
European enlargement and the economic crisis: impact and lasting effects

Rebecca Zahn

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europaen trade union institute

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Introduction

Following the enlargements of the European Union in 2004 and 2007, there was a fear amongst trade unions and workers in 'old' member states that large numbers of Central and Eastern European workers and enterprises would avail themselves of their free movement rights under EU law in order to engage in 'social dumping'. As a result, all 'old' member states apart from Ireland, Sweden and the UK initially restricted access to their labour markets for workers from those countries that joined the EU in 2004 (with the exception of Cyprus and Malta). The same happened in 2007 when all 'old' member states apart from Sweden and Finland imposed limitations on the rights of Bulgarian and Romanian workers to move to their territories. The enlargements, taken together, are unprecedented in the history of the European Union. Never had so many accession countries been admitted into the European Union within such a short period of time. In addition, there were large income differences between workers in old and new member states. In terms of labour law, a majority of the ten Central and Eastern European countries which acceded in 2004 and 2007 combined weak domestic labour protection systems with a high proportion of skilled workers and enterprises willing and keen to move. All of these factors placed an enormous strain on the European Union's institutions and structures. Much was written, immediately following the event, on the impact of the enlargements on the European Union, its member states and non-state actors such as trade unions. However, the current economic crisis which started in 2008 has led to a shift in focus away from the social problems that faced the EU and its member states in the immediate wake of the enlargements. Nonetheless, there is a pressing need to address recent developments which have taken place following and as a result of the European enlargements, and to assess the impact of the economic crisis on the European Social Model. This Working Paper takes a first step in this direction by considering the effects of the economic crisis on an enlarged EU and its Social Model taking into account the lasting impact of the recent enlargements.

1. The economic crisis

The current economic crisis, the biggest financial and economic downturn since the Great Depression, has its origins in the bursting of the American housing bubble and the consequent collapse of the sub-prime mortgage market in the United States in 2007 and 2008. In the years leading up to the peak of the housing bubble, a growing number of mortgage loans were made available to borrowers who did not meet banks' prime lending criteria. In many cases, the original lenders which had advanced these 'sub-prime' loans no longer bore the economic risk that borrowers might default on their loans. This risk had been externalised by means of securitisation, whereby mortgage loans were packaged together into loan portfolios and sold to special purpose vehicles, which then used the loans as collateral for the issue of securities (i.e. debt instruments). Secondary markets enabled the original purchasers of these debt instruments to sell them on to other financial institutions and investors, leading to the international trade in such securities. As the housing bubble burst, sub-prime borrowers increasingly found themselves unable to meet the repayment obligations under their mortgage loans. With the fall in house prices, the proportion of borrowers in negative equity increased and, accordingly, the full value of non-performing loans could no longer be recovered by enforcement and foreclosure. The consequent shortfall meant that there was insufficient income to satisfy the claims under debt instruments which were issued on the back of sub-prime mortgages. The holders of such securities were left high and dry, along with those institutions which had sold protection against the risk of default in the form of credit derivatives. The ever-growing number of defaults in the sub-prime mortgage market and the global proliferation of mortgage-backed securities led to uncertainty amongst banks as to the exposure of their counterparties to such toxic assets. As a result of this climate of fear, banks stopped lending to each other, thus leading to a shortage of liquidity. Those financial institutions whose business models were predicated on the assumption that they would always be able to satisfy their liquidity requirements by tapping the wholesale markets, such as UK lender Northern Rock, were hit particularly hard by the sudden disappearance of interbank lending. The resultant doubts as to the solvency of Northern Rock brought about the first run on a British bank in more than a century, as customers sought to withdraw their deposits in expectation of the bank going under. As the Robert Schumann Centre (Paulo 2011) explains in a briefing, the crisis peaked in the autumn of 2008 when the US government decided not to save the investment bank Lehman Brothers. Previously, the American state had decided to bail out several financial institutions, such as Bear Sterns, an investment bank, and the mortgage agencies, Freddie Mac and Fannie Mae. The decision to do otherwise in the case of Lehman Brothers further

