# The Free Movement of Services, Industrial Action and the Swedish Industrial Relations Model
## – the Legal Structure and Actors' Acting in the Laval Case

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## 1 Introduction

The fundamental features in Swedish labour law have been established in line with principles that the labour market parties have settled themselves. Further, the labour market parties' dealing with labour market matters is carried out within the framework of law built on these principles. Hence, the development in Swedish industrial relations could be analysed as interplay between the labour market parties and the legal structure.

However, since Sweden's affiliation to the European Union (EU) in January 1, 1995, and even before that point of time referring to the EEA Agreement, also fundamental principles in EC law must be considered. This has been obvious in the so called Laval case dealt with by the Swedish Labour Court as well as the European Court of Justice (ECJ).[1] A Latvian contractor in the building line of business posting workers to Sweden for temporary services was subject to industrial actions from Swedish trade unions. The unions claimed that the employer should sign a collective agreement with a Swedish trade union.

A crucial issue was that – compared with Swedish collective agreements – the Latvian workers were paid lower wages in accordance with a collective agreement concluded in Latvia. The Latvian firm referred to EC law and the free movement of services, while the Swedish trade unions referred to the right to take industrial action regulated in the Swedish Co-determination act (1976:580). The case caused the Swedish Labour Court in 2005 to ask the ECJ for a preliminary ruling concerning the Swedish regulation on trade unions' right to industrial action in relationship with EC law on the free movement of services.[2]An extensive debate followed concerning the justification of the trade unions' actions as well as the relationship between Swedish regulations and EC law on the matter.[3]

In December 2007, the ECJ answered the Swedish Labour Court's questions. The ECJ made some crucial remarks concerning Swedish regulations on the matter in relation to the Treaty and the free movement of services, and the Court stated that it was contrary to EC law to take industrial action against the Latvian undertaking in order to establish the collective agreement for the building line of business. The legal situation was made rather clear even if some matters still could be subject to discussion.

The aim of this article is to analyse the legal preconditions and the labour market parties´ acting within the framework of EC law and the Swedish industrial relations model, especially the period before December 2007, and with a special attention to the right to take industrial action. I will also put the finger on some conflicting points in the relationship between EC law and Swedish law.

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1 Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others.

2 The Swedish Labour Court Case 2005 no. 49.

3 Concerning the debate in Sweden and my position on the matter, see Edström, *The free movement of services in conflict with Swedish industrial relations model – or was it the other way around?* in Wahl & Cramér (editors), Swedish Studies in European Law, Volume 1, 2006. Concerning EC law on the matter, see also Sigeman, *Fri rörlighet för tjänster och nationell arbetsrätt*, in Europarättslig tidskrift, p. 481 ff.

My interest is focused on the interplay between the actors and the legal structure, in Sweden traditionally characterized by a great autonomy for the parties to settle conflicts by self-regulating mechanisms. Another question is to analyse the parties' actions in practice, especially in the building line of business, within the framework of the legal structure and the effect of this acting.

First I will introduce a theoretical framework for the study, then I will give a brief account for EC regulations concerning the free movement of services and labour law, the Swedish industrial relation system, and an empirical study concerning the parties' dealing with the legal situation in 2007 will be presented. Finally, conclusions will be drawn concerning the legal framework and the actors' acting, especially in the "Laval situation" until the judgement from the ECJ was presented.

## 2 Theoretical Framework

In the study the law represents the structure which both functions as a means for the structuring of the labour market parties' activities as well as a medium for the parties' social actions. The actors are Swedish employers and trade unions and their representatives. As pointed out above the Swedish industrial relations regulations settled in law to a large extent is founded on the labour market parties' dealing with their conflicts through self-regulation.

Hence, there is a close interplay between legal structure and the actors' activities. An appropriate framework contributing to an understanding of the situation is the theory on structuration, developed by the English sociologist Anthony Giddens. Structure is pre-existing in society from the agents' perspective, but it is important that structure manifests itself through social practices, through active doings of subjects; that structure is both reconstructed and constructed by the social agents in social practices.[4]

An illustrating example is language, which from the individuals' or actors' perspective is a pre-existing structure, structuring our communication with other people. But at the same time there is no language without people using it, and, further, the people using the language also contribute to the continuous development of language.[5]

Gidden's perspective is that structure is both constraining and enabling social action, and he emphasizes the "duality of structure"[6], thereby bridging the gap in social theory between determinism and voluntarism, meaning that "structure is both medium and outcome of the reproduction of practices".[7]

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4 Giddens, *Central Problems in Social Theory*, 1979, pp. 69 ff. Concerning Giddens and the concept of structure, see also Mendoza, *Structuralism and the Concept of Structure*, in Anthony Giddens. Critical Assessments, Volume I, 1997.

5 Manicas, The *Concept of Social Structure*, in Anthony Giddens. Critical Assessments, Volume II, 1997, p. 11.

6 Giddens, *New Rules of Sociological Method*, 1976, p. 121.

7 Archer, *Morphogenisis Versus Structuration: On Combining Structure and Action*, in Anthony Giddens. Critical Assessments, Volume II, 1997, pp. 28 ff. Archer has made some critical notes concerning the complexity in Gidden's concept when used in sociological

Giddens focuses on the recursive elements that he considers to be important for understanding social organization and change.[8] Hence, the concept also emphasizes the mutual dependence of structure and agency.[9] Further, Giddens dissociates himself from the theoretical pole claiming that social action is determinated by structure and theorists claiming that the individual is acting independent of structures.[10]

In this article I will use Gidden's theoretical view to understand the interplay between the social actors on the labour market and the legal structures regulating the right to take industrial action directed towards foreign undertakings posting workers to Sweden for temporary services. A crucial problem is that sometimes there is incongruence between EC law and Swedish labour law, and this structural uncertainty has an impact on the parties' dealing on the labour market.

Anyway the labour market parties are trying to stabilize the situation by developing legal solutions (or they may try to avoid conflicts that actualize legal institutions' involvement), and in that way they are both reconstructing and constructing the legal structure.

In his writings Giddens has not put much emphasize on law as the structure. Hence, I would say that his theoretical concepts, especially on structuration, has inspired me to the chosen approach, even if I will not make use of all aspects, terms etc. developed within the framework of the theory. Further, I will take the opportunity to refer to Giddens himself claiming that structuration theory is not a definite research programme not leaving room for new applications. Rather his theoretical concepts could be used in a great variety of research contexts where it could be of relevance.[11]

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analyses (see *ibid*.). The quotation refers to Giddens, *Central problems in social theory*, 1979, p. 69.

