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FORMULA Working Paper

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Introduction

FORMULA is a multifaceted research project focusing on labour market regulation and governance. The acronym, a creative one, stands for «Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective», the appellation in full of the project.

Commenced as per 1 January 2008 the project is not yet completed, completion is due by 30 June 2012, following a final international conference in Oslo 22 and 23 March, 2012, to present and discuss our final findings. Some observations and results may nonetheless be presented at this juncture.

The background against which to do so is, obviously, the goals and themes for the Europe in Transition program document of 2006 and the objectives of the FORMULA project within that framework. Starting with the latter, I shall return to the former when presenting the intermediate results of the FORMULA project.

The FORMULA project and its objectives
The overarching objective of the FORMULA project is to analyse, in a Nordic perspective and through an interdisciplinary and comparative approach, the development of a multilayered system of labour market governance in Europe, focusing on the interplay between legal and institutional change at the supra-national and national levels in the current context of enlargement and deepened market integration in the EU/EEA. This encompasses a complex of themes consequential both to the understanding of the interplay of an expanding and changing EU/EEA law with the role of Member States and to the scope of action and the possibilities at nation levels of

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preserving labour market regimes that are often crucial to domestic social and economic policies.

From this overarching perspective four more specific objectives are derived, of which the fourth refers back to and develops the initial overarching objective. The aim of the comparative analyses is to develop new, applicable knowledge about:

1) How the interplay between extension of the EU/EEA market, growth in cross-border services, supra-national regulations, and national responses, influence the evolving multilayered regime of labour market regulation, industrial relations and interest intermediation in the EU/EEA; this includes national reactions to and influence on EU legislative initiatives and different forms of adaptation in transposition.

2) The impact of these processes, and of the application of the Posted Workers Directive and the Services Directive in particular, on the national regimes of labour market regulation in the Nordic countries, Germany, Poland, and the UK; and

3) the aims, strategies, and institutional channels through which the political authorities and the social actors in these countries try to influence EU policies and regulations in this field.

Through (1)-(3) the overriding ambition is to

4) deepen the understanding of how interacting political, legal, socio-institutional and economic logics are influencing the interplay between the different institutions and organized actors shaping supra-national decision-making and national adjustments in the emerging multilayered European polity, with particular regard to the formation, adaptation, and application of legal regimes in the labour market.

Further foundations
The very essence of the EU, and thereby the EEA, is the single market with its «four freedoms». Developments in this area are at the core of the FORMULA project. Market integration has evolved in two directions. In part, there has been a territorial expansion through successive enlargements of the union, most prominently marked by the twelve new Member States in 2004 and 2007. Further, it is pertinent to speak of a deepening of the market integration through the increased opening up in particular of the services sector, as epitomized for example by the Services Directive\(^2\) and its underlying processes. The regulation of transnational services involving cross-border movements of workers, bringing the Posting of Workers Directive\(^3\) into play, is even more crucial.

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At the inception of the project further development in this field was predictable although which direction it would take was not equally easily foreseen. It has however turned out to be both radical and radically interventive, challenging national labour market regimes as well as international human rights standards. The project is aimed at analysing how these aspects of market integration impact on conditions in the labour and service markets as well as the regimes for regulating these markets. The interplay between increased mobility of services and labour, the Services Directive, and the Posting of Workers Directive provides the basis for several interlinking topics of study. One strand is to analyse the (development of) European regulation in the field. The analysis comprises both a substantive and a governance perspective. Further, the project studies national level developments. The aim here is to analyse the responses, adjustments and innovations in national labour market regulation (labour and employment laws and collective bargaining, monitoring, control and enforcement of terms and conditions for the mobility of work and services) that have been introduced as a consequence of the European regulations or the increased mobility of labour or services. The further aspect of this pertains to the institutional industrial relations effects: how market extension and supra-national regulations, via the chosen paths of adaptation by way of juridification, influence the patterns of interest organisation, power relations and strategies among different national actors. Moreover, approaching this from a «horizontal» perspective the comparative analyses aim at clarifying how and why different national traditions with regard to labour market regulation and institutions impact on the effects at national level of changes at the European level by constituting different legal and institutional preconditions for adaptation. In addition, the comparisons can be seen to elucidate how States and IR actors enter into bilateral or regional contexts involving dissemination of operational information or coordination of measures in order to address problems of regime competition and «social dumping», or develop direct forms of cooperation with sending States (e.g., the Nordic countries with Baltic states or Poland), and to what extent and how States and IR actors collaborate (through «coalition-building») with a view to influencing developments at the level of the European regulatory regime.

Intermediate results and contribution to Europe in Transition

Introductory observations

It can freely be stated that the FORMULA project has nothing to say to the «Foreign policy and security policy in Europe» dimension of the Europe in Transition program. Although concerned with aspects of the relationship and cooperation between Norway and the EU, FORMULA does not deal with such matters of foreign policy, security policy and defence policy that are at the core of this limb of Europe in Transition.