destabilised the world's financial markets, and governments in the US and Europe had to step in to provide emergency funding for banks in their countries, to guarantee investments, to provide hefty stimulus packages for their economies and, in some cases, to nationalise failing institutions. The financial crisis in turn developed into a global economic crisis as global GDP contracted in 2009. This global recession considerably reduced public revenues and placed a heavy burden on welfare states. In addition, governments in most developed countries were burdened with costly rescue packages from bailing out banks in the wake of the financial crisis and had to initiate deep spending cuts and austerity measures in order to reduce their public deficit. At the same time, market confidence in sovereign debt faltered as investors and rating agencies began to doubt the creditworthiness of certain countries in the euro-zone – notably, Portugal, Ireland, Greece and Spain. The downgrading of such countries' credit ratings had the effect of raising interest rates for those countries, making it harder for them to service their debt.

In October 2009, Greece admitted that it was no longer able to pay its creditors and, in February 2010, the country was placed under budgetary supervision by the European Commission. European leaders, together with the Commission and the International Monetary Fund have since agreed a number of rescue packages for Greece in exchange for the reform and stabilisation of Greece's public finances. However, this did not calm markets and by October 2011, amidst political turmoil in Greece, euro-zone leaders and the IMF came to an agreement with private lenders to write off part of Greece's debt. The opposition amongst the Greek public to the austerity measures led to the collapse of government in October 2011 and the formation of a unity government. Nonetheless, it remains to be seen whether Greek politicians will be able to force through further austerity measures which are required by the international community as a condition of the rescue. In November 2010, Ireland was forced to draw on the financial support of the European Financial Stability Facility in order to service its debts. Portugal followed in May 2011 and there is a fear that Spain and even Italy may need to rely on financial support in order to meet their debt repayment obligations. In parallel, the euro-zone crisis has created deep rifts between European member states. Within the eurozone, Germany and France have taken a strong lead in pushing for greater integration of euro-zone economies. This culminated in a meeting of European leaders in Brussels in December 2011 at which David Cameron, the UK Prime Minister, was the only European leader to refuse to agree to a change in the EU Treaty which would have provided for deeper integration around tax and budget powers of member state governments. The remaining 26 member states signed their own fiscal pact, the precise details of which are yet to be determined.

2. European dimension

The economic crisis has also had a profound effect on the EU's Social Model which has developed since the early 1990s. The heads of state at the Nice European Council described the European Social Model in the following terms:

'The European social model, characterized in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based [...] on a common core of values. [...] It now includes essential texts in numerous areas: free movement of workers, gender equality at work, health and safety of workers, working and employment conditions and, more recently, the fight against all forms of discrimination.'

However, this description of the content of the Model does not fully explain its nature. There has been a long-standing debate as to whether the European Social Model really exists and, if so, what its role is. It is often stated, for example, that the European Social Model 'is not really a model, it is not only social, and it is not particularly European' (Diamantopoulou 2003). In contrast, Vaughan-Whitehead (2003) recognises the existence of a European Social Model but lists countless criteria that it must fulfil in order to count as such. A number of more general arguments are also often put forward when discussing the existence, or otherwise, of a European Social Model. First, it is impossible to define a Europe-wide social model. Every member state has its own system which has developed varying standards, institutions and structures (Alber 2006). It is thus difficult to define a European norm and Social Model. Secondly, even where European standards exist, these are often implemented to varying degrees and in different ways in the member states. It is therefore difficult to speak of a clearly defined 'European Social Model'.

However, the problem may not lie only with the availability of EU norms which may or may not make up a European Social Model. Rather, the difficulty in definition may be due to the criteria used. It is often argued that the European Social Model cannot be compared with national social models which regulate a vast array of social matters. Instead, the European Social Model should be seen as a political tool which enables the EU to create minimum standards in those areas that fall within its competence. These minimum standards are meant to reduce competition between member states which should lead to further European integration. The hope of the EU is that, by combining economic and social welfare, the EU will achieve 'stronger, lasting growth and the creation of more and better jobs' (Commission Communication 2005).

