Three years have passed since the “judgment day”\(^1\), but the interest surrounding 
*Viking* and *Laval* (together with the other members of the quartet, *Rüffert* and *Commission v. Luxembourg*) is still high all across Europe. The conference “Reconciling fundamental social rights and economic freedoms after Viking, Laval and Rüffert”, held in Brussels on 13-14 January 2011, gives evidence of this persisting trend. Indeed, more than 80 registered participants (legal practitioners, trade unionists and civil servants coming from various European countries) attended the conference, which was jointly organized by the European Trade Union Confederation and the University of Wismar. The purpose of the event was to present and discuss the results of a two-year long research aimed at assessing the impact of *Viking*, *Laval* and *Rüffert* on the national industrial relations systems of several Member States (namely Belgium, Germany, Hungary, Italy, Poland, the UK and the “Nordic countries”), which was coordinated by Andreas Bücker (University of Wismar) and Wiebke Warneck (ETUI)\(^2\). The event, which took place in the premises of the European Trade Union Institute, as well as the research project was financially supported by the European Commission.

After a short welcome address of Andreas Bücker, professor at the University of Wismar, Wiebke Warneck (researcher at the ETUI) took the floor for an introductory speech aimed at presenting the research. Building upon the consequences of the CJEU decisions on national industrial relations systems (explored in the national reports), Warneck identified the perspectives stemming from the findings: the multi-level regulation of the European labour market delivered by the courts and the need for a legislative answer to this action. She stressed the novelty of the intervention of the European Court of Justice in the field of industrial relations, which generated doubts and praise. She also emphasized obstacles and hurdles hindering a legislative intervention in the field. Finally, she exposed the ETUC demands on the subject: a “Social Protocol” to be attached to the Treaties, the revision of the Posted Workers Directive\(^3\) and a legal instrument (the so-called “Monti II” regulation) clarifying the relationship between fundamental social rights and economic freedoms.

It was then the time for the national teams to present their findings. The first to take the floor was the “Nordic” team, formed by Niklas Bruun (University of Helsinki) and Erland Olauson (Erland Olauson Arbetsmarknadsjuridik). Bruun briefly presented

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\(^2\) The results of the research will be published by the month of April 2011.

similarities and differences between the responses of countries included in the so-called “Nordic Model”. In doing so, he stressed how the Laval judgment was particularly problematic for the Swedish and Danish systems, because of the lack of regulation of minimum wages and of the absence of a system to declare collective agreements generally binding. Looking at the reactions to the case law developed in the Nordic countries, Bruun stressed how this response was shaped by the social actors in a cooperative way in Finland and Denmark, while it was left to the political and governmental intervention in Sweden. The outcome however was similar in both Denmark and Sweden, where the aim was to safeguard the autonomous bargaining system through the legislation. Finally Bruun showed that after those interventions foreign service providers are actually in a better position –to confront trade unions’ action- compared to domestic service providers. In completing this picture, Olauson emphasized the importance of international standards (both the ones set by the ILO and those enshrined in the European Convention of Human Rights, as interpreted by the ECtHR) for the protection of the Nordic systems of industrial relations, because Nordic countries cannot rely on the intervention of a Constitutional Court.

Proceeding along the same way, the first part of the “German intervention”, delivered by Bückler, warned the audience from relying on national constitutional courts as shields from the European intervention in the industrial relations sphere. Indeed he showed as the German constitutional court, notwithstanding its cautious attitude towards EU law, conceives its role just as an “emergency brake” to be pulled in the most peculiar situation of EU law violating fundamental constitutional rights. Torsten Walter, from the DGB, focused his attention on the consequence of Rüffert on German public procurement law. Going through all the Länder reforms (actually implemented or undergoing a political discussion) in the field of public procurement, Walter demonstrated a certain convergence upon the reference to minimum wages set by law (at regional level, by the law on public procurement, or in the law regulating the posting of workers). Another interesting condition present in several reforms is the obligation for the contractors to use only goods which were manufactured respecting the ILO Core Labour Standards.

