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Résumé de l'article

Avec le parachèvement du Marché commun, à la fin de 1992, s'intensifient les discussions portant sur l'harmonisation du droit communautaire et celui des différents États membres. La littérature s'intéresse surtout aux effets directs du droit communautaire sur les droits nationaux. Pour ce qui est du domaine des politiques sociales, la juridiction communautaire est cependant très limitée ; ce domaine relève encore des pouvoirs discrétionnaires des États membres. Le présent texte fait toutefois ressortir le fait que le pouvoir de réglementation et l'influence de la Communauté européenne excèdent de beaucoup ses compétences directes et sa réglementation, compte tenu de l'influence économique, juridique et sociale qu'exercera un marché commun sur l'ordre juridique interne des États membres. Un de ses principaux aspects réside dans la tendance naturelle qu'ont les systèmes politiques (con-)fédérés à étendre les pouvoirs centraux limités. Il ne s'agit pas seulement des « pouvoirs implicites » accordés à la grande entité politique, mais aussi de la prépondérance du pouvoir de la Communauté d'établir un libre marché sur celui de chacun des États membres de déterminer sa propre politique sociale. Un autre aspect consiste dans la portée diversifiée qu'aura ce libre marché communautaire sur la structure des politiques sociales des différents États membres : dumping social, limites aux réglementations nationales de services sociaux qui portent atteinte à la libre circulation des biens et services, mobilité des travailleurs et exportation des avantages sociaux.

Bien que la plupart des exemples d'harmonisation portent sur le droit allemand du travail et de la sécurité sociale, la problématique vaut aussi pour les autres États membres de la Communauté européenne. Elle s'étend même à des pays qui, comme le Canada, font partie d'une grande zone de libre-échange et qui constituent eux-mêmes des entités fédérales au sein desquelles règne un délicat équilibre entre les pouvoirs centraux et ceux des États membres.

Harmonisation of social policy in the European Community

Karl-Jürgen BIEBACK*

Avec le parachèvement du Marché commun, à la fin de 1992, s'intensifient les discussions portant sur l'harmonisation du droit communautaire et celui des différents États membres. La littérature s'intéresse surtout aux effets directs du droit communautaire sur les droits nationaux. Pour ce qui est du domaine des politiques sociales, la juridiction communautaire est cependant très limitée ; ce domaine relève encore des pouvoirs discrétionnaires des États membres. Le présent texte fait toutefois ressortir le fait que le pouvoir de réglementation et l'influence de la Communauté européenne excèdent de beaucoup ses compétences directes et sa réglementation, compte tenu de l'influence économique, juridique et sociale qu'exercera un marché commun sur l'ordre juridique interne des États membres. Un de ses principaux aspects réside dans la tendance naturelle qu'ont les systèmes politiques (con-)fédérés à étendre les pouvoirs centraux limités. Il ne s'agit pas seulement des « pouvoirs implicites » accordés à la grande entité politique, mais aussi de la prépondérance du pouvoir de la Communauté d'établir un libre marché sur celui de chacun des États membres de déterminer sa propre politique sociale. Un autre aspect consiste dans la portée diversifiée qu'aura ce libre marché communautaire sur la structure des politiques sociales des différents États membres : dumping social, limites aux réglementations nationales de services sociaux qui portent atteinte à la libre circulation des biens et services, mobilité des travailleurs et exportation des avantages sociaux.

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zone de libre-échange et qui constituent eux-mêmes des entités fédérales au sein desquelles règne un délicat équilibre entre les pouvoirs centraux et ceux des États membres.

With the completion of the Common Market by the end of 1992 the issue of harmonisation of EC law and the Member States is being intensively discussed. Most articles concentrate on discussing the direct effects that EC law has on the law of the Member States. However, in the field of social policy EC competences are very limited as this is still within the prerogative power of the Member States. This paper analyses the problem that the regulatory power and weight of the EC are much greater than its direct competences and regulations mainly through the legal, economic and social influences a common market will exert on the legal order of the Member States. One point is the "natural" tendency of (con-)federated political systems to extend the existing limited competences of the centre. This is not only a matter of "implied powers" granted to the larger political unit, but also of the predominance of EC competence to establish a free market over the Member States' competence to regulate their social policy. The second point is the various influences the free market of the Community will have on the structure of the respective social policies of the Member States : social dumping ; limits to national regulations of social services which disturb the free market for services and goods ; the mobility of labour and the exports of social benefits.

Although most mechanisms of harmonisation are illustrated by examples of German labour and social security law, the problems apply to all other Member States of the EC and even to a country, like Canada, which is part of a larger zone of free trade and which itself forms a federal system with a fragile balance between the competences of the Federation and the Member States.

In the first part (1.) of this paper I only want to give a very short outline of the few explicit competences the European Community (EC) has in the field of social policy. Social policy is still the prerogative power of the Member States. According to articles 2 and 117(2) of the Treaty of Rome the economic unification process and the free market aim to accomplish an improvement in the standard of living and it is by these means that the social order of the Member States will be influenced. Therefore my main interest in the following parts (2.-4.) will focus on the problem that, although the explicit competences of the EC in the field of social policy are very limited, the regulatory power and influence of the Community is much greater, but it is mainly indirect. One aspect is the "natural" tendency of (con-)federated political systems to extend the existing limited competences of the centre (2.). The second aspect is the various influences the free market within the Community will have on the structure of the social policy of the Member States itself (3.). This leads to the old conflict between market policy and social policy and poses the problem that the EC will have to adopt the course of democratisation in order to add the common welfare state (4.) to the common market.

These two aspects (2) and (3) of Common Market social policy are quite similar to problems Canadian social policy is facing. The problems of competence within the (con-)federate political system of the EC resemble some of the problems of the Canadian Federation that Pierre Issalys deals with in this issue. The influence a "free market" of different nations exerts

on the social policy of its Member States might be the same for the EC as for the North American zone of free trade, although the EC has already gained a much higher degree of integration.

