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The legal mobilisation of EU market freedoms: strategic action or random noise?

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ABSTRACT

This article investigates litigation in the field of EU market liberalisation from the perspective of legal mobilisation research. It follows the assertion that litigation has seized on asymmetries in EU law to threaten cornerstones of national industrial relations regimes. The article investigates litigants and their legal counsel in 14 seminal cases. It identifies three distinct types of litigants: narrowly self-interested 'one-shotters', organised interests as 'repeat players', and 'cause lawyers'. Key take-aways add to the literatures on both liberalisation and legal mobilisation. The prominence of purposeful, strategic action speaks against previous assertions of a purely self-sustaining logic of market liberalisation, and efforts by trade unions to reinforce national regulations protecting labour speak against the assumption that EU law is only employed by those seeking greater factor mobility. On the other hand, attention to litigants seeking market liberalisation calls into question the notion of law as a 'weapon of the weak' often pursued in legal mobilisation research.

KEYWORDS Legal mobilisation; EU market freedoms; liberalisation; judicial politics; industrial relations

This article addresses two interlocking developments that have their origin in European Union law. The first is the advance of a new regulatory style in Europe, which is based on individual rights that are enforceable in national courts. This development affects the procedures by which conflicts are resolved in European Union member states. Rather than rely on traditional, corporatist processes of consultation and cooperation, citizens, companies, and interest groups can now directly resort to litigation in order to pursue their objectives. Daniel Kelemen has called this style 'Eurolegalism' (Kelemen 2011), a European version of 'adversarial legalism' (Kagan 2003), which had previously been identified as a uniquely American phenomenon. A growing literature investigates how citizens and interest groups shape this new opportunity structure and seize opportunities for influence (Conant *et al.* 2018). The prominence of law and

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litigation in turn induces a second, substantive development. Literature on legal mobilisation has highlighted transformations in policies that result from such efforts: EU rights litigation has contributed to the removal of discriminatory laws and practices relating to gender (Cichowski 2007), disability (Lejeune and Ringelheim 2019; Vanhala 2011), or race (Evans Case and Givens 2010), to liberalising migration regimes (Passalacqua 2022) or to improving measures against environmental degradation (Hofmann 2019; Reiners and Versluis 2022; Töller 2021).

One such transformation that has received a lot of academic attention elsewhere has remained a blind spot in the literature on EU legal mobilisation: the liberalisation of European markets (Louis 2022b). Observers largely concur that this process is driven by law and litigation (Garben 2017; Garrett and Weingast 1993; Höpner and Schmidt 2020; Scharpf 1999). Critics of such 'market liberalisation though law' point out that the barriers to trade under challenge are no longer merely national product standards, but increasingly also rules protecting the prerogatives of (nationally) organised labour. Such rules have been challenged as impediments to the right of establishment and the free movement of services and capital. Critics see this as a serious threat to essential features of industrial relations in social market economies of the European North-West. While EU law contains a catalogue of rights protecting individual employees from unsafe working conditions, discrimination, long working hours etc., protections for labour's 'collective voice' (Bogg *et al.* 2016: 11) are scarce. And while member states have attempted to protect national industrial relations regimes from intrusion by the EU legislator[1], such protections do not extend to judicial intrusion (Scharpf 2010: 231). There is a consensus that 'the dynamic that is unleashed is one of considerable liberalisation' (Höpner and Schmidt 2020: 186), but the outcome of efforts towards 'market liberalisation though law' in EU member states have been far from uniform (Blauberger 2012; Freedland and Prassl 2014; Refslund *et al.* 2020, Seikel 2015). Even landmark cases, such as *Viking* and *Laval*, have had vastly differing effects: 'from the need to change primary domestic legislation to barely any practical impact; from a near-complete cessation of industrial action with a potential cross-border element to a revival in collective solidarity; and from the discovery of a right to strike to significant inter-judicial discord' (Prassl 2014: 114).

Sources of such variation are not well understood. Existing accounts largely speak of a self-reinforcing dynamic where judicially induced liberalisation begets more litigation that feeds the cycle (Scharpf 2010; Stone Sweet and Brunell 1998). Proposed corrective measures therefore target the judicial institutions of the EU or the legal authority of the fundamental freedoms (Herzog and Gerken 2008; Höpner and Schmidt 2020;

Scharpf 2008). The literature does not address the puzzle how litigants were able to overcome the inertia and resilience of national regulatory regimes that have been reported in other policy fields covered by EU legal mobilisation literature (Conant 2002). This article aims to take one step towards a more systematic answer. It combines what we know about 'market liberalisation through law' with what we know about legal mobilisation and its effects. Accounts of successful efforts to mobilise EU law for domestic policy change often highlight the agency of organised interests (Reiners and Versluis 2022; Töller 2021). Other work emphasises the obstacles that litigants face: the demand for financial and legal resources, long time horizons, as well as a willingness to take on the risk of adverse outcomes (Passalacqua 2020; Pijnenburg and van der Pas 2022). To this point, research on market liberalisation has paid little attention to who exactly mobilises the law – and for what purpose.

