

# TTIP and Service Liberalization: Bolkestein returns?

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## Introduction

The Transatlantic Trade and Investment Partnership (TTIP) negotiations over the liberalization of services revisit many issues arising in debates over the highly controversial 2006 EU Services Directive.<sup>1</sup> Drafted in 2004 by Single Market Commissioner at the time, Frits Bolkestein, the Directive proposed many significant changes in the EU services market. Member states would now have to justify existing service regulations as necessary, non-discriminatory and proportionate. The draft Directive also placed many public services (or ‘services of general public interest’) in its scope, including water, sewage and waste management. Most controversial was Bolkestein’s evocation of the ‘country-of-origin’ principle, whereby service providers would be subject to the regulatory rules of their home country. Trade unions and other civil society groups mobilized against the proposal, with 50,000 demonstrators gathering in Strasbourg in 2006 as the European Parliament debated the proposal. The end result was a significantly modified version, with the ‘country-of-origin’ principle excluded. But the Directive left potential conflicts between service liberalization and national social regulation to the courts to decide on a case-by-case basis.

This paper considers what lessons we can learn from the case of the EU Services Directive to understand the potential implications of TTIP on social regulation in the EU. In particular, it considers what lessons we can draw from the Services Directive case about the consequences of the judicialization. The Commission has repeatedly declared in response to TTIP critics that the EU’s ‘direct effect’ principle is not equivalent to the Investor-to-State Dispute Settlement (ISDS). But a closer examination of European Court of Justice (ECJ) cases in the wake of the Services Directive demonstrates the ability of private firms to exploit judicial processes to contest national laws and practices. Whether this opposition is waged through national and European courts or through an ISDS, the results are arguably the same: governments are motivated to modify existing rules and practices to avoid further litigation.

The paper contains three parts. The first consider debates over the single market and social Europe, examining the logic of ‘decoupling’ national social regulations and market liberalization. It suggests how this decoupling is increasingly unsustainable in an enlarged EU shaped by the logic of ‘new constitutionalism’ (Gill 1998). It then goes on to show how conflicts between market liberalization and social regulation played out in negotiations over the EU Services Directive. While the draft directive was watered down in the course of negotiations, the paper considers how the directive has not been as ‘toothless’ as expected. The third section, by examining one ECJ case related to service liberalization (Laval), considers how domestic political conflicts between societal actors, namely business and labour, over social regulations were now played out through the courts. After the Court ruled in favour of the former, many member states have now changed national regulations to avoid future litigation. The concluding section draws out three lessons from the case of the Services Directive for understanding the implications of TTIP, and in particular the proposed Investment Court System, on the balance between social regulations and service liberalization in the EU.

### **Between the Single Market and Social Europe**

The revitalization of the European project in the 1980s involved an explicit compromise: abolishing barriers to the free movement of goods, capital, services, and labour (the single market) would proceed in tandem with maintaining social cohesion within and across its member states (Social Europe). One way EU actors have sought to advance the goals of Social Europe has been to create policies and objectives at the EU level. Since Lisbon, most of these initiatives have been pursued with ‘softer’ instruments through the ‘Open Method of Coordination’ (OMC). Another, less explicit, way in which the EU has sought to uphold this compromise is to ‘decouple’ market integration from social cohesion. That is, subsequent treaties have tended to grant EU institutions further authority over economic integration while leaving most matters of social and labour policy to member states.

Some argue that this division of authority is both efficient and legitimate. The arrangement is *efficient* if one conceives of the EU as essentially a ‘regulatory state’ (Majone 1998). In other words, member states grant the EU authority to ensure that goods, capital and services flow freely across borders, and to address negative externalities involved with cross-border transactions. National or local

authorities, on the other hand, are argued to provide public goods such as welfare, housing, education or health more efficiently. Decoupling market integration and social policy is claimed to be more *legitimate* because social and employment issues necessarily involve fundamental decisions over taxing and spending, decisions that should be left to democratically accountable governments (Moravcsik 2002). The EU's subsidiarity principle – that decisions should be taken at the lowest level of government as possible – is consistent with arguments that the EU oversees single market issues while social and labour issues remain the responsibility of member states and/or their subnational regional or local authorities.

