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The embedded flexibility of Nordic labor market models under pressure from EU-induced dualization—The case of posted work in Denmark and Sweden

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Abstract

While many coordinated market economies have responded to internationalization by regulation that creates dualization between insiders and outsiders, the Nordic countries have opted for an embedded flexibilization in which strong unions and cooperative employers have combined flexibility and equality. However, in recent years, the Nordic countries have come under pressure from an EU-induced dualization that has institutionalized mobile low-wage workers as an outside group. This article presents case studies of how Denmark and Sweden have responded to these challenges. While political processes have been different in the two countries, pressure from EU regulation and changes in employers’ incentive to compromise implies that there is now a specific category of low-wage workers in both countries’ otherwise egalitarian labor markets. The article, thus, contributes to the literature on dualization by highlighting the pressure coming from EU regulation rather than national policy.

Keywords: dualization, European Union, labor market regulation, Nordic countries, posting of workers.

1. Introduction

The expansion of the Copenhagen Metro was one of Denmark’s largest construction projects ever, employing thousands of construction workers from 2009 to 2019. However, rather than Danish workers employed in Danish companies under Danish labor standards, most workers on the project were Italians, Poles, and Romanians employed by companies from other EU countries under their home country’s labor regulation. This is legally facilitated by the EU’s rules on cross-border service trade, allowing companies to post their workers temporarily to different EU countries. Because these posted workers are formally employed in one country but sent to work temporarily in another country by their employer, receiving countries have only limited competence to regulate their working conditions under EU law. Consequently, the Copenhagen Metro expansion project workers were paid 20%–70% less than an average Danish construction worker and thus became a second-tier workforce in the otherwise egalitarian Danish labor market (Arnholtz & Refslund, 2019). This situation caused massive public debate in Denmark, but the Copenhagen Metro expansion was only the most highly profiled case of a more general problem with labor market dualization that the Nordic countries experience concerning these workers posted for short-term tasks across the EU.

Since the 2004 EU enlargement, an increasing flow of low-wage posted workers has contributed to the already existing dualization of labor markets in many of the EU’s coordinated market economies (Bosch & Weinkopf, 2013). Dualization is a process in which policies discriminate between workers in different labor market positions and is often observed in coordinated market economies. In contrast to a deregulatory liberalization, which undermines the conditions of all workers by removing their institutional protection, dualization allows that “the position of insiders may remain more or less constant, while only the position of outsiders deteriorates” (Emmenegger et al., 2012, p. 10). Thus, migrant and posted workers can, for instance, be used as cheap and flexible labor in countries that otherwise have high standards for labor protection (King & Rueda, 2008; Krings, 2020).
However, the Nordic models have previously avoided dualization by adjusting to internationalization through a process of “embedded flexibilization” (Thelen, 2014). Employers and unions regulating the labor markets via collective agreements and continuous negotiation underpin this embedded flexibilization, which also relies on strong social protection and continuous upskilling. These systems provide a combination of flexibility and social protection that has so far avoided dualization. However, Nordic models have come under pressure from EU law to increase the transparency of their regulation to allow for better cross-border service trade and posting. Combined with the increasing inflow of low-wage temporary posted workers, this has revealed tensions between the Nordic labor market regulation and the EU’s attempts to create a single market for services. Consequently, the embedded flexibilility of the Nordics has come under pressure from an EU-induced dualization.

The key question raised by this article is how the Nordic actors have responded to this pressure. Empirically, the article presents case studies of how Denmark and Sweden have developed their regulatory governance concerning posted workers to balance the tension between their national systems and EU rules allowing the temporary use of low-wage workers. Drawing on interviews, official documents, and secondary literature and focusing on the construction sector where posting is most prevalent, the article shows that posting is challenging the systems of both countries. In Sweden, national-level politicization of posting has created a complex legal setup without providing solutions to the spread of dualization caused by the dis-embedding of flexibility. Responses via collective bargaining have been almost nonexistent. A joint and pragmatic response to the transparency requirement in Denmark has initially allowed greater scope for combating posting’s dualizing tendencies. However, as trade unions at the sectoral level are trying to re-embed flexibility vis-à-vis posted workers, employers are becoming more skeptical of adopting new initiatives.

Thus, the article concludes that the “embedded flexibility,” which scholars have viewed as an alternative to both deregulatory liberalization and coordinated dualization (Thelen, 2014), is being challenged by an EU-induced dualization of these otherwise egalitarian systems. It thus contributes to the literature on dualization by highlighting how EU liberalization pressures may also drive dualization in countries where dualization has so far been minimized.

2. Dualization, embedded flexibility, and actor responses to European integration

The article’s analysis takes its starting point in debates about variations of capitalist economies and viable alternatives to erosion of labor standards under conditions of increasing internationalization. In the literature on comparative political economy, the distinction between liberal and coordinated varieties of capitalism (Hall & Soskice, 2001) has long been used to argue for the viability of egalitarian alternatives to neoliberalism. More specifically, Hall and Soskice (2001) argued that coordinated market economies have their own comparative advantages, making them able to survive increasing international competition without succumbing to deregulatory liberalization. While their argument focused on employers’ motivation for retaining coordinated market economies, the fact that such economies have generally had more regulated labor markets, stronger trade unions, and lower inequality raised hope that their survival also implied the survival of more egalitarian societies despite pressures from internationalization and neoliberal policies.

However, in the recent debates, there is a growing recognition that coordinated market economies are changing in a less egalitarian direction. Some authors argue that the institutions upholding the coordinated economies are eroding due to a process of deregulatory liberalization (Baccaro & Howell, 2017; Streeck, 2009). Others claim that coordinated economies are being dualized, with protective institutions still covering core manufacturing workers but not peripheral workers in, for example, the service sector, who, therefore, suffer from poor working conditions (Emmenegger et al., 2012; Hassel, 2014; Palier & Thelen, 2010). To understand the difference between these two arguments, we must outline the concept of dualization in more detail.