The mechanisms that connect individual litigation to lasting policy change are complex (Rosenberg 1991), but the identity of the parties to the case is one central piece of the puzzle. It indicates conflict constellations that continue to play out in other political fora. When organised interests are involved, we can expect mobilisation to not only take place in the courtroom, while the effects of litigation by individuals will be more contingent on the activities of political actors that respond to case outcomes. A greater focus on the identity of litigants and their legal counsel will allow for the formulation of hypotheses as to the expected effect of litigation efforts, both on the judges deciding the case (Hermansen *et al.* 2023) and on political processes beyond the courtroom. The present article takes a first step in that direction. It asks the question: Who exactly mobilises EU free movement law to challenge national prerogatives of organised labour? It presents data on litigants and their legal counsel in prominent cases that national courts have referred to the CJEU, as well as similar cases at the national level that were not referred. Case selection concentrates on those cases that academic debate has identified as central to liberalising pressures emanating from EU market freedoms. The article identifies three types of litigants: individual 'one-shotters', organised 'repeat players', and 'cause lawyers'. Future steps can test assumptions about the mechanisms that connect the identity of the litigants to the heterogeneous policy effects of litigation (Blauberger 2012; Freedland and Prassl 2014; Refslund *et al.* 2020, Seikel 2015). The article should therefore be seen as a first step in a broader research agenda that investigates how exactly market liberalisation through law operates, who its central actors are and whether it is in fact structurally inevitable under the present institutional and legal framework.

The article proceeds as follows. The next section outlines the argument that EU market freedoms put national industrial relation regimes under pressure. Next follows a section that describes types of litigants that drive legal mobilisation. The subsequent section provides empirical evidence on legal mobilisation in the field in question, and a final section discusses and concludes.

National industrial relations regimes and the asymmetry of EU law

By focussing on micro-level agency, this article adds a neglected facet to the ongoing debate about the structural impact of EU market freedoms on national industrial relations regimes. This debate has intensified since the so-called '*Laval* quartet' of cases, which triggered a host of analyses by legal scholars (e.g. Barnard 2016; Freedland and Prassl 2014) and scholars of the political economy (e.g. Caporaso and Tarrow 2009; Höpner and Schäfer 2012; Scharpf 2010). The legal scholarship on CJEU caselaw is extensive, but it can roughly be separated into two perspectives. One strand looks at the current development from an EU law perspective that asks whether recent controversial judgements are consistent with the CJEU's previous caselaw on market freedoms and what the appropriate balance between market integration and social protection can be in EU law (Azoulai 2008; Barnard 2008; Davies *et al.* 2016; Garben 2017; Nic Shuibhne 2010). Another strand of this literature is more directly concerned with the concrete impact of CJEU case law on different national industrial relations regimes. Many of these contributions focus on the Nordic countries, as their systems of autonomous collective bargaining were most centrally affected (Eklund 2008; Malmberg and Sigeman 2008; Rönnmar 2008). Such studies are highly critical of the court's weighing of basic tenets of worker protection against free market principles. They emphasise that the balance has been tipped in favour of market freedoms (Eklund 2008: 570) and that trade unions now face significant constraints in protecting high labour standards against low-wage competition (Malmberg and Sigeman 2008: 1144).

A similar argument has been put forward by the political economist Fritz Scharpf, who has used the *Laval* quartet as an example underlining his assertion that EU market integration places asymmetric pressure on co-ordinated market economies of the European North-West. In declaring national collective labour law a potential obstacle to the freedom of establishment and the freedom to provide services, the CJEU has significantly limited member states' ability to implement market-correcting measures. At the same time, the heterogeneous constellation of national interests at

the European level prevents the EU legislature from passing such measures itself. The loss of discretion at the national level, in Scharpf's argument, cannot be compensated at the EU level, and increasingly 'europeanised' market economies will therefore develop towards the liberal model prevalent in countries such as the United Kingdom (Scharpf 2010). In a similar vein, Martin Höpner and Armin Schäfer have argued that with the extension of the market-making logic from products to services and establishment in the wake of *Laval,* the EU has entered a new phase in which it moves beyond mere competition between different national production regimes such that it now pressures national political economies to converge towards the liberal model (Höpner and Schäfer 2012, 2010).

Contributions by political scientists have addressed variance in outcomes, but authors tend to focus on how political actors respond to CJEU judgments. Blauberger (2012), Refslund *et al.* (2020) and Seikel (2015) highlight the role of political parties and employer organisations in conditioning the impact of judgments on national political economies. Werner (2017) has outlined how national authorities tend to fall back on alternative policy instruments to achieve regulatory goals where 'traditional' approaches have been invalidated by the CJEU. Hassel *et al.* (2016) argue that trade union strength can condition the impact of EU-induced liberalisation on working conditions in domestic industries particularly impacted by posted work. The agency of the litigants and their legal counsel, however, is rarely addressed. The question of how such cases arise and make their way to the CJEU remains a blind spot in the literature on EU market liberalisation (Louis 2022b: 3–4), despite indications that at least some litigants have ties to powerful organised interests (Seikel 2015: 1177). The next section reviews what we know about legal mobilisation and outlines how this can help us better understand the process of market liberalisation through litigation.

What do we know about legal mobilisation in the EU?

Accounts of the transformative impact of EU market freedoms on national industrial relations regimes make essentially three assumptions about the underlying mechanism: First, EU law is asymmetrical in that it emphasises economic freedoms over any counterbalancing measures (Garben 2017). Second, citizens and companies respond to this incentive structure by bringing cases that predominantly challenge national restrictions to economic freedoms (Höpner and Schmidt 2020: 186–7). Third, CJEU judges tend to side with the plaintiffs, not because they are (necessarily) economic liberals, but because they have a preference for EU rules over

national rules (Höpner 2011). Scharpf outlines the likely characteristics of the litigants the following way:

> the questions the Court will receive and the cases it will see must inevitably constitute an extremely skewed sample of all the interest constellations that are affected by European integration. They will reflect the interest of parties who have a major economic or personal stake in increased factor or personal mobility as well as the financial and organizational resources to pursue this interest by seeking judicial redress against national laws and regulations […]. What the Court will not see, however, are cases promoting the interests of the less mobile majority of European individuals and firms […] and, even more significantly, cases representing the interests that benefit from existing national laws and regulations. (Scharpf 2010: 220)