But many argue that this tidy decoupling of economic integration from social policy is unsustainable (Scharpf 2002; Offe 2003; Føllesdal and Hix 2006). For one, regional economic integration places numerous indirect pressures on maintaining social cohesion as governments seek to maintain or gain competitive advantages (Hemerijck 2002). This can include reducing corporate tax rates, increasing labour market flexibility, and weakening social regulations. The 2004 and 2007 eastward enlargements have threatened to exacerbate these pressures. Given that new EU member states generally have lower corporate tax rates, laxer regulatory standards, weaker labour unions and more limited social benefits, many fear that enlargement has worsened 'social dumping' in the EU (Vaghan-Whitehead 2003; Kvist 2004). Real and perceived threats of (a) West European-based firms moving East and/or (b) East European workers moving West both threaten to reinforce competitive pressures on West European governments, labour unions, and workers (see Bohle 2008; Baas; Brücker; and Hauptmann 2010; Bernaciak 2015). This fear of a 'race to the bottom' in labour and social protections contributed to the failed 2005 Dutch and French referenda, where the 'Polish plumber' came to signify such threats (Crespy 2010).

European integration can also exert *direct* pressure on national social policies. That is, supranational institutions such as the European Commission or the European Court of Justice (ECJ) can challenge national social and labour laws on the grounds that they are incompatible with single market rules (Leibfried 2010). Some argue that the ECJ can benefit individual litigants who are seeking redress against discriminatory practices (Mabbett 2005) or help workers claim rights and benefits across national borders (Caporaso and Tarrow 2009). But others argue that the ECJ is far more likely to benefit private firms who have both the

incentive and the necessary resources to pursue legal cases against national laws and policies that undermine their economic interests (Conant 2006; Höpner and Schäfer 2012). Here national courts play an important role as ‘gatekeepers’ in this process, given that most cases must be referred to the ECJ by national courts. Once the Court makes a judgement, member states respond in varying ways. Governments can pursue a strategy of ‘contained compliance’ (Connant 2006), whereby they respond to immediate court cases but go no further, to ‘regulatory surrender’, whereby governments pursue far-reaching policy changes to respond to and pre-empt further Court jurisprudence (Blauberger 2012: 111).

Whether the pressures of European integration are direct or indirect, real or perceived, many observers point to the underlying social purpose of decoupling markets from national political and social arrangements. European integration, according to this view, is a political project that seeks to subsume all states and societies into a single logic of market competitiveness (van Apeldoorn 2002). Höpner and Schäfer (2012) argue that by combining market-enforcing integration with a European area of non-discrimination (or, delinking social rights from social duties), the EU embodies Hayek’s ideal ‘inter-state federalism’. That is:

‘...while the capacity to tax and redistribute remains the prerogative of the member states, non-elected agencies such as the ECJ and the European Commission prevent these states from placing barriers on the free flow of resources and goods across their borders (Höpner and Schäfer 2012: 449).

Gill (1998: 5), argues, furthermore, that the EU’s ‘new constitutionalism’ is designed to ‘separate economic policies from broad accountability in order to make governments more responsive to the discipline of market forces and correspondingly less responsive to popular-democratic forces.’ As Polanyi (1944) famously argued, moves towards further market liberalization are invariably accompanied by countermoves to embed markets within societies. Failure to protect societies against market forces, according to Polanyi, would lead to a ‘plunge into utter destruction,’ the kind of breakdown of social order that he witnessed from inter-war Vienna (Polanyi 2001: 163). Today those most adversely affected by market liberalization direct their ire against the EU (a target that national politicians are happy to nurture) and/or mainstream parties.

## **The EU Services Directive and the Politics of Liberalization**

The EU Services Directive, proposed in 2004 with the aim of reviving the Lisbon Agenda's growth and competitiveness strategy, was one of the most controversial legislative proposals ever debated in the EU (Hay, 2007; Jensen and Nedergaard 2012: 844). 'With the Services Directive,' Schmidt (2009: 847) writes, 'politicisation hit the internal market.' Most controversial was the country of origin principle in which service providers would be subject to the laws from their home country. In France, for example, the clichéd figure of the Polish plumber was perceived to threaten both 'the Paris sewers and the employment prospects of indigenous Parisian plumbers' by making the Polish plumber's trade and employment conditions subject to Polish laws and regulations (Hay 2007: 37). The second contentious aspect of the draft Directive was its scope of application. The Directive included services of general economic interest, such as health care and social services, within its scope, services which had long been outside the EU's remit. The following section summarizes key findings of research on conflicts over the Services Directive in the decision-making stage, before going on to consider political implications of the Directive in the post-decisional phase.