For the Canadian reader a short explanation of the legal instruments of the EC is necessary. In the EC the main legislative body is not the European Parliament, but the Council composed of members of the Member States' governments. By a *regulation* the Council addresses legislation directly to the citizens of Member States and regulations are directly applicable in all Member States. A *directive* sets a binding framework specifying only goals and some standards and leaves it to the Member States' choice of form and methods to implement it properly into national law. As the Community cannot legislate all the acts necessary to complete the common market, it is especially by directives the national laws are harmonized. When a directive is not implemented in a given period the Member States are directly bound by the directive.

1. The limited competence of the EC in the field of social policy

Neither in the political practice of the Community nor in the legal literature of Community law is there any doubt that the competence to regulate social policy rests with the Member States[1]. When drafting the treaty in the early fifties[2] it was mainly France that wanted to enlarge the competences of the Community in the field of social policy because it feared that its own high level of social security contributions, which raised French wages and granted a high degree of social protection to French workers would create a disadvantage in the internal workings of the common market. It was, inter alia, the "low wage country" Germany which impeded this initiative. As part of the French initiative article 119 survived, which deals with the competence of the Community to regulate equal pay for women and men. The Single European Act added only the "working-environment" in article 118a to those matters which can be regulated by majority vote of the Council, whereas even the regulation of the mobility and the rights and interests of workers have explicitly been excluded from the (qualified) majority rule in article 100a(2).

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1. H.G. MOSLEY, "The Social Dimension of European Integration", (1990) 129 *International Labour Review* 147-164; G. KLEINHENZ, "Die Stellung der Sozialpolitik im politischen Gefüge der EG", in: H. Lichtenberg (ed.), *Sozialpolitik in der EG*, Baden-Baden, 1986, pp. 17 ff., p. 23; U. WEINSTOCK, "Europäische Sozialunion — Historische Erfahrungen und Perspektiven", in: W. Däubler (ed.), *Sozialstaat EG? Die andere Dimension des Binnenmarktes*, Gütersloh, 1989, 15 ff.
2. B. JANSSEN, in E. GRABITZ (ed.), *Kommentar zum EWG-Vertrag*, München, 1989, vor Art. 117; U. WEINSTOCK, *ibid.*

The reasons for this "unsocial" character of the Community are manifold:

1. The Community is *only a common market*, it is dominated by economic interests and it can very well function without a common social policy. Therefore the political structure of the Community represents one modern "technocratic" way to regain or stabilise the priority of economic policy and economic development in regard to social policy.
2. The traditional social security *systems of the Member States differ so much* that harmonization is said to be impossible and a waste of political energy. It should however be remembered that most national systems did not acquire their specific structures until after the second world war, only a few years before the Community came into existence. And they are still subject to major changes, Britain giving the best example.
3. The *financial consequences* of a common social policy cannot be calculated and would undermine the financial basis of the EC.
4. In most countries, the U.K. excepted, social policy is embedded within a network of public and *private, national and regional organisations* which are already too centralised and bureaucratic and do not need another bureaucratic superstructure.
5. Last, but by no means least, social policy is an *indispensable attribute and source of legitimacy* for all modern industrialised states.

1.1 Free movement of labour

Still the most important competences in the field of social policy in the EC are article 48 and following which guarantee the free movement of labour and give the EC the power to regulate it. These articles of the Treaty of Rome grant rights directly to the citizens of the Member States. They form the basis for two major types of EC regulations:

1. *The law of non-discrimination* which stipulates that no worker or self-employed person, taking residence in another country of the community, is to be discriminated against on grounds of nationality; e.g. that person cannot be excluded from any of the social benefits the Member States provide for their working population[3].
2. *The law of coordination* which guarantees that workers moving from one country into another will not be disadvantaged because of their

3. Case 63/86, *Italy*, ECR 1988, 29; case 293/83, *Gravier*, ECR 1985, 606. See Regulation 1612/68.

mobility. Therefore social security benefits (except those of a social assistance nature) can be exported and periods of insurance or residence as a worker in one country are aggregated towards relevant periods in the systems of another country[4]. This law is quite similar to the provisions in international social security law (see Pierre Issalys in this issue) which coordinates the different legal systems of sovereign nations or Member States of a confederation.

Only recently the Community has enacted legislation for a general system of mutual recognition of vocational qualifications and the right of residence for students and pensioners.

This coordinating law leaves the social security law of the Member States unchanged. However, it will require some substantial adaptations as will be shown later.

1.2 Special competences in the field of social policy

The first major substantial competence of the EC is still the directly binding article 119 of the treaty which again grants individual rights to the citizens of the Member States. It guarantees *equal pay for men and women* and has forced all Member States to change their labour law system in order to realise equal treatment of men and women in all kinds of different remunerations paid by the employer, e.g. occupational benefits and especially occupational pensions[5].

The *Single European Act* inserted the second important field of social legislation, *working-environment*, in article 118a[6]. As this area influences the free movement of means of production (machinery as well as materials), it is not by chance the only matter of social policy which is explicitly subject to majority rule in the legislative body, the Council of Ministers,

4. Regulations 1408/71 and 574/72. A brief outline in A.I. OGUS/E.M. BARENDT, *The Law of Social Security*, 3rd ed., London, 1988, p. 597-612. Further: P. WATSON, *Social Security Law of the European Communities*, London, 1980.
5. Directives 75/11, 76/207, 86/378 and 86/613. See N. COLNERIC, "Gleichberechtigung von Mann und Frau im Europäischen Gemeinschaftsrecht", (1988) 43 *Betriebsberater* 986 ff.; K.-J. BIEBACK, "Mittelbare Diskriminierung der Frauen im Sozialrecht — nach EG-Recht und dem Grundgesetz", (1990) 4 *Zeitschrift für internationales und ausländisches Arbeits — und Sozialrecht* 1; I. EBSEN, "Gleichberechtigung von Männern und Frauen im Arbeitsleben", in: B. von MAYDELL (ed.), *Soziale Rechte in der EG*, Berlin, 1990, 97.
6. For the EC activities in the field of health and safety at work see: R. KONSTANTY/B. ZWINGMANN, "Europäische Einigung und Gesundheitsschutz in der Arbeitsumwelt", (1989) 42 *WSI-Mitteilungen* 558; M. KOLL, "Arbeitsschutz im Europäischen Binnenmarkt", (1989) 42 *Der Betrieb* 1234.

whereas majority rule has been introduced for most other fields necessary for the completion of the common market (art. 110a (1)). The EC has developed a program to promote health and safety at work and has already promulgated more than 50 directives which have had considerable impact on the social policy of the Member States. The most recent ones follow the "new" pattern of harmonisation. This acknowledges that all necessary regulations cannot be legislated for by the EC and its institutions, and so it sets only minimum standards through community law and leaves it to special norm-setting bodies of experts to define them and it does not hinder the Member States from enacting higher standards.