Such assumptions have so far not been empirically tested. Refining them with insights from legal mobilisation research will allow for a more nuanced understanding of the underlying mechanism. Following the quote above, an analysis of the litigants should show a combination of two characteristics: a 'major stake' in removing national barriers to economic freedoms and sufficient resources to engage with the legal system. Research on legal mobilisation broadly concurs that resources are a central factor in predicting litigation as a strategy of interest representation (Hofmann and Naurin 2021). The question of 'major stake' however, can be interpreted in two ways, following Galanter's (1974) distinction between 'one-shot' litigants and 'repeat players'. One-shotters are litigants with a primary (personal or economic) interest in the immediate outcome of the case, not its long-term implications for a set of rules. Repeat players, on the other hand, can discount individual losses against a strategy that 'plays for the rules' (Galanter 1974: 100). They engage in strategic litigation that specifically aims to alter existing rules to suit long-term (financial) interests. Both stakes can be 'major' from the point of view of the litigant, but the implications of their efforts are different. One-shotters will be content with immediate results and will not advocate for rule change, whereas repeat players will. In the following sections, I will discuss this for each type of litigant in turn. Apart from organised interests as 'classic' repeat players I will also pay attention to a second class of repeat player, 'cause lawyers', i.e. activists from within the legal profession.

Random noise from one-shot litigants

Both Galanter's work and research on legal mobilisation more broadly assume that transformative change comes from strategic action of repeat players. From the point of view of this literature, it would seem less likely that one-shotters can achieve the same effect. On the other hand, neo-functionalist accounts of EU rights litigation explain transformative

change without reference to strategic litigation. Alec Stone Sweet and Thomas Brunell, prominent exponents of this literature, interpret European legal integration as a 'response to the demands of those individuals and companies who need European rules, and those who are advantaged by European law and practices compared with national law and practices' (Stone Sweet and Brunell 1998: 72). They suggest a self-sustaining logic where increased transnational trade produces more litigation, which in turn gives the CJEU an opportunity to further liberalise trade, which again promotes trade, etc. The argument rests on the assumption that 'private actors, motivated by their own interests, [provide] a steady supply of litigation' (Stone Sweet and Brunell 1998: 72). The mobilisation of EU law, in this sense, flows naturally from market integration, essentially as 'random noise' from self-interested litigants without grander designs. Without specifically endorsing this view, Scharpf follows a similar line of argument: 'Since a favourable decision will encourage other parties to exploit the newly granted liberty from national regulation, and to push for its extension to other areas, the evolution of the case law […] will be driven by the persistent push of liberalising interests searching for new obstacles to remove' (Scharpf 2010: 221–2). Kelemen's (2011) account of the European advance of adversarial legalism highlights the proliferation of large international law firms offering special expertise in fields such as public procurement, mergers and acquisitions, company, or labour law (Kelemen 2011: 79–88). Tommaso Pavone calls these 'Euro-firms' and outlines their growing importance in EU law litigation since the 1980s (Pavone 2022: 202–11). This means that affluent one-shotters who can afford such services can now have vast legal expertise at their disposal. Euro-firms can come up with tailor-made solutions to individual problems, and at times such problems originate in national regulations protecting labour.

Strategic action by organised interests

On the other hand, accounts of legal developments in other policy areas with a substantial body of EU law tend to tell a different story. Far from following a self-sustaining logic, such accounts speak of more purposeful action on the part of litigants. Studies on areas strongly affected by EU rights regimes highlight the crucial role of strategic action on the part of well-organised groups (Cichowski 2007; Passalacqua 2022; Töller 2021; Vanhala 2011). This literature also underlines that favourable court rulings do not automatically translate into lasting policy change, but rather require sustained political mobilisation by organised interests (Conant 2002; Rosenberg 1991). Following this literature, we should not expect

things to work differently in the field of market liberalisation. Studies of, for example, Supreme Court litigation by the U.S. Chamber of Commerce point to strategic efforts by organised business interests in fostering a market-friendly legal environment (Emmert 2018; Franklin 2009). Evidence of such strategic action is not absent in the EU: it has not escaped attention that a peak Swedish employer organisation financed litigation in *Laval* (Seikel 2015: 1177). The legal arena thereby becomes an extension of conflicts over national industrial relations that are traditionally fought out in very different fora. While Scharpf's assumptions about litigants do not exclude actors fitting this category, the distinction between 'one shotters' and 'repeat players' allows for better insights into the nature of the conflict and its potential ramifications.

Cause lawyers

Beyond one-shot litigants and organised interests, literature has highlighted the role of lawyers and legal networks in driving Europe's 'integration through law' (Pavone 2022; Rasmussen 2021; Vauchez 2015). In the U.S., Austin Sarat and Stuart Scheingold coined the term 'cause lawyers': 'The objective of the attorneys that we characterise as cause lawyers is to deploy their legal skills to challenge prevailing distributions of political, social, economic, and/or legal values and resources. Cause lawyers choose clients and cases in order to pursue their own ideological and redistributive projects. And they do so, not as a matter of technical competence, but as a matter of personal engagement' (Sarat and Scheingold 2001: 13). Sarat and Scheingold had in mind lawyers that supported 'human rights, marginalised peoples and moral activism' (2001: 14). One prominent European who fits this mould is the late Belgian lawyer Éliane Vogel-Polsky, who was a champion of EU social rights and gender equality (Dermine *et al.* 2020; Irigoien Domínguez 2022). But such activism need not be confined to marginalised or diffuse interests. Pavone has outlined in detail how 'Euro-lawyers' 'pioneered a remarkable repertoire of strategic litigation. They sought clients willing to break national laws conflicting with European law, lobbied judges about the duty and benefits of upholding EU rules, and propelled them to submit cases to the ECJ by ghostwriting their referrals' (Pavone 2022: 4–5). A focus on lawyers conceives them as more than infrastructure for litigants, as actors in their own right: '[i]dentifying when and why lawyers are the first movers pushing for institutional change requires that we take their agency seriously instead of focusing predominantly on structural factors' (Pavone 2022: 6).

