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The Swedish model and the future of labour standards after *Laval*

Charles Woolfson,¹ Christer Thörnqvist² and Jeffrey Sommers³

Abstract

This article reflects on the European Court of Justice ruling in the case of Laval, involving Latvian posted workers in Sweden. It analyses the implications of the ruling and ensuing debate over the Laval case for the future of the ‘Swedish model’ and labour standards. It suggests that profound dilemmas now face trade unions both at Swedish national and European level as to appropriate strategies to adopt to defend national pay and working conditions in the light of the European Court decision and especially in the Swedish context due to the subsequent ruling by the Swedish Labour Court. Nevertheless, a human rights discourse is emerging in which the European Court of Human Rights may act as a counterbalance to the European Court of Justice, especially in the context of the Lisbon Treaty.

Key Words: *Laval* case, labour standards, posted workers, Swedish labour market model.

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Introduction

The European Union regards free movement of labour as one of its four ‘basic pillars’ and migration between member states is generally depicted as a positive feature of the single market, valued as ‘one of the fundamental freedoms of European citizens and for its contribution to a better functioning of labour markets’ (European commission, 2006: 17). Following the unanticipated outflow of labour from new EU member states after their accession in 2004, the Commission acknowledged that while ‘expected mobility from the three Baltic countries and Poland is significantly higher than that from the rest of the Member States...this is unlikely to pose major and lasting challenges for the labour markets of the receiving countries (European Commission, 2006: 17). Nowhere has this assertion been more debateable than in Sweden, where the presence of labour from the Baltic new EU member state of Latvia, provoked a watershed industrial dispute over the right of Swedish trade unions to apply the collective agreement current in the construction industry. The arrival of East European workers has been accompanied by the contentious issue of ‘social dumping’, most notably, in the so-called *Laval* case.

The fact that the Latvian workers were posted in Sweden, without the intention to enter permanently into the Swedish labour market, was very significant. It meant that a dispute over the manner of setting the wages of posted workers could be referred to the European Court of Justice (ECJ), which would have to decide whether the dispute was about exporting labour or the freedom to provide services. From a perspective of securing freedom of services, which would allow a new EU member state company to compete in old member state markets, Roger Blanpain has recently asked: ‘Was the industrial action, namely the boycott of Laval by

the Swedish unions compatible with freedom of services? The Court said no, and rightly so' (Blanpain, 2009: xxii).

This article will argue, however, not only is the legal analysis of the ECJ contentious, but that the outcome of the case will have a strong bearing on industrial relations in Sweden, and by implication, on those member state systems which rely on strong labour market actors to set labour standards secured within a framework of voluntary collective bargaining. The implications of the *Laval* case for key aspects of labour standards therefore, reach beyond issues of preserving the 'Swedish model' of industrial relations and pose wider questions about the future of European industrial relations.

The ECJ has delivered a series of rulings in the *Viking*, *Laval*, *Rüffert* and the *Luxemburg* cases that directly address the right to defend existing standards of employment against erosion of wages and conditions. In the first two cases, the rulings were directed towards issues of the legitimate scope of trade union collective bargaining and industrial action; in the latter two, the subjects were regional government and the state. Each of the decisions is considered as hostile to labour rights (Notre Europe, 2008). The Court is seen to have privileged the economic priorities of the Europe, in particular, treaty provisions on freedom of provision of services and the freedom of establishment of undertakings, over a 'social dimension'. Moreover, paradoxically, the Court would appear to have done so, even though explicitly affirming the right to industrial action as a 'fundamental right' (Ashiagbor, 2009).

A substantial academic literature has emerged in which academic labour lawyers have rehearsed the details of the individual judgments concerning the *Laval* and other cases (Barnard, 2008; Bell, 2008; Bercusson, 2007; Davies, 2008; Eklund, 2006, 2008; Picard,

2008). The present article does not dissent from the mainly pessimistic conclusions as to the cumulative deleterious effects of the various ECJ judgments for organised labour. While some have previously warned of the possibility of an accelerated ‘race to the bottom’ in labour standards (Woolfson and Sommers, 2006), others have argued a more nuanced view, suggesting a greater tractability for the European ‘social dimension’ (Donaghey and Teague, 2006; Krings, 2009). At its most optimistic, the claim has been advanced of efficacy for the European trade union movement in enhancing processes of ‘Euro-democratization’ (Erne, 2008). What follows is intended as a contribution to this debate, but suggests a somewhat less sanguine perspective.

For reasons of space, we cannot deal here with all of the key cases and judgments of the ECJ pertaining to free movement of labour and the provision of services, but we would argue that our analysis embraces a common thrust arising from these. In focusing on the *Laval* case, we follow the approach of Dølvik and Visser (2009), but explore in particular the implications and aftermath in a specifically Swedish context in the first instance. The article proceeds as follows: It begins with a background to recent developments in the Swedish labour market model. Next, the key rulings of the Court are examined in the *Laval* case (Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* Judgment 18 December 2007). Third, the all-important reactions of the Swedish ‘social partners’ and the Swedish government to the ECJ judgment are assessed together with their implications for the application of the Directive on the posting of workers to Sweden, and its purportedly inadequate transposition in the Swedish Posted Workers’ Act (Ministry of Industry, Employment and Communications Sweden, 1999). The subsequent ruling of the Swedish Labour Court in the light of the ECJ judgement would seem to confirm that the ‘Swedish model’ has, at the very least, been significantly redefined if not fundamentally altered in the light of the *Laval* case. Nevertheless, an alternative human rights

discourse and jurisprudence is emerging from the European Court of Human Rights (ECtHR) which may act as a counterbalance to the European Court of Justice, especially in the context of the entering into force of the Lisbon Treaty.

Sweden's labour market model

In Sweden, a labour market model has prevailed with strong actors arriving at voluntary agreements in a legally endorsed, but not legislatively mandated, bargaining process over terms and conditions. There is broad agreement on 'rules of the bargaining game' between well-intentioned parties who have an interest in preserving the 'Swedish model' of relatively autonomous self-regulation with minimal state intervention. Since the main actors agreed the rules of the game in a labour accord in 1938, the so-called Saltsjöbaden Agreement, the role of the state has been at most to cast a benevolent eye over industrial relations without the need for extensive legislative intervention (Thörnqvist, 1999).

