

THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE MEGA-POLITICS OF POSTED WORKERS

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I

INTRODUCTION

The Court of Justice of the European Union (CJEU)¹ is often criticized for judicialization of politics and at times, the CJEU is called into the terrain of mega-politics. The posting of workers in the European Union (EU) is such a terrain of mega-politics, characterized by deep conflicts between EU free movement principles and national social protection. A “posted worker” is employed in one EU member state, but temporarily sent by his or her employer to another EU member state to provide a service. Since posted workers do not migrate permanently, they principally remain subject to the law of their sending country. They are also entitled to a core of rights in the receiving country. This constellation triggers fundamental questions about social justice between and within EU member states, which are mega-political in all three respects theorized in the introduction to this special issue.² At the inter-state level, the basic question is which country’s labour and social regulation applies to posted workers. At the societal level, the opportunity for firms to rely on workers governed by foreign rules may call into question domestic compromises between capital and labour, like wage levels and social security. Finally, conflicts about the posting of workers invoke sovereignty concerns, begging the question of how to balance the freedom to provide services, protected by EU rules, and the regulation of labour relations, regarded as a matter of national sovereignty by EU member states.

After the EU Eastern enlargements in 2004 and 2007, posting of workers has substantially increased. In industries such as construction, willing citizens from poorer, new EU member states have had increased opportunities to work at comparatively low wage levels in richer Western and Northern EU member states.³ In the wake of this increased labour mobility, the EU free movement

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1. In the following Article, we also use the abbreviation CJEU for the Court of Justice of the European Union for the earlier period, when the official name was the European Court of Justice (ECJ).

2. Karen J. Alter & Mikael Rask Madsen, *The International Adjudication of Mega-Politics*, 84 *LAW & CONTEMP. PROBS.* no. 4, 2021, at 1.

3. See JENS ARNHOLTZ & NATHAN LILLIE, *European Integration and the Reconfiguration of*

rules have become contested in terms of their consequences for national labour markets and welfare states.⁴ Arguably, this contestation of free movement is part of a larger trend towards politicization of European integration, that is, the mass public's increasing engagement with and contestation of European integration.⁵ Eurosceptic and anti-immigration attitudes are often closely related.⁶ Political forces have thus mobilized against both European integration and immigration within and into the European Union. European scholars even suggest that a new political cleavage has emerged, that is, a new line of conflict, which divides European citizens and the politics of political parties on whether they support or reject European integration and its free movement regime. Different labels for this new cleavage have been proposed,⁷ which share the common notion that traditional cleavages based on class or religion are insufficient to understand European politics today.⁸

In this article, we examine what happens when the CJEU is called upon to intervene in a highly political subject-matter that divides significant segments of society and invokes mega-political disputes.⁹ The puzzle for us is two-fold, bringing in both politicization and judicialization. We thus examine 1) the

National Industrial Relations: Posted Work as a Driver of Institutional Change, in POSTED WORK IN THE EUROPEAN UNION. THE POLITICAL ECONOMY OF FREE MOVEMENT 1, 5–6 (Jens Arnholtz & Nathan Lillie eds., 2020).

4. Susanne K. Schmidt, Michael Blauburger, & Dorte Sindbjerg Martinsen, *Free Movement and Equal Treatment in an Unequal Union*, 25 J. OF EUR. PUB. POL'Y, 1391, 1391 (2018).

5. Liesbet Hooghe & Gary Marks, *A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus*, 39 BRIT. J. OF POL. SCI. 1, 5 (2009).

6. Dimiter Toshkov & Elitsa Kortenska, *Does Immigration Undermine Public Support for Integration in the European Union?*, 53 J. OF COMMON MKT. STUD., 910, 911 (2015).

7. See, e.g., HANSPETER KRIESI, EDGARD GRANDE, ROMAIN LACHAT, MARTIN DOLEZAL, SIMON BORNSHIER, & TIMOTHEOS FREY, WEST EUROPEAN POLITICS IN THE AGE OF GLOBALIZATION 9 (2008) (explaining demarcation vs. integration cleavage); Liesbet Hooghe, Gary Marks, & Carole J. Wilson, *Does Left/Right Structure Party Positions on European Integration?*, 35 COMP. POL. STUD. 965, 689 (2002) (distinguishing between GAL (green/alternative/libertarian) vs TAN (traditionalism/authority/nationalism)); Catherine E. De Vries, *The Cosmopolitan-Parochial Divide: Changing Patterns of Party and Electoral Competition in the Netherlands and Beyond*, 25 J. OF EUR. PUB. POL'Y 1541, 1551–52 (2018) (proposing to speak of a “cosmopolitan-parochial divide” to capture essentially the same new cleavage).

8. For further elaboration of how globalization and European integration have affected traditional cleavages, see also Rafaela M. Dancygier & Stephanie Walter, *Globalization, Labor Market Risks, and Class Cleavages*, in THE POLITICS OF ADVANCED CAPITALISM 133 (Pablo Beramendi et al. eds., 2015); Maurizio Ferrera & Alessandro Pellegata, *Worker Mobility Under Attack? Explaining Labour Market Chauvinism in the EU*, 25 J. OF EUR. POL. 1461 (2018); Felix Karstens, *How Public Discourse Affects Attitudes Towards Freedom of Movement and Schengen*, 21 EUR. UNION POL. 43 (2020); Céline Teney Onawa Promise Laceywell & Pieter De Wilde, *Winners and Losers of Globalization in Europe: Attitudes and Ideologies*, 6 EUR. POL. SCI. REV. 575 (2014); Stephanie Walter, *Globalization and the Demand-Side of Politics: How Globalization Shapes Labor Market Risk Perceptions and Policy Preferences*, 5 POL. SCI. RES. AND METHODS 55 (2017).

9. Our case makes it possible to empirically investigate the combination of a highly political subject matter and supranational judicial intervention as presented by Alter and Madsen in the introduction to this special issue. Alter and Madsen assume that such combination will increase the likelihood of adverse political response, making mega-politics cases the most likely cases for political backlash. See Alter and Madsen, *supra* note 2.

politicization of the posting of workers in general and of judicialized conflicts about the posting of workers in particular, and 2) the impact of politicization on judicial decision-making on the posting of workers. We are ultimately interested in how these two processes relate. We cannot establish a causal link between politicization and judicialization, but we seek to uncover a potential relationship between the two processes by means of new data and by asking two research questions (RQ):

RQ1: To what extent has the posting of workers been politicized, and has judicialization further increased or decreased politicization of the issue?

RQ2: In light of politicization of posted work, how did CJEU jurisprudence evolve with respect to a) the Court's assertiveness or self-restraint and to b) its substantive impact, that is, its influence on the subsequent legislative negotiations?

To address these questions, we will examine how sequences of politicization and judicialization unfold over time and relate to one another. In principle, EU regulation on posting of workers contains all three kinds of mega-political disputes. The extent to which these conflicts have actually reached mass public attention remains an empirical question. If they have reached such attention, we must also ask whether such politicization already characterized the field before adjudication on the matter, as well as how adjudication impacts politicization. RQ1 thus asks for the sequences of politicization and judicialization and how they unfold in relation to one another. RQ2 digs further into the central question of what happens in the aftermath of adjudication of mega-politics as formulated in the introduction to this special issue.¹⁰

This article is structured as follows. Part II describes in greater detail the three kinds of mega-political issues involved in conflicts about the posting of workers in the EU. Subsequently, in Part III, we discuss the concepts of judicialization and public backlash on an abstract level and more specifically with respect to the field of posting of workers, including an overview of early CJEU case law on posting until its famous *Laval* ruling, challenging the right to collective actions in relation to free movement of services.¹¹ Part IV then introduces the concept of politicization, before measuring the politicization of the posting of workers over time, both as a general policy issue and specifically when related to CJEU jurisprudence. For this, a novel data set of newspaper articles from five EU member states (Austria, Denmark, France, Germany, Spain) between 2000 and 2020 was collected and coded in terms of the three key dimensions of politicization¹²: salience, actor involvement and polarization. We find that since EU Eastern enlargement in 2004, the issue of posted work has been politicized, that is, it has attracted considerable media attention and involved a broad range

10. Alter and Madsen, *supra* note 2.

11. Case C-346/06, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

12. Section IV A, *infra*, further details on how politicization can be conceptualized, operationalized, and measured empirically along the three dimensions.

of governmental as well as non-governmental actors with polarized positions. Notably, when the CJEU developed its highly contested Laval jurisprudence on the issue of posting, it did not trigger politicization as such, but rather entered an already established terrain of mega-politics. Part V analyzes how the CJEU responded to politicization and traces its more recent case law on the posting of workers after Laval. While we cannot establish a direct causal link, we show that the Court has adopted a more restrained interpretation of the freedom to provide services after the massive politicization of the Laval judgement and, thereby, also helped to overcome obstacles to a political solution at the EU level, eventually leading to the revision of the Posted Workers Directive in 2018. Part VI concludes by summarizing the main findings of our analysis and their relation to the overall topic of the special issue on mega-politics.

II

THE MEGA-POLITICS OF POSTED WORK

As outlined in the introduction to this special issue, mega-politics litigation can be i) inter-state driven “where important state interests diverge,” ii) social-cleavage driven, when strong societal cleavages undergird an essentially domestic dispute, or iii) sovereignty-driven, when only individual countries are involved, but “absent international judicial involvement, there would be no legal issue to adjudicate.” While these are analytically distinct categories of mega-politics, the mega-politics of posted work in the EU combines aspects of all three categories.