14 cases on EU market liberalisation

The following sections analyse efforts by litigants and their lawyers to leverage EU law in order to challenge foundational aspects of national collective labour law. Their structure follows the typology outlined above by sorting cases along the identity of both litigants and their legal counsel. I have chosen these cases for their salience – they are among the most frequently discussed in research on 'market liberalisation through law'. It is a purposeful selection, primarily because the relevant universe of cases – the totality of cases that had the potential to challenge national collective labour law – is hard to determine and so far remains unmapped. It is therefore difficult to compare the case characteristics of these cases to the 'typical' case, precluding a clear definition of what type of case study this selection implies (Seawright and Gerring 2008: 296). I claim that these cases are relevant: their outcome was largely unpredicted, they set important precedence for future cases, suggesting a path-dependence in market liberalisation (Schmidt 2012), and they frame our expectations about how 'market liberalisation through law' progresses. I cannot claim that they are necessarily representative of the (unknown) whole.

The selected cases (Table 1) concern clashes between EU-derived economic freedoms and three cornerstones of national industrial relations regimes: the right to strike, the reach of collective agreements, and employee representation on company boards. The underlying conflicts arose primarily in the context of posted work, where the economic rights of the service provider clash with the collective bargaining rights of domestic unions, the transfer of undertakings, where the rights of the new owner clash with the rights of the remaining employees, and company law, where the rights of the owners to choose among alternative corporate governance structures clash with the rights of employees to be represented in company leadership. I provide information on the litigants and their legal counsel in nine frequently cited cases that have been referred to the CJEU, one that has been referred to the EFTA Court and four related cases that have remained at the national level. The earliest cases I include are the three cases of the so-called '*Laval* quartet' that were initiated by private litigants. Their relevance is heavily documented in the literature (e.g. Freedland and Prassl 2014). Literature on the domestic context of *Viking* and *Laval* highlighted two other *Laval*-like cases about posted work from Denmark (*Dansk Arbejdsgiverforening*) and Norway (*STX*) that I include here (Barnard 2014; Neergaard and Nielsen 2010). *Rüffert*, the third case from the *Laval* quartet, engendered two much discussed follow-up cases (*Bundesdruckerei* and *RegioPost*) about the legality of collective bargaining clauses in public procurement that were also referred to the CJEU (Arnholtz and Lillie 2019). A final case on posted work that I include here

Table 1. 14 cases on EU market liberalisation.

Case no.	Court	Parties	Area of Law	Type of litigant
C-346/06	CJEU	Dirk Rüffert v Land Niedersachsen	Public procurement	One-shotter
C-549/13	CJEU	Bundesdruckerei GmbH v Stadt Dortmund	Public procurement	One-shotter
C-115/14	CJEU	RegioPost GmbH & Co. KG v Stadt Landau in der Pfalz	Public procurement	One-shotter
C-438/05	CJEU	International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti	Freedom of Establishment	One-shotter
C-426/11	CJEU	Mark Alemo-Herron and Others v Parkwood Leisure Ltd	Transfer of undertakings	One-shotter
C-341/05	CJEU	Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Svenska Elektrikerförbundet	Freedom of Establishment, Posting of Workers	Organised interest
A2005.839	Arbeijdsretten [DK]	Dansk Arbejdsgiverforening v Landsorganisationen i Danmark	Posting of Workers	Organised interest
E-2/11	EFTA Court	STX Norway Offshore AS m.fl. v Staten v/Tariffnemnda	Posting of Workers	Organised interest
C-396/13	CJEU	Sähköalojen ammattiliitto ry v Elektrobudowa Spolka Akcyjna	Posting of Workers	Organised interest
C-680/15	CJEU	Asklepios Kliniken GmbH v Ivan Felja and Vittoria Graf	Transfer of undertakings	Organised interest
3-16 O 1/14	Landgericht Frankfurt [DE]	Volker Rieble v Deutsche Börse	Company law	Cause lawyer
HK O 27/13	Landgericht Landau [DE]	Konrad Erzberger v Hornbach Baumarkt AG	Company law	Cause lawyer
5 HK O 20 285/14	Landgericht München [DE]	Konrad Erzberger v BayWa AG	Company law	Cause lawyer
C-566/15	CJEU	Konrad Erzberger v TUI AG	Company law	Cause lawyer

(*Sähköalojen ammattiliitto*) was initiated by a Finnish union – a case constellation that seems unlikely given the presumed asymmetry of EU law and therefore of relevance to this study (Arnholtz and Lillie 2019). From conflicts about the transfer of undertakings I include two frequently cited cases (*Alemo Herron* and *Asklepios*) on the authority of collective agreements (Prassl 2013). Finally, I include four cases on company law (*Deutsche Börse, Hornbach, BayWa* and *TUI*) that have been interpreted as efforts by interested parties to circumvent domestic rules on employee representation on company boards (Höpner 2018). I have identified case facts, litigants and their legal counsel primarily from the text of the respective judgments. In addition, I have consulted specialised trade journals – particularly helpful where judgments are anonymised. For affiliations with 'Euro-firms' I have consulted the legal counsel's LinkedIn pages as well as the firms'

internet presence. All sources other than the text of the judgement are indicated in the text.