If the 2004 draft services Directive was portrayed as 'Frankenstein', the final version, according to Jensen and Nedergaard (2012), was a 'toothless vampire'. That is, the draft Directive was watered down during the legislative process, most notably in eliminating the country of origin principle and excluding key public services from its scope. What can account for this outcome? We can first examine member state preferences. Looking to the constellation of member state positions in the Council of Ministers, France and Germany led the coalition opposing the proposal, supported by Austria, Sweden, Italy, Belgium and Denmark. The coalition in favor comprised all the new member states, together with the United Kingdom, the Netherlands and Iceland (Jensen and Nedergaard 2012: 85). Preferences of member states were not only determined by the level of barriers to service provision, i.e. the more existing barriers, the higher degree of opposition. Member state positions depended crucially on the extent to which national actors who perceived the proposal as a threat to their interests, such as trade unions, were able to mobilize effectively to shape their government's position (Jensen and Nedergaard 2012: 851). Miklin (2009) shows, for example, that the left-leaning governments of Germany, Austria and Sweden were initially positive towards Bolkestein's proposal. The German SPD Economics Minister, for

example, viewed it as a ‘welcome lever to indirectly reform Germany’s (allegedly) overregulated rules of profession in the services sector’ (Milkin 2009: 951). However, once governments saw the mounting opposition to the Directive through trade union protests and debates in the European Parliament, all three governments changed their position.

Looking to the European Parliament, positions of European party groups fell along the predicted left-right dimension, with the Party of European Socialist (PES), Greens/European Free Alliance (EFA) and Radical Left opposing the proposal and the Alliance of Liberals and Democrats for Europe (ALDE) and the European People’s Party (ALDE) opposing it (Jensen and Nedergaard 2012: 851-852; Linberg 2008). Yet this European Parliament was the first to include MEPs from the new post-socialist member states. Similar to government positions in the Council of Ministers, MEP positions on the Directive tended to correspond to an East-West divide. A new territorial dimension was thus introduced to ideological groupings. Within the PES, for example, Crespy and Gajewska (2010) describe conflicts between new member state MEPs, who saw the Directive as a way to extend their competitive advantage, and old member state MEPs who wanted to retain or strengthen existing service regulations. Negotiations over the services Directive highlighted a ‘clash of capitalisms’ within the enlarged EU that transcends traditional left-right, or East-West dichotomies: between those committed to further market liberalization and those seeking to preserve national social regulations and/or create stronger regulations at the EU level (Höpner and Schäfer 2010: 354; Crespy and Gajewska 2010; Copeland 2012).

The result of the Services Directive seems to lend support to Höpner and Schäfer’s (2010) claim that the EU has entered a post-Ricardian phases whereby liberalization attempts create resistance that limits further integration. That is, the Commission, by drafting such a radical proposal that spurred such active opposition, seemed to set back the course of service liberalization. Indeed, the draft proposal provisions to ease controls on the posting of workers was removed, against the wishes of new EU member states (Schmidt 2009: 859). Public services such as health care, utilities, and public transport were also exempted in the final version. However, the final Directive left open many contentious issues. For one, many service sectors would be subject to mutual recognition, meaning that member state governments accept regulations for their own states and populations that were decided in other member states (Schmidt 2009: 855). As

Schmidt argues, this depends on mutual trust, i.e. that governments believe their counterparts will control service providers for the sake of other EU member states. This trust was lacking the immediate wake of eastward enlargement, with many old member states questioning new member states' administrative capacity and political will.

Most pertinent to this analysis is the final Directive also leaving open contentious questions of which existing national rules and regulations overseeing the service sector would be in violation of the Directive and free movement principles more generally. Deregulation was always a primary objective of the proposal's drafters. Bolkestein stated on the draft proposal's release, for instance: 'Some of the national restrictions are archaic, overly burdensome and break EU law. Those have simply got to go. A much longer list of differing national rules needs sweeping regulatory reform' (quoted in Schmidt 2009: 849). In the final version, Article 16 requires that any national requirements must respect the principles of non-discrimination, necessity and proportionality. It also explicitly forbids other types of requirements, such as an obligation to be established on the territory or to be authorized by a competent authority or professional body in the host state. Many ambiguous legal questions and contentious political issues were now shifted to the implementation stage. This allowed greater roles for the ECJ, to adjudicate issues on a case-by-case basis, and for the Commission, to monitor compliance and pursue infringement cases. The next section considers the implication of the Directive, arguing that the final version has not been as 'toothless' as many observers expected.