To begin, disputes about EU market freedoms are often *inter-state conflicts* about the costs and benefits of economic liberalization. In the area of posted work, these conflicts divide economically more developed from less developed EU member countries. The former mostly receive posted workers and seek to protect their higher standards in terms of labour rights and social protection against “social dumping.”¹³ By contrast, economically less developed member states are mostly posting workers. From their perspective, lower wages and production costs are their main competitive advantages, which are threatened by protectionism, if higher social standards and wages for posted workers are required.¹⁴ This conflict between receiving and sending countries already characterized the negotiations of the original Posted Workers Directive in the early 1990s.¹⁵ After Eastern Enlargements in 2004 and 2007, economic heterogeneity within the EU increased considerably. That also increased the

13. See Frederic De Wispelaere & Jozef Paolet, *The Benefits of Posting: Facts and Figures on the Use and Impact of Intra-EU Posting*, POSTED WORK IN THE EUROPEAN UNION: THE POLITICAL ECONOMY OF FREE MOVEMENT 31, 34 (2019).

14. See Bernard Steunberg, *How Implementation Affects Revision: EU Decision-Making on Changing the Posting of Workers Directive*, JOURNAL OF COMMON MARKET STUDIES 1, 7 (describing the different EU member state preferences on facilitating unhindered posting of workers or on increasing the social protection of posted workers).

15. See WERNER EICHHORST, EUROPÄISCHE SOZIALPOLITIK ZWISCHEN ZATIONALER AUTONOMIE UND MARKTFREIHEIT [EUROPEAN SOCIAL POLICY BETWEEN NATIONAL AUTONOMY AND MARKET FREEDOM] 172–77 (2000).

potential for this kind of inter-state conflict.¹⁶ Redistributive conflict is even exacerbated in the case of posted work, as receiving states largely depend on sending states regarding the enforcement of labour regulation.¹⁷ Moreover, whereas most Western EU member states shielded their labour markets by restricting the free movement of workers from Central and Eastern Europe for up to seven years after enlargement, posted work falls under the free movement of services and was not subject to transitional arrangements. Consequently, the number of posted workers in the EU rose immediately after Eastern Enlargement and has continued growing since then.¹⁸ The most politicized judgement on posting — and arguably one of the most politicized CJEU cases ever — the *Laval* ruling¹⁹ (C-341/05) in 2007 — was also characterized by this pre-existing divide between EU member states. Before the case was heard, sixteen governments had submitted written observations to the CJEU, which clustered around two opposed positions: all newer member states advocated a liberal interpretation of the services freedom, whereas almost all old member states (except for the UK and Ireland) supported a more restrictive interpretation.²⁰ Whatever the CJEU had decided, it would have upset one of these two groups.

Secondly, conflicts about posted work reflect fundamental *social cleavages*. As our media analysis below will show in greater detail, the issue of posting is not just a governmental affair. It mobilizes a broad spectrum of stakeholders at the domestic level. Essentially, their conflict is between capital and labour.²¹ Posted work provides one opportunity for employers to reduce labour costs in the EU's internal market, which increases competitive pressure on the domestic workforce and weakens the bargaining position of trade unions.²² Unlike other forms of international wage and locational competition, posted work arrangements even allow firms to employ local and foreign workers side-by-side while arbitraging between different national labour regulations.²³ Domestic cleavages and power relations have been found to strongly shape member state responses to CJEU posted workers cases.²⁴ For example, German *Länder* responses to the Court's

16. Martin Höpner & Armin Schäfer, *Embeddedness and Regional Integration: Waiting for Polanyi in a Hayekian Setting*, 66 INT'L ORG. 429, 436–38 (2012).

17. Susanne K. Schmidt, *When Efficiency Results in Redistribution: The Conflict over the Single Services Market*, 32 W. EUR. POL. 847, 855 (2009).

18. De Wispelaere & Pacolet, *supra* note 13.

19. *Laval*, *supra* note 11.

20. Nicole Lindstrom, *Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?*, 48 J. OF COMMON MKT. STUD. 1307, 1316 (2010).

21. See generally Daniel Seikel, *Class Struggle in the Shadow of Luxembourg: The Domestic Impact of the European Court of Justice's Case Law on the Regulation of Working Conditions*, 22 J. OF EUR. PUB. POL'Y 1166 (2015) (explaining that the national distribution of power between capital and labor affects the domestic impact of CJEU jurisprudence) [hereinafter *Class Struggle in the Shadow of Luxembourg*].

22. See *id.* at 1176 (explaining that the *Laval* decision weakened the domestic bargaining power of trade unions).

23. Schmidt, *supra* note 17, at 856.

24. See Michael Blauberger, *With Luxembourg in Mind: The Remaking of National Policies in the Face of ECJ Jurisprudence*, 19 J. OF EUR. PUB. POL'Y 109, 118–21 (2012) (describing the different responses within Germany to the *Rüffert* ruling).

Rüffert²⁵ ruling from 2008 greatly differed between economically liberal and socially democratic governments.²⁶ And whereas the Laval ruling weakened the position of Swedish trade unions, its effects were less pronounced in Denmark due to a cross-class coalition of trade unions and employers seeking to protect the ‘Danish model.’²⁷ Importantly, domestic cleavages not only shape the application of CJEU jurisprudence, but are also at the origin of posted workers cases. In the Laval conflict, Swedish employers even lent financial support to the foreign service provider and used the case as an “opportunity . . . to challenge Swedish labour and social laws.”²⁸ After all, Laval did not create a conflict between member states or social partners. It originated from a domestic dispute with a strong international dimension.

Finally, posted workers cases may trigger *sovereignty concerns*, which would not exist without European jurisprudence. With its landmark judgement in *Rush Portuguesa Limitada v. Office National d’Immigration*, the CJEU established that posted workers are not covered by the free movement and equal treatment of workers (as they do not enter the labour market of the host country), but by the free movement of services (and, therefore, are primarily subject to the labour).²⁹ Consequently, many posted workers cases are essentially about the extent to which EU member states may apply and enforce their own labour laws vis-à-vis posted workers without unduly restricting the services freedom. This question gets even more sovereignty-sensitive when it touches upon the autonomy of social partners rather than leaving conflicts to international courts.³⁰ Even though EU Treaty law (Art. 153 TFEU, ex-Art. 137 TEC) explicitly protects the right to collective action as a national competence, the Laval judgement challenged collective actions of Swedish trade unionists as restrictions of the free movement of services. What is more, it particularly affected Nordic EU member states, which are not only characterized by autonomous collective bargaining, but also by a strong notion of parliamentary sovereignty and, accordingly, a greater reluctance towards supranational judicial review.³¹

In sum, whenever the CJEU is called to rule on the posting of workers, it enters the terrain of mega-politics in one way or another. However, as stated in the introduction, the extent to which the posting of workers actually attracts mass public attention, that is, whether it is politicized before the CJEU is asked to

25. Case C-346/06, Dirk Rüffert v. Land Niedersachsen, 2008 E.C.R. I-01989.

26. See *id.* See also Detlef Sack, *Europeanization Through Law, Compliance, and Party Differences: The ECJ’s ‘Rüffert’ Judgment (C-346/06) and Amendments to Public Procurement Laws in German Federal States*, 34 J. OF EUR. INTEGRATION 241, 253–54 (2012).

27. *Class Struggle in the Shadow of Luxembourg*, *supra* note 21, at 1174.

28. Lindstrom, *supra* note 20, at 1314.

29. Case C-113/89, *Rush Portuguesa Ltd. v. Off. Nat’l d’Immigr.*, 1990 E.C.R. I-1417.

30. See Blauburger, *supra* note 24, at 117 (noting the differences in the Danish and Swedish political responses to the *Laval* inquiry).

31. Marlene Wind, Dorte Sindbjerg Martinsen & Gabriel Pons Rotger, *The Uneven Legal Push for Europe: Questioning Variation when National Courts Go to Europe*, 10 EUR. UNION POL. 63, 72–73 (2009) (explaining the relatively low number of case referrals from Nordic EU member state courts to the CJEU by the general reservations against strong judicial review in these countries).

adjudicate and how adjudication affects further politicization, remains an empirical question. Before turning to our empirical analysis, we present the judicialization of posting of workers in the EU.

III

THE JUDICIALIZATION OF POSTED WORK

The posting of workers in the EU triggers mega-political conflicts, and the potential for such conflicts increases with economic heterogeneity. Hence, it did not take long after EU Eastern enlargement in 2004 until several major conflicts about the posting of workers reached European courts. In this part, we first discuss on an abstract level the concept of judicialization, i.e., the transfer of political disputes into the legal arena as well as potential feedback to judicialization, before describing the judicialization of conflicts about posted workers in the EU.

A. Judicialization and Political Reactions

The judicialization of politics is a central narrative in describing the interplay between law and politics in the E.U. Judicialization of politics generally refers to a process where courts and judges increasingly intervene in politics and policymaking.³² The term judicialization has a dynamic connotation and generally seems to suggest a hierarchical relationship, where adjudication impacts the political—and not the other way around.³³

However, in mega-politics, a different dynamic is likely to play out. When the judiciary enters highly politicized issue areas, political reactions from involved parties should be expected.³⁴ Andreas Hoffmann, as well as Madsen, Cebulak &

32. See *id.*; Karen J. Alter, Emilie M. Hafner-Burton & Laurence R. Helfer, *Theorizing the Judicialization of International Relations*, 63 INT'L STUD. Q. 449, 449 (2019).

33. At times, scholars even present judicialization as trumping legislative politics in the EU, implying that politics is framed and often decided by law rather than the EU legislator. See generally Gareth Davies, *The European Union Legislature as an Agent of the European Court of Justice*, 54 J. OF COMMON MKT. STUD. 846, 846–61 (2016) (describing the constraints imposed by CJEU jurisprudence on the EU legislature); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE and JACK HAYWARD & EDWARD C. PAGE, GOVERNING THE NEW EUROPE (expressing similar interpretations).