One-shot litigants and their (Euro-firm) counsel

Out of the 14 cases, the three concerning public procurement most unambiguously fall into this category. Contracts issued by public bodies to private companies constitute a large percentage of GDP. A clear objective for public authorities (and by extension, taxpayers) is to award contracts to the supplier with the most economical offer. However, public authorities in many member states attach other conditions to public tenders, such as clauses obliging bidders to adhere to collective agreements on wages and working conditions for the sector concerned. Public procurement is a heavily litigated area, and litigants have questioned whether social clauses conform with EU market freedoms. The most prominent case to be referred to the CJEU in this area (*Rüffert*) concerned the company 'Objekt und Bauregie GmbH' that in 2003 won a contract from the German state government of Lower Saxony to build a prison, on the condition of adhering to local collective agreements in the building sector. Objekt und Bauregie employed a Polish subcontractor that was later found to have violated this condition. State authorities demanded a contractual penalty against Objekt und Bauregie, which was held liable for its subcontractor. The legal action ensued in subsequent bankruptcy proceedings, in which Objekt und Bauregie's liquidator, Dirk Rüffert, challenged the contractual penalty, arguing that the social clause constituted an undue restriction of the freedom to provide services. Rüffert is a bankruptcy lawyer and one of two partners in a husband-and-wife-operated law firm based in the rural town of Oldenburg (Rüffert Rechtsanwälte n.d.). Nothing indicates that Rüffert pursued designs for public procurement rules beyond the immediate case at hand.

Two follow-up cases to *Rüffert* also came from German courts. The first case (*Bundesdruckerei*) concerned a 2013 public tender by the city of Dortmund for the digitisation of documents. The tender stipulated that the winning bidder would need to adhere to a minimum wage laid down in state public procurement law. The federally-owned company 'Bundesdruckerei GmbH' intended to bid for this contract and subcontract the service to a subsidiary located in Poland. Since the service would not be provided in Germany, Bundesdruckerei asked for an exemption from the minimum wage rule, which was denied (Behrens 2014). Bundesdruckerei then challenged the tender before a regional arbitration body. It hired outside legal counsel Wolfram Krohn, a procurement lawyer then with the international law firm Orrick, Herrington & Sutcliffe.

Krohn is a seasoned lawyer with international law firms, who started his career at prominent all-service law firm Freshfields Bruckhaus Deringer and is now with the equally large firm Dentons (Chambers and Partners n.d.). The litigation effort was controversial, since Bundesdruckerei is a company wholly owned by the German federal government. The government did not issue an opinion in the proceedings and refrained from requesting an oral hearing, despite being asked to do so by the *Länder* chamber of the federal legislature (Behrens 2014). However, there is no indication that the government actively sought to use this case to move against state laws.

Legal action in the second case (*RegioPost*) in the wake of *Rüffert* was initiated by regional mail delivery company 'RegioPost GmbH' against a call for tender by the city of Landau concerning postal services, which had included a regional minimum wage clause specific to public contracts. The litigation challenged the German *Länder's* ability to introduce such clauses into their public procurement law where they differed from general statutory minimum wage levels. Wolfram Krohn, the procurement lawyer who had represented *Bundesdruckerei*, was also involved in this case, this time however on the side opposing RegioPosts's free movement rights claim as an intervener on behalf of his client Deutsche Post, which had won the tender when RegioPost was excluded (Schulze 2015). Here, too, there is no indication that any of the litigating parties pursued interests outside of the immediate case outcome.

Two other cases in the sample fall into a grey area between this category and instances of more strategic litigation. One of these is *Viking*, which of course is one of the seminal cases in the area in question. Viking Lines is a Finnish ferry operator that in late 2003 decided to reflag its ship 'Rosella' to the Estonian flag to take advantage of lower labour cost. In protest, the Finnish seamen's union threatened industrial action. The Finnish union is an affiliate of the International Transport Workers Union (ITF), who had a general policy to oppose the reflagging of vessels for purely economic purposes. ITF, based in the UK, subsequently issued a circular to all its affiliates asking them to refrain from entering into collective bargaining with Viking. After a confrontation with the Finnish union, Viking halted its reflagging plans until after Estonia had joined the EU. In August 2004, Viking brought action against the Finnish union and ITF before the UK High Court, relying on the freedom of establishment to force the unions to relinquish their threat of boycotts. Both the timing of the case and the venue for litigation were clearly strategic. Viking submitted its claim to a court in the UK (which it could do because ITF is headquartered in London), not in Finland, fearing that litigation would get held up there.[2] It also submitted its claim a year into the conflict and

only after Estonia had joined the EU. Nonetheless, there is no indication that Viking pursued any other motive than to move ahead with its reflagging plans. Both sides were represented in the various proceedings by experienced lawyers from London chambers Brick Court (Hollander 2021: 108). The unions, however, found the case, which was submitted to the CJEU around the same time as *Laval,* to be of central importance for the future of the 'European Social Model' and coordinated their legal defence strategies with both the European Trade Union Conference (ETUC), the peak trade union association in the EU, and the legal defence team in the *Laval* case (Louis 2022a, 2022b). For the defendants, organised interest and repeat litigants themselves, the case was therefore clearly of relevance beyond the immediate outcome. That Viking did not pursue rule change, however, is supported by the fact that the case was settled before the final judgement by the High Court (Prassl 2014: 122).