The last major competence is found in the *European Social Funds*[7] (art. 123 and following, 130c, 130d) which dispersed in 1988 the quite meagre sum of DM14 billion, not even ¼ of what (West) Germany spent in the same year on unemployment benefits and labour market policy. During the last decade the Funds have concentrated their resources on a few innovative programs for less developed regions, especially in supporting retraining efforts and promoting marginalised groups.

As I will analyse later on, all three competences have wider consequences than might be first imagined.

1.3 Social policy by convergence and the *European Charter of Social Rights*

As the jurisdiction to harmonise or coordinate is quite narrow, the Treaty of Rome has some instruments to stimulate the voluntary consent and assimilation between the social policy of the Member States (art. 118) and the social dialogue of the social partners of all Member States (art. 118b). The 1989 *European Charter of Social Rights* is part of this policy as it is of no legal relevance in a strict sense neither for the Member States nor for their citizens, but rather serves as an instrument to set a frame for the policy of the Commission and for voluntary coordination of the different national policies. The Action Program of the Commission to implement the Social Charter[8] therefore confines itself to the improvement of labour market policy, the free movement of labour, the social protection of some groups of workers, free information of employee representatives and health and safety at work.

7. P. LOWE, "The reform of the Community's structural funds", (1988) 25 *Common Market Law Review* 503-521; Mosley, *supra*, note 1, p. 156.
8. See Com (89) 586 final (= Official Publication of the Commission of the EC, Paper 586 of 1989, final version): Action programme of the Commission to implement the Social Charter.

2. The dominance of the "federal" competences

In this section I want to deal with problems that are well known in federal states and their dynamics of centralisation and concentration of power on the federal level. Though not even a "confederation", the community displays some processes of concentrating competences and political power which are typical of federal and confederate states. The legal problems connected with this development are more technical, but at least the last one shows that the dominance of the Community means dominance of the market and lower priority for a genuine social policy.

2.1 Broad interpretation of the competence for social policy in the "active phase" of the seventies

In analysing the development of the Community's competence in social policy one has to differentiate between two aspects. One is the very *complicated and restricted procedure* of Community legislation. *Unanimity rule* applies in most matters of social policy. Therefore the representative of one Member State in the Council can hinder every initiative. The matters of (qualified) majority rule in the field of social policy are limited to article 118a, working environment and health and safety at work.

The second aspect is the *basis and interpretation of the legislative competence of the Community*, which tend to be wide whenever the Council is prepared to use them. The Treaty of Rome and the Single European Act provide for an extensive *competence for all measures necessary to complete the common market* and the free movement of labour and capital (art. 100, 100a, 235) which is only restricted by unanimity vote (art. 100 and 235) and in articles 100 and 100a to the function of merely coordinating the law of the Member States. Although the general competence to regulate through majority rule in article 100a does not explicitly apply to the free movement of labour and the rights and interests of the workers, its general competence for completing the common market affects many matters of social policy and workers' rights as well. The establishment of a common and free market covers every field of economic and social activity and therefore hardly any domain of politics is outside the ambit of article 100a as well as 100 and 235[9]. E.g. the European Court of Justice decided that the general competence in article 100 to legislate for establishing and sustaining the common market may cover social policy as

9. For the wide interpretation see : B. LANGEHEINE in E. GRABITZ, *supra*, note 2, Art. 100 Rdnr. 8 ff., 36 ; E. GRABITZ, *ibid.*, Art. 235 Rdnr. 12 ff. ; TASCHNER, in von der GROEBEN *et al.* (ed.), *Kommertar zum EWG-Vertrag*, Art. 100 Rdnr. 25-27.

well[10]—just to underline the importance of social security in every market economy. The dominance of the market shows up even in the competences of the EC. In the late sixties and in the seventies the Council was prepared to use its wide powers in the field of social policy.

In the seventies three directives in the field of *labour law* were based on articles 100 and 235 which required many changes in most of the Member States: Directive 75/129 concerning collective redundancies; 77/187 concerning transfer of business and safeguarding of employee's acquired rights; 80/987 protection of employees in the event of insolvency. However, the growth of the community made unanimity more and more difficult which has forestalled further progress. The Commission had proposed directives to set minimum standards for atypical work, parental leave, hours of work and for the disabled. Not one of them has been accepted by the Council of Ministers[11]. The European Parliament[12] proposed to base these directives on a wide interpretation of article 118a ("working environment") and its majority rule—thus transforming article 118a into an universal competence for all kinds of protective labour law legislation. Though broad in its wording, article 118*a* refers only to the traditional task of protecting health and safety at work[13].