The European institutions have adopted a key role in the development of the European Social Model. The European Community has enjoyed a limited amount of competence in the field of labour law since the adoption of the Single European Act in 1986. Apart from the provisions contained in the EU Treaties, which enable the EU institutions to act in order to facilitate the free movement of workers, article 153 TFEU allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work between men and women. Limitations on legislative competence operate in other areas of labour law and, as an alternative, soft law techniques must be used. The European Union repeatedly took advantage of the Treaty provisions to legislate in a number of areas in order to achieve a certain degree of harmonisation in the areas of labour law and social policy across the member states. Particularly following the entry into force of the Maastricht Treaty in 1993, the European Commission, together with the social partners, pursued a social policy. However, Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community marked the culmination of almost a decade of active legislating in the area of social policy by the Commission and the social partners. Even though Directives on social policy are still sporadically negotiated, soft law mechanisms have, since 2002, taken over as the preferred method for achieving an approximation of labour standards across the EU.

A number of reasons have been put forward for this shift towards soft-law mechanisms. Bercusson (2009: 554-555), for example, argues that the paucity of new 'hard law' is due to a lack of enthusiasm for social measures within the European Commission. According to this author, the Lisbon Agenda does not encourage further social developments. Weiss, on the other hand, lays the blame with the member states. His argument is that, following enlargement, the interests of the 27 member states have become too diverse to negotiate effective social instruments. Ashiagbor (2004: 313) argues that 'the resort to soft law [can be seen] as a means of finding a middle ground between legal and political interventions, [which is] particularly important whilst member states continue to be so reluctant to sanction further inroads into their sovereignty.' In either case, the emphasis since 2002 has been on soft law mechanisms – 'framework agreements, joint declarations and guidelines and codes of conduct' (Marginson 2006: 103) – as a means of achieving some sort of harmonisation of national labour laws across the European Union. Moreover, there has been a growing emphasis on the Open Method of Coordination which has been described as a 'means of spreading best practice and achieving greater convergence towards the main EU goals' (Commission Communication 2002). This method 'combines processes of common target-setting by member states, cross-country benchmarking and periodic review' (Marginson 2006: 103). The OMC originated in the context of the EU's Employment Strategy, which is essentially 'a coordinated and Commission-facilitated inter-governmental process' (Marginson 2006: 103). Barnard and Deakin (2002) argue that the OMC can be seen as a way of regulatory intervention which attempts to provide space for experimentation in rule-making and to encourage regulatory learning through the exchange of best practice between different levels. Scott and Trubek (2002) explain that 'the OMC aims to coordinate the actions of several member states in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence.'

The OMC can therefore be seen as 'a response to regulatory failure, as well as a response to the 'joint decision trap' or the 'competency gap' in social policy and in other policy areas' (Ashiagbor 2004: 318). As a form of governance, the OMC 'has the potential to achieve policy coordination without threatening jealously-guarded national sovereignty, *and* to allow member states to implement policy in accordance with their socio-economic development' (Ashiagbor 2004: 318).

There are conflicting views on the effectiveness of the OMC. Advocates of the method argue that 'with an increasingly differentiated European Union, and in light of [...] enlargement, the coordination approach is appealing, as it does not seek to establish a single common framework, but instead, to put the EU member states on a path towards achieving common objectives' (De la Porte 2002: 39). Ashiagbor (2004: 319) suggests that the OMC 'can provide an innovative regulatory strategy which in fact leads to more effective coordination of social policy, by providing a flexible framework in which member states can achieve the aims of European social policy on their own terms.' The characteristics often associated with the OMC are therefore flexibility, adaptability and pervasiveness (Rodriguez and Telo 2004).

Opponents of the OMC challenge its effectiveness and argue that it 'impacts on domestic policy-making only when the European objectives coincide with the national policy objectives' (De la Porte 2002: 50). Empirical research also demonstrates that the OMC tends frequently to be ineffective, particularly as there are no time constraints on implementation or enforcement mechanisms to ensure compliance. Moreover, according to one author (Hatzopoulos 2007: 318-319), the OMC may:

'damage the future legitimacy of the EU and its Institutions [...] as it does not confer any new competencies on them but specifically limits their reach on national policies in the fields concerned. More importantly still, there is a risk that the OMC replaces the classic Community method in fields where the latter currently prevails.'

The lack of legislative measures in the field of labour law since 2002 seems to confirm such suspicions.

