



Master's thesis

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**From Rush-Portugesa to Laval and  
the Wharf-case: How the posting of  
workers in the EU and Norway has  
been shaped by the courts**

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## **Abbreviations**

ECJ	The European Court of Justice
EEA	The European Economic Area
EFTA	The European Free Trade Area
ETUC	The European Trade Union Federation
ETUI	The European Trade Union Institute
EU	The European Union
FOC	Flags of Convenience
FSU	The Finnish Union of Seamen
ILO	The International Labour Organisation
ITF	The International Federation of Transport Workers' Unions
LO	Landsorganisasjonen
NHO	Næringslivets Hovedorganisasjon
PWD	The Posting of Workers Directive



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# 1. Introduction

The Wharf-case is considered to be one of the most significant decisions in the Norwegian labour market in years, and is of vital principal importance for Norway's legal position regarding the posting of workers in a post-Laval EU. The verdict of the Norwegian Supreme Court was in favour of the trade unions claims about the Posting of Workers Directive (PWD, *utstasjoningsdirektivet*) and its effect on the Norwegian labour market, becoming the last in an uncommonly long list of court cases surrounding a seemingly mundane EU directive. The PWD's history can be told by the court cases it has been the main focus in, something that reflects the difficulty of reconciling the two issues it was meant to; the social protection of workers and the four freedoms of the EU's inner market.

The importance of rules governing the movement of workers between the members of the European Union (EU) and the European Economic Area (EEA) has increased as more and more countries have joined the union. In 1957 only six countries, all with fairly advanced economies, signed the Rome Treaty, embarking on a much more daring venture than the European Coal and Steel Community had been. Article 3(c) of the Rome treaty states that one of the objectives of the European Economic Communities would be "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital" (1957, p. 4). Those obstacles were many. The EU has in many ways been shaped by the desire of the member countries to make the common rules needed to achieve this goal conform to the national rules already in place within their own borders.

An increased rate of cross border movement of workers has created a prominent fear of social dumping, where companies are hiring cheap labour from low-cost countries, creating a two-tier labour market. The European trade unions have fought this for many years, but the completion of the inner market, with free flow of workers made the fight all the more important. There was a low rate of cross border migration the first years of the union, which was a result of the relatively high standards of living in the six member countries. The main reasons for this was that this was made difficult by the fact that the common rules for this had not been laid down, and there was simply not much difference in the cost of a construction firm from Germany or from France. The importance of regulation within this field was made clear by the inclusion of relatively speaking poorer countries to the EU, such as Portugal and Spain. Firms from these countries, for example Portugal, paid lower wages to their workers



than for example a comparable German firm did, thereby giving the Portuguese firm the ability to offer their services at a lower rate than the German firm. This creates a challenge for the common market, one that is fascinatingly difficult to solve in practice; how do you strike a balance between protecting workers from both exploitation and from unfair competition at the same time, while also upholding the four freedoms of the European common market? Cross-border labour mobility creates both the challenge of ensuring that posted workers are not exploited with sub-standard pay rates and working conditions, and the challenge of ensuring that workers in one country are not unfairly outmanoeuvred by companies which pay significantly less to their workers than they are. But protection of workers has to be balanced up against ensuring that companies have the right of establishment within the EU and the EEA without being hindered by bureaucracy and red tape, including vast tariff agreements and labour regulations. This is where the PWD was supposed to create a balancing mechanism to simplify what rules companies would have to adhere to when taking on contracts in other member countries, while protecting the core rights of the workers being posted. Great energy went into formulating this directive, both from the EU institutions, from member states and from the partners in the labour market. However, recent years have shown that the interpretation of the directive was not as established as first thought. The four verdicts in the so called Laval-quartet in the European Court of Justice (ECJ) has changed how the directive is interpreted, sparking outrage from trade unions fearing a rise in exploitation of workers and social dumping. In Norway, the posting of Workers Directive spared little controversy outside academic circles until the Wharf-case came before the Norwegian court.

## **1.1 Major debates**

Labour politics is in many ways far removed from the game theory and complex structure of international politics in general. On the national level it is very much divided between the workers and the employers, both fighting for what would seem to be polar opposite ideals; workers want to be paid as much as possible, employers want to pay their workers as little as possible to maximize profit. That is obviously a major simplification, but the essence is true.

When reviewing the literature relevant for the scope of this thesis, one thing becomes clear: None are more concerned with the topic than trade unions. Painfully logical, yes, but the amount of research material that in some way is encouraged or sponsored by trade unions greatly outweighs similar material from their counterpart on the employer side. One answer to why it is so lies in how the labour market has developed since the start of the 1990s, and the core conflict of this thesis: The trade unions see the basic rights of their members being

infringed upon, and produce material to back up its claims. On the other hand, business organizations welcome the focus on the four freedoms, and are in general happy about the state of the PWD. The purpose of this section will therefore be to give an overview on the literature concerning the PWD, with the main focus being on how it is perceived by the partners of the labour market.

The European Trade Union Confederation (ETUC) is what you can call an umbrella organization for European trade unions, and has since 1973 strived to be the voice of European labourers in the European institutions. As a part of its work it has also been a promoter of research about the labour market, especially through the European Trade Union Institute (ETUI), a research institute with a particular focus on workers and social rights. ETUI has dedicated a whole project on the Laval-quartet, looking both on the situation before and after the verdicts. Bücken & Warneck examines the impact the verdicts have had on several individual countries in the EU, including Germany, Poland, the UK and the Nordic countries (2010). When they review the academic scrutiny of the Laval-quartet, they found large interest in countries like Germany, Italy and the UK, while countries like Poland lacked an extensive academic interest in the verdicts (Bücken & Warneck 2010, p. 130). Furthermore, the references they could find were to potential changes on a European level, not which consequences it could have on the Polish labour market (ibid). They found that most of the academic articles were critical to many parts of the verdicts, and that the consensus was that the verdicts had created a substantial legal uncertainty around the scope of fundamental freedoms in the internal market (Bücken & Warneck 2010, p. 134). As a result, they found that many EU member states have tried to find ways to protect their own system, for example Denmark and Germany, where the latter saw “a considerable discrepancy between the interpretation and application of the freedom of association by the ECJ and the level of protection of this fundamental right codified in the German constitution” (Bücken & Warneck 2010, p. 136). The aim of the rapport was not to give answers, but rather to pose some questions, as this was not that long after the verdicts had been given.

There has been a particular focus on how different countries have reacted to the verdicts legislative-vice. Malmberg (2011) looks at how some of EU’s member states reacted to the verdicts. In Sweden, a country where the cooperation between the social partners has been a cornerstone of the labour market, the Confederation of Swedish Enterprises was partly financing the Laval-case, suggesting that some of its members saw a potential to “change national labour law or the balance between the social partners” (Malmberg 2011, p. 33).

Furthermore, after the verdict a committee was set up in order to find a solution to bringing the Swedish labour law more in line with the result of the law (ibid). Malmberg sees the Laval-quartet as a result of the relatively weak position of the EU's legislature, with a court that is given plenty of leeway in its interpretation by a PWD that failed to foresee the potential conflict between the freedoms of the market and the social rights of workers (2011, pp. 35-36). By opting to establish a principle of minimum protection instead of equal treatment between the two, he argues that the Laval-quartet was "an accident waiting to happen" (ibid).

Bosch, Cremers & Dølvik (2007) takes a similar approach to examining the legal basis of the PWD, stating that while the debates in the Commission before the Directive was finished showed an intention to establish equal treatment as the directive's basis, but that the finished result was a compromise between the conflicting logics of the protection of worker and the protection of the four freedoms. They also mirror the point that:

"[t]he widening and deepening of the Common Market for services and labour has thus triggered state initiatives of re-regulation at the national levels, in order to curb outright regime competition at the site and prevent further erosion of national labour regimes" (Bosch, Cremers & Dølvik 2007, p. 539)

When debating Denmark and Sweden, they make a point of the decision of both countries government not to use article 3(8) of the directive when implementing the PWD in its legislation. The article allow the use of collective agreements that are "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned" (Directive 96/71/EC), but according to Bosch, Cremers & Dølvik, the two governments in dialogue with the respective countries trade unions deemed the collective bargaining model flexible enough to ensure the social rights of workers (2007, p. 534). That negated a need to incorporate such a provision in the national legislation; something they felt would only undermine the autonomy of the social partners and threaten their exclusive right to decide pay issues between them without the interference of the state (ibid).

Out of all partners who have had a stake in the PWD debate after the Laval-quartet, the Swedish has arguably been the most prominent, both because of their loss in the Laval-case and because of their active role in the aftermath. The Swedish Trade Union Confederation (Swedish LO) has conducted its own study on the Laval-quartet, written by Lars Nyberg (2011), which chronicles how the PWD has impacted the Swedish labour market from the

start. In Norway, a wide range of research material is available from FAFO, including both studies of the Norwegian Labour system and international studies.

The vast scope of the EU makes it a difficult task to create legislation that is precise and detailed enough to create a legal framework able to meet both the present and future demands. Because of the vast differences between the member countries, both in legal system, political norms and in social system, the EU legislators has the near impossible task of creating a legal framework that works for all members. Such a task is by all standards impossible, but such a system creates a need for a court that can settle any dispute that arises out of the EU legislation. The PWD has spawned some of the most prolific ECJ-cases since the Maastricht treaty was signed, and has become a contentious directive, especially for many trade unions that sees the courts verdicts as an attack on the fundamental rights of workers. The role of the courts has been instrumental in the history of the PWD, and throughout this thesis we will see how the a narrative can be drawn from the Rush-Portugesa case, which was one of the main reasons for the creation of the directive in the first place, via the Laval-quartet, where the interpretation of the directive was changed in favour of a minimum requirements directive, to the wharf-case, which proved to be one of the most defining cases in the Norwegian labour market in years. The thesis will show the influential role of the court in redrawing the interpretation of legislation, and how the difficulty of creating legislation that manages to foresee conflicts with the national legislation in the vastly different member states creates a space for judicial activism in the EU. It is important to note that this judicial activism is not necessarily a bad thing, for an organisation as large and as complex as the EU it is in many cases essential to the functioning of the Union.

## **1.2 Analytical approach**

Within the scope of this thesis, the goal is not to explain this based on a theoretical perspective. There are many economic models that seek to explain aspects of the international economy, but that is an entirely different field from what this thesis will seek to explain. The thesis will not rely heavily on theory, although aspects of integration theory will be drawn in to showcase among other things how the role of the ECJ can be explained. Instead, the thesis will take a more comparative angle on the subject. The comparison which the thesis will make is between what the verdicts in the Laval-quartet led to in the countries in which they originated, and how this can be compared with the Wharf-case in Norway. The Wharf-case is very interesting since it is the first major case that challenges the Norwegian labour markets adoption of the PWD and how Norway adopted to entering the EEA in 1994. In examining

the Wharf-case, we will see how the EFTA-court based its preliminary ruling in the case on case-law from the Laval-quartet, and we will see how the interpretation of the Norwegian Supreme court differed in some crucial points.

Although this thesis does not take a theoretical approach to the analysis of this role of the courts, it is useful to mention examples of theoretical approaches that are specifically constructed to look at this role in order to borrow some analytical tools. Burley & Mattli (1993) adapted the neofunctionalist integration theory of Ernst Haas to analyse the role of the European Court of Justice in European integration. As Haas' version, their neofunctionalist approach to the court was a counterargument to a realist approach where institutions are regarded as little more than tool for the member states in policymaking. Burley & Mattli argues that the ECJ has gradually extended its power through the years by for example extending the rights of individuals to get their case tried before the ECJ<sup>1</sup> (Burley & Mattli 1993). The ECJ is independent from the other institutions, and Burley & Mattli explains the expanding role of the court with the concept of functional spillover, which in practice means that the court is filling in the blanks in EU legislation that they believe follows logically from the structure that already is in place. That would mean that the court is promoting European Integration, and following that it is not far to arguing that the ECJ has a political agenda. Would that undermine its legitimacy? As long as the court can legitimise its verdicts that should not be a problem, but when large groups disapprove of the court's decision it can create disillusionment with the courts role in the political system. The Laval-case, as we shall see later, has caused some member states to seek to shield its national legislation from interference by the court, fearing that it can cause unwanted changes in the established order of the national labour system. By lending analytical viewpoints from neofunctionalism and realism, the role of the court will be easier to analyse later on, even though they will not be used as an overarching theory.

In order to do this, it is vital to look at the reasoning of the court in the cases mentioned. Therefore, the original texts of the verdicts are essential to the thesis. Verdicts from three different courts will be used. The European Court of Justice will be the most prominent, both because it features in the most cases, including all of the Laval-quartet cases, and because those verdicts form the basis upon which the verdicts of the other two courts are based. One verdict from the EFTA-court will be used, the preliminary ruling on the Wharf-case

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<sup>1</sup> See «Van Gend & Loos v. Nederlandse Administratie der Belastingen» C-26/62

forwarded to the court by the Norwegian court of appeal, Borgarting Lagmannsrett. Finally, the final verdict in the Norwegian Supreme Court in the Wharf-case will feature heavily in chapter 5. The verdicts are extremely valuable sources because they not only provide the first hand, official justifications behind the courts judgement, but also provide access to the questions forwarded by the national courts, along with the claims made by the parties in the case, the most unbiased retelling of the facts of the case and references to the relevant EU legislation that the court bases its verdict on. Using these primary sources therefore spares the thesis for any unintentional bias that would occur if the facts were retold from sources that had an important stake in the case. Many of the chapters, specifically chapter 2, 3 and 5 will contain many references to the court-cases in passages that rely heavily on the courts perception on the case. All verdicts are publicly available online. When it is needed, other sources will be used to illuminate other points of view, or opinions diverging from the courts.

The secondary sources are from a wide range of academic texts and from interest groups. The PWD has spawned a large amount of academic attention and as a result a relatively substantial body of literature dealing with the directive itself and the Laval-quartet. Some of those articles will be used to provide angles for debate about the directive and the court-cases. There is also a large amount of research that comes from research institutes connected to the social partners, especially from the workers side. Although they are connected to the social partners, that does not necessarily mean that the reports are biased, but there is important to accurately convey the source materials origin when using such sources. The comparison between sources from trade unions and from employers' organisations should ideally provide a nuanced view of the different opinions on a case.