Although article 119 gives only jurisdiction to guarantee equal pay for men and women, it served as a basis to enact a complete series of *equality directives* about all aspects of the employment relationship and even social security, all of them explicitly based on article 235[14]. The last one covers the whole range of social security benefits, with the exception of social assistance[15]. As the concept of equal treatment outlaws not only forms of direct but also of indirect discrimination the ambit of these directives is extremely wide. *Indirect discrimination*[16] is a measure which is apparently neutral, but in fact predominantly affects persons of one sex which cannot be explained by factors other than those related to one sex and which is not justified objectively. The EEC Commission's report about the implementation of directive 79/7[17] demonstrates many forms of indirect discrimination

10. Case 43/75, *Defrenne II* ECR 1976, 455, 473-479.
11. Official Bulletin 12.3.1982, Nr. C 62, p. 7; 21.5.1984, Nr. C 133, p. 1; 27.11.1984, Nr. C 316, p. 7; 26.10.1983, Nr. C 290, p. 4: 12.8.1986, Nr. L 225, p. 43.
12. *Frankfurter Rundschau* 16.11.1990, p. 2.
13. B. JANSEN, in E. GRABITZ, *supra*, note 2, art. 119a, nr. 3.
14. Directives 76/207, 79/7; directives 86/378 and 86/613 were based on article 100 as well. See note 5 and S. PRECHAL/N. BURROWS, *Gender Discrimination Law of the European Community*, Aldershot, Dartmouth Publ. Comp., 1990.
15. Dir. 79/7 and 86/613.
16. See PRECHAL/BURROWS, *supra*, note 14, p. 12-20 and 106-7, and BIEBACK, *supra*, note 5.
17. COM (88) 768—Council Document Nr. 4110/89.

in the social security law of all Member States. The main fields in occupational benefits as well as social security law are:

— insufficient integration of *part-time workers* in systems of occupational or public insurance benefits and insufficient benefits to part-time workers; this especially puts to question the basic *principle* to grant and calculate benefits in relation to *continuity and seniority of employment and/or contributions*;

— *supplements for dependents* in insurance as well as in social assistance systems within and beyond the exceptions of article 7(d) of the directive;

— *aggregation of family income* in income-tested benefits, which often results in a cut back of the women's benefit;

— *administrative discrimination* where benefits are left to the wide discretion of the adjudicating officer and women do not receive their equal share, e.g. in labour market programmes of unemployment insurance.

As the sexual division of the welfare state is at stake, most areas of labour and social security law have to be changed and harmonised.

However, after the period of extensive implementation of article 119 in the seventies the subsequent draft directives proposed by the Commission to specify the concept of indirect discrimination and the burden of proof and to complete the legislation in the field of social security have not been accepted by the Council[18].

The competence in article 128 allows only the enactment of general principles for a common policy in *vocational training*. In a wide interpretation of this clause the Council however applied it to university education and to specific programmes. Only recently it adopted very specific programmes to promote vocational training, as COMETT I and II for training in new technologies (against were West-Germany and U.K.)[19] and PETRA for the vocational training of youngsters (against was U.K.)[20] which were only based on article 128 and decided by majority vote, or ERASMUS for university training and cooperation[21] which was based on article 128 in combination with article 235 and decided by unanimity. The European

18. COM (88) 269 and COM (87) 494 final.
19. Decision of the Council from 24.7.1986 Off. Bull. Nr. L 222, p. 17, and from 16.12.1988 Off. Bull. 1989, Nr. L 13, p. 28.
20. Decision of the Council from 1.12.1987 Off. Bull. Nr. L 346, p. 31.
21. Decision of the Council from 15.6.1987 Off. Bull. Nr. L 166, p. 20.

Court upheld this wide interpretation of article 128 in cases concerning PETRA and ERASMUS[22].

2.2 Mixed administration

It is an ambiguous method of financial and administrative cooperation and control for the central state of a federation[23] to influence the process of budgeting and administration of the Member States through offering financial aid for administrative programmes of "common interest" which are established and designed by the federal administration. This method has been well developed by the European Funds. During the past decade they have tried to gain more efficiency by cooperating closely together with the administration of the Member States in programmes instigated by the Funds and financed by them up to only 50%, the other part of the money has to come from the national administrations. Very often the Funds cooperate directly with the local and regional administrations of the Member States by-passing the central and federal government and its coordinating function. Thus, the financial impact of the EC programmes gains considerably and the national administration becomes involved in the social policy of the Community.

2.3 Wide competence to regulate the free market for goods and services and its "implied powers"

However, even on the basis of the competence to regulate the free market of goods and services (art. 8a, 9, 30 and 59) quite a few issues of social policy can be regulated by the Community and by (qualified) majority in the Council pursuant to articles 8a and 100a. This development follows the doctrine of "implied powers" inherent in the constitutional law of all federal states allowing for the union or the Community to regulate together with its explicit competences all necessary, consequential matters ("effet utile" and "effet nécessaire"). As the Community's explicit competences are mainly those concerning the free market, it is the logic of the market and of market regulation which will dominate and design European social policy.

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22. Case 242-87, *ERASMUS* ECR 1989, 1425 and case 56/88, *PETRA* ECR 1989, 1615. For the discussion see C.D. CLASEN, "Bildungspolitische Förderprogramme der EG — Eine kritische Untersuchung der vertraglichen Grundlagen", (1990), 25 *Europarecht* 10, and K. SIEVEKING, "Bildung im Europäischen Gemeinschaftsrecht", (1990) 73 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 344.
23. See for the German experience: F. SCHARPF/B. REISSERT/F. SCHNABEL, *Politikverflechtung im Bundesstaat*, Kronberg, 1975, and R. LOESER, *Die bundesstaatliche Verwaltungsorganisation in der Bundesrepublik Deutschland. Verwaltungsverflechtungen zwischen Bund und Ländern*, Baden-Baden, 1981.

The free market for goods outlaws all barriers which have the same impact as tariffs and other forms of discrimination ("charge having the equivalent effect" in article 30 of the Treaty of Rome). One such barrier comprises *safety standards for machines*. Therefore the machine directive was based on articles 30 and 100a(1) and majority vote[24], setting cogent standards for all machines traded within the Community. The regulation and control of the safety of machines have traditionally been part of labour and social security law, exercised in most European countries by a public inspectorate and, a German speciality, by the authorities of the public workers compensation insurance *(Berufsgenossenschaften)*[25] run by employers' and union representatives. As this directive is not based on article 118a it sets an upper limit and its standards cannot be improved by national authorities. Therefore all those national systems of public agencies and standards of safety and health at work will partially lose in importance in favour of the free trade of goods. In addition to this, the German government argued that the machine directive concerned the rights and interest of the workers and had needed unanimity in the Council according to article 100(2)[26].

