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CORE ANALYSIS

Constructing the *Viking* and *Laval* cases as a major defeat for social Europe: a contextual and processual analysis

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Abstract

This Article brings new perspectives on the well-known *Viking* and *Laval* cases, decided by the Court of Justice of the European Union (CJEU) in December 2007, by studying the processes and modalities of the construction of this case law as a major defeat for social Europe. It demonstrates that the political and legal implications of these two rulings were socially constructed by a variety of European actors (especially trade unionists and academics specialising in labour law) rather than legally inscribed in the rulings. In doing so, the author defends a constructivist approach in the analysis of European case law, both contextual and processual. The Article is divided into two parts. The first retraces the pre-ruling construction of the *Viking* and *Laval* cases, and shows that trade union and academic actors as well as parliamentarians worked to construct the judgements on these cases as decisive landmarks for social Europe. The second part considers the process of interpretation of the rulings after they were delivered by the CJEU. It evidences the central role played by trade union and academic actors in promoting a critical reading of the rulings, arguing that the Court subordinated social rights to economic liberties. The Article concludes by showing that this interpretation has tended to become subject to consensus, to the extent that it is now European common sense.

Keywords: European labour law; Viking and Laval cases; social Europe; European trade unions; legal mobilisations

1. Introduction

The *Viking* and *Laval* cases rank among the most famous judgements issued by the Court of Justice of the European Union (CJEU) over the past 15 years.[1] Perhaps 'infamous' is the better term, as they have come to symbolise the subordination of fundamental social rights, especially the right to strike and collective bargaining rights, to the economic rights inherent in the freedoms of the internal market. The two judgements have come to represent a crushing defeat of social Europe against 'market Europe'. The shock wave they sent can still be felt in the European political and legal debate: for instance, in May 2022, during the conclusions of the Conference on the Future of Europe, the European Trade Union Confederation (ETUC) called for revising the treaties to restore the precedence of social rights over economic rights, to end the 'social dumping' introduced by the two rulings.[2] Their effects on the legislative output of the European Union (EU)

[1]Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, ECLI:EU:C:2007:772; Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others*, ECLI:EU:C:2007:809.

[2]ETUC, The Conference on the Future of Europe calls for social progress, including through Treaty changes, 6 May 2022.

have been just as lasting: the adoption of the revised directive on posted workers (2018/957) is one of its most notable consequences. More recently, Denmark and Sweden have referred to the *Viking* and *Laval* judgements to oppose the proposed directive on minimum wages,[3] arguing that derogations protecting their collective bargaining model could be challenged before the CJEU.[4]

On the doctrinal side, the two judgements have been equally unpopular and continue to haunt academic debates, especially among European labour law scholars.[5] Many specialists contend that with these rulings, the CJEU has contributed to the 'crisis' of this branch of European law (which was developing but still fragile at the time[6]) by deepening the EU's 'social deficit'.[7] In their view, the judgements attest to the capitulation of European labour law to 'transnational capitalism'[8] and call into question the historical compromises forged over the course of the European integration process, which reconciled the protection of workers and the operation of the internal market.[9] According to these scholars, the CJEU has imperilled the very autonomy of national and social European rights.[10]

These criticisms, voiced repeatedly by a highly diverse set of trade union, political, legal and academic actors, all depict the *Viking* and *Laval* judgements as a crushing defeat for social Europe. Conversely, as we will see further, there were very few people in favour of the rulings. This Article questions this commonsense interpretation; more precisely, it sets out to highlight the actors and processes that have contributed to developing and entrenching this widely shared take. In doing so, it intends to demonstrate that the legal, political, and more generally, the symbolic impact of the *Viking-Laval* case law on the fate of social Europe is the result of the mobilisation of various European actors who promoted an interpretation of these rulings as a major defeat for social Europe. In this sense, and this is the main argument of this Article, I argue that the meaning of the CJEU's judgements was shaped both before and after the rulings were issued, by European actors mobilised in varied social and institutional spaces, rather than inscribed in the formal text of the rulings. I evidence in particular the role of trade union and academic actors in crafting this critical interpretation of the two judgements.

This argument is based on a number of analytical postulates regarding European case law. First, I adopt a constructivist approach, which analyses the impact of European law with a focus not on the textuality of CJEU rulings, but on their social and political uses and interpretations. In that sense, I intend to show that the *Viking* and *Laval* judgements constituted a defeat for social Europe because they were constructed as such by a variety of actors, especially trade unionists and academics. Second, I adopt a contextual and processual approach to CJEU case law. This requires analysing the CJEU's decisions beyond the scope of the judicial institution itself and the sole

[3]B Rolfer and G Wallin, 'Yellow Card from Sweden and Denmark to Proposed Minimum Wages in the EU' *Nordic Labour Journal* (22 January 2021); J Allenbach-Ammann, 'Danish and Swedish Socialists Fight Against Minimum Wage Directive' *Euractiv* (19 November 2021).

[4]For an analysis of the proposed directive and its legal consequences on the Swedish model: E Sjödin, 'European Minimum Wage: A Swedish Perspective on EU's Competence in Social Policy in the Wake of the Proposed Directive on Adequate Minimum Wages in the EU' 13 (2) (2022) European Labour Law Journal 273.

[5]For a synthesis of this literature: C Barnard, 'The Calm After the Storm: Time to Reflect on EU (Labour) Law Scholarship Following the Decisions in Viking and Laval' in A Bogg, C Costello and ACL Davies (eds), *Research Handbook on EU Labour Law* (Edward Elgar Publishing 2016) 337.

[6]J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000).

[7]C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' 67 (1) (2014) Current Legal Problems 205–6.

[8]S Giubboni, 'The Rise and fall of EU Labour Law' 4 (1) (2018) *European Law Journal* 6.

[9]N Countouris, 'European Social Law as an Autonomous Legal Discipline' 28 (1) (2009) *Yearbook of European Law* 95.

[10]P Syrpis and T Novitz, 'The EU Internal Market and Domestic Labour Law: Looking Beyond Autonomy' in A Bogg et al (eds), *The Autonomy of Labour Law* (Hart Publishing 2015) 291–5; S Robin-Olivier, 'Droit de l'Union et droit du travail: les rapports compliqués d'un vieux couple' 623 (2018) *Revue de l'Union européenne* 650; M Schmitt, 'La recomposition du droit du travail de l'Union européenne' 10 (2016) *Droit Social* 703; C Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform' in P Craig and G De Burca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 676.

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moment of the ruling. These judgements must accordingly be situated within the broader transnational space of the actors who contribute to making, interpreting, and mobilising European law. This space includes European judges, European Commission lawyers, MEPs, academic legal scholars, as well as claimants and their counsel.[11] The CJEU's rulings should also be analysed with an attention to social processes unfolding before and after they are issued, which contribute to shaping their legal and political impact.

This constructivist, contextual and process-based approach to CJEU rulings has been defended by a number of authors who have helped renewing the study of integration through law over the past few years. This is the case for instance of the 'new historians of European law',[12] but also of sociologists and political scientists, and more generally of legal scholars who partake in the 'law in context' approach.[13] These authors have promoted an analysis of European case law that is rooted in the social, political, and legal contexts of production and reception of CJEU judgements. They emphasise the role of the protagonists of legal decisions (legal specialists in EU institutions, lawyers, claimants, academics, etc.) beyond the judges themselves.[14] This new analytical approach has also come with a methodological renewal that puts the empirical study of CJEU rulings and of European law in general front and centre by drawing on a variety of sources and investigative methods (public and private archives, interviews, ethnography, collective biographies, prosopography, network analysis, etc.).[15]

This renewal of the study of integration through law has proved its worth by offering a new perspective on CJEU case law. Regarding the examples of that Court's two most famous judgements, *Van Gend en Loos* and *Costa v Enel*, these studies have shown that these rulings constituted a legal revolution not in themselves,[16] but because of the intense social and political investments from various actors mobilised for the recognition of the supremacy of European law (European Commission lawyers, activist lawyers, federalist parliamentarians, law professors supporting the supranational nature of Community law, judges and *référendaires*, etc.). They were involved *before* the rulings in the construction of these cases as test cases that would yield verdicts on the 'legal' nature of the Community,[17] and *after* the rulings in the promotion of the doctrines of direct effect and primacy, using strategies of celebration of this supranational case law[18] and a constitutionalist interpretation of it.[19]

[11]On this space theorised as a European legal field, see A Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015).

[12]B Davies and M Rasmussen, 'Towards a New History of European Law' 21 (3) (2012) Contemporary European History 305; M Pollack, 'The New EU Legal History: What's New, What's Missing?' 28 (5) (2013) American University International Law Review 1257.

[13]On the 'law in context' turn in the study of European law and CJEU case law: C Harlow, 'The EU and Law in Context: The Context' 1 (1) (2022) European Law Open 209.

[14]F Nicola and B Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017); A Vauchez and B De Witte (eds), *Lawyering Europe: European Law as a Transnational Social Field* (Hart Publishing 2013).

[15]C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford University Press 2020); M Rask Madsen, F Nicola and A Vauchez (eds), *Researching the European Court of Justice. Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022).

[16]See also: D Gallo, 'Rethinking Direct Effect and Its Evolution: A Proposal' 1 (3) (2022) European Law Open 627.

[17]J Bailleux, 'Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review' 50 (2) (2014) Common Market Law Review 359; M Rasmussen, 'Establishing a Constitutional Practice of European Law: The History of the Legal Service of the European Executive, 1952–65' 21 (3) (2012) Contemporary European History 375.

[18]A Vauchez, 'Keeping the Dream Alive: The European Court of Justice and the Transnational Fabric of Integrationist Jurisprudence' 4 (1) (2012) European Political Science Review 51.

[19]A Bernier, 'Constructing and Legitimating: Transnational Jurist Networks and the Making of a Constitutional Practice of European Law, 1950–70' 21 (3) (2012) Contemporary European History 399; A Boerger and M Rasmussen, 'Transforming European Law: The Establishment of the Constitutional Discourse from 1950 to 1993' 10 (2) (2014) European Constitutional Law Review 199; R Byberg, 'The History of the Integration Through Law Project: Creating the Academic Expression of a Constitutional Legal Vision for Europe' 18 (6) (2017) German Law Journal 1531.

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Here this analytical approach will be applied to the *Viking* and *Laval* judgements,[20] highlighting the processes and actors that led to the construction of these judgements as a major defeat for social Europe. Ultimately, this approach allows us to understand why the impact of this case law on social Europe was so strong and why it profoundly contributes to discrediting the CJEU, and more generally the EU, as an engine for social progress.[21] To achieve this demonstration, I draw on research conducted between 2014 and 2019 for the purposes of my PhD thesis on the legal and judicial strategies of the European Trade Union Confederation (ETUC).[22] The materials used in this Article are drawn from that research. They comprise interviews with European trade unionists and their lawyers, analyses of documents from unions (press releases, meeting minutes, etc.) and EU institutions (parliamentary debates, speeches, etc.), of European press Articles on the two cases, and a reflexive analysis of the academic literature on the two judgements.[23]

The Article is divided into two main parts. First, I retrace the construction of the *Viking* and *Laval* cases ahead of the rulings. I show that these cases elicited early investments from trade union and academic actors, as well as parliamentarians, based on the premise that their outcome would be decisive for social Europe. Second, I analyse the work performed to interpret the judgements delivered by the CJEU. I evidence the key role again played by trade union and academic actors in promoting a critical reading of the judgements, arguing that the CJEU struck a fatal blow at social rights in Europe. I conclude by showing that this interpretation has tended to represent consensus, to the extent that it has now come to be European common sense on this case law.

2. The construction of *Viking* and *Laval* as two crucial cases for social Europe

In this first part, I will show how and why *Viking* and *Laval* were constructed ahead of the rulings as two crucial cases for social Europe. To evidence this *a priori* construction of the case law, I will focus on the symbolic framing work performed by European trade union actors, media outlets and parliamentarians, as well as academics specialising in labour law. First, however, it is necessary to briefly recount the genesis of the two cases; in the process, we will see that they were not necessarily destined to become major cases for social Europe.

A. The Viking and Laval cases: national or European litigation?

The *Laval* case began in 2004 in the small Swedish town of Vaxholm, near Stockholm, when the Latvian construction firm Laval un Partneri won a call for tenders to renovate a school.[24] The company posted around 30 Latvian workers in Sweden to do the work. According to the posted workers directive (96/71/CE), such workers must be paid at least the minimum wage applying in the host country. However, there is no legal minimum wage in Sweden: the minimum wage is

[20]For other studies with a similar approach on these rulings, see in particular: J Arnholtz, *A 'Legal Revolution' in the European Field of Posting? Narratives of Uncertainty, Politics and Extraordinary Events* (University of Copenhagen 2013); D Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015).

[21]A Crespy and G Menz, 'Conclusion: Social Europe Is Dead. What's Next?' in A Crespy and G Menz (eds), *Social Policy and the Euro Crisis. Quo Vadis Social Europe* (Palgrave MacMillan 2015) 182. For a broader historical perspective on this 'road not taken': A Andry, *Social Europe, the Road Not Taken. The Left and European Integration in the Long 1970s* (Oxford University Press 2023).