### **1.3 Structure and Argument**

In the second chapter of this thesis the background for the PWD will be examined, drawing a red thread from the Single European Act, through the European Social Charter and the Rush-Portuguesa case to the inception of the PWD. The chapter will show how the PWD was in the end constructed as an attempt to compromise between the protection of workers and the protection of the four freedoms of the internal market, something that was destined to be unsuccessful.

In the third chapter, we will see how the shortcomings of the PWD was brought to the foreground with the Laval-quartet, series of court-cases that in most scholars eyes changed the initial balanced interpretation of the PWD to being heavily in favour of the four freedoms.

The four cases will be examined in turn, before debating the combined effect of the quartet on the European labour market.

The fourth chapter will outline how the Norwegian labour market is built on a three-part model, where the social partners of the labour market along with the state form a negotiation system based on the desirability of consensus. The chapter will show how this system has ensured a stable and predictable labour market spared of major conflict. Furthermore, the chapter will examine how the law on the universal application of collective agreements (*allmengjøringsloven*) has contributed to ensuring that the membership in the EEA and the increase in labour immigration following the eastern enlargement haven't led to widespread social dumping and other negative effects in the labour market.

Finally, in the fifth chapter we will go through the Wharf-case, a case that is considered to be a landmark case in the Norwegian labour market. The background for the case is explained, before examining how the EFTA-Court saw no overriding reasons of public policy exceptions that could warrant the universal application of the most important remuneration that was considered. The EFTA-Court did however leave the final evaluation up to the Norwegian Supreme Court, which we shall see found that it was sufficient evidence to conclude that the removal of the remunerations in question would have negative effects on the labour market, and in turn found that the actions taken to avoid those effects were in proportion to the desired effect. Following this, there will be a discussion of four important topics in the wake of the wharf case: the status of remunerations such as those for travel lodging and board, the relationship between the EEA Article 36 and the PWD, the interpretation of the public policy exception and the status of Norway's relationship to the EU on labour matters following this case. In the concluding remarks, we will take a look at how the PWD has been shaped and reshaped by the courts, and how the relationship of the PWD to the Norwegian labour system is secured by the Supreme Court in the Wharf-case.

The thesis will show how the judicial system has played a vital role in shaping the PWD, and how the Laval-quartet changed the interpretation of the directive, sparking major controversy among trade unions, who are fighting to dispel the 'ghost of Laval' from the labour system. Thus far the thesis is in accord with the current research on the PWD, but the thesis also shows how the Wharf-case in Norway exemplifies that there is considerable room to manoeuvre for member states, and that the PWD can also be used in the protection of workers.

## **1. The Posting of Workers Directive: A troubled inception**

In order to understand the posting of workers directive, it is vital to look into the process behind it. Although one can argue that the single European act was the first real step towards a true European labour market policy, there are a few important steps along the way that it is important to mention. In this chapter we shall review these steps in order to have a clear view of why the PWD was a result of increased market integration in the EU, leading to a strong demand for accompanying social rights for workers.

Already in the Rome treaties from 1957 you can find the intention of creating a social policy in the EU. It states that the member states shall “ensure social progress of their countries by common action to eliminate the barriers which divide Europe” (The Treaty of Rome 1957, p. 2). On the one hand this means that the goal is to remove barriers between the member countries, referring to everything from trade barriers and production standards to enabling cross-border migration and worker mobility. On the other hand the referral to “social progress” is also interpreted as the intention to securing the social security of the European citizens, and by extension, European workers. However, the development of a common social policy in the EU did not truly start until the 1970s. After the heads of state met at the Paris summit in October 1972 they issued a mandate to create the first Social Action Programme of the EU, the result of which was launched in 1974. It stated that

“such a programme involves actions designed to achieve full and better employment, the improvement of living and working conditions and increased involvement of management and labour in the economic and social decisions of the community, and workers in the life of undertakings” (The Council, 1974 p. 2).

In other words, we see the start of a social dialogue between the legislators in the EU and the European organisations for both workers and employers.

The informal social dialogue was becoming a reality in the second half of the 1980s, with the Commission having talks with the European trade unions and the employer organizations (Nyberg 2011, p. 10). Between the Single European Act (SEA) and the Delors-Commissions goal of a European Union, the partners demanded closer cooperation with the EU to ensure that their voices were heard when new rules on the labour market were being proposed. During the eighties, Spain, Portugal and Greece had joined the EU, countries with relatively speaking lower rates of pay than most of the previous members. This created a new focus on



which rules that would apply to those workers when working in another member country. In 1989, a court case would put this problem on the agenda, and creating a demand for a directive tackling the issue specifically.

In the next part, we will see how the Rush-Portugesa case (ECJ C-113/89) highlighted shortcomings in the EU treaties regarding the posting of workers and contributed strongly to the creation of the PWD.

Throughout the history of the European Union, the European Court has had an important role to play in filling in the blanks of European law. In cases where there has been doubt over the jurisdiction of European law, over the interpretation of trade rules or whether national or European law has precedence, the role of the EU court has been to interpret these laws. This has in many cases led to new legislation based on the judgement of the court. The Jurisdiction of the court lies within three main areas. It passes judgement in cases where a member country is being accused of either the Commission or another member country of not adhering to their obligations to the EU-treaty (Hix & Høyland 2011, p.78). The Court also judges in cases where it is asked to evaluate the legality of EU-laws. Within the scope of this thesis the third area is the most important though. The Court gives preliminary rulings in cases brought before it by national courts. These often take the form of national courts asking the EU Court to give a preliminary ruling on how the case relates to community law before the national court gives a final verdict. The usefulness is obvious; if in doubt over whether community law takes precedence over national law in the case, a preliminary ruling from the court is preferable to the ruling of the court of the member country being appealed to the EU-court afterwards. Although the national courts are not bound by the preliminary ruling, they follow it in most cases, as they rarely have anything to gain by not doing so.

One of the prime examples of how the EU-court plays an important role in the legislative process came in the 1990 Rush-Portugesa case. It also highlighted missing pieces in the regulation of the free flow of workers between member states of the EU. Portugal had joined the EU along with Spain in 1986. Those two countries along with Greece, which had joined in 1981, were comparatively poorer to the other member countries, and sported a working force lower paid than those of countries like France and Germany. Following their accession to the EU, Portugese firms could enjoy the freedom of offering their services in the other member countries, something that would eventually lead to a need of clarifying which laws the workers would be subjected to. The court case in question was between the Portugese firm

Rush Portuguesa Lda and the National immigration office (Office national d'immigration) of France (ECJ C-113/89). Rush Portuguesa was a Portuguese construction firm which was hired as a subcontractor to a French firm for doing work on a railway line in France. Problems arose when the subcontractor wanted to bring its own workers from Portugal to work on the project, while French employment law stated that only the French immigration office was allowed to recruit nationals from other countries within France (ECJ C-113/89, art. 2). When the immigration office submitted a demand that the company was required to pay a "special contribution" because of the violation of the French Labour Code, the firm appealed to the French court in order to get the demand annulled (ECJ C113/89, art. 3 & 4). They argued that according to the articles 59 and 60 of the EEC treaty they were free to provide their services within another member country, and that the demands of the French immigration office constituted a hindrance to this right (ibid). The decision of the case clearly rested on the interpretation of community law, and so the French Court in Versailles referred three questions to the European Court of Justice, in order for them to provide their verdict on the questions.

The first question asked whether France could, based on the EEC treaty and Portugal's accession treaty, preclude Rush Portuguesa from bringing its own workers to France temporarily to do the work the company had been subcontracted to do. The second question asked whether a company operating in a country different from its own could be made subject to the labour laws of the host country, in this case specifically the rules on the procurement of labour permits of the company's workers, and if they were obliged to pay the fees to the immigration office. The third question was conditioned on how the ruling would be on the first two questions. It asked if the labourers from Portugal in this case was to be regarded as "specialized staff or employees occupying a post of confidential nature".<sup>2</sup> Of these, the first two are the most important ones, especially since the verdict of ECJ on the first and second question made ruling on the third redundant. Therefore, the focus shall be on the first two questions. Together, they sum up the main conflict of European labour integration, as well as the reason the posting of workers directive was deemed necessary: Can a firm from one member country compete for, and take on, contracts in another member country in the same way a firm from the host country can, and what rules would the firm and its workers be subject to? In essence, this is the basis for the PWD. Therefore, it is vital to see how the

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<sup>2</sup> This refers to the Annex of Regulation No 1612/68 of the Council of 15. October 1968, which states that "The expression "confidential nature of the post" refers to employment which in the host country customarily involves special relations of trust between the employer and the worker."

decision of the court laid the foundation for the long discussion that led to the posting of workers directive taking five years from inception to finished directive.

When answering the first question, the court refers heavily to article 59 and 60 in the EEC-treaty<sup>3</sup>, which at that time regulated the provision of services within the community. In addition, the accession treaty between Portugal and the EU applies a transitional period for some of the parts of the treaty. The court therefore spends considerable time debating the intricacies of the provisions this creates, before concluding that:

“It follows from all the foregoing considerations that the reply to the first and second questions should be that Articles 59 and 60 of the EEC Treaty and Articles 215 and 216 of the Act of Accession of the Kingdom of Spain and the Portuguese Republic must be interpreted as meaning that an undertaking established in Portugal providing services in the construction and public works sector in another Member State may move with its own labour force which it brings from Portugal for the duration of the works in question . In such a case, the authorities of the Member State in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese work-force.” (ECJ, C-113/89, art. 19)

Rush Portuguesa was according to the EEC treaty free to bring their own workers to France in order to work on the project to which the firm was hired, and the French immigration office was not allowed to impose on the firm conditions “relating to the recruitment of manpower in situ or the obtaining of work permits for the Portuguese work-force” (ECJ, C-113/89, operative part). Following from the last part is also that a firm bringing their workers to another country should not be submitted to different rules and obligations than a firm permanently established in the host country, such as the obtainment of work permits.

The result of the court case was that Portuguese workers who were posted for a limited time in France would not have to seek work permits ‘as normal’, since they were there for a limited amount of time, and would return to the country of origin when the contract was fulfilled. At the same time, paragraph 18 of the verdict reassures member countries that they can extend their legislation to any labourer working in their country, regardless of country of origin (ECJ C-113/89). From this, it seems obvious that further legislation had to be made to clarify the difficult balance between the right of companies to free movement and the right for countries to apply domestic rules and regulations to those companies.

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<sup>3</sup> Corresponding to Articles 56 and 57 in the consolidated version of the treaty on the functioning of the European Union, 2010.

In the next section we will chart how the basis for the PWD was formed by the differences between labour exporting and labour importing countries, the differences between trade unions and employers organizations, and the differences within the EU institutions.

Even though the PWD was adopted as late as 1996, the process behind it started in 1991. European trade unions demanded after the Rush Portuguesa-case that the legal framework for cross border worker movement had to be clarified. There was however many difficult questions which would have to be answered in order to achieve this goal in an effective way. This section will outline the major discussions throughout the process of creating a Posting of Workers Directive, showing the many different opinions and spotlighting some core problems that we will later see emerging through the Laval-quartet.

First, we have the problem of how the Directive should be based legally. Should it be based on social policy, or should it be based on free movement policy? The distinction was of importance not only because of the signal any such preference would send about the intentions of the Directive, but also on how it could be ratified. After the Maastricht treaty, legislation on free market regulation was decided by qualified majority voting, while social policy was still decided by unanimity. Therefore, it would be considerably easier to pass the directive, since not all member countries favoured the Directive. This would attract criticism from labour exporting countries like the UK and Portugal, who argued that the Directive did not make the free movement of services any easier, and should rather be classified as a labour law directive (Malmberg 2011, p. 28). The distinction between the two echoes the debate about the hierarchical relationship between the free market and social policy we have seen in recent years. The Commission sought to aim for the middle road when drafting the Directive, but it is important to note that there is a great difference between arguing which particulars of labour law can legally put restrictions on the free movement of services, and arguing which particulars of the free movement of services can legally put restrictions on labour law. Obviously, the first is the real debate. The EU's internal market has been paramount for the EU, and its purpose is to break down the barriers for trade between the member countries. Social policy is a part of that, but as we have seen, it only became an integrated part of the EU following the eighties, a decade when new economic ideas such as Thatcherism made an organized labour force important. And as we have seen, even following the inclusion of social policy in the EU after Maastricht it would not have the same status as free market policy because of the reluctance of countries like the UK to adopt it. Having touched upon that subject, it is appropriate to move on to the differences between member countries.

There was one major characteristic that divided the member countries on the PWD, and that was whether the country had high labour cost or low labour cost (Bosch, Cremers & Dølvik, 2007, p. 527). In the latter category we find the UK, Ireland and Portugal, countries with a relatively low level of worker protection and low wages, therefore fearing that they would lose their competitive edge if higher costs would be required when competing for contracts in other member countries (ibid). On the other hand you have the high cost countries, such as Denmark and Germany, which although having different ways of organizing the labour market, share a relatively high standard of worker protection and relatively high wages. Those countries were vocal about the fear of social dumping, resulting from a free flow of low paid and low skilled workers entering their economies, creating a social underclass made possible by the free market. Also, countries with high labour cost feared that an influx of workers from countries with lower pay standards would lead to unfair competition, while having the possibility to greatly undermine the national regulation systems (Bosch, Cremers & Dølvik, 2007). It was important to make sure that the national legislation could be extended to all workers employed within a country's borders, but there is an obvious contrast between the protection of free movement and the protection of national regulations. While calling it a zero-sum game would be a bit too far, a 100 % free movement of workers would disregard all national regulations or payment standards, while a 100 % maintaining of national regulations and pay standard would make free movement of workers undesirable for any company from a low-cost country. But where would the balance be struck? From the Commission's first proposal and to the finished text, there are many differences that are telling of the development of the Directive. In general, it can be viewed as going from very protective of the free movement of workers to being more balanced between protecting free movement and protecting the rights of workers.