Up to now the Council could not agree on a concept for a *"European Company"* because the Member States had completely divergent views on many decisive issues, especially the problem of *workers' representation* on the board[27]. However it is undisputed that the competence of the EC to regulate this matter is based on article 54(2) and article 100, now 100a, concerning freedom of establishment, i.e. the free movement of capital and the freedom of investment[28]. As article 100a) excludes matters pertaining to the rights of employees, the newly proposed directive for worker participation and transeuropean companies is based on article 54(2). A matter of social policy which, in Germany and in the Scandinavian countries is deeply rooted in labour law and which will transform most labour law, systems will thus be dominated by the free movement of capital.

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24. 392/89 Off. Bull. Nr. L 183, p. 9.
25. To a minor part by some private norm-setting association Deutsches Institut für Normung-DIN.
26. P. CLEVER, "Herausforderungen für eine europäische Sozialpolitik", 40 *Bundesarbeitsblatt* 6/1989, p. 18, 23 ; O. WLOTZKE, "EG-Binnenmarkt und Arbeitsrechtsordnung—eine Orientierung", (1990) 7 *Neue Zeitschrift für Arbeits- und Sozialrecht* 417, p. 423.
27. Actually quite a few new attempts are under way : see *Handelsblatt* 21.1.1991 about the regulation for a European society. In general "Report Marin" Sept. 14 1988 Com (88) 1148 final.
28. See WLOTZKE, *ibid.*

The competence of the Community to regulate the free market of *transport* in article 75 was the basis for regulating the law of working hours of transnational traffic within the community[29].

Most continental Member States have established special social security systems for their agrarian population which receive many state subsidies because of this sector's permanent economic decline. The Commission investigates quite a few of these subsidies on the ground that they are *national subsidies* within the system of the common agricultural market organisation and therefore need the Commission's approval pursuant to articles 49, 91[30]. The same applies to subsidies given to enterprises in order to stimulate the employment of marginal workers as part of the national labour market policy[31].

Even the competence of the EC to regulate the free movement of goods and services seems to dominate some of its other competences. The EC equality directives allow for "positive actions" (dir. 76/207, art. 2(4))[32], which are measures in favour of women like quotas or *contract compliance programmes*. The latter oblige all those doing business with a state government to develop positive actions to promote women. However, only recently the Commission took action against several German States and their programmes of contract compliance on the ground that this would discriminate against companies of other Member States and impair their equal chances to apply for public contracts in Germany[33].

3. The impact of the common market on social policy

It is, however, not only a matter of the dominance of market policy within the competence of the Community but also the establishment of the common market itself that will influence the social policy of the Member States.

3.1 Social dumping

As the common market is supposed to increase the economic competition between Member States it is feared that business will invest in those

29. Regulation 543/69 art. 7 ff., 11 ff. and 3820/85.
30. B. von MAYDELL, "Die soziale Dimension des EG-Binnenmarktes—Grundsätzliche Fragestellungen", (1990) *Die Krankenversicherung* 190, p. 191.
31. P. CLEVER, "Gemeinschaftscharta sozialer Grundrechte und sociales Aktionsprogramm der EG-Kommission—Zwischenbilanz und Ausblick-", (1990) 29 *Zeitschrift für Sozialhilfe/SGB* 225, p. 233.
32. PRECHAL/BURROWS, *supra*, note 14, p. 11/2.
33. *Frankfurter Rundschau* May 8 1991, p. 1 (Nordrhein-Westfalen) and April 4 1991, p. 4 (Niedersachsen).

states where enterprises find the highest flexibility in labour management and the lowest labour-costs, i.e. the lowest level of wages, protective legislation and employers' contributions for social security schemes. As a consequence, the most costly systems of social security have to lower their standards to be able to compete on a national, regional and enterprise level[34]. There are many arguments against this opinion and in favour of different developments and consequences.

The future development of the common market and the competition between the Member States is quite uncertain[35]. From the history of regional development in the Member States and the debate about regional policy we know that a *market economy does not have a "natural" tendency to equalize economic disparities* between regions but may rather intensify them. The lower level of social protection in the Southern rim of the Community may constitute a necessary condition to survive the competition of the North, and the high level of social protection in the North may be regarded as a sign of economic strength gained in long contest with other industrialised nations on the world market.

The main indicator for competitiveness is not the level of labour costs but the level of *labour costs in relation to productivity*, the unit labour costs. Here Germany or France rank in the lower field while Greece and Ireland score highest[36].

Competition between locations depends not only on labour costs but also on *other costs and other non-cost factors* like transport and social infrastructure. One can even evaluate a high level of social protection as an economic asset that guarantees productivity and, on the basis of social security systems, a high degree of personal flexibility.

Free movement of capital within the Community already existed in past decades. However (West-)German business did not *invest* very much

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34. See with different arguments: E. BREIT (ed.), Für ein soziales Europa, Köln, 1989; O. JACOBI, "Gewerkschaften, industrielle Beziehungen und europäische Einigung", (1988) 34 *Die Mitbestimmung* 609. Critics at SCHULTE, *supra*, note 1, pp. 88 ff.; DAÜBLER, *supra*, note 1, pp. 62 ff.; C. DEUBNER, "Einleitung", in: C. DEUBNER (ed.), *Europäische Einigung und soziale Frage*, Frankfurt/New York, 1990, pp. 9 ff., and MOSLEY, *supra*, note 1, pp. 160-162.
35. W. JUNGK, "Integrationstheoretische Grundlagen der Sozialpolitik der EG", in: H. LICHTENBERG (ed.), *supra*, note 1, pp. 35-49; R. CLEMENT, "Zur Notwendigkeit entwicklungspolitischer Maßnahmen in der Europäischen Gemeinschaft", (1988) 34 *Konjunkturpolitik* 85-103; F. FRANZMEIER, "Was kostet die Vollendung des europäischen Binnenmarktes", (1987) 33 *Konjunkturpolitik* 146-166.
36. COMMISSION, "The Social Dimension of the Common Market" ("Degimbe Report"), *Sociale Europe, Special edition*, Luxemburg, 1988, pp. 65-68; CLEVER, *supra*, note 26, p. 19.

in the low-wage countries of the South in order to take advantage of lower unit-labour costs but to be closer to the regional market and to secure their presence and position there[37].