8 Giddens, *Structuration theory: past, present and future*, in Bryant & Jary (editors), Gidden's theory of structuration: A critical appreciation, 1991, p. 204.

9 See Dallmayr, *Agency and Structure*, in Anthony Giddens. Critical Assessments, Volume II, 1997, pp. 58.

10 Compare Cohen who exemplifies the matter in a discussion concerning power and domination by referring to Focault emphasizing structural power and Weber paying attention to the actor's perspective and understanding social actions in terms of meaning and rationality. See Cohen, *Structuration Theory. Anthony Giddens and the Constitution of Social Life*, 1986, pp. 154 ff.

11 Giddens, *Structuration theory: past, present and future*, in Bryant & Jary (editors), Gidden's theory of structuration: A critical appreciation, 1991, p. 213.

# 3 Legal Structure for Free Movement of Services and Industrial Action

## *3.1 EC Law*

### 3.1.1 The EC Treaty and the free movement of service

The free movement of services is one of the four fundamental freedoms regulated by the EC Treaty. In particular the free movement of services is regulated in the articles 49 and 50 of the EC Treaty. The Treaty prohibits restrictions on the free movement of services. This follows from article 49 where it is stipulated that

> "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended".

Basically the definition of the term "services" is negative and follows from article 50, meaning that services "are not governed by the provisions relating to freedom of movement of goods, capital and persons". However, normally "services" should be provided for remuneration and examples are presented such as activities of craftsmen and more.[12]

### 3.1.2 The Services directive

The aim of the Directive 2006/123/EC on services in the internal market (hereafter the *Services directive*) is to facilitate the exercise of the freedom of establishment for service providers and the free movement of services (article 1.1).[13] The freedom to provide services means that the Member States shall respect the right of providers to provide services in a Member State other than that in which the provider is established. Hence, the Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory (article 16.1).

The directive makes a crucial difference between services of different characters, for instance if the service is of general economic interest or not etc., but there is no reason to develop this analysis in the present article, which mainly focuses on the building line of business.[14]

The approval of the Services directive in 2006 was preceded by several years of extensive debate in Europe. A burning issue raised by trade unions and more

12 For an account with references to the ECJ, see Barnard, *The Substantive Law of the EU*, 2007, p. 358 ff. Even though the right to *establishment* is closely connected with the providing of services, there is a fundamental difference meaning that services are temporary, while establishment has a permanent character.

13 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market. *Official Journal L 376, 27/12/2006, pp. 36–68.*

14 For further comments, see Neergaard, *Services of General (Economic) Interest and the Services Directive – What is Left Out, Why and Where to Go?*, in Neergaard, Nielsen and Roseberry (editors), The Services Directive – Consequences for the Welfare State and the European Social Model, 2008.

was the so called state of origin principle, in a posting of workers context meaning that in principle the state of origin law should apply when services are performed by a service provider, bringing with him employees to another Member State. Thus, the relationship between the coming directive and national labour law was discussed, and the result was that the country of origin principle was toned down.

Hence, in the Services directive, article 1.6, it is stated that the directive

> "does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law".[15]

Further, in the preamble, point 15, it is also stated that the Services directive "respects the exercise of fundamental rights applicable in the Member States and as recognized in the Charter of fundamental Rights of the European Union reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty". In particular concerning industrial action, the preamble notices that these fundamental rights "include the right to take industrial action in accordance with national law and practices which respect Community law".

There are possibilities for the Member States to set up obstacles for the free movement of services, but such measures must meet certain requirements. Hence, restrictions may be imposed referring to "overriding reasons relating to the public interest". This concept includes – among other – the grounds public policy, public security, public safety and public health, and, further, the protection of recipients of services and workers (article 4.8).[16]

Another reason for restrictions is referring to "public policy". The term "covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety" (the preamble, point 40).

Concerning the free movement of services, in article 16.1b the term public interest is not mentioned. Instead the article refers to requirements for reasons of public policy or public security or for the protection of public health or the

15 In the preamble, point 82, there are further wordings meaning that *employment conditions* should be exempted from the direct impact from the directive, and in accordance with the passage the "provisions of this Directive should not preclude the application by a Member State of rules on employment conditions".

16 See also concerning the concept of "overriding reasons relating to the public interest" the preamble, point 40, with references to the practice from the ECJ concerning the Treaty, articles 43 and 49. Further, see the preamble, point 82, where the principles of non-discrimination etc. are mentioned in connection with laws and provisions on working conditions applied by Member States.

environment, and these terms do not necessarily cover the protection of workers.[17]

Further, from article 16.a-c it follows that a Member State may not introduce obstacles that do not respect the following general principles:

> (a) *non-discrimination* including both direct and indirect discrimination, referring to nationality or – concerning legal entities – depending on the state where the undertaking is established,
>
> (b) *necessity*; restrictions should refer to public policy, public security, public health or the protection of the environment, and
>
> (c) *proportionality,* which means that requirements "must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective".

Concerning the application of Member States' regulations on employment conditions, rules laid down by "law, regulation or administrative provisions" should apply before the Services directive, if they could be justified referring to the protection of workers and are non-discriminatory, necessary and proportionate, and if they comply with other relevant Community law (the preamble, point 82). It could be noted that compared with Directive 96/71/EC concerning the posting of workers (see below!), there is no wording in the Services directive that – regarding employment conditions – explicitly says that in this respect the collective agreement as a regulatory instrument should be approved.[18]

Finally, in accordance with the Services directive, article 3.2, the directive should not concern private international law, in particular not regulations concerning the governing the law applicable to contractual and non contractual obligations. A more general exception from the Services directive is employment conditions and more embraced by Directive 96/71/EC, which will be dealt with in the following.

### 3.1.3 The Posting of workers directive

Another Community directive that is important for analyzing the legal structure concerning the free movement of services is the Directive 96/71/EC on the posting of workers (hereafter *the Posting of workers directive*).[19] The aim of the

17 See also Nielsen., *The Services Directive, Rights of Recipients of Services and the Welfare State,* in Neergaard, Nielsen and Roseberry (editors), The Services Directive – Consequences for the Welfare State and the European Social Model, 2008, p. 222.