A comprehensive list of the most important changes can be found in Nyberg (2011. pp. 13-14), along with additional details in Bosch, Cremers & Dølvik (2007) and Malmberg (2011). They include: In article 3(8), there was added that if a country had no mechanism for making a collective agreement generally applicable by law, it was possible to require adherence to a collective agreement if the collective agreement was also in force for possible domestic competition for the posting firm in question. The vital part was that the same rules would have to apply for all firms within a sector and/or a geographical area, so no firm could take advantage of not having to obey the same rules. This was especially important to a country like Sweden, which had no mechanism for making collective agreements universally

applicable, although they did not join until 1995. Denmark was instead on the forefront of demanding additions that better suited labour markets that relied heavily on collective bargaining, and less on measures such as minimum wage, such as the Scandinavian ones (Nyberg, 2011 p. 14).

In article 3(7), it was added that “[p]aragraphs 1 to 6 shall not prevent application of terms and conditions which are more favourable to workers” (Directive 96/71/EC). There was ambiguity to whether that meant that more favourable terms in the country of origin could be demanded, or it meant that more favourable terms in the country in which the posting of workers took place could be demanded. That would later be interpreted in the Laval-case as meaning the latter. The first draft from the Commission suggested that the Directive would enter into force after three months from the start of the work, but that was lowered to one month in the final draft (Nyberg 2011, p. 14).

In article 3(6) it was added that if a worker was replaced with another, the combined time would be the basis for measuring the longevity of the posting. This was added to prevent the circumvention of the PWD by changing the workers within one month, something that would have been possible without this clause. Finally, the mention of temporary workers was removed, but this would later be made into a separate directive, the Temporary and Agency Work Directive (2008/104/EC). All these changes are made to increase the rights of workers. The Commission and the Council wanted strong protection for the four freedoms, while the European Parliament was generally more positive towards securing the rights of trade unions (Bosch, Cremers & Dølvik 2007, p. 527). Nyberg (2011) mention the election to the European Parliament in 1994 as one of the reasons the directive took so long to be finished, while Bosch, Cremers & Dølvik argues that “the national positions only shifted in favour of the directive if there was an urgent ‘political’ need at home” (2007, p. 527). Furthermore, they argue that the motivation of countries was not to secure the rights of workers, but rather a fear of an influx of workers taking the jobs of their citizens (ibid). The first wave of this came after Spain and Portugal joined the Union, something which put the problem on the map in the first place, but in hindsight one can argue that they did not anticipate what the membership of Eastern European countries would do in later years. This will be expanded upon in the next chapter.

The social partners had an obvious stake in the process, and there were not surprisingly very diverging views between labourers and employers. Trade Unions, often led by the European

Trade Union Confederation (ETUC), had through the process advocated equal treatment between national workers and posted workers. They wanted the directive to reflect the workers' rights in the International Labour Organisation (ILO) conventions, and were naturally eager to establish a protection of the rights of workers across European borders. In the start of the nineties saw the beginnings of a new European social policy under a formal social dialogue with the Commission being established in the Maastricht-treaty, and although the EU social policy was at the time rejected by countries like the UK, legal protection for workers was being introduced (Nyberg 2011, p. 10). The protection of the privileges enjoyed by workers working outside their own country as a result of the inner market was therefore a natural priority. The fear was that there would be different standards for workers doing the same job, something that could lead to a 'race to the bottom' if the market forces were to be given free reigns. On the employer side, Business Europe was a proponent of solidifying the market principles, interpreting the PWD much more formalistic and minimalistic (Bosch, Cremers & Dølvik 2007, p. 536). These differences have shown themselves in recent years when debating the PWD after the Laval-quartet, as we shall see in the next chapter.

The Posting of Workers Directive was launched on the 16<sup>th</sup> of December 1996, after five years of debate among the institutions, member states and social partners of the EU. Bosch Cremers & Dølvik sums the PWD up as being "about equal treatment, free movement of services, ensuring minimum protection of workers' rights, fair competition and respect for the regulatory framework" (2007, p. 528). The PWD tries to do a lot at the same time, and legally it can be interpreted as both a maximum free movement directive and a minimum labour law directive (Malmberg 2011, p. 27). Nyberg argues that the directive was designed around countries with minimum wages and large coverage of universally applicable, and not for countries where much of the terms and conditions of employment are negotiated in tariff agreements, which are often also negotiated on a case-by-case basis. An example of the latter would be Sweden, who does not have minimum wage in its legislation, nor any way of declaring collective agreements universally applicable (Malmberg 2011, p. 15). Posting of workers became a hot topic again after the 2004 enlargement of the EU, an enlargement that comprised seven former members of the Soviet Union and one former Yugoslavian country. The comparatively low rates of pay in those countries led to an increase in posting of workers from those countries, an inevitably to questions about what terms of employment those workers would enjoy. The ambiguous nature of the PWD led to conflicts in several European

countries which turned into court cases before the European Court of Justice (ECJ), four of which became famous under the name of the Laval-quartet.

The PWD was born out of a demand by the European trade unions for a European social policy to go along with the completion of the inner market and the four freedoms. The Social Charter was a step in the right direction, but a court case such as the Rush-Portuges case highlighted the fact that EU legislation was not capable or strong enough to regulate cross border movement of workers. Therefore, a directive governing what terms cross-border workers would enjoy was needed. The Directive made it an obligation for member countries to extend a nucleus of requirements to foreign workers, instead of just permitting it. The difference in opinion between labour importing and labour exporting countries, between employers and employees, and between the EU institutions led the directive to take a compromising line which left it without a clearly defined legal basis and corresponding purpose. The trade unions were left with the promises of a directive that did not ultimately strike the balance it was intended to do. In the next chapter the verdicts of the Laval-quartet will be examined in order to showcase how the ECJ interpreted the directive in the direction of a maximum free movement directive.





## **2. The Laval-quartet: Old conflicts made new**

The amount of attention and scrutiny awarded a small group of verdicts from the European Court of Justice (ECJ) after the so-called Laval-quartet was, if not completely unprecedented, then at least not expected beforehand. Even though the cases were about relatively mundane and everyday topics within labour politics, the sum of the cases made up a substantial redefinition of the interpretation of the posting of workers directive, especially in the eyes of the European Trade Union Confederacy<sup>4</sup> (ETUC), who stated that the jurisprudence of the ECJ “created major social unrest and are endangering social partnership models” (ETUC 2010, p. 2). The view of the result was divided between the trade unions on the one hand, who lamented what they interpreted as a blatant confirmation of a hierarchy in which the free movement of workers was deemed more important than the protection of workers’ rights (ETUC 2010), while on the other hand employer organisations such as Business Europe was happy with the result, as it solidified their view on the directive. In the aftermath, ETUC has proposed extensive suggestions for a revision of the directive, while Business Europe wants to keep the directive as it is, while agreeing that the enforcement of the directive can be improved (ETUC 2010, Cerutti 2012). We will review these suggestions later in the chapter.

First though, it is vital to examine these four cases and find the essentials that are important to this thesis. To do that, we must answer some questions about them. Firstly, why was a preliminary ruling from the ECJ deemed necessary in the first place? Secondly, what about the ruling went against the previous interpretation of the directive? Thirdly, in what way does the ruling change the established interpretation of the directive, if it does so at all, and is this relevant only for the state in which the case originated or does it have implications for some or all of the other member states? When we look at the four cases, the main focus will be on the Laval-case. There are several reasons for that, firstly it was the first of the four to reach the ECJ, setting precedence for the others to some degree. Secondly, the many similarities between the Norwegian and the Swedish labour systems make it the most suitable for comparison. That being said, the main point is to analyse the possible impact of each and every one of these cases on the Norwegian labour market. In this chapter the four cases will be briefly explained, before the verdict is analysed in order to extract the most important political and legal ramifications that has emerged, or could possibly arise in the future. Afterwards, the combined impact of the court rulings will be discussed. In order to convey the particulars of the cases in an as accurate way as possible, it is necessary to rely heavily on the

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<sup>4</sup> See ETUCs proposals for revision from 2010, ETUC 2010

course of action described in the court rulings. This will in my opinion be more accurate than sources from for example the trade unions or the businesses involved because of the danger of biases. The information in the court rulings should be sufficient to convey the events of the cases, but where it is appropriate, opinions from the different parties of the cases or from third parties will be included.

### **3.1 The Laval-case (C-341/05)**

The Laval case was sent to the ECJ from the Swedish Labour Court (Arbetsdomstolen) on the 15. September 2005, and was a case between the Latvian construction firm Laval un Partneri Ltd on the one side and the Swedish building and public works trade union (Svenska Byggnadsarbetareförbundet, Byggnads) and one of its local branches (Byggettan) together with the Swedish electrician union (Svenska Elektrikerförbundet, Elektrikerna) on the other side. Laval operated as a subcontractor to the Sweden-registered company L&P Baltic AB, and posted in between May and December of 2004 around 35 workers to work on a school building commissioned by the municipality of Våxholm. Laval had signed a tariff agreement with a Latvian trade union, in which around 65 % of the posted workers were members (ECJ C-341/05, P. 20). Laval entered into negotiations with Byggnads in order to work out a collective agreement under which the terms for the posted workers would be governed. The terms of wages and other terms of employment would be negotiated simultaneously with the collective agreement on the request of Laval, even though the normal procedure is to negotiate those after the collective terms are established. The court ruling states that:

“During the negotiations held on 15 September 2004, Byggettan had demanded that Laval, first, sign the collective agreement for the building sector in respect of the Våxholm site, and secondly, guarantee that the posted workers would receive an hourly wage of SEK 145 (approximately EUR 16). That hourly wage was based on statistics on wages for the Stockholm region for the first quarter of 2004, relating to professionally qualified builders and carpenters. Byggettan declared that it was prepared to take collective action forthwith in the event that Laval failed to agree to this” (ECJ C-341/05, p. 21).

The negotiations were not successful. As a result, the local branch Byggettan asked the umbrella organisation Byggnads to initiate a collective action against Laval. The collective action took form of a blockade of the worksite at Våxholm, which as a result hindered the delivery of goods to the site and workers from getting in. According to the events listed in the verdict of the ECJ, Laval asked the Swedish police to intervene, but they were unable to do so because it was a legal collective action under Swedish Law (ECJ C-341/05, p. 22). In Sweden,

the liaison office (Arbetsmiljöverket) is responsible for informing companies of the collective agreements that may be applicable to their workers when they are posting to Sweden (ECJ C-341/05, p. 14). Laval contacted the liaison office in November 2004 in order to clarify which agreements it was required to adhere to. They stated that Laval “was required to apply the provisions to which the law on the posting of workers refers, that it was for management and labour to agree on wage issues [and] that the minimum requirements under the collective agreements also applied to foreign posted workers” (ECJ C-341/05, p. 22). To resolve the case, mediations were set up. The largest issue was that in order for the collective actions to stop so that the wage negotiations could begin, Laval would have to sign the collective agreement for the building sector. For Laval this was a problem, since they had no way of knowing what wages they would have to agree to pay in advance. Because of the refusal to sign a collective agreement, an increasing amount of sympathy actions from other trade unions, such as Elektrikarna was initiated in January 2005. This included a boycott of all of Laval's working sites in Sweden, resulting in L&P Baltic declaring bankruptcy in March of 2005, after Våxholm terminated the contract (ECJ C-341/05).

Before that, in December 2004, Laval had brought the trade unions before the court in an attempt to end the blockade by getting the collective action declared illegal. Laval asked for an interim order by the court so that work could be resumed, but that was dismissed by the court. However, before deciding a final verdict in the case the court opted to seek a preliminary ruling from the ECJ in order to firstly “ascertain whether Articles 12 EC and 49 EC and Directive 96/71 preclude trade unions from attempting, by means of collective action, to force a foreign undertaking which posts workers to Sweden to apply a Swedish collective agreement” (ECJ C-341/05, p. 22). Secondly, the Swedish Law on workers' participation in decisions (Medbestämmandelagen, or MBL) states that it is prohibited for trade unions to initiate a collective action with the purpose of having another collective agreement from another country or third party set aside. Together with the “Lex Britannia<sup>5</sup>” it has the effect that Swedish collective agreements “take precedence over foreign collective agreements already concluded” (ECJ C-341/05, p. 24). The Swedish court therefore asks whether the EU rules, including both the Treaties and the PWD, go against these provisions of Swedish law.

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<sup>5</sup> The verdict of the Britannia case in the Swedish Arbetsdomstol (1989) found it illegal for a trade union to initiate collective action against a vessel flying a “flag of convenience” where the crew is already bound by a collective agreement from another country. However, a special clause makes it “not applicable to collective action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce” (ECJ C-341/05, p. 24). See more about “Lex Britannia” in the chapter about the Viking-case.

The court acknowledged the uncertainty of the relationship between the Swedish law and the EU-law, something that the Swedish trade unions strongly disagreed with. They argued that a preliminary ruling from the ECJ was not applicable in this case. The reason was that Laval operated in Sweden under its subsidiary Baltic, both of which was owned by the same persons, used the same trademark and had the same representatives. The trade unions argued that since Baltic was established in Sweden, and Laval operated in Sweden through Baltic, they could be viewed as a single economic entity, although legally the two were separate. On this background the trade unions asserted that Laval would have to adhere to the same conditions and rules to which Swedish companies would. They added that the way in which the relationship between Baltic and Laval was organized was an attempt to circumvent Swedish labour legislation and secure more favourable terms under the provisions of the posting of workers directive than under Swedish law (ECJ C-341/05, art. 25-26). However, the ECJ notes that it is up to the national court to decide whether or not there is a need for a preliminary ruling on the case in question, and therefore also to decide on the relevance of the questions, and the national court is in the end solely responsible for the final verdict of the case.