2.1. Dualization in coordinated market economies

Dualization is understood as a process in which policies increasingly discriminate between workers in different labor market positions, often in ways where “the position of insiders may remain more or less constant, while only the position of outsiders deteriorates” (Emmenegger et al., 2012, p. 10). Classical segmentation theory
(Berger & Piore, 1980) argued that labor market dualism originates in company strategies. In response to product market fluctuations and uncertainty, companies would differentiate between core workers, who have essential skills and are retained via high wages and good employment conditions, and peripheral workers, who can be easily replaced and are, therefore, given lower wages and poorer employment conditions. By contrast, dualization theory focuses more on policies. Some authors identify dualism as originating in company strategies but emphasize the process by which dualism is institutionalized in various forms of regulation (Palier & Thelen, 2010), while others focus on how policy changes make differential treatment of workers possible (Krings, 2020). Furthermore, the dualization literature focuses on how the labor market and social policies contribute to the creation of dualisms in the labor market. For instance, strong employment protection regulation can create divides between employed insiders and unemployed outsiders (Betthäuser, 2017), while differentiated unemployment benefits also creates dualisms in the labor market (Clegg, 2012). Thus, in contrast to deregulatory liberalization, where labor standards of all workers are assumed to erode because institutions are dismantled, dualization theory focuses on policies that “do not directly challenge the institutional core but which create employment options circumventing it” (Eichhorst & Marx, 2012, p. 76).

While identifying dualization as an alternative to deregulatory liberalization is important for understanding changes to especially coordinated market economies, there are still unresolved issues around dualization theory. First, it is unclear whether the deterioration of outsiders’ positions will ultimately undermine the positions of insiders as well, or whether occupational segmentation and differences in interest representation will allow insiders to maintain their privileges (Emmenegger et al., 2012). Second, this links to questions about the respective interest representation of outsiders and insiders (Häusermann et al., 2020; Rueda, 2005). While much of the literature on outsiders’ interest representation focuses on electoral politics, it also concerns the role of unions as protagonists, consenters, and antagonists of dualization (Korpi, 2006). Classical insider-outsider theory (Lindbeck & Snower, 1988) saw unions as the protagonists of dualization because they marginalized outsiders by defending insiders’ interests through wage bargaining and employment protection. Dualization theorists more often regard unions as consenters of dualization that try to defend the interests of their core members by making cross-coalitions with employers without being the actual drivers of the process (Emmenegger et al., 2012). However, other scholars argue that inclusive unions may be antagonistic toward dualization (Benassi & Dorigatti, 2015; Marx & Starke, 2017) even if they sometimes have insufficient power to oppose it effectively (Rathgeb, 2018).

### 2.2. Embedded flexibilization as an alternative

Much of the debate on liberalization and dualization has revolved around Germany—Europe’s largest economy and the archetype of coordinated market economies (Baccaro & Benassi, 2017; Hassel, 2014). Nonetheless, Thelen (2014) has made an important contribution to the debate by expanding the empirical focus beyond the US-Germany opposition. This led her to distinguish between three trajectories of liberalization: a deregulatory liberalization associated with liberal market economies like the United States, a dualizing liberalization associated with conservative Christian Democratic countries such as Germany, and an embedded form of flexibilization found in Nordic countries like Denmark and Sweden. While acknowledging that the inequality gap is expanding in some coordinated economies due to dualization, she argued that the path of embedded flexibilization delivered a more egalitarian alternative for dealing with pressures from internationalization. She highlighted how the embedded flexibility of Danish skill formation, labor market policy, and wage-setting continued to deliver high wages and good working conditions for most workers, thus avoiding both dualization and deregulatory liberalization.

Thelen highlighted three important features providing the underlying condition for this embedded flexibilization. First, while the employer support for institutions, which characterizes coordinated market economies, is necessary for embedded flexibility, it is not sufficient. Rather, “what is crucial is unity and coordination on the labor side” (Thelen, 2014, p. 31) as well as labor’s power resources (such as high trade union density). Second, embedded flexibilization “involves the introduction of new forms of flexibility within the context of a continued strong and encompassing framework that collectivizes risk” (Thelen, 2014, p. 14). There is increased flexibility, but it is held in check by collectivizing institutions and strong trade unions. Third, Thelen notes that “embedded flexibilization often
rest on “ambiguous agreements” among actors with different and sometimes contradictory interests” (Thelen, 2014, p. 31). The balancing act of embedded flexibilization is possible because employer and worker representatives continuously make compromise-based agreements to solve challenges despite their different interests.

While Thelen’s argument touches upon other aspects of the Nordic models, the three features highlighted here point to the central role played by employer and worker representatives in finding joint solutions to new problems both through national agreements and embedded local negotiations over the ambiguous agreement.

2.3. EU induced dualization in the Nordics

Since debates about dualization and embedded flexibilization mainly focus on European countries, it is puzzling that these debates have paid little attention to the relation between dualization and European integration (although see Porte & Emmenegger, 2017). There is a vast literature arguing that EU liberalization is pressuring national labor market institutions (Rubery et al., 2008), especially regarding service liberalization and posted work (Arnholtz & Andersen, 2018; Bosch & Weinkopf, 2013; Dolvik & Visser, 2009). However, others argue that the liberalizing pressures from the EU do not fundamentally challenge core national labor market institutions (Blauberger, 2011; Menz, 2005) and that service liberalization can even strengthen them (Afonso, 2016). A potential answer to this controversy may be that liberalizing pressure from the EU is causing dualization—leaving core institutions and workers untouched but causing deteriorating institutional protection for outsiders. This would be particularly likely with regard to service liberalization, where only posted workers are directly affected.