However, following the recent European enlargements, there is a pressing need for European initiatives to counter their negative effects. The underlying rationale for the European social policy has hitherto been the demand for broad equivalence in labour standards to minimise competition across member states. Following the European enlargements and the accession of ten Central and Eastern European States, with their differing labour relations systems, this task has become increasingly difficult. As one author comments (Vaughan-Whitehead 2003), two common features of the labour markets of the new member states are their relatively low levels of employment and productivity. They are thus prime targets for enterprises from old member states seeking to outsource or relocate labour-intensive stages of production. Furthermore, most of the new member states of Central and Eastern Europe have adopted the liberal-individualist approach to social and welfare policies. This has gained ground without a development of

adequate social dialogue and worker representation. Yet, 'from the perspective of the new member states of Central and Eastern Europe, this process [of relocation by enterprises], and that of the related migration of some of their workers to the old member states, are the means by which convergence on Western European levels of productivity and per capita income are achieved' (Adnett & Hardy 2005: 201).

The negative impact of this movement of enterprises and workers culminated in the *Viking* and *Laval* decisions of the European Court of Justice in 2007 and 2008. In these cases, the ECJ was asked to balance fundamental collective rights with the free movement provisions enshrined in the Treaty on the Functioning of the European Union.

In the *Viking* case, the English Court of Appeal referred a number of questions to the ECJ regarding the extent to which trade unions are able to use industrial action to resist dumping in the EU. The facts of the case are relatively straightforward. Viking Line ABP (Viking), a ferry operator incorporated under Finnish law and running regular services on the route between Tallinn and Helsinki, sought in 2003 to reflag its vessel by registering it in Estonia. The reason for this was the higher wages applicable under the terms of a collective agreement, governed by Finnish law, with the Finnish Seaman's Union (the FSU) and which caused Viking to run its services at a loss on the above-mentioned route. In accordance with Finnish law, Viking gave notice of its intentions to reflag to the FSU who opposed the plans. Based on the 'Flag of Convenience' policy of the International Transport Workers' Federation (ITF), the FSU requested that the ITF, whose headquarters was in London, send out a circular asking its affiliates to refrain from entering into negotiations with Viking, which it duly did. Despite numerous negotiations, the ITF's circular remained in force and prevented Viking from pursuing its intention of reflagging its vessel. Following Estonia's accession to the European Union in 2004, Viking brought an action before the High Court of Justice of England and Wales requesting it to declare the action taken by the ITF and the FSU contrary to the provisions on the free movement of establishment contained in the TFEU; to order the withdrawal of the ITF's circular; and to order the FSU not to infringe the rights enjoyed by Viking under EU law. The court granted the order on 16 June 2005 on the grounds that the actual and threatened collective action constituted a restriction on freedom of establishment. However, this was appealed by the ITF and the FSU who claimed, *inter alia*, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title X of the TFEU. Before deciding the case before it, the Court of Appeal referred to the ECJ a number of questions pertaining to, *inter alia*, the relationship between social rights such as the right to take collective action, and the rights on freedom of movement guaranteed by the Treaty.

While the ECJ accepted that the right to take collective action must be regarded as a fundamental right forming an integral part of EU law, it ruled that this right may be subject to restrictions. In particular, the exercise of the fundamental right must be reconciled with the requirements of the Treaty. In attempting such reconciliation, regard must be had to the principle of proportionality. Leading on from this, the Court considered whether the restriction on freedom of establishment by the FSU

and the ITF in this case could be justified. The Court elaborated on the balance to be struck between the right to collective action and freedom of establishment. The collective action must pursue a legitimate aim compatible with the Treaty and be justified by overriding reasons of public interest. Furthermore, according to settled case law, the restriction would have to be proportionate to the objectives being pursued. The ECJ left it up to the national court to consider whether the collective action could be justified in this case.