For the ECJ to come to a verdict in the case they had to consider how the relevant articles of the EU treaty and the posting of workers directive would be interpreted along with existing case law. The most important articles were of course those who governed the free flow of workers, mainly articles 49 and 50 in the treaty on the functioning of the European Union (TFEU). Article 49 states that “restrictions on the freedom of establishment of nationals of a member state in the territory of another member state shall be prohibited” (TFEU 2012, p. 21). Meanwhile, article 50 first states that the freedom of establishment shall be governed by directives issued by the EU branches after following the proper legislative process, and then goes on to list the guidelines for regulation of the freedom of establishment in eight lettered points (TFEU 2012, p. 22).

In the following section the goal is to clarify the reasoning behind the verdict of the ECJ. Firstly, how did the court answer if there is a legal basis for trade unions to force a foreign service provider to sign a collective agreement in the host country, even though the firm has already done so in its native country. The court had ample basis for its reasoning. In addition to the legislation, several cases has dealt with the problem of determining which rules should apply to cases under the jurisdiction of the posting of workers directive, and several of them are mentioned in the court verdict. In addition to *Rush Portuguesa*, which we have examined in

a previous chapter, we have cases such as *Portugaia Construções* (ECJ C-164/99 2002) which concluded that a member state has the right to apply their legislation to a foreign firm regardless of the timespan in which the firm is posted in the host country. Another example is the *Commission vs. Germany* case (ECJ C-341/02 2005) which states that the measures which are put in place to secure the rights of workers must be proportional to the goal they wish to achieve. There are several more cases which touch on the subject.<sup>6</sup> In many of them we see results that foreshadow the result of both the *Laval*-case, but also the other three cases in the quartet.

The verdict in *Laval* states that in circumstances like those in this case, a blockade is not permitted (ECJ C-341/05, art. 111). It constituted a restriction on the freedom to provide services which could not be supported in community law. One of the main reasons for the PWD in the first place was to ensure clarity over which rules would apply to workers working in another member country, and therefore the guidelines to how this should be done is listed in article 3 of the directive. Importantly, Sweden did not have a minimum wage, nor did it have a national system for making tariff agreements universally applicable. The result of the Swedish system of collective bargaining between workers and employers, although deeply ingrained in the Swedish system, did not contain rules which applied to all of the workers in one area. The crucial point is of course that the rules should apply to all. The PWD ensures that posted workers should enjoy the same provisions as the workers in the host country, but if there are no common tariffs or legislation which applies to all, then that cannot be demanded of service providers from other member countries either. The court states that:

”in order to ascertain the minimum wage rates to be paid to the posted workers, those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided” (ECJ C-341/05, art. 100) .

They hold that the need to enter into collective agreements in Sweden, in this case in which there are terms that are more favourable than what is required, can make it less desirable for firms to establish themselves in Sweden, and therefore it constitutes a restriction on the right to provide services (ECJ C-341/05, art. 99). Sweden and the Swedish trade unions had submitted that the protection of workers “constituted an overriding reason of public interest” (ECJ C-341/05, art. 102), and they also argued that the right to strike was a fundamental right,

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<sup>6</sup> See for example ECJ C-100/01 *Oteiza Olazabal* (2002) or ECJ C-387/01 *Weigel* (2004).

and not something that the EU had any jurisdiction over (ECJ C-341/05, art. 89). The ECJ does recognize that collective action is a fundamental right, and it also recognizes that there is a social dimension to the PWD, although as we have seen, the legal basis for the directive lies in trade policy, not social policy. These points were held up as positive by for example ETUC after the verdict, although it could at best be described as a silver lining on, at a whole, a disappointing verdict for the trade unions. In a response to the Laval and Viking cases, ETUC argues that the verdict says that “the right to strike is a fundamental right but not as fundamental as the EU’s free movement provisions” (ETUC 2008, p. 2). ETUC envisions that trade unions has to justify their collective action before a court, something they argue is against both the ILO convention and the charter of workers’ rights. They even hint that this may pose a democratic problem, since one can argue that the court makes the final decision on a law, rather than the legislative branches of the EU, the Parliament and the European council. Furthermore, they recall that there was a broad consensus that the directive should be a minimum-directive, not a maximum-directive, something which they feared had changed with the verdict (ETUC 2008, p. 3). It should be noted that the ECJ acknowledges that the protection of workers against what trade unions may see as social dumping can be warrant social actions such as strike. As previously mentioned however, any collective action must be compatible with the provisions of the PWD. This is an important part of the Laval-case: Swedish labour market is based around collective bargaining in such a way that there are no laws governing minimum wage, and no laws that allows extending a tariff agreement to all workers in a particular field. As a consequence of this, article 3, subparagraph 1, which states terms and conditions of employment does not cover the Swedish system as it would others. Terms and conditions that can be extended to posted workers must according to article 3(1) be laid down

“-by law, regulation or administrative provision, and/or

-by collective agreement or arbitration awards which has been declared universally applicable”  
(Directive 96/71/EC)

Since none of them applies to Sweden when it comes to minimum wage, there cannot be demanded that a firm operating in Sweden with its workers must pay more than what is provided by the two mechanisms mentioned above. Following this, there are not grounds for initializing a collective action neither, as it cannot be justified with respect to public order. The court was in many ways raising the question if the Swedish collective bargaining system

is compatible with the PWD, and if they have failed to implement the directive properly. The Swedish trade unions had multiple objections to this. First of all, they questioned the evaluation of the Swedish posting of worker legislation made by the court. The court took no heed of 70 years of collective bargaining traditions, instead basing the verdict on the lack of reference to the Swedish customary practice in the legal provisions. The Swedish labour organisation (Swedish LO) asked in a 2011 rapport on the Laval quartet if the wages demanded by Byggnads would have been accepted if only there had been references to the customary roles of the trade unions and employers' organisations in the Swedish law on posting of workers (Nyberg 2011, p. 108). As it stood, a firm from another member state could not easily ascertain which obligations it would have to adhere to when posting workers to Sweden. It is certainly true that Sweden lacked laws or other provisions in line with the PWD that fixed minimum wages, but the disregard for the Swedish system fell heavy on the labour organisations. As a consequence, they were pretty much forced to rethink how they approached collective actions. Since the ECJ regarded the blockade of the Våxholm site as unlawful, the need for justification of a collective action would in their opinion change greatly (ibid). They could not use overriding reasons of public interest as a justification of collective actions such as the blockade, because the verdict clearly states that a restriction on the freedom to provide services is permitted only if it is "suitable for securing the attainment of the objective which it pursues and not go beyond what is necessary in order to attain it" (ECJ C-341/05, art. 101). The court agrees that the protection of workers from what the trade unions deem to be social dumping can constitute a legitimate reason for collective action, but that the

"specific obligations, linked to signature of the collective agreement for the building sector, which trade unions seek to impose on undertakings established in other Member States by way of collective action such as that at issue in the main proceedings, the obstacle which that collective action forms cannot be justified with regard to such an objective" (ECJ C-341/05, art. 108).

That can only be interpreted as the introduction of a proportionality test, something that in most cases will favour employers. Bucker & Warneck (2010) suggests that this could have been a goal to start with by the Swedish Employers' Confederation, who supported Laval financially, although this has never been officially admitted (p. 18). However, there can be little doubt about that a proportionality mechanism would be advantageous in simplifying the



hiring of foreign companies, since trade unions would be more incentivised towards agreeing to tariff agreements.

Laval led to changes in the Swedish legislation. As early as 2008, a committee was set up by the Swedish government in order to find solutions to how Sweden could adapt its legislation so that it was more in line with the provisions of the PWD. The result was passed by the Swedish parliament more or less unaltered and contained three criteria which had to be satisfied for a trade union to be able to legally initiate a collective action<sup>7</sup>. The criteria was based around an acceptance of that the demands that could be forwarded had to be explicitly supported by the PWD article 3, and that no collective action could be taken if the posted workers were already bound by a tariff agreement in their home country which gave them at least the minimum demands stated in the PWD. The Swedish debate has continued, but instead of spending much time on that now, it is better to move on to the other court cases, and instead sum up the over-all debate afterwards.

### **3.2 The Viking case (C-438/05)**

Although it has a later case-number than Laval, the verdict of the Viking case came one week before. It was the result of a conflict between the ferry company Viking on the one side and the Finnish Union of Seamen (FSU) and the International federation of transport workers' unions (ITF) on the other side. Before we continue to examine the facts of the case it is important to be aware of the legal background of the case. In addition to the EU treaties and the PWD, the Council regulation (EEC) No 4055/86 which applies the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ 1986 L687, p. 1) is a basis for the verdict in the Viking-case. Without going into detail, the title of the regulation is relatively self-explanatory, and the regulation thus governs how the freedom to provide services is applied to the maritime sector. Also, it is important to be aware of the "Flag of Convenience" (FOC) problem. The ITF has over many years worked to ensure that the flag of a ship is the same as the nationality of the true owners of the ship. The reason is to avoid shipping companies reflagging their vessels to countries where wages and worker protection is lower, which has been a problem in many countries. As far as the ITF is concerned, only unions based in the country where the beneficiary owners are located should be allowed to sign collective agreement with the shipping company (ECJ C-438/05, art. 8). Lastly, domestic Finnish law protects the right of trade unions to initiate

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<sup>7</sup> See Bückler & Warneck (2010, p. 24) for the details

collective actions to protect workers rights, although this right is subject to certain restrictions (ECJ C-438/05, art. 4-5).

Instead of going into detail about the procedures of the case as has been done with the Laval-case, it is more important to see the main results of the case. Still, appropriate time will be spent to ensure that the information can be put into context properly. The Finnish ferry company Viking Line operated seven ferries around the time of the court case, one of them being the ferry Rosella. Rosella ran between the Finnish capital of Helsinki and the Estonian capital of Tallinn with a Finnish crew, but the earnings of the route had at the time decreased, mainly because of competition from other ferry companies which were able to run at a lower cost because of lower wages. When Viking initiated plans to reflag the Rosella to Estonia in order to employ a cheaper Estonian crew, the FSU objected and with the help of the ITF they not only struck against Viking, but sent out a circular asking other trade unions not to enter into negotiations with Viking either. After Viking learned of this, they brought the dispute before the Finnish court of first instance in an attempt to get the planned action cancelled (ECJ C-438/05, art. 17). Negotiations between Viking-line and the trade union resulted in the discontinuation of the legal proceedings in December 2003, but after Rosella continued to run at a loss under Finnish flag and Estonia joined the EU in May 2004, Viking again pursued the reflagging of the vessel to Estonia (ECJ C-438/05, art. 19-21). Since the ITFs circular was still in effect, Viking was unable to do what they intended, and so they opted to bring the matter before the court. Since the ITF is based in London, England, the case was put before the “High Court of Justice of England and Wales, Queens Bench Division requesting it to declare that the action taken by the ITF and FSU was contrary to article 43 EC<sup>8</sup>” (ECJ C-438/05, art. 22). The court evaluated the case to be dependent on the interpretation of community legislation, and so opted to get a preliminary ruling from the ECJ.

The ruling was to answer several questions, but going through them all is unnecessary for the scope of this thesis, so focus will be on those questions which have principal significance beyond the case itself. First, if the actions taken by the FSU in the case fell under the scope of article 43 EC and/or Regulation 4055/86 with regards to the right of establishment? Secondly, does the previously mentioned treaty article and regulation give rights to a private company that can be invoked against a trade union, or In other words, does the legislation have horizontal effect? Thirdly, it asks what constitutes a restriction to the free movement through

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<sup>8</sup> Now article 49 in the consolidated version of The Treaty on the Functioning of the European Union

several sub-questions. Does the action taken in the case constitute a restriction on the free movement of labour? Is the demand that vessels must be flagged in the same country as the owners in order for only the trade unions based in the origin country to be able to enter into collective agreement with the owners in accord with community law? And when deciding whether or not the actions taken by the trade union is discriminatory or not, should the court base this on the trade unions intentions or the effects of the action? (ECJ C-438/05). A question that mirrors a question being raised in the Norwegian Wharf-case is:

“If collective action by a trade union or association of trade unions is a directly discriminatory restriction under Article 43 or Regulation No 4055/86, can it, in principle, be justified on the basis of the public policy exception set out in Article 46 EC on the basis that:

(a) the taking of collective action (including strike action) is a fundamental right protected by Community law; and/or

(b) the protection of workers?” (ECJ C-438/05)

As we shall see later, the Norwegian Supreme Court had its own consideration on how to interpret “public policy,” so it is interesting to see how the ECJ defines the use of a “public policy exception” compared with the Norwegian Supreme Court. To sum up the final questions, the ECJ was in short asked the same question as were the focus of the Laval-case, if the actions the trade unions had taken could be considered restrictions upon the freedom of establishment, and whether those restrictions were justified. The purpose of the next section will be to briefly outline how the ECJ answered these questions.

The first question is quite straightforwardly answered:

“collective action [...] against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article [43]” (ECJ C-438/05).

The Laval-verdict which came one week later would mirror this point, emphasizing the fact that collective actions such as those taken in these two cases are not exempt from community law. Even though collective action is a national right in both Sweden and Finland, they are subjected to community legislation when infringing upon the right of establishment and the free flow of workers. In both Viking and Laval, the court recognizes international agreements such as the ILO-conventions and the Community Charter of the fundamental Social Rights of Workers as well as national legislation regarding the fundamental right for trade unions to

strike, but is also clear on the fact that this does not mean that the practices of those fundamental rights are exempt from the Community jurisdiction, as they can infringe upon the right of establishment. Far from saying this came as a shock, the verdicts nevertheless establishes a new hierarchy between the four freedoms of the common market and the social rights that especially trade unions rely on, in the sense that trade unions was left with the burden of proof when justifying the collective actions they were to take.

When answering what constitutes a restriction on the right of establishment, the court discusses an interesting different angle on the interpretation of community legislation. Freedom of establishment is in most cases directed towards making sure companies from outside the country enjoys the same rights as domestic companies, but it also applies the other way around. In other words, a domestic company should not be restricted in its desire to move its operations or establish a new one in another country (ECJ C.438/05, art. 69). Following this, a company with the intentions to reflag a vessel in another member country should not be hindered in doing so, since the vessel is the reason for the company's desire to move parts of its operation. A hindrance of this would therefore constitute a restriction on the right of establishment under community law (ECJ C438/05, art. 70). Now, could these restrictions be justified?

