests, welfare and good life in theory, we also have to take into account the fundamental rights of people and interest groups (such as trade unions) and the national interests of the member states. European freedoms cannot function self-servingly. Therefore, the founding treaties of the EU ensure the restriction of single market regulations when it is established by overriding national public interests such as public health, public morality, public order, public safety etc. In the introductory thoughts of this paper I threw up a question whether the regulations on the single market could be interpreted less strictly in order to ensure the collective rights in national social systems. Now I wonder whether collective rights in issue could be handled as public interest if the majority of the nation's employees are affected by it? If yes, could this mean an exception under the free movement of services?

The Charter of Fundamental Rights involves the human and fundamental rights, which have to be respected by everyone. However, the Charter did not have legally binding force at the time of the *Laval-case*⁷ so it was mainly an elegant collection and declaration of rights but without any effect legally being enforced.

On the other hand, the EU served another act for the Swedish to refer to. The so-called *Posting Directive* (96/71/EC) of the EU concerning the posting of workers in the framework of the provision of services states that the guarantees ensured for the employees are regulated in legislative products or administrative-decrees and in the constructive industry guarantees are in collective agreements or in gen-

⁷ The Charter got legally binding force by the entering into force of the Lisbon Treaty on 1 December 2009.

erally applicable judicial resolution.⁸ The Swedish act regarded to the *Posting Directive* determines the working conditions of the employees however it does not determine the minimum wage. The Swedish tradition is that the wages are determined in collective agreements and the Swedish law contains that trade unions have the right to force the employers not belonging to the trade union to accept collective agreements elaborated by the trade unions. Swedish workers made their steps in harmony with their national rights and the *Posting Directive*. The minimal wage for a Swedish worker at the time of the *Laval*-case was around 11 euros per hour. When the Latvian workers came to work for less money (but possibly more than they have earned in Latvia before) and by this they turned up-side-down the Swedish labour-market situation, the Swedish workers of each field (mostly industrial fields) became disappointed and felt that their livelihood was in danger. According to the market-rules of our capitalized global world, the person who does the same job for smaller amount of money is usually the person who gets the job. Therefore, the worry and anger of Swedish workers are probably understandable. In order to keep the balance of the Swedish labour market, they had two options: trying to sign a contract with *Laval* in compliance with their traditionally accepted labour conditions, or starting to work for less money – such as Latvians do in their country – in order to stay on the market. Obviously, they did the first option and when it was not successful, they made a collective step. Soon another trade unions joined to the construction industry's action, because workers knew, that if they cannot stop the process, sooner or later the cheaper manpower will reach their industry, too. That could have turned totally up-side-down the whole country's living and working conditions, and as a *spillover-effect*⁹ it would have reached whole Western and Northern Europe's labour-market. That is why the countries at issue¹⁰ sent their opinion to the ECJ and supported the Swedish in this case in every channel they were able to use.

As we can see, the rest of the questions arise from the lack of the social-integration in the EU. We live in an economic integration which binds some cultural, traditional similarities and a generally common European value-system. However, this integration misses social and political integrity – as it already have been mentioned by some commentators such as *Martin Höpner*.¹¹ The question is that: how could the European Court of Justice bridge this huge gap between the social interests and single market requirements.

In the following chapter, I examine the opinion and arguments of *Paolo Mengozzi*, the Advocate General dealt with this case.

⁸ Article 3, point 1 of directive 96/71/EC.

⁹ A secondary effect that follows from a primary effect.

¹⁰ The countries which have high minimal wages for workers, except for the United Kingdom.

¹¹ alp. Prof. Dr. Martin Höpner, Max Planck Institute for the Study of Societies, Köln.

4. A step forward for trade unions – Opinion delivered by Paolo Mengozzi

The Swedish Labour Court requested the following question within the frames of preliminary rulings procedure to the European Court of Justice on 15 September 2005.

“Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions of Directive 96/71/EC [...] if trade unions attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?”¹²

The other question submitted to the ECJ was that: *“The Swedish Law on workers’ participation in decisions prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the ‘lex Britannia’, only where a trade union takes measures in respect of industrial relations to which the Medbestämmandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition on discrimination on grounds of nationality and the provisions of Directive 96/71 constitute an obstacle to an application of the latter rule - which, together with other parts of the lex Britannia also mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded - to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?”¹³*

According to *Mengozzi*, the question of collective bargaining in this case belongs under the scope of the Union-law. He argues, that the fact that Sweden entitles the trade unions to determine the minimal wages in contracts does not mean the inadequate implementation of the *Posting Directive*. He examined the fulfilment of the protection of workers and the equal treatment of market players regarding the national companies interests’ who intend to provide the same services as *Laval Ltd*

¹² C-341/05, Reference for a preliminary ruling from the Arbetsdomstolen. <http://curia.europa.eu/juris/liste.jsf?pro=&lgrc=it&nat=or&oqp=&dates=&lg=&language=hu&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-341%252F05&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=454231> [Consulted: 30. 09. 2015]

¹³ Quoted above.

and who are binded by the collective agreements of the Swedish industry, highlighting that the case influences also the situation of employers on the market. He argued that the collective bargaining was not against the European law when the bargaining was based on public interest such as the protection of the rights of the employees and the fight against social dumping. However the bargaining should not be disproportionate related to the public interest.¹⁴ This is also in compliance with the case-law of the European Court of Human Rights. The examination of proportionality should be discussed by the court requesting the preliminary ruling, focusing on the conditions of the collective agreements accepted in the construction industry.

As we could see, the opinion presented by *Paolo Mengozzi*, the interests of the trade unions meet some advantages because the advocate general evaluated the social values, harmony between the employer and employee interests' and also the future of the national companies providing similar services to *Laval*.

The question of legally acceptable bargaining divided the European public opinion. According to "the advocates of business-freedom and liberalized market the Advocate General went too far"¹⁵ because "the ECJ should not let the trade unions to dictate with power and blockades in the field of the single market of Europe."¹⁶ Others argued that it was not possible, that some interest group only tended to accept the free market whenever it was advantageous for them. According to *Ashworth* the Swedish only fought against the situation, because their employment-market was *not competitive enough* compared to the markets of the new member states (such as Latvia was at that time). Other representatives of the European People's Party also highlighted the importance of the ensurement of the free movement rules in practice. As we can see, the case divided the opinion of politicians, too. The liberal representatives argued for the market-interests, whereas the socialist representatives argued for the Swedish trade unions. Also the trade union representatives expressed their opinion related to the case and also their collective rights. They emphasized the importance of collective bargaining, collective actions and collective agreements, which cannot be ignored or disregarded.

Before analyzing the judgement of the ECJ, I would like to point out, that in my opinion although judicial issues can be affected by politics, decisions cannot be exclusively made on it. Maybe in some cases it is necessary to take into account some opinions of the public sphere representatives' and politicians, when these

¹⁴ Point 303 of the Opinion of Advocate General Paolo Mengozzi, delivered on 23 May 2007.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=62532&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=454231> [Consulted: 30. 09. 2015]

¹⁵ Undated and unnamed article on Bruxinfo online news portal, 23 May, 2007. www.bruxinfo.eu [Consulted: 28. 09. 2015]

¹⁶ Told Richard Ashworth member of European People's Party.

opinions are adequate and relevant, but issues covering social interests cannot be decided clearly on the base of economic interests and politics.

In my view, the ECJ paid more attention to the economic issues of the case than to the social rights, therefore the landmark decision of the ECJ in this case is based mostly on economic points of view of the single market.

5. The big surprise: the landmark decision of the ECJ

On 18 December 2007 the European Court of Justice gave the judgement¹⁷ on the *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* case. As the opinion of *Paolo Mengozzi* meant a step forward for the trade unions, the judgement of the ECJ meant two steps back for them.