[22]J Louis, *La Confédération européenne des syndicats à l'épreuve du droit et de la justice. Genèse, usages et limites d'un mode d'action syndicale en faveur de l'Europe sociale* (Université de Strasbourg 2019).

[23]On the reflexive sociology of law: Y Dezalay and M Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' 8 (2012) Annual Review of Law and Social Science 433; M Rask Madsen, 'Reflexivity and the Construction of the International Object: The Case of Human Rights' 5 (3) (2011) International Political Sociology 259.

[24]For a detailed account: C Woolfson and J Sommers, 'Labour Mobility in Construction: European Implications of the Laval un Partneri Dispute with Swedish Labour' 12 (1) (2006) European Journal of Industrial Relations 49.

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negotiated in each company or sector by unions and employers. Therefore, the Swedish construction union contacted the Latvian employer to come to an agreement ensuring that the posted workers would be paid the usual wage.[25] The negotiations stalled in autumn 2004, as the company refused to sign.

In response, the Swedish union launched multifaceted collective action (strike, boycott, blockade) that brought construction to a halt. The Latvian firm referred to the Swedish courts to end the collective action. The strategy of Laval un Partneri's lawyers, who were covertly advised by lawyers at the Directorate-General (DG) for Internal Market of the European Commission,[26] and bankrolled by the Swedish Employers Confederation,[27] consisted in arguing that the union's actions breached EU law and asking for the referral of the case to the CJEU.

As a result, in April 2005, the Swedish Labour Court drafted two questions for a preliminary ruling, which were referred to Luxembourg on 15 September 2005. The first question pertained to the compatibility of the union's action with the freedom to provide services on the internal market, the posted workers directive and the non-discrimination principle. The second question pertained to the conformity of the Swedish law on co-determination with these same components of EU law. That law provides for an exemption to the 'peace obligation' (ie, no industrial action) for unions when a collective bargaining agreement with an employer has been secured. Indeed, it allows for industrial action against a foreign company, even when that company has signed a collective bargaining agreement in its country of origin, which was the case of Laval un Partneri in Latvia.

Like the *Laval* case, the dispute that sparked the *Viking* case began in a Scandinavian country, but this time in the maritime transport sector. The conflict was between the Finnish seamen's union (FSU) and the Finnish company Viking Line, a ferry operator active mainly in the Baltic Sea. In October 2003, Viking Line announced that it wanted to have one of its ships on the Helsinki-Tallinn line registered in Estonia instead of Finland. Commonly known as using a 'Flag of Convenience (FOC)',[28] this practice would have allowed Viking Line to hire seamen under Estonian labour law, and therefore to pay them far lower wages than in Finland. This reflagging therefore posed a direct threat to the working conditions and jobs of Finnish seamen. The FSU, which opposed the project, served a strike notice in November 2003. The notice was circulated by the International Transport Workers' Federation (ITF), which urged its affiliates (seafarers and dockers) to boycott Viking Line ships.

In this highly unionised and well-organised sector at the transnational level,[29] this threat led the shipping company to renounce the reflagging and turn to the courts. The employer's lawyers referred to the English courts in August 2004, on the grounds that the ITF is headquartered in London. With this strategy of 'forum shopping', the lawyers were hoping that the English courts, which have a reputation for hostility towards union rights, would rule in their favour. Like their Swedish counterparts, they based their argument on EU law. According to them, by preventing the reflagging of Viking Line's ship, the union boycott breached a fundamental legal principle of the internal market: the freedom of establishment. This strategy led the Court of Appeal, which the unions had referred to after a first judgement against them, to turn to the CJEU. The questions for a preliminary ruling, which the Registry received on 6 December 2005, concerned the conformity

[25]This was roughly 15 euros per hour. According to Agence France Presse (AFP), Laval un Partneri paid workers around 3.9 euros per hour: 'More Swedish unions to block Latvian company accused of wage dumping' *Agence France Presse* (23 December 2004).

[26]Author's interview with a civil servant in the 'Services' unit of the DG Internal Market of the European Commission who worked on the follow-up of the Viking and Laval cases (Brussels 2016).

[27]'Swedish Employers Confederation to pay for Laval's litigation expenses' *Latvian News Agency* (23 May 2005).

[28]N Lillie, 'Global Collective Bargaining on Flag of Convenience Shipping' 42 (1) (2004) British Journal of Industrial Relations 47.

[29]N Lillie, *A Global Union for Global Workers. Collective Bargaining and Regulatory Politics in Maritime Shipping* (Routledge 2006).

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of the union's action with internal market law, particularly regarding the freedom of establishment.

The two cases bear a number of similarities (geographical area, timeframe) and contain several European elements: they are transnational labour disputes in which employers' lawyers used EU law to counter unions and national social protections,[30] referred by national courts to the CJEU through questions for preliminary ruling. However, at the beginning, these elements alone did not give the cases a European dimension.

Indeed, for the Latvian, Swedish and Finnish employers, the main objective was to use EU market law to weaken the ability of the Scandinavian unions – among the strongest in the world – to initiate collective action to impose theirs terms in collective bargaining. This strategic use of EU law was also a way to circumvent the Nordic Labour Courts, by referring the Laval case to the CJEU, and by delocalising the Viking case to the Commercial Chamber of the High Court in London (it was indeed the ITF and the FSU, and not Viking Line, who asked in appeal to refer the case to the CJEU, hoping that European judges would be more protective of trade union rights than English judges).[31]

For the unions involved in this litigation, the stakes at that stage of the proceedings were only about resisting employers' mobilisations and defending their workers. Indeed, for the Swedish unions, the purpose was to regulate the construction market by setting the wages of workers posted in Sweden by foreign companies. For the Finnish seamen's union, the goal was to protect members' jobs by preventing the reflagging of Viking Line ships in Estonia. And for the ITF, the most important issue was to safeguard its longstanding international campaign against flags of convenience.

In other words, for both sides, the *Viking* and *Laval* cases started out as national and sectoral litigation resulting from a private and ultimately classic conflict between unions and employers on wages, jobs, and trade union freedoms. There was originally no talk of defining a right of transnational collective action, or of establishing whether economic freedoms take precedence over social rights in the EU legal order. Legally, what was at stake, rather, was to interpret the conformity of Swedish law with the posted workers directive, and to define the material scope of the freedom to provide services and the freedom of establishment within the internal market. This means it is not enough for social conflicts dealt with by national courts to be referred to Luxembourg for their implications to automatically concern social Europe as a whole: they have to be constructed as such by the actors mobilised in and around the cases. In this perspective, the next subpart examines the framing operations of the litigation performed by union, parliamentarian and academic actors, who shaped these cases as future major verdicts on social Europe.

B. The judicial mobilisation of unions to defend social Europe

In this subpart, I will show that the members of the European Trade Union Confederation (ETUC) and their legal advisors played a key role in the construction of the implications of the *Viking* and *Laval* cases. Indeed, through their judicial mobilisation, union actors contributed to defining the political and legal stakes of these cases. They gave them a European dimension by making them arbiters of the role of social Europe in the face of 'market Europe'.

It should first be stressed that this trade union work of litigation framing, in the sense used by the sociology of social movements,[32] was facilitated by the setting up of a European coordination

[30]On employers' strategies and the CJEU, see R Rawlings, 'The Eurolaw Game: Some Deductions from a Saga' 20 (3) (1993) Journal of Law and Society 309; T Pavone, 'From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa' 53 (3) 2019 Law & Society Review 851.

[31]Interview with a former Secretary-General of the ITF, London, 2017.

[32]R Benford and D Snow, 'Framing Processes and Social Movements: An Overview and Assessment' 26 (1) (2000) Annual Review of Sociology 611.

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of the trade unions involved in the two cases, managed by the ETUC Secretariat. This transnational coordination, which was unprecedented in ETUC history, took the form of an ad hoc working group set up in the autumn of 2005. The 'Viking-Laval Task Force' brought together members of the ETUC Secretariat,[33] Swedish, Finnish and ITF trade unionists and lawyers,[34] their counsel,[35] labour law professors with ties to the union movement,[36] and PR consultants hired to work on the cases.[37] They met several times in Brussels, London, or Stockholm.

The mobilisation initiated by the Task Force translated into 'judicial lobbying', a term I use to refer to the efforts made by union actors to convince the third parties involved in the cases (governments and the European Commission) to submit union-friendly observations to the European judges. This judicial lobbying involved a number of symbolic framings of the cases: convincing these parties to support unions before the CJEU indeed required defining the implications of the litigation to promote legal solutions that meet the unions' interests.[38] Therefore, I need to present the different framing operations performed by the Task Force in order to show how they constructed the European dimension of the two cases, and their importance for the fate of social Europe.

The first framing operation consisted in presenting the stakes of the two cases from a single angle. This joint treatment was not self-evident: despite their similarities, the two cases began in distinct countries, did not concern the same sectors, and raised different legal questions. Yet, union actors did their best to present them as facets of the same social dumping issue.[39] The following quote from an interview I conducted with a former ITF lawyer involved in the proceeding is a good example of this common framing promoted by the members of the Task Force:

> In both cases, economic interests were put forward to the detriment of social interests, that was the common pillar of the two cases. And it was also a story of social dumping in the background, social dumping in the maritime sector where they took cheaper Baltic States, and in the construction sector with Latvian posted workers.[40]

In the Task Force, these efforts materialised in the drafting and promotion of shared arguments between the teams in charge of *Viking* and *Laval*. For instance, the two teams issued a joint document entitled 'How do Laval and Viking connect'. Its contents reflected the unions' eagerness to emphasise the similarities between the two cases:

[33]The Task Force was headed by the ETUC Confederal Secretary Catelene Passchier and coordinated by the ETUC lawyer Claes-Mikael Jonsson.

[34]On the Swedish side, representatives of the following organisations participated to the Task Force: Swedish Trade Union Confederation (LO), Swedish Confederation of Professional Employees (TCO), Swedish Confederation of Professional Associations (SACO), Swedish Building Workers' Union (Byggnads). The officers of the Brussels Office of the Swedish kTrade Unions were also involved. On the Finnish side, there were the Finnish Seafarers' Union (FSU) and the Central Organisation of Finnish Trade Unions (SAK). Several representatives of the Council of Nordic Trade Unions (NFS), who gathers the Scandinavian confederations, of the European Transport Workers' Federation (ETF) and of the European Federation of Building and Woodworkers (EFBWW) were also involved.

[35]The ITF et the FSU were represented at the CJEU by two English barristers and the chief in-house solicitor of the ITF. The Swedish trade unions were represented by two Swedish lawyers and their chief in-house legal advisor.

[36]These labour law professors gather in an academic network coordinated by the European Trade Union Institute (ETUI), which is the research and training center of the ETUC. Founded in 1996, this network is called the 'Transnational Trade Union Rights Experts Network' (TTUR).

[37]Two PR firms were recruited by the unions in these cases: APCO by the ITF, and DLA Piper by the Swedish unions.

[38]For a detailed analysis of the ETUC's judicial lobbying and the internal dynamics of the Task Force, see J Louis, 'Litigation Strategies and the Political Framing of EU Law. Exploring the Archives of a Trade Union Lawyer in the Viking and Laval Cases' in M Rask Madsen, F Nicola and A Vauchez (eds), *Researching EU Law: New Approaches and Methodologies* (Cambridge University Press 2022) 105.

[39]M Bernaciak (ed), *Market Expansion and Social Dumping in Europe* (Routledge 2015).

[40]Interview with a former ITF lawyer, Brussels, 2015.

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> There are important similarities between Laval and Viking, despite apparent differences, both cases deal with employers that seek to use the Single Market to restrict the right to collective action, without acknowledging any restriction of the freedom of establishment or free movement of services.[41]

In this document, the stakes of the two cases were synthesised as a conflict of principle between the social dimension (union rights) and the economic dimension (internal market rules) of EU law. This joint framing was not only shared internally, but also reproduced in various papers used by union actors for their judicial lobbying. For instance, a memo drafted by the Task Force for the benefit of European civil servants, social policy officers in Permanent Representations, MEPs and journalists emphasised the 'common issues' in the two cases, explaining that 'both cases are of fundamental importance' in the sense that they both put internal market law and union rights in the balance.[42] This framing was adopted in several other Task Force documents geared towards European policymakers, such as the letter addressed by John Monks (ETUC Secretary-General, 2003–2011) to José Manuel Barroso (European Commission President, 2004–2014) regarding the Viking Case. Thus, in the letter, Monks presents the case as a 'mirror image' of the Laval case, and stresses the 'important similarities' between the two on the same grounds.[43]

Through this political (the denunciation of social dumping) and legal (the conflict between social and economic rights) framing of the two cases, the Task Force members sought to defend social Europe against 'market Europe'. Pleading this cause required a second framing operation consisting in generalising the stakes of the cases. Union actors indeed worked to de-nationalise and de-sectorise them to give them a European dimension. For instance, the memo drafted by the Swedish lawyers in the *Laval* case focuses less on issues related to the application of the posted workers directive in Sweden than on the questions of principle the case raised for the EU. According to the Swedish lawyers, the *Laval* case raised such general issues as the balance between the economic and social goals of the Treaty, the distribution of competences between the EU and Member States in the social policy field, and the recognition of trade union freedoms as fundamental principles of EU law.[44]

Similarly, the ITF's lawyers emphasised the European implications of the *Viking* Case. A memo they circulated as part of their judicial lobbying effort explained that the litigation raised a question of 'sizeable constitutional and international importance', namely that of the 'hierarchy of norms' (social and economic) in EU law. The judgement would accordingly not just affect the maritime transport sector, but have 'considerable implications for the exercise of social rights' and be of 'major significance for unions and their members in the entire EU'.[45] Again, the document jointly drafted and disseminated by the Task Force also illustrates this generalisation effort:

> The potential legal, political and social repercussions of the outcome of the Viking and Laval cases go far beyond the Finnish and Swedish social models to affect labour relations throughout Europe more widely. Moreover, the potential outcome and effect of the Viking Line Case is not restricted to the maritime sector.[46]

In this effort of promotion of a European framing of the cases, the ETUC Secretariat was particularly well positioned to embrace and relay the message, as an organisation with a European

[41]ETUC Viking-Laval Task Force, How do Laval and Viking connect (undated).