18 In article 6.1 the directive refers to labour law as "any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law".

19 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services. *Official Journal L 018, 21/01/1997, pp. 1–6.*

directive is primarily to secure the situation for workers posted by an undertaking in a Member State to another Member State. Another aim embedded means that domestic workers' employment conditions in the host Member State should be protected from the impact of foreign competition, and at the same time this means that social dumping should be counteracted. A crucial issue is what kind of method could be used on the national level referring to this purpose.

It follows from the Services directive, article 3, that the Posting of workers directive constitutes *lex specialis* vis-à-vis the Services directive. Activities referring to the Posting of workers directive are explicitly not embraced by the Services directive.

In the Posting of workers directive, article 1.1, it is stated that the directive should apply to undertakings established in a Member State, who are posting workers to another Member State.[20] In accordance with article 2.1, a posted worker is a worker "who, for a limited period, carries out his work in the territory of a Member State other than the state in which he normally works".[21]

An important matter is that the employer's contract on services should be temporary, and there should be an employment relationship between the employer making the posting and the worker during the posting. Hence, the posted worker could have a permanent or a temporary employment relationship with the service providing employer. Also employments in temporary undertakings or placement agencies are embraced. Otherwise, the term worker should be interpreted in accordance with the law in the host Member State.

Considering the aim of the directive, another crucial matter is what in particular should be the scope of the directive; what working conditions etc. should be subject for certain protection by the national labour law in the host Member State? In article 3.1a-g these matters are listed (in the preamble, point 14, called the "hard core" of clearly defined protective rules that should be observed by the provider of the services and that should apply to the posted workers' employment conditions"):

> "(a) maximum work periods and minimum rest periods;
> (b) minimum paid annual holidays;
> (c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;
> (d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
> (e) health, safety and hygiene at work;
> (f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
> (g) equality of treatment between men and women and other provisions on non-discrimination".

20 In article 1.2 there is an explicit exception from the directive's scope concerning merchant navy as regards seagoing personnel.

21 Further preconditions are specified in the directive, article 1.3. For being within the scope of the directive, the posting should be based on a contract between the contractor and a party operating in the host Member State.

Further specifications are presented, such as the term "minimum rates of pay" which should be defined in accordance with national law or practice in the host Member State. Regarding working conditions etc. it is important to note that the Posting of workers directive does not prevent the application of more favorable terms regarding conditions of employment (article 3.7).

Another question is what kind of regulatory instruments should be accepted for regulating the matters listed in article 3.1. National regulations should be laid down by law, regulation or administrative provision and (or) by collective agreements or arbitration awards. In principle a collective agreement in order to fulfill the requirements should have been declared universally applicable.

Concerning the application of article 3.1, in accordance with article 3.8 and a certain supplement to the directive, a collective agreement could apply generally in the building line of industry if it is "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, …" and (or) the agreement has been "concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory,…". Further, article 3.10 opens up for a more extended application of article 3.8 and to make collective agreements to embrace foreign contractors posting workers also in other lines of businesses.

Concerning which national law or regulation that should apply to a posted worker's employment beyond article 3.1 and the "hard core" of national provisions, the parties could make an agreement on which national law that will be given priority (compare the preamble, point 6). Such an agreement is in line with article 3 of the Rome Convention, which came into force in 1991.[22] However, if there is no agreement on which law that should apply, the Posting of workers directive, the preamble point 8, referring to the Rome Convention, stipulates that the contract

> "is to be governed, …, by the law of the country, in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country, or, if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated, unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract is to be governed by the law of that country;…"

Hence, in principle when workers are posted to another Member State, the meaning is that the working conditions should be ruled by the state where the employees normally are employed. Further, the posting should be temporary and the circumstances should indicate a connection to the country of origin, but the Convention is rather vague on this matter referring to the circumstances "as a whole" when judging if the contract is closer to another country (for instance the host Member State).

22 The Rome Convention of 19 June 1980 on the law applicable to contractual obligations. *OJ No L 266, 9.10. 1980, p. 1*.

Considering the guidelines, provided by the Posting of workers directive referring to the Rome Convention, the employment conditions beyond those belonging to the "hard core" of a Member State's labour law, should be ruled by the law of the country, in which the employee habitually carries out his work in performance of the contract.

However, a Member State could in accordance with article 3.10 impose further restrictions to the principle mentioned and stipulate that working conditions beyond those listed in article 3.1 should apply also to foreign contractors. Such restrictions must be justified referring to public order ("ordre public") and should be laid down in law or collective agreements meeting the directive's requirements.

### *3.2 Swedish Law and Industrial Relations*

#### 3.2.1 Structuring through self-regulation and law

An important starting point for the development of the industrial relations and the legal structuring on the Swedish labour market was an arrangement – called the "December compromise" in 1906 – between the dominating central organizations on the labour market. The trade unions and the workers won the right to organise, and in exchange the employer's right to lead and distribute work as well as to hire and fire workers was recognised by the trade unions. A basic structure for collective bargaining was founded after a long period of industrial unrest on the labour market, where the growing trade union movement and the employers had struggled to establish equilibrium.

It was, however, not until 1928 that the Riksdag took the Act on collective agreement, and at the same time the Swedish Labour Court (AD) was set up, primarily given the task to settle legal disputes concerning collective agreements.[23] Further, in 1936 a legal procedural framework for continued self-regulation through collective bargaining was completed when the Act on the right of association and the right of collective bargaining covering the whole private sector was taken.[24]

For an understanding of the Swedish model also the Saltsjöbaden Agreement, concluded between the dominating labour market parties in 1938, is crucial. The parties agreed to settle disputes through peaceful negotiations and to take industrial action only after making strong efforts to settle disputes peacefully. Thereby, the actual threatening of state intervention measures in order to promote industrial peace could be avoided.[25]

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23 Government's proposition 1928:253 om kollektivavtal and Government's proposition 1928:254 om arbetsdomstol.

24 Government's proposition 1936:240 med förslag till lag om förenings- och förhandlingsrätt m.m. For the major part of the labour market such a system was already before 1936 established through the collective agreements. However, the white-collar workers on the private sector were not embraced, which was an important reason for the legislation in 1936.