Or, at least that was the picture until the early 1990s, when trade union density peaked at 85%. Since then, trade unions in Sweden have undergone progressive decline due to changes in the composition of the workforce, growing decentralisation of collective bargaining, difficulties in recruiting younger workers, and changing contractual forms leading to greater labour market insecurity. Between 1993 and 2005, overall density declined by 9% to 77%, still a remarkably high figure by most international comparisons, although for the blue-collar LO, (the Swedish Trade Union Confederation), the decline has been sharper (Kjellberg, 2007: 260). The loss of power by the social democratic government in 2006, and the election of a right-of-centre alliance of four parties to government, saw a number of changes introduced which have further adversely affected trade union membership. In particular, the cost of

premiums for unemployment insurance funds administered by trade unions has increased, while there has been a reduction in income tax deductions for both trade union membership fees and premium payments. The result has been an acceleration of the previous structural decline in union density. Overall, trade union density dropped over the course of the single year between 2006 and 2007 by five percentage points to 72%. Between them, LO and the white-collar confederation, TCO (the Swedish Confederation of Salaried Employees) lost about 173,000 members across all sectors of the economy.

Table 1. here

Against this decline, in 2008, the ‘rules of the game’ in Swedish industrial relations came under renewed scrutiny. The various parties to the original Saltsjöbaden Agreement decided, albeit reluctantly in the case of LO, to revisit the basic labour accord. A key objective for the main organization for private sector employers, the Confederation of Swedish Enterprise, SN (Svenskt Näringsliv) was to review the guidelines under which unions deploy secondary industrial action, a long-standing concern. The possibility of recourse to sympathy action was important, not just in the *Laval* case discussed below, but in many other similar disputes where organised labour imposed boycotts in order to establish collective agreements or the withdrawal of non-compliant companies from the Swedish labour market. Under the guise of ‘taking back power over the labour market from the politicians’, the employers sought to *maintain* the role of voluntary mechanisms in a situation in which the balance of power increasingly shifted in their favour. This is a vital point for understanding the strategic objectives of employers as the *Laval* case unfolded. The employers desired to prevent trade unions from securing legal means to bolster their declining labour market position, for example, through minimum wage legislation and a legally enforceable extension of collective

agreements. As Kjellberg (2007: 281) has commented union strategy for preserving employment terms and conditions through voluntary agreements, ‘under pressure from foreign firms with foreign workers...might be reconsidered if the conflict capacity of Swedish unions is weakened, or restricted by legislation’. The Laval episode has presented precisely this problematic of weakened conflict capacity for the Swedish trade union movement.

Circumstances of the *Laval* case

The details of the *Laval* case are by now reasonably familiar. In June 2004, the Latvian company Laval un Partneri, through its subsidiary L&P ‘Baltic Bygg’ to which it hired out its labourforce, started contract work involving the refurbishing of an old school in the Vaxholm municipality near Stockholm. The work was carried out by Latvian building workers posted to Sweden, while effectively remaining in the employ of their ‘home state’ service provider. The company had some 35 workers in total posted in the Stockholm region on various contracts. The Swedish Building Workers’ Union, (Svenska Byggnadsarbetareförbundet), hereafter Byggnads, demanded that the company conclude a Swedish collective agreement to provide comparable wages and conditions to those of Swedish workers under the Construction Sector Collective Agreement. The initial demand was for the payment of the average hourly wage of 145 SEK (15 EUR) which was later modified to the fall-back wage of 109 SEK (12 EUR). Due to the company’s refusal to sign an agreement over a period of several months of negotiations, on 19 October, Byggnads gave notice of industrial action, starting on 2 November 2004.

The industrial action took the form of a blockade of the Vaxholm site. One month later, on 3 December this action was intensified by sympathy action on the part of the Swedish Electricians' Union (Svenska Elektrikerförbundet), SEF – which was extended to all company sites in the Stockholm region. On 7 December, the company submitted a summons application to the Swedish Labour Court (Arbetsdomstolen) seeking declaration of the industrial action and the secondary action as illegal, the immediate lifting of the action, and damages for losses incurred. The Labour Court rejected the company claim, but subsequently, in April 2005, undertook a preliminary reference of the case to the European Court of Justice, in order to seek clarification as to whether the industrial action at Vaxholm had contravened certain aspects of EC law (Eklund, 2006). At issue were provisions in the EC Treaty, specifically Article 12 (prohibition of discrimination on the ground of nationality), and Article 49 (prohibition of restrictions on freedom to provide services within the Community) which the company claimed were violated by the actions of the trade unions.

The case hinged upon provisions of the EC Directive on the posting of workers with respect to terms and conditions of employment for workers who perform services in one member state, while remaining in the employ of a company from another member state (Directive 96/71 EC). Three ways exist by which the Directive sets minimum standards: First, by *law, regulation or administrative provision* (Article 3(1)). Second, by collective agreements which are *universally applicable* (Article 3(8)). Third, for those states such as Sweden where it is not possible to declare collective agreements universally applicable, minimum standards/pay can be set by other types of *broadly applicable collective agreements* (Article 3(8), second subparagraph) that is by collective agreements which are generally applicable to all similar undertakings in a geographical area and industry; and/or by collective agreements which have

been concluded by the most representative employers' and labour organizations at national level.

As Sweden had not introduced such generally applicable rules (*erga omnes*) or statutory provisions on minimum wages, Laval argued that there was no obligation upon it to pay a certain minimum wage. Minimum wages in Sweden are specified only in collective agreements agreed between employers and trade unions, and serve mainly as a starting-point for local negotiations. Laval maintained that it had no obligation to enter into a Swedish collective agreement, since it had concluded two collective agreements with the Latvian Construction Workers' Union (LCA), albeit only *after* the dispute with the Swedish construction union had begun.

The Labour Court also had to consider whether provisions under Sweden's *Lex Britannia* clause in the Codetermination Act could be applied to the blockade action of the trade unions. This clause allowed industrial action to be taken against a company, even where there was an existing (foreign) collective agreement (normally forbidden under the Swedish Codetermination Act), thereby establishing precedence of Swedish collective bargaining agreements over any existing foreign collective agreement. There had been several attempts to set wages lower than the minimum level provided by Swedish collective agreements during the 1980s. These involved shipping companies employing seafarers from low-wage countries, such as the Philippines or Estonia. To avoid 'social dumping', the trade unions, in particular the Swedish Mariners' Union affiliated to the LO, conducted sympathy strikes or placed ships under a portside boycott. The peak of these conflicts came in 1989 with the boycott of the *M/S Britannia*, a flag-of-convenience vessel with a low-paid Filipino crew, a conflict that ended in the Swedish Labour Court. *Lex Britannia* was subsequently enacted as an amend-

ment to the Codetermination Act giving trade unions the right to take industrial action to improve employment conditions of workers not governed by Swedish agreements on terms and conditions. Such actions were deemed lawful, if the trade union could demonstrate that the activities of a foreign-owned company, permanently or temporarily working in Sweden, enhanced the risk of 'social dumping'. Moreover, the actions were allowed, even if the trade union in question did not have any members at the workplace, and even if there was a valid collective agreement from the company's – or the workers' – home country (Junesjö, 1998).