The Court evaluated the collective action of the trade unions as an unlawful restriction of the free movement of services. The Court did not question the rights of the trade unions to collective actions, but the action against the Latvian company was not supportable by the principle of the protection of social dumping.¹⁸ The Court neither questioned the protection of employees as public interest, but it stated that the proportionality was not covered. According to the Court the action of the union was more overlapping than the one that the protection of workers' rights would have required, which led to the unlawful restriction of the free movement rule on services. However, the judgement is just the *right interpretation* of the acts of the EU released by the ECJ (as the only body who has the right of interpretation in the field of EU law), this does not make any sense in the case before the national court. Therefore, the Labour Court of Sweden would have had the right to decide against the trade unions, however the interpretation provided by the ECJ is binding, therefore indirectly the ECJ decided the case.

The judgement was shocking for the trade unions and their representatives. According to *John Monks*¹⁹ the decision discredit the principle of *flexicurity*²⁰ and the flexible collective agreements on wages.

The ECJ's judgement on the Laval-case divided the public opinion of the EU and it was surprising for me in two aspects. The first is that it was controversial with the Advocate General's opinion, which is not a problem, because the opinion is obviously not binding for the Court, however the Court usually follows these opinions. The second aspect of this surprising – but economically reasonable – decision is, that the Court gave a political answer to a judicial issue, in my opinion. This was unusual for me, because the EU usually tends to integrate the member states in every field possible. In this case, instead of suggesting some kind of social

¹⁷ C-341/05; Reference for preliminary ruling.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=71925&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=454231> [Consulted: 29. 09. 2015]

¹⁸ See the points 103–113 of the judgement.

¹⁹ President of the European Trade Union Confederation (ETUC)

²⁰ Flexicurity: Flexibility and security

integration, labour law integration or “*minimum wage integration*” for the EU, the ECJ took the focus on the single market interests’, which ensures and strengthens only an economic integration. Moreover, it enlarges the aversive feelings against the foreign employees in the member states. This process – in my view – is not an advantage for the EU in the long-run regarding the free-movement of workers, employers and other market-freedoms.

6. Consequences – in my view

The main message of the *Laval*-judgement is, that the freedoms of the single market cannot be restricted: neither because of national public interests, nor because of social questions. The Court concerned the employment-market interests of the whole European integration, but did not evaluate the future of the Swedish employment-market. The ECJ ignored the Advocate General’s opinion in order to consider clearly economic and maybe political interests. Of course the judgement is legally based, but maybe the politically supported interests enjoyed the advantage and the social issues of the Swedish workers were left in the background.

Naturally the decision, which is exclusively legally-based, does not exist. However, in my opinion the ECJ should have taken into account the social interests to a greater extent than they did. Further consequence is that the trade unions will think twice whether they stand up for their interests, which leads to the ineffectiveness of the collective actions and collective advocacy. Employees and other interest groups will not trust in their representatives and as a result, the institution of trade unions will be deprived of their power in the long-run.

Other consequence is that – as I mentioned in the previous chapter – the aversive feelings towards the foreign workers will arise and strengthen in the member states. The European integration aims the free movement of persons, workers, services, goods and the capital, therefore the EU should strengthen the values of the foreign-ness in the member states. The question should be: what is the thing, that a foreign worker does better than the nationals of a state? What can we learn from the foreigners? In this case, the balance could be established between the economic interests of the integration and those of the national-social systems. By accepting the foreign workers and their knowledge, the effectiveness of a working-manufacturing process can develop. By the development, the financial effectiveness could be reached, which is an interest of a country and also that of the EU, and not just in the long-run, but from now on.