Whether social dumping occurs, depends to a large degree on the *common social policy of the EC* and its success in installing a common minimum level of social rights.

Though the notion of social dumping is quite disputable, two real dangers of social dumping exist.

3.1.1 Seconded workers

It is a principle of international labour and social security law of many countries of the EC that the mandatory law of the country applies to all workers who "usually" work there (Principle of territoriality and principle of the place of employment according to article 6 of the EC Convention of June 19 1980 and article 13 EC Reg. 1408/71). This guarantees that the same social protection applies to all employment relationships in one country. However one important exemption exists especially in the European social security law. Pursuant to article 14, 17 Reg. 1408/71 workers seconded to a foreign country can maintain their social security status of the country they came from and do not need to enter the social security schemes of their working place for up to two years. This time can even be prolonged to five or ten years. The European Court of Justice even applied this regulation to workers and agency workers who were explicitly hired only for the purpose of being posted to a foreign country for a fixed period[38].

These regulations for posted and seconded workers are in the interests of employers to permit more flexibility in personnel management and of employees to keep the social security standards and status of the country where they ususally live and find employment. However, the extremely flexible solution of European law can lead to different standards of social protection and to direct competition between these standards within one country. This is already a problem in the construction industry and transport[39].

37. M. WORTMANN/W. OESTERHELD, "Produktionsverlagerungen in die europäische Peripherie durch deutsche Unternehmen", in: DEUBNER, *supra*, note 34, pp. 53 ff.
38. Case 35/70, *SARL Manpower* ECR 1970, 1251; case 19/67, *Sociale Verzekeringsbank* ECR 1967, 461 and in Britain R (U) 7/88.
39. MOSLEY, *supra*, note 1, p. 162. Even between West and East Germany, see DGB (ed.), *Die Quelle* 11/1990, pp. 6/7.

3.1.2 Flight in the "European Company"

In international company law every company residing in one country is subject to the company law of that country, even subsidiaries of a foreign or multinational enterprise. Therefore all companies in Germany are subject to the German law of co-determination. After several years of delay the creation of a EC statute for an "European Company" ("Societas Europaea") has a good prospect of finally being accepted[40]. The objective of this statute is to provide one single legal regime for companies which are active in different European states and for all their European subsidiaries and to grant some tax advantages, like writing off the losses of foreign subsidiaries against taxable profits of the parent company.

All plans so far discussed take into account the extremely divergent forms of company-structures found in Europe and offer a choice of different forms for the "European Company" and of different types of co-determination, some of them far less reaching than the existing German system[41]. Roughly speaking three different types will be offered : the German dualistic system with a board of directors and co-determination only on the board of supervisors, the Scandinavian system of co-determination on the basis of collective bargaining and special bodies of cooperation, and the monistic British system with co-determination on the board of directors. It is a real danger that quite a few large and internationally active German companies will opt for the statute of an "European Company" just to evade the German law of co-determination[42], as companies in all European countries may choose this statute in order to avoid stricter national systems of public control or influence. These are inevitable social costs of transnational company law, but they also may lead to a more profound debate about the future of co-determination in Europe.

3.2 Free market for social services

A large part of social security benefits in all countries are not monetary, but benefits in kind, like hospitals, rehabilitation and health services, and pharmaceutical products. The markets for these benefits are usually intensively regulated by the Member States and their social security administrations. No doubt, the emerging common market will severely influence these national regimes of regulation.

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40. *Supra*, note 27.
41. DÄUBLER, *supra*, note 1, pp. 66 ff. ; WLOTZKE, *supra*, note 26.
42. DÄUBLER, *ibid.*

3.2.1 Conflict between the common market and national regulations of social services

As mentioned above, it is solely in the competence of the Member States to regulate the systems of social policy. Therefore the European Court of Justice has accepted the different national regimes to regulate markets for social services and confines the European law to guarantee the free, non-discriminated access of foreigners to these markets[43]. Therefore we find completely different systems of public health care in the Community. Some Northern and most Southern countries have a national health system, where the state or local government provides for most of the health services. France, the Netherlands and Germany rely on an insurance system, where the state or the public insurance only supplies funds for services and goods which have to be bought from private doctors, hospitals etc.

However, this neat division between national social policy and the common market is not fixed forever, but dynamic. National regulations of markets can be subject to control by community law with regard to their function as a non-tariff barrier of free trade. Therefore they have to comply with the principle of proportionality, i.e. they have to be necessary and appropriate for attaining the goals of the national regulatory system[44].

This is the basis for directive 89/105 to set minimum standards for all national systems of price control and price fixing in the drug market[45]. These systems have to be clear and have to guarantee judicial review of all administrative acts. Thus, control by European law not only sets some external limits to national systems but may also intervene into and even destroy these systems, depending on the idea of balance between social policy and free market one is adhering to. In Germany, a lively debate is going on about the necessity of the Federal Employment Agency's mo-

43. Case 238/82, *Duphar* ECR 1984, 523 and case 181/82, *Roussel Laboratoria BV* ECR 1983, 3849. Generally see case 120/78, *Cassis de Dijon* ECR 1979, 649.

44. See the rulings of the European Court of Justice of article 36 of the Treaty of Rome: H. MATTHIES, in: E. GRABITZ, *supra*, note 2, Art. 36 Rdnr. 7. The national regulation of the freedom of establishment is much discussed, see D. BLUMENWITZ, "Rechtsprobleme im Zusammenhang mit der Angleichung von Rechtsvorschriften auf dem Gebiet der Niederlassungsfreiheit der freien Berufe", (1989) 42 *Neue Juristische Wochenschrift* 621.

45. Art. 4 (1). See G. GLAESKE/D. SCHEFOLD, "Aufgaben und Möglichkeiten von Transparenz auf dem Arzneimittelmarkt", in: N. REICH (ed.), *Die Europäisierung des Arzneimittelmarktes—Chancen und Risiken*, Baden-Baden, 1988, pp. 157 ff.

nopoly of labour market placements. This monopoly is said to infringe on the European law of free establishment and free movement of services[46].