25 In 1965 important decisions concerning the right to collective bargaining on the public sector were taken by the Riksdag, and in 1976 further steps were taken in order to make the regulations on bargaining in the public sector more equal to the private sector. See Government's proposition 1965:60 angående reform av de offentliga tjänstemännens förhandlingsrätt m.m. and Government's proposition 1975/76:105 med förslag till arbetsrättsreform m.m. Bilaga 1 and 2.

### 3.2.2 The Co-determination act

In the 1970's the Swedish Co-determination act (1976:580) was taken, integrating *inter alia* the previous Act on collective agreement as well as the 1936 act mentioned above. From now on the law also provided a complementary legal structure for the prevention of the rising of conflicts between the employer and the employees.[26] Hence, the basic structure for collective bargaining etc. is founded on the Co-determination act, especially 10 §, and in 23–31 §§ there are fundamental regulations concerning the collective agreement.

Collective bargaining is supposed to – although it is not necessary in accordance with Swedish law – lead to the concluding of collective agreement, and the concluding of collective agreements is of vital importance in Sweden for the way the industrial relations system works (as well as in the other Nordic countries).[27]

Concerning the employer's engaging of a contractor or a decision to "have someone who is not in his employment to perform certain work for him or in his business", there is a duty for the employer to negotiate (38 §) and a right for the central trade union to veto the engagement of a contractor (39 §).[28] The idea behind the regulation on consultation and the veto right is to prevent work either violating the law, the collective agreement regulating the work concerned or what otherwise is generally accepted on the area of the agreement.

### 3.2.3 Collective agreements

Most regulations on collective bargaining in the Co-determination act are optional and could be replaced by collective agreements within the framework of law. In principle the Co-determination act provides an optional structure for collective bargaining.

In great parts and in almost all lines of business as well as in the public sector there are collective agreements for the procedures for collective bargaining. In practice the parties on the labour market also have completed great parts of substantial labour law in the collective agreements.

Many times substantial law stipulates a basic level for matters that could be subject to regulations in collective agreements. For instance, the length of the holiday period with pay is stipulated in the Compulsory holidays act 4 §, and the

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26 According to § 11 of the act, the employer is obliged to initiate consultations through negotiations *before* a decision is taken on major changes concerning both company and labour management issues. For instance, negotiations shall precede decisions concerning dismissals, rearrangements in production, the laying down of the activity, the introducing of new technology, the change of work organization and decisions on budget and financial investments.

27 For a brief comparison between the Nordic countries, see Edström, *Involvement of Employees in Private Enterprises in Four Nordic Countries*, in Stability and Change in Nordic Labour Law (Scandinavian Studies in Law, Volume 43, 2002).

28 Before the employer takes a decision on sub-contracting etc. he shall – in accordance with the Co-determination act 38 § – provide information to the trade union concerned about the plans for the arrangement and negotiations shall be carried through on the employer's initiative.

number of days stipulated in collective agreements can be more – but not fewer – than what is stipulated in law.[29]

### 3.2.4 Industrial action

Concerning the right to industrial action there is a regulation in the Swedish Constitution 2 ch. 17 § founding the right to unions of workers as well as employers' unions to take industrial action, if nothing else follows from law or collective agreement.[30] When the parties on the labour market have concluded a collective agreement, and there is a peace obligation clause in that agreement, there must be industrial peace between the parties in accordance with the Co-determination act 41 §.

Hence, in accordance with 41 § of the act it is contrary to the law to take or participate in an industrial action while a collective agreement is in effect, if the purpose with the action is

1. to exert pressure in a dispute over the validity of a collective agreement, its existence, or its correct meaning, or in a dispute as to whether a particular procedure is contrary to the agreement or (the) Act,
2. to bring about alteration of the agreement,
3. to affect the adoption of a provision, intended to come into operation when the agreement has ceased to apply, or
4. to support some other party which is not itself permitted to take industrial action.[31]

   (Not officially translated, *author's note*.)

In accordance with 42 § a trade union or an employer's association may not take or participate in an industrial action that is banned referring to 41 §. Further, an organization bound by a collective agreement may not give support to unlawful industrial actions taken by any member of the organization, and the organization should also counteract such actions among its members.

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29 The same technique is used to many EC labour law directives, where there are EC law-barriers saying that a collective agreement – for instance concerning working hours (the Working hours Act 1982:673, 3 and 19 §§) – may not be lower regarding worker's rights than the level stipulated by the Working hours directive (now Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. *Official Journal L 299, 18/11/2003, pp. 9–19).*

30 See the Swedish Labour Court Case AD 2003 no. 46 concerning the right to industrial action and the protection of this right in accordance with the Constitution 2 ch. 17 §.

31 Regarding these four basic prohibitions, see Göransson, *Kollektivavtalet som fredsplikts-instrument,* 1988. Further, there are important additional restrictions in the Co-determination act on the right to take industrial action for public employees doing work consisting in the exercising of public authority or doing work that is absolutely necessary for the exercising of public authority (23 §). The only industrial actions allowed in connection to work concerning the exercising of public authority are lockout actions, strike, overtime ban or blockade on new appointments, and these restrictions also embrace work in the local government sector (see the Act 1994:260 on public employment 2 §). If the intention is to exert influence in domestic political matters, there is a general prohibition for public employees to take industrial action.

However, before the ECJ judgement in the Laval case 42 § explicitly only applied to measures taken concerning working conditions etc. that were embraced by the Co-determination act (the Lex Britannia principle). The meaning was that an undertaking from another Member State, providing temporary services in Sweden, should not be embraced by the Co-determination act.

Hence, a crucial issue in the Laval case was the legitimacy of that restriction in relation to EC law. The Lex Britannia meant that a foreign employer posting workers to Sweden and bound by a collective agreement concluded in another Member State should not be protected from industrial action taken by a Swedish trade union in order to establish another collective agreement repressing the first agreement.

The judgement from the ECJ was very clear regarding the Lex Britannia principle, and in the answer to the Swedish Labour Court's request on a preliminary ruling the ECJ stated that the Lex Britannia is contrary to EC law.[32] The Lex Britannia was considered to be discriminatory, and to repress the Latvian collective agreement could not be justified referring to public order, security or health.

### 3.2.5 Swedish law on the posting of workers

The Posting of workers directive has been transmitted into Swedish law through the Riksdag's approval of the Act (1999:678) on the posting of workers.[33] The definition of the term posting is in correspondence with the directive. Concerning employment conditions there is a list of the Swedish labour law regulations that should apply to posted workers' employments, independent of what law that otherwise should apply to the relationship (5 §).