34. See Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 ANN. REV. OF POL. SCI. 93, 109 (2008) [hereinafter *The Judicialization of Mega-Politics*] (noting that political actors that are strongly against judicial decisions may aim to “clip the wings of overactive courts”). The extent to which judicialization actually impacts political outcomes depends on these subsequent political reactions. Politicians have different means at their disposal to quell the impact of unwelcome developments. See generally LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS, 200–30 (Princeton University Press 1988) (explaining the different methods by which Congress may curb the Court). See also RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 206 (Harvard University Press 2009) (explaining how the political sphere may curb the court, such as by sheer bureaucratic disregard). Such political reactions can be effective in quelling the impact of judicial decisions because courts depend on third party compliance and enforcement of their decisions for these to have a more general impact. See, e.g., *The Judicialization of Mega-Politics* at 110 (noting examples where American legislature hampered

Wiebusch distinguish between two forms of reactions; push-back and back-lash.³⁵ A “pushback” connotes a softer form of resistance where member states or other actors are unsatisfied with the development of a court’s jurisprudence and seek to influence its impact or subsequent development.³⁶ A “backlash” constitutes the more rare and severe form of resistance, which may ultimately reform or even dismantle the court as an institution.³⁷ When pushing back against the court, politicians may take the legislative road, changing and clarifying the law so that future litigation will stay out of mega-politics.³⁸ EU politicians may also try to override jurisprudence. Although overrides are rare, a credible threat thereof may be sufficient to push the Court to readjust its position.³⁹ Or politicians may push back by insufficiently implementing the judicial decision so that its impact is diminished or even neglected.⁴⁰

Thus, in theory, political pushbacks can restrain judicialization and its impact. However, we know little about the mechanisms or processes of such adverse political responses or when a pushback or backlash is strong enough to make the Court react. To examine the interplay between judicialization and politicization, we suggest a sequential model, where both who responds, as well as the scope or sphere of response, matter. The sequential logic is as follows: 1) the Court interprets the question before it, 2) political actors take positions on the judicial interpretations and respond, and 3) the Court takes into account or ignores the political responses in its subsequent interpretations. In the case of posted workers, the relevant positions which political actors may split around concerns the mega-political dimensions. Different positions may emerge between states on each side of the social cleavage and in relation to sovereignty. We expect the courts’ responsiveness to increase depending on how many member states take positions that align the Court’s interpretation. These governmental positions can

the implementation of court decisions); LISA CONANT, *JUSTICE CONTAINED: LAW AND POLITICS IN THE EUROPEAN UNION*, at 202 (Cornell University Press 2002) (describing EU member states’ strategies to limit the impact of CJEU jurisprudence at the implementation stage).

35. Andreas Hofmann, *Resistance Against the Court of Justice of the European Union*, 14 INT’L J. OF L. IN CONTEXT 258, 258 (2018). See generally Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT’L J. OF L. IN CONTEXT 197 (2018).

36. Madsen et al., *supra* note 35, at 198.

37. *Id.*

38. See MAURIZIO FERRERA, *THE BOUNDARIES OF WELFARE: EUROPEAN INTEGRATION AND THE NEW SPATIAL POLITICS OF SOCIAL PROTECTION* (Oxford University Press 2005); Dorte Sindbjerg Martinsen, *AN EVER MORE POWERFUL COURT?: THE POLITICAL CONSTRAINTS OF LEGAL INTEGRATION IN THE EUROPEAN UNION*, at 4–5 (Oxford University Press 2015) [hereinafter *The Political Constraints of Legal Integration in the European Union*] (noting that the legislature can override unwanted jurisprudence). See also Fabio Wasserfallen, *The Judiciary as Legislator? How the European Court of Justice Shapes Policy-Making in the European Union*, 17:8 J. OF EUR. PUB. POL’Y 1128, 1130 (2010) (describing how the CJEU may shape EU policy-making).

39. See Olof Larsson & Daniel Naurin, *Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU*, 70 INT’L ORG. 377, 379 (2016) (arguing that the “possibility of override is a significant factor affecting judicial behavior”).

40. See CONANT, *supra* note 34, at 226 (describing implementation gaps in the UK and Germany, as well as non-implementation in France).

be expressed by means of observations submitted to the Court before it decides a case, as well as after the judgement when member state representatives express their positions on a judicial decision in political debates and to the public. We also expect it to matter to the Court's responsiveness when non-governmental actors take positions on a judicial interpretation. Political responses then extend in scope, moving beyond the more insulated governmental sphere into the public sphere, where a wider opposition may mobilize against the Court. Such mobilization is likely to influence a wider spectrum of political actors and legislators. If adverse political responses to judicialization are expressed by only a few political actors who submit observations to the Court, we should not expect the judiciary to react. But when CJEU jurisprudence is met by both opposition from a wider set of member states, and politicization as expressed in the public sphere, the Court is under more severe pressure.⁴¹ We expect that the combination of member state opposition and politicization increases the likelihood of Court responsiveness.⁴²

Both judicialization and politicization are important dynamics in our area of mega-politics. To some degree, continued EU integration and the adoption of new legislative frameworks that govern cross-border interaction will inevitably lead to an increase in court cases concerning newly established or reformed law. In that sense, further integration will most likely also lead to an increase in the number of judicial disputes in the respective legal and policy areas.

We consider judicialization as expressing an increase in the power or authority of courts⁴³ (they get to judge on more cases), while politicization is a reaction to the issue at hand, as well as a reaction to the increase in Court authority litigating the issue at hand. Analytically, we will distinguish between the politicization of the overall issue, that is, posting of workers, and the politicization of specific court cases.

41. See Michael Blauburger & Dorte Sindbjerg Martinsen, *The Court of Justice in Times of Politicization: 'Law as a Mask and Shield' Revisited*, 27 JOURNAL OF EUROPEAN PUBLIC POLICY 382, 386 (2020) (analyzing the impact of governmental or public opposition against unwelcome CJEU jurisprudence).

42. It is, however, important to note that such combination has been far from the standard political response to CJEU jurisprudence. Many landmark CJEU decisions (for example, in relation to the internal market or gender equality) were concluded without noticeable governmental or public contestation, see generally RACHEL A. CHICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE* (2007); Joseph H. H. Weiler, *A Quiet Revolution: The European Court of Justice and its Interlocutors*, 26 COMP. POL. STUDIES 510 (1994). A large number of important cases of integration through law took place in a context of 'permissive consensus' and, even today, still goes unnoticed by politicians and by the public if too technical or too specific. Blauburger & Martinsen, *supra* note 41. In less politicized areas of integration, the Court is still likely to be the more unrestrained motor of integration as once found by Burley and Mattli. See generally Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41 (1993).

43. For similar conceptualization, see Alter et al., *THEORIZING THE JUDICIALIZATION OF INTERNATIONAL RELATIONS*, *supra* note 32.

B. The Judicialization of The Posting of Workers in the EU

The Court of Justice of the European Union stands out as an exceptionally powerful international court, and judicial integration is found to be one of the key dynamics in European integration. The CJEU is the key institution in an EU process of judicialization. Two legal procedures are particularly important for this process. The first very important procedure is the preliminary reference procedure where a national court refers questions to the CJEU on interpretations of European law. The procedure is laid down in Article 267 of the Treaty of the European Union and its function is to ensure uniform interpretation and validity of EU law across all the Member States.⁴⁴ The other procedure is the infringement procedure. Under it, the Commission can ask the CJEU for a judgement on a member state's compliance with European law.⁴⁵ As we will see below, both procedures have been invoked regarding posting of workers.

While most CJEU cases go unnoticed in the broader public and political discussion, some are met with a lot of attention and spark particularly intense public debates. Some of the most prominent cases of CJEU history stem from the area of posted work.

The posting of workers has been politically controversial since its early history. The European Commission first announced its intent to propose a posting of workers directive as part of its 1991 social action program.⁴⁶ The proposal COM (1991) 230 was presented in August that same year.⁴⁷ A long process of political negotiations and disagreements followed. Disagreements concerned the balance between free movement principles and the social protection of workers, between posting and hosting Member States, between EU regulation and national law and practices, and along more ideological lines between left and right. The year before the start of negotiations, the *Rush Portuguesa* case concluded. In the case, the CJEU concluded that Community law did not preclude Member States from applying national labour law or collective agreements onto posting firms.⁴⁸ Hosting Member States thus used the case as a justification for enacting national labour law onto posted workers.

In its proposal, however, the Commission took a different stance, aiming to modify the impact of the caselaw, which it found to work against the internal market principles.⁴⁹ The Commission proposed Article 3.2, under which workers

44. See Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 0164.

45. This procedure is laid down by Article 258 of the Treaty of the European Union. See Consolidated Version of the Treaty on the Functioning of the European Union art. 258, May 9, 2008, 2008 O.J. (C 115) 0160.

46. Eeva Kolehmainen, *The Directive Concerning the Posting of Workers: Synchronization of the Functions of National Legal Systems*, 20 COMP. LAB. L. & POL'Y J. 71, 79 (1998).

47. *Commission Proposal for A Council Directive Concerning the Posting of Workers in the Framework of the Provision of Services*, COM (1991) 230 final (Aug. 30, 1991).

48. See *Rush Portuguesa*, *supra* note 29, at ¶ 18.

49. See Paul Davies, *The Posted Workers Directive and the EC Treaty*, 31 INDUS. L. J. 298, 300 (2002) (detailing the Commission's response to member-state legislation after the *Rush Portuguesa* case).

posted for less than three months would be subject to the home Member State's labour laws.⁵⁰ The European Parliament and the majority of member states in the Council fiercely opposed this part of the proposal and successfully made their case with reference to the *Rush Portuguesa* case, so that in the adopted posting of workers directive, the period during which the home Member State's legislation would be applicable was reduced to only eight days.⁵¹ This historical background, as well as subsequent developments, make the posting of workers a prime example for what happens when the CJEU steps into a terrain of mega-politics, where both dynamics of judicialization and politicization are in play.