The *Laval* case originated in May 2004, when Laval un Partneri ('Laval'), a Riga-based company incorporated under Latvian law, posted workers to Sweden in line with Directive 96/71 on the posting of workers ('the Posted Workers Directive') to work on building sites operated by a Swedish company. In June 2004, Laval, on the one hand, and the Swedish building and public works trade union, *Svenska Byggnadsarbetareförbundet* ('Byggnadsarbetareförbundet'), on the other, began negotiations to determine the rates of pay for the posted workers contained in a collective agreement for the building sector. However, negotiations failed and Laval signed collective agreements with the Latvian building sector trade union, to which a large majority of the posted workers were affiliated. As a result, the Byggnadsarbetareförbundet established a blockade – legal under Swedish law – of all sites on which Laval was working in Sweden. In addition, the Swedish Electricians' Union gave notice of sympathy action directed against electrical installation work at all the construction sites of the company in Sweden. This led to the posted workers being sent back to Latvia.

Laval brought an action before the Labour Court against the unions, *inter alia*, for a declaration as to the unlawfulness of the collective action and for compensation for the loss suffered. In the course of the proceedings, the Labour Court decided to refer a number of questions to the European Court of Justice for a preliminary ruling in order to ascertain whether EC law precluded trade unions from taking collective action which hinders the free movement of services as protected under EC law. The ECJ handed down its judgment on 18th December 2007.

The ECJ, at the outset, established the horizontal direct effect of the EC Treaty provisions on the free movement of services. It then went on to consider whether the collective action in the form of a blockade taken by trade unions in this case was compatible with the EC rules on the freedom to provide services and the prohibition of discrimination on the grounds of nationality. One aspect that the ECJ discussed at length was the fact that in the host country the legislation implementing the Posted Workers Directive made no express provision for the application of terms and conditions of employment contained in collective agreements. The relevant collective agreement in this case provided for more favourable conditions than those envisaged by the directive. The ECJ, therefore, considered whether the collective action taken was justifiable in light of its objective, namely, to force a service provider to grant more favourable conditions to its workers than those prescribed by EC law.

The ECJ found that the host member state may not make the movement of the service provider subject to more restrictive conditions than national service providers. A member state may thus apply its legislation or collective agreements

to the service provider as long as the application of these rules is appropriate for securing the protection of workers and does not go beyond what is necessary for the attainment of the objective. The Posted Workers Directive lays down a level of minimum protection the exact content of which may be defined by the individual member states. However, the ECJ did not accept the method of implementation of the Posted Workers Directive in Sweden where the applicable rates of pay were negotiated on a case-by-case basis through the social partners, without being supplemented by legislation providing for universal applicability, as this led to a climate of unfair competition between national and posted service providers. In addition, the ECJ pointed out that the right of collective action which may be used to force foreign service providers to sign collective agreements is liable to make the provision of services by those providers more difficult and less attractive in the host member state. The action thus constituted a restriction on the freedom to provide services and was unlawful.

Both judgments have been heavily criticised by labour lawyers and trade unionists across Europe. The cases were referred to the ECJ amidst a climate of fear amongst workers in old member states that the presence on their labour markets of new member state workers whose wage demands are often lower would lead to a race to the bottom. As mentioned above, the social policy of the European Union has traditionally aimed to establish a threshold of rights for workers in the hope of broadly approximating labour standards across the member states and, in turn, eliminating unfair competition. However, a situation of 'disparities in wages and working conditions among the member states, exacerbated by the accession of new member states, has led to challenges which have yet to be accommodated by EU law' (Bercusson 2009: 656). This is coupled with the fact that the 'commitment to harmonisation is in decline and there has been a growing emphasis on promoting a European social model by softer means' (Davies 2006: 85). The *Viking* and *Laval* judgments did little to alleviate the fear of trade unions that they would be unable to protect their members from the occurrence of social dumping following the European enlargements.

The *Viking* case was eventually settled out of court. However, the *Laval* case returned to the Swedish Labour Court that had referred the question to the ECJ. The Labour Court, in December 2009, applied EC law principles on state liability to private parties in order to find a trade union liable for damages for taking unlawful collective action. This revived the fear amongst labour lawyers and trade unionists that national collective labour law systems and the European Social Model were under threat following the European enlargements. While there is an urgent need for action at a European level to clarify the effects and scope of the ECJ's judgments, little has been forthcoming so far and the ongoing economic crisis seems to have delayed any prospects for action in addition to creating additional problems for the European Social Model.