Minimum wages are not listed in 5 § of the Act on the posting of workers. Instead it follows from the Swedish model that the foreign employer is expected to negotiate on wages and more with the Swedish trade union organising workers in the actual line of business, and the right to take industrial action follows with the right to negotiate if the employer is not bound by a collective agreement with the Swedish trade union.

To a foreign reader it may seem remarkable that minimum wage – which is among those employment conditions listed in the directive, article 3.1 – is not comprised by the Swedish act. However, the reason is – as accounted for above – that these matters traditionally, in accordance with the Swedish model for industrial relations, are matters that the parties themselves have the entire disposal of.[34]

As stated above, concerning industrial action the ECJ in the Laval judgement rejected the Lex Britannia regulation to apply in the Laval situation. Further, concerning minimum wages there should be more specific requirements either in law or collective agreements to be foreseen by a foreign employer. Otherwise a

32 Case C-341/05 *Laval* (the judgement, point 120).

33 Government's proposition 1998/99:90 Utstationering av arbetstagare.

34 See, for instance, the Swedish Government's plea handed in to the ECJ on account of the *Laval* case, 2006 (hereafter the Swedish Government's plea in *Laval*).

foreign employer will be obliged to collective bargaining from case to case, the Court argued.[35]

Further, regulations on employment conditions beyond those that are listed in the Posting of workers directive could not be required, if such requirements are not regulated in law or collective agreements made generally applicable to all employers, *and* could be justified referring to public order.[36]

## 4 Inconsistent Legal Structures: EC Law and Swedish Law?

The brief accounts for EC law and the fundamental features of the Swedish industrial relations model should be compared in order to outline some ambiguous points, where there are possible discrepancies between EC law and Swedish law that are pertinent to the practice concerning the free movement of services. I will underline that I analyse incongruence from a legal point of view, considering that EC law will take precedence before Swedish law.

Discrepancies mean that there is an inconsistency within the legal structure that is supposed to lead to a normative shortcoming or confusion concerning the normative impact on the practice on the labour market. Even if the Laval case has resulted in a more clarified situation concerning especially the right to take industrial action, there are still issues to consider that could have an impact on the actors dealing on the labour market.

### *4.1 Law and Collective Agreement*

A crucial issue is the emphasize EC law puts on different legal regulatory forms such as law. Both the Services directive and the Posting of workers directive seem to give priority to employment conditions etc. regulated by law, while in Sweden collective agreements play a prominent part for regulating employment conditions.

Nevertheless, in accordance with the Posting of workers directive collective agreements explicitly should be recognised for regulating employment conditions to apply on posted workers from another Member State, but the directive, article 3.1, narrows the scope to collective agreements that have been "declared universally applicable".

However, for the same purpose article 3.8, which is often said to open up for the Swedish (and Danish) system not having the possibility to declare collective agreements universally applicable, approves collective agreements that are generally applicable within a geographical area, profession or industry, or agreements that are concluded by the most representative labour market organizations. Further, the agreement should apply to all similar undertakings in the area, profession etc. that are in a similar position.

A crucial principal issue is if the scope of an ordinary Swedish collective agreement will correspond to the requirements set up by the directive. A collective agreement concluded within the framework of the Co-determination

35 Case C-341/05 *Laval* (the judgement, point 71, see also point 100).

36 Case C-341/05 *Laval* (the judgement, point 80–82; see also point 100).

act is binding only for the members of the organization that has signed the agreement (26 §). Extending a collective agreement to embrace even organizations' non-members is contrary to Swedish legal tradition.[37] Hence, not all employers within a geographical area etc. could be expected to be bound by the agreement, even if they might conclude local collective agreements on the same terms and to identical wording.

Finally, the extension of a collective agreement to cover employers that are not members of an organization implies a state decision in wage matters and more, and referring to the industrial relations tradition even this is a matter where there obviously is a reluctance to take measures.

### *4.2 Equal Treatment, Non-discrimination and Nationality*

Consider a situation when the freedom to be bound or not bound by an agreement should be maintained on the Swedish labour market, but at the same time the possibility to make the collective agreement to embrace also foreign employers posting workers to Sweden, in line with the Posting of workers directive, article 3.8, would be utilized disregarding the Co-determination act 26 §.

In such a situation, a problem could occur in relationship to EC labour law, if the collective agreement should apply only to employers being members of the association that has concluded the agreement and undertakings from another Member State posting workers to Sweden. A Swedish employer not bound by a collective agreement would be treated more favorably compared with foreign contractors, since the Swedish employer not bound by a collective agreement would meet less restriction regarding the application of the dominating collective agreement in the actual line of business.[38] Further, such a situation could be considered to be an obstacle to the Treaty article 49.[39]

### *4.3 Industrial Action, Proportionality and Public Interest*

In Swedish law there is no explicit regulation on proportionality and industrial action. However, there are elements in the mediation regulation that basically will rely on some kind of proportionality concept, since the Mediation Office will have to consider that matter when taking a decision to intervene in industrial actions (the Co-determination act 47b §).

The question on proportionality was also raised by the Swedish Labour Court in the first preliminary decision concerning the Laval case (Case 2004 no. 111). The Court kept the door open for making a distinction between trade union claims that are too far going in relation to the goal to counteract social dumping and trade union claims that are in line with this purpose.

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37 Compare the Swedish Government's plea in *Laval*, point 83.

38 Compare the Swedish Government's plea in *Laval,* point 83. The Government's (as well as the Riksdag's) position was that such an application would be discriminatory.

39 Compare C-341/05 *Laval*, especially the judgement, point 99, where the right to take industrial action in order to drive through a collective agreement having more favourable working conditions than those mentioned in the Posting of workers directive, were considered to be contrary to article 49. See also for instance the Services directive, articles 14.1, 15.3a and 16.1a.