Much the same can be said for the «Cultural change processes» as understood in the description in the third limb of the Europe in Transition program document. There, the emphasis is on demographic and social factors pertaining to the population at large. The
FORMULA project’s focus in comparison is more narrow, primarily concerned with the institutional actors in a wide sense in labour market governance and regulation. However, with a different, broader concept of «legal culture» encompassing legal adaptation and legal transplants the FORMULA project definitively contributes to the understanding of «cultural change processes», offering new insight and understanding to the field with its studies of different national ways of implementing EU/EEA law in a state specific as well as a comparative perspective and how one state may be seen to borrow from another in the process.

The more significant contributions of the FORMULA project however lie in the two strands of Europe in Transition which were the focus of FORMULA from the inception of the project, i.e. «Law and democracy in Europe» and «Economic development and integration».

«Law and democracy in Europe»
In the Europe in Transition program document it is stated, under this heading, that «Regulatory processes and the enforcement of law can reinforce as well as delimit the political leeway of democratic bodies». In one sense, this is self-evident, in another, it is a crucial aspect of international and, in particular, EU/EEA relations. Here it is not the purported growing importance of international human rights that takes centre stage but EU/EEA developments that increasingly stipulate limits for the national legislator’s freedom of action. The observation in the program document that the «European integration process and the expansion and development of the EU have put democracy to an extreme test» is entirely apt. The FORMULA project adds significant insight to this in two areas and dimensions.

One concerns the Services Directive. The first proposal for such a Directive tabled by the EU Commission – the «Bolkestein directive» – immediately gave rise to serious controversy and unrest in a number of EU Member States on account of the perceived implications in particular for labour law and labour market regulation. This led to strong mobilisation especially by the trade union movement, which in collaboration with the European Parliament managed to bring about a new proposal without the more offensive provisions. A unique study of the decision-making process, conducted as part of the FORMULA project, has demonstrated how the multi-level, multi-actor efforts combined to achieve an unprecedented success in the EU legislative process, and discusses the prospects – considered bleak – for something similar to occur again.\(^4\) Moreover, FORMULA research team members were able to draw on insights from the project when preparing a report for the Ministry of Trade and Industry on the

compatibility of the Government’s Action Plans against Social Dumping and the Services Directive.\(^5\)

Of greater impact, and greater concern, is the development in the field of cross-border services involving posting of workers. At the time of inception of the FORMULA project the issues were visible but the outcome not yet clear. The *Viking Line* and *Laval* cases\(^6\) were then pending in the European Court of Justice (now the Court of Justice of the European Union) and an international debate on the issues involved was slowly emerging. A key aspect of the FORMULA project focuses on this area of legal and governance problems. Being operative just weeks after the ECJ decisions were handed down FORMULA took an active role in developing the international agenda in particular as the legal issues are concerned, and also contributed significantly to discussions at the Nordic level of means and measures of adaptation of domestic labour law regimes. A considerable number of publications, and also Working Papers, have linked in with and taken an active role in the international and European debate. The project and its written contributions have also attracted the attention and considerable interest from the EU Commission in conjunction with its on-going work to try to resolve some of the difficulties ensuing from the ECJ case law.\(^7\)

This strand of the project also fits in with the broader discourse on «constitutionalization» in the European context. The term is somewhat a misnomer, from a legal point of view anyway. Far older as a term, for close to two decades it has been a buzz-word in studies of the European Union in particular and its prominence is mainly attributable to the realization that the activity of governing is increasingly being exercised through arrangements that are not easily susceptible to the controls of national constitutions. Generally speaking, the notion of «constitutionalization» concerns the attempt to subject all governmental action – at all levels of government, local, national, regional, international – within a designated field to the structures, processes, principles and values of a «constitution».\(^8\) Since governmental power is now being channelled

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\(^6\) Case C-438/05 *International Transport Workers’ Federation, Finnish Seamen’s Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779 (‘*Viking Line’*) and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767 (‘*Laval’’),

\(^7\) This is manifested in part by the strong interest on the part of key persons in the Commission to attend FORMULA conferences and to partake of project Working Papers and by the Commission’s inviting FORMULA team members to expert conferences on the Posting of Workers Directive and possible alleviating measures.

through regional, supranational and international bodies, «constitutionalization» lends itself to be perceived as a benevolent process subjecting the exercise of all types of public power – whatever the medium of its exercise – to the discipline of constitutional procedures and norms. In that, it is deceptive, first, because in many cases there is no written law or any written law with a superior standing comparable to a constitution involved and second, by invoking and usurping the legitimacy and standing of superior norms. Here is not the place to elaborate on this. The essential point in the present context is that by its decisions in *Viking Line* and *Laval*, and the subsequent decisions in *Rüffert* and *Commission v Luxembourg,* the European Court of Justice, intervening in the name of market freedoms, has significantly altered the balance between national and supranational EU powers. In sum, this case law amounts to radical «negative integration» imposed by the Court, to the extent, even, that is lays down a state of law conflicting with fundamental human rights in the field of labour by which all EU and EEA Member States are bound. It remains to be seen whether the entry into force of the Lisbon Treaty (2009) may serve to alleviate this conflict.