In this context, the Nordic countries seem a good test case for studying whether pressure from the EU is causing dualization, that is, whether an EU-induced dualization can be identified. Since the Nordic countries have generally been less prone to dualization than other coordinated market economies, trends toward dualization in policy areas where EU liberalization pressures are strong may indicate that it is an EU-induced dualization and not a purely national trend. More specifically, the question is whether the Nordic countries can successfully tackle the combined pressure from low-wage mobility and EU regulation as it manifests itself concerning posted workers, or whether we will observe an EU-induced dualization of these otherwise egalitarian labor markets.

To detect dualization, we would need to observe challenges to the three preconditions of embedded flexibilization mentioned above. That is, we should observe (1) diminishing strength of organized labor, (2) a disembedding of flexibility, and (3) an inability to produce compromises to solve the problems. While previous literature has clearly identified how EU case law on posting held the potential to hamper trade unions strength and disembedded the flexibility of the Nordic systems (Malmberg, 2008; Ronnmar, 2008), Blauberger (2011) argued that the Nordic countries could solve these problems through regulatory reforms based on national compromises.

However, Blauberger focused only on national-level parliamentary responses to EU rulings. This fundamentally misrepresents the Nordic systems because, on the one hand, it ignores how employers and trade unions respond to the challenges of posting through sector-based collective bargaining and, on the other hand, ignores that these challenges come from the combined effect of EU regulation and low-wage labor mobility. Furthermore, Blauberger (2011) focuses only on the immediate political responses and misses that EU regulation can cause a gradual shift in actors’ incentive to make compromises. Especially for employers, the EU ruling offered an opportunity to advance their interest at the expense of making compromises, while recent EU initiatives—the Enforcement Directive and the revision of the Posting of Workers Directive (PWD)—have offered trade unions some opportunities to further their opportunities.

The key question raised by this article is thus whether the Nordic employers and trade unions have been able to produce compromises regarding posted work that allows for the maintenance of embedded flexibility, or whether pressures from EU regulation have incentivized them to opt out of this compromise-based maintenance and thus allowed for dualization. Underlying this question is also the question of whether Nordic trade unions have acted as protagonists, consenters, and antagonists of dualization. Have they actually tried to promote the protection of posted workers, or have they accepted them as an outsider group?
3. Methods

The article uses case studies of posting in Swedish and Danish construction to answer this question. Sweden’s and Denmark’s reliance on collective agreement makes them representatives of the traditional Nordic model of labor market regulation and makes them stand out in a European context, where most countries rely on statutory regulation. Furthermore, both countries have wage levels at the top-end of the European continent—especially when looking at blue-collar work like construction (Arnholtz & Ibsen, 2021). There is, therefore, a strong incentive for foreign companies and workers to enter the two countries’ construction sectors and benefit from labor cost differences. Posting thus has the potential to cause dualization in the two countries. In both countries, the main debates on posting revolve around the construction sector, which is where most posted work occurs.

The case studies method used is process tracing (George & Bennett, 2004), in which multiple observations of the same issue are made over time within the same case. Specifically, the analysis focuses on how actors respond to the pressure from posting through both sector-level collective bargaining and input into national political responses to various forms of EU regulation. The aim is to establish whether the actors can find the compromises characteristic of embedded flexibilization or whether EU regulation incentivizes actors to opt out of compromise-finding and thus allow dualization to materialize.

Empirically, the two case studies are based primarily on official documents and the accumulated knowledge from 30 interviews conducted with key actors in the two countries during the last decade. Official documents include legislation (including legislative responses to EU regulation) and debates about this legislation, and collective agreements. They were organized in a timeline, and main developments were summarized. The official documents were supplemented by semi-structured interviews that were conducted at various points in time (2011, 2017, & 2020/2021 in Sweden, 2008, 2015, & 2020 in Denmark) with representatives from various trade unions and employers organizations in the two countries (see Appendix A for an overview of the interviews). The focus of the interviews was to “fill in the blanks” in the timeline, with a specific focus on the political processes behind policy developments and the actual effects of these developments. The interviewees were, therefore, selected on the basis of their specific knowledge about these issues. Interviews were transcribed and coded according to the issues and policy developments they addressed. These two data sources were supplemented with position papers, news reports about the reforms, statistical data, and secondary literature.

4. Background: nordic models, low-wage workers, and EU regulation

To understand how posting is challenging the Swedish and Danish models of labor market regulation, this section presents four key features of the Nordic models of Denmark and Sweden and then outlines the challenges raised by posting, thus showing how posting is undermining trade union strength and disembedding flexibility.

4.1. Key features of the Nordic models

In the context of the questions raised above, four defining features of the Danish and Swedish models are important to outline. First, there is limited law-based regulation and no statutory minimum wages in Denmark and Sweden. Instead, employer associations and trade unions regulate the labor markets via multi-employer collective agreements. It is voluntary for companies to sign a collective agreement, and the state does not extend the applicability of these collective agreements to companies that have not signed them because it respects the social partners’ wish to maintain independence in collective bargaining. Thus, the two countries stand out from other EU member states in how little statutory regulation is in place to ensure workers’ rights (Andersen et al., 2014). Second, however, the limited law-based regulation is counteracted by a high degree of organization on both employers’ and workers’ sides. Trade union density is high due partly to procedural support from the state, such as its financial support for the Ghent system in which unemployment insurance and trade union membership are closely linked (Bosch, 2015; Clasen & Viebrock, 2008). Additionally, trade unions have the right to take collective action in blockades and boycotts to make employers sign collective agreements. Furthermore, trade unions’ high membership base allows them to ensure effective enforcement of collective agreements and implies that collective agreements have a spillover effect on the parts of the labor market not covered by collective agreements (Stokke & Thornqvist, 2001).
Third, flexibility through negotiation has been a key feature of these models since collective bargaining was decentralized during the 1980s (Swenson, 1991). Importantly, this decentralization is “organized” (Ibsen & Keune, 2018) in the sense that sectoral agreements set the frame for local, company-level negotiations between employers and worker representatives. In Sweden, sectoral agreements in, for example, construction only prescribe local negotiation must take place but sets no minimum wage. In Denmark, the sectoral agreements set a minimum wage as a starting point for company-level bargaining, but typically wages are raised substantially via company-level negotiations while employers may obtain more working time flexibility in exchange. Thus, there is significant room for negotiation-based flexibility at the company level in both countries, but in practice, Denmark and Sweden have very low wage differentiation because local bargaining gives roughly similar results (Andersen et al., 2014). This paradox of significant formal flexibility and little real differentiation is explained by trade unions’ strength and their formal representation in the local negotiations and a high social protection level in these countries, which underpins workers’ reservation wages. This is a clear illustration of the “embedded flexibilization.”

