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Adjusting the Danish IR-system after Laval: Re-calibration rather than erosion

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Introduction

Following what became known as the Laval-quartet¹ many analyses have been concerned with the implications for the Nordic labour markets. The Laval-quartet (Laval, Viking, Rüffert and Luxembourg rulings) have made scholars question the durability of the Nordic industrial relations model and even point to an erosion of the model (see e.g. Sippola, 2012; Thornqvist, 2011; Woolfson et al., 2010). But much of these sceptic analyses refer to the Swedish case, where the situation seems more uncertain. However, the Danish IR-system seems to be re-calibrated, rather than eroded, following the Laval-quartet, through judicial and political adjustments, where the labour market organisations' position remains strong.

The conflicting traditions of Nordic IR-regulation and European integration

As European integration intensifies, the policy impact is spreading to areas that supposedly still are the national realm like labour markets and industrial relations (Crouch, 2014). The Laval ruling caused serious concerns in the Nordic countries since it revealed how far-reaching the potential implications of European integration are. The Laval-quartet also highlighted the tension between the removal of barriers for the single European market (negative integration) and a European social policy dimension (positive integration), with the social dimension often being overruled by the negative integration (Scharpf, 2010). The legal foundations for the European social dimension are generally weak (Falkner, 2010: 296), while legislation concerning the free movement is very extensive. This challenges national policy measures to curb the impact of the European single market, since these might violate single market regulation (Leibfried and Pierson, 2000), which became highly evident with Laval. The social-democratic Nordic countries are more affected by this process since they have more regulatory policies that can be negatively affected (Scharpf, 2010: 238).

Laval also highlights the tension between European traditions of legislative regulation and Nordic traditions of self-regulating labour markets. Nordic IR-models are based on voluntary agreements, mainly collective bargaining, between strong labour market organisations, with international unique organisation

¹ For an overview see Bucker and Warneck (2010).

levels (Andersen et al., 2014). The unionisation rate is 67 % in Denmark (Ibsen et al., 2012). Another key feature in the Nordic IR-systems is industrial actions like strikes or blockades against firms without collective agreements or firms violating the collective agreements. In Denmark secondary industrial action is also normal, where other vital functions like transportation, which itself is not conflict-struck, are included in industrial conflict. The Laval case basically challenged the right for industrial action against foreign firms.

The Nordic IR-models have very limited state and judicial interference (Andersen et al., 2014), which conflicts with EU regulation through courts and legislation, where individual rights typically are more important than the collective rights often emphasised in Nordic IR (Kristiansen, 2013). The Laval-ruling have been criticised from a Nordic perspective for turning minimum-regulation into maximum-regulation, and the judicial stances e.g. the interpretations of the posted workers directive (71/1996) is questioned by Nordic legal scholars (Kristiansen, 2013).

Amending the Danish posted workers law to solve the problems post-Laval

The recent Danish experience shows that the IR-system can adjust (at least for now), so that the pressure on the Danish IR-model following Laval have been mitigated. The Danish adjustments were mainly achieved through changes in the law on posted workers.

Shortly after the Laval-verdict a tri-party working group (including external experts) was formed to investigate the implications of Laval for the Danish IR-model. The committee's main recommendation was to adjust the Danish law on posted workers, so the criteria set in the Laval-verdict could be met. This was supported by both employers' organisations and unions. A key issue in the Laval conflict was that it was unclear (from a legal perspective) what the Swedish union's wage claims were (paragraph 110 in the Laval-verdict). In Denmark this was solved by adding a new article (§6A) to the posted workers law, which states collective actions (like strikes) can be taken against foreign firms to enforce wage claims for posted workers through a collective agreement (as it can towards Danish companies). Three criteria have to be met before industrial action can be taken (Posted workers' law §6a paragraph 2): the wage claim has to be the same as Danish companies face, set in a collective agreement signed by '*the most representative parties*' in the labour market and sufficiently clear. The wording of '*the most representative labour market organisation*' in the law de facto refers to the traditional union movement, which reinforces the LO-unions' (the traditional union movement) position and have manifested that a collective agreement with an 'alternative union' is not judicial equal to a collective agreement.

This *de jur* allows Danish unions to take industrial action against foreign firms to achieve the wage level set in the collective agreements for *posted* workers. Danish unions have actively used this option, from January 2012 to February 2014 Malerforbundet (the painters union) has initiated industrial action against 200 foreign service suppliers leading to around 30 new collective agreements and 3F (the main industrial union covering construction) has taken industrial action against 700 foreign suppliers resulting in approximately 100 new collective agreements. Many of the cases, which did not led to a collective agreement, ended because the foreign firm left Denmark (Arbejdsretten, 2014: 12).