In the *Laval* case, the Swedish Labour Court requested clarification as to whether this provision and the actions of the trade unions at Vaxholm could be seen as being in violation of Community law, specifically, the previously mentioned Articles 12 and 49 of the EC Treaty. For the Swedish trade unions, the core issue at stake was the efficacy national collective bargaining arrangements, and supportive provisions such as 'tie-in' arrangements having the effect of binding non-signatory companies to Swedish labour rates to prevent 'social dumping'. The trade unions had hoped to persuade the ECJ that collective action fell outside the scope of the EC Treaty and therefore, its competence. This, however, was not the view of the Court which framed its adjudication in terms of the 'balancing' of two 'fundamental rights' which could be seen to clash - 'that of free movement, and that of collective action, when exercise of the right to strike restricts free movement of services or freedom of establishment' (Ashiagbor, 2008: 235-6).

ECJ Advocate-General Paolo Mengozzi delivered a first opinion on the *Laval* case on 23 May 2007. Presenting this, AG Mengozzi argued that 'where a member state has no system for declaring collective agreements to be of universal application':

Article 49 EC must be interpreted as not preventing trade unions from attempting, by means of collective action in the form of a blockade and solidarity action, to compel a service provider of another Member State to subscribe to the rate of pay determined in accordance with a collective agreement which is applicable in practice to domestic undertakings in the same sector...provided that the collective action is motivated by public interest objectives, such as the protection of workers and the fight against social dumping, and is not carried out in a manner that is disproportionate to the attainment of those objectives (para. 309).

The first opinion held, therefore, that a service provider from another European member state should subscribe to provisions of collective agreements in the host country, while collective industrial action taken against such a service provider from another EU country, if conducted in a manner proportionate to the attainment of its objectives, was legitimate. The Swedish trade unions saw this as an indication of future success of their argument with the ECJ. The Swedish employers' confederation, SN, was less enthusiastic, regarding as particularly problematic the question of whether the 'proportionality' of collective action should be a matter determined by the Swedish Labour Court (EIROnline, 2008b). Here matters remained in legal limbo as the ECJ considered the complex issues at stake before reaching a final judgment.

The European Court of Justice judgment

On 18 December 2007, the ECJ (Grand Chamber) delivered its judgment. It considered two interrelated issues: whether a restriction which the exercise of the fundamental right to strike imposes on free movement could be justified, and whether or not the exercise of this right was

‘proportionate’ to the objectives which the industrial action sought to achieve. Contrary to the first opinion, the Court ruled that the trade union blockade in order to force Laval to enter into negotiations on pay and sign a Swedish collective agreement, represented a restriction on freedom to provide services under Article 49EC (Case C-341/05, para. 99). The Court argued that such action *could* be justified in cases where the public interest of protecting workers prevailed. However, it held the view that this was not the case with respect to the Laval dispute. The Court conceded that the blockade served the purpose of protecting Swedish workers against possible ‘social dumping’, which ‘may constitute an overriding reason of public interest’ (para. 103). In such circumstances it added, such companies *may* thereby be forced to respect particular member states’ rules on minimum pay. However, with respect to the case in hand:

collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective...where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (para. 110).

The Court held that the trade unions were precluded from attempting, by means of collective action, to force a provider of services established in another Member State to enter into negotiations on rates of pay constituting *more favourable* conditions than those resulting from relevant domestic legislative provisions. In the Swedish case, there was an absence of domestic legislative minimum wage provisions providing a clear base line. Minimum wages are not legislatively set down, but emerge through the collective bargaining processes at

industry level. Moreover, the specific provisions of *Lex Britannia* were deemed by the Court to be discriminatory, since it treated foreign employers in the same manner as Swedish domestic employers who had failed to conclude agreements, even if a home state agreement was in place.

In the 'restrictive' view of the Court, the Directive on the posting of workers established only a 'hard core' of provisions, including specified terms and conditions such as health and safety, maximum working hours, minimum paid annual holidays and minimum wages. Effectively, the Court reached the view that the nucleus of mandatory rules for protection of posted workers provided not a *starting* point for negotiation, but the upper limit or a 'ceiling' for negotiation of terms and conditions (Malmberg and Sigeman, 2008: 1140). Summing up the legal implications of the ECJ ruling, with respect to the vexed issue of 'social dumping', Malmberg and Sigeman comment:

Unfair competition is only found if the foreign service provider does not apply the hard nucleus of the host State. Other differences in labour standards between the host State and the State of origin are not regarded as unacceptable social dumping. The aim of establishing such a narrow definition of unfair competition is obviously to promote free movement of services, by not depriving visiting companies of the competitive advantages that may follow from lower labour standards (2008: 1144).

Thus, while reaffirming the general right of trade unions to initiate strikes (or actions short of strikes), the Court also determined that the action taken by Swedish trade unions to force Laval to endorse a Swedish collective agreement was disproportionate, and likely to make it 'less attractive' or more difficult as a company from another member state to carry out construction work in Sweden, in other words, to act as a service provider in the internal market. The blockade mounted by the Swedish unions was also deemed disproportionate. As

Anne Davies (2008: 141) has pointed out, the manner in which the ECJ used the test of ‘proportionality’ in the context of *Laval* in effect ‘substantially undermines the significance of the Court’s seeming recognition of the right to strike as a fundamental right’. The burden of proof falls upon the trade union to demonstrate that its industrial action is ‘proportionate’ *in relation to the employer’s freedom of movement*. The ECJ’s recognition of the right to strike is ‘therefore *conditional* on the satisfaction of the proportionality test’ (Davies, 2008: 141). This test in the light of the ECJ judgement in *Laval* will be difficult for trade unions to meet in the context of industrial action to prevent ‘social dumping’ by employers from within the EU.

The ensuing debate¹

The reactions of the social partners and government to the *Laval* judgment fed into a broader debate regarding collective bargaining rights and how ‘rules of the game’ may need to be changed.