Fourth, while both employer associations and trade unions recognize that they have divergent interests, the bargaining system acts as a vehicle for letting conflicts play out in an institutionalized manner and eventually find compromise-based solutions (Andersen et al., 2014). Thus, the parties recognize their shared interest in maintaining the system and keeping politicians out of labor market regulation. Combining these features has created regulatory models recognized for dealing well with internationalization by successfully combining international competitiveness and flexible training systems with low inequality, high wages, and decent working conditions (OECD, 2018). However, the inclusive nature of these features has come under pressure from low-wage labor mobility and EU regulation.

4.2. Pressure from low wage labor mobility
Since the 2004 EU enlargement, there has been a large and growing labor cost gap between new and old member states (Figure 1), incentivizing labor mobility from East to West. Part of this labor mobility consists of posted work, in which companies employ workers from the new member states and send them to work in an old member state. Posted work, which is very prevalent in the construction sector, can be regarded as a functional equivalent to outsourcing production to low-wage countries (Menz, 2005; Wagner, 2015). The number of posted workers has been growing in the EU, with available data suggesting an increase from approximately 1 million postings in 2007 to approximately 4.5 million postings in 2019 (OECD, 2011, 2020; Wispelaere et al., 2020). The number of postings into Swedish and Danish construction sectors has also grown despite the economic slump caused by the financial crisis (see Figures 2 and 3).

However, it is not the sheer numbers of posted workers that matter the most, but rather the regulatory challenges they pose, for instance, in the Nordic countries. When individual workers move across borders within the EU, they are granted rights to social protection in the country they work. By contrast, posted workers remain covered by the social protection of the country where they are employed. This implies that posted workers’ reservation wage is determined by the wage levels and social protection of their home country, which in the context of
large wage and benefit differences within the EU, institutes a clear dualism between posted workers and native workers.

Given the dualism caused by wage differences and differentiated treatment vis-à-vis social protection, it is mainly labor market regulation that can counteract the dualization of posted workers. However, posting companies often try to avoid such regulation by not signing collective agreements or ignoring statutory regulation. In countries like Germany, Finland, Norway, Belgium, and the Netherlands, posting companies are typically covered via the legal extension of collective agreements (Bosch & Weinkopf, 2013; Lillie et al., 2020), while in Sweden and Denmark, trade unions sometimes have success with imposing collective agreements on them via industrial action and labor clauses (Arnholtz & Refslund, 2019). However, even when formally covered by collective agreements or statutory minimum wages, posting companies often use a variety of strategies to circumvent host country labor regulations that could increase their labor cost (Berntsen & Lillie, 2015; Wagner, 2015).

The posted workers typically are unorganized, work long hours, and receive extremely low wages compared to the host country’s standards (Arnholtz, 2021; Lillie & Sippola, 2011; Wagner, 2015). Furthermore, they are greatly dependent upon their employer and contribute to circumventing labor regulations to protect their employment (Lillie, 2016; Matyska, 2019). In the Nordic context, this implies that trade unions have a hard time securing collective agreement coverage and enforcing these agreements because they do not have members among the posted workers. Therefore, the challenge from this kind of labor mobility lies in labor standards differences and the fact that trade unions often lack support from posted workers.
4.3. Pressure from EU posting regulation

Additionally, posting is governed by EU rules on the free movement of services. Ordinary labor mobility within the EU rests on a principle of nondiscrimination, which requires mobile workers to be covered by the labor regulation of the country they work in. However, in the case of posted work, the Rome I regulation (593/2008) allows companies and their employees to decide which country’s labor regulation should apply, and posted workers are often hired on the premise that they accept the country with the least favorable conditions. The PWD (96/71/EC) counteracts this partially by allowing member states to apply some parts of their labor regulation to posted workers within their territory. Specifically, the PWD contains a list of minimum standards (such as working time rules, minimum wages, holiday pay, etc.), which member states should apply to posted workers.

However, there are limits to the scope of the PWD’s re-regulatory effect, which became clear in the Laval ruling (C-341/05) made by the European Court of Justice (ECJ) in 2007. The case concerned a conflict between the Swedish construction trade union, Byggnads, and a small Latvian company, Laval. Following ordinary practices of the Swedish model, Byggnads demanded that Laval sign a collective agreement to ensure that the posted workers received Swedish wages. When the company refused, Byggnads initiated collective action (Woolfson & Sommers, 2006). The Swedish labor court asked the ECJ for guidance on interpreting EU law on this situation and the ECJ ruled that Byggnads’ collective action was illegal under EU law because it demanded a collective agreement, which was not generally applicable and went beyond the minimum standards prescribed by the PWD. Additionally, it argued that taking collective action to push local wages beyond the minimum wage prescribed in the sectoral collective agreement was an unjustified restriction to the free movement of services because it made the market intransparent for companies (Malmberg, 2008; Rønnmar, 2008). The ruling thus challenged both trade unions’ involvement in local wage negotiations and their right to strike. That is, it diminished trade union strength and disembedded flexibility with regard to posted workers.