The UK team, formed by Tonia Novitz and Lydia Hayes (both from the University of Bristol) was the third to take the floor, closing the group of the countries more interested by the CJEU decisions. In analyzing the effects of Viking and Laval upon the UK system of industrial relations, Novitz identified three categories of those effects: the chilling effect on industrial actions, due to legal uncertainty and possible claims for damages; the ripple effect, making it difficult for trade unions to be recognized and reinforcing employers arguments against their activities; the disruptive effect, pushing workers away from trade unions and towards wildcat strikes, xenophobia and euro-skepticism. She then applied these categories to two well known disputes, namely BALPA and East Lindsey Refinery, giving evidence of the concrete nature of the proposed categorization. Lydia Hayes focused on the right to strike, showing its downward evolution in the UK system: indeed, the right to strike was considered as “already well recognized” by the Donovan Commission (1968), while in the recent Metrobus case (2009) a judge could affirm that “the right to strike has never been much more than a slogan”. She than pointed out as the damages awarded in the Laval case may deteriorate the –already difficult- situation, undermining the national legislation that sets a maximum cap for damages deriving from industrial action, allowing employers to argue that a claim relying on EU law should not be subject to those limits.

After the coffee break, Joanna Unterschütz (Solidarnosc) opened the group of the countries less affected by the consequences of the CJEU decisions. Indeed she explained that in Poland the most part of workers’ rights is contained into statutes, and thus would not be undermined by the recourse to posted workers in the field of a transnational provi-
sion of services. Furthermore she stressed the fact that the right to strike is already subject to severe procedural limitations. Afterwards, Judit Czuglerne Ivany (National Federation of Worker’s Councils) continued the “New Member States” discourse, summarizing the history of the right to strike in Hungary. Although the CJEU decisions seems not to have an important direct influence on the national system of industrial relations, she pointed out that in a recent dispute concerning the strike of airport workers, the right to free movement of citizens was used in order to limit the right to strike of those workers. Furthermore, she expressed a certain concern as in the draft of the new Constitution the right to strike is no more mentioned.

The Italian team, formed by Edoardo Ales (University of Cassino) and Michele Faioli (University of Rome – Tor Vergata), was the last to present a national report. Ales emphasized the scarce influence that the CJEU intervention should have on the national system of industrial relations, the right to strike being a constitutional right. Because of this he was convinced that an Italian judge should not ask the CJEU for a preliminary ruling on the subject. In his intervention Faioli called for a cooperative action between the different actors in the multi-level regulation of the European labour market. Then, recalling a decisions of the Italian Regional Administrative Tribunal (TAR) of Bolzano⁴, he showed that judge had considered all the provisions falling within the EU regulations and the harmonized law deriving from EU directives as excluded from its check for equivalent protection, somehow following the CJEU reasoning delivered in Commission v. Luxembourg.

The research group, together with some willing participants, then moved to the European Parliament for an evening chat with Elisabeth Schroedter (European Parliament Member, The Greens European Free Alliance), Alejandro Cercas (European Parliament Member, Group of the Progressive Alliance of Socialists & Democrats in the European Parliament) and Jan Cremers (former European Parliament Member). The chat was hosted by the S&D group of the European Parliament. It was the occasion for an exchange of knowledge on the topic of posted workers. The MPs expressed their concerns on several aspects, especially the problem of the duration of posting, the need for a definition of “worker” and of “self-employed”, the nature of the Posted Workers Directive, being interpreted by the Court of Justice as a “ceiling of rights” and not as a “floor” granting only minimal conditions. Cercas then linked the issue of posted workers with the one of workers coming from outside the EU, informing the audience about the directive on the “single work permit” blocked by the EU Parliament, which would have introduced the same regulation of the Posted Workers Directive in respect of third country nationals employed as seasonal workers, in intra-group posting or by temporary work agencies. Finally Jan Cremers pointed out as the CJEU intervention made it difficult for national inspections to check working conditions of posted workers.

The second session, devoted to “Conceptualizing the Reconciliation”, saw the interventions of Andreas Bücker (University of Wismar) and Filip Dorssement (Université Catholique de Louvain). In summarizing the impact of the CJEU jurisprudence on national courts, Bücker said that it is still too early to assess this influence, as only time will tell if national courts will follow the CJEU or look for alternative solutions. However, he recalled that the CJEU is not “alone” and that a dialogue between courts will be needed in order to solve the knot of the relationship between social rights and economic freedoms. Furthermore, he recalled that the ILO Committee on the Application of Conventions and Recommendations has already expressed serious concerns about the impact of Viking and