The Swedish government

The *Laval* case began when a Social Democratic government was in office, but following the general election in September 2006, Social Democrats were replaced by a centre-right Alliance Party-led coalition. On the surface at least, the new government did not change the official standpoint towards the *Laval* case. The new Prime Minister, Fredrik Reinfeldt, declared that the Swedish labour market should still be largely regulated by collective

bargaining and collective agreements, not by legislation (*Regeringsförklaringen*, 6 Oct. 2006), a view re-iterated by the Minister of Labour, Sven-Otto Littorin (*Dagens eko* 24 Nov. 2006). As Littorin made clear in the Swedish Parliament in January 2008, the Swedish model was both a flexible means for wage formation and, even more important, the main reason for comparative labour market quiescence. The main problem was that the collective agreement in the construction industry was not transparent enough. Somewhat disingenuously, he argued that the existing Swedish labour market model did not have any ‘political colour’, since it was ‘a bourgeois government that introduced the Collective Agreement Act in 1928’, *against* Social Democratic and trade union opposition (*Riksdagens protokoll* 2007/08 # 54). The rhetorical search for the ‘non-partisan’ roots of Sweden’s key employment legislation had less to do with history, than a desire to capitalise on new vulnerabilities facing the trade unions.

The Employers Confederation (SN)

The Confederation of Swedish Enterprise, SN, and its predecessor, the Swedish Employers’ Confederation, SAF, had long argued in favour of reducing the scope of trade union industrial action, especially with regard to sympathy action affecting so-called ‘third parties’ (Duker 2006). The *Laval* case offered a strategic opportunity to re-open this sensitive issue. To this end, the SN had assisted Laval financially as it pursued its case, both in the Swedish Labour Court and in the ECJ, even beyond the point at which the company itself had declared bankruptcy (*Svenskt Näringsliv*, homepage, 11 Dec. 2006). After the general election in September 2006, SN expressed its growing impatience with the new centre-right government’s seemingly ‘neutral’ stance in the *Laval* case (*Svenskt Näringsliv*, homepage, 1 Dec. 2006). For the Confederation, freedom of services according to the European Union treaty provisions was regarded as the overriding principle (*Svenskt Näringsliv*, homepage, 11

Dec. 2006). Their main objective remained a reformed legislative framework which would entail a permanent ban on secondary strikes and compulsory arbitration of disputes (Svenskt Näringsliv, homepage, 31 Jan. 2008).

Unsurprisingly, SN warmly welcomed the final judgment from the ECJ (Svenskt Näringsliv, homepage, 18 Dec. 2007). Its views, both before and after the judgment, were shared by its affiliate in the construction industry, the Swedish Construction Federation, Sveriges Byggindustrier, BI (*Byggindustrin*, editorial, 18 Dec. 2007). According to BI, Swedish companies should compete on the same terms as foreign companies and not by ‘trade restrictions’ (*Byggindustrin*, editorial, 23 May 2007). BI’s view had been that the existing industry agreement in the construction sector was ‘outmoded’. The fact that its own members might suffer from competition from abroad in the short run, appeared to be of less importance.

The Trade Union Confederation (LO)

A bedrock assumption from the standpoint of the Swedish blue-collar Trade Union Confederation (Landsorganisationen) LO had been the inviolability of an accession ‘promise’ made to Sweden when it joined the European Union that the special character of the Swedish labour market model would be maintained. Yet this assurance was not a specific legal instrument within the accession agreement, but rather a letter from the then European Commissioner for Enlargement. Key officials within LO now recognised that the *Laval* judgment jeopardized the Swedish labour market system, since, until this point, collective agreements and their enforcement through industrial action had provided effective protection against wage undercutting. In the words of LO’s head of collective bargaining, Erland

Olauson, LO's fundamental standpoint was that workers were 'humans ... not merchandize', echoing the International Labour Organization's *Declaration of Philadelphia* with its assertion of labour rights as basic human rights. LO could not accept a development where 'companies compete about which one is the best in paying its workers the worst' (LO, homepage, Jan. 2007). The 'arrogant interference' by the ECJ in the Swedish industrial relations system as it was seen, was also condemned. 'To allow foreign workers to work under worse conditions than Swedish ones' Olauson claimed, 'means that we have got a new form of apartheid' (*LO-tidningen* 18 Dec. 2007). Yet, despite this rhetoric, a rather more conciliatory tone was struck by the LO leadership (Lundby-Wedin and Olauson 2008). The ECJ judgment was not the 'final defeat' for the trade unions. Yet, for LO, there was a fear of opening a 'pandora's box', in terms of further undermining an already weakened position. The core of the practical problem created by the ECJ judgment was characterised in terms of national legislation which was 'simply not clear enough'. LO's requested government to amend the terms of the Swedish transposition of the Directive in the Swedish Posted Workers' Act. Thus, adopting a tactical position of reasonableness, LO as a responsible 'social partner' hoped also to manoeuvre the government into a sympathetic posture.

Subsequently, it was Byggnads, the construction workers' union, as the union for the sector most detrimentally affected by the judgment, rather than LO that was in the forefront of the debate emerging in Sweden. Torgny Johansson, chairman of Byggnads's local branch in the Stockholm area maintained that all workers within the European Union had to be treated equally, using the metaphor of the 'rules of the game' which had to be the same for both teams (*Svenska Byggnadsarbetareförbundet* 2005: 2, 14-17). In Byggnads's opinion, SN, supported by right-wing political forces, had used *Laval* as a 'guinea-pig' to test the limits of

workers' rights in the Swedish labour market (Svenska Byggnadsarbetareförbundet 2005: 6, 12, 16; homepage, 1 Nov. 2006).

Byggnads chairperson, Hans Tilly, who had previously welcomed the Advocate-General's first opinion as 'a wholesome telling-off' for the employers (Svenska Byggnadsarbetareförbundet, homepage, 23 May 2007) was now less happy. Tilly urged the government to take measures to prevent unscrupulous entrepreneurs from 'job trafficking', suggesting that many construction companies used foreign labour under 'slave-like' circumstances, similar to other forms of human trafficking (Tilly, 2007). In a further contribution to the yearbook of the union-friendly think-tank *Agora*, the construction industry was characterised as a battle-ground for a future deregulated Swedish labour market (Tilly 2008). In sum, with this partial exception, the response of organised labour to the *Laval* judgment had been muted.

The *Laval* Public Inquiry

On 10 April 2008, the Swedish government launched a public inquiry to resolve the legal issues raised by the ECJ (Regeringen 2008 dir. 38). The remit of the inquiry presupposed the fundamental principle that the main responsibility for pay formation and employment terms and conditions was assigned to the labour market parties, should as far as possible be maintained; yet the EC legislation on freedom of movement of services and the principle of non-discrimination on nationality grounds had also to be fully respected (SOU 2008 # 123).² Claes Stråth, Director-General of the National Mediation Office, one of the most trusted mediators in the Swedish labour market system, was chosen as chairperson, thus maintaining

the ostensible neutrality of such procedures (Thörnqvist, 2007). The inquiry discussions focussed, in particular, on the future of the *Lex Britannia* provisions and the compatibility of the Swedish model with EU law. The trade unions, for their part, launched their own legal review, undertaken by Niklas Bruun and Jonas Malmberg, both leading experts in European law and Swedish/Nordic labour law. A ‘first analysis’ found the *Lex Britannia* provisions impossible to maintain in the light of the ECJ judgment. Also accepted was the need for legislative revision of the Swedish application of the Directive on the posting of workers. Their immediate suggestion was to implement a clause on minimum wages for posted workers in all industry-wide collective agreements (Bruun and Malmberg 2008).