[42]ETUC Viking-Laval Task Force, Briefing Note on the common issues in the Viking Line Case and the Laval Case before the European Court of Justice (undated).

[43]Letter from John Monks to José Manuel Barroso, 5 April 2006.

[44]ETUC Viking-Laval Task Force, Memorandum Vaxholm, 5 December 2005.

[45]ITF, Résumé de l'affaire Viking renvoyée devant la Cour européenne de justice, 23 January 2006.

[46]ETUC Viking-Laval Task Force, Briefing Note on the common issues in the Viking Line Case and the Laval Case before the European Court of Justice (undated).

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dimension itself. In a letter to the President of the European Commission, the ETUC Secretary-General emphasised the consequences of the *Laval* case for the European trade union movement as a whole and for the very future of European integration: 'The outcome of the case is of great importance for trade unions all over Europe and the future orientation of the European Union'. The letter concludes that what is at stake in the judgements are 'fundamental labour rights in general' and the 'European social model' – in other words, social Europe as a whole, not just the Scandinavian system.[47]

This judicial lobbying also targeted governments.[48] Indeed, as Marie-Pierre Granger has shown in her work,[49] the governments are key players at the CJEU alongside the European Commission. Thus, the ETUC mobilised its members to promote their European common framing of the cases to national authorities. For instance, regarding the *Laval* case, the Belgian Confederation of Christian Trade Union Federations (ACV/CSC) asked its government to intervene before the CJEU in a letter that stressed 'the importance of such a case on principle' and noting that 'the fundamental issue of this case is that of the balance between Europe's economic and social goals.'[50] This judicial lobbying took also the form of direct contacts with the authorities, as the then Secretary-General of the European Federation of Building and Woodworkers (EFBWW) explained to me:

> I was involved in trying to influence the other Nordic countries' governments, to send submissions to the Court of Justice. So I was traveling around at that time, talking to governments, especially Finland, but also for instance to Iceland . . . We took countries that we thought they could in fact have governments that potentially could be trade unions friendly, let's say left wing governments, or with a system like Denmark which was similar to Sweden. So Denmark, Norway, Iceland. I met at least these countries. And these governments in fact did a submission to support Sweden.[51]

The judicial lobbying also targeted Members of European Parliament (MEPs), who were liable to indirectly influence the positions of the European Commission and of the Member States at the CJEU. The members of the Task Force chiefly relied on social-democrat MEPs (especially those from Scandinavia) and on the members of the parliamentary Intergroup on Trade Unions. One of the Task Force's consultants, for instance, drafted a letter that was signed by Martin Schulz (president of the socialist group), Poul Nyrup Rasmussen (president of the Party of European Socialists – PES) and Jan Andersson (president of the Committee on Social Affairs) and sent to all MEPs. The letter argued that in the *Laval* case, the Swedish unions defended equal treatment between European workers, and urged MEPs to convince their government to support the unions at the CJEU.[52]

Overall, the Task Force members presented the *Viking* and *Laval* cases as two rulings where the future of social Europe in the face of market-based Europe was at stake. Despite the legal initial phrasing of the questions for a preliminary ruling submitted by employers' lawyers to the CJEU and the sectoral and national specificities of the cases, the unions reworded these particular legal disputes as major conflicts on principle where the primacy of social Europe over the market-based Europe lay in the balance. This political framing of the cases was indissociable from the legal

[47]Letter from John Monks to José Manuel Barroso, 11 January 2006.

[48]On the national governments' positions at the CJEU, see N Lindstrom, 'Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?' 48 (5) (2010) Journal of Common Market Studies 1307.

[49]M-P Granger, 'When Governments Go to Luxembourg . . . : The Influence of Governments on the Court of Justice' 29 (2004) European Law Review 3.

[50]Letter from Luc Cortebeeck and Josly Piette to Guy Verhofstadt, 21 December 2005.

[51]Interview with the Secretary-General of the EFBWW, Brussels, 2015.

[52]Martin Schulz, Poul Nyrup Rasmussen, Jan Andersson, Letter to MEPs, 13 December 2005.

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framing: for the unions, defending social Europe against 'market Europe' meant defending fundamental social rights against the economic freedoms of the internal market.

C. The mediatisation and politicisation of the Viking and Laval cases

The construction of *Viking* and *Laval* as two key cases for the future of social Europe was then supported by their European-wide mediatisation and politicisation. I will explain in this subpart that these processes unfolded in a context that was conducive to debate on social Europe, particularly with the negotiations on the 'Bolkestein' directive. As we will see also, the European Parliament played an important role in the construction of these debates. Thanks to these different social processes, the two affairs became a transnational 'public problem'[53] even before their reviewing by the CJEU.

A first particularity of the mediatisation of the two cases is that they both garnered attention at an early stage in the European media, which is uncommon for social conflicts.[54] By late 2004 already, several press agencies reported on the dispute between the Swedish trade unions and Laval un Partneri. The Latvian press agency published 28 dispatches (in English) on the subject between December 2004 and February 2005, the Agence France Presse (AFP) put out seven in December 2004, and Reuters also did one. The conflict in Vaxholm was also covered by several national daily newspapers, particularly in Sweden where the case received extensive coverage: by my count, the *Dagens Nyheter* (the country's biggest general interest daily paper) devoted 16 pieces to the case in December 2004 and 24 more from January to April 2005. The Baltic press also published several pieces on the case, for instance in *The Baltic Times*, the region's main English-language paper.[55]

Another particularity is that the media coverage of the conflict was not limited to the Scandinavian and Baltic countries most directly involved in the *Laval* case. In France, for instance, against the backdrop of an intense politicisation of European social issues fuelled by the referendum campaign on the planned constitutional treaty and debates on the 'Bolkestein' directive,[56] several national papers covered the case from the angle of social dumping.[57] While the *Viking* case made fewer headlines, it was still discussed by prominent papers such as the *Financial Times*, and by international outlets specialising in maritime issues.[58] Overall, due to the simultaneity of their respective timings, the media often treated the two cases jointly.

This early transnational coverage of the cases facilitated their EU institutional agenda setting and their political framing as cases that crystallised tensions between social Europe and 'market

[53]E Neveu and M Surdez (eds), *Globalizing Issues. How Claims, Frames, and Problem Cross Borders* (Palgrave Macmillan 2020).

[54]P Lefébure and E Lagneau, 'Media Construction in the Dynamics of Europrotest' in D Imig and S Tarrow (eds), *Contentious Europeans. Protests and Politics in an Emerging Polity* (Rowan & Littlefield Publishers 2001) 187.

[55]'Swedish union protests could reach Brussels' *The Baltic Times* (9 December 2004); 'PMs Fail to Resolve Labor Dispute' *The Baltic Times* (15 December 2004); 'Labor Dispute with Sweden May End up in European Commission' *The Baltic Times* (15 December 2004); 'Labor Standoff Goes to Swedish Court' *The Baltic Times* (22 December 2004); 'More Unions Join the Blockage' *The Baltic Times* (12 January 2005).

[56]A Crespy, 'When 'Bolkestein' Is Trapped by the French Anti-Liberal Discourse: A Discursive-Institutionalist Account of a Preference Formation in the Realm of European Union Multi-Level Politics' 17 (8) (2010) Journal of European Public Policy 1253; E Grossman and C Woll, 'The French Debate over the Bolkestein Directive' 9 (3) (2011) Comparative European Politics 344.

[57]'Lettonie' *La Croix* (7 December 2004), 'La Lettonie exporte en Suède ses chantiers très bon marché' *Le Monde* (15 December 2004), 'Le modèle suédois ébranlé par des ouvriers lettons' *Libération* (1 February 2005); 'Les Lettons lâchent l'affaire en Suède' *Libération* (11 February 2005); 'Toute la Suède défile contre Bolkestein' *Libération* (17 March 2005), 'La Suède traumatisée par la concurrence suédoise' *Le Figaro* (16 February 2005), 'Les bâtisseurs lettons menacent la Suède' *La Tribune* (22 April 2005).

[58]'Unions Challenge Employer Relocation Ruling' *Financial Times* (8 September 2005); 'Viking Injunction Backs Ferry Reflagging' *Lloyd's List* (30 June 2005); 'Court Ruling Hits Viking Reflagging Plan' *Lloyd's List* (4 November 2005); 'Vessel Reflagging Act of Establishment' *The Shipping Times* (8 July 2005); 'ITF Appeals' *Trade Winds* (26 August 2005).

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Europe'. Before I go on to analyse the component parts of this framing, it is necessary to briefly explain the factors that were conducive to this politicisation process.

First, the *Laval* case emerged in the context of the debates sparked by the proposed directive on Services (2006/123/EC), commonly known as the 'Bolkestein' directive after the Commissioner for the Internal Market Frits Bolkestein, who led the initial proposal. Presented in February 2004 by the European Commission, the proposal was intended to liberalise the provision of cross-border services. In 2005–2006, it met with vehement opposition (from trade unions, parliaments, and governments) across Europe. The text was often perceived as a Trojan horse for a neoliberal Europe. Posted workers and social dumping were key issues in this controversy, and ones that were particularly relevant since the EU's enlargement to Central and Eastern European Countries in 2004.[59] The ETUC and its members were at the time highly invested in negotiations on the text with the European Parliament,[60] and repeatedly criticised the social dumping it would cause.[61] The congruence between the controversies raised by the services directive and by the *Viking* and *Laval* cases (on social dumping, posted workers, and the enlargement) is therefore a first explanation of their politicisation at the European level.

Second, the early involvement of Swedish and Latvian diplomats in the *Laval* case gave it a highly political dimension. In November 2004, Latvia's Deputy Minister for Foreign Affairs met with the Swedish ambassador in Riga to ask for explanations on the treatment of Laval un Partneri by Swedish unions in Vaxholm.[62] In December 2004, during a European summit, the Latvian Prime Minister directly confronted the President of the European Commission José Manuel Barroso and his Swedish counterpart about the ongoing social dispute. Additionally, as the 'Guardian of the Treaties', the Commission received a formal request from the Latvian government to assess the conformity of Swedish law with the posted workers directive.[63] In return, on behalf of their government, the social-democrat Swedish Prime Minister and the Minister of Labour spoke up in defence of the unions.[64] No longer a private dispute between the Swedish unions and the Latvian company, the *Laval* case quickly became a major political and legal concern, debated by public authorities at the highest European level.

Lastly, statements made by Commissioner for the Internal Market Charlie McCreevy (who succeeded Frits Bolkestein in late 2004) led the European Parliament to include the *Laval* case in its agenda. During a visit to Stockholm on 5 October 2005, the Commissioner publicly declared that the Commission would support Laval un Partneri at the CJEU.[65] This unexpected announcement sparked the anger of the Swedish unions and government, with the latter threatening to veto the services directive.[66] Asked to respond by the ETUC, social-democrat MEPs, including several members of the parliamentary Intergroup on unions,[67] urged José

[59]A Crespy, *Qui a peur de Bolkestein ? Conflit, résistances et démocraties dans l'Union européenne* (Economica 2012).

[60]J Erik Dolvik and A Mette Ødegard, 'The Struggle Over the Services Directive: The Role of the European Parliament and the ETUC' 53 (1) (2012) Labor History 69.

[61]ETUC, The European Trade Union Confederation Executive Committee Today Hardened Its Opposition Towards the Current Services Directive Proposal, 9 June 2004; ETUC, ETUC Demands Major Changes to the Draft Directive on Services in the Internal Market, 12 November 2004; ETUC, Ms Gebhardt's Report on Services Is a Step in the Right Direction, 20 April 2005; ETUC, ETUC Restates Opposition to 'Bolkestein' and Welcomes Progress on Negotiations on Amending the Services Directive, 9 February 2006; ETUC, A Major Victory for European Workers: The Initial Bolkestein Proposal Is Dead, 16 February 2006.

[62]'Sweden's Trade Union' *Baltic Business Daily* (18 November 2004).

[63]'Labor Standoff Goes to Swedish court' *The Baltic Times* (22 December 2004).

[64]'Workers' Rights Sour Swedish-Latvia Relations' *EU Observer* (30 November 2004).

[65]'McCreevy Locks Horns with Swedish Unions' *EU Observer* (6 October 2005).