3. The effects of the crisis and the need for action

As one observer (Van Reisen *et al.* 2009: 44) points out, ‘increasing financial deregulation and privatisation has put the European Social Model under threat. [...] The economic recession resulting from the crisis further threatens Europe’s approach to social welfare.’ At a national level, spending cuts to reduce public deficits have entailed a reduction in social, welfare and public services. Continued low growth rates have led to some of the highest levels of unemployment in the EU member states since the Second World War. However, at a European level the response has mainly focussed on recovery plans and rescue packages targeted at the financial sector. The rationale behind such support is that ‘state guarantees and recapitalisations will allow banks to make more loans available, thus stimulating an increase in investment, which is expected to create and maintain jobs’ (Van Reisen *et al.* 2009: 44). However, this policy has also been criticised by many as ignoring the widening social inequalities which are developing in the member states. There have been calls for the EU to adopt ‘measures to integrate those who are excluded from the labour market, invest in social and health services and improve social protection systems’ (Van Reisen *et al.* 2009: 44). Although the EU institutions have the competence under the Treaty to adopt minimum standards in the area of labour law and social policy, there has been no talk of adopting hard law mechanisms in order to ease the effects of the crisis. Even within the Open Method of Coordination, initiatives within the social sphere have declined considerably (Pochet 2008). So far, the EU has restricted itself to ‘developing guidelines on the design of labour market policies during the crisis’ (Commission 2009). Indeed, a summit of EU leaders which was supposed to find a resolution for the growing unemployment problem as a result of the crisis was postponed in order to avoid false promises being made in the run-up to the European Parliament elections in 2009 (Labaki 2009). While a summit was held in February 2010, it focussed mainly on the Greek debt crisis rather than the social issues facing the member states (Illmer 2010).

The EU institutions have also stressed the importance of the Lisbon Strategy and of Europe 2020 in responding to the economic crisis. The Lisbon Strategy, ‘the EU’s strategy for creating growth and jobs in a sustainable manner’ between 2000 and 2010, if adhered to, ‘will help recovery by boosting demand and restoring confidence in the European economy’ (Employment and Social Affairs 2011). Following the replacement of the Lisbon Strategy with ‘Europe 2020’, the EU’s growth strategy from 2010 until 2020 was meant to have a double purpose: ‘it should focus on how to overcome the crisis, and in the medium term, it should define the EU’s economic and social model, which is needed in order to face

the challenges of globalisation' (Presidency 2010). However, the ambit of the strategy is still unclear.

The European Trade Union Confederation (ETUC 2011) remains sceptical about the EU's social response to the crisis and even goes so far as to suggest that 'the current situation is unfortunately used as an opportunity by those neo-liberals who want our economies to be fully in the hands of the markets, to attack the European social model.' Whether or not the ETUC's assessment of the situation is correct, it certainly seems unfortunate that the EU is not availing itself of its legislative competences to use the crisis in order to strengthen the European Social Model.

Judging by the current lack of initiative at an EU level, it seems that the European Social Model is itself in crisis. There have been almost no hard-law developments since 2002 and even the use of soft-law mechanisms has stalled. While the EU 2020 Strategy sets ambitious targets, little has been forthcoming in the social policy field even though the economic crisis has had a major impact on employment and social welfare across the EU. Obviously, the pressing need at an EU level is to find satisfactory solutions to the banking and euro-zone crisis which is placing an enormous strain on national economies, the euro zone and European integration as a whole. However, it is submitted that ignoring the future development of the European Social Model is a very short-sighted strategy. In an enlarged European Union of 27 member states with very diverse social protection levels, economic integration needs to be coupled with a certain level of social integration in order to further European integration. For a long time the European Court of Justice acted as a driver of European social integration. However, its recent decisions in the *Viking* and *Laval* cases have led to a difficult interface between EU free movement law and national labour regulation. The judgments have wide-reaching implications for national social models and action is needed at an EU level to clarify the judgments and their scope within the European Social Model. However, the EU seems to be reluctant to take action in the social sphere, despite such action being necessary to counter the effects of the economic crisis. The impression is thereby given that the EU is at a loss as to the nature and extent of its social identity and how that identity is going to develop.

