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European integration - on the road to social union?

I. Introduction

The notion of European social union is not an immediately self-evident one, as that of the welfare state is, for example. Terminological confusion alone makes it a difficult idea to get to grips with - does "social union" mean more than the much-discussed "social dimension"? Does it indicate the same thing as the equally widely debated notion of "social Europe"? The situation is further complicated by the fact that there is a dual debate going on, at least among legal experts. Some are interested in the evolution of employment both now and in the Europe of the future[1], while others are concerned primarily or exclusively with national or supranational benefits paid in the event of unemployment or "need" in the widely understood sense of the term.[2] While the first group is concerned mainly with the division of competences in the relationship between individual member states and the EC[3], the second group is interested in the much more fundamental question of the extent to which the EC will be in any position to make good, in however makeshift a way, social deficits that arise as a result of economic development.[4] There is seldom much of a link between the two groups.[5] Nevertheless, the following paper is an attempt to integrate the two approaches. Despite the theme of the conference, we shall not concentrate exclusively on dependent employment but shall also pay attention to the wider social policy sphere of welfare measures. This accords with the system in use at EC level: "European social law" also includes labour law, in complete contrast with standard practice in Germany.[6]

1 See for example Birk RdA 992, 68 ff; Windbichler RdA 1992, 75 ff.
2 See for example Leibfried NDV 1992, p. 107 ff; Schulte KJ 1990, 79 ff.
3 See for example Waas, Die Europäisierung des Arbeitsrechts, in: Jahrbuch Junger Zivilrechtswissenschaftler, Munich 1992, p. 185 ff.
4 See for example Tietmeyer, Integration 1992, 17.
5 See, however, Bieback, Der Sozialstaat der Bundesrepublik in der Europäischen Gemeinschaft, in: Sozialökonomische Beiträge 1991, p. 45 ff; Däubler, Sozialstaat EG? Die andere Dimension des Binnenmarktes, Gütersloh 1989.
6 This is particularly clearly expressed in an account of European social law written in Spanish (Colina Robledo-Ramírez Martínez-Sala Franco, Derecho Social Comunitario, Valencia 1991), in which the standardisation of Community labour law is described as part of employment policy.

II. The development of EC activity in the sphere of social policy

Social policy at the European level has to date been confined to selective interventions. Neither the founding treaties nor the Single European Act provide any basis for a consistent conception of social policy.[7] This does not mean that the EC does not have wide-ranging competences in this sphere; rather, the use of those competences is not the subject of much forward planning, let alone a binding schedule, as was the case with the introduction of the internal market. EC social policy has passed through four basic phases.[8]

(1) Between 1958 and 1972, generally speaking, very little happened. The Community limited itself to introducing legal measures in the sphere of social security in support of the free movement of labour[9] and to granting subsidies from the European Social Fund that merely provided backing for measures taken at national level[10]. Employment in DG V was reputedly a guarantee of a quiet life. There do not even seem to have been many draft proposals. Social policy was more or less dormant.

(2) The situation changed radically in the 1970s. A whole range of activities was launched as a result of the 1974 social action programme[11]. It was during this decade that all the basic regulations and directives on European labour and social law were issued.[12] The decision of the European Court of Justice on equal pay for men and women in accordance with Article 119 of the EC Treaty of Rome[13] was a decisive landmark, the effects of which are now becoming increasingly apparent.[14] The 1970s can be seen as the "golden age" of social policy - the world economic crisis that began in 1974 did not have an immediate impact because of the long-term nature of the planned programmes.

(3) The period between 1980 and 1986 was characterised by stagnation. The Community took virtually no further steps towards integration; the notion of a "two-speed Europe" emerged, and if the idea had been put into practice it would at least have saved what there was to be saved[15]. It has to be said that in the sphere of social policy absolutely nothing happened. Proposals put forward by the Commission, such as the so-called Vredeling Directive[16] or the Regulation on atypical employment relationships[17], were defeated by the British veto in the Council of Ministers. The Community was engaged in the task of deregulation: social policy measures would have run counter to that project.

(4) Since the White Paper on the internal market and the Single European Act, it is possible to speak of a "restrained re-awakening". It is true that the dynamic created by the completion of the internal market has not been transferred to social policy, but some progress has been made, both in conceptional and, to a certain extent, practical terms. The Framework Directive on health and safety at work of 12.6.1989[18] and the reform of the structural fund[19] are the high points to date. In comparison, the Community Charter of the Fundamental Social Rights of Workers of December 1989 (the so-called "Social Charter")[20] is cosmetic in nature; attempts to implement its provisions through the Commission's action programme are not only coming up against formidable difficulties but have failed to introduce any really new element into Community social policy.