[66]'EU to Criticize Sweden for Violating Free Circulation of Labour Rules' *Agence France Presse* (5 October 2015); 'Vaxholm Case Could Lead to EU Crisis of Confidence' *EU Observer* (2 November 2005).

[67]The unions relied particularly on Jan Andersson, a social-democrat MEP, a Swedish national and a member of the intergroup, who at the time chaired the European Parliament's Social Affairs Committee.

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Manuel Barroso and Charlie McCreevy to appear before the Parliament to explain the latter's statements.

A debate on the *Laval* case was as a result held in a plenary session on 25 October 2005, only a few weeks after the CJEU Registry had received the questions for a preliminary ruling on the *Laval* case. This was, to say the least, an unprecedented situation, in that a legal case was discussed in a parliamentary setting before a judgement had even been issued. In his opening address, the President of the Commission immediately acknowledged the political character of the case:

> Let me make it clear: this Parliament is not a court, it is a political body and a political debate is needed. This is a matter of substance, not just of legal interpretation. The essential questions are clear. Are we for or against solidarity in an enlarged Union?[68]

Like the framing promoted by the ETUC's Task Force, the MEP's interventions during the debate contributed to presenting the *Laval* case as the expression of a political cleavage between 'market Europe' and social Europe, or, in its legal version, as a standoff between economic freedoms and fundamental social rights.

For instance, Hans-Peter Poettering, the Chairman of the European People's Party (EPP) group, argued that in his statements, Charlie McCreevy had merely nodded to 'the right to the freedom to provide services' and that the Swedish collective bargaining system had to adapt 'to the establishment of the internal market'. Conversely, the Chairman of the Party of European Socialists (PES) group, Martin Schulz, berated the Commission for taking up 'an unequivocal stance and set[ting] a right-wing, neoliberal course', encouraging 'the lowest standards for social security and the lowest standards for workers' rights', and thereby threatening 'the European social model'.

This opposition between the social dimension of the EU and its internal market was asserted by several MEPs. For instance, Francis Wurtz (European United Left, France) denounced 'a concept of Europe founded on creating competition among workers and on organising social dumping', whereas Elisabeth Schroedter (Greens/EFA, Germany) called for reconciling the internal market and social Europe, meaning the 'protection of workers' and 'the freedom to provide services'. This framing was successful in large part because it resonated strongly with the heated parliamentary debates that were raging at the same time regarding the services directive.[69] The directive was actually mentioned by a majority of MEPs (12 out of 19) who spoke in the plenary session, even though the session was dedicated to discussion of Charlie McCreevy's statements and of the *Laval* case.

Thus, concomitantly with the ETUC's judicial lobbying (and to some extent following its impetus), the European Parliament contributed to constructing the *Laval* case (and through that case, the *Viking* case as well) as one that put the future of social Europe in the face of the market-based Europe at stake.[70] It should also be noted that these politicisation and mediatisation processes are mutually reinforcing. Debates at the European Parliament considerably increased the echo found in Europe by the *Laval* case, as several press agencies (AFP, Dow Jones, Reuters, Agencia EFE, Agence Europe, Latvian News Agency, Belga, Finnish News Agency) published at least one dispatch on the plenary session of 25 October 2005. These dispatches were picked up by many national media outlets, in Scandinavia (*ErhvervsBladet*, *Dagens Nyheter*), France (*L'Humanité*, *La Tribune*, *Le Monde*), Germany (*Süddeutsche*

[68]European Parliament, Minutes of the Plenary Sitting, 25 October 2005. The following quotes are all from these minutes.

[69]A Crespy and K Gajewska, 'New Parliament, New Cleavages after the Eastern Enlargement? The Conflict over the Services Directive as an Opposition between the Liberals and the Regulators' 48 (5) (2010) Journal of Common Market Studies 1185.

[70]For a study of the recent cleavages pertaining to the posting of workers at the European Parliament, see S Michon and P-E Weil, 'An "East–West Split" about the Posting of Workers? Questioning the Representation of Socio-Economic Interests in the European Parliament' (2022) Journal of Contemporary European Studies 1.

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Zeitung) and in English-language countries (*The Guardian*, *The Financial Times*, *The Irish Times*). The heightened media coverage on the *Laval* case following the parliamentary debates cemented its status as a major test for social Europe.

D. An academic construction: The role of law professors

As I will explain in this subpart, the construction of *Viking* and *Laval* as two major cases for social Europe was also informed by the analytical work performed by legal scholars specialising in labour law. Indeed, a number of comments on the cases were in fact produced even before the judgements were delivered, which helped create a heightened sense of expectation towards their outcome for academic doctrine.

Most of these comments were drafted by academics specialising in labour law, especially legal scholars with ties to the trade union movement (some were directly involved in the ETUC Task Force). This is the case of the authors who contributed to an issue of the journal *Transfer*, edited by the European Trade Union Institute (ETUI), the ETUC's research and training centre. The summer 2006 issue focused on 'Mobility of services and posting of workers in the enlarged Europe'. It contained two Articles on the *Viking* and *Laval* cases. The first was written by Thomas Blanke, then a professor of labour law at the University of Oldenburg, and a member of the ETUI's Transnational Trade Unions' Rights (TTUR) legal network. In the Article, the German academic argues that the questions for a preliminary ruling on the Viking case 'go to the heart of the European integration process'. The CJEU, in his view, was tasked with 'determining a policy orientation between economic freedom and social protection of workers'.[71]

The second Article focused on the *Laval* case and was authored by three Scandinavian academics specialising in labour law, who were then researchers at the Swedish National Institute of Working Life and were close to the Swedish trade union movement: Kerstin Ahlberg, Jonas Malmberg and Niklas Bruun. The latter was also a member of the TTUR network, like Thomas Blanke. In their Article, they contend that the *Viking* and *Laval* cases are 'symbols of the challenges that the freedom to provide cross-border services might pose to national labour standards'. According to them, 'the issue at stake in the Vaxholm case is how the exercise of free movement is to be balanced against the fundamental right to collective action'. Regardless of its outcome, they claim that the ruling will be 'revolutionary' for Sweden and the EU as a whole:

> Its revolutionary impact will be that it will set the criteria for how to balance against each other the free movement of services and the right to industrial action. The criteria and the way to make this assessment will have to be drawn in this case and will have a major impact on the future of industrial relations across the European Union.[72]

Other journals with connections to the unions addressed the two cases and helped cement their importance even before the rulings were rendered. These included the publication outlet of the International Centre for Trade Unions Rights (ICTUR), a London-based trade union think tank. Its journal *International Union Rights* devoted a 2007 special issue to 'labour rights in the Nordic countries and Baltic region'. The list of contributors included Professor Niklas Bruun, this time commenting on the *Viking* case, while Dan Holke, one of the three Swedish trade union lawyers in the *Laval* case, analysed that one. Both emphasised their crucial importance for the future of union rights in Europe and not only for Scandinavian countries. Dan Holke, for

[71]T Blanke, 'The *Viking* case' 12 (2) (2006) Transfer: European Review of Labour and Research 251.

[72]K Ahlberg, N Bruun, and J Malmberg, 'The *Vaxholm* Case from a Swedish and European Perspective' 12 (2) (2006) Transfer: European Review of Labour and Research 155.

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instance, wrote: 'The outcome of this case is of importance for all unions in Europe and will determine the balance between the EU's economic aims and social values.'[73]

These early Articles on the two cases did not only appear in trade unions' legal publications; they also popped up in prominent academic journals. Two Articles on *Viking* and *Laval* were published in early 2006 in the *Industrial Law Journal*, which is the UK's main labour law journal and more generally speaking an important journal for specialists in this field in Europe. The first was penned by Anne Davies, a professor of labour law in Oxford. In her Article, she calls the *Viking* case 'an important test of the ECJ's commitment to fundamental rights . . . Will the ECJ be able to strike an appropriate balance between trade union rights and free movement?'.[74] In the following issue, Ronnie Eklund, a professor of law at the University of Stockholm and an important authority on labour law in Sweden, also published an Article on *Laval*, in which he also stressed its decisive character for the future of social Europe: 'The question being asked in Sweden is whether *Laval* will turn out to be a landmark case for the development of EC law with respect to the social dimension of the European Union'.[75]

The doctrinal activity that occurred before the judgements was also and lastly showcased in general interest European law journals. The best example of this is Brian Bercusson's oft-cited May 2007 Article in the *European Law Journal*, whose title is ostensibly prophetic: 'The Trade Union Movement and the European Union: Judgment Day'. The Article is original in that it analyses the contributions submitted to the CJEU by governments and the European Commission in the *Viking* case, to which Bercusson gained access. Then a professor of European labour law at London's King's College, he was close to the ETUC and had founded the TTUR in 1996. In both cases, he acted as one of the unofficial legal advisors to the ETUC and the ITF, and more generally as an active member of the ETUC Task Force. To this activist law professor: 'as the title of this Article suggests, the future of the trade union movement, but also of the EU, may depend on whether on judgement day the ECJ decides that the EU legal order upholds the right of trade unions to take transnational collective action.'[76]

Indeed, a consensus developed among some legal scholars, especially among academics specialising in labour law and with ties to the unions, around the idea that the *Viking* and *Laval* cases would be of crucial importance to the future of social Europe, even before the judgements were delivered. Ultimately, the construction of the stakes of these cases was a process that was fuelled by both trade union and academic actors, and by mediatisation and politicisation processes spurred among others by the European Parliament. The concomitant construction of all these legal and political anticipations surrounding the upcoming judgements made them a major case law for social Europe even before they were formally delivered by the CJEU.

3. The interpretation of the *Viking* and *Laval* judgements as a major defeat for social Europe

The *Viking* and *Laval* judgements were delivered by the CJEU on 11 and 18 December 2007. In the *Viking* decision, the CJEU found that the action of the Finnish seamen's union and of the ITF constituted a restriction of the freedom of establishment in the internal market. This restriction could, however, be justified on the grounds of the protection of workers, and it was up to the British Court of Appeal to establish whether the means used were proportionate to the ends

[73]D Holke, 'The *Laval* Case' 13 (4) (2007) International Union Rights 22; N Bruun, 'The *Viking* Line Case' 13 (4) (2007) International Union Rights 8.

[74]A Davies, 'The Right to Strike Versus Freedom of Establishment in EC Law: The Battle Commences' 35 (1) (2006) Industrial Law Journal 86.

[75]R Eklund, 'European Developments. The *Laval* Case' 35 (2) (2006) Industrial Law Journal 208.

[76]B Bercusson, 'The Trade Union Movement and the European Union: Judgment Day' 13 (3) 2007 European Law Journal 308.

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pursued.[77] In the *Laval* case, the CJEU adopted a more clear-cut position, finding that the action of the Swedish construction union was not in conformity with the posted workers directive or the free provision of services in the internal market; this also applied to the Swedish law on co-determination.

Despite the outcome of this litigation for the unions, it bears noting that for the first time ever, the CJEU enshrined in its case law the right to take collective action as a 'fundamental right which forms an integral part of the general principles of Community law'. This recognition is especially notable considering that at the time the right to take collective action was altogether absent from the primary sources of EU law, as the judgements predate the integration in the Lisbon Treaty of the Charter of Fundamental Rights, whose Article 28 guarantees the right to take collective action.

Arguably, it was not a foregone conclusion that the judgements would elicit such criticisms among trade union and academic actors. Tactically, they could have emphasised the general principles contained in the rulings, and push the solutions given to the cases at hand to the background.[78] Thus, I defend the idea that the legal implications of the two judgements were in this sense contingent, constructed by the actors who took them up rather than inscribed in the rulings. In that perspective, this second part analyses the interpretation processes that made the *Viking* and *Laval* judgements a major defeat for social Europe. I will explain that the rulings only took on this meaning because of the critical analysis made by union and academic actors and its subsequent promotion at European level. I will conclude by showing that this critical reading became a widely shared consensus.

A. From an equivocal victory to a crushing defeat: the trade unions' interpretation of the judgements

When the CJEU's decisions were made public on 11 and 18 December 2007, the ETUC's first reactions were cautiously positive. In this subpart, I will show that the trade unions' reading of the rulings changed over the months, morphing into harsh criticism of the case law on the grounds that it would have major negative impacts on social Europe. This evolution suggests that the legal meaning of the judgements was not set in stone from the start, but the outcome of an interpretation process.

In contrast with the strong criticisms voiced later, the unions' first statements on the two judgements were rather positive. Regarding the *Viking* ruling, the ETUC's initial press release 'welcomes the ECJ's clear recognition of the right to take collective action'. While he acknowledged that the decision was ambiguous in some ways, Secretary-General John Monks claimed that 'this judgment clearly gives protection to unions acting at local and national level when challenging the freedom of establishment of companies.' Regarding the *Laval* ruling, the ETUC's reaction was more lukewarm, expressing 'disappointment' but noting a few 'positive features' in the judgement.[79]

Similarly, the ITF Secretary-General responded to the *Viking* ruling by welcoming 'the Court's assertion that the right to take collective action . . . is a fundamental right which forms an integral

[77]The British Court of Appeal would never rule on this point, since the ITF, the Finnish seamen's union and Viking Line reached an out-of-court settlement in March 2008. ITF, Press Release: Settlement reached in Viking case, 5 March 2008. In a sense, the unions both won and lost the case. On this paradox, see C Albiston, 'The Rule of Law and the Litigation Process: The Paradox of Losing by Winning' 33 (4) (1999) Law & Society Review 869. From this paper's author, see also J Louis, 'Construire sa propre défaite. Les affaires Viking et Laval: un échec judiciaire pour le syndicalisme européen' 107 (1) (2021) *Droit et Société* 181.