The Laval ruling caused an uproar, as it was viewed as legitimizing the social dumping caused by posting (Höpner, 2008; Joerges & Rödl, 2009). This initiated a pushback on EU level liberalization that eventually led to two pieces of legislation concerning posted workers. The first was the 2014 Enforcement Directive (2014/67/EU) to secure the proper implementation and functioning of the PWD. This directive contained a demand for introducing chain liability or similar measures concerning posted workers in the sector most affected by posting, namely the construction sector. The second piece of legislation was the 2018 revision of the PWD, which was adopted through a highly complex political process (Seikel, 2019). Among numerous changes, the most important was the change of the term “minimum wage” into the concept of “remuneration.” The aim was to improve the conditions of posted workers by allowing member states to include a broader set of wage elements (allowances, skill bonuses, etc.) in the regulation they applied to posted workers (Costamagna, 2019). Trade unions have tried to use both pieces of legislation to push back on the dualization caused by Laval, but the transparency requirement, which made Byggnads’ demands for local wage negotiations illegal, is still in effect.

In sum, EU regulation of posting has added to the pressure from temporary low-wage mobility by challenging both trade unions’ right to take collective action and the mechanisms that have made Nordic decentralization of collective bargaining organized. The combined effect is a dualization process where posted workers are treated very differently from local workers. The key question is whether actors in Sweden and Denmark have been able to find compromise-based solutions to these dualizing pressures or whether the dualizing tendencies of these have been allowed to develop?

5. Politicization of posting in Sweden

In Sweden, the Laval ruling caused a strong, initial focus on the pressure from EU regulation while little attention was paid to the challenge raised by low-wage labor mobility. After years of contestation, trade unions and employers in construction have started to develop solutions that focus on the latter, but there is dualization on the ground, and trade unions’ ability to embed flexibility has weakened.
5.1. The politics of Laval

The Laval ruling has been decisive for the response to posting in Sweden. It is important to note that the conflict, which the case revolved around, was perfectly ordinary, according to the standards of the Swedish model. The Swedish labor court acknowledged this before asking the ECJ for guidance (Malmberg, 2008). The ruling, therefore, came as a shock for Swedish trade unions. However, two other things contributed to the politicization of Laval in Sweden. First, the Swedish employers’ confederation, Svensk Näringsliv (SN), decided to support Laval’s legal action against Byggnads even though Laval was not a member of any Swedish employer association (Woolfson & Sommers, 2006)—a decision that was unprecedented and highly controversial. Behind SN’s support lay a frustration with Swedish construction unions’ use of collective action. In the years leading up to the Laval conflict, several minor conflicts had escalated, and employers wanted to use the Laval case as an opportunity to undermine trade union strength, even if this challenged the Swedish system and invited foreign competition. As an employer representative explained:

Minor conflicts threatened labor peace in the whole sector, even for companies that had no part in them. The secondary industrial action called for by SEF [the electrician trade union] in relation to the Laval conflict would have affected thousands of our members, although they abided by the collective agreements that they had signed. (SE2)

Second, the Laval case was also politicized in the parliamentary arena. While the Social Democratic government sided with Byggnads, the center-right opposition criticized them. The leader of the Swedish conservative opposition, Fredrik Reinfeldt, argued that the whole affair was a “disgrace” for the trade unions (EUobserver, 2004). Reinfeldt argued that Swedish construction workers earned too much and that it was good for public budgets to have competition from the new member states. He argued that the Swedish model contained “unclear” elements and needed to be reformed in light of the EU enlargement.

Reinfeldt became prime minister of Sweden in 2006, and when the Laval ruling came in late 2007, the center-right government used the opportunity to revise the implementation of the PWD. This revision, known as Lex Laval, outlined three conditions restricting trade unions’ rights to take collective action against posting companies. First, trade unions could demand only those employment conditions stipulated in the PWD. Second, trade unions were allowed to take collective action only to demand employment conditions equal to those found in the central collective agreement (no demand for local negotiations). Third, the “proof rule” implied that trade unions could not take collective action to gain a collective agreement if the company provided proof that their posted workers already had employment conditions similar to those stipulated by that collective agreement (Rønnmar, 2010). These changes made it almost impossible for a trade union to take collective action and thus weakened them in relation to posting companies. This effectively secured posting companies a labor cost discount because they were allowed to avoid the local wage negotiation (SE13). It thus instituted a dualism between local and posted workers.

5.2. Social democratic push back

When the Swedish Social Democrats came back into office in 2014, their first initiative was to roll back the “proof rule” to make it possible for trade unions to take collective action once again. SN and the center-right opposition objected to this rollback and ever since have continued doing so in every debate on posting. However, it is noteworthy that the Social Democrats did not roll back the other restrictions implemented by Lex Laval. The contested nature of the issue implied that they would not risk toeing the line of EU law by allowing trade unions to take collective action to demand local negotiations (SE11). The new reform introduced a special agreement for posting companies with conditions aligning with those that trade unions could take collective action to demand. These were not part of the usual Swedish system but provided special conditions for posted workers (SE6). In that sense, the reform institutionalized a kind of dualization of the Swedish labor market, where trade unions were allowed to take collective action with regard to posted workers but for inferior labor standards. Swedish trade unions have never used that opportunity because they will not recognize the legitimacy of this dualism (SE15).
Two other reforms were introduced in recent years. In 2017, the Social Democratic government implemented the EU Enforcement Directive by introducing chain liability in the construction sector. In 2020, it implemented the revision of the PWD. Both times, employers and the center-right opposition fiercely contested the implementation. For instance, employers’ associations criticized the “trade union friendliness” and “needless over implementation” of the Enforcement Directive, arguing that it would be repealed under a center-right government (Svenskt Näringsliv, 2017; Sveriges Byggindustrier, 2017). However, the results of these reforms have been minimal, despite the high degree of politicization. Asked about the real effects of these new reforms, both trade unionists and employers’ representatives argue that they have had little effect since they had been preempted either by collective bargaining results or by case law from the ECJ (SE8, SE12, SE13, SE14). The highly politicized revision of the PWD has thus had little effect in Sweden.