### **Service Liberalization through the Courts<sup>2</sup>**

In a 2002 article Fritz Scharpf warned: 'the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of ... legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary opinion. In other words, it may happen one day' (Scharpf 2002: 657). The day appeared to come when four service liberalization-related cases were referred to the ECJ: *Laval*, *Viking*, and *Rüffert*.<sup>3</sup> In each case the ECJ was asked to determine whether existing social and labour regulations and practices were compatible with free movement of services. Arising in the midst of contentious negotiations over the Services Directive and the Constitutional Treaty referenda campaigns, the cases

attracted a great deal of attention. Moreover, given that the cases involved employers based in old member states (Sweden, Finland, and Germany respectively) established in and employing workers from new member states (Latvia, Estonia, and Poland), the cases also exacerbated ongoing concerns about social dumping in the newly enlarged EU. With the ECJ ultimately ruling in favour of the employers in each of the three cases, the outcome of the cases appeared to vindicate concerns that legalization of liberalization poses a significant threat to existing national social frameworks (Alfonso 2009; Joerges and Rödl 2009; Woolfson, Thörnqvist, and Sommers 2010; Scharpf 2010). The following section examines one of these cases in more depth, Laval, in order to consider both how cases come to be referred to the ECJ and, more briefly, the domestic impact of the ECJ ruling.

### *The Laval case*

In 2003 a Latvian construction firm (Laval) won a contract through its Swedish subsidiary worth nearly 2.8 million euros to refurbish and extend a primary school in a Stockholm suburb. Laval proceeded to bring in 35 Latvian workers to carry out the contract. The Swedish construction union (Byggnads) contacted Laval to argue that the Latvian workers should fall under existing Swedish national collective agreements for the building sector. Laval was paying the Latvian workers approximately nine euros per hour, in addition to covering accommodation, meal, and transport costs. This wage was nearly double the average pay for construction workers in Latvia. Yet it was almost half the rate of pay for Swedish construction workers in the Stockholm region. Under the Swedish national collective agreement, Swedish workers at the same site would make approximately 16 euros per hour, in addition to 12.8 percent holiday pay, and other collectively agreed benefits.

When Laval refused to abide by the Swedish agreement, the Swedish construction union blockaded the building site. Union members prevented workers and deliveries from entering the site and picketed with signs reading 'Swedish laws in Sweden.' The Swedish electricians union launched a solidarity strike and unionized cement suppliers ceased deliveries. A month in to the blockade, Laval went to the Swedish Labour Court to argue that the blockade and the electricians' solidarity strike were illegal and should cease immediately and requested compensation for damages. Two weeks later the Court ruled that the blockade was legal under Swedish labour law. Additional Swedish unions

launched sympathy actions. With the company unable to get necessary supplies to its site to carry out the work, the Swedish local council terminated Laval's contract. A month later Laval declared bankruptcy. But the story didn't end there. The Latvian firm decided to pursue the case further through the courts, arguing that the union's actions constituted an infringement on its freedom to provide services. Laval did this with the active support of the Confederation of Swedish Enterprise, which footed all the legal costs. The Swedish Labour Court referred the case to the European Court of Justice for a preliminary opinion.

Laval and its supporters argued that the Swedish unions' actions were discriminatory towards Latvian workers in Sweden (and foreign workers more generally). The Swedish unions responded, in turn, that their industrial action was designed to protect the rights of all workers to fair wages and working conditions. The Swedish government was steadfast in its support of upholding the Swedish welfare model. This was true of the Social Democratic government in power when the strike occurred, and the right-of-centre coalition that took power while the case made its way through the courts. Right-of-centre Prime Minister Göran Persson argued that Swedish unions had the 'right to take retaliatory measures' in order to 'ensure the survival of collective agreements' (Woolfson and Sommers 2006: 55). Later, leading up to ECJ hearings on Laval, where member states and other actors can submit legal briefs, the Swedish government invited all member states to a special information meeting to hear the Swedish position on the issues raised in the case. 'We were concerned that other member states didn't understand the Swedish social model,' the head of the Swedish government's legal team, Andres Kruse, explains, 'so we invited them to come to Stockholm and ask questions' (Personal interview March 2009).