The CJEU has often been asked to decide issues related to posting of workers, especially since EU Eastern enlargement in 2004 (see Figure 5). As was already introduced above, the Court initiated its distinct jurisprudence on posted workers by subsuming them under the free movement of services in *Rush Portuguesa* in 1990.⁵² That laid the ground for the posting of workers directive 96/71 as adopted in 1996.⁵³ The directive sets out how the laws on minimum wages, working time, and paid annual leave of the host member state apply to posted workers.⁵⁴ However, these laws in the host member state represent only the most basic floor of protection. The directive also establishes that Article 3.1 "shall not prevent application of terms and conditions of employment which are more favourable to workers."⁵⁵ Furthermore, the directive adds that rights can be derived from collective agreements, not only from legislation,⁵⁶ and that the hosting Member State may take further measures in relation to posted workers than those laid down in Article 3.1.⁵⁷ The original directive as adopted thus aimed to strike a delicate balance between internal market principles and social protection.

50. See Martinsen, *supra* note 38.

51. See *id.*

52. See *Rush Portuguesa*, *supra* note 29, at ¶ 12.

53. Directive 96/71, of the European Parliament and of the Council of 16 December 1996 Concerning the Posting of Workers in the Framework of the Provision of Services, 1996 O.J. (L 18) 1 (EC).

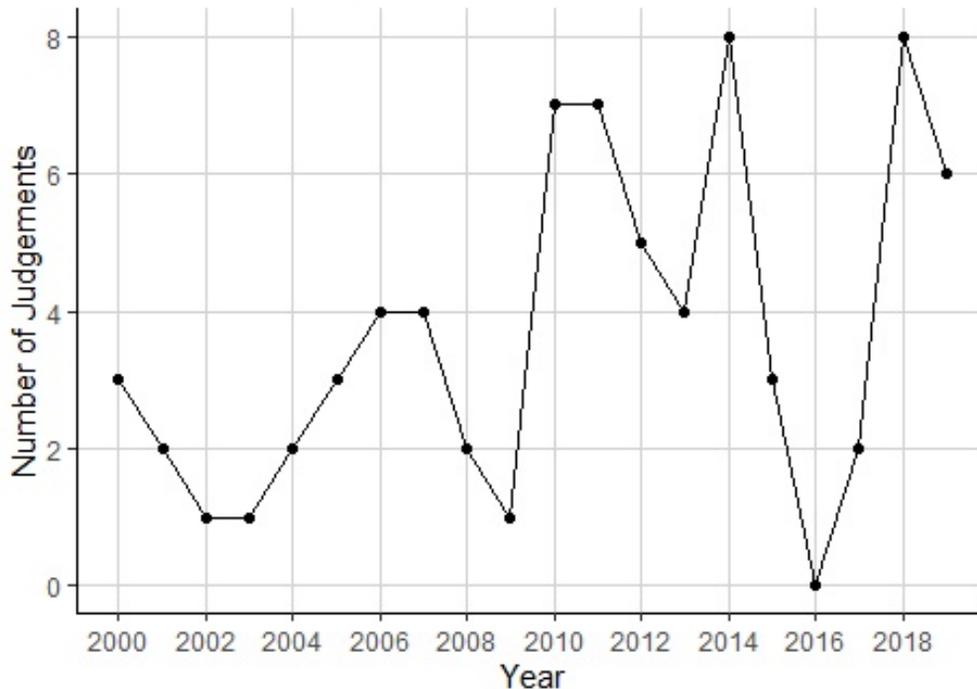
54. *Id.* at art. 3.1.

55. *Id.* at art. 3.7.

56. *Id.* at art. 3.8.

57. *Id.* at art. 3.10.

Figure 1: CJEU judgements on posting of workers 2000–2019



This balance was, however, called into question after EU Eastern enlargement and led to the highly controversial Laval quartet of cases in 2007–2008. In the four cases *Viking*,⁵⁸ *Laval*,⁵⁹ *Ruffert*,⁶⁰ and *Commission v. Luxembourg*,⁶¹ the CJEU gave more consideration to the free movement principles against national labour regulation. In *Viking*, the Court ruled that the right to strike can only be exercised within certain limits.⁶² The case concerned the right to strike in relation to the right of establishment in Article 42 of the Treaty.⁶³ In *Laval*, the Court followed suit and concluded that the Treaty’s Article 49 (now Article 56 TFEU) and Article 3 of the posting of workers directive meant that a trade union could not force a posting firm to sign a collective agreement.⁶⁴ A posting firm could not be obliged to more favourable working conditions than

58. Case C-438/05, Int’l Transp. Workers’ Fed’n & Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti, 2007 E.C.R. I-10806.

59. Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet, 2007 E.C.R. I-11767.

60. Case C-346/06, Dirk Ruffert v. Land Niedersachsen, 2008 E.C.R. I-01989.

61. Case C-319/06, Comm’n v. Grand Duchy of Lux., 2008 E.C.R. I-04323.

62. See *Viking*, *supra* note 58, at ¶ 44.

63. *Id.* at ¶ 27.

64. See *Laval*, *supra* note 11, at ¶ 111.

the minimum conditions set in the posting of workers directive.⁶⁵ In *Rüffert*, the Court found that the Public Procurement Act in the German state Lower Saxony imposed an unjustified restriction of the services freedom by requiring firms bidding for tenders to commit themselves to pay minimum wages according to local collective agreements.⁶⁶ In the last case, *Commission v. Luxembourg*, the Commission argued that Luxembourg had not transposed Articles 3.1 and 3.10 of the posting of workers directive correctly because it imposed too many national standards on posting firms.⁶⁷ The Court followed this argument and laid down that Article 3.10 constituted a derogation of the principle of freedom to provide services and, therefore, had to be interpreted restrictively.⁶⁸

To capture *judicialization*, we identified crucial court cases that have been decided on posting of workers during the analyzed period (see Table 1). By selecting and focusing on specific court cases, we can identify the dynamics that occur in relation to specific events, that is, in this case CJEU judgements that are a primary expression of the judicialization of the issue areas under consideration.

Table 1. Crucial court cases

Posting of workers
<ul style="list-style-type: none"> • Viking (C-438/05) • Laval (C-341/05) • Commission vs Luxembourg (C-319/06) • Rüffert (C-346/06) • Regiopost case (C-115/14) • ESA (C-396/13) • Bundesdruckerei GmbH v Stadt Dortmund (C-549/13) • Dobersberger (C-16/18)

IV

TRACING THE POLITICIZATION OF POSTED WORK AND CJEU CASE LAW OVER TIME

The next two parts trace sequences of politicization and judicialization over time and examine how these processes relate to one another. We begin by establishing empirically when mega-political conflicts about the posting of workers in the EU actually attracted mass public attention, and how public attention developed further once courts had to decide these conflicts. For this, we first introduce and operationalize a multi-dimensional concept of politicization, which guided our collection and coding of newspaper articles on the posting of workers from five EU member states. We then present the main

65. *See id.*

66. *See Rüffert*, *supra* note 25, at ¶ 43.

67. *See Grand Duchy of Lux.*, *supra* note 61, at ¶¶ 15–16.

68. *See id.* at ¶¶ 49–52, 54–55.

findings of our analysis and show how, contrary to the perception of many Court observers at the time,⁶⁹ the CJEU entered an already heavily politicized field when it issued its famous Laval judgement in December 2007.

A. Conceptualizing and Measuring Politicization

Whereas “mega-political” refers to the inherent quality of a political conflict, its “utmost political significance that often . . . divide[s] whole polities,”⁷⁰ we draw on the related concept of “politicization” to measure empirically when an issue such as the posting of workers is actually perceived as important and divisive by large parts of society. Politicization refers to the way in which issues become subject to public contestation⁷¹ and is commonly defined as a three dimensional process that involves increased *salience*, *expansion of actors* and *polarization of opinions*.⁷² According to research on EU politicization, the three dimensions are interrelated but refer to different aspects of the same dynamics.⁷³ *Salience* refers to the visibility of a given issue in public debates and, thus, relates to the “significance” in Hirschl’s definition of mega-politics above.⁷⁴ Only when a topic is frequently raised by political actors in public can we speak about politicization. *Actor expansion* concerns the range of contestation and refers to an increasing number of actors involved in public debates. The argument is that if only a few elite actors advance their positions on an issue, it is only politicized to a limited extent.⁷⁵ Even though societal mobilization is part of the definition for all kinds of mega-political conflicts discussed in the introduction to this special issue, actor expansion is particularly relevant for the second type of mega-political conflicts: conflicts that mobilize large segments of domestic societies beyond governmental actors. *Polarization* is the third dimension of politicization. It captures the idea of divisiveness in Hirschl’s definition of mega-politics above, as it concerns the extent to which actors’ positions on an issue differ. For an issue to be polarized, opposing positions must be identifiable.

69. See, e.g., Christian Joerges & Florian Rödl, *Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections After the Judgments of the ECJ in Viking and Laval*, 15 EUR. L. J. 1, 1 (2009) (arguing that the Court’s *Viking* and *Laval* judgments “caused quite a heated critical debate”) (emphasis added).

70. Hirschl, *supra* note 34, at 94.

71. See Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and Its Politicization*, 4 INT’L THEORY 69, 71 (2012).

72. See Edgar Grande & Swen Hutter, *Introduction: European Integration and the Challenge of Politicisation*, in *POLITICISING EUROPE: INTEGRATION AND MASS POLITICS* 3, 8 (Swen Hutter et al. eds., 2016) (distinguishing between “issue salience (visibility), actor expansion (range), and actor polarisation (intensity and direction)”); Pieter de Wilde, Anna Leupold & Henning Schmidtke, *Introduction: The Differentiated Politicisation of European Governance*, 39 W. EUR. POL. 3, 4 (2016) (positing “that politicization can be empirically observed in (a) the growing salience of European governance, involving (b) a polarisation of opinion, and (c) an expansion of actors and audiences engaged in monitoring EU affairs”).

73. Edgar Grande & Swen Hutter, *Beyond Authority Transfer: Explaining the Politicisation of Europe*, 39 W. EUR. POL. 23, 25 (2016).