The *FORMULA* project has been concerned with these issues, again from the very start of the project and has contributed to domestic and international discourses in this field, which are continuously on-going in light of their overriding importance on several levels. The project will continue to feed into this debate in *FORMULA*’s final year of operation.

«Economic development and integration»

On this, the second strand of the Europe in Transition program the main focus of *FORMULA* has been and is on repercussions at national levels of EU level developments. This is not just about what consequences the economic integration processes in Europe have for Norway. The comparative objective of *FORMULA* enter into the equation here. The aim is to better understand how and why different national traditions with regard to labour market regulation and institutions impact on the effects at national level of

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changes at the European. For example, why did Norway adopt an «Act on Extension of Collective Agreements» (General Applicability Act) as early as 1993 while Denmark and Sweden decided to rely on collective bargaining? And why did Denmark and Sweden take such different courses with a view to adapt to the post Viking Line/Laval legal situation. Moreover, it is a question why Poland in effect took no measures to implement the Posting of Workers Directive while the Directive has posed several challenges in other jurisdictions. Similar questions can to some extent be posed also with regard to the Services Directive.

Labouring with such issues FORMULA is able to contribute to the understanding of economic integration and the fulfilment of the four liberties – the free flow of goods, services, labour and capital – as a complex and demanding political project. In doing so, FORMULA adds to the comprehension of salient factors in the integration of transitional economies in the East and western market economies. While migratory trends and matters pertaining to the free movement of workers, as opposed to cross-border movement of workers in the context of the provision of services, is essentially outside of the scope of the FORMULA project, the labour law regimes in sending states are not and play an important role in the overall context.

On this limb, FORMULA research has already materialized in several national and international publications apart from publicly accessible Working Papers. The major contribution remain, however, until the completion of the FORMULA Conference 2012 and subsequent book publication of the contributions presented there. In the interim, work is in progress on publishing papers from the first two stages of the project.

Conclusions in the interim

The FORMULA project has been running largely according to schedule. Effective organisation has permitted us to reinforce to project as we have progressed. The objectives set out for the project are so far well attended to and prospects are good with a view to rounding up the project on a positive note.

FORMULA has allowed domestic (Norwegian) and other Nordic and international colleagues to collaborate on issues of common interest over a broad spectrum, ranging from labour law to sociology and political science on national and European and international levels. By consciously employing non-project researchers as external

commentators at research group workshops and conferences it has been possible to widen perspectives and broaden and deepen network effects of the project.

**FORMULA** has delivered a number of contributions to different discourses within the broad scope of the project, at European level as well as nationally. In so doing **FORMULA** has contributed to framing the agenda for debate on legal and interdisciplinary debate which in part is general, in part issue specific in the wake of the *Viking Line/Laval* case law and has equally contributed to this debate, again at European level as well as nationally. The relevance and importance of these contributions are evidenced also by the demand in which research team members have found themselves from different actors, e.g. labour market organisations, ministries of government, and in academic contexts. This has been the case in Norway in particular, naturally inasmuch as it is here the project is based and has the higher profile, but it is true also otherwise, including at European level.

Through all of this, the **FORMULA** project has also contributed new knowledge and insight within the Europe in Transition target areas of «Law and democracy in Europe» and «Economic development and integration», as discussed above.

I have not quantified or enumerated publications emanating from the **FORMULA** project. All publications are available, directly downloadable or by reference, at the project website, [http://www.jus.uio.no/ifp/english/research/projects/freemov/index.html](http://www.jus.uio.no/ifp/english/research/projects/freemov/index.html). There, moreover, further information on the project, the project researcher team, etc. is available.
Formula

Free movement, labour market regulation and multi-level governance in an enlarged EU/EEA – a Nordic and comparative perspective
FORMULA

The research team, led from the University of Oslo spans Europe by the universities of Århus, Stockholm, Uppsala, Helsinki, Krakow, Trier, Nijmegen, Amsterdam, Bristol
moreover includes a network of external collaborators and commentators, experts in the fields covered by the project, from the universities of Stockholm, Lund, Vienna, Göttingen, Frankfurt, Passau, Louvain, Amsterdam, Tilburg, Firenze, Cambridge, London, Leeds, Nottingham, and the EU Commission
**Formål:**

- Utviklingen av regelverk, i EU og nasjonalt (implementering)

- Interaksjon mellom ulike aktører på ulike nivåer, i EU-sammenheng og på nasjonalt plan
Rett og demokrati

• Tjenestedirektivet

• Utstasjonering, ”Laval-kvartetten” og negativ integrasjon (constitutionalization)

• Nasjonale svar og variasjoner
Økonomisk utvikling og integrasjon

• Tjenestedirektivet

• Utstasjonering, “Laval-kvartetten” og negativ integrasjon (constitutionalization)

• Nasjonale svar og variasjoner
Resultater?

- Til den europeiske agenda
- Til den europeiske retts- og lovgivningsutvikling
- Til nasjonale myndigheter og lovgivningsprosesser
- Til nasjonale arbeidslivsaktører m.v. ("de sosiale parter")
Formula

Sluttkonferanse i Oslo 22. og 23. mars 2012

For nærmere informasjon, kontakt

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