Finally, the most ambiguous case in this category is *Alemo-Herron*, a case concerning employment conditions after a transfer of undertakings – another heavily litigated area (Prassl 2013: 434). The 24 litigants in the case (the name Alemo-Herron is the first, alphabetically) were previously employed by the leisure department of the local authority for the London borough of Lewisham. The borrow council outsourced this department in 2002. The newly private entity was eventually acquired by Parkwood Leisure Ltd. in 2004. The plaintiffs' employment contract contained a 'dynamic' clause on pay and working conditions, which stipulated that these would adhere to applicable collective agreements in the relevant public sector. After Parkwood acquired the outsourced business, it initially set pay and working conditions in line with the public sector agreement in force but refused to adjust both when a new public sector agreement was concluded after the acquisition. With the support of the legal services department of their union, Unison (a public sector union), the plaintiffs started legal action against Parkwood with the aim of forcing the company to honour the dynamic clauses. Unison Legal Services is clearly not a one-shot litigant, and it has strategic interests in shoring up employment protection beyond the 24 employees concerned by the case at hand. EU law, however, was raised by Parkwood, who is a one-shot litigant (a defendant, in this case), in its defence – and not by Unison. While EU legislation protects employees' entitlements in the event of a transfer of ownership, UK law at the time offered greater protections than the minimum prescribed by EU law. Parkwood's lawyers, led by Adrian Lynch, a QC with considerable experience in EU law litigation (11KBW 2019), relied on the freedom to conduct a business codified in article 16 of the EU's Charter of Fundamental Rights to argue that UK law should not go beyond what is required by EU law.

Nothing indicates that Parkwood pursued grander designs than the contract dispute at hand.

Social partners meet in court

This section concerns cases where plaintiffs or interveners on their behalf are strongly associated with organised interests. Such cases replicate clashes between social partners in other fora. The most prominent of these is certainly *Laval*. The subject matter is similar to that in *Viking*, but here the plaintiff received the support of the largest Swedish employer association. Laval un Partneri was a Latvian company that was contracted to build a school in the Swedish town of Vaxholm. The conflict began when negotiations between Laval and the Swedish Building Workers Union (Bygnads) about a collective agreement for Laval's workers broke down and Laval signed an agreement with a Latvian union instead. Bygnads subsequently initiated a blockade of the building site, supported in sympathy action by the Swedish Electrical Workers Union. In response, Laval initiated legal proceedings against the Swedish unions, relying on the freedom to provide services. Laval entered bankruptcy proceedings before the case was resolved. Since Laval seemed unable to afford prolonged litigation, the Confederation of Swedish Enterprise decided to support the legal action financially, stating that it was 'incredibly important' to clarify the question to what extent industrial action could be taken against foreign undertakings in order to bring about a Swedish collective agreement (Danielsson 2005, *my translation*) and that the unions' boycott action was 'entirely disproportionate' – industrial action should not restrict the freedom of foreign companies to provide services in Sweden (Svenskt Näringsliv n.d., *my translation*). In the proceedings before the CJEU, Laval was represented by Martin Agell, a lawyer with the Confederation of Swedish Enterprise (Agell Advokatbyrå n.d.), while the two Swedish unions were represented by Dan Holke, head counsel at LO-TCO Rättsskydd (Örnerborg 2020), the joint litigation unit of the two large umbrella organisations of Swedish blue- and white-collar unions, together with Peter Kindblom and Ulf Öberg, two lawyers in private practice. The Swedish government later nominated Öberg as judge at the General Court, which he joined in 2016. Julien Louis describes the unions' legal strategy in great detail (Louis 2022a, 2022b). ETUC took the occasion of *Viking* and *Laval* to set up a specialised litigation unit that coordinated union strategies in the two cases and provided lobbying efforts to influence the submissions of the Commission and the intervening member states. This unit later replicated lobbying efforts in the cases of *RegioPost* (discussed above) and *Sähköalojen ammattiliitto* (discussed below) (Louis

2022a: 22). Comparatively less is known about the strategies of the employer association. Nonetheless, this is a clear instance where social partners faced off in CJEU proceedings with an interest in the future development of EU market integration (Seikel 2015).

Laval was not the only instance of litigation supported by peak employer associations leveraging EU free movement law to target unions' right to strike in cross-border situations. Similar cases were brought in other Nordic countries. In Denmark, the peak employer association Dansk Arbejdsgiverforening in 2005 initiated a court case against a number of Danish unions for organising sympathy actions in labour conflicts with three eastern European companies active in Denmark (Timber-House-Baltic SIA, Il Raivista and WIPOL). The factual circumstances in this case were very similar to *Laval* (Neergaard and Nielsen 2010: 458). The employer association asked the Danish Labour Court to declare the sympathy actions illegal for being disproportionate. From commentary and court documents it is not clear in how far the Danish employers raised EU free movement arguments, but the Danish Labour Court argued in its judgement (before the CJEU decided *Laval*) that it was not necessary to refer the question to the CJEU, since EU law (in its interpretation) did not render the unions' actions illegal. Rather, it held that the trade unions had an 'evident and strong' interest in ensuring that work in Denmark is done under the conditions of Danish collective agreements, even where that work is carried out by foreign companies employing foreign workers (pages 7–8 of the judgement, *my translation*). In Norway, too, a peak employer association pursued litigation to question the applicability of Norwegian collective agreements to cross-border undertakings. The case concerned a 2008 decision by the Norwegian Tariff Board (an independent administrative entity) to declare a collective agreement for the engineering sector applicable to the entirety of the shipbuilding industry. This action was specifically designed to compensate for the Norwegian unions' lack of opportunity to ensure the application of Norwegian collective agreements to posted workers (Evju 2014). STX Norway Offshore AS and eight other shipyard owners challenged the Tariff Board's decision before the Oslo District Court on the grounds that the collective agreement's terms concerning overtime pay and expenses for travel, board and lodging infringed against the posted workers directive, which is binding on Norway as a member of the EEA. The companies were supported in their legal action by Kurt Weltzien, a lawyer with the Confederation of Norwegian Enterprise (NHO n.d.), the Norwegian peak employer organisation. Courts at various instances, including the Norwegian Supreme Court, held against the employers. The question was also referred to the EFTA Court for an advisory opinion (case E-2/11), but the final

judgement by the Norwegian Supreme Court contradicted the EFTA court in important aspects (Barnard 2014).