Looking on EC law, the principle of proportionality is mentioned as a principle to consider for putting possible restriction on the free movement of services in accordance with the Services directive: such restrictions must "be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective". Further, the term "proportionate" is a keyword in the Monti regulation 2679/98/EC when judging what measures should be taken in order to assure the free movement of goods.[40]

However, in the Laval judgement the ECJ did not apply a principle on proportionality which could be expected after reading the judgement in the Viking Line case concerning industrial action taken by trade unions against a shipping company that wanted to use the right to establishment (the EC Treaty, article 43) in order to register in another Member State.[41] Hence, the scope for introducing such a principle in matters concerning the free movement of services seems to be narrowed by the ECJ after the Laval judgement.[42]

### *4.4 The Transposition of the Posting of Workers Directive*

In Swedish law there is no regulation extending Swedish collective agreements to be applied by foreign service contractors coming to Sweden, and there is no regulation on minimum wage. The Swedish position is that these matters are delegated to the trade unions to deal with, using the bargaining instruments including – if necessary – industrial action. Further, in general terms the Swedish Government before the Laval case pointed out that a great part of the regulations on the labour market is relying on the right to take industrial action with the aim to reach a collective agreement, and that there is no request from EC law that Member States should introduce a certain labour market model.[43]

Hence, the more concrete conclusion drawn by the Government before the decision from the ECJ, concerning the Posting of workers directive, was that the practice from the ECJ meant that EC law does not require the introduction of a law with the aim to extend the applicability of collective agreements or the introduction of regulations on minimum wages.[44] In principle, the ECJ confirmed that position in the Laval case when the Court stated that the Posting

40 Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. *Official Journal L 337, 12/12/1998, pp. 8–9.*

41 Case C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line.

42 However, the position taken by the Court could have reference to the fact that – as mentioned above – in the Services directive the protection of workers should be embraced by the term overriding reasons of public interest, but at the same time the protection of workers is only mentioned in connection with the freedom of establishment (see the Services directive, article 4.8), while the phrase overriding reasons of public interest is not mentioned in the directive's section concerning the free movement of services (article 16.1b).

43 See the Swedish Government's plea in *Laval,* point 74.

44 The Swedish Government's plea in *Laval*, point 82.

of workers directive does not mean a harmonization of law in the Member States.[45]

However, it must be clear what regulations, collective agreements etc. should apply concerning the "hard core" of national labour law including explicitly the minimum levels concerning wages and more, and the regulations must apply equal to both foreign and domestic employers.[46] In order to meet these kinds of problems – and already before the ECJ judgement in the Laval case – the Swedish Confederation of Trade Unions (LO) and the Confederation of Swedish Enterprise (Svenskt Näringsliv) agreed on a recommendation to their sectoral affiliates.[47] The named organizations issued a joint recommendation concerning how to deal with foreign employers providing temporary services in Sweden. The meaning was that the foreign employers should be offered a temporary and voluntary membership in an employers' federation in Sweden.[48]

The legal effect of such an affiliation to a Swedish employers' federation, which normally is a part in collective agreements, is that the foreign employer as a member of the association will be bound by the collective agreement concluded between the employers' federation and the trade union for the actual kind of work. Hence, the ban on industrial action, referring to the Co-determination Act 41 § and peace obligation clauses in collective agreements, will embrace the foreign employer's activity on the same terms as other members of the association.

The solution that the foreign employer is offered is to accept the collective agreement on the actual sector, and in exchange he will enjoy the protection against industrial actions, although after the decision in the Laval case the risk for such actions is minimized, if the foreign employer already is bound by a collective agreement in the state where the undertaking is established.

## 5 Dealing with Legal Uncertainty in Practice

A theoretical starting point for this article is that legal structure is both enabling and constraining regarding the labour market parties' dealing. Before the ECJ decision in the Laval case the legal structure that should apply in accordance with Swedish labour law gave especially the trade unions a large scope for taking industrial action against a foreign undertaking posting workers to Sweden

45 Case C-341/05 *Laval* (the judgement, points 60 and 68).

46 Case C-341/05 *Laval* (the judgement, points 64 and 68).

47 The joint recommendation was signed on August 30, 2005. On September 6, 2005, a similar agreement was concluded concerning the private sector and white collar work.

48 A practical example where the labour market parties have considered to follow the recommendation is in the industry sector. The employers' Association of Swedish Engineering Industries has offered the trade unions to sign an agreement expressing a positive will concerning temporary membership in the employers' association. A foreign contractor providing services not longer than twelve months in Sweden should apply for a temporary membership in the organisation.

making use of the free movement of services. However, there are still some matters left showing that the situation is characterized by uncertainty.

Hence, a question to investigate is how the parties dealt with the situation on the labour market, especially before the ECJ took the decision in the Laval case. For instance, concerning the regulation of employment conditions for posted workers and the use of industrial action, they could act within the framework of the present Swedish regulations or they could lean upon a more strict EC law perspective, or they could consider both.

In this section I will put the light on some ways to deal with the situation that the Swedish labour market parties have utilised within the framework of the Swedish model.

### *5.1 An Empirical Investigation*

In order to investigate the Swedish labour market parties experiences on the local level concerning foreign contractors posting workers from other Member States, interviews with both central and local representatives for employers' federations and trade unions in the building line of business were carried through during September to December in the year 2007.

Totally, 17 representatives have been subject to interviews. The interviewees are representatives of the Swedish Construction Federation (Sveriges Byggindustrier, two representatives) and Målaremästarna (the Masters of Painting Federation; not officially translated, six representatives), and representatives of the trade unions were the Swedish Building Workers´ Union (Byggnads, six representatives), the Swedish Painter's Union (Svenska Målareförbundet, six representatives) and the Swedish Electricians Union (Svenska Elektrikerförbundet, three representatives).

The interviews were carried out using a qualitative method based on open questions following a roughly outlined formula. An advantage using this methodological approach is that the answers can be followed up with new questions and reflections, directly responding to the informants' answers and reactions.

The intention is to present examples of different kinds of experiences from the posting of workers to Sweden, and to show what kinds of problems that occur when applying the Swedish model of industrial relations and, further, how the Swedish labour market parties deal with the legal uncertainty on crucial issues.

### *5.2 Forms for the Providing of Services and Posting of Workers*

The results from the investigation show that all representatives say that they have experienced competition from contractors from other Member States on the Swedish market. The foreign contractors appear in different forms and the informants list

- ordinary undertakings established in another Member State, posting their own employees to Sweden, and sometimes the undertaking performs work as a subcontractor,

- placement agencies established in another Member State, posting workers to Sweden.

Further, the parties' representatives have experienced also the following categories operating on the Swedish market:

- self-employees from other Member States registered in Sweden performing work for a Swedish undertaking or an undertaking from another Member State, sometimes as subcontractors engaged by a placement agency,
- joint owners to limited partnership companies registered in another Member State (which in practice means that formally each individual is not an employee).