74. See Hirschl, *supra* note 34, at 94.

75. See Grande & Hutter, *supra* note 73, at 31.

In order to investigate the *politicization* of the posting of workers, we collected newspaper articles from a selection of EU countries addressing the issue across the covered twenty-year period from 2000 to 2020. We included newspapers from five countries in our analysis: Austria, Denmark, France, Germany, and Spain. Our country selection includes Northern, Continental, and Southern Member States, which are all receiving countries when it comes to posting. For all five countries, posted workers are part of their workforces and national labour markets. According to the Commission's factsheets on posted workers, Germany received the highest number of posted workers in the European Union in 2016, while France had the second highest, Austria had the fourth highest, Spain had the eighth highest, and Denmark had the fifteenth highest.⁷⁶

As we aimed to comparatively examine politicization over twenty years for five countries, we had to limit our analysis to cover one newspaper per country. We investigated newspaper coverage for one quality paper in each of the five different member countries.⁷⁷ We have selected daily newspapers that have European sections and editorial staff, and which are not party-political papers, but aim to cover issues from a center-political spectrum, though they may differ as to whether they lean center-left or center-right. The newspapers sampled from the five countries are: Die Presse (Austria), Politiken (Denmark), Le Figaro (France), Süddeutsche Zeitung (Germany) and El Pais (Spain). We examined public debates throughout the entire period specified. In this way, we captured both politicization of posted workers in general and as it may arise in relation to specific events, such as a CJEU decision, a change of EU legislation, or other relevant happenings.

Unlike TV news or tabloid newspapers, and even amidst the growing role of social media, the quality press continues to be a "leading medium of political coverage."⁷⁸ Therefore, this selection gives us a good representation of the public debate about posting of workers in large parts of Western Europe. For each newspaper, we identified all the newspaper articles that include keywords associated with posting of workers in the respective language (Table 2). Combining a keyword search with either the term for the European Union (EC, EU, etc.) or the Court of Justice of the EU (CJEU, CJEU, etc.) in each country's

76. See Country Factsheets: Posted Workers 2016, EUR. COMM'NS., SOC. AFFS., & INCLUSION PUBL'NS & DOCUMENTS, <https://ec.europa.eu/social/main.jsp?advSearchKey=PostWork2016&mode=advancedSubmit&catId=22&policyArea=0&policyAreaSub=0&country=0&year=0&qty=50> [<https://perma.cc/3N69-WZDC>].

77. Grande & Hutter note that whereas the selection of only one newspaper per country is a pragmatic decision, it is also a reasonable one. Their reliability tests and previous research based on several national newspapers found only small differences between national newspapers when focusing on a fairly broad aggregation level of issues and time. See Grande & Hutter, *supra* note 73, at 3.

78. JULIAN DEDERKE, CONTESTATION, POLITICIZATION, AND THE CJEU'S PUBLIC RELATIONS TOOLBOX: JUDGMENTS OF THE COURT OF JUSTICE OF THE EU IN THEIR PUBLIC AND POLITICAL CONTEXT 76 (2020) (citing Martin Dolezal, Swen Hutter & Bruno Wüest, *Exploring the New Cleavage Across Arenas and Public Debates: Design and Methods*, in POLITICAL CONFLICT IN WESTERN EUROPE 36, 41 (Hanspeter Kriesi et al. eds., 2012)).

language provided us with 1785 total newspaper articles for the twenty-year period: 142 in Die Presse, 566 in Politiken, 574 in Le Figaro, 325 in El Pais and 178 in Süddeutsche Zeitung.

Table 2. Keywords searching for newspaper articles on the posting of workers (searched for by relevant language)

Posting of workers
<ul style="list-style-type: none"> • posted worker • posting of workers • labour mobility • free movement of workers • social dumping • polish plumber • right to collective action • right to strike • road transport • cabotage

In line with previous research and our conceptualization of politicization above, we aim to capture *salience*, *actor expansion* and *polarization* as key components of politicization.⁷⁹ All three dimensions are operationalized with the data we collected from newspapers. For a detailed presentation of our coding strategy, see our online codebook. First, *salience* is operationalized as the number of newspaper articles per year that deal with the subject of posted workers within the EU. We only code articles that thematically refer to posted workers in the EU but exclude articles that concern labour migration generally, or labour migration from outside of the EU.

Second, regarding *actor expansion*, we differentiate between governmental and non-governmental actors. On the one hand, governments are key actors in mega-political conflicts at the inter-state level and when sovereignty concerns vis-à-vis international courts are at stake, resulting in pushback or backlash against the increasing judicialization of the respective issue areas. On the other hand, the broad mobilization of non-governmental actors is particularly important as an indicator for mega-political conflicts between different segments of domestic societies. Apart from governments, we therefore distinguish between different types of non-governmental actors, such as political party (representative on local, national, or European level), civil society actor, trade union, employers association, citizen, scientist/expert, or independent. Like Grande and Hutter, we measure the expansion of actors by the share of non-governmental actor

79. See, e.g., Grande & Hutter, *supra* note 73; de Wilde et al., *supra* note 72. See also Michael Zürn, *Opening Up Europe: Next Steps in Politicization Research*, 39 W. EUR. POL. 164, 169 (2016).

statements as a percentage of all coded statements.⁸⁰

Third, to capture the *polarization* of the debate, we code the position of actors taken in the debate. The position variable describes the political position of the actor towards the EU (that is, towards a certain policy, regulative, directive, stand, etc.). We adapt the coding from Grande and Hutter.⁸¹ An actor's position is coded based on whether the actor frames the outcome of EU legislation/policy as positive (strongly affirmative +1; weakly affirmative +0.5), neutral or negative (strongly opposed -1; weakly opposed -0.5). This can, for example, mean that a politician emphasizes that social dumping is a negative consequence of the free movement of labour (-1). The coding indicates whether the actor favours or opposes a certain action, legislation, or decision taken by an EU institution. It does not indicate whether the actors take a pro- or anti-EU standpoint generally. If a newspaper article contains multiple actors stating a position, all the actors and their positions are coded. If an actor states multiple positions in the same article, only one is coded. If the actor both favours parts of a proposed EU-policy and criticizes other aspects of it, the statement is coded as ambiguous (that is, '0'). The coding includes only direct quotes from actors – not journalists referring to statements in former debates.

The data we collect allows us to investigate the public debate about posting of workers, both in general, as well as directly following (or in reaction to) specific events like CJEU judgements. By looking at the public debate, we are able to identify points in time when the issue area or particular court decision gets more (or less) politicized. If an increase in politicization occurs directly in relation to a court decision, we can assume with reasonable certainty that this intensification is in response to the Court decision. If newspaper articles and the actors they mention refer explicitly to court cases, we can directly investigate the debate about the individual court case or judgement. Moreover, by looking at newspaper coverage in the quality press across several EU countries, we are able to situate this study at the interplay between the national and EU contexts, which is crucial to understanding developments on the domestic level in response to judicialization trends in the realm of international law.

B. The Politicization of Posted Work in General and CJEU Case Law in Particular

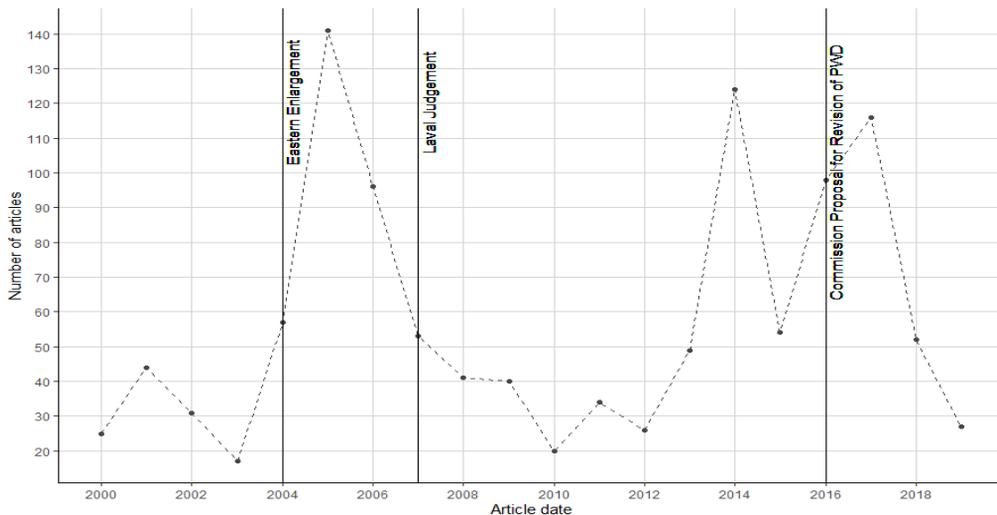
Our newspaper analysis shows that the posting of workers in the European Union was part of the public debate throughout the period 2000–2020, albeit to strongly varying degrees. Figure 1 shows the salience of posted work measured as the number of newspaper articles per year over the entire period a) aggregated for all countries (to the left) and b) disaggregated into the individual countries included in our analysis (to the right). The figure demonstrates that EU posted work is salient in general, but salience is particularly pronounced in the periods