7 Birk EuR Supplement 1/1990, p. 18.
8 An overview of the development of social policy is also to be found in Hepple, The Modern Law Review 53 (1990), p. 645 ff; Rocella-Treu, Diritto del Lavoro della Comunità Europea, Padua 1992, p. 13 ff; Currall-Pipkorn, in: Groeben-Thiesing-Ehlermann (eds.), Kommentar zum EWG-Vertrag, 4th. ed., Baden-Baden 1991, Vorbemerkungen zu den Art. 117-128 Rn. p. 27 ff.
9 Regulations nos. 3 and 4, OJ1, 1958, p. 561.
10 Schulz, in: Groeben-Thiesing-Ehlermann, op. cit., Vorbemerkungen zu den Art. 123-128 Rn. 6
11 OJ1, 12.2.1974, C 13/1.
12 The state of the relevant EC legislation is documented in German in Birk (ed.), Europäisches Arbeitsrecht, Munich 1990; Schulte, Soziale Sicherheit in der EG, Munich 990; Däubler-Kittner-Lörcher (ed.), Internationale Arbeits- und Sozialordnung, 2nd. ed., Cologne 1993 (with introductions to each law). Byre, EC Social Policy and 1992: Laws, Cases and Materials, Deventer 1992 offers a comparable overview in English.
13 ECJ NJW 1976, 2068 - Defrenne II
14 The importance of this decision lies in the fact that the principle of equal pay was not only made legally binding in member states but could also be applied to "third parties", with the result that individual employers and employees were covered by the principle.
15 On the concept of "staggered integration" see in particular Langeheine-Weinstock EA 1984, 262.
16 Guideline on the information and consultation of employees in transnational undertakings, OJ1, 15.11.1980, C 297/3, revised version OJ, 12.8.1983, C 217/3.
17 See Michael Schmidt, Die Richtlinienvorschläge der Kommission der Europäischen Gemeinschaften zu den atypischen Arbeitsverhältnissen, Baden-Baden 1992.
18 Directive on the implementation of measures to improve the safety and protect the health of employees at work, OJ1, 29.6.1989, L 183/1
19 For details see Schulz, in : Groeben-Thiesling-Ehlermann, op, cit., Vorbemerkungen zu den Art. 123-128 Rn, p. 23 ff.
20 Reprinted in: Social Europe, no. 1/1990, p. 52 ff.

III. The results to date

1. Changes in national law

EC directives and decisions taken by the European Court have produced a situation in which a mixture of European and national legislation prevails in three areas of labour and social law; in these areas, European law has made considerable inroads into national law, although the latter has not completely lost its significance.

- The right of workers to freedom of movement, laid down in Article 48 ff. of the EC Treaty of Rome, is intended to place citizens of another member state on an equal footing in the labour market.[21] This involves not only the right of entry and the abolition of the work permit required in the case of foreign nationals from non-member states, but also requires completely equal treatment at the work place as well as equal entitlement to company and other social benefits.[22] Sources of discriminatory treatment, such as the absence of a right to vote in elections for representative bodies, have thus been eliminated. However, these measures affect less than 5 % of the economically active population in the Community.[23] Nor are labour markets in the various member states integrated in any way at all. Acquired rights to unemployment benefit cannot be transferred to another member state[24], and individuals cannot be forced to work outside their own country by suspending entitlement to benefit in accordance with º 119 of the German Employment Promotion Law, as is the case with a refusal to accept reasonable employment in the country of origin.

- The principle of equal pay for men and women, enshrined in Article 119 of the EC Treaty of Rome, has been implemented in particular by the Equal Pay Directive of 10 February 1975[25] and the Equal Treatment Directive of 9 February 1976[26]. The consequences of this are not confined to job classification systems, which can no longer use "muscle power" as their sole criterion.[27] Of much greater significance is the European Court's finding that each disadvantage suffered by part-time workers generally constitutes discrimination on the ground of sex.[28] True, it is still open to employers to seek to justify such a situation on the grounds that it serves important business or social policy interests unconnected with sex, but such attempts seldom succeed. Thus, for example, the failure to continue to pay the wages of part-time workers working fewer than 10 hours per week in the event of sickness could not be justified, and the corresponding regulation in German law is no longer used.[29] The same applies in cases where promotion is dependent on the period of service and the smaller number of hours worked by part-time workers has little effect on the amount of experience acquired.[30] And the fact that part-time workers can no longer be excluded from company pension schemes[31] also has considerable practical consequences, particularly since different retirement ages for men and women constitute an infringement of Community law.[32] Finally, the European Court called into question conventional principles when it declared refusal to employ a woman because of pregnancy to be direct discrimination that cannot be justified even on the ground of exigency.[33] As a result, women being interviewed for jobs cannot be asked whether they are pregnant.[34] However, the equal treatment of men and women is confined to the sphere of work in the strict sense of the term; Commission proposals intended to facilitate the reconciling of family and working life have to date been wholly unsuccessful.