The ECJ, as in *Laval*, reiterate that the protection of workers is a fundamental right, and that it in principle can be a legitimate restriction. However, it has to be proportional to the goal of the actions, and not go beyond what is necessary in order to obtain it. The ECJ leaves it up to the national court to decide whether or not this was the case, but leaves it with strict guidelines on how to do so. For example, if the jobs of the Finnish crew of *Rosella* were not directly in jeopardy, such a collective action would not be justified. If the national court found that the jobs were under serious threat, the court would then have to decide if the collective action taken against *Viking* was proportional to the goal it was to achieve (ECJ C-438/05, art. 84). This two-step method was not something the trade unions took to heart. ETUC stated after the *Laval* and *Viking* verdicts that they were disappointed that the court had disregarded the compromise position by the European parliament since the court regarded the demand for equal pay an obstacle to free movement, and instead making demand for minimum rights the only goal that could be supported under community rules (ETUC 2008, p. 2). That this would also have a horizontal direct effect, meaning that the legal custom could be invoked by firms under collective action by trade unions, forcing the trade unions to justify the level of pressure applied by the proportionality principle, left ETUC disappointed in the verdicts. On the other

hand, Business Europe (BE) argued that the verdicts as a whole removed some of the uncertainties that made posting of workers difficult when there was no way of knowing what rules any given firm would have to adhere to. Furthermore, BE appreciated that the right to strike was important for the trade unions, but that it was not an absolute right, and had to be limited by certain restrictions in order for the labour market to function efficiently and predictably (Cerutti 2010, p.2). This debate will be expanded upon after an overview of the Luxembourg and Rüffert cases. In order to avoid repeating the same discussions, those cases will highlight issues that was not raised in the Laval and Viking cases, while skipping the points that are virtually similar to those cases.

### **3.3 The Rüffert-case (C-346/06)**

The Rüffert-case, brought before the ECJ in August 2006, was between the construction firm Objekt und Bauregie GmbH & Co. KG (henceforth O&B) and the German bundesland of Niedersachsen, with the name Rüffert being the surname of Objekt und Bauregie's attorney in the case. Niedersachsen needed to refurbish one of its prisons, and gave the job to O&B after a bidding round which they won. O&B hired a Polish subcontractor to do parts of the job, but it was discovered that the subcontractor paid its workers less than half of what was the average for construction workers in Niedersachsen. Niedersachsen has a collective agreement for all public contracts in order to ensure that workers on public projects are not underpaid, and in the contract with O&B it was written that the contractor had to comply with the collective agreement, and that also subcontractors were required to do so (ECJ C-346/06, art. 8). When this was discovered, Niedersachsen and O&B terminated the contract, the former based this decision on that O&B had not fulfilled its contractual obligations to ensure that the workers were paid according to the collective agreement in place (ECJ C-346/06, art. 11).

The PWD article 3(1) outlines that the benefits that can be demanded for workers has to either be mandated by "law, regulation or administrative provision and/or by collective agreements or arbitration awards which have been declared universally applicable" (Directive 1996/71/EC). German law has the provisions for declaring collective agreements universally applicable, however the collective agreement in question from Niedersachsen applied only to public contracts, and not to private. It was therefore neither covering the whole construction sector in the geographical area of the agreement in question, nor made universally applicable. Therefore, Niedersachsen was not allowed by the PWD to make a public contract dependent on the compliance with this clause in the contract. Since the contract demands a minimum wage based on the collective agreement for "buildings and public works," it makes it more

difficult and less desirable for foreign companies to establish themselves as subcontractors on public works in the Bundesland, and therefore this can constitute a restriction on free movement (ECJ C-346/06, art. 37). The court notes that they can see no reason that such a protection of workers is needed in only public sector, and not in private sector. Nor can it see that the removal of the clause would lead to a “risk of seriously undermining the financial balance of the social security system,” something that the German state had argued during the proceedings (ECJ C-346/06, art. 42). All in all, the verdict reduced the possibility for including minimum requirements in public contracts, as the requirements must be either demanded by law or by a collective agreement that has been made universally applicable. As the verdicts of Laval and Viking before, the criteria for extending demands for higher than absolute minimum pay for foreign workers were not in place, and the accumulated legal practice was affirming a labour market where there was little room for extensive demands for workers’ rights that was not explicitly protected by the PWD. Before we discuss the quartet as a whole, we will take a look at the Luxembourg-verdict which came in June 2008.

### **3.4 The Luxembourg-case (C-319/06)**

The Luxembourg-case from 2006 is slightly different from the previous three, since it is a case between the Commission of the European Communities and the Grand Duchy of Luxembourg, not a preliminary ruling on a case from a national court. The Commission initiated the case against Luxembourg for failing to fulfil their obligations to implement the PWD correctly into Luxembourg law. The Commission warned Luxembourg in 2004 that the legislative measures taken to integrate the PWD into Luxembourgian law was beyond what was required by article 3(1) of the PWD (ECJ C-319/06, art. 8). Firms who were from other member countries would have to comply with several mandatory terms of employment that the Commission considered not to be supported by the PWD, in addition to requiring member countries to have an agent permanently in place in Luxembourg who would supply firms posting in Luxembourg with the required documents (ibid). Perhaps the biggest difference between the interpretation of the PWD was that Luxembourg saw article 3(10), which states that “[t]his Directive shall not preclude the application by member states [...] terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions (Directive 96/71/EC, art. 3(10)), as justifying the demand for terms and conditions for posted workers similar to the national average for all the terms and conditions mentioned in article 3(1), letters a to g, in the PWD. The Commission, referring to the Laval-verdict, refutes this notion by reiterating that only

minimum protection can be demanded if supported by law or collective agreement which has been made generally applicable (ECJ C-319/06, art. 24). Furthermore, the court holds that

“the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the member states” (ECJ C319/06, art. 30).

It is important to note that in the Laval-case the court did not acknowledge the trade unions referral to public policy as grounds for protection of workers, as this was for the national government to claim this right (ECJ C-341/05, art. 82). In this case however, we see from the previous quote that this is regarded in the eyes of the court as something that cannot be decided unilaterally (Nyberg 2011, p. 138). Clearly, using public policy as a justification for extending the regulations foreign firms have to adhere to is something the court wished to discourage. This is logical with regards to hindering a precedence of declaring national laws and practices essential for public policy in order to protect domestic workers, but the change in definition of who can decide whether or not something constitutes such an essential public policy is still peculiar. The court backs this up by saying that

“public policy provisions is to be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest” (ECJ C-319/06, art. 32).

Such a claim would also have to be backed up by substantial amount of evidence that proved how seriously public policy would be affected in any given case (ECJ C-319/09, art. 51). That leaves little room for use, something that would most likely split opinions, largely between employers and employees.

Luxembourg was found to have failed to fulfil its obligations to implement the PWD by the court on all points, thoroughly making a statement about what member countries could demand of mandatory protection for workers posted within its borders. Looking to Norway and the Wharf-case, we note that the definition of what is an essential part of public policy is interpreted severely restrictive.

### **3.5 Was the Laval-quartet a redefinition of the PWD?**

The combined effect of these four cases created a massive debate in the EU. The Commission has started a review of the directive, and suggestions for further guidelines on how to interpret the directive has been forwarded in the “proposal for a council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services,” popularly known as the Monti II proposal (The Commission 2012). In it, the Commission acknowledges the differences of opinion on the Directive between the social partners, and presents a suggestion on how to amend it. The proposal has subsequently been rejected by the member states, so there is little point in retelling the suggestions here. However, the proposal gives a relatively good insight in the viewpoints of the social partners, something that is vital to understand the controversy that arose after the Laval-quartet.

The trade unions lamented what they saw as a clear shift towards a directive that were in place to protect the free movement of workers and the right of establishment, not the rights of workers. ETUC (2008) released a statement in response to the Viking and Laval verdicts where they expressed their disappointment in the courts interpretation of the PWD. They stated that the verdicts made it clear that s demand for equal pay for posted workers could be regarded as an obstacle to the free movement of services, that the demand for proportionality in collective responses would create uncertainty for any trade union which considered such an action, that by giving horizontal direct effect to the four freedoms of the Treaty they would give a green light to legal prosecution of any collective action that could be deemed disproportionate, and that although the court recognized that the right to strike is a fundamental right, it is not as fundamental as the right to free movement within the Union (ETUC 2008, p. 2). They argued that the verdicts did not follow the ILO conventions, which “guarantee the freedom of association and the right to collective bargaining and strike” (ibid). ETUC has since then advocated a revision of the directive, with proposed changes including:

“- make mandatory what are currently only ‘options’ for MS’s (to apply all generally binding collective agreements to posted workers, etc.);

-ensure that host country collective agreements can provide for higher than minimum standards;

-make clear that both legislative sanctions and social partner activity including collective action are available to enforce these standards;



-ensure a broad scope for what can be considered ‘public policy provisions’ that MS’s can apply in addition to the nucleus of minimum standards of the Posting Directive.” (ETUC 2008, p. 5)

The Swedish Labour Organisation (LO) has been one of the most vocal when it comes to revising the Directive. They have proposed a wide range of changes, including adding a clause that states that the EU institutions, including the Court, would have to adhere to the ILO conventions (Nyberg 2011, p. 17). They also wanted a clause that demanded that new member states would do the same, and even add a fifth freedom to the existing four; if the right to sympathy actions by trade unions were allowed in a member state, it would also be allowed for international actions (Ibid).

On the other hand, Business Europe stated in a position paper on the Monti II proposal that the “provisions of the Posting of Workers Directive (96/71/EC) remain valid and there is no need to revise the directive (Business Europe 2012, p. 1). They felt the Monti II proposal would make it more difficult for companies to participate in the common market across borders, and that” imposing an EU system of joint and several liability for minimum wages, social security contributions and taxes would entail high costs for companies while not being an effective way to enforce the rules of the Posting of Workers Directive” (Ibid). Even though they oppose a revision of the directive, Business Europe also see the need for better enforcement of the directive, including improving the access to information on which rules apply to posted workers in a country (Ibid). They also refer to the legal basis of the directive and states that “given that the legal basis of the proposal is related to single market rather than social policy, the objective should be first and foremost to facilitate cross-border service provision. This should be made clear in its Preamble as well as in Article 1” (Business Europe 2012, p. 2).

From the viewpoint of the trade unions, the Laval-quartet was a redrawing of the PWD, but in truth it is more true to say that it was a redrawing of the trade unions perception of the Directive. Their perception of it had been shaped by vague promises of a directive that would not necessitate any new legislation in member states (Nyberg 2011, p. 14), but in hindsight the directive was a conflict waiting to happen. When the Court of Justice was to pass judgement on these conflicts that had emerged in a post-enlargement EU, they chose to interpret the directive in a narrow way, excluding anything not explicitly mentioned when

deciding what rules applies in these cases. It forced some member countries to re-evaluate their legislation, and some trade unions to re-evaluate their approach to cross border conflicts.

During this chapter we have seen how the four different verdicts of the cases in the Laval-quartet have created a different interpretation of the directive than was originally envisioned. From a compromise position between protecting the four freedoms of the common market and the rights of workers, the interpretation that can be drawn from the verdicts is that the interpretation of the court is thoroughly on the side of the four freedoms. The legal basis of the directive, along with the ambiguous wording, has been some of the biggest reasons behind this change in interpretation. This has led to changes in national legislation, particularly in Sweden, where the collective bargaining based system of labour market control has come to blow with the directives focus on regulations that are based in law or in collective agreements that have been declared universally applicable. The next chapter will track the most important features of the Norwegian labour market, as to enable a comparison with members of the European Union.



### **3. The Norwegian Labour market**

Although there is often talk about a Scandinavian model when it comes to the labour market, the truth is that although there are many similarities between the Scandinavian countries that set them apart from other European countries, there are as many differences that set them apart individually. Trond Bergh identifies three characteristics that set the Norwegian system apart (2010, p. 14). First, there is a prevailing degree of centralization and coordination, exemplified by the still vital position held by the most important organisations for workers and employers in Norway, LO and NHO<sup>9</sup> (Ibid). Secondly, the negotiations between those actors are characterized by an amicability not always found in negotiations of that importance other places (Ibid). Thirdly, the Norwegian state play a larger role in the negotiations than the Swedish and Danish states do in their respective countries, something that has led many to call the Norwegian model a three-part model (Bergh 2010, Frøland 2010). In this chapter, the most important aspects of the Norwegian labour system that is vital for this thesis, the collective agreement system and the law on the universal application of collective agreements, is explained.

#### **4.1 General background**

Since 1935, the negotiation and cooperation between employers and employees has been governed by the Basic Agreement. The first Basic Agreement marked a significant change in the Norwegian labour market, and is by many deemed one of the most important documents in Norwegian history (Bergh 2010, p. 13). Its purpose is to govern the conditions under which trade unions and employers' organisations are negotiating collective agreements, ensuring a stable environment that promotes cooperation and stability (Ibid). Its creation in 1935 marked a change from a situation where industrialization had led to a class struggle for labourers and negotiations were characterized by animosity between labour and capital, to a situation where negotiations included mutual respect and trust (Bergh 2010, p. 15). Since then, Norwegian tariff negotiations have been performed in a way that has been called a three-part model, where the State is the last piece of the puzzle (Frøland 2010). Norway experienced in the 1980s, along with many other countries, major labour conflicts brought along by liberalisation and the rise of capitalism, where companies rather than the state controlled the direction in which the society was moving (Heiret et al. 2003, p. 193). But although outside factors like the single European act in 1986 suggested a more liberal approach to labour market

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<sup>9</sup> LO, or *Landsorganisasjonen* is the largest trade union confederation, while NHO, or *Næringslivets Hovedorganisasjon*, is the largest interest group for employers.

regulation, Norway, guided by the Labour party in government from May 1986, reverted to the three-part system of labour market governance after a series of labour conflicts the same year (Heiret et al. 2003, pp. 195-196). Along with the trade unions and the employers' organisations, in most cases LO and NHO, this model played a large part in guiding Norway out of the financial difficulties in the start of the 1990s (Dølvik & Stokke 1999). After a referendum declined Norwegian membership in the European Union, Norway instead joined the European Economic Area (EEA) in 1994. Later we shall see how Norway opted to protect its national tariff system against any adverse effects by the EUs free market by giving themselves the option to make parts of collective agreements universally applicable, but let's first examine the basis of the Norwegian collective agreement system.