⁴ Tribunale Amministrativo Regionale, Autonomous Section of the Province of Bolzano, 19 April, 2005, no 140; upheld by Consiglio di Stato (the highest administrative jurisdiction), 1 March, 2006, no. 928.
Laval on the right to strike (in relation of the BALPA dispute). Finally he emphasized the need for political guidelines, as the dialogue between court cannot solve all the issues. It was then Filip Dorssemont to address the topic of dialogue and co-operation between courts in the European area. He analyzed the issue referring to the theory of Santi Romano about the plurality of legal orders. Following this conception there is no legal norm that is able to tackle the conflict between legal orders; on the contrary each legal order has to define its own relationship with other relevant orders. He recalled the construction of the EU legal order by the CJEU through the Van Gend en Loos and Internationale Handsgesellschaft decisions. Then he showed how the Italian and the German Constitutional Courts defined their relationship with the newly-born system, in the field of fundamental rights, through the theory of controlimiti (“counterlimits”) and the Solange test (“as long as”). However Dorssemont stressed again the nature of “emergency brakes” of those legal instruments, which thus cannot be conceived as tools for a dialogue between courts. Still he considered that they had (and may have in the future) a role in putting pressure on the European Court of Justice, which answered recognizing fundamental rights as general principles of EU law in the Nold and Rutilli decisions. Finally Dorssemont analyzed the relationship between the CJEU and the European Court of Human Rights. He stressed that the CJEU takes into account the European Convention of Human Rights as a source, but it does not consider as such the jurisprudence of the ECtHR thus making it hard for a dialogue to establish. This dialogue would be especially needed in the field of collective social rights, as the ECtHR recently recognized the right to strike and to collective bargaining as essential elements of the right to form and join a trade union. As a final word he emphasized the possible scenarios opened by the accession of the EU to the European Convention of Human Rights (required by the Lisbon Treaty), as human rights stated in the Convention, and hopefully their interpretation delivered by the ECtHR, could arise from the nature of “general principles of EU law” to the one of genuine fundamental rights.

The third and closing session, “Balancing economic freedoms and fundamental social rights”, consisted in a round table, which saw the participation of László Andor (EU Commissioner, DG Employment, Social Affairs and Inclusion), Elisabet Fura-Sandström (judge at the European Court of Human Rights), John Monks (General Secretary of the ETUC), Maxime Cerrutti (BuisnessEurope), Stein Evju (Professor of Labour Law at the University of Oslo, former president of the Labour Court of Norway, former member and President of the European Committee of Social Rights) and Niklas Bruun (Hanken School of Economics and Business Administration). During the discussion, Andor called for an improvement of the Posted Workers Directive, aimed at a better implementation and interpretation of it, while assuring the legitimacy of policies aimed at protecting achieved social standards. Fura-Sandström brought the attention of the audience on some interesting cases pending beyond the ECtHR (in particular the case Palomo Sanchez and others v. Spain); she then invited trade unions to profit from the possibility to intervene as interested parties in the proceedings beyond the ECtHR. For the trade unions side, John Monks sadly affirmed that in present times government are more afraid by

6 Case 26/62, NV Algemene Transporten Expedite Onderneming van Gend & Loos v Netherlands Inland Revenue Administration [1963], ECR 1.
9 Case 36/75, Rutilli v. Minister for the Interior [1975], ECR 1219.
10 Demir and Baykara v. Turkey [2008], ECHR 1345, (2009) 48 EHRR 54; Enerji Yapi-
the bond market than by trade unions; in this sense he called for an action at national level in order to put pressure on governments. For the employers side, Maxime Cerruti expressed his view about the CJEU judgments, stressing the fact that collective action was already limited by law, and that the proportionality test was something already present in several national experiences; under this light he defined *Laval* as a fair balance, as well as the Posted Workers Directive (as interpreted by the CJEU). Evju, on the contrary, pointed out that a limitation to minimum conditions was plain and simply the end of collective bargaining; then he emphasized the fact that undefined duration of negotiations and unspecified demands (both condemned by the CJEU) were the natural situation of a process of collective bargaining, and that the same was true for the restriction to economic freedoms caused by collective actions. Bruun warned about the “juridification” of industrial relations, calling for an attentive selection of cases to bring before superior jurisdictions; however he stressed the fact that courts are not the miracle that will change the situation, urging the need for trade unions to promote initiatives stemming directly from workers being actually posted. Intervention from the audience during the debate were mainly addressed at Maxime Cerruti, reaffirming the fact that although the right to strike wasn’t conceived as an absolute right, the limitations and tests imposed by the CJEU were something of absolutely new (and shocking) for the European tradition of industrial relations.