In the Introductory thoughts of this paper, I raised some questions. I asked: *How is it possible to keep the balance between the application of the so-called free movement rules of the European Union and the fundamental social rights, with the preservation of the national social systems?* I think it is not possible to find the balance, but we can try to find a satisfying solution between the application of the free movement rules and the requirements of the different social systems. We live in a Union which has 28 different social systems. Each system tries to protect its workers, employees, employers, and other national interest groups. In order to pro-

tect them, the states necessarily make laws, agreements, regulations and institutions for the protection, not against the foreign citizens or their services intended to provide in the countries, but for declaring that the laws protect the citizens, their business and ensure their social rights. National laws are guarantees for the citizens in every legal system. Guarantees are available also against the home-state of a national. Therefore, by maintaining 28 different social systems the EU will not keep the adequate balance. However, an adequate solution could be made. Then both the goat has enough to eat and the cabbage remains – as the famous Hungarian proverb says. This solution – in my view – requires an integration in social issues, too. Of course, the EU takes steps in order to establish a *more social Europe*,²¹ in which social cohesion is promoted, unemployment rates are lower, poverty is tackled and job creation is supported,²² however the different social systems are still upheld. Different social systems should be abolished in my opinion, and a unique, special system for the whole Union should be established in the remote future. Now, this is not possible because of the diverse levels of the social-systems of the member states. Nevertheless, step by step, the harmonization could be reached. The first step would be a directive in which minimum wages for the workers of industry sector are declared for all member states of the EU. Secondly, the wages of the other employment-sectors should also be regulated, despite the fact that it is even more complicated than the previous one because of the different working-conditions of the states, and the different values of different university-degrees and so on... The *equalization of wages* would need the same social parameters of the member states which are diversing because of the different social systems. I wonder, whether the introductory step (before the previously mentioned first) would be the rule: every state has the rights to regulate minimum wages in decrees nationally, but all foreign workers have to earn that amount for the same work (not less, not more, the same). This would meet the requirement of “*equal pay for equal work*”, which would protect not just the foreign workers, but also the nationals, in the above-analyzed case: the Swedish. The wage-strategy²³ would support productivity also which would led to a further improvement of the integration.

I also asked *if the regulations on the single market could be interpreted less strictly in order to ensure the collective rights in national social systems*. Well, the answer is no, the regulations cannot be interpreted flexibly. Though, the collective rights are public interests of Sweden, the trade unions are not allowed to apply blockades in order to express their interests against the single market freedoms according to the ECJ. Therefore, there is no balance between economic interest of

²¹ For more information on the social policy of the EU, see: http://europa.eu/rapid/press-release_IP-15-5132_hu.htm [01. 10. 2015]

²² See the page of the European Commission: On the path to a more social Europe. http://ec.europa.eu/news/2015/06/20150609_en.htm [01. 10. 2015]

²³ About wage-led growth, see: STOCKHAMMER, Engelbert: *Wage-led Growth*. Kingston University, London, Friedrich Ebert Stiftung, SE, No. 5, April, 2015.

the EU and the social rights of the employees, yet. In my view, not only can we consider the Swedish claims as social issues, but also as economic ones – as we consider the wages of the Swedish workers as economic interests. Their economic interest is to receive the same wage for their work as before. This is not in proportion with the interest of the EU namely, letting the workers move freely without any restrictions applied by the member states.

On the other hand, the judgement strenghtens the situation and place of the single market, ensures the free market rules without any restrictions on it. This – thinking federatively about Europe – is a “*continental*” interest for Europe. Federative aspect in the future can lead to a *federative Europe-concept*, however the conditions are not available either in time or in financial circumstances. Thus now, we have to treat Europe as *a Union* (as it is a union now), an integration covering more and more fields of cooperation and harmonization, preparing for a future federative Europe, which is able to compete with the USA and the developed Asian countries. And in an integration, the national interests and the divergence of the different social-systems on a single employment-market mutually have to be concerned. Therefore, the integration has to be extended into more fields, eg. social integration, and *Social-Europe*²⁴ has to be established – as it was suggested also by other commentators. Thus – in my opinion – the judgement was neither the best, nor the worst, it was simply surprising.

²⁴ More information about Social-Europe are available on the website of the social-Europe: www.socialeurope.eu