The inquiry, its terms thus set, found that the core of the problem was not the overall Swedish system of labour market regulation based on collective bargaining, but incompatibility between the encompassing rights to take industrial action and the freedom of movement according to the EC law. Hence, the inquiry proposed to limit the right to strike, or take action short of strikes, intended to force foreign-owned enterprises temporarily active in Sweden to conclude agreements with better pay or working conditions than the required minimum for the industry. To assist foreign service providers posting workers to Sweden to access information on prevailing labour market terms and conditions, it was proposed that the Swedish Work Environment Authority act as a liaison office. In effect, trade unions would not be able to attempt to replace collective agreements that were already legally settled in other EU countries by Swedish ones (SOU 2008 # 123; *Dagens Nyheter* 12 Dec. 2008).

The SN, the sharpest critic of the existing framework of trade union rights, immediately declared the proposal ‘incomplete’. SN’s expert on labour law, Lars Gellner, argued that the suggested amendment to existing law was still not compatible with the ECJ judgment

regarding the free mobility of services within the Union, and that the inquiry proposal allowed the possibility for trade unions to take action in matters that should be beyond their rights. Neither, it was argued, did the Laval inquiry recommendations ensure that foreign companies would be able to estimate prevailing wage rates, a particularly important issue in the construction industry. Moreover, it was also unacceptable that ‘discriminating legal regulation’ in the form of *Lex Britannia* should still be in force for companies from outside the European Union and European Economic Area (Svenskt Näringsliv, homepage, 12 Dec. 2008).

The Swedish Trade Union Confederation, LO, was less critical of the inquiry findings, adopting a ‘minimalist’ defensive posture. For Wanja Lundby-Wedin, as president of LO, but also a powerful figure within the Swedish Social Democratic Party *and*, wearing a third hat as chairperson of the European TUC, the problem had to be solved at European level by changes in the EC law (LO, homepage, 12 Dec. 2008). Yet, critical voices within LO were also raised (12 Dec. 2008). According to Claes-Mikael Jonsson, LO jurist and a member of the inquiry’s reference group, the problem with ‘double contracting’ remained; too many foreign companies settled a ‘real’ individual employment contract with their employees, and a ‘fake’ contract to show to Swedish trade unions and employers’ associations. It was very hard for the unions, Jonsson argued, to prove that a company was ‘lying’, when it could present papers showing that the workers had wages and working conditions equal to Swedish collective agreement. In other words, a Swedish collective agreement was transparent in a way that, for example, a foreign one, in particular a foreign individual employment contract was not. Similar viewpoints were expressed by Byggnads and the union confederation for salaried employees.

In October 2009, on the basis of the inquiry, the Swedish government announced a proposal for a new law revising the rules governing when unions have the right to take industrial action, set to take effect on 1 April 2010. Somewhat disingenuously, Sven Otto Littorin, Minister of Labour, was able to claim: ‘a solution that combines the Swedish labour market model with existing Community law in a well-balanced way...We do not need to introduce a statutory minimum wage or extend collective agreements to be generally applicable’ (Ministry of Employment, 2009). Yet, both organised labour and employers were critical of the proposed legislation. Employers who did not want to be subject to industrial action in the future, would now need to prove that they fulfilled the minimum requirements laid out in Swedish collective wage agreements, with disputes to be settled by the Labour Court. For the trade unions however, the issue of ‘social dumping’ remained unresolved. The terms of collective agreements over which trade unions could take industrial action were to be confined to Swedish central industry-wide agreements and thus, would only regulate certain core provision areas – such as minimum pay, working hours and holidays. Trade unions would also have to take into consideration the circumstances that the posted workers might be working under a foreign collective agreement, and hence not subject to Swedish union bargaining pressures. The Swedish trade unions demanded the Parliament submit the proposed Bill to the Swedish Constitutional Court to see whether it was compatible with the Swedish Constitution, with the European Convention of Human Rights, with the ILO Conventions ratified by Sweden and with the EU Charter of Fundamental Rights as embodied in the Lisbon Treaty coming into force on 1 December 2009.

The Lisbon Treaty incorporates the Charter of Fundamental Rights of the European Union into the European Treaty. Article 28 of the Charter of Fundamental Rights proclaims that

workers and employers have 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’ (EU, 2000). Moreover, the EU Charter also refers to the European Convention for the Protection of Human Rights and Fundamental Freedoms which is upheld by the European Court of Human Rights (ECtHR). Thus, the special role of the Convention has been codified by the EU Charter which gives priority to rights originating in the ECtHR. Article 52(3) of the EU Charter accords deference to the ECtHR jurisprudence on Convention rights. It provides that, in so far as the EU Charter contains rights which correspond to those guaranteed by the ECtHR, the meaning and scope of those rights shall be the same as those laid down by the European Convention. Article 11 of the Convention affirms ‘Freedom of assembly and association.’ Para. 1 states ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.’ Para. 2 notes that ‘no restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others’ (Council of Europe 2003). The EU is not as yet a party to the ECtHR, however, all individual EU Member States must comply with the Convention and the interpretation of the Article 11 jurisprudence of the ECtHR, and, in addition, Member States have conferred on the EU the competence to accede as a whole to the European Convention. Even if accession does not take place, the ECJ has made it clear that it will defer to human rights rulings of the ECtHR. So, whilst the ECJ has held back from formally finding that the ECtHR is binding, it routinely refers to the importance of the Convention as a key source of law. Meanwhile, the ECtHR in two recent decisions (Council of Europe 2008) and also *Enerji Yapı Yol Sen v Turkey* (App. No.68959/01) has confirmed a

broader scope for both collective bargaining and the right to strike (McKay 2009). It would appear that the European law now has an inconsistency that may provide space for a legal challenge to reassert greater national autonomy in collective bargaining arrangements.³

The final ruling of the Swedish Labour Court

In the light of the ECJ judgment and the pending Bill before the Swedish parliament, the Swedish Labour Court, as the relevant national court, returned to the *Laval* case in order to apply the interpretation handed down by the ECJ in a final determination on 2 December 2009. By an ironic coincidence this was the day after the EU Charter of Fundamental Rights in the Lisbon Treaty came into force. In most cases, the Labour Court has seven members. They are officially appointed by the government, but both the trade unions and the employers' associations must be represented in an equal way, that is, either three or two Court members with connections to each side. The chair is held by a supposedly 'neutral' judge with a solely legal background, who is not connected to any of the parties.