While the ECJ considered the case, political debates continued outside the courts. Given that Denmark's industrial relations model is quite similar to Sweden's – based on voluntary collective bargaining rather than mandatory minimum wages – Danish actors weighed in on the impending decision. Former Danish Prime Minister Poul Nyrup Rasmussen suggested that the case had seriously undermined Swedish and Danish support for the EU (James 2006). This view that the dispute might have wider implications for Swedish support of the EU more generally was reinforced by the Swedish Employment Minister's comment that the question of Sweden's withdrawal from the EU would be raised. 'There are a lot of people out there,' he said, 'who voted for EU entry in the belief that

the Swedish model would stay intact' (James 2006). The President of the European Commission went out of his way not to take sides. Barroso declared, 'In no way are we going against or criticizing the Swedish social model' (James 2006).

On 9 January 2007 the ECJ held a hearing on the case. In addition to the two plaintiffs (Byggnads and Laval), the European Commission, 14 member states, and EFTA states Iceland and Norway submitted observations. According to a ECJ official, 'While it is difficult to give an average of the number of Member States intervening in a case, it would be safe to say that very few cases generate the number of interventions seen in these two' (Personal interview March 2008). The UK joined new post-socialist member states in arguing in favour of the bankrupt Latvian firm. The UK was the only member state that did not recognize the right of the Swedish unions to strike.<sup>4</sup> Ireland was the only 'old' EU member state to side with the UK, although it did recognize that the right to strike is a fundamental right. Most old member states, on the other hand, argued forcefully that free movement of services cannot infringe on the right to industrial action to enforce wage agreements or national social policies more generally. The European Commission observed that both principles must be upheld but it was up to national and ECJ courts to decide which principle should prevail on a case-by-case basis (see Lindstrom 2010).

In their December 2007 decision, the ECJ recognized that the right of trade unions to take collective action is a fundamental right under Community law – and that the right to take collective action for the protection of workers against social dumping might constitute an overriding reason of public interest. However, ECJ deemed that in the Laval case the Swedish unions' boycott violated the principle of free movement of services since the unions' demands exceeded minimal protections under national labour law and was disproportionate. The Court also ruled that the Swedish 'Lex Britannia', which permitted collection action in Sweden regardless of existing collective agreements in home countries, as discriminatory (Blauberger 2014: 467). The ECJ decision thus reaffirmed the right to industrial action as a fundamental right, but struck a blow to Sweden's voluntary collective bargaining system. The Swedish government expressed disappointment in the ruling. Swedish employment minister Sven Otto Littorin told the *Financial Times* that the center-right government, which had supported the unions in the dispute, would now have to

amend the law. 'I'm a bit surprised and a bit disappointed by the verdict,' he said. 'I think things are working well as they are' (*Financial Times* 2007). Kruse remarked: 'The free movement of services cannot take precedence over such fundamental rights as negotiating a collective agreement or staging an industrial action' (BBC 9 January 2007).

Supporters of Laval's position voiced satisfaction with the ruling. The key counsel for Laval, Anders Elmér, remarked in the Swedish daily *Dagens Nyheter* that the ruling vindicated Laval's opposition to the blockade (Carp 2008). The Swedish employers' association also welcomed the decision. Its vice-president, Jan-Peter Duker, said: 'This is good for free movement of services. You can't raise obstacles for foreign companies to come to Sweden' (Jacobsson 2008). Latvian public officials also weighed in on the debate. Latvian European Parliament member Valdis Dombrovskis of the centre-right EPP-ED Group suggested that the EU should consider putting protective mechanisms in place to safeguard companies that post workers from the 'arbitrary and unjustified demands of trade unions' (EurActive 27 February 2008). Dombrovskis also declared that 'the Laval ruling will shape the direction of the single market in the future' (*Diana* 25 June 2007).

Swedish labor unions, Swedish opposition parties, and the ETUC condemned the ruling. While many commentators made a point of emphasizing that the ECJ had upheld the fundamental right to strike – as well as to take actions to preserve national protections against social dumping – they concurred that the ECJ ruling presented a setback to the Swedish collective bargaining system and the European Social Model more generally. Speaking in front of a packed audience at a February 26, 2008 hearing before the European Parliament's Employee and Social Affairs Committee on the Laval and Viking cases, TUC General Secretary John Monks argued that the rulings challenge 'by accident or by design' the European Parliament's position that free movement of services and fundamental social rights should be granted equal footing. He remarks:

The idea of social Europe has taken a blow. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the actions they take against those employers' tactics. That is both wrong and dangerous. Wrong because workers' rights to equal treatment in the host

country should be the guiding principle. Wrong because unions must be autonomous. And dangerous because it reinforces those critics of Europe who have long said that liberal Europe would always threaten the generally excellent social, collective bargaining and welfare systems built up since the Second World War (European Parliament 26 February 2008).

