STATUS AND POTENTIAL OF THE REGULATION OF LABOR AND EMPLOYMENT LAW AT THE EUROPEAN LEVEL

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I. INTRODUCTION

The regulation of labor and employment law at the European level seems to be at a dead end: The last directives that addressed new substantive issues of labor and employment law were passed[1] or proposed[2] between 2000 and 2002. The other directives adopted since only amend,[3] rephrase,[4] or further implement[5] already existing legislation. At about the same time, the social dialogue of Articles 138 and 139 EC-Treaty shifted

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1. Council Directive 00/43 2000 O.J. (L-180) 22 (EC), implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 00/78 2000 O.J. (L 303) 16 (EC), establishing a general framework for equal treatment in employment and occupation; Council Regulation No 2157/01 2001 O.J. (L 294) 1 (EC), on the Statute for a European Company (SE); Council Directive 01/86 2001 O.J. (L 294) 22 (EC), supplementing the Statute for a European Company with regard to the involvement of employees; Directive 02/14 2002 O.J. (L 80) 29 (EC), of the European Parliament and of the Council of March 11, 2002, establishing a general framework for informing and consulting employees in the European Community.

2. Directive 08/104 2008 O.J. (L 327) 9 (EC) of the European Parliament and of the Council on temporary agency work; first proposal, O.J. (C 203) 1; and amended proposal, COM(2002) 149 final.

3. Council Directive 98/59 1998 O.J. (L 225) 16 (EC) on the approximation of the laws of the Member States relating to collective redundancies; Council Directive 01/23 2001 O.J. (L 82) 16 (EC), on the 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 undertakings or businesses; Directive 02/73 2002 O.J. (L 269) 15 (EC) of the European Parliament and of the Council, amending Council Directive 76/207 1976 O.J. (L 29) 40 (EC) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions; Directive 09/38 2009 O.J. (L 122) 28 (EC), of the European Parliament and of the Council on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast).

4. Directive 06/54 2006 O.J. (L 204) 23 (EC) of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

5. Directive 06/25 2006 O.J. (L 114) 38 (EC), of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to risks arising from physical agents (artificial optical radiation) (19th individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

from agreements enforced by directives,[6] i.e., hard law, to soft law agreements implemented merely "in accordance with the procedures and practices specific to management and labour and the Member States," Article 139(2) EC-Treaty.[7] The European Commission has decided that its so-called Green Paper[8] on "Modernising labour law to meet the challenges of the 21st century,"[9] published in November 2006, which outlined possible new lines of action for the European legislature, shall not be followed by a so called white paper and hence not by proposals for new directives.[10] In

6. Article 139(2) EC-Treaty mentions a Council decision, but practice has been to use directives to implement the agreements between the social partners: Council Directive 96/34 1996 O.J. (L 145) 4 (EC), on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC; Council Directive 97/81 1997 O.J. (L 14) 9 (EC), concerning the framework agreement on part-time work concluded by UNICE, CEEP and ETUC; Council Directive 99/70 1999 O.J. (L 175) 43 (EC), concerning the framework agreement on fixed-term work concluded by UNICE, CEEP, and ETUC.

7. Framework of actions for the lifelong development of competencies and qualifications, signed by ETUC, UNICE, and CEEP, Feb. 29, 2002, http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do;jsessionid=HFdJTTzkCj3jt1TyvQ6tH4Rc2wpfmtxHwtRFJFw4TQztXJ1vfHpG!-1022048718?id=10421; framework agreement on telework, signed by ETUC, UNICE, UEAPME, and CEEP, July 16, 2002, http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=10418; framework agreement on work related stress, signed by ETUC, UNICE, UEAPME, and CEEP, Oct. 8, 2004, http://ec.europa.eu/employment_social/dsw/public/actRetrieveText.do?id=10402; framework agreement on gender equality, signed by ETUC, UNICE, UEAPME and CEEP, Mar. 22, 2005, http://ec.europa.eu/employment_social/news/2005/mar/gender_equality_en.pdf; agreement on Workers' Health Protection through the Good Handling and Use of Crystalline Silica and Products containing it, signed by APFE, BIBM, CAEF, CEEMET, CERAME-UNIE, CEMBUREAU, EMCEF, EMF, EMO, EURIMA, EUROMINES, EURO-ROC, ESGA, FEVE, GEPVP, IMA-Europe, and UEPG, Apr. 25, 2006, 2006 O.J. (C 279) 2; framework agreement on harassment and violence at work, Apr. 26. 2007, signed by ETUC, Business Europe, UEAPME, and CEEP, http://ec.europa.eu/employment_social/news/2007/apr/harassment_violence_at_work_en.pdf.