[78]A counter example is the ETUC's position on the Holship judgement (Application no. 45487/17) delivered by the European Court of Human Rights (ECtHR) on 10 June 2021: whereas the judgement rejected the claims of the Norwegian unions, the ETUC welcomed the general recognition of the primacy of the right to strike over economic liberties in a paragraph. See ETUC, ECtHR ruling on right to strike, 10 June 2021.

[79]ETUC, ECJ judgement on Viking case recognises fundamental right to collective action as integral part of EU Community law, 11 December 2007; ETUC, Laval case: disappointment of the ETUC, 18 December 2007.

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part of the general principles of Community law'. He added, however: 'The devil's in the detail and it's now up to the Court of Appeal to apply the guidance to the particular facts of this case.'[80] The Central Organization of Finnish Trade Unions (SAK) likewise welcomed the recognition of the right to take collective action as a fundamental right.[81] The first reactions of the Swedish Trade Union Confederation (LO-S) were equally positive, explicitly using the term 'victory' regarding the *Viking* case: 'It's a victory for the European trade union movement that the court so clearly establishes that the right to take union action is a fundamental right within the EU'.[82] About the *Laval* judgement, the president of LO-S granted that a change in the Swedish law on posted workers would be necessary, but mentioned that she was 'pleased' that the Swedish model was found compatible with EU law.[83] Overall, surprisingly given their later statements, the union's early reactions suggested that the rulings were a victory for the European trade union movement.

Soon, however, uncertainty arose regarding the interpretation of the rulings. These judgements are indeed complex texts, difficult to decipher at first glance. Thus, the ETUC's first internal analyses are more cautiously worded than its first public statements: 'Further study and analysis were needed to fully assess the meaning and impact of the cases not only for the parties concerned and their respective industrial relations systems, but also for other trade unions and industrial relations systems around Europe, and for "social Europe" in general'.[84] Several questions were raised: had the CJEU introduced a normative hierarchy between the right to strike and internal market law? Should the posted workers directive be amended? In February 2008, the ETUC Secretariat drafted a document for the benefit of trade union leaders. The phrasing again belied the prudence of the analysis: the CJEU 'seems to confirm' a hierarchy of norms between social rights and economic liberties as well as a restrictive interpretation of the posted workers directive. This was, however, a 'first assessment'; at any rate, the unions' lawyers pointed out that the *Laval* judgement was 'ambiguous and unclear' regarding the fate of collective bargaining agreements in European law.[85]

After the somewhat positive initial reactions, during the December 2007–March 2008 period, the unions' analysis of the verdicts was not yet stabilised. This opening up of interpretative options ended in the course of 2008, making way for a strong critique of the case law by European unions. The interpretation of the judgements was an important political issue for the ETUC, since it would determine its response: if they were considered a defeat for the European trade union as a whole, then the ETUC's response would have to be European. Conversely, if they were framed only as a problem for Sweden or the maritime sector, solutions would have to be found at the national or sectoral level.

Being the most directly affected by the judgements, the Swedish unions and the European federations for the building (EFBWW) and transport (ETF) sectors were the ETUC members that most actively sought to promote a negative interpretation of the judgements and a European trade union response. In interviews, their Secretaries-General told me they worked tirelessly to persuade the other trade union leaders to adopt a critical stance towards the two rulings, as the EFBWW Secretary-General (a former Swedish trade unionist) and the ETF Secretary-General explain here:

> The first two months the ETUC, John Monks and the legal experts, they don't seem to be distressed at all, they said 'ok this is a Swedish problem but it's not a European problem'. So, the first two months I had to try to persuade them to see this is a European problem. In February 2008 they started to change a bit, and then they could see this is not a Swedish

[80]ITF, *Press Release*, 12 December 2007.
[81]SAK, *Press Release*, 12 December 2007.
[82]LO-S, *Press Release*, 11 December 2007.
[83]Ibid.
[84]ETUC, Actions and Activities Regarding Follow up of ECJ Judgements Viking and Laval (31 January 2008).
[85]ETUC, Viking & Laval. Explanatory Memorandum (26 February 2008).

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> problem. Ok, it was a case related to the Swedish and Danish models, which are specific in Europe, but the consequences are European. So they changed their position, they made a clear statement, but the first month, at least in January, and a part of February, there was not really a response of the ETUC.[86]

> I remember the debates where everybody was outraged, really outraged at the Court of Justice rulings, and at the end of the debate, nothing happens. And that's when I passed the information to the ITF saying 'at the ETUC nothing is going to happen. We have to do something, we have to push the ETUC'. That was my role, with the colleague from the building federation, we were the two voices saying 'if we are all against, if we are all revolted, what are we going to do?' It was John Monks' time, he liked me, I was his left-wing conscience, but he was always angry at my interventions, because I always said 'so what, what are you going to do?'[87]

Moreover, these stances taken in the ETUC's governing bodies, which were recorded in meeting minutes,[88] were embraced by the Chairwoman of LO-S. In 2008, she was also President of the ETUC, therefore her voice was important inside the European Confederation. In an interview, a former ETUC confederal secretary in charge of following the consequences of the *Viking* and *Laval* cases reminisced about the Swedish unions' pressure to adopt a critical stance towards the judgements:

> There were some people who said 'oh this is very much about the Swedish model', but the Swedes didn't accept anybody to say that, they said this is about everybody. So, even also it was very much about the Swedish model, for the Swedes it was so big, they made it enormous, everybody had to be on the line that it was terrible for all the trade union movement.[89]

By mobilising in the ETUC's governing bodies, these actors helped legitimise the idea of a major setback for social Europe. Their efforts were fruitful, as the ETUC adopted the following interpretation in the Spring of 2008: 'The judgments are of massive importance to the European trade union world, and not just to our colleagues directly affected in Sweden/Latvia and Finland/Estonia . . . One thing is very clear: for the ETUC and its members the outcome of these two cases represents a major challenge . . . The idea of social Europe has taken a blow.'[90]

Since then, the analysis defended by European unions has been unequivocally critical, arguing that the *Viking* and *Laval* judgements enshrined the primacy of internal market freedoms over union rights and legalised social dumping. It follows that they constitute a defeat for the European trade union movement as a whole. This reading had practical implications for the subsequent orientations of the European trade union movement: the ETUC and its members for instance then called for the revision of the posted workers directive and the inclusion of a social progress protocol in European treaties that would affirm the priority of social rights over economic freedoms.[91]

The ETUC actively promoted this critical interpretation of the *Viking* and *Laval* judgements in European trade union circles. Over the long term, a consensus developed and most of the European trade unions came to share this negative representation of the judgements. Multiple resolutions, press releases, brochures and reports by unions on *Viking* and *Laval* were published over the following decade. By my count, the cases were mentioned in 27 ETUC press releases and

[86]Interview with the EFBWW Secretary-General, Brussels, 2015.

[87]Interview with the ETF Secretary-General, Brussels, 2015.

[88]'Sam Hagglund [EFBWW] claims the Laval judgement is a disaster for Europe' (ETUC 7 February 2008); 'Eduardo Chaggas [ETF] confirms that it is not only a Swedish problem', ETUC, Steering Committee Minutes (15 April 2008).

[89]Interview with a former ETUC confederal secretary (Amsterdam 2016).

[90]ETUC, Response to ECJ judgements Viking and Laval (4 March 2008).

[91]Ibid.

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in 11 resolutions of its Executive Committee between 2008 and 2018. To quote one among many others, a resolution adopted in December 2011 called out 'an intolerable interference with the fundamental right to take collective action' by the CJEU and the priority given to economic freedoms over social rights.[92] In 2017, ten years after the judgements, the ETUC even published an anniversary statement that stressed that the effects of the 'disastrous anti-worker *Laval* ruling'[93] had yet to be remedied by EU authorities.

The cases were also being referred to on a regular basis in European and international trade union conferences. The 2009 Congress of the ETF, for instance, adopted two resolutions criticising the CJEU's rulings. The first, entitled 'Fundamental Rights vs Economic Freedoms' cited the judgements' 'negative repercussions on workers' labour and social rights throughout Europe'. The second, entitled 'European Court of Justice Anti-Trade Union Judgments', denounced the rulings as the 'most fundamental attack on trade union rights for generations.[94]' Similar resolutions were also adopted by the ITF at its 2010 Mexico Congress and 2014 Sofia Congress.[95] Likewise, the consequences of the CJEU's case law were discussed at every ETUC congresses since then. At the 2011 Athens Congress, the manifesto adopted by European union delegates demanded the restoration of the primacy of fundamental social rights over economic freedoms;[96] so did the action programmes adopted at the Paris (2015), Vienna (2019) and Berlin (2023) congresses.[97]

More broadly, the *Viking* and *Laval* cases came to serve as the lens through which other European judgements that touch on posted workers or union freedoms are interpreted. It was especially true regarding the 'Rüffert' and 'Luxembourg' decisions of the CJEU, issued in the first half of 2008.[98] Both cases dealt with the interpretation of the posting of workers directive, and with the freedom of collective bargaining for the *Rüffert* case. Together, these four cases were soon be called 'the Laval Quartet' not only by the ETUC but also by numerous commentators. For the ETUC, these two new cases confirmed the pre-eminence of economic freedoms over fundamental social rights established by the CJEU in the *Viking* and *Laval* decisions. Indeed, according to John Monks speaking on behalf of the ETUC, the *Rüffert* case is 'another destructive and damaging judgment after the recent *Laval* ruling'[99] and the Luxembourg case is 'another hugely problematic judgment by the ECJ, asserting the primacy of the economic freedoms over fundamental rights'.[100]

Besides these two cases, the same interpretation was again applied by the ETUC to less renowned cases. For instance, in 2010, regarding a CJEU judgement on a German case on the compatibility of some collective agreements with EU procurement laws,[101] the ETUC's Secretary-General argued that it confirmed 'the supremacy of economic freedoms over fundamental social rights', adding that 'the dark series initiated by the *Viking* and *Laval* cases is far from being over'.[102] References to *Viking* and *Laval* were still being made in 2016, when the ETUC's Deputy Secretary-General said about a preliminary ruling on the participation of union delegates in

[92]ETUC, Achieving social progress in the single market: proposals for protection of fundamental social rights and posting of workers, 7–8 December 2011.

[93]ETUC, 10 years after Laval – we need a Social Progress Protocol and an end to social dumping, 18 December 2017.

[94]ETF, Resolutions adopted at the ETF 2009 Congress, 27–29 May 2009.

[95]ITF 42nd Congress, Congress Resolutions, 5–12 August 2010; ITF 43rd Congress, Congress Resolutions, 10–16 August 2014.

[96]ETUC, *The Athens Manifesto*, 2011.

[97]ETUC 13th Congress, Action Programme 2015–2019, 29 September – 2 October 2015; ETUC 14th Congress, Action Programme 2019–2023, 21–24 May 2019; ETUC 15th Congress, Action Programme 2023–2027, 23–26 May 2023.

[98]Case C-346/06 *Dirk Rüffert v. Land Niedersaschsen*, ECLI:EU:C:2008:189; Case C-319/06, *Commission v. Luxembourg*, ECLI:EU:C:2008:350.

[99]ETUC, Rüffert case: ETUC warns that ECJ's judgement is destructive and damaging, 3 April 2008.

[100]ETUC, ECJ further limits scope for Member States to demand respect for national labour law and industrial relations by foreign service providers, 19 June 2008.

[101]Case C-271/08 *European Commission v. Federal Republic of Germany*, ECLI:EU:C:2010:426.

[102]ETUC, Economic freedoms vs Fundamental rights – the dark series continues, 23 July 2010.

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German company boards:[103] 'We all have very bad memories of cases like *Laval* and *Viking*. We really do not need another set-back'.[104] The critical interpretation of the *Viking* and *Laval* rulings by European trade union leaders was reinforced over time: each new case provided an opportunity to reassert the argument that the two judgements were a major defeat for social Europe.

B. A critical doctrine: the academic interpretation of the Viking and Laval judgements

The *Viking* and *Laval* judgements are particularly noteworthy for having immediately (and even before they were delivered, as we have seen above) elicited a considerable academic output: dozens of commentaries, Articles and books were published on the rulings, not to mention the numerous seminars, workshops, and conferences that were held on the subject. In this subpart, I will show that law professors, particularly those specialising in labour law, played a key role alongside the unions in constructing a strong critical interpretation of this case law, which was academically analysed as very negative for social rights in particular and social Europe in general.

However, a few methodological notes about the EU academic doctrine are in order before developing my reasoning. In this regard, Bruno de Witte has shown that the group of European law professors does not constitute a unified community; it is fragmented along national, linguistic and disciplinary lines.[105] Likewise, Harm Schepel and Rein Wesseling have emphasised the variety of the members of the legal European community, which include professors, judges, European civil servants and lawyers.[106] However, in the case at hand, I intend to show that a truly *European* interpretation (going beyond the national subdivisions of the European academic field) of the *Viking* and *Laval* rulings was voiced by labour law scholars, who reached a transnational consensus on a critical reading of the CJEU's decisions, depicted as harmful for social Europe.