The main means the foreign contractors compete with is lower wages compared with Swedish undertakings, bound by collective agreements concluded between Swedish employers and trade unions. Hence, the Swedish organizations' representatives see this as a risk for social dumping, that Swedish undertakings will loose business contracts, and that Swedish employees risk deteriorated employment conditions and even unemployment.

Regarding risk calculation, there seems to be an important difference between large and small undertakings in Sweden. For large Swedish companies such as NCC, Skanska and Peab, the free movement of services facilitates the access to the European internal market, while small and local undertakings often perform work as subcontractors to a larger company, and then they find themselves in hard competition with subcontractors from other Member States.

### *5.3 Collective Agreements and Temporary Membership*

Concerning collective agreements both employers' federations and trade unions in Sweden advocate a policy, meaning that Swedish collective agreements should apply on the Swedish market when workers are posted from another Member State. Further, the organizations provide information on the matter. The employers' federation for masters of painting informs about the possibility for foreign contractors to join the Swedish federation (compare the central organizations' joint recommendation to offer a temporary membership in an employers' confederation – see above section 4.4). The trade unions inform about the possibility (and their intention) to conclude collective agreements between the trade union and the foreign contractor.

According to a representative for the Swedish Construction Federation around 25 percent of the foreign contractors that have been offered membership in the Swedish federation for the building industry have made use of this possibility. The meaning is that they in principal will be bound by the organization's collective agreement. For the moment (in October 2007) the federation has around 60 foreign undertakings as members (even if the organization does not use the agreement on temporary membership recommended by the central parties).

The Swedish Building Workers´ Union has concluded around 400 local collective agreements with foreign employers (October 2007). Regarding painting undertakings, the corresponding figure is around 10–12 local agreements, according to the Swedish Painter's Union.

However, the trade unions' representatives claim that there are problems even if the foreign contractor joins an employer's association or signs a local collective agreement with a Swedish trade union. The representatives mean that it occurs that the foreign employer does not fulfil the commitments following from the agreement, and that certain employers even don't have the intention to follow the agreement. A possible reason could also be that the employer is already bound by a collective agreement in the home state, and it is often difficult for the trade unions to map the current state of things before the posting period is finished.

Further, according to the trade union representatives the foreign employers might have concluded individual contracts with the posted employees, saying that the collective agreement in the home country should apply. In general that agreement stipulates a lower wage level and more in comparison with the corresponding Swedish agreement.

### *5.4 Industrial Action and the Veto Right*

According to the informants industrial actions have occurred especially within the building line of business, but after the Laval conflict begun the number of industrial actions has decreased. The foreign contractors have been less reluctant to co-operate with the Swedish trade unions or to join a Swedish employer's federation.

However, if that kind of co-operation etc. should be considered to be more of an evasive manoeuvre, rather than expressing a willingness to adapt to Swedish employment conditions, could be discussed. The representatives of trade unions participating in the empirical examination seem to be inclined to believe the latter.

Further, according to the trade unions representatives, the possibility to use the trade union right to veto in accordance with the Co-determination act against a contractor that the employer has the intention to engage, has not been frequently used.

### *5.5 Certain Problems and how Actors Meet Them*

The trade unions representatives claim that clauses in the individual posted workers contracts, which are concluded in the home Member State, sometimes mean that the employees are bound not to have any contact with a Swedish trade union. Especially when the foreign contractor is a placement agency even the Swedish counterpart, contracting the foreign undertaking, does not have any information about this kind of clauses.

To deal with these kinds of problems representatives from the Swedish Building Workers´ Union have organised secret meetings with the foreign employees. The aim is to get information about employment conditions etc., and they also try to organise the foreign workers.

The trade union representatives also tell about planned actions to be taken when they acknowledge that there is a new foreign contractor on the local

market. For instance the Swedish Painter's Union has developed a template, and in accordance with that the local union investigates who is the owner of the foreign undertaking, who has engaged the contractor, and the union contacts the state authorities, for instance the Tax authority, trying to prevent tax crime etc. should there be reason to believe that. Beyond that the trade union offers the contractor to sign a collective agreement with the union.

Finally, a general problem that both trade unions and employers' representatives put the finger on has to do with work environment. According to the representatives the number of industrial injuries has increased in connection with a growing number of foreign contractors operating on the Swedish market. The reason behind these problems is said to be cultural differences, language problem, traditions and more, but obviously there is also an economic aspect to consider; work environment might have turned out to be another competitive means.

Further, according to the interviewed representatives there is reason to believe that there is a number of unrecorded cases, since the foreign employers are said not to report industrial injuries to the Swedish social insurance office, founding the statistics on these matters.

## 6 Conclusions

My main interest in the present article is to analyse the actors' interplay with and within the legal structure. A starting point – referring to Giddens and structuration theory – is that structure is both constraining and enabling. Further, the actors could act strategically in order to influence the legal structure and thereby contribute to the design of future legal solutions.

In the present section I will draw conclusions concerning the legal structure, the possibilities that are offered as well as other preconditions for resolving problems concerning the regulation of workers posted by undertakings established in other Member States. Further, I will make comments on the actors dealing with these matters on the Swedish labour market, and finally some concluding remarks will be made.

### *6.1 Legal Structure as Possibility and Restriction*

Swedish labour law is to a large extent founded on self-regulation. The crucial enabling factor in Swedish labour law is that the parties on the labour market are free to negotiate and to establish other rules, since a great part of labour law is optional. The labour market parties are expected to regulate working conditions in collective agreements, within the framework of procedural or substantial law. Hence, to a large extent the parties on the labour market are free to regulate their matters without state interference, meaning that the parties are acting comparatively autonomous from the state.

The right to take industrial action is fundamental for how the Swedish industrial relations system works. When the market was opened up for foreign competition, especially from the new Member State in the year 2004, and when the right to industrial action was utilized by trade unions against foreign undertakings posting workers from other Member States to Sweden for

temporary services, inconsistencies between EC law concerning the free movement of services and Swedish labour law became obvious.

Swedish labour law – within the tradition of self-regulation – provided possibilities for the trade unions to take industrial action also against the posting undertakings in order to establish Swedish wage levels embracing also the foreign employees. On the other hand, the right to free movement of services founded on the EC Treaty meant that especially the right to take industrial action in accordance with the Lex Britannia in Swedish law was not in accordance with EC law. More precisely, from a legal point of view EC law was putting restrictions on the Swedish, especially trade unions', right to take industrial action, and consequently on their autonomy, and this state of things became evident in the Laval case.