8. In the words of the Commission's Web site,

> Green papers are discussion papers published by the Commission on a specific policy area. Primarily they are documents addressed to interested parties - organisations and individuals - who are invited to participate in a process of consultation and debate. In some cases they provide an impetus for subsequent legislation. The consultations can be accessed on the Your voice in Europe site. White papers are documents containing proposals for Community action in a specific area. They sometimes follow a green paper published to launch a consultation process at European level. While green papers set out a range of ideas presented for public discussion and debate, white papers contain an official set of proposals in specific policy areas and are used as vehicles for their development.

http://europa.eu/documents/comm/index_en.htm.

9. *Commission of the European Communities, Green Paper on Modernising labour law to meet the challenges of the 21st century*, COM (2006) 708 final (Nov. 22, 2006).

10. The undated communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the "Outcome of the Public Consultation on the Commission's Green Paper, *Modernising labour law to meet the challenges of the 21st century*, http://ec.europa.eu/employment_social/labour_law/docs/2007/follow_up_com_627_en.pdf, is less clear on that point than the press release of the Commission entitled *Public consultation calls for better enforcement of existing labour law*, dated Oct. 24, 2007, http://ec.europa.eu/employment_social/labour_law/docs/2007/press_07_1584_en.pdf. In this press release, the Commission states that: "While the Commission does not propose any new legislative initiatives, it sets out a number of areas which should, in its view, act as a basis for further discussion so as to achieve more cooperation, clarity and better information and analysis."

yet another Commission initiative[11] upon so called "flexicurity" in 2007,[12] the Commission initially proposed three options: (1) no additional EU-action, (2) comprehensive legislation on flexicurity at EU level, and (3) flexicurity approach through the open method of coordination.[13] At the outset of consultations, the Commission however concluded that the second option "is not a realistic option."[14]

This article analyzes to what extent this standstill of European regulation of labor and employment law is a coincidental break, whether it reflects limits imposed by factual and legal developments at the Member States' level or whether it is the consequence of the fact that the European Commission has lost or not found its mission in the field of labor and employment law. The underlying issue is: Is there a case in favor of regulating labor and employment issues at the European rather than at the Member States' level? The first step in answering this question is to understand what European labor and employment law actually *is*.

II. THE STATUS OF EUROPEAN LABOR AND EMPLOYMENT LAW

A. Components of European Labor and Employment Law?

European labor and employment law is not and has never been intended to be a comprehensive set of European rules for the employment relationship or the different subject matters dealt with in collective labor law destined to replace the Member States systems. Neither would it adequately be described as a partial set of such rules. European labor and employment law differs from Member States' labor and employment law insofar as it is not merely driven by the aim of protecting the employee. It rather is the product of various community policies defined in the treaties; some of these policies are direct or indirect manifestations of employee protection, others have a completely different background.

11. The author of the article does not understand how the Green Paper and the flexicurity initiative, almost parallel in time and both from the same Directorate-General, are related to each other; they do not seem to be fully synchronized.

12. European Commission, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security*, Directorate-General for Employment, Social Affairs and Equal Opportunities, Unit D.2, July 2007, http://ec.europa.eu/employment_social/employment_strategy/flexicurity%20media/flexicuritypublication_2007_en.pdf.

13. Commission of the European Communities, Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, Impact Assessment*, COM(2007) 359 final SEC(2007) 862, http://ec.europa.eu/employment_social/employment_strategy/pdf/flex_sec20070861_en.pdf, 4.

14. Commission staff working document, *supra* note 13, at 4.

1. Pillar No. 1: Minimum Standards in Liberalized Trade Approach

The Founding Treaties addressed only some issues of employment law. The Treaty establishing the European Economic Treaty (EEC-Treaty) in 1957 stipulated in its Articles 119 and 120:

> Art. 119
>
> 1. Each Member State shall during the first stage ensure and subsequently maintain the principle that men and women should receive equal pay for equal work.
>
> 2. For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment, from his employer.
>
> Equal pay without discrimination based on sex means:
>
> (a)that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> (b)that pay for work at time rates shall be the same for the same job.
>
> Art. 120
>
> Member States shall endeavour to maintain the existing equivalence between paid holiday schemes.