- As far as health and safety at work is concerned, Community law will lead to significant changes in national legislation. The so-called framework directive of 12 June 1989[35], for example, forces the German legislature to grant each employee the right to an annual medical check-up. Employers are also obliged to assess the risk attached to each individual job and not only to "inform" employees of the risks but also to "instruct" them, that is to provide information on how they might best protect themselves.[36] A special directive is devoted to the problems of working with VDUs[37] and the "manual handling of

21 COM (89) 568 final (29.11.1989), Social Europe 1/1990, p. 57 ff.
22 For an account of the legal situation, including decisions of the European Court, see Wölker, in: Groeben-Thiesing-Ehlermann, op. cit., Erläuterungen zu Art. 48-51. On the social law aspect, see Watson, Social Security Law in the European Communities, London 1980 and ZIAS 1991, p. 41 ff.
23 Schulte KJ 1990, p. 96.
24 See, for example, Bieback (op. cit., note 5 above). If a worker leaves the country where he has hitherto been employed, any entitlement elapses after 3 months.
25 OJ1 of 19.2.1975, L 45/19
26 OJ1, 14.2.1976, L 39/40
27 ECJ, DB 986, 1877
28 Cf, for example, EJC, EuZW 1991, 217 - Nimz.
29 EJC DB 1989, 574 - Rinner-Kühn; Federal Labour Court, DB 1992, 330.
30 EJC EuZW 1991, 217 - Nimz
31 EJC, DB 1986, 1525; Federal Labour Court, DB 1987, 994
32 EJC, EuZW 1990, 283 - Barber
33 ECJ DB 1991, 286 - Dekker
34 Federal Labour Court DB 1993, 435
35 See note 17 above
36 Article 14, paragraphs 3, 9, paragraphs 1 and 12 of the directive
37 OJ1, 21.6.1990, L 156/14

loads"[38], neither of which topics has to date been the subject of separate regulations in German law.[39]

Judgements by the European Court are playing an increasingly important role, particularly in the first and second areas, i.e. the regulations covering migrant workers and equality between men and women. A considerable proportion of the Community law that has been superimposed over national legislation is "judges' law". Several recent decisions on the obligation to accept foreign invalidity certificates[40] and the payment of part-time workers serving as members of works councils[41] have attracted considerable criticism from the Federal Government and employers' organisations[42]. The fact that a more recent decision means that it is not against Community law for shipowners to employ sailors under Third World conditions[43] will undoubtedly help to calm tempers.[44]

2. Allocation of resources

An annual sum of approximately 3 billion ECUs is now available to the European Social Fund[45] to spend on supporting labour market measures in member states. In contrast to previous practice, there is now a certain degree of coordination with the other structural funds; the Community also exerts influence in the way that certain projects agreed with regional authorities are financed. Nevertheless, the Community is far from having established a proper system for the redistribution of income[46]; despite the apparently impressive sums of money involved, they are in fact merely drops in the ocean.[47]

EC social policy measures in the agricultural sphere are of much greater significance - although it is not explicitly described as such, the policy pursued in this sector is one of a guaranteed minimum income.[48]

38 OJ1, 21.6.1990, L 156/9
39 For a survey of EC health and safety regulations see Wlotzke NZA 1990, p. 419 ff and Kohte, FS Gnade, Cologne 1992, p. 675 ff.
40 ECJ DB 1992, 1577 - Paletta
41 ECJ DB 1992, 1481 - Bötel
42 Summarising Schiefer DB 1993, 38
43 ECJ judgement of 17.3.1993, case C-72/91 and C-73/91 - Sloman Neptun. The issue revolved around the law on the so-called second register of shipping.
44 See the commentary in Informationsdienst Europäisches Arbeits- und Sozialrecht (EuroAS), vol. 1/1993, p. 6
45 Hilf-Willms JuS 1992, 372
46 Schulte KJ 1990, 85
47 Cf. Leibfried NDV 1992, p. 118.
48 Bieback, op. cit. (see note 5 above), p. 57; Leibfried NDV 1992, p. 113.

Finally, mention should be made of various aid programmes intended to support student exchanges and scientific research. Their legal basis is relatively uncertain[49], but of course they can hardly be challenged legally so long as the Parliament makes the required resources available.