To begin with, I conducted a study of the scope of the academic output on this case law to document the transnational character of this critical doctrine. I chose to analyse the characteristics of the bibliography compiled by the CJEU's research and documentation directorate on the two cases. This sizeable bibliography, which was updated until 2018, comprises 125 items for the *Viking* case and 140 for the *Laval* case.[107] Few CJEU judgements have elicited more references.[108] Although it is not exhaustive, this bibliography offers a heuristic window into the main features of the European doctrine on the two rulings. It should, however, be noted that it includes many references twice; once the duplicates are filtered out, we obtain a single bibliography comprising 175 references: 50 on *Laval*, 35 on *Viking*, and 90 that address both. The findings presented below are from this duplicate-free database ($n = 175$).

I started by looking at the temporality of the academic production on the judgements. As we have seen above, it began early: 21 references date from 2005 to 2007, which confirms that the importance of the two rulings was enshrined even before they were delivered. A peak of publications was reached in 2008, with 75 references, essentially Articles and case analyses. The academic output decreased over the following years (11 references in 2009, 10 in 2010, under 10 for each of the subsequent years) and picked up again in 2014 (24 references), a resurgence that

[103]Case C-566/15 *Konrad Erzberger v. TUI AG*, ECLI:EU:C:2017:562.

[104]ETUC, ECJ to declare composition of German company boards illegal? 21 September 2016.

[105]B De Witte, 'European Union Law: A Unified Academic Discipline?' in B De Witte and A Vauchez (eds), *Lawyering Europe. European Law as a Transnational Social Field* (Hart Publishing 2013) 101.

[106]H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' 3 (2) (1997) *European Law Journal* 165. See also F Snyder, 'Creusets de la communauté doctrinale de l'Union européenne : regards sur les revues françaises de droit européen' in F Picod (ed), *Doctrine et droit de l'Union européenne* (Bruylant 2009) 35.

[107]On Viking: https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX:62005CJ0438 accessed 26 July 2022; On Laval: https://eur-lex.europa.eu/legal-content/FR/ALL/?uri=CELEX:62005CJ0341 accessed 26 July 2022.

[108]For comparison purposes, if we consider a few other famous judgements, the CJEU's research unit lists 179 references on the Bosman ruling (Case C-415/93) and 153 on the Francovich ruling (Case C-6/90), but only 35 on the Defrenne II ruling (Case C-149/77) and 25 on the 'Parti écologiste les Verts' ruling (Case C-294/83). Among more recently judged cases, there are only 59 references on the Gauweiler ruling (Case C-62/14) and 118 on the 'Safe Harbour' (Case C-362/14) ruling.

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constituted a second period of scientific discourse production on the *Viking* and *Laval* judgements, as edited volumes on the cases were released.[109] Lastly, only a dozen publications came out during the 2015–2019 period.

I then set out to specify the disciplinary affiliations of this output, by identifying the branch of law from which the Articles, case analyses and chapters published derive. The majority were published in labour law journals or books (94 references, for instances: *Arbeit und Recht*, *European Journal of Social Law*, *Industrial Law Journal*...). Other outlets – journals – discuss EU law in general (26 references) and business law (18 references). Other legal specialties are represented to a smaller extent in the bibliography, such as maritime law, fundamental rights or administrative law.

Regarding the languages in which these publications were written, English (49 references), German (42), Swedish (24) and French (21) dominate. Other recurring languages are Spanish (7), Greek (7), Dutch (7) and Italian (6). This supports an observation made by Bruno De Witte, who found that the language of academic European law is primarily English, followed by German and French.[110] Notably, the bibliography only includes nine publications in the languages of the Central and Eastern European countries. It does not mean that scholars from these countries were not interested by the *Viking* and *Laval* cases, but that they published papers in a foreign language, mostly in English.[111]

This analysis of the corpus compiled by the CJEU's documentation staff shows that the *Viking* and *Laval* judgements gave rise to a genuinely European doctrine, extending far beyond the countries where the cases originated, and mobilising academics from across Europe and from various branches of law (although the labour law scholars were the most represented). I will now move on to the content of this doctrine. In the following, I will show that most academic analyses exhibit a critical stance towards the two rulings and emphasise their negative consequences on social Europe.[112]

Among the recurring criticisms of the rulings, the precedence given by the CJEU to economic market freedoms over fundamental social rights is by far the most frequently cited. Numerous labour law scholars have formulated it in English-language journals[113] and Francophone ones,[114] in major journals of European law[115] and in labour law publications.[116] The other recurring

[109]The volume edited by Mark Freedland and Jeremias Prassl includes 20 chapters and accordingly accounts for 20 references: M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2016).

[110]B De Witte, 'European Union Law: A Unified Academic Discipline?' (n 105).

[111]For instance, on the academic debate in Poland: J Unterschütz, 'Viking, Laval and Rüffert from a Polish perspective' in A Bücker and W Warneck (eds), *Viking – Laval – Rüffert: Consequences and Policy Perspectives* (ETUI 2010) 83.

[112]A similar finding was made in V Champeil-Desplats and E Millard, 'Viking et Laval: que reste-t-il du droit social européen ? Petit exercice d'analyse méta-doctrinale' in A Jeammaud et al (eds), *A Droit ouvert. Mélanges en l'honneur d'Antoine Lyon-Caen* (Dalloz 2018) 205.

[113]E Christodoulidis, 'The European Court of Justice and "Total Market" Thinking' 14 (10) (2013) German Law Journal 2005; C Rasnic, 'Shootout at the ECJ Corral: Management 4, Labor 0; European Labor Dispute after *Viking Line*' 9 (2) (2013) South Carolina Journal of International Law and Business 353; N Shuibhne, 'Settling Dust? Reflections on the Judgments in Viking and Laval' 21 (5) (2010) European Business Law Review 683.

[114]C Nivard, 'Le droit de mener une action collective, un droit fondamental menacé par l'exercice des libertés communautaires' 76 (2008) *Revue trimestrielle des droits de l'homme* 1191; A Supiot, 'Le sommeil dogmatique européen' 1 (2012) *Revue française des affaires sociales* 185; S Laulom, 'Les arrêts Viking et Laval: et après ?' 748 (2010) *Le Droit Ouvrier* 570.

[115]C Joerges and F Rödl, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' 15 (1) (2008) European Law Journal 1; J Malmberg, T Sigeman, 'Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice' 45 (1) (2008) Common Market Law Review 1115; T Novitz and P Syrpis, 'Economic and Social Rights in Conflicts: Political and Judicial Approaches to Their Reconciliation' 33 (3) (2008) European Law Review 411.

[116]A Davies, 'One Step Forward, Two Steps Back? The Viking and Laval cases in the ECJ' 37 (2) (2008) Industrial Law Journal 126; P Chaumette, 'Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises' 2 (2008) *Droit Social* 210; E Dockès, 'L'Europe antisociale' 3 (2009) *Revue de droit du travail* 145; S Robin-Olivier and E Pataut, 'Europe sociale ou Europe économique. A propos des affaires Viking et Laval' 2 (2008) *Revue de droit du travail* 80; P Rodière, 'L'impact des libertés économiques sur les droits sociaux dans la jurisprudence de la CJCE' 5 (2010) *Droit social* 573.

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criticism of the doctrine has consisted in deploring that the CJEU turned the social standards guaranteed by the posted workers directive into a 'ceiling' when it used to be a 'floor'.[117]

It should also be noted that several subsequent CJEU judgements were analysed in light of *Viking* and *Laval*, which became a key framework of interpretation of cases pertaining to fundamental social rights. For instance, Franck Lecomte (*référendaire* at the CJEU) analysed a case involving a Danish shipping company as 'another Viking in the courtroom',[118] while Sophie Robin-Olivier (University of Paris 1) described a question for a preliminary ruling to the CJEU regarding the reflagging of a Greek ship in Malta as an opportunity to 'forget about Viking'.[119] The *AGET Iraklis* judgement delivered in December 2016 by the CJEU[120] was also described as a 'new Laval judgment' by Sylvaine Laulom (University of Lyon 2)[121] and Menelaos Markakis (Erasmus University Rotterdam).[122] Lastly, on a broader level, it is worth mentioning that by the late 2000s, a number of European labour law scholars had begun diagnosing a crisis of their discipline, whose autonomy they said was threatened by other branches of EU law. They regularly cited the *Viking* and *Laval* judgements as major factors in that crisis.[123]

The centrality of a critical interpretation of the *Viking* and *Laval* judgements in the doctrine can be also demonstrated by studying European labour law handbooks, which give us a window into the dominant orientations of current scholarship in synthesised and teachable form.[124] Among the French-language handbooks, the *Manuel de droit européen du travail* published in 2016 by Sophie Robin-Olivier calls the judgements a 'turning point in the case law history' of the CJEU and points out the 'absence of primacy of fundamental social rights over freedoms of movement'.[125] The 2013 book *Droit social international et européen en pratique*, edited by Michel Miné (Centre National des Arts et Métiers), also features a section on the *Viking* and *Laval* rulings. It faults the CJEU for having 'strictly framed' the right to strike by 'depriving it of useful effects' in light of the 'requirements of justification and proportionality' for the exercise of this right in relation to economic freedoms.[126]

Written by Mélanie Schmitt (University of Strasbourg), the handbook *Droit du travail de l'Union européenne* (2011) also criticises the hierarchy between economic freedoms and social rights introduced by the CJEU.[127] Although less openly critical in tone, the handbook *Droit social de l'Union européenne* by Jean-Michel Servais (University of Bordeaux) and Quentin Detienne (University of Liège) also subscribes to the thesis of an opposition between economic freedoms and union rights.[128] In the handbook by Pierre Rodière (University of Paris 1), the two rulings are analysed along the same lines; he writes that the CJEU has made the right to strike a fundamental

[117]See for instance C Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' 34 (6) (2009) European Law Review 844.

[118]F Lecomte, 'Un autre Viking dans le prétoire. Commentaire sous CJ, 3F c. Commission des Communautés européennes, 9 juillet 2009, Case C-319/07 P' 24 (3) (2010) *Revue internationale de droit économique* 297.

[119]S Robin-Olivier, 'Oublier *Viking*: quand la Cour de justice fait primer la législation sociale de l'Union sur la liberté d'organisation des entreprises de transport maritime' 9 (2016) *Revue de droit du travail* 581.

[120]Case C-201/15, *AGET Iraklis v. Ypourgos Ergasias, Koinonikis Asfalisis kai Koinonikis Allilengyis*, ECLI:EU:C:2016:972.

[121]S Laulom, 'CJUE: l'arrêt AGET Iraklis, un nouvel arrêt Laval?' 1753 (2017) *Semaine Sociale Lamy* 8.

[122]M Markakis, 'Can Governments Control Mass Layoffs by Employers? Economic Freedoms vs Labour Rights in Case C-201/15 *AGET Iraklis*' 13 (4) (2017) European Constitutional Law Review 724.

[123]C Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' 67 (1) (2014) Current Legal Problems 205–6; S Giubboni, 'The Rise and Fall of EU Labour Law' 24 (1) (2018) European Law Journal 6; N Countouris, 'European Social Law as an Autonomous Legal Discipline' 28 (1) (2009) Yearbook of European Law 121; S Robin-Olivier, 'Droit de l'Union et droit du travail : les rapports compliqués d'un vieux couple' 623 (2018) *Revue de l'Union européenne* 650; M Schmitt, 'La recomposition du droit du travail de l'Union européenne' 10 (2016) *Droit Social* 703.

[124]A-S Chambost (ed), *Histoire des manuels de droit* (LGDJ 2014).

[125]S Robin-Olivier, *Manuel de droit européen du travail* (Bruylant 2016) 52.

[126]M Miné (ed), *Le droit social international et européen en pratique* (Eyrolles 2013) 201.

[127]M Schmitt, *Droit du travail de l'Union européenne* (Larcier 2011) 106.

[128]Q Detienne and J-M Servais, *Droit social de l'Union européenne* (Bruylant 2021) 280.