By a majority of four to three, the Court now found that the actions of the trade unions in mounting the blockade at Vaxholm had violated the fundamental market freedom of Laval to offer its services in Sweden using posted workers and in consequence, the trade union action was deemed illegal. Byggnads and the Swedish Electricians' Union were duly fined 2.63 million Swedish kronor (208,000 Euros) of which 2.13 million kronor was awarded in legal costs incurred by the company. The remaining 550,000 kronor was 'general damages' for the illegal industrial action, to be jointly paid by Byggnads (200,000 kronor), the Stockholm branch of Byggnads (200,000 kronor) and the electricians' union (150,000 kronor). The

Labour Court rejected Laval's demand that it be compensated for economic damages arising from the trade union action (*Arbetsdomstolens Domar*, 2009 # 89)⁴. According to the Codetermination Act, the individual participant in a conflict is protected by virtue of her/his belonging to an organization, and the employment contract is still valid during a legal industrial action. Even though the Court found that the blockade violated EC legislation, the action was not considered a 'wildcat' one, and consequently none of the workers involved were subject to damages or legal costs. Three members of the Court, among them the trade union representatives, registered reservations as to the size of the damages.

Even though trade unions found the ruling unfair, there were only minor disagreements with the legal aspects of the decision. The only hint of unfair treatment of the case was suggested by Kurt Junesjö, a jurist formerly connected to the LO, but now retired, although remaining a labour market commentator. According to Junesjö, the chair in the Laval case, Inga Åkerlund, was not as 'neutral' as one could expect in such a case; on the contrary, she had a reputation of judging against the trade unions in 90 per cent of all cases she had been involved in (Junesjö, homepage, Dec. 2009). However, as there is no right of appeal to the decisions of the Court, the matter has rested there.

No important Swedish politician made any immediate statement either for or against the Labour Court ruling. SN welcomed the decision from the employers' view, while for the trade unions the decision of the Court was a shock. LO condemned what it called an 'inconsistent and unfair' judgment (LO homepage, Dec. 2009). Byggnads, likewise, argued that it would now be harder for Swedish unions to protect foreign workers (Byggnads, homepage, Dec. 2009). Taking a broader view, the European Federation of Building and Woodworkers (EFBWW), spearheading a European-wide trade union campaign to secure amendments to the

Directive on the posting of workers, characterised the judgment as affecting not only the rights of Swedish trade unions, but also having serious implications for the right to strike at EU level, ‘since collective actions that are lawful according to national legislation in a Member State may be pronounced unlawful according to EU law and thus liable to damages – by way of the “horizontal direct effect” given to EU law by the European Court of Justice’ (EFBWW, 2009). By contrast, the Latvian Foreign Ministry, speaking for the Latvian government, welcomed the Labour Court's decision as being ‘in accordance with the European Union principles’ (LETA, 2009). Becomes Baltic Course

Conclusion

While in total perhaps no more than 2,000 foreign workers are present in Sweden as posted workers at the time of writing (2009), these migrants, albeit ‘temporary’, represent the core ‘documented’ labourforce. Until now, it has been possible for Swedish trade unions to attempt to regulate their terms and conditions. The erosion of the capacity to defend core national labour conditions as a result of the *Laval* case, while worrying in itself, now opens the way to the ‘unprotecting’ of migrant ‘posted’ workers and more particularly of vulnerable undocumented labour on a wider scale. Collaterally, the prospect of a gravitational pull on Swedish labour standards in general is real. It becomes singularly difficult to affirm ‘benchmark’ collective agreements setting the higher rather than the lower standard. This project was difficult enough to realise even before the *Laval* judgment (Erne 2008: 90-95). After *Laval* resort to traditional forms of collective action and labour solidarity to defend labour standards at national level has become legally circumscribed. Moreover, in the absence of a minimum threshold of wages at EU level, regulating labour standards through cross-border trade union solidarity also becomes problematical. With the door open to employers

from the new EU member states to compete on a European-wide scale on the basis of lower-cost labour, the issue of labour standards and ‘the race to the bottom’ post-*Laval*, is therefore fundamental to the future preservation of a social dimension to the European project.

The ECJ ruling has thus struck at the very heart of the so-called Swedish model for setting wages and conditions. The ECJ’s particular, narrow (and some might argue idiosyncratic) interpretation of the Directive, and, crucially, of Article 3(8), is at the heart of the damage to Swedish national industrial relations autonomy. More generally, the ECJ’s approach post-*Laval* flattens out or disregards the complexities of systems of collective bargaining in Member States with their varying mix of wage-setting through combinations of national and sectoral bargaining (Kilpatrick 2009: 853-4) . Moreover, it could be argued that the whole purpose and legislative intention of the Directive on the posting of workers has been undermined. Arguably, post-*Laval* the flow of discrimination, if such it is, is in the opposite direction, towards foreign service providers. In short, key pillars of the distinctive Swedish model of labour market regulation have now been undermined, if not altogether dismantled. The only positive note is that following the Lisbon Treaty coming into force, the European Convention and the rulings of the EctHR may hold greater weight and unquestionably affirm a broader view than that of the ECJ. This may offer space for a future legal challenge if the trade unions are ready to make it.

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References

Arbetsdomstolens Domar (2009), Dom nr 89/09. 2009-12-02. Mål nr A 268/04. Stockholm.

[<http://www.arbetsdomstolen.se/upload/pdf/2009/89-09.pdf>]

Ashiagbor, D. (2009), 'Collective Labor Rights and the European Social Model', *Law & Ethics of Human Rights*, Article 5, 3, 2, 221-266,

Barnard, C. (2008), *Employment Rights, Free Movement under the EC Treaty and the Services Directive*, Europa Institute Mitchell Working Paper Series (Edinburgh: University of Edinburgh).

Bell, M. (2008), *Understanding Viking and Laval: An IER Briefing Note* (London: Institute of Employment Rights).

Bercusson, B. (2007), 'The Trade Union Movement and the European Union: Judgement Day', *European Law Journal*, 13, 3, 279-308.

Blanpain, R. (2009) 'General Comments: *Laval* and *Viking* Who pays the price?' In R. Blanpain and A. Swiatkowski (eds) *The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia*, The Netherlands: Kluwer International, pp. xix-xxii.