3. Coordinating measures

The free movement of labour and cross-border economic activity give rise to a need to "coordinate" the various national legal systems; it must be clear which body of legislation applies in which circumstances. Thus Article 6 of the Rome Convention of 19 June 1980[50] on the law applicable to contractual obligations determines the labour legislation that should be applied in the event of disputes: basically, it is the law of the country in which the employee habitually carries out his work that should apply. The Convention has now been ratified by 9 member states. The European Convention on the Court of Jurisdiction and Enforcement is more wide-ranging in its sphere of application; among other things, it determines competence in disputes arising out of employment relationships involving work abroad.[51] Of greatest importance is the coordination of state benefit systems, particularly social security: Regulation 1408/71[52], which implements Article 51 of the EC Treaty of Rome, seeks to ensure that periods of time spent in the various member states should be totalled. Following the ECJ's finding - most definitely not universally approved - it does not matter in which country family members are when it comes to the payment of family benefits such as child allowances.[53]

49 G. Lyon-Caen speaks of "droit européen souterrain" ("underground European law"), in: Quel Avenir pour l'Europe Sociale: 1992 et après? Colloque Européen en hommage à Léon Eli Troclet, Brussels 1992, p. 56. The European Court has declared the COMETT II programme, among others, to be compatible with the EC Treaty of Rome (European Court EuZW 1991, 505)
50 OJ1, 9.10.1980, L 266/1
51 On the position relating to ratification of the revised agreement concluded in 1989 see Jayme-Kohler IPrax 1991, p. 364. The revised agreement is essentially the same as the Lugano Agreement to which the EFTA countries are signatories (OJ1, 1988, L 319/3).
52 Consolidated version in OJ1 of 10.12.1992, C 325/1 ff.
53 ECJ EuZW 1990, 33 - Bronzino

4. Specific interventions

Elements of EC law crop up at various places in other parts of labour and social legislation. Their importance varies widely.

- Company representative bodies must be consulted and their views heard before mass redundancies.[54] German law has been changed to the extent that the threshold for a "mass redundancy" had to be considerably reduced.

- German law did not have to change as a result of the so-called Insolvency Directive[55], which guarantees that employees will receive pay arrears that accrue during the three months prior to the beginning of bankruptcy proceedings. Things are different in Italy: since the government has not incorporated the directive into Italian law and also ignored a subsequent judgement by the ECJ, it is now obliged, following a recent decision by the Court[56], to pay compensation to any employees placed at a disadvantage by its delay in implementing the EC legislation. Incidentally, this is a new kind of sanction, which does not require fault to be proved and which could also acquire significance for the Federal Republic: thus, for example, the deadline for implementing the above-mentioned framework directive on health and safety at work expired on 31.12.1992.

- The Council Directive on an employer's obligation to inform employees of the conditions applicable to the employment contract or relationship (the so-called "Written Contract Directive")[57] gives employees the right to require employers to put down in writing all the substantive conditions of employment. This represents a step forward for German law; on the other hand, there is no guarantee that employees will make effective use of their rights.[58]

- The Council Directive on approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[59] is similarly detailed. In particular, the fact that rights established by collective agreement must continue to

54 The so-called Mass Redundancy Directive of 17.2.1975, OJ1, 22.2.1975, L 48/29. For the revised version see Weiss RdA 1992, p. 367 ff.
55 OJ1, 28.10.1980, L 283/23
56 ECJ EuZW 1991, 758 - Francovich and Bonifaci
57 OJ1, 18.10.1991, L 288/32
58 For further details on this directive see Däubler NZA 1992, p. 577 ff.
59 OJ, 5.3.1977, L 61/62

apply for at least a year after transfers of ownership or mergers led to an improvement in German law. However, judgements by the Federal Labour Court did not take note of the directive until a relatively late stage. A great deal of attention has been paid recently to the question of whether the individual worker's right to oppose the transfer of his employment relationship, granted by the Federal Labour Court, can be reconciled with Community law; just this year, the ECJ judged this to be the case.[60]

- As far as cross-border transport is concerned, maximum driving times, particularly for coach and lorry drivers, are laid down in EC regulations.[61]

5. The competition principle and social standards

Individual national regulations in the sphere of labour and social law may come into conflict with the principles underlying the functioning of the Common Market. If the principle of competition were set up as an absolute, certain provisions offering social protection could in theory be considered unauthorised interventions in the market, or at the very least goods and services from member states with lower social costs would be considered legitimate and in conformity with market principles under all circumstances. Judgements by the ECJ have to date successfully sought to prevent the uncompromising domination of market principles.

- The prohibition of Sunday working is not an inadmissible restriction on the free movement for goods, as defined in Article 30 of the EC Treaty of Rome: the sale of imported goods is no more restricted than that of domestic products and the prohibition of Sunday working, in accordance with national wishes, is permissible in Community law and does not amount to a disproportionate restriction of trade.[62] It is widely agreed that the prohibition of agreements amounting to a restraint of competition, as defined in Article 85, paragraph 1 of the EEC Treaty, cannot be extended to collective agreements, despite its general wording.[63]

60 ECJ DB 1993, 230
61 OJ1, 31.12.1985, L 370/1
62 ECJ EuZW 1991, 318
63 Federal Court of Labour AP no. 25 on ° 5 of the Law on Collective Agreements, p. 7