3.2.2 The freedom to buy and to provide services and the "danger of social tourism"

The Treaty of Rome guarantees in article 59 the free movement of services which includes two rights:

— the freedom of consumers to move into another state in order to buy goods and social services[47];

— and the freedom of suppliers to deliver social services and goods to social security institutions of another state without having any business location in the other state.

Both aspects of the free movement of goods and services have hardly developed, because they again collide with the exclusive regulation and financing of national markets for social services.

Under its old version article 22(2) Reg. 1408/71 allowed for the *free movement of a sick person* into another Member State to buy or claim medical services or goods. Although such a person needed the permission of his or her national social security administration, the European Court of Justice ruled that this permission could only be refused on medical grounds[48]. It was feared that this liberal principle would induce "social tourism" which led to a change of article 22. It now requires that the medical services and goods cannot be obtained in proper time in the state where the person originally could claim these services and goods. The free market of medical services and goods has thus been hampered to a degree that is hardly necessary and justified with regard to article 59 of the Treaty

46. U. ENGELEN-KEFER, "Das Arbeitsvermittlungsmonopol vor den Herausforderungen der internationalen Personalberatung", (1989) 44 *Betriebsberater* Beilage 3, pp. 20 ff.; V. EMMERICH, "Internationale Personalberatung im Lichte des EWG-Vertrages", *ibid.*, pp. 9 ff. Meanwhile the European Court of Justice, case C-41/90, April 23, 1991, not yet reported, has limited the monopoly to "ordinary labour" and has allowed for competition for the placement of highly qualified labour, managers, etc.

47. Case 286/82 und 26/83, *Luisi und Carbone* ECR 1984, 409. See J.-V. LOUIS, "Free Movement of Tourists and Freedom of Payments in the Community: The Luisi-Carbone Judgment", (1984) 21 *Common Market Law Review* 625-637; H. LICHTENBERG, "Ärztliche Tätigkeiten, klinische Leistungen und freier Dienstleistungsverkehr im Gemeinsamen Markt", (1978) 6 *Vierteljahresschrift für Sozialrecht* 125; U. EVERLING, "Von der Freizügigkeit der Arbeitnehmer zum Europäischen Bürgerrecht", (1990) 25 *Europarecht Beiheft 1* 81, pp. 93-95, and N. REICH, *Förderung und Schutz diffuser Interessen durch die Europäischen Gemeinschaften*, Baden-Baden, 1987, pp. 77 ff.

48. Case 117/77, *Pierik*, ECR 1978, 825 und Case 182/78, *Pierik II*, ECR 1979, 1977.

of Rome. The rationale behind these restrictions is evident: all Member States want to safeguard their autonomy in social security matters.

Even worse is the situation with *public contracts*, but here more general issues and larger economic interests (e.g. of transnational construction or computer companies) are at stake and the Commission is willing to open up the common market[49]. Still the problems for social services and medical goods are extremely complicated. Just to give an idea, two examples:

— The prices for pharmaceutical goods within the common market differ remarkably. Having to pay the highest prices[50], the German sickness insurance is quite interested in importing drugs from European countries at a lower price. The German pharmaceutical industry argues that prices in other European countries are that low because their markets are controlled or their prices are fixed by the state whereas in Germany the price fixing process is free. Whether this is true or prices are low because competition in other countries is stronger can hardly be verified.

— The prices for hospital treatment in Germany do not reflect the real costs but only the prices for personal services and goods spent on individual treatment. Construction costs and long-term investments are paid for by the states *(Länder)* on the basis of a complicated system of public hospital planning and financing[51]. Due to this system of split financing the German prices for hospital treatment are relatively low. It might be quite attractive for a person or a sickness insurance of another Member State to acquire hospital treatment in Germany at the normal price in order to receive the same subsidies as the Germans do.

As the right of free access to all goods and services within the common market does not allow charging persons from Member States more than one's own citizens, the free common market will jeopardise all systems of subsidies for social services. One may even welcome this effect, as systems of state subsidies hinder the public from knowing the real costs of public services, but one has to recognize that these systems are quite common and a legitimate form of social security, ranging from public education to public provisions of health care.

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49. E. DICHTL, "Schritte zum Europäischen Binnenmarkt", (1989) *Wirtschaftsstudium* 333, pp. 336/7.
50. F. DIENER, "Arzneimittelpreise in der EG", (1990) 135 *Pharma-Zeitung*, 2631 ff.; Bundestagsdrucksache 10/6504 v. 20.11.1986.
51. *Krankenhausfinanzierungsgesetz* (Federal Hospital Financing Act) 20.12.1984 and *Bundespflegesatzverordnung* (Federal Regulation for Hospital Treatment Charges) 21.8.1985.

According to the European Court of Justice[52] the free movement of services clause in article 59 of the Treaty of Rome applies only to services dealt with in markets and supplied for money, but not for services which are usually delivered as part of a "national service". Thus, countries which organise their health service systems on the basis of private markets where public and private suppliers may compete and access is free, like the systems of social insurance in France and Germany, are open for competition from suppliers from other countries, whereas the "National Health systems" are closed, except if they incorporate competitive structures like parts of the British system.

One example: in Germany every dentist has free access to deliver services for the sickness insurance system while in the Netherlands the ratio between dentists and insured persons is fixed, a measure to contain soaring costs. As a result many Dutch dentists have moved into the border area of North West Germany[53].

There is much evidence that without tight systems of public control the market for social, especially medical, services is dominated by the suppliers[54]. As long as the Community opens the free market for social services there are only three options. Either the competence of the EC is extended to control and regulate the market for social services, or the Member States coordinate and harmonise their systems voluntarily, or finally all national systems of social services opt out of market-systems into "national" systems. Evidently, all options tend to increase the pressure towards harmonisation.

3.3 Mobility of labour and the tendency towards harmonisation

One of the main, and probably the only effective, social right of employees in the Treaty of Rome is the freedom of movement of workers in article 48. As already mentioned the law of coordination (1.1) and the freedom to export acquired social security rights from one country to

52. Case 263/86 ECR 1988, 5365 *Humbel*. See E. STEINDORF, *Grenzen der EG-Kompetenzen*, Heidelberg, 1990, pp. 36 ff., 39 ff.