80. See Grande & Hutter, *supra* note 73, at 31, as well as our online appendix.

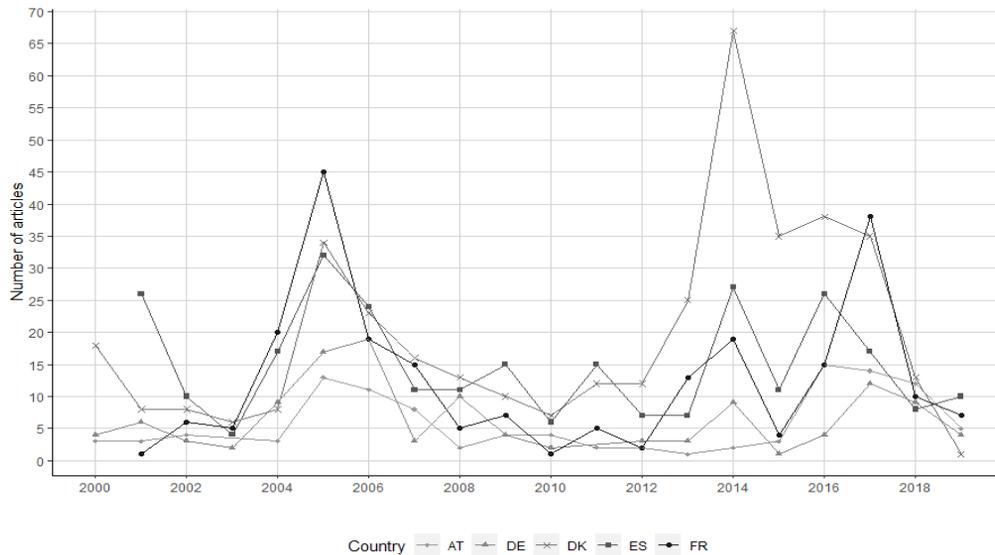
81. *Id.*

between 2004–2008 and 2013–2017. The salience in these periods relates to different main issues. Between 2004–2006, the public debate on posted work is related to Eastern Enlargement and the proposal on a services directive for the internal market, the so-called Bolkestein directive (COM (2004) 2), later adopted as Directive 2006/123/EC.⁸² The debate concerned whether Eastern Enlargement and the new directive would lead to social dumping. Between 2007–2008, the public debate focused on the CJEU cases related to the Laval quartet. The salience of EU posted work increased again between 2013 and 2017. The later increases in salience concerned social dumping, particularly related to the construction and transport sectors, as well as the reform of the posted workers directive. The increase in salience in this period was mainly driven by a very intense debate in France and Denmark.

Figure 2: Aggregated salience and country salience disaggregated

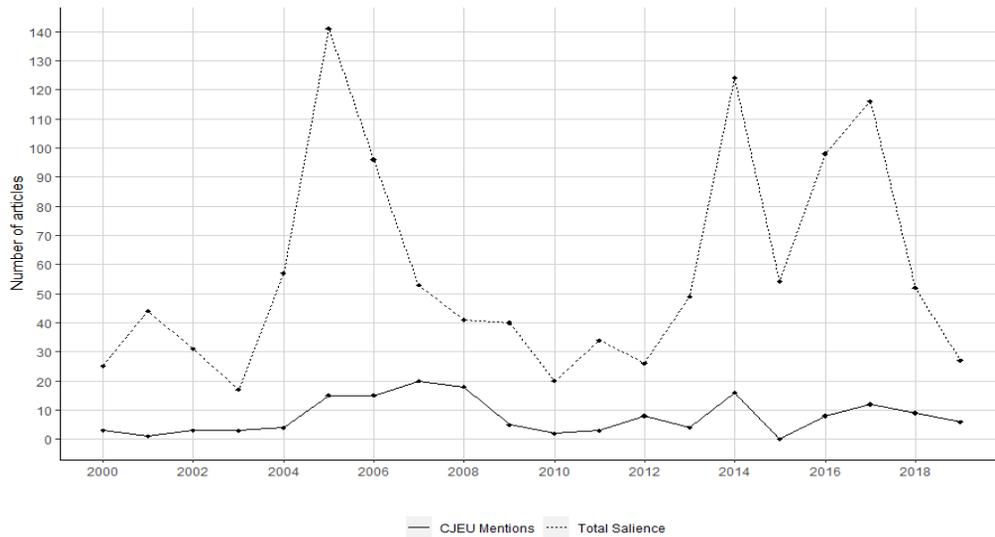


82. Directive 2006/123, of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, 2006 O.J. (L 376) 26.



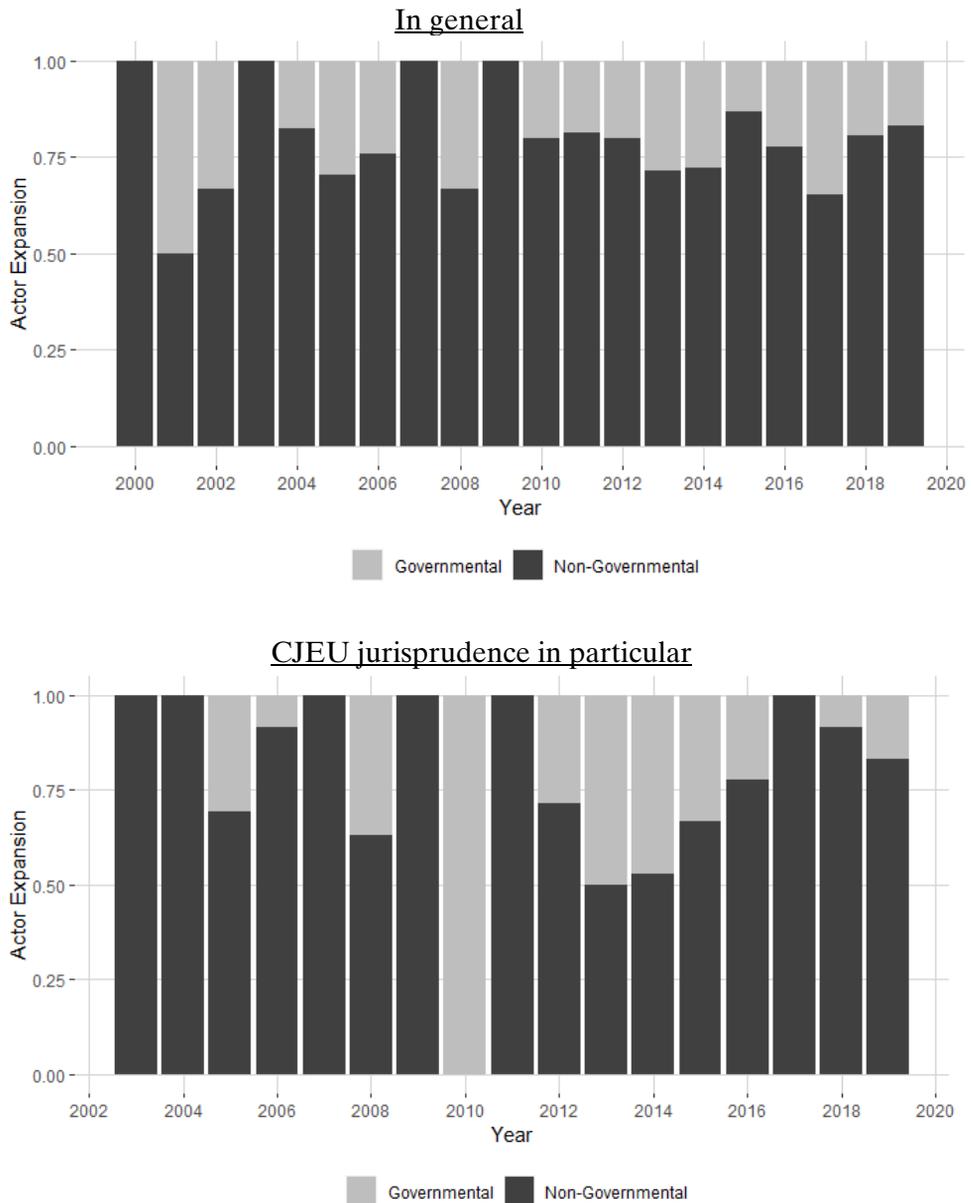
When we turn to the politicization of the CJEU in relation to the posting of workers, figure 2 demonstrates that the role of the CJEU occupies a considerable part of the salience measure. The figure shows CJEU mentions aggregated across countries as a share of total salience. 2007–2008 marked a particular peak in the CJEU salience measure. Across countries, the Laval ruling is much debated, as were the Viking and Ruffert cases. However, when held against the total salience measure, we see that the Laval quartet did not trigger general politicization of the issue at hand. Rather, CJEU jurisprudence got drawn into the mega-politics of posting when the issue had already been heavily politicized in general. The Laval case continues to be mentioned in the later debate on CJEU rulings. In later politicization, we see the role of the CJEU discussed and the extent to which it prohibits national actions against social dumping, including the right to strike. Among some actors, there is an expressed concern that the CJEU takes away national labour market autonomy. In addition, we see the role of the CJEU discussed in relation to social dumping in the transport sector, and the extent to which proposed national actions to counteract social dumping will be hindered by CJEU interpretations.

Figure 2: Aggregated share of CJEU mentions of total salience



Turning to actor expansion, we see a constantly high level of actor involvement. Figure 3 presents the share of non-governmental actors taking part in a) the general debate of EU posting of workers (to the left) and b) in relation to CJEU mentioning (to the right). As a constant feature throughout the period, non-governmental actors took part in the debate, expressing opinions in mostly more than 50% of the debate. The share of governmental actors taking a position on the posting of workers in relation to CJEU cases was slightly higher. But we also found considerable involvement of non-governmental actors. Generally, this finding supports the second dimension of politicization, that is, conflicts about the posting of workers are not just a concern for governmental elites, but also mobilize broader audiences. The slightly lower share of non-governmental actors featuring in public debates in the context of CJEU judgements might indicate a certain de-politicizing effect of shifting conflicts about the posting of workers to judicial fora. Nevertheless, the share of public statements by non-governmental actors is also considerable in the context of CJEU judgements. Hence, it shows that the posting of workers is also mega-political in the second sense, as it involves important societal cleavages which mobilise a wider set of actors. The issue at hand is not left for governmental actors to debate.