In response to the Laval judgement, the Swedish court awarded compensation to Laval, with Swedish unions forced to pay €55,000 in punitive damages (Blauberger 2014: 469). The Swedish government proceeded to carry out a comprehensive review and reform of laws overseeing posted workers. Given that Denmark shares a very similar industrial relations model with Sweden, it, too, reviewed its existing laws and regulations in light of Laval. When faced with an ECJ judgement, member states must navigate the ‘legal corridor’ set out by the Court in adapting national policies to EU law (Seikel 2015: 1168). That gives governments a range of options: non-compliance (i.e. doing nothing), ‘contained’ compliance (i.e. comply with the law but without changing policies significantly), or ‘regulatory surrender’ (i.e. fundamentally change existing policies) (Conant 2002; Blauberger 2012:111; Seikel 2015). Both Sweden and Denmark went beyond the individual case to modify policies to avoid future conflicts with EU law, with Sweden going much further than Denmark (Blauberger 2014: 467). This outcome depended on how domestic actors used the ECJ ruling to pressure the government to implement reforms. Seikel (2015) argues that what explains why Sweden pursued more far-reaching reforms than Denmark – or why Sweden pursued ‘regulatory surrender’ while Denmark ‘contained compliance’ – is that Swedish employer associations were dominated by larger, export-oriented firms who stood more to gain from liberalization than their smaller Danish counterparts. While Danish business was more willing to reach a consensus that preserved existing regulations, the role of business here was pivotal, supporting Alfonso’s (2009) claim that Laval had furthered strengthened the position of business vis-à-vis labour in ongoing conflicts over market liberalization.

### **From the Services Directive to TTIP: what can we learn?**

In September 2015 the European Commission unveiled its proposal for a new Investment Court System for TTIP, replacing the existing investor-to-state dispute settlement (ISDS) mechanism. First Vice-President Frans Timmermans remarked:

With our proposals for a new Investment Court System, we are breaking new ground. The new Investment Court System will be composed of fully qualified judges, proceedings will be transparent, and cases will be decided on the basis of clear rules. In addition, the Court will be subject to review by a new Appeal Tribunal. With this new system, we protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule of law (European Commission 2015a).

The Services Directive case provides a number of important insights for considering the consequences of TTIP, and the Investment Court System in particular, on the relationship between service liberalization and social regulation.<sup>5</sup> The first concerns the role of supranational actors, namely the European Commission. The Commission has demonstrated a longstanding and active commitment to liberalizing the European service sector. Bolkestein was a strikingly candid proponent of this objective and became a highly polarizing figure. But in the decision-making phase, and in controversies over the ECJ cases that followed, the Commission took care in public statements to portray itself as neutral arbiter. This was evident in the public statements of Barroso, who took pains not to criticize the Swedish model in the Laval dispute. The Commission also took a neutral position in its legal brief submitted to the ECJ hearing in the case, which was not subject to public scrutiny.<sup>6</sup> In the case of TTIP the Commission continues its efforts to advance the liberalization of services. But it is less constrained than it was in the Services Directive case, both in terms of the EU Trade Commissioner enjoying more autonomy but also in responding to political pressure. Compare, for instance, Barroso's statement on Laval with EU Trade Commissioner Cecilia Malmström's recent declaration that 'I do not take my mandate from the European people' (Hilary 2015).