In these three cases, plaintiffs were supported by employer organisations and trade unions were put on the defensive. They follow a pattern that is consistent with Scharpf's assertion that litigant constellations will 'reflect the interest of parties who have a major economic or personal stake in increased factor mobility' (Scharpf 2010: 220). Other cases, however, break with this pattern and speak against the notion that 'the Court will not see […] cases representing the interests that benefit from existing national laws and regulations' (Scharpf 2010: 220). After *Viking* and *Laval*, some union umbrella organisations founded or upgraded existing specialised litigation units (Louis 2022a). These units devised strategies to wrest back some of the lost ground in strategic litigation of their own. A prominent case in my sample is *Sähköalojen ammattiliitto*, initiated by a Finnish electrical workers' union on behalf of 186 Polish workers, who joined the union after they had been posted by their Polish employer (Elektrobudowa) to work on the construction of the nuclear plant Olkiluoto in western Finland (Hellsten 2015). The union, represented by Jari Hellsten, counsel at the litigation unit of the Central Organisation of Finnish Trade Unions (SAK 2015), claimed that Elektrobudowa was required to offer its workers remuneration in line with the Finnish collective agreement for electrical workers. The union's submission to the CJEU argued strongly against the prior interpretation of the Posted Workers Directive in *Laval*, pointing out its mismatch with the legislative history of the directive, and achieved a partial retraction of the CJEU's previous interpretation of the Directive as establishing a (maximum) ceiling of employment conditions that member state authorities and unions can demand from posting companies (Hellsten 2015: 265). The union litigants in this sense succeeded in restoring some of the original social content of the Posted Workers Directive (Davies and Kramer 2021) against an interpretation that relied heavily on the freedom to provide services. Hellsten is a seasoned litigator who has argued several cases before the CJEU (Hellsten 2017). German unions also have specialised litigation units with a focus on EU law. The German Trade Union Confederation (DGB) offers broad legal services through a wholly union-owned private law firm (DGB Rechtschutz GmbH), which in turn operates a specialised unit on appeals, focussing on litigation before German high courts and the CJEU (DGB Rechtsschutz n.d.). Their counsel Rudolph Buschmann represented two employees of a German hospital that was transferred from public ownership to the private company Asklepios Kliniken GmbH. The two employees retained a collective agreement clause for the public sector in their work contracts, which were transferred to Askplepios. As in *Alemo-Herron*, the company refused to adjust the terms of their contracts to changes made in

the collective agreement after the transfer into private hands. In a partial correction of *Alemo-Herron*, the union successfully argued before the CJEU that such contractual clauses stipulating dynamic adjustments retain their validity, even though the new employer may not be represented in bargaining procedures for the collective agreement in question. Buschmann, too is a seasoned lawyer with multiple appearances before the CJEU (SPD Geschichtswerkstatt n.d.).

Cause-lawyering for market liberalism

Cases in this category are pursued by actors who have no apparent self-interest in the outcome and are clearly acting strategically, but who do not have direct ties to organised interests. The cases in my sample in which litigants fit this type all originate in Germany and concern the German system of labour representation on company boards. While many EU member states have comparable rules, German law mandates particularly strong representation. The 1976 German law on corporate co-determination stipulates that a third of the members of the supervisory board of companies with more than 500 employees must be employee representatives elected by company-wide ballot. For companies above 2000 employees, half of the supervisory board is to be made up of employee representatives. After the law came into force, the Confederation of German Employers' Associations (the peak employer association) launched an unsuccessful challenge before the German constitutional court, but after their loss corporate co-determination saw relatively little legal conflict in the ensuing decades. The more recent conflict started as an academic debate. A group of academics started arguing in the mid 2000s that corporate co-determination was discriminatory, since employee representatives on the supervisory board could only be elected by employees based in Germany (Rieble 2005). Employees of foreign subsidiaries of German companies do not participate in these elections. Proponents of this view argued that such discrimination was contrary to EU law since it was liable to make the exercise of free movement less attractive for employees if they stood to lose their voting rights upon moving to a foreign subsidiary (Hellwig and Behme 2009). Critics have pointed out that this position is voiced primarily by opponents of co-determination, who highlight the apparent discriminatory practice not to expand co-determination, but to dismantle it (Tornau 2015).

In 2014, two activist shareholders started pursuing litigation to settle this question in court. (Under German company law, any shareholder has the possibility to challenge the composition of a company's supervisory board.) One of these activists was German labour law professor Volker

Rieble, who had been among the first to argue against the conformity of the German corporate co-determination law with EU free movement law (Rieble 2005). Rieble is co-director of a 'centre for labour relations and labour law' at the Ludwig-Maximilians University in Munich (ZAAR n.d.-a). The centre, which also finances Rieble's position as chair in labour and civil law (ZAAR n.d.-b), is wholly financed by three employer organisations, the Bavarian and the Baden-Wuerttemberg Employers' Associations for the Metalworking and Electrical Industries and the German Federation of Chemical Employers' Associations (ZAAR n.d.-c), but Rieble has no official affiliation with these associations. In 2014, Rieble acquired a number of shares in the company Deutsche Börse, apparently only for the purpose of initiating a court challenge against the co-determination law (Tornau 2015: 35). The Landgericht Frankfurt allowed the challenge but did not follow Rieble's central argument.