Byggindustrin (journal for Sveriges Byggindustrier) editorial, 21 April 2007,
[<http://bi.wd6.se/Templates/Default.aspx?pId=25>]

Not working

Byggindustrin (journal for Sveriges Byggindustrier) editorial, 23 May 2007,
[<http://bi.wd6.se/Templates/Default.aspx?pId=33>]

Not working

Byggindustrin (journal for Sveriges Byggindustrier) editorial, 18 December 2007,
[<http://bi.wd6.se/Templates/Default.aspx?pId=313>]

Not working

Byggnads (2009), AD:s lavalldom får allvarliga konsekvenser, 2 December.
[<http://www.byggnads.se/Nyheter/Nyhetsarkiv/ADs-lavalldom-far-allvarliga-konsekvenser/>]

ok

Bruun, N. and J. Malmberg (2008), *Anställningsvillkor för utstationerade arbetstagare i ljuset av Laval och Rüffert*, (Stockholm: Facken inom industrin).

[<http://www.fackeninomindustrin.se>]

Case C-341/05, JUDGMENT OF THE COURT (Grand Chamber) 18 December 2007.

Council of Europe (2003), Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6, 7, 12 and 13. Registry of the European Court of Human Rights.

Dagens eko (daily news programme on Swedish Radio) 24 November 2006.

Dagens Nyheter (Swedish morning newspaper). Debate article by the members of the *Laval* inquiry, 12 December 2008.

Davies, A.C.L. (2008), 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ', *Industrial Law Journal* 37, 2, 126-148.

Dølvik, J-E. and Visser, J. (2009), 'Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?' *Industrial Relations Journal* 40, 6, 491–509.

Donaghey, J. and P. Teague (2006), 'The free movement of workers and social Europe: maintaining the European ideal', *Industrial Relations Journal* 37, 6, 652-666.

Duker, J-P. (2006), 'Ett arbetsgivarperspektiv på medling', in A-M Egerö and B. Nyström (eds), *Hundra år av medling i Sverige: Jubileumsskrift: Historik, analys och framtidsvisioner* (Stockholm: Medlingsinstitutet) 184-99.

EFBWW (2009), Executive statement, Brussels, 3 December (authors' possession).

EIROnline (2008a), Trade unions take action to counter membership decline (Dublin: European Foundation for the Improvement of Living and Working Conditions). [<http://www.eurofound.europa.eu/eiro/2008/06/articles/se0806029i.htm>].

ok

EIROnline (2008b), Government to amend labour law in light of European Court ruling on Laval case (Dublin: European Foundation for the Improvement of Living and Working Conditions). [<http://www.eurofound.europa.eu/eiro/2008/04/articles/se0804029i.htm>]

Eklund, R. (2006), 'The *Laval* Case: Swedish Labour Court Decision 2005 No. 49', *Industrial Law Journal* 35, 2, 202-208.

Eklund, R. (2008), 'A Swedish Perspective on *Laval*', *Comparative Labor Law and Policy Journal* 29, 551-572.

Ekström, V. (2008), *Vaxholmskonflikten och EG-domstolens dom: En analys av den offentliga debatten kring konfliktens och domens eventuella framtida konsekvenser för den*

svenska arbetsmarknadsmodellen, MA (Magister) thesis, University of Gothenburg, the European studies programme.

Erne, R. (2008), *European Unions: Labor's Quest for a Transnational Democracy*, Cornell: ILR Press.

European Commission (2006), *Employment in Europe 2006* (Brussels: European Commission).

EU (2000), Charter of Fundamental Rights of the European Union, (2000/C 364/01), 12 December. Official Journal of the European Communities, C 364/1.

[http://www.europarl.europa.eu/charter/pdf/text_en.pdf].

ok

Council of Europe (2008), CASE OF DEMİR AND BAYKARA v. TURKEY (*Application no. 34503/97*), Grand Chamber, Judgment, Strasbourg, 12 November.

[http://www.menschenrechte.ac.at/orig/08_6/Demir.pdf]

ok

Junesjö, K. (1998), *Strejk – En demokratisk rättighet för bättre arbetsförhållanden* (Stockholm: LO).

Junesjö, K. (2009), homepage,

[http://www.kurt.nu/index_svensk_arbetsratt/svensk_arbetsratt_ad_text/ad_domar_2009/ad_2009_nr_089.htm].

Kilpatrick, C. (2009), 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers', *European Law Review* 34, 6, 844-865.

Kjellberg, A. (2007), 'The Swedish trade union system in transition: High but falling union density', in C. Phelan (ed) *Trade Union Revitalisation – Trends and Prospects in 34 Countries*, (Oxford, Bern, Brussels, Frankfurt am Main, New York, Vienna: Peter Lang) 259-285.

Krings, T. (2009), "'A race to the bottom?'" Trade unions, EU enlargement and the free movement of labour', *European Journal of Industrial Relations* 15,1, 49-69.

LETA (2009), Swedish Labor Court orders unions to pay "Laval un partneri" SEK 2.7 million, 3 December. [<http://www.leta.lv/eng/fnews.php?id=5C8A06E1-2C85-4439-BD95-969F01A95261>].

LO 2007a, homepage, 9 January 2007, 'Alla löntagare berörs om det blir tillåtet att dumpa svenska löner', [<http://www.lo.se/home/lo/home.nsf/unidView/27EC69B6DC6F4317C1256F71004BBBC9>],

LO, 2007b, homepage, 9 January 2007 'Vi vill inte se en utveckling där företagen konkurrerar om vem som är bäst på att betala sina anställda sämst',

[<http://www.lo.se/home/lo/home.nsf/unidView/21BA80FEEF501A27C125725E004F405C>]

(interviews with Erland Olauson).

LO, homepage, 12 December 2008, comments on the *Laval* inquiry, both editorial and from Wanja Lundby-Wedin and Claes-Mikael Jonsson respectively.

LO (2009), Arbetsdomstolens dom i Laval-målet väcker frågor om rättssäkerheten. 2 December.

[<http://www.lo.se/home/lo/home.nsf/unidview/BCF63A2088641872C1257680004D7319>]

LO-tidningen (journal of LO) 18 December 2007, 'Domen innebär apartheid' and 'EU-domen ett nederlag för Sverige' (interviews with Erland Olauson), (comments on the *Laval* inquiry) 12 December 2008.

Lundby-Wedin, W. and E. Olauson (2008), 'Laval-domen kan tvinga LO att ändra lönepolitik', *Dagens Nyheter*, 18 January.

Malmberg, J. and T. Sigeman (2008), 'Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice', *Common Market Law Review*, 45, 1115-1146.