The second lesson concerns the role of the courts in service liberalization. In response to widespread criticism that a TTIP Investor Court System would force states to change laws and regulations, the Commission claims, in a document entitled 'The Top Ten Myths About TTIP: Separating Fact from Fiction,' that 'If the tribunal decides the government has [treated an investor unfairly], it can make it pay compensation. But it can't make it change or scrap a law' (European Commission 2015b). The analysis of the Laval case suggests that while a court

may not directly force a state to change or scrap a law – which applies to the ECJ as well as an Investor Court System – a ruling can nevertheless result in change in laws and regulations. As Blauberg (2014) argues, states can be motivated to make changes in order to avoid future litigation. This can result in moderate changes to the status quo (or ‘contained compliance’) to full-fledged change (or ‘regulatory surrender’), as we saw in the case of Denmark and Sweden in the face of an adverse ECJ ruling. The ‘myth,’ therefore, such as it is, is that the courts act in a supranational-hierarchical mode, using coercive mechanisms to induce top-down change. The ‘reality’ is that the *threat* of legal challenges can have deregulatory consequences. One outstanding question, however, is whether this anticipatory compliance works the same way in an international trade agreement as it does in the EU. We can expect, for instance, that states would anticipate more litigation within EU legal channels than through the Investment Court System thus reacting to the latter in a more targeted way.

A final lesson we can draw from the case of the Services Directive is the crucial role played by societal actors. In the decision-making phase, trade unions were highly influential in highlighting the potential negative consequences of the proposal and pressuring governments and MEPs through lobbying and protest to demand significant changes to the draft directive (Nicolaidis and Schmidt 2007; Jensen and Nedergaard 2012: 850). If many member states had initially supported Bolkestein’s proposal, once trade unions and other societal groups mobilized and the positions of member states and MEPs came under increasing scrutiny, many governments withdrew their support. In the post-decisional phase, societal actors played a key role in ECJ cases that tested the balance between free movement of services and labour and social regulations. The active involvement of the Swedish employer association in bringing the Laval case to court points to a basic but important fact: the ECJ does not initiate actions against states but hears cases brought before it (Wincott 2000: 21). It also provides evidence for the claim that firms tend to litigate most frequently and successfully (Conant 2006).

Once brought before the court, scholars disagree over whether the ECJ is inclined to interpret EU law in a more social or liberal way (Caporaso and Tarrow 2009; Höpner, Martin and Armin Schäfer). The Laval, Viking, Ruffert and Luxembourg judgements lend support to the latter view. Laval, by pitting Swedish unions against Swedish business, shows how ECJ cases are most often

'domestic political battles' fought through supranational channels (Blauberger 2012: 123). Societal groups also matter in determining national responses to legal judgements of supranational courts. Here too domestic groups battle over whether to turn a court judgement into adjustment pressures or to counter these pressures in order to preserve existing national regulations (Blauberger 2012: 113; Seikel 2015). If firms are most likely to bring cases before the court (and often with support of peak business associations), then their inclusion is key in coming to a domestic regulatory consensus (Blauberger 2012: 113). But with TTIP's Investment Court System providing another legal channel for challenging this consensus, and with business behind this initiative, we can expect more conflict than consensus ahead on the road to service liberalization.

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<sup>1</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

<sup>2</sup> This section draws on Lindstrom (2010; 2011).

<sup>3</sup> C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and ors. (Laval) [2007] ECR I-11767; C-438/05 International Transport Workers' Federation and Finish Seamen's Union v. Viking Line ABP and OU Viking Line Eesti (Viking) [2007] ECR I-10779; Case C-346/06, Rüffert v. Land Niedersachsen [2008] ECR I-1989.

<sup>4</sup> The UK's observation stated: 'There is no legally binding 'fundamental social right to take collective action' in Community law'.

<sup>5</sup> We can consider two key differences between the Service Directive and TTIP proposals on trade in services and investment. First, much of the debate over the Services Directive focused on the active freedom of services, or when a service provider, like a plumber, must move to provide his trade (Schmidt 2009: 851). Debates on European service liberalization was therefore inextricably linked to the free movement of people and its distributional consequences, concerns exacerbated by eastward enlargement (Nicolaidis and Schmidt 2007). In the case of TTIP, the focus is arguably more on investment or establishment, i.e. US firms investing in services rather than posting service workers. Second, if mutual recognition of service regulations requires trust in public administrations, this condition is arguably easier to meet in the case of TTIP than the Services Directive. That is, although the 'country of origin' principle was eliminated in the final directive, it still relies on 'managed mutual recognition' whereby a host state must accept that a home state's regulations are sound and effectively enforced (Schmidt 2009). Whether these conditions were met in new post-socialist states remained an open question, given that administrative capacity was still considered weak. But these concerns are much less significant in the case of the US.

<sup>6</sup> An important exception is the Commission v. Luxembourg (Case C-319/06) in which the Commission pursued an infringement case against Luxembourg for their regulation of posted workers, which coincided with the Laval, Viking and Rüffert cases.