4. The economic crisis and the consequences of European enlargement

The lack of initiative at a European level when it comes to social policy is particularly regrettable in light of some of the lasting effects of the recent European enlargements. Despite the imposition of transitional measures restricting the free movement of workers in most member states following the 2004 and 2007 enlargements, unprecedented numbers of workers availed themselves of the right to free movement under the Treaty on the Functioning of the European Union in order to move to another member state. Approximately 70% of migrants from the new member states that acceded in 2004 travelled to the UK and Ireland, and by the end of 2007 such immigrants made up about 1% of the population of the UK (European Integration Consortium 2009). Since the start of the economic crisis, some migrants have left the UK and it was assumed that more would continue to do so if the economy failed to improve. However, a Polish expert on migration disputes this, saying that Polish research indicates the contrary (BBC News 2010). Statistical evidence from a study carried out in 2011 also indicates that few new member state workers from the 2004 accession have left the UK (Holland *et al.* 2011). Even for a 'classic' country of immigration such as the UK, this development which has been described as 'almost certainly the largest single wave of in-migration [...] ever experienced' (Home Office 2007) has had noticeable effects. There have been a number of widely publicised industrial disputes centering on the use of EU workers instead of British workers. The 'British Jobs for British workers' dispute provided the catalyst to a wave of 'protests against the employment of workers from other EU member states on engineering construction projects' (Ryan 2011: 73). In January 2009, workers at Lindsey oil refinery began unofficial strike action in protest against perceived discrimination against British workers. The owners of the refinery had awarded construction of a new unit at the plant to an American company who had sub-contracted part of the work to an Italian company. Workers at Lindsey oil refinery commenced unofficial strike action after learning that the sub-contractor would post its own permanent workforce of foreign nationals (Italians) to the refinery to complete the project rather than employing British workers. This illustrates the feeling, as evidenced by many of the placards bearing the then Prime Minister Gordon Brown's pledge of 'British Jobs for British Workers', that British workers should be accorded preference over foreign nationals, in this case EU workers, in the allocation of employment contracts. The dispute generated a large amount of publicity and illustrated the resentment felt by members of the public about the process of European integration. However, other disputes soon followed, all of which resulted in the replacement of all or part of the EU workforce by local workers.

The occurrence of such anti-European sentiment following the enlargements was not confined to the UK. In Germany, despite the imposition of transitional measures which were intended to restrict access to the labour market for new member state workers, allegations of wage dumping resulting in the loss of local jobs emerged in sectors like the German meat industry, where there was evidence that service providers from the new member states often paid their workers wages which were well below the rates paid to Germans (Czommer and Worthmann 2005). More recently, a German newspaper reported that the German national train company (Deutsche Bahn) was using workers from the new member states to clear stations and tracks of snow while paying them below the industry standard (Ritter 2010). Even though the transitional measures for those member states which joined the EU in 2004 were lifted in 2011 and the feared large influx of new member state workers never materialised, there is evidence that the enlargements have had a lasting effect on German national politics. This is most clearly enunciated in the debate surrounding the creation of a statutory minimum wage. Under its post-war industrial relations model, pay-rate agreements in Germany were negotiated across entire industries by the social partners and regulated pay for all employees. However, this system has begun to unravel for a number of reasons: first, many employers in former East Germany are not members of the employers' associations who negotiate the pay agreements, so that they do not feel bound by the terms and conditions; secondly, the increase in trade union mergers and the founding of small unions independent of the DGB have blurred the distinctions between industries; and, thirdly, a rival Christian trade union confederation has concluded lower pay agreements than the DGB in some firms. As a result, approximately 25% of workers in former West Germany are no longer covered by a pay-rate agreement and there was a fear that new member state workers would mainly work in areas not covered by a pay-rate agreement.