- The ban on subsidies laid down in Article 92 of the EEC Treaty has not been extended to national measures taken by an individual member state in order to free a group of undertakings from certain social standards; thus a selective social policy remains possible.[64]

- The freedom (of entrepreneurs) to provide services in another member state could lead to "social dumping", since workers posted temporarily to another country remain subject to the law of their country of origin and the conditions of employment contained therein. The ECJ has expressly declared that the member state in which the services are provided may extend the employment conditions in force on its territory to workers posted there from another member state.[65] It remains to be seen how much use member states will make of this judgement; a Commission initiative that seeks to make a "hard core" of employment conditions legally binding under all circumstances in the country where employees habitually carry out their work[66] has met with considerable opposition.[67]

- However, the monopoly of job placement services enjoyed by the Federal Labour Office in the Federal Republic of Germany does infringe Community law in so far as it extends to executive and managerial staff.[68] The ECJ found that the relevant German legislation permitted abuse of a dominant market position, since the Federal Office of Labour was not in a position to satisfy demand adequately. However, the decision is restricted to cross-border placements, but it does address a fundamental problem that affects all so-called social services. To the extent that the provision of such services is the monopoly of certain government agencies, liberalisation is unavoidable in cases involving cross-border arrangements.[69]

64 ECJ, judgement of 17.3.1993, see note 42 above
65 ECJ, EuZW 1990, 256 - Rush Portuguesa. See also ECJ Slg. 1982, 233 - Seco for legal and collectively agreed minimum wages, in so far as foreign employers do not thereby incur a double burden.
66 Council Directive concerning the posting of workers in the framework of the provision of services of 28.6.1991 (OJ1, 30.8.1991, C 225/6)
67 For details see Däubler EuZW 1993
68 ECJ NZA 1991, 447
69 Bieback, op. cit., (note 5 above), p. 54

- It remains to be seen whether the so-called Machinery Directive[70] can really lay down definitive safety standards without retaining the possibility of improvement on health and safety grounds.[71]

6. Provisional assessment

Examination of the results of 35 years of EEC social policy makes two things clear:

Firstly, it would wrong to say that EC law is making ever greater inroads into national labour and social law. It is undoubtedly true that the influence of the EC has increased in recent years, but we must guard against a reversal of the normal relationship between rules and exceptions. If we look at the totality of problems addressed by labour and social legislation, only a small number of them are affected by EC legislation. Whether it is a question of protection against dismissal, rates of pay, industrial action or the right to collective bargaining, we can speak of "spots of European colour", of additions that emerge now and again but do not alter the fact that 98 % of labour and social law has remained national law.

Secondly, there is a lack of symmetry between economic and social integration.[72] While technical barriers to trade, the last remaining obstacles to single markets for goods and services, are being eliminated, "the social dimension" continues to be the province of individual member states. This is reflected not only in law but also in the resources made available for social purposes.

70 Council Directive on the approximation of the laws of the Member States relating to machinery, OJ1, 29.6.1989, L 183/9
71 For a critical attitude to this aspect see Bieback, op. cit, p. 67; Börner DB 1989, 614; Däubler, Soziale Mindeststandards in der EG - eine realistische Perspektive? in: Birk (ed.), Die Soziale Dimension des Europäischen Binnenmarktes, Baden-Baden, 1990, p. 54
72 Schulte KJ 1990, p. 88

IV. The reasons for this cautious assessment

1. The lack of legal powers at Community level

The modest nature of EC labour and social legislation is often explained by reference to the lack of adequate legal powers at Community level. The EC, it is argued, is an economic not a social community; the lesser importance of social policy is reflected not least in Article 117 ff. of the EC Treaty of Rome, which merely contain declarations of intent rather than any direction to take action and certainly do not establish any specific legal powers.[73]
It is indeed true that the EC Treaty of Rome does not establish any specific legal powers expressly related to social policy. The single exception is Article 118a, added to the Treaty in 1987, which provides for the issuing of directives laying down minimum standards for the "work environment". And of course there are no politically binding timetables for the introduction of social policy measures, as was the case with the completion of the single market.