In parallel to Rieble's efforts, another activist shareholder pursued a similar line of cases. Konrad Erzberger, a young lawyer and entrepreneur with no apparent vested interest in the issue of corporate co-determination also bought a handful of shares in a number of German companies with foreign subsidiaries and pursued a similar claim. His first two attempts, concerning the hardware retailer Hornbach AG in 2013, and BayWa, a company active in agriculture, building materials and energy, in 2014, were unsuccessful. His case against TUI AG, a large tourism company, ended up before the CJEU (which found against Erzberger's claims). Erzberger's motivation is somewhat obscure (Esslinger 2017). He does not personally stand to gain economically from a legal victory, yet he continues his pursuits as a serial litigator involved in 'about 50′ cases concerning co-determination (Bayer and Hoffmann 2018: 336; Behlau 2019). He wrote his dissertation on the same conflict (Bayer and Hoffmann 2018: 336). Another connection to academic debate exists in Caspar Behme, 'of counsel' to the firm Brandhoff Obermüller Partner (Brandhoff Obermüller Partner n.d.), which represented Erzberger in the *TUI* case. Behme has held several academic positions since 2013 (Behme n.d.). He has been the author of several pieces of (academic) criticism of German co-determination law since his time as a doctoral student (Hellwig and Behme 2009). Erzberger also employed Brandhoff Obermüller Partner as counsel in his legal action against BayWa, but it is unclear whether Behme was part of that team. Erzberger's legal counsel in the Hornbach case is not known, but Caspar Behme published academic commentary on the case (Behme 2013).

Discussion and conclusions

This article has employed the perspective of legal mobilisation research to study the phenomenon of 'market liberalisation through law'. It pursued

the question who exactly mobilises EU free movement law to challenge national prerogatives of organised labour, concentrating on a three-fold typology of litigants: individual one-shotters, organised repeat players, and cause lawyers. An investigation of 14 salient court cases at the national and EU level highlighted that litigation driving 'market liberalisation through law' was initiated by all three types of litigants.

One take-away from this is that assumptions about a self-sustaining feedback loop of litigation generating more litigation (Scharpf 2010; Stone Sweet and Brunell 1998) is incomplete. Litigation in a core area of the internal market is not only driven by narrowly self-interested market participants, but to a considerable degree by purposeful action of organised interest and cause lawyers. Moreover, Scharpf's (2010: 220) expectation that cases will reflect the interests of actors with a major stake in factor mobility and not interests that benefit from existing national laws and regulations has its limits in the new-found efforts of trade unions to invest in litigation strategies. Trade unions have found ways to mobilise EU law in order to protect existing national laws and regulations (Louis 2022a, 2022b). Such litigation has focussed on restoring an interpretation of secondary EU labour legislation that does not rely heavily on market freedoms. Attention to such 'anomalies' will allow for a better understanding of the dynamics at play.

The argument that motivated this article was that the identity of the litigants matters for what happens next. Identifying them is a first step in a broader research agenda linking litigants to outcomes, given that we know the outcome varies substantially. In a next step, research can link the typology of litigants to immediate case outcomes. Research on party capability (Nelson and Epstein 2022; Szmer *et al.* 2016) has highlighted the importance of experienced legal counsel in pursuing successful legal claims. Different types of litigants will have different access to such counsel. Individual one-shotters have traditionally been in the least favourable position to secure quality counsel. Parties 'with an economic interest in increased factor mobility' (Scharpf 2010: 220), however, stand to profit from the 'corporatization of Euro-lawyering' (Pavone 2022: 197), provided that they can afford such services. I would expect substantial variation on this point. Trade unions and employer organisations as organised interests can draw on in-house legal expertise with extensive experience in litigating EU law disputes. Cause lawyers, in turn, are by definition legal experts. Beyond the courtroom, several hypotheses can be formulated regarding the broader impact of litigation by different types of litigants. Since one-shot litigants do not have a primary interest in rule change, impact beyond the immediate case outcome will depend on who takes notice and translates judgments into political demands. Michael Blauberger,

for example, demonstrates how German political parties seized on the *Rüffert* judgement to either remove or shore up protections for labour in public procurement (Blauberger 2012). In the absence of broader mobilisation, governments hostile to liberalising judgments can find ways to contain the policy-implications of judgments (Conant 2002), for example by falling back on 'protective equivalents' (Werner 2017) – regulatory alternatives that the court had not pronounced on. Cause lawyers, too, face the problem of translating success in court into broader policy change if they are unaffiliated with organised interests. In contrast to one-shot litigants, however, they can resort to serial litigation to put pressure on the policy status quo. Organised interests, on the other hand, have the capacity to incorporate litigation into broader mobilisation campaigns. Efforts by organised interests can amplify or neutralise real world effects of CJEU judgments (Refslund *et al.* 2020, Seikel 2015). Their litigation comes with in-built compliance constituencies (Kahler 2000: 675). In sum, we would expect legal mobilisation of EU free movement law to unfold differently depending on the nature of the litigants. This could go some way towards explaining variance in outcomes.

Finally, I would like to highlight that literature on EU legal mobilisation would also benefit from greater attention to market liberalisation – or economic issues more broadly (tax and competition policy would also be fruitful fields). Doing so might correct for a bias in this literature that at times overemphasises law as a 'weapon of the weak' (Jacquot and Vitale 2014). Powerful organised interests use litigation quite decisively to their advantage. While there is some work done on legal mobilisation strategies of trade unions (Louis 2022a, 2022b), employer organisations and large companies remain a blind spot.

Notes

1. Art. 153(5) TFEU specifically excludes EU legislative competences to regulate pay, the right of association, the right to strike or the right to impose lock-outs.
2. This is indicated at para. 24, xvii in the judgement of the UK Court of Appeal, [2005] EWCA Civ 1299.

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