Since Norway has no minimum wage demanded by law, the minimum wages are usually negotiated in tariff agreements between workers and employers. If these negotiations are not successful, the state can step in as a broker in order to secure a deal. The three-part model also allows the social partners to be a part in other decisions regarding the labour market as well, being heard for example when new laws were being made and when the pension-system is revised (Frøland 2010, p. 244). The point is that the Norwegian labour market is very much defined by the cooperation between the workers, the employers and the state. It is very much a consensus-based system where conflict is avoided if possible. While the Basic Agreement within one field governs the overall rules of the negotiations and cooperation, terms like minimum wages and working time is governed by a tariff agreement. What constitutes a tariff agreement is not clearly defined one place, but the definition in the Labour Dispute Law (*Arbeidstvistloven*) defines it as "an agreement between a trade union and an employer or employers' organisation about work and pay terms or other work matters" (Evju, Frøland & Stokke 2003, p. 117). The Service Dispute Law (*Tjenestetvistloven*) defines it slightly differently, focusing on how the tariff agreement is supposed to firstly regulate the object of the law, and secondly regulate the relationship between the parts of the law (Heiret et al. 2003, p. 255). The object is the regulation of terms and conditions regarding wages and other work related matters, and the parts refer to the trade unions and employers' organisations, including the members (Ibid). For the purpose of this thesis it is convenient to use the tariff agreement which will play a big part in the next chapter, the Engineering Industry Agreement<sup>10</sup> (*Verkstedsoverenskomsten*) universally applicable within the maritime

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<sup>10</sup> This is the translation of "verkstedsoverenskomsten" used in the EFTA-court, and therefore the one that will be used in the thesis.

construction industry, as an example of the terms that are governed by tariff agreements in Norway.

Firstly, we have the partners of the tariff agreements. On the workers side, it is required that a trade union is the acting part (Evju, Frøland & Stokke 2003, p. 117). A trade union is defined as “any association of workers or workers organisations, when the association has the purpose of safeguard the workers interests opposite their employer” (ibid). By this definition, both a trade union and their umbrella organisation can negotiate a tariff agreement. By the definition of the law, there are no criteria that the trade union has to represent a set amount of the workers to be able to demand a tariff agreement either, but it is important to distinguish what is demanded by law, and what may be demanded by a Basic Agreement (Evju, Frøland og Stokke 2003, p. 118). Since the Basic Agreement governs the rules under which the negotiations take place, any restrictions on who can demand a tariff agreement would be mentioned there. When it comes to the employers’ side, both a single employer and an employers’ organisation can be the acting part of a tariff agreement (Heiret et al. 2003, p. 258). In the Engineering Industry Agreement, the workers are represented both by the trade union Fellesforbundet, who represents workers within construction, industry, farming, hotels, restaurants and graphical sector, and LO, the Norwegian Confederation of Trade Unions. On the employers’ side, the employers are represented by both *Norsk Industri*, who represents a wide range of companies within the industrial sector, and NHO, the Confederation of Norwegian Enterprises. This shows the deep anchoring of the tariff agreement, and the broad extent of the cooperation between the partners in the labour market.

Secondly, what terms are decided by the tariff agreement? To be a tariff agreement by legal definition, the agreement cannot be for specified individual workers, it has to be for a group of workers defined in the tariff agreement itself (Evju, Frøland & Stokke 2003, p. 119). Beyond this, there are no real limitations on what is deemed a tariff agreement, as long as it contains at least one condition regulating the relationship between the parties or terms of pay or work (Evju, Frøland & Stokke 2003, p. 120). Most tariff agreements does however naturally contain a number paragraphs regulating the terms and conditions for workers in the firms covered by the agreement. Using the Engineering Industry Agreement, let us show some examples of terms that can normally be found in a tariff agreement<sup>11</sup>. Firstly, working time,

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<sup>11</sup> The whole tariff agreement can be found at:  
<http://www.norskindustri.no/getfile.php/Dokumenter/PDF/Verkstedsoverenskomsten20082010.pdf>

including ordinary working time, shift working time, overtime pay, vacation and terms for paid leave can be regulated by the agreement. Secondly, wages, including but not limited to hourly wages, monthly wages, pay under training, bonuses, paid holidays and specialised rates for working on holidays and so on. In other words it can contain any necessary detailed outline of the minimum wages that the companies covered by the agreement are obliged to pay its workers. A range of other terms, such as the parties mutual duties and obligations and the length of the agreement is usually a part of it as well.

A tariff agreement is normally only binding towards the workers that are members of the union(s) which are a part of the agreement. But when Norway was set to join the EEA after having rejected membership in the EU by referendum, concerns were raised about how an expected influx of workers from low-cost member countries would affect exposed parts of the Norwegian labour market. The solution was the Law on the Universal Application of Collective Agreements (*Allmengjøringsloven*).

#### **4.2 The law on the universal application of collective agreements**

On the same date that Norway joined the European Economic Area, the first of January 1994, a new law on the Universal application of collective agreements took effect. Far from being coincidental, the new law was the Norwegian answer to concerns about labour immigration and competition from entering into the common market of the EU (Eldring et al. 2011, p. 76). The purpose was stated in the first paragraph of the law, it was

“to secure foreign workers the same wages and terms as Norwegian workers. This is to hinder workers in performing labour under conditions that in total are demonstrably worse than what is agreed upon in a nationwide tariff agreement for the trade or field in question, or what is normal for the place and profession<sup>12</sup>” (*Allmengjøringsloven* 1994, § 1).

This goal would be achieved by making collective agreements universally applicable for all workers within the field the agreement was for. Thus, workers from other countries coming to Norway, either on their own or posted by a foreign firm would enjoy the same terms and conditions as Norwegian workers doing the same job. Both trade unions and employers’ organisations could demand that a tariff agreement should be made universally applicable, as long as they were a part of the agreement (*Allmengjøringsloven* 1994, § 4). Such demands would be put before the tariff board (*tariffnemda*), which would decide if the agreement

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<sup>12</sup> This was in 2009 changed to «The purpose of the law is to secure foreign employees’ wages and terms that are equal to what Norwegian workers have, and to hinder a shift in competition that is negative for the Norwegian labour market.”

should be made universally applicable or not (Allmengjøringsloven 1994, § 3). This board would consist of five members, and of them one would be the leader, and of the four others one would be from the trade unions and one from the employers' organisation to represent their interest (ibid). The board can decide if part or the whole of the agreement shall be made universally applicable if they deem it likely that foreign workers are, or may in the future, perform labour under conditions that in total are demonstrably worse than for similarly employed Norwegian workers (Allmengjøringsloven 1994, § 5). It is the individual pay and working terms that can be made universally applicable, while collective terms like the rights of unions and terms regarding pension are not possible to be made universally applicable (Eldring et al. 2011, p. 77).

Even though it entered into force as early as in 1994, the law was not used until 2004, when the first tariff agreement was made universally applicable (Eldring n.d.). The reason it took ten years for the law to be used is simply that after Norway joined the EEA the influx of workers from EU member states failed to take place (Alsos & Eldring 2008, p. 447). However, after the eastern enlargement, Norway has seen a sharp rise in workers from the new member states, something that has led to several agreements being made universally applicable since then (Eldring n.d.). The relatively low wage level of the workers that came to Norway from the new member countries led to several agreements within branches that were especially labour demanding being extended to all workers. The first one was adopted on 1<sup>st</sup> of October 2004, and was an agreement for seven land-based petroleum-plants (Eldring n.d.). Of note to the scope of this thesis is the decision to make the tariff agreement for the maritime construction industry universally applicable in 2008, something that can be said to have initiated the Wharf-case, which will be detailed in the next chapter (ibid).

Within Scandinavia, the Norwegian system stands out compared to Sweden and Denmark. While in Norway 55% of the private sector is covered by collective agreements, the corresponding number for Denmark and Sweden are 77% and 90% respectively (Alsos & Eldring 2008, p. 445). The relatively high levels of collective agreements coverage are reflections of systems that give the social partners a highly autonomous role in negotiating collective agreements, while having little or no legal regulation (ibid). Norway, while emphasizing the important role of negotiations between the social partners, have used the option to extend collective agreements in order to protect branches that are deemed exposed to competition on wages from foreign workers. One can therefore say that Norway has a model that incorporates elements from both autonomous collective agreement model and a



model based on regulation by law (Alsos & Eldring 2008, p. 445). On Finland and Iceland have a different approach to Sweden and Denmark, having both minimum wages by law, and 90 % coverage of collective agreements in private sector (ibid). Many of those collective agreements are also made universally applicable.

The reasoning behind the Norwegian law is one that sets it apart from similar laws in other European countries. The purpose in most countries is to extend the terms and conditions of a collective agreement to as many workers as possible (Eldring et al. 2011, p. 76). But in Norway, the reason for the legislation is to specifically counter adverse effects of labour immigration from other EEA member states (Ibid). This reflects the circumstances under which the law was created. Since Norway had previous to joining the EEA relied heavily on collective bargaining in order to ensure that workers were treated fairly, the government resorted to this mechanism in 1994 as a safeguard against social dumping as a result of the EEA membership.

The Norwegian law on the universal application of collective agreements has been challenged on its compatibility with EU legislation. The Norwegian employers' organisation for technology firms, Norsk Teknologi, sent in 2008 a complaint to the EFTA Surveillance Authority (ESA) where they questioned if the Norwegian Tariff Board was compatible with the EEA agreement (Eldring n.d.). However, the complaint was rejected in 2009, after ESA concluded that the Norwegian practice did not go against EU-legislation (Ibid). Also, since the decision to make the tariff agreement for the workshops at Norwegian wharfs universally applicable came shortly after the Laval-quartet, the decision from the Tariff Board contains a section dedicated to explaining the relationship to the EEA-agreement (Tariffnemda 2008). After the verdicts in the Laval-quartet, the Tariff Board asked the legal department of the Department of Justice for an evaluation of the legitimacy of the Tariff Board within EEA-rules. The legal department pointed out that the EEA-agreement said that economic purposes, such as the protection of national businesses, do not justify a restriction of the right to provide services (Ibid). However, even though the stated purpose of the law is to protect the Norwegian economy of adverse effects of the free flow of workers, this does not make the law incompatible with the EEA-agreement (Ibid). Instead, it must be evaluated what direct effects the decisions of the tariff board has (Ibid). Even though the Tariff Board in practice has the possibility to go beyond the scope of the Posting of Workers Directive, it also has the responsibility to make decisions that are in line with the Directive (Ibid).According to the

legal department, as long as it does this, it does not go against the EEA-agreement or the PWD.

The Law on the Universal application of Collective Agreements has been an important tool for Norway in the last ten years, being used to hinder social dumping in sectors that have been exposed to a sharp rise in foreign workers after the eastern enlargement of the EU in 2004. Although the compatibility with EU legislation on the free flow of workers has been questioned, there appears to be no ground for conflict as long as the Tariff board take EU legislation into consideration when evaluating if collective agreements should be made universally applicable. That does not mean that the arrangement is not without controversy, both nationally and internationally. The decision to make the tariff agreement for the workshops of Norwegian wharfs universally applicable resulted in a court case between on the one hand representatives of eight wharfs and the employers' organisation NHO, and on the other hand the State represented by the Tariff Board, assisted by the trade union LO. The case went through all three Norwegian court instances and included a preliminary ruling from the EFTA-court, which in many aspects builds its ruling upon the Laval-quartet. The next chapter will discuss how this case is principally important to Norwegian legislations standing with regard to the EEA-agreement and the Posting of Workers Directive.



## 4. The Wharf-case

The Wharf-case is in short a court case in which eight Norwegian wharfs<sup>13</sup>, aided by their employers' organisations NHO and Norsk Industri, contested the decision made by the Tariff Board of October 6<sup>th</sup> 2008 to make parts of the Engineering Industry Agreement universally applicable for the maritime construction industry after the trade unions LO and Fellesforbundet had requested it on behalf of their members in 2007 (Høyesterett 2013, p. 2). After the Supreme Court's verdict in the Wharf-case on March 5<sup>th</sup> 2013, the Norwegian trade unions celebrated what many regarded as a landmark victory. FAFO-researcher Jon Erik Dølvik called it a milestone when it comes to securing workers' rights, the [Norwegian] agreement system and a defined labour market (Grimsrud 2013). While the trade unions enjoyed the end of a long legal battle that had gone through all three levels of the Norwegian legal system, and including a preliminary ruling from the EFTA-court, the wharfs and their employers' organisation were left to reluctantly accept the ruling. This chapter will see the Wharf-case in light of the PWD after the Laval-case, and explore how the Wharf-case showcased how there is room to manoeuvre within the PWD as long as the national provisions are in line with the directive.

LO asked the Tariff Board in September 2007 to make parts of the Engineering Industry agreement universally applicable, limited to the maritime construction industry (Tariffnemda 2008, n.p.). This was based on information that Fellesforbundet had gathered from 15 enterprises in different parts of the country, that show that social dumping was an increasing problem within this industry in Norway (ibid). The survey had found that foreign workers many places received an hourly pay that was far lower than the average for a Norwegian worker, and there was also found that many workers did not receive proper remuneration for expenses connected to trips home (ibid). The Tariff Board decided to make the provisions for minimum hourly wage, working time, overtime supplements, a 20% add-on for work that required overnight stay away from home and reimbursement for expenses for travel, board and lodging for work that is requiring overnight stays away from home universally applicable, with the latter two being explicitly made applicable regardless of whether the worker was Norwegian or not (Høyesterett 2013, p. 2). The wharfs contested the Tariff Board's decision on the basis of two things. Firstly, because they did not think that the trade unions had proved that the criteria for making the provisions universally applicable was fulfilled, and secondly

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<sup>13</sup> The names of the wharf are: STX OSV AS, STX Norway Florø AS, Kleven Verft AS, Bergen Group Shipbuilding AS, Ulstein Verft AS, Havyard Ship Technology AS and Aibel AS. They will be called just "the wharfs" for short.

because they felt the decision was not compatible with EEA-regulations (ibid). Therefore they initiated a court case before the Norwegian court of first instance (Tingretten) against the Norwegian State represented by the Tariff Board, with LO and Fellesforbundet stepping in as partners to the Tariff Board.