On the other hand, nobody can prevent the Community from having recourse to the general clauses in Articles 100 and 235 of the EC Treaty of Rome in order to take action in the sphere of labour and social law. They have provided the legal basis for the standards introduced to date, except in those cases where a sort of additional competence has been adopted, as is the case with transport policy.[74] Nobody would be able to prevent the Commission and the Council of Ministers from having recourse to these regulations in other instances - in the literature it is merely pointed out that there is no "sweeping" injunction to work towards legal harmonisation[75] and that labour law "as such" does not fall within the community's competence.[76]

If a parallel is drawn with other protective policies in the Community, it is highly questionable whether it can be argued that there is a lack of legal instruments. There have, for example, been a series of positive initiatives in the sphere of consumer protection, although until Maastricht there were no references to consumer protection in the text of the Treaty. The Community has also been very active in the sphere of environmental protection, even though

73 This argument has been most clearly formulated by Schlotfeldt (Rechtsfragen der Arbeits- und Sozialpolitik, in: Clauder et al., Einführung in die Rechtsfragen der europäischen Integration, 2nd. ed., Bonn 1972, p. 170 ff.).
74 On additional competences in the area of labour law, see Birk RdA 1992, p. 72.
75 Windbichler RdA 1992, 84.
76 Zuleeg RdA 1992, 124; similarly Birk RdA 1992, 72.

this also lay in a legal no-man's-land until 1987. Clearly, the cause of the problem cannot lie in a lack of legal powers.

2. The real obstacles

The basic reason why consumer and environmental protection have received so much attention is that they impact directly on the markets for goods and services: differing national regulations on the composition of products or the safety standards that have to be observed are obviously technical barriers to trade as defined in Article 30 of the EC Treaty of Rome, the elimination of which is one of the Community's fundamental concerns.[77] In that respect, the situation in labour and social law is different: divergent levels of protection do increase costs, but otherwise have no effect on the functioning of the markets for goods and services. Only in the sphere of health and safety at work do conflicts arise, which is why it is possible to speak of the Community's relatively wide-ranging involvement in the establishment of standards.[78] Thus social policy cannot be left to the purely economic dynamic of the internal market. This will not lead - as many people fear - to a levelling down of labour regulations simply because the "cheapest" labour regime appears to offer cost savings. It is true, for example, that hourly wage costs in the Federal Republic are three times higher than those in Portugal[79], but labour productivity in Germany is so high that unit wage costs are actually to be found at the lower end of the range.[80] Other locational advantages, such as a highly developed infrastructure, help to make the Federal Republic a net exporter and mean that it is still profitable to produce in Germany goods that are actually destined for other markets.

The absence of any economic imperative for the harmonisation or even the equalisation of national labour regulations means there is scope for decisions to be taken on political grounds. If it is so desired, it is perfectly possible for the EC to follow the example of Canada and to allow a wide diversity of regulatory regimes to persist; equally, it is also possible in the long term to introduce common legal standards, as has long been the practice in the Federal Republic of Germany (apart from a few insignificant exceptions).

77 On the "productivist" approach of the EC Treaty of Rome and the resultant need for uniform policies, see Reich Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften, Baden-Baden 1987, p. 25 ff.
78 See above III 1
79 For an overview see O. Vogel: Die Bundesrepublik Deutschland im internationalen Standortwettbewerb, in: Haufe Verlag (publ.), EG-Binnenmarkt '92. Chancen und Risiken für Betriebe, 3rd ed., Freiburg im Breisgau, 1991, p. 33.
80 Schulte KJ, 1990. p. 90

There has to date been a lack of political will in the Community to support a move towards harmonisation and alignment. One of the reasons for this is that national policies on labour law diverge widely: the almost fanatical deregulation in Great Britain in the 1980s contrasts with the more cautious approach adopted in mainland Europe. There have even been attempts to establish new regulations, on part-time work, for example, or equal rights for men and women.[81] The principle of unanimity, which survived even after the Treaty was amended in 1986 (with the single exception of Article 118a), means that just one government with a different point of view can block Community legislation. Moreover, harmonisation would eliminate the relative cost advantages lower labour costs confer upon the less developed member states.[82]

Equally important, but less discussed, is the fact that industrial relations are a fundamental part of the social system of any country, and consequently any government that relinquishes control in this area is giving up a large part of its sovereignty. "The organisation of dependent employment" is no less sensitive a topic than, say, national currency. Political consciousness in this respect is not yet sufficiently developed for such renunciation to be a realistic prospect. Furthermore, the Community does not yet possess the instruments it would require in order to be able to control industrial relations at the European level in a crisis situation; in that respect, policy in this sphere differs decisively from monetary policy, and this difference will persist even if the Maastricht Treaty is eventually ratified by all the member states.[83] All those concerned would be launching themselves into an adventure with a very uncertain outcome if they were to replace the very detailed legal, judicial and collectively agreed standards laid down in national law, and the opportunities they provide for specific state intervention, with a regulatory framework that would of necessity be initially much less specific and does not even have institutions capable of taking generally acceptable action in the event of conflict.

81 On the Italian law of 10.4.1991 on so-called positive action, see Gaeta-Zoppoli (a cura di), Il Diritto Diseguale, La Legge sulle Azioni Positive. Commentario alla L. 10 Aprile 1991 n. 125, Turin 1992.

82 On the question of whether a developed labour law regime may also constitute a locational advantage, see Däubler DB 1983, 781 ff.