McKay, S. (2009), 'ECHR upholds the right to collective bargaining and to strike', Eironline, Dublin: European Foundation for the Improvement of Living and Working Conditions. [http://www.eurofound.europa.eu/eiro/2009/05/articles/eu0905029i.htm]

Ministry of Employment (2009), Measures with reference to the Laval judgment, Press Release, October 8. [http://www.sweden.gov.se/sb/d/12274/a/133290]

Ministry of Industry, Employment and Communications Sweden (1999), Foreign Posting of Employees Act, SFS 1999.

Notre Europe (2008), *Debate: Viking-Laval-Rüffert: Economic freedoms versus fundamental social rights – where does the balance lie?* [<http://www.notre-europe.eu/en/axes/competition-cooperation-solidarity/works/publication/debate-viking-laval-ruefferteconomic-freedoms-versus-fundamental-social-rights-where-does-the-bal/>]

Opinion of Advocate General Mengozzi delivered on 23 May 2007 Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others (Request for a preliminary ruling from the Arbetsdomstolen (Sweden))

Picard, S. (2008), 'Collective action vs free movement: The *Laval* and *Viking* cases', *Transfer*, 1, 160-165.

Regeringen (Swedish Government) 10 April 2008, 'Kommittédirektiv: Konsekvenser och åtgärder med anledning av Laval-domen', Dir. 2008:38.

[<http://www.regeringen.se/content/1/c6/10/26/10/90e01d7d.pdf>]

Regeringsförklaringen (inaugural speech in the Swedish Parliament), 6 October 2006

[<http://www.regeringen.se/content/1/c6/07/02/32/bcc6951a.pdf>]

Riksdagens protokoll (minutes from the Swedish Parliament) 2007/08 # 54, Friday 18 January 2008.

SOU 2008 # 123: *Förslag till åtgärder med anledning av Lavaldomen*,

[<http://www.regeringen.se/content/1/c6/11/74/43/5d1a903d.pdf>]

Svenska Byggnadsarbetareförbundet (2005), *Fallet Vaxholm: Vi tog matchen mot ojusta regler på arbetsmarknaden* (Stockholm: Byggettan).

[<http://www.byggnads.se/vaxholm/Fallet%20Vaxholm.pdf> Fulltext]

Svenska Byggnadsarbetareförbundet, homepage, 1 November 2006, 'Högerattack mot bygglönerna', [<http://www.byggnads.se//byggnads/52981.cs>]

Svenska Byggnadsarbetareförbundet, homepage, 23 May 2007, 'Framgång för Byggnads i Generaladvokatens yttrande' (comment by Hans Tilly),

[<http://www.byggnads.se//byggnads/58484.cs>]

Svenskt Näringsliv, homepage, 1 December 2006, 'Regeringen lägger sig platt i Vaxholmsmålet' (interview with Jan-Peter Duker).

http://www.svensktnaringsliv.se/fragor/utlandska_foretag_i_sverige/regeringen-lagger-sig-platt-i-vaxholmsmalet_19243.html

Svenskt Näringsliv, homepage, 11 December 2006, 'Vaxholm: Protektionism mot fri rörlighet' (by Kent Brorson),

http://www.svensktnaringsliv.se/fragor/utlandska_foretag_i_sverige/vaxholm-protektionism-mot-fri-rorlighet_19927.html

Svenskt Näringsliv, homepage, 18 December 2007, 'Välkommen EU-dom i Vaxholmsmålet' (by Urban Bäckström, Jan-Peter Duker and Lars Gellner),

[http://www.svensktnaringsliv.se/fragor/utlandska_foretag_i_sverige/article41188.ece]

Svenskt Näringsliv, homepage, 31 January 2008, 'Konfliktreglerna bör ändras' (by Lars Gellner and Jan Peter Duker)

[<http://www.svensktnaringsliv.se/fragor/konfliktregler/article7091.ece>]

Svenskt Näringsliv, homepage, 12 December 2008, comments on the *Laval* inquiry by Lars Gellner.

Thörnqvist, C. (1999), 'The Decentralization of Industrial Relations: The Swedish Case in Comparative Perspective', *European Journal of Industrial Relations* 5, 1, 71-87.

Thörnqvist, C. (2007), 'Changing Industrial Relations in the Swedish Public Sector – New Tensions within the Old Framework of Corporatism', *International Journal of Public Sector Management* 20, 1, 16-33.

Tilly, H. (2007), 'Avser regeringen att stoppa jobbtrafficking?', *Svenska Dagbladet*, 19 December.

Tilly, H. (2008), 'Domstolstvister eller fasta handslag?', in A. Thoursie (ed.), *Vems ordning och reda? Framtidens kollektivavtal och fackliga samarbete* (Stockholm: Agora) 106-116.

Woolfson, C. and J. Sommers, (2006), 'Labour Mobility in Construction: European Implications of the Latvian Laval un Partneri Dispute with Swedish Labour', *European Journal of Industrial Relations* 12, 1, 49-68.

Table 1. Trade union density in Sweden by sector and year (%)

	1990	1993	2000	2003	2004	2005	2006	October 2006	October 2007
A. Blue-collar workers									
Private sector	81	82	79	77	75	74	74	74	70
Public sector	87	93	90	89	88	86	87	87	84
Both sectors	82	86	83	80	79	77	77	77	73
B. White-collar workers									
Private sector	70	74	70	71	70	70	69	68.5	64
Public sector	94	94	93	91	90	90	89	88.5	85
Both sectors	81	83	79	79	78	78	77	76	72
C. All workers									
Private sector	75	78	75	74	73	72	71	71	67
Public sector	91	94	92	90	89	89	88	88	85
Both sectors	81	85	81	80	79	78	77	77	72

Source: A. Kjellberg cited in EIROOnline, 2008a.

¹ This section draws on public statements in different media and official sources from the main Swedish actors, that is, the government, the trade unions and the employers' associations. The authors have had great help in the collection of the material from Veronica Ekström, and a thorough methodological overview of the basic data collection is found in her MA dissertation: Ekström 2008: 4-6.

² The citations are taken from the English summary and the English translation of the government's directive, published in the appendix 'Bilaga 2: Committee terms of reference, ToR 2008:38.

³ We are grateful to Diamond Ashiagbor for this detailed explanation regarding the importance of the ECtHR with respect to human rights discourse on the right to strike and the importance of the Convention *visavis* EU law.

⁴ Swedish law distinguishes between general and pecuniary damages. The trade unions were ordered to pay general damages for violating EC legislation, but Laval could not prove that it had suffered enough financially to also gain pecuniary damages.