In 1957, neither of these two articles was meant to establish a European rule of substantive employment law, or even less, to grant the European Economic Community the power to adopt any such rule. Article 119 and Article 120 of the original EEC-Treaty asked the Member States to set minimum labor standards so that Member States could not derive any competitive advantage from lowering their holiday schemes or from not prescribing equal pay for female and male employees.[15] Article 68(2) of the Treaty establishing the European Coal and Steel Community (ECSC-Treaty) in 1951 is to be seen in the same context, when stating that: "If the High Authority finds that one or more undertakings are charging abnormally low prices because they are paying abnormally low wages compared with the wage level in the same area, it shall, after consulting the Consultative Committee, make appropriate recommendations to them." The ECSC-Treaty expired in July 2002. With slight changes in the wording, Article 119 became Article 141(1) and (2). Article 120, now Article 142, remained unchanged.

15. Opinion of Advocate General Dutheillet de Lamothe, Case 80/70, Defrenne v. Belgian State, 1971 E. Comm. Ct. J. Rep. 445, 455 et seq.

2. Pillar No. 2: Social Policy

a. The First Attempt to Lay Down Europe's Mission in Social Policy in the Social Action Program 1974

i. The 1974 Council Resolution

Under the regime of the original Treaties, therefore, one can hardly speak of the existence of a European labor and employment law. And even if Article 117 of the original EEC-Treaty stipulated that

> Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained.
>
> They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

Thus envisaging the possibility of harmonization, the original Treaty did not provide for the necessary base of competence in its chapter about social policy. The EEC, as its name clearly expresses, was meant to be an economic community. This attitude only changed in the early 1970s[16], beginning at a Paris conference of the Member States' Heads of State or Government and ending, in 1974, in the adoption of the Council Resolution concerning a social action program.[17]

In this resolution, notwithstanding the fact that, as mentioned before, the Community had no competence to harmonize labor and employment law, the Council expresses "the political will to adopt the measures necessary to achieve the following objectives during a first stage covering the period from 1974 to 1976, in addition to measures adopted in the context of other Community policies." The objectives for social action are categorized in three groups: (1) "Attainment of full and better employment in the Community," (2) "Improvement of living and working conditions so as to make possible their harmonisation while the improvement is being maintained," and (3) "Increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings." The resolution starts off by setting out numerous ideas linked to one of those three goals, and, towards its end,

16. On the Background, see Paul Davies, *The Emergence of European Labour Law*, *in* LEGAL INTERVENTION IN INDUSTRIAL RELATIONS: GAINS AND LOSSES 313, 325–27 (William McCarthy ed., 1st ed. 1992); CATHERINE BARNARD, EC EMPLOYMENT LAW 8–10 (3rd ed. 2006).

17. 1974 O.J. (C 13) 1.

> Lays down the following priorities among the actions referred to in this Resolution:
>
> Attainment of full and better employment in the Community
>
> 1. The establishment of appropriate consultation between Member States on their employment policies and the promotion of better cooperation by national employment services.
>
> 2. The establishment of an action programme for migrant workers who are nationals of Member States or third countries.
>
> 3. The implementation of a common vocational training policy and the setting up of a European Vocational Training Centre.
>
> 4. The undertaking of action to achieve equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay.
>
> Improvement of living and working conditions so as to make possible their harmonization while the improvement is being maintained.
>
> 5. The establishment of appropriate consultations between Member States on their social protection policies.
>
> 6. The establishment of an initial action programme, relating in particular to health and safety at work, the health of workers and improved organization of tasks, beginning in those economic sectors where working conditions appear to be the most difficult.
>
> 7. The implementation, in cooperation with the Member States, of specific measures to combat poverty by drawing up pilot schemes.
>
> Increased involvement of management and labour in the economic and social decisions of the Community, and of workers in the life of undertakings.
>
> 8. The progressive involvement of workers or their representatives in the life of undertakings in the Community.
>
> 9. The promotion of the involvement of management and labour in the economic and social decisions of the Community.

The resolution continues with the following passage, in which the Council

> Takes note of the Commission's undertaking to submit to it, before 1 April 1974, proposals relating to:
>
> . . .
>
> - a directive[18] on the harmonization of laws with regard to the retention of rights and advantages in the event of changes in the ownership of undertakings, in particular in the event of mergers;
>
> notes that the Commission has already submitted to it proposals relating to
>
> . . .

18. In the document as published in the official journal (*supra* note 17), the word "directive" is sometimes spelled with a minuscule, sometimes with a capital "D."