83 In the context of the welfare state as a whole, Pitschas DöV 1992, 277 ff points emphatically to the lack of adequate EC institutions.

V. Political necessities in the future

1. The reasons for a European social policy

At both the national and supranational levels, social policy is justified in the first instance by the need of the individual for protection. If the Community creates problems through the creation of the internal market and possibly later through the introduction of a single currency, it has an obligation to develop strategies for coping with the difficulties. A fundamental part of such strategies must be the provision of an indispensable minimum of essential goods for all - without such a guarantee the EC would be a second-class community with a "constitution" restricted to market freedoms and to a statute governing its own organisation.

Secondly, however, it is also in the interest of the community to ensure that individuals are protected. To banish social policy to the bottom of the list of priorities would seriously undermine the legitimacy of the Community in anything other than favourable circumstances. Its position is different to that of a nation state. As a "fragment of a state", its activities are for the time being restricted essentially to the economic sphere, - even if the Maastricht Treaty comes into force, nothing will change in the short term. If expectations in the critical area of the economy are disappointed to any large extent and if the Community is perceived as the (actual or supposed) creator of unemployment and other social problems, it has no real power to take countermeasures. It lacks the power to gain the loyalty of the vast majority of its citizens through shared cultural values or the provision of public goods such as internal and external security. There are three further areas of deficiency:

- Although the European Parliament is democratically elected, it has only a limited right of veto over Community efforts to lay down standards. It has no right to initiate legislation and even after the Maastricht Treaty comes into force it will be able to block only quite specific projects; to that extent, even the German Reichstag was in a stronger position under the 1871 constitution.

- Community decision-making lacks transparency. The Council of Ministers, the actual legislature, meets behind closed doors; interested citizens cannot discover, as they can in the parliaments of individual member states, who supported or contested particular decisions.

- The democratic deficit and lack of transparency are reinforced by the absence of European media. Press, television and radio, as well as most interest groups, are still organised along national lines. This means that their controlling function can be exercised effectively only at national level. Brussels, Luxembourg or Strasbourg are treated as "spheres" outside their own country; a change in the composition of the Commission is hardly more important than a vote of confidence in the Belgian Parliament.

An institution built on such weak foundations must ensure that the interests and wishes of individual citizens are somehow fulfilled within the Community (not fully, of course, but to a certain extent at least). The first Danish vote on the Maastricht treaty made it clear that the Community has to be concerned with the individual and that it will be putting its own existence in jeopardy if it continues to rely solely on market mechanisms, confining itself in other respects to a sort of background function. This does not mean that an effective social policy would by itself make good the legitimacy deficit and bring about stability; without such a policy, however, the Community's future prospects will look even less certain.[84]

2. Increased pressure for action as a result of Maastricht

The Community's problems will intensify if the Maastricht Treaty comes into force, whether in its present or in a slightly modified form. The lack of legitimacy will become more and more obvious as the Community's powers increase.[85] Even before actual currency union begins, the restrictions on state indebtedness laid down in the new Article 104c of the EC Treaty will considerably reduce the scope for action in social policy currently enjoyed by many member states. This is particularly true in cases where it will be necessary to cut back on current commitments in order to fulfil the so-called convergence criteria for monetary union.[86] Once a single currency for some or all member states has been introduced, the exchange rate mechanism will no longer exist as a means of compensating for different productivity levels. A declining level of productivity, whether relative (i.e. in comparison with other member states) or absolute, will have to be offset by "cost reductions", particularly cuts in labour costs. Although the devaluation of the less productive country's currency reduces its citizens' purchasing power, this applies only to those markets that are influenced by foreign trade.[87] Nor will it possible for individual member states to adopt a countercyclical economic policy.[88] Disequilibriums that develop or are exacerbated within the EC would have to be equalised or mitigated by member states themselves[89]; among other things, this would involve sacrifices on the part of the richer areas, which would not be acceptable without a solidly based political consensus.[90] The difficulties encountered in financing German unification give some idea of the political opposition that would ensue if considerable transfer payments to the less developed parts of the Community had to be made.[91]

The increased pressure for action is not matched by what is only a modest improvement in the instruments available. The agreement on social policy empowers the eleven (excluding Great Britain) to issue some directives with a qualified majority and others only with unanimous approval; only in the areas of wages and the law governing labour disputes do the current arrangements still apply.[92] The exclusion of Great Britain may not necessarily facilitate or hasten the introduction of social policy measures. It is perfectly plausible that individual governments in mainland Europe have supported particular projects in the past only because they were sure that the British government would veto them; this enabled them to put on a socially progressive face for domestic consumption while knowing perfectly well there was no risk of having to implement the proposals put forward. If governments now have to show their true colours, things may suddenly be very different. Furthermore, the eleven (or some of them) might well shrink back from major initiatives because they fear they might give the British an advantage in social costs. For the foreseeable future, the eleven will have to act as though there were an invisible 12th party at the negotiating table whom they will ignore at their own peril.