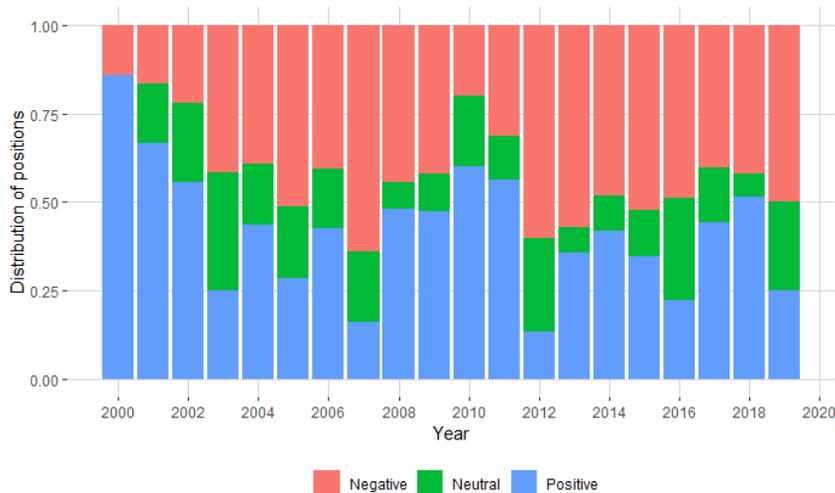
Figure 3: Actor expansion regarding posting in general and CJEU jurisprudence in particular



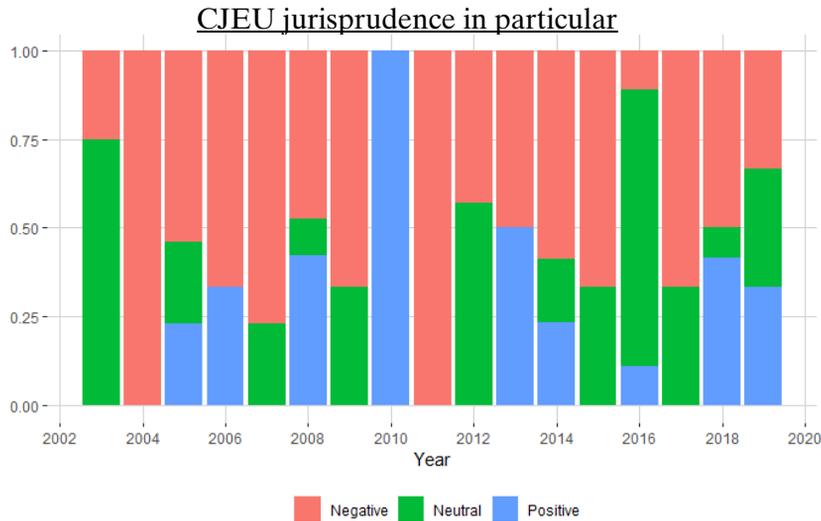
Finally, turning to polarization, this third dimension of politicization is also identifiable in our newspaper compilation. Figure 4 demonstrates the aggregated distribution of opinions a) on the general debate of EU posting of workers (to the left) and b) in relation to CJEU mentions (to the right). The figure presents the share of the different positions. Positions are generally polarized, as there are many negative or positive positions and relatively few neutral ones. Most striking

is the considerably larger share of negative opinions, combined with very few positive opinions expressed in the context of CJEU rulings. We do not see evidence that the Court, with its rulings, introduces new controversy or bias that did not exist beforehand, and we can only speculate about potential explanations for this observation. On the one hand, we might interpret this predominantly negative debate about CJEU judgements on the posting of workers as a sign of distrust in the Court's ability to reconcile incompatible claims in these mega-political conflicts. On the other hand, the Court might be an easy target for blame-shifting⁸³ by political actors, who are reluctant to accuse their peers in mega-political conflicts, or even tacitly agree with the Court but do not want to admit to their constituency.

Figure 4: Polarization regarding posting in general and CJEU jurisprudence in particular
In general



83. See Blauberger & Martinsen, *supra* note 41, at 391.



In sum, our newspaper analysis demonstrates that throughout the entire 2000–2020 period, EU posting of workers was politicized, both as a general policy and also when the CJEU was called to rule on conflicts about the posting of workers. Notably, when the CJEU concluded on the famous Laval-quartet, it entered an already established terrain of mega-politics. Hence, it was not judicial decision-making as such which set forth mega-politicization. Rather, the CJEU was asked to decide on an already politicized terrain of mega-politics. Stepping into this terrain, the Laval-quartet jurisprudence was perceived to side with the free market dimension of the mega-politics cleavage, which only spurred further politicization, at least in the short run. The role of the court in mega-politics is delicate. We see that the actors expressing positions regard the role of the CJEU much more negatively than the issue at hand in general. CJEU involvement in this area of mega-politics is regarded as problematic.

V

TRACING THE EVOLUTION OF POSTED WORKERS JURISPRUDENCE IN LIGHT OF POLITICIZATION

In the remainder of the analysis, we trace the evolution of CJEU case law on posted work. While we cannot establish a direct causal link, we show that the Court has adopted a more restrained interpretation of the freedom to provide services after having been drawn into the heavily politicized Laval conflict. This more recent case law also helped overcome obstacles to a political solution at the EU level, eventually leading to the revision of the Posted Workers Directive in 2018.

A. From Assertive to Restrained Interpretation of EU Services Freedom

The ‘Laval quartet’ jurisprudence involved all sorts of mega-political conflicts distinguished above and triggered fierce opposition at the European and member

state levels.⁸⁴ Yet, as will be discussed in greater detail below, EU member states could not agree on a comprehensive legislative response to this case law. Rather, it was the Court itself that initiated a certain re-balancing between internal market principles and social protection with two judgements in 2015.⁸⁵ In the ESA case *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, the Court deviated from the opinion of its Advocate General, who had once again found unjustified restrictions of the services freedom in the claims of a Finnish trade union against a Polish employer of posted workers.⁸⁶ By contrast, the Court adopted a generous interpretation of what may be included when “minimum rates of pay” are calculated for posted workers according to the rules of their host country and also allowed categorizing them into different pay groups.⁸⁷ In *Regiopost GmbH & Co. KG v. Stadt Landau in der Pfalz*, the Court approved — contrary to the position of the Commission — the inclusion of minimum wages in public procurement contracts.⁸⁸ While the ESA judgement is seen as departing from, in particular, the *Laval* case, the *Regiopost* ruling adopts a strikingly different position than the previous judgements in *Rüffert*⁸⁹ and *Bundesdruckerei GmbH v. Stadt Dortmund*⁹⁰: “While . . . departing from the *Rüffert* approach, the Court does not explicitly reverse its stance but instead goes to great length to distinguish it.”⁹¹ In sum, these two cases are thus regarded as having “softened the hardline market logic of the *Laval* and *Ruffert* rulings.”⁹²

Despite the Court’s re-balancing, tensions between the freedom to provide services and the rules for posting of workers persist. For example, in December 2019, the CJEU ruled in *Dobersberger v. Magistrat der Stadt Wien* on a case concerning the Austrian railways’ Hungarian subcontractor whose employees provide services on cross-border trains from Hungary to Austria.⁹³ In the ruling, the CJEU established that as long as the subcontractor’s employees perform most of their work on Hungarian soil, and begin and end their work there, they are not supposed to be considered “posted workers” (under Directive 96/71/EC).⁹⁴ This rule applies even though the Hungarian company’s employees

84. See Blauberger, *supra* note 24, at 114–15.

85. See Sacha Garben, *The Constitutional (Im)balance between ‘the Market’ and ‘the Social’ in the European Union*, 13 EUR. CONST. L. REV. 23, 38 (2017) (analyzing recent CJEU case law on the relationship between economic freedoms and social regulation).

86. Case C-396/13, *Sähköalojen ammattiliitto ry v. Elektrobudowa Spółka Akcyjna*, ECLI:EU:C:2015:86, ¶ 71 (Feb. 12, 2017).

87. See Pieter Peonovsky, *Evolutions in the Social Case Law of the Court of Justice: The Follow-up Cases of the Laval Quartet: ESA and Regiopost*, 7 EUR. LAB. L. J. 294, 305 (2016) (analyzing case law on minimum wage(s)).

88. Case C-115/14, *Regiopost GmbH & Co. KG v. Stadt Landau in der Pfalz*, ECLI:EU:C:2015:760, ¶ 89 (Nov. 17, 2015).

89. See *Rüffert*, *supra* note 25.

90. C-549/13, *Bundesdruckerei GmbH v. Stadt Dortmund*, ECLI:EU:C:2014:2235 (Sept. 18, 2014).

91. See Garben, *supra* note 85, at 39.

92. See *Arnholtz & Lille*, *supra* note 3, at 19.

93. Case C-16/18, *Dobersberger v. Magistrat der Stadt Wien*, ECLI:EU:C:2019:1110, ¶ 39 (Dec. 19, 2019).

94. *Id.*

provide onboard services in Austria.

Yet, these later post-*Laval* rulings show a Court that appears to have stepped back from the *Laval* quartet precedent and now accepts that additional allowances can be part of the minimum wage.

B. From Litigation to Legislation (And Back to Court Again?)

Judicial and legislative politics are closely interlinked at the European level. On one hand, the CJEU heavily influences legislative policy-making, while on the other hand, EU legislators not only codify but often seek to modify or override case law.⁹⁵ As regards posted workers, the *Laval* quartet jurisprudence was followed by a phase of (partial) EU legislative failure and domestic attempts to contain judicial impact unilaterally, whereas the post-*Laval* jurisprudence paved the way for the posted workers directive in 2018.

Immediately after *Laval*, critics of the Court's case law called for a strong political response. The European Trade Union Confederation (ETUC) called for a treaty amendment, proclaiming that the Court had decided on a hierarchy of norms, with market freedoms highest and rights of collective action in second place. In addition, the left-wing and social democratic groups of the European Parliament took a strong position against the rulings and demanded political action.⁹⁶ The Commission was requested to take action to provide a solution to the 'case law problem.'⁹⁷

As a result, the Commission presented two legislative proposals in March 2012: the so-called Monti II Regulation proposal and a proposal for an enforcement directive on the posting of workers. Both proposals took issue with the Court's jurisprudence, aiming to ensure that the right to collective action had not been dismantled and that hosting member states still had sufficient tools to control and act against social dumping. The explanatory memorandum to the Monti II proposal acknowledged that the Court's rulings had "revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level."⁹⁸ Whereas the proposal for an enforcement directive was adopted by the EU legislators in 2014, however, the Commission withdrew its Monti II proposal in September 2012 after wide-spread opposition from EU member states. For the first time since the introduction of the "early warning mechanism"

95. See generally Dorte Sindbjerg Martinsen, *Judicial Influence on Policy Outputs?: The Political Constraints of Legal Integration in the European Union*, 48 COMP. POL. STUD. 1622 (2015) (discussing legislative responses to unwelcome CJEU jurisprudence).