The first time the 2008-amendment of the posted workers law was tested in the Danish labour court system was in a 2014 ruling (See Arbejdsretten 2014; hereafter named the Hekabe-ruling after the German company filing the case. The firm was owned by a Dane). The Hekabe-ruling confirmed that Danish unions have the right to take industrial action towards foreign subcontractors to enforce wage levels as in the collective agreements. The German entrepreneur filed a case against Malerforbundet (the painters union) stating the collective agreement Malerforbundet wanted Hekabe to sign was unclear and not relevant since only part of the work was painting and finally that the claim was violating the Laval-ruling. The unions' wage and collective bargaining claims were presented for Hekabe at a meeting between the union and the firm. The Danish Labour court stated clearly that these claims were sufficient and in line with the Danish law on posted workers and that the 2008-amendment of the posted workers law meant that there was no conflict with the Laval-ruling.

The prevalence of corporatist structures in the Danish labour market

Corporatist institutions are declining across Europe, but the Danish industrial relations' adjustment to European legislation have been handled in a highly corporatist manner, reflecting the IR-systems' tradition of self-regulation. All EU legislation affecting the labour market is left for the labour market organisations to implement through the collective agreements. First it is discussed in *Implementeringsudvalget* (the implementation committee), which was established as a corporatist committee in 1999 that discusses Danish compliance with EU-legislation on labour market issues (Kristiansen, 2013: 260–61). The committee do also discuss how to deal with significant ECJ-rulings like the Laval-case, where a working group prepared the suggestions to the changes in the Danish posted workers law. The first implementation of the posted workers directive was also a tri-party corporatist approach, where it was agree to leave the wage question for the labour market organisations themselves (Kristiansen, 2013: 200).

The state only interferes if no agreement can be reached, or if additional legislation is needed to cover workers potentially not covered by collective agreements. In some prominent cases like e.g. the

implementation of the directive of agency work the state had to step in because the organisations could not reach an agreement. But the outcome was still corporatist in the sense that all major political parties voted in favour and the both sides of the labour market impacted the design of the law.

The labour market organisations are in general not trying to take advantage of any EU-directives or legislation in terms of getting a better outcome, since they accept that this would probably led to a trade-off in some other negotiation. So in this sense the system keeps a 'check and balances' approach. Still wages and other core issues are handled exclusively by the labour market organisations.

Increasing use of 'social clauses' in public work

The increased use of 'social clauses' on public work is yet another way of reducing problems with posted and sub-contracted workers. Following the ECJ-rulings especially Rüffert the situation was uncertain, but Denmark has (as opposed to Germany) signed the ILO-convention 94² that secures the right to apply labour clauses in public work. In 2014 did the Danish ministry of Employment issued a new "Circular on Labour Clauses in Public Contracts",³ which very clearly states that public social clauses can demand that contractors follow the terms set in collective agreements (although they cannot demand they sign a collective agreement). Paragraph 3.1 in the circular also rather strikingly establishes chain liability for public contractors.

Whether this Danish solution is conflicting with the Luxembourg and Rüffert rulings is unclear, but it is clearly in line with the ILO 94, which the Danish government has emphasised over the ECJ-rulings.

While all state-financed public work has to apply 'social or labour' clauses it is optional for the Danish municipalities, but they are in general using the 'social clauses', with Copenhagen municipality being the front-runner and they recently hired the international certification firm Bureau Veritas Certification to control wages and working conditions.

A continued recalibration of the Danish model (at least for now).

Despite much discussion after the Laval-rulings, the Danish IR-system has not seen any large-scale changes and the labour market organisations' position remains strong. Following changes in the Danish posted workers law Danish unions can and do take industrial action against foreign service providers and posted workers have only had minor impact on the Danish labour market. Also increased use of social clauses in public work has helped

² See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312239

³ Available in English at: <http://bm.dk/~media/BEM/Files/English/Cirkular%20on%20labour%20clauses%20pdf.ashx>

curb the negative effects. Both employers and unions have remained rather loyal to the formal organisation of the Danish IR-model in the aftermath following the Laval-quartet.

Whether the Danish judicial solution will be deemed conflicting with European legislation is uncertain, but it will very likely be contested at some point. But ECJ have in several cases, including Laval, accepted that curbing social dumping in a national setting can be a legitimate motive for restricting the free movement of services (cf. Kristiansen, 2013: 169). Also the right to industrial action and conflict is well established in European legislation (Kristiansen, 2013: 175) and was also recognised in the Laval-verdict.

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