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one, but with no actual 'fundamental value' in the face of economic freedoms.[129] After all, only the handbook written by Bernard Teyssié (Université of Paris 2) does not criticise the case law. Nevertheless, the two rulings are still analysed through the prism of an opposition between the right to strike and economic freedoms (but without this opposition being criticised).[130]

When it comes to the English-language handbooks, the volume published in 2012 by Catherine Barnard (University of Cambridge) with Oxford University Press is an important reference. The preface of this fourth edition stresses the 'seismic' repercussions of the two rulings and the book includes a new chapter on the relationship between internal market law and labour law, in which the author criticises the 'victory of the economic freedoms' over social rights.[131] *EU Labour Law*, written by Anne Davies (University of Oxford) and published by Edward Elgar in 2012 also supports the thesis of the primacy of economic freedoms : 'Despite the talk of 'balance' between the economic and the social, most regarded the results as a victory for the economic freedoms'.[132] Thus, the professor describes *Viking* and *Laval* as 'the two most important cases in this area so far'[133] and concludes by emphasising their revolutionary implications: 'EU labour law is constantly changing . . . It is no exaggeration to say that the much-debated *Viking* and *Laval* cases transformed the subject's landscape'.[134] Lastly, the second edition of *European Labour Law*, written by Brian Bercusson (King's College) and published posthumously by professor Keith Ewing (King's College) with Cambridge University Press in 2009, also extensively discusses *Viking* and *Laval* and embraces the thesis of a hierarchy between social and economic standards to reach a highly critical conclusion: 'The outcome is deeply unsatisfactory. Fundamental rights are given lip service, but then trampled on in the name of archaic market fundamentalism.'[135]

The European doctrine, particularly in European labour law, thus overwhelmingly considers Viking and Laval as groundbreaking negative rulings for social Europe. As we have seen, this critical interpretation of the rulings has been repeated in many Articles, chapters, books, but also by the same authors in many conferences and seminars for which there is no written record. Entire PhD theses have even been devoted to the consequences of the two judgements.[136] It can also be assumed that this critical interpretation has been taught by labour law professors to many cohorts of law school students in Europe, notably with the help of the handbooks mentioned above. All these academic efforts to promote a critical interpretation of the two judgements contribute to construct and to frame this case law as a major defeat for social Europe.

On the contrary, I found only a few academic texts which have supported the judgements.[137] Moreover, among these supportive authors, one later became a judge in the General Court (Damjan Kukovec) and one advised the Latvian government in the Laval case (Norbert Reich). In fact, most of the authors who published supportive or non-critical interpretation of the *Viking* and

[129]P Rodière, *Droit social de l'Union européenne* (LGDJ 2022) 615.

[130]B Teyssié, *Droit européen du travail* (LexisNexis 2019) 683.

[131]C Barnard, *EU Employment Law* (Oxford University Press 2012) 207.

[132]A Davies, *EU Labour Law* (Edward Elgar Publishing 2012) 22.

[133]Ibid., 92.

[134]Ibid., 266.

[135]B Bercusson, *European Labour Law* (Cambridge University Press 2009) 705–6.

[136]S Guadagno, *Viking, Laval and All That: Consequences of ECJ Rulings and Developments in the Area of Industrial Conflict in an Enlarged EU* (Università delgli Studi di Milano 2012); S Ripley, *Finding Balance between the Competing Interests of National and European Union Law and Economic and Social Policies through the Posted Workers Directive* (King's College 2013); M Rocca, *Posting of Workers and Collective Labour Law: There and Back Again – Between Internal Market and Fundamental Rights* (Université Catholique de Louvain 2014); K Chatzilaou, *L'action collective des travailleurs et les libertés économiques : essai sur une rencontre dans les ordres juridiques nationaux et supranationaux* (Université Paris 2015) 10.

[137]To my knowledge: U Belavusau, 'The Case of Laval in the Context of the Post-Enlargement EC Law Development' 9 (12) (2008) German Law Journal 2279; E Engle, 'A Viking We Will Go! Neo-Corporatism and Social Europe' 11 (6) 2010 German Law Journal 633; D Kukovec, 'Law and the Periphery' 21 (3) (2015) European Law Journal 406; H Micklitz, 'Three Questions to the Opponents of the *Viking* and *Laval* Judgments' 8 (2012) *OSE Opinion Paper* 1; N Reich, 'Free Movement v. Social Rights in an Enlarged Union – The *Laval* and *Viking* Cases before the ECJ' 9 (2) (2008) German Law Journal 125.

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Laval case were mostly members (judges, advocates general, *référendaires*) of the CJEU.[138] Indeed, on several occasions, these judicial actors intervened in the scholarly debate to defend a more positive or nuanced interpretation of their case law (the CJEU's Vice-President and President themselves also published an Article),[139] but they did not succeed in countering the prevalence of the critical interpretation by academics. Paradoxically, although they have a formal monopoly on EU law interpretation, the European judges failed to impose their interpretation of their own verdict.

C. The emergence of a commonsense European interpretation of the Viking and Laval judgements

The criticisms voiced by trade unionists and labour law professors on the *Viking* and *Laval* judgements did not remain confined to the union and academic spaces. They were also actively promoted on the EU political and administrative scene by these actors, who in doing so contributed to the normalisation of the meaning of this case law as nefarious for social Europe. In this last subpart, to conclude the demonstration of my constructivist thesis, I will show how this critical reading became a European commonsense interpretation, a self-evident consensus shared by most EU actors.

The unions' interpretation of the judgements was first promoted for the benefit of EU institutions. For instance, the ETUC and its members defended their critical analysis of the rulings within the Committee of Experts on Posted Workers, in which they were observers. This Committee was attached to the European Commission's DG Employment and brought together civil servants from national ministries of labour. Its creation in 2008 was a direct result of the *Laval* judgement: on a proposal from the Commission, the EU Council tasked it with studying how to improve co-operation on posted workers.[140] The unions' criticisms of the CJEU case law were also voiced in the context of the European social dialogue, as part of which the ETUC undertook the task of analysing the rulings with European employers' organisations.[141]

European union representatives and European labour law professors also shared their interpretation of the judgements in the EU's political arenas, including the European Parliament. For instance, John Monks (ETUC Secretary-General) and Jonas Malmberg (University of Uppsala) spoke before the Committee on Employment and Social Affairs.[142] Likewise, the MEP Jan Andersson, who had strong connections to the ETUC and to Swedish unions, drafted an initiative report on 'Challenges to collective agreements in the EU'. The report was used as the

[138]A Rosas, 'Les travailleurs détachés dans l'espace social européen – la jurisprudence récente' in V Kronenberg et al (eds), *De Rome à Lisbonne : les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 387; F Biltgen, 'Le dialogue des juges et l'articulation de la jurisprudence de la Cour de justice de l'Union européenne avec les normes du droit international social' 5 (2017) Droit Social 393; E Levits, 'Das Europäische Sozialrecht und die Rechtsprechung des EuGH' in O Scholz and B Ulrich (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 37; J Kokott, 'The ECJ's Interpretation of the Posting Directive in the Laval and Rüffert Judgements' in O Scholz and B Ulrich (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 165; M Bobek, 'EU Law in National Courts: Viking, Laval and Beyond' in M Freedland and J Prassl (eds), *Viking, Laval and Beyond* (Hart Publishing 2016) 323.

[139]K Lenearts, J Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' 47 (6) (2010) Common Market Law Review 1666–7; V Skouris, 'Das Verhältnis der Grundfreiheiten zu den Gemeinschaftsgrundrechten' 5 (2009) *Recht der Arbeit* 25.

[140]European Commission, Recommendation on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, 31 March 2008; Council of the European Union (EPSCO), Conclusions on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, 9–10 June 2008.

[141]ETUC, BusinessEurope, CEEP, UEAPME, Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases, 19 March 2010.

[142]Committee on Employment and Social Affairs of the European Parliament, Exchange of view on the Laval and Viking rulings of the ECJ, 26 February 2008.

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basis for a European Parliament resolution that embraced the thesis of the primacy of economic rights over social rights.[143] This critical analysis of the judgements was further supported by an opinion of the European Economic and Social Committee.[144] Overall, the shock wave sent by the *Viking* and *Laval* rulings rippled through several EU institutions, far beyond the sole union and academic arenas.

To go beyond a mere inventory of stances on the judgements, I will conclude here by outlining the structure of the transnational space of opinions on the case law, to evidence the construction of a commonsense interpretation on the negative implications of the rulings for social Europe. To do this, I have analysed speeches given during five major European conferences on *Viking* and *Laval*: one was held at the German Federal Ministry of Labour in Berlin in June 2008; three others were organised by the European Commission, first in Brussels in October 2008 with support from the French Presidency of the Council, then in Oviedo in March 2010 with support from the Spanish Presidency, and finally in Brussels in June 2011; the fifth was held by the ETUC in Brussels in January 2011.[145] I selected these conferences based on their size and on the diversity of their participants: each brought together dozens of speakers from varied backgrounds, giving them a hybrid character – political, legal and academic – and venues for the confrontation of different viewpoints.

In total, the programmes of the five conferences under study mention 156 speeches: 16 by Ministers, six by Commissioners, 32 by (senior) European (13) and national (19) civil servants, 24 by leaders of trade unions (15) and employers' groups (9), 15 by experts from trade unions (9) and employers' groups (6), 34 by law professors and 9 by MEPs. A minority of speeches was also given by consultants (5), from the International Labour Office (ILO) (3), from the European Agency for the Improvement of Living and Working Conditions (Eurofound) (2), by members of the European Social and Economic Committee (2), of the CJEU (3), of the European Court of Human Rights (ECtHR) (2), and by national judges (2). The table below synthesises information on these speeches. Some individuals spoke at several conferences, which means that some speakers are counted twice or more Table 1.

Having outlined the composition of this space of debates, let us now move on to the contents of the views expressed. As we will see, a majority of speeches were critical of the *Viking* and *Laval* rulings. Conversely, only a minority of speakers praised the CJEU's judgements. A cleavage appears between a minority who found that the judgements neither weakened union rights nor interpreted the posted workers directive in a restrictive manner and a majority who adopted a critical interpretation of the judgements on the grounds that they were nefarious for social Europe.

Among those speaking in favour of the *Viking* and *Laval* rulings, only employers' representatives openly argued that they reinforced union rights and usefully clarified the posted workers directive. For instance, the Director General of BusinessEurope Philippe de Buck defended that stance at the two conferences organised by the Commission in Brussels in 2008 and 2011.[146] At the latter, de Buck stated that 'the real novelty of the Viking and Laval rulings is that

[143]European Parliament, Resolution on challenges to collective agreements in the EU, 22 October 2008.

[144]European Economic and Social Committee, Opinion on The Social Dimension of the Internal Market, 14 July 2010.

[145]The titles are these conferences were, by order of appearance in the text: 'Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsrecht der Mitgliedstaaten'; 'Forum on Workers' Rights and Economic Freedoms'; 'Conference on Posting of Workers and Labour Rights'; 'Conference on Fundamental Social Rights and the Posting of Workers in the framework of the Single Market'; 'Reconciling Fundamental Social Rights and Economic Freedoms after Viking, Laval and Rüffert'.

[146]Philippe de Buck, Speech at the Forum on Workers' Rights and Economic Freedoms, Brussels, 9 October 2008; Philippe de Buck, Speech at the Conference on Fundamental Social Rights and the Posting of Workers, Brussels, 28 June 2011.

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Table 1. Speakers in the five conferences under study

Type of speakers	Speeches ($n = 156$)	Distribution of speakers	Examples of speakers
European Commission	19	Commissioners (6) Civil servants (13)	• Laszlo Andor (EU Commissioner for Employment) • Armindo Silva (Director, DG Employment) • Guido Berardis (Director, DG Internal Market)
Ministers	16	Social (15) and European affairs (1)	• Xavier Bertrand (Minister of Labour, France) • François Biltgen (Minister of Labour, Luxembourg) • Sven Otto Littorin (Minister of Labour, Sweden)
National civil servants	19	Social (16) and European affairs (3)	• Jean-Denis Combrexelles (Ministry of Labour, France) • Wolfgang Koberski (Ministry of Labour, Germany)
Unionists	24	Executives (15) Advisors (9)	• John Monks (Secretary-General, ETUC) • Rainer Hoffman (President, DGB) • Claes-Mikael Jonsson (lawyer, LO-S)
Employers	15	Executives (9) Advisors (6)	• Philippe de Buck (Director General, BusinessEurope) • Jorgen Ronnest (Director, Conf. of Danish Employers) • Lars Gellner (lawyer, Conf. of Swedish Enterprise)
Judges	7	CJEU (3)	• Egils Levits (Judge, CJEU) • Elisabet Fura-Sandström (Judge, ECtHR) • Pauliine Koskelo (President, Finnish Supreme Court)
		ECtHR (2)	
		National courts (2)	
Law professors	34	Social and/or European law (34)	• Catherine Barnard (University of Cambridge) • Niklas Bruun (Hanken School of Economics, Helsinki) • Antoine Lyon-Caen (University of Nanterre)
MEPs	9	PES (7) EPP (2)	• Jan Andersson (PES, Sweden) • Jacek Protasiewicz (EPP, Poland)
Other institutions	7	ILO (3) Eurofound (2) EESC (2)	• Karen Curtis (Standards Department, ILO) • Maria Luz Vega (Labour Inspection Department, ILO)
Other actors	6	Consultants (5) Journalist (1)	• Ingrid Vanhoren (consultant, ECORYS)

the right to strike has been recognised by the ECJ as an EU fundamental right for the first time'. This argument was reiterated by other employers' representatives, such as Maxime Cerutti (Director of BusinessEurope's Social Affairs Department) in 2011 at the conference held by the ETUC in Brussels,[147] or Lars Gellner (labour law specialist from the Confederation of Swedish Enterprise) in 2008 in Berlin.[148]

At odds with this interpretation, trade union actors were very critical of the CJEU's case law. At the first Brussels conference, John Monks explained that the judgements constituted 'a major challenge' for the ETUC and its members as the CJEU appeared 'to confirm a hierarchy

[147]Maxime Cerutti, Speech at the ETUC Conference, Brussels, 14 January 2011.