53. See E. BLOCH, "Auswirkungen des Europäischen Binnenmarktes auf die gesetzliche Krankenversicherung", (1989) 44 *Betriebsberater* 2405, p. 2409; D. BLUMENWITZ, "Rechtsprobleme im Zusammenhang mit der Angleichung von Rechtsvorschriften auf dem Gebiet der Niederlassungsfreiheit der freien Berufe", (1989) 42 *Neue Juristische Wochenschrift* 621.

54. See Endbericht der Enquete-Kommission, *Strukturreform der gesetzlichen Krankenversicherung*, Bundestagsdrucksache 11/6380, Bonn, 1990, pp. 300 ff., pp. 320 ff.; Sachverständigenrat der Konzertierten Aktion im Gesundheitswesen, *Jahresgutachten 1987*, Baden-Baden, 1987, p. 23.

another have many indirect repercussions on the national social security systems which again exert pressure to move towards more harmonisation.

EC Regulation 1408/71 grants the right to export all "acquired" social security rights regardless of their foundation in social insurance and contributions or in universal national systems and residence/payment of taxes. Only the most basic system, social assistance, is exempted (art. 4(4)).

In many Member States the economic crisis that started in 1974 and the increase of long-term unemployment have revealed many gaps in the social security net, especially for women and youngsters, which led to the public debate to introduce *systems of minimum social income*[55]. One common characteristic of all these systems is that they should be distinct from social assistance and its means test. This attribute however moves them within the ambit of Regulation 1408/71 and the freedom of export and principle of aggregation. Therefore such minimum income systems have to be open to all citizens of the community which might raise their costs and might render them incalculable[56].

Again there are only two harmonising solutions: either the Member States coordinate their reforms in a very intensive way, excluding cumulations as well as deficiencies[57] and harmonising definitions and regulations, or they renounce their plans or try to "nationalise" them.

Exporting rights means that quite a few requirements for benefits like disability and invalidity and their degree have to be checked and decided by the social security administration of another Member State. This matter is dealt with in Regulation 1408/71 article 40(4) (invalidity) and article 57(1,2) (occupational disease) and Regulation 574/72 article 18 (incapacity for work). The *foreign administration's* decision has to *bind all other administrations* because it may affect requirements which are common to different benefits in different countries, it may cost too much to examine the claimant in all countries and the migrant worker may not be capable to undertake the necessary travelling. Therefore it makes much sense that the European

55. B. SCHULTE, "Sociale Grundsicherung — Ausländische Regelungsmuster und Lösungsansätze", in: G. VOBRUBA (ed.), *Strukturwandel der Sozialpolitik*, Frankfurt, 1990, pp. 81 ff.

56. F. RULAND, in: H.F. ZACHER/B. SCHULTE (eds.), *Wechselwirkungen zwischen dem Europäischen Sozialrecht und dem Sozialrecht der Bundesrepublik Deutschland*, Berlin, 1991, pp. 47-81.

57. One solution to this problem in systems of minimum pensions is provided by article 50 Reg. 1408/71.

Court of Justice[58] has, in a fairly generous interpretation[59] of the Regulations, strengthened the binding power of these decisions. However, such administrative practices demand a basic similarity of legal requirements, expressions and procedures. Otherwise this necessary coordination will not work effectively.

In Germany most invalidity benefits are closely linked to rehabilitation benefits in kind according to the principle of priority of rehabilitation[60] —an internationally accepted and very useful social policy measure[61]. Furthermore, in Germany unemployment insurance is closely linked with employment policy[62] therefore unemployment benefit is subordinate to training and the benefit can be cut when appropriate training is offered. However, only cash benefits, like pensions and unemployment benefit are exported, not benefits in kind, like rehabilitation and retraining. Therefore in export cases the payment of pensions and benefits on the one hand and the delivery of rehabilitation and retraining services on the other hand are split and the priority of rehabilitation training cannot be realised.

All these problems point to one common solution: harmonisation of law and administration either by widening the competence of the Community or voluntary harmonisation of the social policy of the Member States.

4. Social policy and the deficit in democracy of the EC

As I have already said at the beginning, social policy is a very important source of legitimacy of modern industrialised states. Mass democracy, or in Bismarckian Germany the impending threat of democracy, was a decisive promoter of the welfare state. In the long run the EC has to complement its structures by all attributes of a modern political community.

58. Case 22/86, *Rindone* ECR 1987, 1359 (disability in sickness insurance) and Case 28/85, *Deghillage* ECR 1986, 991. In Germany the system is much criticised, see: P. POMPE, *Leistungen der sozialen Sicerheit bei Alter und Invalidität für Wanderarbeitnehmer nach Europäischem Gemeinschaftsrecht*, Köln, 1986, pp. 55/6.
59. See the critics of R. NEUMANN-DUESBERG, "Wechselwirkungen zwischen dem Europäischen Sozialrecht und dem Socialrecht der Bundesrepublik Deutschland aus der Sicht der deutschen gesetzlichen Krankenversicherung", in ZACHER/SCHULTE (eds.), *supra*, note 57, pp. 83, 96-102.
60. Sect. 7 *Rehabilitationsangleichungsgesetz* (Federal Rehabilitation Act).
61. ISSA, *Social security, unemployment and premature retirement*, Geneva, 1985.
62. See for the different models of unemployment insurance and its link with social and employment policy F. CALCOON/L. EECKHOUDT/D. GREINER, "Unemployment insurance, social protection and employment policy: An international comparison", (1988) 41 *International Social Security Review* 119-134.

What we now witness is the traditional, but arduous way modern welfare states developed: after the free market and industrialisation threatened to destroy the basic fabric of society and endangered even the basic concepts of social equality and freedom, social security was to compensate for this process. This path to social security is not mandatory. When we consider social security to be an indispensable means of guaranteeing the competitiveness of modern economies, which is an almost universal opinion, it is necessary to establish a balance between the development of the common market and of common social policy. Fortunately, the market system itself is such a strong device of unification and egalisation that it even influences the very structure of the different national social security systems. That, at least, was the point I have tried to prove.