5.3. The “forgotten” effects of market integration

While posting has been high on the national political agenda in Sweden, initiatives to tackle the effects of the low-wage mobility aspect of posting have not. While posted workers’ share of the employment in the Swedish construction sector has increased over the years (see Figure 3), there have been hardly any collective agreements addressing the challenges related to posted work during the first decade after the EU enlargement (SE7, SE8, SE9, SE13). While the labor market parties used to be initiators of rule development to solve the problems of the day, two things prevented this from happening with regard to posting. First, the legal complexity of the EU rules made the partners reluctant to engage in reform (SE11). Second, the politicization made the issue so contentious that employers declined to negotiate (SE12). Thus, the compromise-based problem-solving conditioning the embedded flexibility of Nordic labor market models under pressure from EU-induced dualization has not worked well with regard to posted work. Only in 2014, with the Enforcement Directive on its way, did the Swedish construction employers, Sveriges Byggindustri, engage in negotiations about chain liability. However, trade unionists argue that this was done for tactical reasons—to lay the tracks for a restrictive implementation of the Enforcement Directive—and that employers have continuously tried to find loopholes in that agreement (SE9, SE15).

The political reforms and the lack of bargaining solutions have caused changes on the ground. In 2002–2008, Byggnads took collective action against at least one posting company per year, but that number has been zero from 2009 to 2017 (Medlingsinstitut reports, 2002-2017). Even if only 25 foreign companies were targeted by collective action in the first period, this was enough to make other companies perceive collective action as a credible threat. However, when Lex Laval restricted trade unions’ right to engage in collective action against posting companies, the creditability disappeared. Consequently, the number of foreign companies covered by collective agreements has declined. In 2007, 122 newly arrived foreign companies were covered by collective agreements, but that number has gradually declined to only 16 of the newly arrived foreign companies in 2017 (Medlingsinstitut reports, 2002-2017).5

Swedish construction unions still have one powerful tool for alleviating the liberalizing pressure from posting, namely Appendix D in the collective agreement for general construction (Byggavtalet). This appendix was adopted before 2004 and requires main contractors to ensure that their subcontractors are covered by a collective agreement (SE15). Since posting companies are not allowed to join the Swedish employer’s organization, subcontractors must negotiate with the trade unions to get the collective agreement required by the appendix. The appendix is, therefore, the most effective tool for Swedish construction unions with regard to posting. On the one hand, it ensures high collective agreement coverage among posting companies on larger construction sites with Swedish main contractors. On the other hand, it allows trade unions to demand that main contractors dismiss posting companies that do not comply with the collective agreements (SE15). Since Laval, not a single case about posting companies has reached the Swedish labor court (SE11), but trade unions have used informal local meetings to put pressure on main contractors and subcontractors alike by threatening to invoke Appendix D (SE15). As long as the Swedish trade union has the strength to force collective agreement coverage on Swedish main contractors, they can still have a strong grasp on the major construction sites.

However, three things are fundamentally different from before Laval. First, trade unions are unable to ensure collective agreement coverage on smaller construction sites where there are no Swedish main
contractors (SE12). Second, trade unions have become more dependent on their prior agreements with Swedish employers to secure collective agreement coverage on larger construction sites. Third, although this has not happened much yet, if the trade unions were faced with foreign main contractors, they might be highly challenged to get collective agreement coverage (SE12). In other words, the Swedish construction sector is being dualized between larger, normally functioning construction sites with Swedish main contractors and smaller sites (and potentially larger sites with foreign main contractors) where posted workers can be underpaid. Furthermore, the ordinary functioning of the system on the larger sites depends increasingly on employers’ support and less on trade unions’ strength. For instance, trade unions find themselves almost helpless in enforcing the collective agreements on larger sites since neither posted workers nor employers support their efforts (SE15). In these ways, the Swedish system is moving away from the embedded flexibility (upheld by strong trade unions) toward a more dualized system where core institutions still work for Swedish workers but not for posted workers.

6. From pragmatism to conflict in denmark

Denmark initially took a path very different from Sweden, with more focus on retaining collective bargaining as the driver of rule innovation and more focus on the labor mobility aspect of posting. While Denmark has had to deal with the same pieces of EU regulation (the Laval ruling, the Enforcement Directive, and the revision of the PWD), there has been almost no parliamentary debate about the issue. Governments of different political orientations have taken their lead from agreements made between the labor market parties. However, this does not imply that there have been no conflicts. While the initial responses to the increasing use of posting were compromise-based solutions, tensions have grown around the issue, and dualization is occurring in Denmark as well.

6.1. Pragmatic responses to Laval

Since the Danish and the Swedish systems are similar, the Laval ruling required a Danish reform too (DK3). However, the process was very different from the one in Sweden. While it took until 2010 for the Swedish government to introduce Lex Laval, the revision of the Danish posting law came in mid-2008. A tripartite commission with government, trade unions, and employers worked out a legislative response that largely allows trade unions to continue their efforts to secure collective agreement coverage (DK5, DK6, DK7, DK8). Where the original implementation of the PWD had made no reference to the issue of wages, the revised law now made an explicit reference to trade unions’ right to take collective action against posting companies to obtain a collective agreement that included wage rates. The only condition was that the collective agreement had to be representative for the national labor market and that it was transparent for the company what wage trade unions demanded (Kristiansen, 2013). This demand for transparency implied that trade unions could not demand local wage negotiations anymore. However, the major Danish construction union, 3F, decided to convert the monetary value of elements not mentioned in the PWD into a “raised minimum wage” when dealing with posting companies (DK5). In that way, posting companies were met with a demand for wages well above the minimum wage of the general collective agreement. Among employers’ representatives, some questioned the legality of this practice, but the issue was never raised in the labor court (DK6).