[148]L Gellner, 'View of the Confederation of Swedish Enterprise' in O Scholz and U Becker (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 123.

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of norms . . . with market freedoms highest in the hierarchy' and to interpret the posted workers directive 'in a very restrictive way', limiting the ability of unions 'to take action against unfair competition on wages and working conditions'.[149] Union lawyers also presented similar interpretations, as Claes-Mikael Jonsson, legal advisor for the Swedish Trade Union Confederation (LO-S) and former coordinator of the ETUC Task force Viking-Laval, did at the 2008 Berlin conference:

> It is our belief that the ECJ, through its recent case law, has planted a time-bomb under the European Union. The fire will start when workers see their wages undercut by posted workers . . . The new industrial relations system constructed by the ECJ on Community level, which restricts the right to collective action in the Member States should be abolished.[150]

This critical view of the rulings was also expressed by a majority of law professors (especially those specialising in European labour law) in conferences. Several of them are in fact close to the ETUC or to one of its national member organisations. For instance, Filip Dorssemont (University of Louvain) and Niklas Bruun (Hanken School of Economics) are members of the European Trade Union Institute's TTUR network. Also worth noting is one of the last public speeches by Brian Bercusson (who died suddenly in the summer of 2008), a founder of the TTUR network and active members of the ETUC Task Force on the Viking and Laval cases. In Berlin, he did not mince words:

> The ECJ's decisions deal a potentially mortal blow to the national industrial relations systems of the EU Member States. The decisions restrict the right to collective action, restrict national collective bargaining systems and restrict labour standards to the minimum . . . The Court's doctrine adopts the premise that fundamental social rights are to be interpreted narrowly where they restrict economic freedoms guaranteed by the Treaty.[151]

The space of position-takings on the *Viking* and *Laval* cases thus appears cleaved between a group of critics of the judgements and of their consequences on social rights in Europe, which includes trade unionists and a vast majority of law professors, and a group of supporters of the CJEU's decisions and of people who downplay its negative impacts, which includes employers' representatives. Along a continuum between these two opposed groups, we find the stances of national ministers. Among those leaning towards the critical side, there is for instance François Biltgen, Luxembourg's Minister of Labour since 1998 (paradoxically he later became a judge at the CJEU). His country was very directly concerned by the CJEU's case law on posted workers, since the 'Commission v Luxembourg' judgement[152] delivered a few months after Viking and Laval cited the incorrect transposition of the directive by the Grand Duchy. At the 2008 Brussels conference, Biltgen defended a rather critical position on the rulings: 'the feeling that fundamental freedoms, such as the freedom to provide services, are prevailing over social rights, keeps spreading'.[153] A similar sentiment was expressed by Andreas Storm, Secretary of State for Labour of the Federal Republic of Germany, a Member State that was also impacted by the CJEU case law

[149]John Monks, Speech at the Forum on Workers' Rights and Economic Freedoms, Brussels, 9 October 2008.

[150]C-M Jonsson, 'Reply by the Swedish Social Partners View of the Swedish Trade Union Movement' in O Scholz and U Becker (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 119.

[151]B Bercusson, 'Scope of Action at the European Level' in O Scholz and U Becker (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 70–1.

[152]Case C-319/06 *European Commission v. Grand Duchy of Luxembourg*, ECLI:EU:C:2008:350.

[153]François Biltgen, Speech at the Forum on Workers' Rights and Economic Freedoms, Brussels, 9 October 2008.

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with the *Rüffert* judgement of 2008.[154] At the 2011 Brussels conference, he voiced several reservations regarding the CJEU's case law.[155]

Among the speeches by ministers, few praised the CJEU's decisions. At the 2008 Brussels conference, the Czech Minister of Labour Petr Nečas was alone in welcoming the rulings, arguing that 'social Europe can only be sustained by enhanced competitiveness'.[156] However, governmental criticisms became less harsh over time. Three years later, in his 2011 Brussels speech, Inger Støjberg, the Danish Minister of Labour, simply stressed that free movement is one of 'the most fundamental' EU rights and called for pursuing practical solutions outside of any form of 'ideological' discussion.[157]

Last but not least, the European Commission's interpretation of the *Viking* and *Laval* judgements gradually changed over time. Initially, the Commission's representatives claimed that the CJEU's rulings did not call into question the posted workers directive or trade union freedoms, but only raised issues specific to certain countries. Hence this statement by Armindo Silva, Director at the DG Employment, at the 2008 Berlin conference: 'We have difficulty in seeing these rulings as reversing a long-established tradition of EU jurisprudence in favour of social rights'.[158]

The institution's discourse subsequently evolved. An important factor in that sense was José Manuel Barroso's public commitment before the European Parliament in September 2009, at the beginning of his second term, to legislate in favour of a better implementation of the posted workers directive and to take measure to resolve conflicts between the right to take collective action and the freedoms of the internal market.[159] To the President of the Commission, as an internal note from the Director-General of DG Employment explained,[160] this commitment was a response to criticisms of the CJEU's rulings by trade unions and left-wing parties. In 2010, the report submitted to the Commission by former Commissioner Mario Monti also contributed to legitimising the idea that the *Viking* and *Laval* decisions had worsened the imbalance between the social and economic dimensions of European integration.[161]

These elements led Commission executives to acknowledge that the CJEU's decisions were problematic. At the 2011 Brussels conference held by the ETUC, the Commissioner for Employment Laszlo Andor claimed to want to clarify the scope of the unions' right to take collective action and to improve the implementation of the posted workers directive. Most importantly, the Commissioner now recognised that the union's criticisms were legitimate:

> The Court has recognised that the right to take collective action is a fundamental right . . . However, we should and cannot ignore the concerns expressed by the unions that, as a result of the Viking and Laval rulings, primacy might be given to economic freedoms over fundamental social rights in national as well as European courts.[162]

[154]Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, ECLI:EU:C:2008:189.

[155]Andreas Storm, Speech at the Conference on Fundamental Social Rights and the Posting of Workers, Brussels, 27 June 2011.

[156]'EU States Eye Political Response to Laval Court Ruling' *Euractiv* (10 October 2008).

[157]Inger Støberg, Speech at the Conference on Fundamental Social Rights and the Posting of Workers, Brussels, 28 June 2011.

[158]A Silva, 'Scope of Action at the European and National Level from the Perspective of the European Commission' in O Scholz and U Becker (eds), *Die Auswirkungen der Rechtsprechung des Europaïschen Gerichtshofs auf das Arbeitsercht der Mitgliedstaaten* (Nomos 2009) 91.

[159]José Manuel Barroso, Passion and Responsibility: Strengthening Europe in a Time of Change, Speech at the European Parliament Plenary, Strasbourg, 15 September 2009.

[160]Robert Verrue, Note for the attention of Mrs Catherine Day and Mr Luis Romero Requena, 23 June 2010.

[161]Mario Monti, A New Strategy for the Single Market, Report to the President of the European Commission, 9 May 2011.

[162]Laszlo Andor, Balance economic integration and social protection, Speech at the Conference on Fundamental Social Rights and the Posting of Workers, Brussels, 27 June 2011.

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While Andor did not openly embrace the thesis holding that economic rights now had precedence over trade union freedoms, he now acknowledged the dominant framing of the debate, namely that the CJEU's rulings had evidenced difficulties relating to the application of the posted workers directive as well as a tension between economic and social rights, requiring a response from EU authorities. The Commissioner for the Internal Market Michel Barnier also made a similar statement.[163] This response came under the guise of two legislative proposals in 2012: first, a directive aimed at strengthening the application of the posted workers directive, adopted in 2014 (2014/67/UE); second, a proposed regulation aimed at reconciling the right to take collective action and the freedoms of the internal market (which was never adopted due to the 'yellow card' raised by national parliaments).[164] By submitting these two proposals, the Commission tended to support the idea that the *Viking* and *Laval* rulings posed problems for social Europe and called for EU reforms.

Ultimately, while the interpretation of the *Viking* and *Laval* cases promoted by trade union and academic actors was not embraced by all on the European scene, it still became dominant and contributed to the development of a critical commonsense interpretation of the rulings. In other words, the idea that the CJEU had struck a blow to social Europe became a consensual one.

4. Conclusions: the *Viking* and *Laval* cases as a double prophecy

By adopting a contextual and processual analysis of the European Court of Justice's decisions, this Article has evidenced the mechanisms at work in the construction of the *Viking* and *Laval* judgements as a political, legal and more largely symbolic crucial defeat for social Europe. This construction was made ahead of the rulings and after the fact, in a context in which debates on social Europe had a prominent place on the European public scene, especially in the wake of the EU's enlargement and amid fears on social dumping, and during negotiations over the 'Bolkestein' directive. The Article has also shown that the construction of the impact of these rulings owes much to trade unionists and their lawyers, who mobilised to make the cases a major challenge for social Europe and to promote a very critical interpretation of the judgements.

These findings call for a fine-grained, contextualised analysis of the role of claimants in these cases,[165] following a 'bottom-up'[166] approach that is still under-represented in the study of European court decisions, and more generally for an analysis that accounts for the diversity of protagonists involved in the narrativisation of CJEU judgements.[167] This study also emphasises the role of academics, and more specifically here by European labour law scholars, in pushing this critical interpretation of the judgements. Far from acting as mere exegetes of the Court's decisions, they directly contributed to constructing its impact,[168] and to enshrining a legitimate interpretation of the rulings, which became CJEU 'classics'.[169]

Ultimately, the *Viking* and *Laval* rulings can be read as a double prophecy. First, a self-fulfilling prophecy, since the cases were constructed as major verdicts for the future of social Europe even

[163]Michel Barnier, Réviser l'articulation des libertés économiques et des droit sociaux, Speech at the Conference on Fundamental Social Rights and the Posting of Workers, Brussels, 28 June 2011.

[164]I Cooper, 'A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike' 22 (10) (2015) Journal of European Public Policy 1406.

[165]L Conant et al, 'Mobilizing European Law' 25 (9) (2018) Journal of European Public Policy 1376.

[166]J Hoevenaars, *A People's Court? A Bottom-up approach to litigation before the European Court of Justice* (Eleven Publishing 2018).

[167]A Bailleux et al (eds), *Les récits judiciaires de l'Europe. Dynamiques et conflits* (Bruylant 2021).

[168]C Majastre, 'Penser l'Etat contre l'Europe. La genèse d'une orthodoxie juridique dans la République fédérale d'Allemagne de 1949 à l'arrêt Maastricht' 69 (1) (2019) *Revue française de science politique* 117.

[169]A Vauchez, 'EU Law Classics in the Making. Methodological Notes on Grands arrêts at the European Court of Justice' in B Davies and F Nicola (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 21.

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before the decisions were delivered by the CJEU. Second, a post *eventum* prophecy, as the meaning given to the CJEU's judgements was constructed after their delivery, through an interpretation effort that involved a variety of agents with a stake in the interpretation of CJEU case law. In the final subpart of this Article, I have shown that the critical interpretation of the rulings came to prevail as a common-sense, consensual reading shared by a majority of European actors.

In the long term, this double prophecy has produced various legal and political effects. For social Europe, the judgements opened a profound era of crisis, extended and amplified by the austerity measures enforced by the EU institutions during the financial and economic crisis.[170] For the European trade union movement, their defeat in the *Viking* and *Laval* cases gave rise to new demands (such as the revision of the posted workers directive), to new political and legal representations (the market-based Europe prevailing over social Europe), and to new litigation strategies.[171] Indeed, other studies have shown that defeat could boost the cohesion of the group of activists[172] and inspire new action programmes.[173] For European labour law professors, although they have deplored the 'crisis' of their discipline triggered by the CJEU's judgements, paradoxically *Viking* and *Laval* also gave a new momentum to their legal speciality area, providing grist to the mill for countless conferences, seminars, publications, group studies, reports, etc. As a final conclusion, if we consider that the advent of a social Europe constitutes the meta-prophecy that was thwarted (among other things) by the *Viking* and *Laval* cases, we must acknowledge that far from weakening the group of believers, its failure has actually helped keep the faith in its possible and desirable existence alive.[174]

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[170]A Crespy and G Menz, 'Conclusion: Social Europe Is Dead. What's Next?' in A Crespy and G Menz (eds), *Social Policy and the Euro Crisis. Quo Vadis Social Europe* (Palgrave MacMillan 2015) 182.

[171]J Louis, 'The Judicialisation of European Trade Union Confederation action: From the Viking and Laval Cases to Defending Fundamental Social Rights' (ETUI Working Paper 2022).

[172]On the subject of posted workers, this trade union cohesion remains fragile: M Seeliger and I Wagner, 'A Socialization Paradox: Trade Union Policy Cooperation in the Case of the Enforcement Directive of the Posting of Workers Directive' 18 (4) (2020) Socio-Economic Review 1113.

[173]S Tarrow, *Social Movements and Contentious Politics* (Cambridge University Press 2011) 217. See also: D NeJaime, 'Winning Through Losing' 96 (2011) Iowa Law Review 941.

[174]L Festinger, H Riecken and S Schachter, *When Prophecy Fails: A Social and Psychological Study of a Modern Group that Predicted the Destruction of the World* (University of Minnesota Press 1956).

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