However, EC law is not fully incompatible to Swedish law. The Posting of workers directive is enabling the Member State to choose between different models for transposing the directive. To counteract social dumping meaning that the posted workers should not be exploited and that minimum levels in the host Member State should apply, for instance concerning wages, is in line with EC law, but the host Member State must take the appropriate measures founded on the Posting of workers directive.

Swedish collective agreements are not excluded as instruments that could be used for regulating also working conditions for employees posted to Sweden. EC law enables the Member States – if they wish – to use collective agreements negotiated by the parties apply to posted workers' working conditions, but a precondition is a state decision on the matter, and the regulations should apply equally to domestic and foreign undertakings.

EC law does not exclude – as shown in the Laval case – industrial action, but certain restrictions follow from the fundamental principles, meaning that even foreign undertakings accessing the common market by utilising the right to free movement of services should enjoy a right to equal treatment. Further, they should enjoy respect for collective agreements concluded in another Member State, in particular if the host state has not made use of the possibilities provided by the directive to extend the national agreements to embrace also the foreign undertaking.

### 6.*2* *The Swedish Labour Market Parties and the Legal Structure*

Besides the trade unions, employers and employers' federations, also the state should be noticed as an important actor.[49] Also the other Member States and undertakings from these states posting workers to Sweden are actors. Further, the Swedish Labour Court and the ECJ are important "actors", but they are primarily legal institutions within the legal structure and function as media for the interplay between the legal structure and the labour market parties. However, other Member States as well as the courts are excluded as actors in my study since my focus is on the Swedish actors on the matter.

The *Swedish state* transposed the Posting of workers directive through a certain law, and minimum requirements were introduced in line with the

49 Compare Dunlop, *Industrial Relations System*, 1958.

directive. However, concerning wages the solution was to leave out the matter and hand it over to the labour market to deal with in line with the fundamental tradition and principles in Swedish labour law. The meaning was that the state underestimated EC laws, arguing that the Swedish solution was legitimate for the transposition of the directive.

The warnings, mostly from academics, concerning problems in the relationship between EC law and Swedish labour law, in particular the Lex Britannia regulation, were not taken seriously by the Government. Even in the plea before the ECJ concerning the Laval case the Government argued that the Swedish regulation on the matter was in conformity with EC law. Obviously the reason was more based on political considerations than a legal analysis, and it could be noted that it was the Swedish Labour Court as a legal institution that found the matter confusing and asked the ECJ for a clarification.

Hence, the Swedish state's position was that there were no contradictions within the legal structure, and following this, there was no reason for the state as an actor to take any measures in order to resolve the problems in the relationship between EC law and Swedish labour law concerning industrial action.

A conclusion concerning the Swedish state as an actor is that the state – bound by the traditions of self-regulating and non-state intervention – gravely underestimated the constraining impact from EC law in matters concerning industrial action and the posting of workers.

The *parties on the labour market* have made more efforts to find a solution in accordance with the tradition of self-regulation. In 2005 the employers' and trade unions on the central level agreed on the recommendation to their sectoral affiliates to involve foreign employers, providing temporary services, in the Swedish industrial relations system. This was an attempt to avoid the problem with foreign undertaking standing outside the collective agreements by offering them a temporary membership in an employers' federation in Sweden.

The labour market parties were acting within the framework of the Swedish legal structure and in line with Swedish industrial relations traditions. However, even if that solution could push aside the legal inconsistencies, it did not resolve the legal problem that could occur should a foreign contractor not accept the offer to become a member of an employers' federation.

A conclusion is that the labour market organizations did not fully realize the constraining elements within the legal structure and the impact from EC regulations concerning the free movement of services. Even here the central organizations were relying on the enabling national legal industrial relations model and did not show enough creativity for resolving legal inconsistence. Especially the trade unions argued strongly for the position that there was no problem referring to almost the same arguments as was used by the Government before the ECJ.

The employers' federations were acting more restraint; a restriction on the right to take industrial action is primarily a problem for trade unions. However, if the introduction of more restrictions concerning industrial action should be the only outcome from the Laval case in Swedish law, this could end up in harder international competition. This is not unlikely especially for small firms acting as subcontractors to larger companies, and the result could be growing internal antagonism within employers' federations.

Hence, not only trade unions and Swedish employees but also employers – especially in smaller undertakings – have a great interest in making the collective agreements embrace contractors from other Member States posting workers to Sweden.

Disregarding the problems relating to the legal structure, the empirical study indicates that foreign contractors after the Laval dispute occurred very often have signed a collective agreement with Swedish trade unions. Obviously the aim was to avoid a Laval situation, but at the same time the labour market parties on the local level report problems with foreign contractors not following the agreements by which they are bound. It is obvious that a crucial problem is how to control the observance of the collective agreements on the labour market, when the work is temporary and there is often other kind of problems referring to language and more to consider.

### *6.3 Final Conclusions*

Giddens claimed that structure is both enabling and constraining. The approach in this article has been to examine the interplay between the legal structure and the factual actions taken by the labour market actors.

Concerning industrial relations, the legal structure on the EC and Swedish national level has been – and to some extent still is – characterized by legal inconsistencies. The enabling structural elements in EC law, especially concerning the regulation of wage levels to be applied by undertakings established in other Member States posting workers to Sweden, have not been used. Instead the Swedish state and the labour market parties have relied on legal solutions that have shown not to be up to date, not considering the changes in the legal structure following from EC law.

Referring to the Laval case and the impact on the Swedish industrial relations model, especially concerning industrial action, the legal structuration aspects have been more clarified. Further restrictions have been put on the scope for self-regulating activities on the Swedish labour market. This means that also the traditional emphasis on the labour market parties' autonomy vis-à-vis state interference has been impaired.

Obviously a result from the Laval case is that the constraining elements in the legal structure have been reinforced in Swedish labour law. Unfortunately, I am not convinced that this result with implications for the Swedish industrial relations model was unavoidable. For obvious ideological reasons the Swedish actors did not observe the enabling elements in the legal structure, and they did not make any efforts to reconcile legal differences in a way that should have been more in line with the fundamental features in the Swedish industrial relations model.

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