Apart from the fact that the decision-making process is, in principle, made easier, the Maastricht Treaty does not provide for any improvements in the sphere of social policy; in particular, it creates no new institutions, apart from a so-called "cohesion" fund. This means that the Community will very probably find itself in a predicament, since it has only modest means at its disposal to

84 On the importance of social policy as a means of establishing legitimacy see Pitschas DöV 1992, 277; Zuleeg NDV 1991, 29. For further detail see Däubler, Sozialstaat EG?, op. cit., p. 70 ff.
85 VerLoren van Themaat RMC 1992, 205.
86 Cf. K. Schmitz, Die Mitbestimmung, vol. 12/992, p. 13.
87 This is not taken into consideration in Bechtold, Die Mitbestimmung, vol. 12/1992, p. 7.
88 VerLoren van Themaat RMC 1992, 207. On the details of the new Article 104-104e see Häde EuZW 1992, 176.
89 Liebfried NDV 1992, 108
90 Tietmeyer, Integration 1992, 18
91 On the need for a transfer of resources see Jansen EuR Supplement 1/1990, p. 13
92 For details of the agreement see Weiss, FS Gnade, Cologne 1992, p. 583 ff and Däubler NZA 992, 577 ff.

counter the enormous socio-political risks. The Community's strategy on the path to currency union is reminiscent of that of a wayfarer travelling through a primeval forest who convinces himself that his merry songs will turn snakes and other beasts into harmless creatures. More seriously, the Community will be putting its very existence in jeopardy if it pursues its monetary and economic policy as if it were a federal state but without possessing the opportunities for adjusting social policy available to such a state.

3. Social policy without Maastricht

Failure to achieve the goal of monetary union would initially be a serious psychological blow for the Community. If after a time it recovered from that setback, it would be likely to continue with its previous policies. It is conceivable that the Community will introduce regulations in areas where problems arise as a result of the integration process, provided that none of the interests involved are seriously damaged and that the "pain barrier" of the social actors or of national governments is not broken.

Data protection is one area in which regulation is questionable. The internal market has necessarily led to a massive exchange of data between the individual member states. Since the legal regulations range from "very strict" to "non-existent", there is a risk that "data oases" will emerge, in which the "systems manager" can do everything that the other national regulations forbid him from doing. Such practices may be prejudicial to the interests not only of employees and consumers but of banks, insurance companies and all other undertakings that pride themselves on handling their customer lists with discretion. The data protection package put forward by the EC Commission[93] is an attempt to introduce an excellent legal standard within the Community, one that would also improve the position of employees.[94]

A second project concerns matters normally referred to under the heading of "social dumping". To the extent that this manifests itself particularly in the importing of "cheap labour", initiatives like the directive on the posting of workers may well have realistic prospects of success.[95]

93 Reproduced in German Government circular 690/90. The revised proposal of 15.10.1992 for a Council guideline on the protection of private individuals in the processing of personal data and on the free exchange of data are to be found in DuD 1992, 648 ff.
94 For details see Wurst JuS 1991, 449.
95 See III 5 above

Even the proposed directive on the establishment of a European works council could become a reality.[96] It obeys the principle of subsidiarity to the extent that it has no effect on national legislation governing the representation of interests but merely creates a supplementary European level. The form to be taken by such a works council is left primarily to negotiations between the interested parties; only if those negotiations remain unresolved after a year does a sort of standard legal statute laying down rights to information and consultation come into force. National traditions are not directly affected. From the point of view of employees and their representatives, there is a useful, indeed essential provision for the establishment of contact with regional decision-making centres. For employers, this directive may be an attractive means of creating a European "corporate identity", thus laying the foundations for partnership within the group. The ambivalence of the project enhances its chances of implementation.

The Europeanisation of large swathes of labour and social law will take much longer to accomplish. More and more elements of EC law will find their way into national legislation, but it would be an exaggeration today to speak of the erosion of national structures. However, currency union would change the situation considerably, since the conditions under which employers and employees operate would be different if governments had to focus primarily on the goal of currency stability.[97] This is where the fundamental problem will lie in the late 1990s, unless Maastricht proves from the outset to have been too great a step towards integration.

96 Guideline "On the establishment of a European works council in Community-scale undertakings or groups of undertakings for the purpose of informing and consulting employees" (OJ 1, 15.2.1991, C 39/10), slightly revised in the autumn of 1991 (OJ 1, 31.12.1991, C 336/11)
97 In addition to the authors listed in footnote 84 ff, see also Hickel, Programm EG '99: Ziele und Stufen zur Europäischen Wirtschafts- und Währungsunion (EWWU), Memo-Forum no. 19, Bremen 1992, p. 76 ff.