6.2. Dealing with low wage labor mobility through collective bargaining

The national-level consensus to defend trade unions’ rights to collective action implied that the focus of regulatory change has been on posting as a source of low-wage mobility. Trade unions and employers in the construction sector have developed and refined enforcement efforts regarding posting via collective bargaining. The background for the early collective bargaining results was the “strong relations of trust” between parties in Danish construction (Lubanski, 1999), which was lacking in Sweden. As a trade union representative explained in a 2008 interview:

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We sat down and had a discussion about what kind of sector we wanted in the future, and then we found some good solutions to ensure that. (DK2)

In 2007, new rules allowed trade unions to monitor whether pension payments of posting companies aligned with the wages agreed upon in the collective agreements. Furthermore, the new rules granted trade unions the right to call meetings with posting companies if these companies had signed a collective agreement or were subcontractors of a company that had signed a collective agreement (DK1, DK2). After initial experiences, the 2010 bargaining round saw these meetings becoming so-called “48-h meetings” that had to be held within a maximum of 48 h after a request from the trade unions. There is a reversed burden of proof during these meetings, implying that companies are obliged to prove that they adhere to the collective agreements (DK5, DK6). Danish trade unions have made massive use of this enforcement tool, using these meetings to claim more than 20 million Euros in fines for violations of collective agreements (Arnholtz, 2021).

However, trade unions’ enforcement efforts toward foreign companies gave rise to employer concerns. Seeing how the enforcement tools were used in practice, employers became less willing to make compromises with regard to the issue of posting. As a representative for the construction sector employer association, Dansk Byggeri, explained in a 2015 interview, employers felt that trade unions were exploiting the rules in an undue fashion:

They [the trade unionists] are using the rules to their limit. When they are dealing with our foreign members, even minor mistakes, which they would otherwise ignore, are subjected to 48-h meetings and arbitration. (DK6)

From 2010 and onwards, employers have been unwilling to take additional steps to strengthen regulation via collective agreements (DK11, DK12). At the same time, posted workers and “social dumping” have become trade union members’ number one priority for collective bargaining, with trade unions demanding chain liability, mandatory collective agreement coverage for subcontractors, and increased minimum wage introduced via the collective agreement (DK11). However, employers have consistently rejected these demands in the bargaining rounds between 2012, 2014, 2017, and 2020 (Arnholtz & Andersen, 2018). These bargaining rounds have become increasingly conflictual, with stalemate in the construction sector threatening to send the whole private sector into conflict.

6.3. A shift toward the political scene

The increasing tensions between employers and trade unions in construction found clear expression in relation to the implementation of the Enforcement Directive. Trade unions saw this as a chance to get a chain liability that could ensure payment of underpaid posted workers and incentivize main contractors to select their subcontractors more carefully to avoid having to pick up unpaid wage bills (DK5). However, construction employers rejected the idea of a chain liability (DK6, DK7). Unlike the pragmatic Danish response to Laval, the two parties could not agree on a joint proposal to implement the Enforcement Directive. Instead, trade unions and employers in the manufacturing industry stepped in and developed an alternative to chain liability, namely a fund that would compensate posted workers for their wage loss in the case of employer bankruptcy. The argument from trade unionists in manufacturing was that they could “not accept the Danish model being destroyed” by this piece of EU legislation (DK10). To the dismay of both trade unions and employers in construction, the Danish government used this fund proposal in its implementation of the directive (DK11, DK12).

Similar conflicts have been observable in relation to the implementation of the revised PWD. Construction trade unions viewed the revision as an opportunity to reintroduce local wage negotiations, but with the sector’s average wage as a starting point for those negotiations. As a trade unionist explained in a 2020 interview:

These workers can’t figure out the local negotiation on their own, so to secure nondiscrimination for them, we need to start at the average wage. It is a positive special treatment of this vulnerable group. (DK15)

Employers view this suggestion as being at odds with the workings of the Danish model. Not only would it undermine the flexibility element of the “embedded flexibility,” but a piece of legislation
prescribing a certain wage level would also be akin to a statutory minimum wage and thus threaten bargaining autonomy (DK13). For the same reason, trade unionists in other sectors have opposed the suggestion of the construction unions, and there are strong tensions between trade unionists on this issue (DK14). Therefore, construction unions tried to persuade the Social Democratic government to implement the directive to secure posted workers the average wage of the sector (DK15). The government did not accommodate this demand, but the request itself shows that the trustful relations have broken down due to the issues raised by posting.

While Denmark initially avoided the intense politicization of posting seen in Sweden and thereby was better able to make a united response to the dualizing pressure from posting, tensions have grown, and the national consensus is now shattered. Employers reject further regulation to handle the low-wage mobility and the Laval ruling, and trade unions struggling against this EU-induced dualization paradoxically hope to draw on EU legislation to diminish the flexibility element of the embedded flexibility they try to defend. However, they have had little success in using the new EU regulation in their favor.

7. Conclusion

In debates on comparative political economy, the Nordic countries and their “embedded flexibilization” (Thelen, 2014) are viewed as alternatives to deregulatory or dualizing liberalization. However, this article has used the case of posted work to argue that the embedded flexibilization of the Nordic models is under pressure from EU-induced dualization. In both Denmark and Sweden, posting companies’ effort to avoid regulation and the low organization of posted workers challenges trade unions’ power to uphold the embedded nature of rule flexibility. Furthermore, the Laval ruling challenged both trade union prerogatives and the mechanisms for embedding the flexibility of local wage bargaining. In the context of large wage differences and lack of social protection for posted workers, this has the potential for dualization.