96. See, e.g., the European Parliament's Resolution of 22 October 2008 on Challenges to Collective Agreements in the EU (2008/2085(INI)), 2008 O.J. (C 15E).

97. See the European Commission, Hearing in the European Parliament, 2 June 2010; Martinsen, *supra* note 38, at 199.

98. See *Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action Within the Context of the Freedom of Establishment and the Freedom to Provide Services*, at 3, COM (2012) 130 final (Mar. 21, 2012).

in the EU Treaty of Lisbon in 2009, twelve national parliaments raised objections and, thereby, showed a “yellow card” against the Commission’s proposal.⁹⁹ The critique of the proposal was that it was an attempt to codify jurisprudence into the legislative text, thus confirming the unwanted hierarchy of market freedoms. The Commission’s withdrawal was welcomed by national parliaments, the opposing members of the European Parliament, and by trade unions.¹⁰⁰ Nevertheless, the European Parliament requested action from the Commission to reestablish legal certainty in the aftermath of the *Laval* quartet.¹⁰¹

In the absence of an EU legislative response, individual member states sought to contain the impact of CJEU jurisprudence domestically.¹⁰² Danish and Swedish reforms aimed at protecting, more or less successfully, the autonomy of social partners in response to *Laval*.¹⁰³ As a consequence of the *Rüffert* judgement, many German states that were ruled under social-democratic participation introduced minimum wage legislation that specifically targeted public tender situations.¹⁰⁴ Ultimately, however, neither the enforcement directive of 2014 nor member states’ unilateral responses could fully settle the post-*Laval* conflicts about the posting of workers.

In March 2016, only months after the CJEU had partly readjusted its jurisprudence on posted workers in the *ESA* and *Regiopost* cases, the Commission was pressured by several Western EU member states and proposed a revision of the Posted Workers Directive. The revision aimed at combatting social dumping by establishing the principle of “equal pay for equal work at the same workplace”; it was adopted by the European legislators as the amending directive on posting of workers 2018/957 in June 2018 and had to be implemented by EU member states by the end of July 2020. Most importantly, in order to eliminate unfair wage competition, the revision replaced the reference to “minimum rates of pay,” which had been the issue in *Laval*, with the broader notion of “remuneration” according to Article 3 of the amended Directive.¹⁰⁵ Consequently, in addition to minimum wages, all mandatory elements of remuneration under national law and universally applicable collective agreements in host states apply to posted workers.

99. Ian Cooper, *A Yellow Card for the Striker: National Parliaments and the Defeat of EU Legislation on the Right to Strike*, 22 J. OF EUR. PUB. POL’Y 1406, 1407 (2015).

100. See Marc Hall, *Brussels Drops Plans for EU Law Limiting Right to Strike*, EURACTIV MEDIA NETWORK (Sep. 14, 2012) <https://www.euractiv.com/section/justice-home-affairs/news/brussels-drops-plans-for-eu-law-limiting-right-to-strike/> [<https://perma.cc/8YBD-24B7>] (discussing the withdrawal).

101. Martinsen, *supra* note 38, at 204.

102. See generally Blauburger, *supra* note 24, for a discussion of member state responses to CJEU jurisprudence.

103. Seikel, *supra* note 21, at 1174–76.

104. See generally Sack, *supra* note 26 (analyzing German state legislation on public procurement after the *Rüffert* judgement).

105. Directive 2018/957, of the European Parliament and of the Council of 28 June 2018 Amending Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services, 2018 O.J. (L 173) 16.

The revision of the Posted Workers Directive was heavily contested, once again triggering a yellow card by eleven national parliaments against the Commission's proposal.¹⁰⁶ However, this time the yellow cards were mainly submitted by Eastern European member states and the Commission did not withdraw its proposal. In contrast to the Monti II regulation proposal, the European legislators ultimately agreed on a legislative compromise. Only a combination of various factors can explain how a window of opportunity opened and enabled policy entrepreneurs such as the Commission, the Council presidency, and then newly elected French President Macron to shift the balance in the mega-political area of posted workers towards greater social protection.¹⁰⁷ Without doubt, the Court's preceding readjustment of its posted workers jurisprudence and European legislators' strategic use of it are essential parts of this explanation. Whereas references to the *Laval* quartet rulings ran through the Monti II proposal as a red thread and were a major part of the Commission's justification,¹⁰⁸ the Commission's proposal for revising the posting of workers directive made only one reference to the case law—namely to the *ESA* case, that is, belonging to the softened turn in jurisprudence. Building on this case, the broader notion of remuneration was justified and introduced into the revised Directive.

In sum, the Court's more restrained interpretation of the free movement of services has not ended the politicization of the posting of workers. But it facilitated another legislative attempt to settle the underlying conflict and partly removed the Court from the spotlight of politicization. Still, the Court could not escape the mega-politics of posted work for very long. Soon after the adoption, two member states outvoted in the legislative process — Poland and Hungary — challenged the legality of the revised Posted Workers Directive and called for its annulment. However, on December 8, 2020, the Court dismissed these annulment actions and thus confirmed that the amendment of the directive strengthening the rights of posted workers was in line with EU free movement principles.¹⁰⁹ In other words, the Court sided with the political majorities of the EU legislatures.

106. Alexis Lubow & Susanne K. Schmidt, *A Hidden Champion? The European Court of Justice as an Agenda-Setter in the Case of Posted Workers*, 99 PUB. ADMIN. 321, 329 (2020).

107. Daniel Seikel, *Die Revision der Entsenderichtlinie. Wie der lange Kampf um die Wiedereinbettung exterritorialiserten Arbeitsrechts gewonnen wurde*, Hans-Böckler-Stiftung, SWI Working Paper Nr. 212 (2020) (analyzing a combination of favourable conditions that facilitated member state agreement on the revision of the posted workers directive).

108. Martinsen, *supra* note 38, at 202, 206.

109. Case C-620/18, Hungary v. European Parliament, ECLI:EU:C:2020:1001, ¶ 190 (Dec. 8, 2020); Case C-626/18, Republic of Poland v. European Parliament, ECLI:EU:C:2020:1000, ¶ 150 (Dec. 8, 2020).

VI

CONCLUSION

The European Union is marked by different terrains of mega-politics. At times, the CJEU is asked to interpret conflicts that undergird these cleavages and conflicts of high politics. In this article, we have examined what happens when processes of judicialization and politicization collide in an area of mega-politics, the regulation of posted workers in the EU. We identified our case as one of deep-seated mega-politics — that evokes interstate conflicts, social cleavages, and sovereignty issues. Our newspaper analysis traced politicization throughout a twenty-year period of fundamental change to EU integration in our issue area, including the 2004 and 2007 enlargements, an increase in posted workers, landmark CJEU litigation, and proposals and compromises of the relevant EU directives.

The analysis demonstrates politicization of posting of workers in general, as well as in relation to CJEU jurisprudence in particular. An important finding of our analysis over time is that the landmark cases of the *Laval*-quartet did not trigger politicization as such. Rather the CJEU was drawn into an already politicized terrain of mega-politics. Another important finding is that the court's interventions in our terrain of mega-politics is evaluated more negatively than EU regulation of the area in general. The majority of actors expressing opinions take position against the court. This suggests that in particular a non-majoritarian institution like the CJEU has to tread carefully into a terrain of mega-politics.

We then examined more recent CJEU jurisprudence concerning the posting of workers in light of politicization and political opposition. Our analysis suggests a certain responsiveness of the court under such conditions. The CJEU has adopted a more restrained approach in its interpretation of freedom to provide services after the massive politicization of the issue of posting of workers in relation to the *Laval*-quartet. We also show that the more restrained approach paved the way for a political compromise by means of legislation. The case-law of 2015 marked a notable departure from the *Laval*-quartet and helped to overcome obstacles to a political compromise at the EU level, leading to a revision of the posting of workers directive.

In sum, our analysis of politicization and judicialization over time makes it possible to identify different sequences of two intertwined dynamics. Five sequences emerge: 1) from the outset, EU's regulation of posting of workers stepped into an already established terrain of mega-politics between free market and social protection; 2) the (in)famous *Laval*-quartet did not trigger politicization but did not ease it either; 3) in the more immediate aftermath of the landmark rulings, much opposition was expressed but EU legislators could not agree on a comprehensive legislative response to the case law; 4) rather, in the light of politicization and fierce political opposition, the court itself initiated a post-*Laval* re-balancing towards more social protection and thus departed from its pre-dominant market logic; 5) this judicial departure also allowed for a re-balancing by legislative means towards greater social protection.

On a more general account, our findings demonstrate that even in a highly judicialized system like the EU with a very powerful court, politicization impacts the CJEU's ability to promote judicial integration. Furthermore, judicial responsiveness to politicisation is key to pave the way for compromise. Certainly, the Court's more restrained approach has not ended politicization and cleavages, and conflicts have not disappeared. The mega-politics of posted work remains. But the later responsiveness of the CJEU facilitated a legislative compromise, which has taken the Court out of the political spotlight for the time being. Thus, our analysis confirms that the scope condition for the impact of judicialization in mega-politics depends on political reactions. At the same time, court responsiveness is important for legislative compromises when mega-politics is expressed. None of the different judicialization and politicization sequences stand out as conclusive. Nor can they be read separately. Instead, they pair and relate, reading into the signposts of one another.