The Court of First Instance decided January 29<sup>th</sup> 2010 that the Tariff Board was cleared of the charges, and that the costs of the case were awarded the losing side (Høyesterett 2013, p.2). The wharfs appealed to the Norwegian Court of Appeal (Borgarting Lagmannsrett), where the court decided to ask the EFTA-court for a preliminary ruling on the case because of the importance of EU legislation and previous EU legal practice on the subject. Borgarting Lagmannsrett rejected the appeal on May 8<sup>th</sup> in 2012, but the wharfs opted again to appeal, this time to the Supreme Court. Before the verdict of the Supreme Court will be examined, we will take a look at the preliminary ruling of the EFTA-court.

The EFTA-court received the request of a preliminary ruling from the Borgarting Lagmannsrett on February 9<sup>th</sup> 2011, and the ruling was given by three judges of the EFTA-court. There were three questions referred to the EFTA-court, the third one being dependent on the answer of the second question.

The first question asks:

“Does Directive 96/71/EC, including its Article 3(1) first subparagraph (a) and/or (c), see second subparagraph, permit an EEA State to secure workers posted to its territory from another EEA State, the following terms and conditions of employment, which, in the EEA State where the work is being performed, have been established through nationwide collective agreements that have been declared universally applicable in accordance with Article 3(8) of the Directive:

- a) maximum normal working hours,
- b) additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site; and
- c) compensation for travel, board and lodging expenses in the case of work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site?” (The EFTA-Court 2012, p. 4)

The second questions ask if the answer to the first question is yes, do you also have to do the same evaluation towards the EEA-agreement’s article 36? The third question asks, providing

the second question is answered in the affirmative, if certain provisions of the Norwegian Law on the universal application of collective agreements are legal, but since the answer in the second question was no, there is little point in spending time on that question.

From this we see that much of the controversy lies in the cost tied to working away from home, something that would in most cases apply to workers that are hired from other member states. A universal application of these rules means that all foreign workers will be eligible for those compensations, making them more expensive for the employers than otherwise. The wharfs argued that this made them less desirable to hire, thereby infringing on the right to free movement.

In its initial remarks, the EFTA-court refers to the Laval-verdict when noting how the “Article 3(1) sets out an exhaustive list of the matters in respect of which a host EEA state may give priority to its own rules” (The EFTA-court 2012, p. 12). The host state is therefore not allowed to extend terms that go beyond those that are listed in the PWD Article 3(1). But they also state that “[h]owever, the Directive does not harmonise the material content of those mandatory rules for minimum protection. Accordingly, the content of these rules may be freely defined by the EEA states” (ibid). Going back to the Laval-quartet, we remember that it was established that although the PWD Article 3(10) states that “[t]his Directive shall not preclude the application by member states [...] [of] terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions.” (Directive 96/71/EC 1996), this was limited by the narrow definition of public policy and the proportionality test.

The EFTA-court proceeds to go through the first questions three letters in turn. The first was regarding maximum normal working hours could be made universally applicable. The disagreement lies in whether Article 3(1) in the PWD is concerned with maximum normal hours or if it is concerned with maximum total hours, including both normal hours and overtime. The wharfs argued that it was referring to the maximum total working hours, and that the PWD therefore did not allow the Tariff Board Regulation of maximum 37.5 normal working hours to be made universally applicable (The EFTA-court 2012, p.14). The trade unions contested that, and held that according to Article 3(1) the EEA states were in their rights to apply limitations to normal working hours universally (The EFTA-Court 2012, p.15). The court finds that the PWD allows for the universal application of maximum normal working hours, but only if the terms are equal for all undertakings in the same field and

geographical area, and is in line with the PWD Article 3(8) (The EFTA-Court 2012, p. 17). However, it leaves it up to the national court to decide whether or not this is the case.

The second question was about the “[a]dditional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, with an exception for employees who are hired at the work site” (The EFTA-Court 2012, p. 17). The Wharfs did not consider the remuneration of costs for expenses applicable to the “rates of pay” referred to in Article 3(1) of the PWD, and believed that only minimum wages could be made universally applicable as a result. The reimbursement of cost could not by definition be considered pay, and in addition they argued how this remuneration would only in some cases be extended to Norwegian workers, but it would always be extended to foreign workers. Therefore, it would make all foreign workers more expensive to hire, something that in the opinion of the wharfs would constitute an obstacle to their freedom to provide services (The EFTA-Court 2012, p. 22). Meanwhile the trade unions, with support of the Governments of Belgium, Poland and Sweden and the Commission, argued that remunerations of expenses can be considered a part of the PWD provisions as long as it is in line with the Articles 3(1) and 3(8), and is defined as minimum reimbursements (The EFTA-Court 2012, p. 18). The EFTA Surveillance Authority (ESA) adds that “such additional remuneration may only be included within the concept of “minimum rates of pay” insofar as such additional remuneration is considered part of the minimum wage in the host State and does not alter the relationship between the service provided and the remuneration paid. In ESA’s view, this is for the referring court to determine.” (The EFTA-Court 2012, pp. 18-19).

An important point made by the Court, following up on a remark made by the wharfs, was that the stipulations of the Tariff Board identified the purpose of the board to be the protection of the national employment opportunities, and not the protection of workers (The EFTA-Court 2012, p. 22). However, the purpose of the Tariff board was not disqualifying in itself, but the national court would have to decide whether the universal application of the provisions was actually beneficial for the protection of the workers. The court held that if the extra cost that the remunerations would entail when hiring foreign workers was liable to discourage companies from hiring them, than this could not be considered a benefit for the workers. Still, the rules could be considered justifiable if the national court considered them to pursue the public interest of protecting foreign workers coming to Norway (ibid). The EFTA-Court adds that in that case, the national court would have to apply the proportionality test to

ensure that the rules did not go beyond what was necessary to protect the interest of the workers (ibid).

The Position of the EFTA-Court is very much in line with the Laval-interpretation of the PWD in the sense that it puts very much weight on the combination of first determining whether or not a policy is justifiable as vital to the public policy in the member state, and then requiring a proportional reaction to secure that vital part of public policy. However, although the EFTA-Court maintains that the PWD and the EEA Agreement Article 36 in principle precludes a state from extending remunerations such as those described in the case to foreign workers by way of universally applied collective agreements, they also leave the member state with the responsibility to themselves evaluate whether or not the rules in question is vital to public policy. This is not entirely in accord with the Luxembourg-verdict, which stated that:

“the public policy exception is a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the member states” (ECJ C319/06, art. 30).

The ECJ in the Luxembourg-verdict seem to be of a diverging opinion to the EFTA-court on the use of public policy exceptions, using a considerably narrower definition that states that

“public policy provisions is to be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest” (ECJ C-319/06, art. 32).

Luxembourg had tried to apply a demand for foreign workers to be paid close to the national average of the profession in question, something that went beyond the scope of the minimum requirements that had previously been accepted by the Laval-verdict, so it seems like the EFTA-Court is extending the option for member countries to use the public policy exception in cases where the terms in question can be said to be minimum requirements that are in line with Article 3(1) and Article 3(8). The importance for member countries then, is to ensure that either their legal provisions or the option to make tariff agreements universally applicable are in accordance with the PWD. In its answer to the third question, the EFTA-Court revisits this point in detail and mirrors several of the points made in the Luxembourg-verdict. They held that the member states in principle were free to decide how to apply the public policy principle, but it had to be interpreted strictly (The EFTA-Court 2012, p. 24). Furthermore, the



scope could not be determined unilaterally by a member state, and any restrictive actions to protect what was labelled as essential public policy provisions would have to be backed by substantial evidence of its importance and the proportionality of the measures taken (The EFTA-Court 2012, pp. 24-25). The EFTA-court left it up to the national court to evaluate if the restrictions could be warranted based on the criteria it set in the preliminary ruling in paragraphs 86 and 87, but added that its own opinion was that “[t]he information which has been given to the Court does not indicate that the allowances in question are justified on public policy grounds” (The EFTA-Court 2012, p. 25). The problematic interpretation of the public policy exception will be revisited when discussing the verdict of the Norwegian Supreme Court.

The third question was concerning the compensation for travel, board and lodging in the case of work assignments requiring overnights stays away from home. The Article 3(7) of the PWD states:

“Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging” (Directive 96/71/EC).

The partners of the case had two different interpretations of the meaning of that. The wharfs argued that the compensation in question did not fall under the Article 3(1) of the PWD because the reimbursement of cost by definition could not be considered payment, and as the under the second question, it would apply in all cases for foreign workers who were not hired at the jobsite, but only in certain cases for Norwegian workers, thereby being discriminatory (The EFTA-Court 2012, p. 23). The trade unions interpreted the Article 3(7) PWD as that it “merely provides that such benefits may not be taken into account when calculating the minimum wage for the purposes of the comparison required under that provision” (ibid). This view is supported by ESA and the Commission, who agrees that the Article 3(1) allows member states to secure the reimbursement of expenses for travel, board and lodging for foreign workers, provided that it is not reimbursement for expenses who are actually paid by the worker (The EFTA-Court 2012, pp. 22-23). The distinction is that if the remuneration is for expenses that the worker has paid for, it cannot be defined as pay, while if it is a general minimum remuneration it is in line with the Article 3(1), letter c. This question will be revisited when analysing the Norwegian Supreme Courts evaluations.

The EFTA-Court found that since the payments in question would be for actual expenses related to travel, and therefore not allowed under the exhaustive list in PWD Article 3(1), it could only be allowed under the public policy exception discussed earlier. That entailed that evidence of the important status of the provisions and of the proportionality of the measures taken would be required. In summary, the EFTA-Court predictably mirrored the established legal practice after the Laval-quartet when answering the questions forwarded by the Norwegian Court of Appeal. While it was acknowledged that maximum normal working hours was covered by the Article 3(1) PWD, the court held that the PWD did not in principle support the universal application of the payments in question two and three, except if proven to be essential to public policy.

The Norwegian Court of Appeal rejected the appeal, but the wharfs decided to take the case to the Supreme Court based on the fact that the verdict from the EFTA-Court supported their view to a great extent. They submitted remarks to the courts regarding the use of the preliminary ruling, stating that the Supreme Court would have to follow the guidelines from the EFTA-Court. If the Supreme Court did not find the solutions in the preliminary ruling to be accurate, the wharfs argued that the questions would have to be re-submitted to the EFTA-Court, since a dismissal of the preliminary ruling would be very questionable from an EEA-perspective (Høyesterett 2013, p. 4). They in general supported the view of the EFTA-Court, while adding that since the Tariff Board's regulations lay to ground different reasons for the universal application than what was allowed in the established legal practice, the Tariff Board's decision contained procedural errors (Høyesterett 2013, p. 5.) Norsk Industri added that the criteria that should have been laid to ground for the Tariff Board's decision are distinctly discretionary and complex, and the decision the Board came to on the wrong basis cannot be representative for what it would have come to on the right basis (Høyesterett 2013, p. 6).

The State, represented by the Tariff Board, held instead that the EFTA-Courts diverging view on if the remuneration to the basic hourly wage for work assignments requiring overnight stays away from home was compatible with the PWD was because it was based on the Laval-verdict, where the terms which were being examined did not comply with the PWD Article 3(1) (Høyesterett 2013, p. 7). The Tariff Board argued that the Norwegian provisions did constitute minimum wage, it should be allowed (ibid). The trade unions added that on average, Norwegian workers earned considerably more than the minimum wages secured in the tariff agreement. If the Tariff Board's decision was to be found unlawful, this would entail

an increasing difference between Norwegian workers and foreign workers, severely damaging the social situation of the latter (Høyesterett 2013, p. 8). This would in their opinion severely damage the Norwegian labour model.

In order to avoid a lengthy retelling of the Supreme Courts evaluation of the case, I will focus on four main topics: The status of remunerations such as those for travel lodging and board, the relationship between the EEA Article 36 and the PWD, the interpretation of the public policy exception and the status of Norway's relationship to the EU on labour matters following this case.

First, the Supreme Court decided to reject the appeal, resulting in the case having gone through the three instances of the Norwegian Court system with victory for the Tariff Board and the trade unions in all three. The wharfs and the employers' unions were disappointed that the Supreme Court in spite of the support they got from the EFTA-Court came to that conclusion, but took notice of the decision and welcomed a final decision on the matter (Eriksen 2013). The decision allowed the remunerations questioned in the case to be universally applied, with the Supreme Court citing the public policy exception as valid reasons for the decision. When debating the additional remuneration to the basic hourly wage for work assignments requiring overnight stays away from home, the Supreme Court came to the conclusion that the remuneration could be considered part of the minimum wage, something that the appellants hadn't questioned (Høyesterett 2013, p. 12). Furthermore, the Supreme Court found that the universal application of this remuneration could be justified with respect to the preservation of important public policy provisions. The Court found that the numbers provided as evidence in the case showed that the remuneration in question objectively speaking was something that enhanced the protection of the workers, and that the remuneration did not exceed what was proportionate to achieve the goal of enhancing the social situation of the workers (Høyesterett 2013, pp. 16-17).