There has been a long-standing debate in Germany over the benefits and disadvantages of a statutory minimum wage and this gained momentum and strong support from the trade unions in the run-up to the lifting of the transitional measures in 2011. A minimum wage was seen as a mechanism of defence to protect against social dumping by those workers from the new member states who could avail themselves of the free movement provisions under EU law from 2011 onwards. German trade unions initially had great difficulty in supporting the idea of a minimum wage as it implied that collective agreements were no longer sufficient to regulate industrial relations. It also meant that trade unions had to accept state involvement in the sphere of industrial relations, an area where regulation is usually left to the social partners and the courts. However, due to the decline in trade union strength through falling membership numbers and the increase in industries that are not covered by a collective agreement, the trade unions have come to recognise the importance of a statutory minimum wage. The debate surrounding the introduction of a minimum wage is ongoing as the political parties and the social partners cannot agree on the form and rate of the wage. However, there have been calls on the government by representatives of the federal states in the Upper House of Parliament to introduce a legislative proposal as soon as possible and it is likely that the debate will intensify in

the run-up to national elections in 2013. Trade unions certainly expect the introduction of a minimum wage either before or after the next elections.

The ECJ's judgments in *Viking* and particularly *Laval* provide the legal backdrop for the fears that EU workers may be used to undercut the local workforce. There have been repeated calls since 2008 for the European Commission to consider revising the Posted Workers' Directive. After consultation on the problems of implementation of the Directive, the Commission issued a roadmap in 2010 with a view to proposing a legislative initiative to deal with the consequences of the ECJ's case law in the fourth quarter of 2011. At the time of writing, the Employment, Social Policy, Health and Consumer Affairs Council was due to hear the Commission's initial proposal on 17th February 2012. Little has been done in the meantime at a European level to calm fears over social dumping in a post-enlargement EU. On the contrary, the Swedish Labour Court's decision in *Laval* added to the uncertainty over the interpretation of the Posted Workers' Directive. Of course, one must bear in mind that the authority of the Labour Court's judgment is restricted to the territory of Sweden. Its adventurous view of the liability of private persons for breaches of EU law is not binding across the European Union. Nonetheless, the judgment has the potential to create problems for trade unions taking collective action in violation of EU law.

The trade union, in taking collective action in *Laval*, had acted in conformity with Swedish Law. Indeed, the Labour Court, before referring questions to the ECJ in September 2005, had, in December 2004, dismissed *Laval*'s application for an interim order requiring that the collective action be brought to an end. Moreover, the Labour Court explicitly recognised in its judgment that there was no provision for the imposition of liability under national law. Nonetheless, once the trade union's actions were later found to be contrary to EU law, the Labour Court established wide-reaching liability and even suggested that the trade unions should have considered whether their actions were compatible with EU law. Such an interpretation is highly problematic and could have serious consequences for industrial relations throughout the EU if trade unions can no longer rely on the protection from legal action by ensuring that collective action is in accordance with national laws. Moreover, this threat to collective action undermines collective bargaining as a whole, as the ability to take collective action is a necessary prerequisite for collective bargaining to function effectively. This was recognised by the European Court of Human Rights in its recent case law¹ and it is regrettable that the Labour Court ignored such concerns.

1. See *Demir and Baykara v. Turkey* (Application No. 34503/97) and *Enerji Yapi-Yol Sen v. Turkey* (Application No. 68959/01).

5. Conclusion

The ongoing economic crisis is increasing tensions across the European Union between member states over austerity packages and is exacerbating inequalities between workers. As Vaughan-Whitehead (2011: 52) explains, 'the increasing movements of labour, capital and trade in the enlarged EU [...] [create] new situations of wage competition, as illustrated by the *Laval* case and other cases brought before the European Court of Justice.' He (2011: 52) opines that 'these pressures will continue to increase'. The danger is that these pressures which result in, for example, allegations of social dumping by new member state workers, leave people in doubt about the benefits of further European integration following the European enlargements. This in turn threatens the very existence of the European Social Model. Unfortunately, the economic crisis seems to dominate so much of the debate at a European level that necessary social initiatives needed to manage the lasting effects of the European enlargements, such as the revision of the Posted Workers' Directive, have been pushed to one side. However, Vaughan-Whitehead (2011: 54) argues that, for example, 'the European social dialogue at EU level should [...] be further strengthened, especially in periods of crisis, precisely to encourage better coordination and interaction of national responses.' Based on this argument, an active European social policy could not only contribute to resolving tensions following the European enlargements but could also relieve the pressures of the economic downturn. Such a policy should not therefore be ignored.

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