Previous literature suggests that countries have leeway for absorbing the pressure from EU regulation if national actors can agree. Studying the specific case of posting, Blauberger (2011) highlighted how consensus between partners made it possible for Denmark to respond very differently to the Laval ruling than Sweden, where trade unions and employers had a more conflictual relationship. Adding to this, Seikel (2015) argues that the different responses were the consequence of differences in the specific political economy of the two countries’ construction sectors, with larger firms that benefit more from low-wage posting dominating the Swedish construction employers’ associations. Another explanation point to longer historical trends, where long-term dominance of the Social Democrats in Sweden has allowed trade unions to shift forum—gaining through law what they could not gain through bargaining—which has made Swedish employers skeptical toward engaging in bargaining at all. By contrast, the shifting parliamentary majority in Denmark as made both trade unions and employers more committed to finding regulatory solutions through collective agreements (Due & Madsen, 2000). Whatever the reason, the present study confirms that Sweden and Denmark responded very differently to Laval—Sweden with high politicization and reforms challenging trade union rights, while Denmark opted for a compromise-based solution and a joint defense of their model.

However, going beyond the immediate reactions to the Laval ruling, this article has shown that the continuous pressure from EU regulation and low-wage labor mobility is also causing conflicts in Denmark. Despite dissimilarities in the process, both country’s cases show how the pressures from posting are increasing tensions between the social partners and undermining the basis for the compromise-based solutions that have been a cornerstone of the Nordic models. No joint response to dualization has been mobilized, and posted workers are now effectively institutionalized as an outsider group in both countries. This similarity of outcome despite different initial situations and processes suggests that not only degrees of consensus or specific features of national political economies cause dualization to occur, but that pressure from EU liberalization has a strong dualizing effect that is hard to resist in the long term. Importantly, new EU regulation of posted work has been adopted with the aim of diminishing discrimination and dualization. Especially the change from “minimum wages” to “remuneration” in the revision of the PWD has been presented as the introduction of “equal pay for equal work in the same place” (Juncker, 2016). However, while Nordic trade unions have tried to use this legislative change nationally, it is far from evident that it will counteract dualization. Not only is the term “remuneration” so vaguely
defined that the ECJ will likely become involved in its interpretation, but the revision is still situated in the ECJ’s case law. To gain equal treatment for posted workers in a system of “embedded flexibilization” would require the reintroduction of trade union access to local wage bargaining. However, this is still bound to clash with ECJ case law that requires transparency (as per Laval). Therefore, legislative changes based on the revision have been modest in both countries despite trade union friendly governments. These findings speak to the literature on dualization in two ways. First, in both countries, trade unions have been highly antagonistic toward the dualization trend. They have mobilized many resources to counteract the institutionalization of posted workers as an outsider group. In Sweden, they have not once utilized the special posted worker agreements as this would legitimize differential treatment, and in Denmark, construction unions have broken rank from the national consensus of declining a statutory minimum wage. Therefore, trade unions were antagonists of dualization in both cases.

Second, these case studies show how pressure from EU liberalization can act as a powerful promoter of dualization. While dualization scholars have been right in highlighting how regulation mediates the pressure from internationalization, they have focused mainly on national regulation. In an increasingly integrated EU, however, regulation is also produced by European institutions. Posted workers’ lack of social security protection in the host country institutionalizes them as outsiders and puts pressure on national labor market institutions to tackle dualization. At the same time, these national labor market institutions and the embedded flexibility they contain are also challenged. Of course, substantial literature has shown how EU regulation can be selectively implemented at the national level (Blauberger, 2011; Menz, 2005; Seikel, 2015), implying that the social partners of the Nordic countries could potentially alleviate the pressures toward dualization. However, promoting dualization is not the only effect of EU regulation; it can also change the balance of power between actors and thus their incentive to find joint compromises. When EU regulation undermines trade unions’ ability to represent outsider workers in bargaining situations, employers have little incentive to bargain with trade unions with regard to these outsiders.

In their defense against the liberalizing tendencies of EU regulation, trade unions have thus become more dependent on employers’ willingness to make a compromise, and this shows that the Nordic countries may become more like those systems in which employers’ support for the institutional setup is key to their continuation. If the strength of trade unions is a distinguishing feature of embedded flexibility—as a viable alternative to both deregulatory liberalization and dualization—then the case of posted workers shows that the European integration process is challenging this mode of regulations. Since these models have long been able to avoid dualization despite internationalization, we would be justified in raising concerns about this development of an EU institutionalized dualization in otherwise egalitarian labor markets.

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Endnotes

1 Thelen also highlights how Denmark and Sweden from a passive to an active approach to unemployment, curtailing benefits but investing heavily in active labor market policy and retraining for workers. Just as other parts of the flexicurity literature (Madsen, 2005), she also recognizes that there are differences between, e.g., the employment protection in Denmark and Sweden, with Denmark having less.

2 In 2004, the minimum rate in construction was 97 Dkr, while the average wage was 150 Dkr, whereas in 2019 these numbers were 128 and 214, respectively.

3 Statistical data on posted workers within the EU is of low quality. It is based on either national registration, which varies from country to country, or mandatory social security registration (A1 forms) that are registered by the European Commission. The latter is the most comparable source, but there are well-known problems with lack of registration suggesting that the numbers are too low (Wispelaere et al., 2020). Furthermore, the data only goes back to 2007, and only in very
recent years is information about sector of activity in the receiving country part of the registration. Figure 2 is based on these registrations found in OECD (2011, 2020), and Wispelaeere et al., 2020, and reports the total number of posted workers in Denmark and Sweden (not only construction). Figure 3 shows estimates of posted workers as a share of total employment in the Danish and Swedish construction sectors. In the period 2011–2020, Danish registrations showed that an average of 53% of posted workers in Denmark work in construction, while Swedish registers from 2019 to 2020 suggest that 60% of posted workers in Sweden work in construction. These percentages and data from Figure 2 were used to estimate the number of posted workers in the two construction sectors, and these estimates were divided by the total employment in the two sectors based on data from Eurostat’s NACE Rev. 2 survey.

4 There are debates about the accuracy of these numbers (Rønnmar, 2010), and the coverage of subcontractors due to appendix D (see below) does not seem to be included in them according to interviews (SE15).

DATA AVAILABILITY STATEMENT
Research data are not shared.

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**APPENDIX**

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