A similar evaluation was made with regards to the covering of expenses for travel, lodging and board in the case of work assignments requiring overnight stays away from home. The EFTA-Court found that the provision was not compatible with the PWD unless it could be justified by public policy provisions, but the Supreme Court questioned the basis of this verdict. Since the Laval-verdict had determined that the PWD did not harmonise the definition of minimum wage, it was left up to the member countries to define the material content of the exhaustive list of minimum rules in Article 3(1) (ECJ C-341/05, p.14). In the

Supreme Court's view, if the costs were not covered by the employer, the worker would not achieve the minimum wage set by the tariff agreement ((Høyesterett 2013, p. 21). The average cost for travel, lodging and board is calculated to be 50 kroner per working hour, while the minimum wage is 126,67 kroner for a trained worker, which would leave the worker with an actual wage of 76,67 kroner per hour if the costs were not covered by the employer (ibid). Therefore this is essential to the relevance of the minimum wage standards as a whole, and its preservation can subsequently be defined as a justifiable public policy exception. In the proceeding of the Supreme Court, there was put forward a number of studies by renowned researchers on the Norwegian labour market, in which the general consensus is that the removal of the universal application of the provisions in this case would cause a change in the competition between Norwegian and foreign workers, causing the gap between them to grow (Høyesterett 2013, p. 24). Professor Ragnar Nymo list possible results of the removal of these provisions:

1. "Political weakening of the workers: Reduced welfare and increased pressure on Norwegian wages.
  2. Reduced benefit of negotiations in "frontfag"<sup>14</sup>
  3. A lower degree of coordination and a worse climate of cooperation.
  4. Lower degree of organisation among workers.
  5. Increased differences in wage level in the society as a whole and on individual level."
- (Høyesterett 2013, p. 24).

The Supreme Court finds that the potential destabilising results of the removal of these provisions and the possible domino effect this could have on other industries as well is enough for the status of these remunerations to be considered essential to the public policy (Høyesterett 2013, p. 25). As for the wharfs question on procedural errors in the Tariff Boards decision to apply the terms universally, the Supreme Court rejects this on the grounds that the Board's justification wouldn't have changed if an evaluation of the EEA Article 36 was included. The result is that the Supreme Court by and large uses the freedom it has to do its own evaluations on the questions forwarded to the court, and takes the EFTA-Courts preliminary ruling into consideration without following the same line of reasoning. That is not to say the EFTA-Courts decision is disregarded. The two courts disagree in two major ways, the definition of what constitutes minimum wage and what constitutes a justifiable restriction to the freedom to provide services based on public policy exception. The first difference could

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<sup>14</sup> Areas of the labour market chosen to be revised at an early stage, setting precedence for the subsequent negotiations in similar areas.

be attributed to the different access to background information of the two courts. While the EFTA-Court argues that the remunerations in question cannot be regarded as part of the minimum wage as long as it is not explicitly regarded as so in the national provisions, the Norwegian Supreme Court bases its decision on the extensive statistical material forwarded in the case which suggested that without the remunerations in question, the foreign workers would in practice be paid significantly lower than the minimum wage stipulated in the tariff agreement. There is a conflict between the EFTA-Courts demand for national minimum wage provisions that are transparent and easy to understand and the basis the Supreme Court used for its decision. However, that is only if there is doubt about if the remunerations are applicable or not; if they are a part of the universally applicable tariffs, that is not a problem. The nature of the remunerations is such that they will always apply to foreign workers, but not to Norwegian workers. This is held by the wharfs as rendering it less attractive for workers to provide their services in Norway (The EFTA-Court 2012, p. 21). The fact that the increased cost to hire foreign workers is a possibility does not however objectively reduce the benefit of said foreign workers, and cannot be considered an argument against demanding the remuneration of costs from the employers.

Regarding the remunerations to the basic hourly wage for work assignments requiring overnight stays away from home, the Supreme Court finds the EFTA-Court's demand for a separate evaluation of this with regard to the EEA Agreement article 36, in the case of the Norwegian court finding the remuneration in accord with the national classification of minimum rates, to be unjustifiable. The Supreme Court does not take a definite stand on the matter, but argues that a separate evaluation is unnecessary. If there was needed a separate evaluation on the EEA agreement and the PWD, this could be considered legally impossible and would render the Directive partially invalid, considering the purpose of the directive is to regulate the posting of workers based on the EU treaties. If the Directive does not correspond to the primary legislation, then it would be legally invalid, something this case does not suggest. Therefore, the Supreme Court was not required to do a separate evaluation of the Article 36 in the EEA Agreement in this case.

The narrow definition of what constitutes a justifiable restriction to the right to provide services established in the Laval-quartet is of importance when comparing the Laval-quartet to the wharf case. The Supreme Court exercised its right to independently evaluate if the remunerations considered in the case could be considered to justify restrictions on the right to right to provide services in Norway. Through evidence that was forwarded by expert

witnesses before the Supreme Court, the court found it sufficiently proved that the removal of the provisions in question from the Tariff Boards decision on the universal application of the Engineering Industry Agreement to the maritime construction industry would be of a detrimental nature to the Norwegian Labour market and cause a domino effect in other industries that would in sum cause a number of negative effects which are mentioned above. The Laval-case is as a whole seen as a resounding loss for the rights of trade unions in the labour market, but when comparing the case to the wharf case, there are several points that is in many ways overseen. The Laval-case caused a thorough examination of the Swedish labour system in order to plug the gaps that had led to the verdict. The main problem is that the Swedish labour system to a very large degree is governed by a collective bargaining model that is not codified in law. Moreover, Sweden does not have any provision for making a collective agreement universally applicable. Therefore, when the ECJ was evaluating whether or not the actions taken by the Swedish trade union as justifiable as a public policy exception, the answer based on the ECJ's interpretation of the PWD is more than clear; the trade unions were not protection what could be considered matters which were laid down by "by law, regulation or administrative provision, and/or by collective agreements or arbitration awards which have been declared universally applicable" (ECJ C-341/05, p. 4). The Swedish trade unions were unable to successfully defend their actions because of the lack of clear parameters and standards for what could be considered vital public policy provisions, and the need to negotiate a new tariff agreement for a company from a member state for every project ran counter to the principles of the PWD article 4, which concerns that countries shall strive to make it easy for posting companies to know what terms and conditions that they are subject to. Therefore, the differences between the Swedish Laval-case and the Norwegian Wharf-case lies in the freedom the Norwegian Court had to declare tariffs as essential public policy provisions because they were made universally applicable in accord with the wording of the PWD Article 3. The Swedish trade unions saw in hindsight that they had missed opportunities when the PWD was being implemented in Swedish law by not ensuring proper description of the Swedish labour law customs, something that would have increased the likelihood of them being recognised by the ECJ (Nyberg 2011, p. 168). Considering the Luxembourg-case as well, the terms that was being demanded for foreign workers went beyond what even a broad interpretation of the PWD would entail, so there should be little controversy about the fact that Luxembourg was in breach of the Directive. In Norway, the law on universal application of collective agreements have since 2003 been used proficiently by the Tariff Board, and although there are still sceptics both within trade unions and employers to the need for

universal application, a study by FAFO showed that as much as 60 % of company leaders polled thought that universal application was needed to some or great degree (Eldring 2010. P.68). If a conflict situation were to arise regarding a tariff agreement that was not universally applied however, the result would predictably be different. In the event of a future universal application request, the verdict of the Wharf-case will have clarified the possibility to include remunerations as those disputed in that request, making the road to universal application considerably easier.

The wharfs and the employers' organisations have shown no intent to take the case further at this point. The Norwegian legal system has been exhausted, so the only possible step would be to complain to the ESA. There is little reason to believe that is a viable option, as the Supreme Court has based its verdict on established legal custom and established how the Norwegian law on the universal application of collective agreements is applied in accord with the PWD. Unless the ESA has a radically different interpretation of this, there is no basis for a continuation of this case. There is bound to still be discussion about universal application in Norway, and as mentioned there is still only a small part of the Norwegian labour market that is covered by universal application, let alone tariff agreement at all. The Wharf-case has confirmed the Tariff Board's use of its authority, and although the Tariff Board on paper has powers that go beyond the scope of the PWD, its use has been in accord.

Although there is at the moment little or no research papers published on the Wharf-case, there is bound to come a wide range, both from the legal and the political side. Even though the case was lauded as a historical win for the trade unions, they have no reason to let the case go, as there are still questions as to which degree it sets precedence for similar future cases that could arise. In a legal perspective, the Supreme Court did not find it necessary to make a final decisions on a range of questions, for example whether remunerations that are part of the minimum wage in light of the PWD also must be evaluated in light of the EEA agreement Article 36 (Høyesterett 2013, p. 15). Answering those questions is best left to lawyers and judges, and it is not impossible that we might see a case where those questions might have to be answered once and for all. We must also remember that the PWD is but a part of the legal framework for the inner market of the EU. The Services Directive and the Temporary and Agency Work Directive have also created much debate around the future of the social Europe, and the debate around the proposed and subsequently rejected Monti II proposal will continue until we have a solution on how the PWD should be enforced.

## 6. Concluding remarks

The Wharf-case brought Norway its first real principally important case regarding the PWD. The PWD has been a source for controversy in large parts of Europe, and especially in countries like Sweden, where the Laval-quartet changed the prevailing interpretation of the directive in what the trade unions saw as a clear pro free market direction. The differences between the different labour systems of the Member countries has led to a situation where a few countries feel their system is under attack by the PWD, while others have no qualms about it whatsoever. For scholars, the PWD has been a source for debate for years, with much scrutiny focused on how it has been implemented in the member states, and how successful it has been. Especially researchers with connections to the trade unions have paid much attention to how the PWD has affected the fight against social dumping. In Norway, several studies, many of them from FAFO, have examined how the situation for foreign workers is in Norway, and how the law on the universal application of tariff agreements has impacted this. Throughout the history of the directive, the PWD has in many ways been defined by the courts. Cases like the Rush-Portugesa laid precedence for how the Directive would be designed, the Laval-quartet reshaped the interpretation of the Directive, and in Norwegian context, the Wharf-case has been vital in defining the relationship between the Norwegian labour market model stands up when tested against the PWD.

In the second chapter we examined the origins of the PWD, starting from the humble beginnings of the European social policy, via the Social Charter to the start of the 1990's, where the completion of the single market led the European trade unions to demand protection for workers against the effects the expected increase in cross border labour migration was going to lead to. The Rush-Portugesa case led to massive pressure towards a new directive on the posting of workers, something which became a reality in 1996, after five years of debate. The Directive's attempt to strike a balance between the protection of workers' rights and the protection of the market freedoms would ultimately turn out to be unsuccessful, as the eastern expansion of the EU ultimately led to the ECJ establishing an interpretation of the Directive which favoured the latter.

In the third chapter we saw how this was done in what has become known as the Laval-quartet, four cases before the ECJ which redefined the PWD. Ultimately, the legal basis and the attempt to strike a balance between two opposing interests led to the interpretation of the directive to be more of a free movement directive than a social protection directive. In sum,



the four cases limited the possibility for trade unions to use collective action in a dispute by enforcing a need for their demands to be compatible with an exhaustive list in the PWD article 3(1) and for the action taken by the trade unions to be proportionate to the goal it was to achieve. This is supported by the wording of the Directive, so one can ultimately argue that the outrage of the trade unions is a result of a wrongly placed contentment with the original intentions of the Commission instead of the final wording of the directive.

In the fourth chapter, the basis for the Norwegian labour market was briefly summarised, before the law on the universal application of collective agreements was outlined. The Norwegian labour market has since the 1930's been based on cooperation between the partners of the labour market, with the state as a facilitator more than an active part of the negotiations. The focus on negotiations and cooperation created a system that has avoided major crisis, and rewarded Norway with a predictable and stable labour market. In order to secure the rights of both Norwegian and foreign workers when Norway joined the EEA in 1994, the law on the universal application of collective agreements was launched. It was set up to allow for the universal application of tariff agreements in areas where there was a potential for social dumping and unfair competition, but saw no use until just before the eastern enlargement in 2004.

In chapter five, the Wharf-case was discussed. The case went through all three stages of the Norwegian legal system, and included a preliminary ruling from the EFTA-Court. The case was regarding if certain parts of the Engineering Industry Agreement could be made universally applicable for the maritime construction industry, and featured eight Norwegian wharfs assisted by the employers' organisations NHO and Norsk Industri, versus the Norwegian State represented by the Tariff Board, assisted by the trade unions LO and Fellesforbundet. The wharf-case was the first principally important case regarding the PWD in Norway, and the final verdict from the Norwegian Supreme Court differed in many ways from the EFTA-Courts evaluations in that it regarded the universal application of the contested terms and conditions as justified under the PWD and proportionate to the goal it was to achieve. The case confirmed the position of the universal application-system in Norway, and set precedence for universal application in the future as well.

Throughout this thesis, we have seen how the posting of workers in the EU and EEA has been shaped by the courts. The ECJ has been a defining factor both in the shaping and reshaping of the PWD. The complexity of the EU and the variety in the different national labour systems of

its members led to a directive that was ambiguous and which definite interpretation was bound to be decided by the court. This interpretation, which was established after the Laval-quartet, ultimately shaped the way in which the EFTA-Court interpreted PWD when providing a preliminary ruling for the Wharf-Case. The Norwegian Supreme Court disagreed in some of the definitions the EFTA-Court forwarded, but the main point to take from the Wharf-Case is that the Supreme Court could use the leeway it had because of the way the law on the universal application of tariff agreements corresponded with the Article 3(1). This enabled it to use the proportionality test to confirm that the terms and conditions in question were essential to public policy and a vital part in the Norwegian labour system.

The public perception of the PWD after the Laval-quartet verdicts has been woefully one-sided, with little focus being given to positive effects. For Norway, the room for action is not greatly affected by the directive. The directive gives both rights and duties for both sides in the labour market, and the national autonomy is not threatened, since the Wharf-case confirms both from the EFTA-Court and the Supreme Court that member countries are free to define terms such as minimum wages and such as long as they do not explicitly go against the purpose of the market. In fact, the directive can offer an increased level of protection in a range of circumstances. Although a country like Sweden have seen major controversy after the Laval-quartet, that is just as much a result of a lack of proper implementation of the directive as it is a result of a redefinition of it. The Supreme Court confirmed that the PWD can be a tool to secure the rights of workers, and that the universal application of tariff agreements is a viable method of doing this within the EEA-framework.



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