> - a directive[19] providing for the approximation of legislation of Member States concerning the application of the principle of equal pay for men and women;
>
> . . .
>
> - a directive[20] on the approximation of the Member Sates' legislation on collective dismissals.
>
> . . . .

ii. Assessment

The 1974 resolution is the most comprehensive attempt of a European institution to identify its task in the field of social policy. The resolution looks at the subject matter from a Community's perspective and, for the first time, documents the particular character of European social action already mentioned earlier: employee protection as such is not the (only) starting point of the Community's concern. Already in 1974, the Community understands social action as a broad mix of different subject matters, also encompassing social law issues, questions of immigration, the fighting of unemployment as well as institutional considerations. If at all, those subjects are loosely linked together by the mere fact that most, but not all of them,[21] affect people that are employees. In substance, the resolution does not set out a systematic concept for social action. It rather is nothing more than an amalgamation of uncoordinated ideas. Hence, the first attempt to set out the task in social policy also ends up being the first proof that the Community is not capable of identifying a homogeneous mission.

The resolution only names three specific directives. For two of them, proposals of the Commission already existed before the resolution was drafted, and the resolution asks the Commission to submit a proposal for the third of them. All three directives were in fact adopted in the years after the resolution: the one on collective redundancies in 1975,[22] the one on equal pay in 1975,[23] and eventually the one dealing with the transfer of undertakings in 1977.[24] The crucial question is: Why these subjects and not others? Again, there are answers to explain *each* one of the directives:

19. *See*, *supra* note 18.

20. *See*, *supra* note 18.

21. The resolution also mentions the coordination of the social protection of self-employed, as is dealt with in Regulation 1408/71 (*see*, *infra* note 48).

22. Council Directive 75/129 1975 O.J. (L 48) 29 (EC), on the approximation of the laws of the Member States relating to collective redundancies.

23. Council Directive 75/117 1975 O.J. (L 45) 19 (EC), on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

24. Council Directive 77/187 1977 O.J. (L 61) 26 (EC), on the 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.

With Article 119 EEC-Treaty, equal pay was, as shown above, addressed in the original treaty. Unemployment in Europe rose in the 1970s, hence the directive on collective redundancies. The economies, at the same time, became more dynamic, thus the directive on the transfer of undertakings. But there is no scheme that could assemble the choice of these three subjects and the omission of others into a larger picture.

Even though the resolution considers further harmonization, these plans are kept at an abstract and general level, and there is no specific commitment to take action. If one compares the resolution's thoughts on further harmonization with those of its passages in which the European institutions, upon implementation, would have been limited to assist the Member States (consultation, promotion of cooperation between the Member States), one can at least doubt that European labor and employment law, even at its conceptual peak, was ever meant to be much more than it actually became. When, if not in 1974, could the propositions for further harmonization have been laid out in more specific terms with regard to time or substance?

Besides the three directives mentioned in the resolution, the only two plans of the social action program to have been completed are: (1) achieving equality between men and women beyond equal pay,[25] and (2) the harmonization of occupational health and safety law.[26] Until recently, the perception therefore has been that most of the subjects addressed in 1974 have been forgotten over the years.[27] However, a comparison between the status quo of European labor and employment law with the resolution shows that, while Europe on the one hand might indeed not have completed the action program, it on the other hand also never went beyond it. Most of all of the subjects that are dealt with in existing directives, as well as later institutional changes are in fact already mentioned in the resolution. Some important examples are outlined in the following chart.

25. Council Directive 76/207 1976 O.J. (L 39) 40 (EC), on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, which came hand in hand with the Defrenne II decision of the ECJ, Case 43/75, Defrenne v. Sabena, 1976 E.CR. 455.

26. The so-called framework directive, Council Directive 89/391 1989 O.J. (L 183) 1 (EC), on the introduction of measures to encourage improvements in the safety and health of workers at work, has been implemented by 19 further directives, the last of which is quoted in *supra* note 5.

27. *See, e.g.*, Rolf Birk, *Arbeitsrechtliche Regelungen der EU*, *in* I MÜNCHENER HANDBUCH ZUM ARBEITSRECHT § 19 NUMBER 11 (R. Richardi & O. Wlotzke eds., 2nd ed. 2000).

Resolution	European Law
to establish appropriate consultation between Member States on their employment policies, guided by the need to achieve a policy of full and better employment in the Community as a whole and in the regions	Article 125 et seq. EC-Treaty
to implement a common vocational training policy, with a view to attaining progressively the principal objectives thereof, especially approximation of training standards, in particular by setting up a European Vocational Training Centre	Article 150 EC-Treaty
to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations	Directive 92/85/EEC[28] Directive 96/34/EC[29]
to initiate a program for the vocational and social integration of handicapped persons, in particular making provisions for the promotion of pilot experiments for the purpose of rehabilitating them in vocational life, or where appropriate, of placing them in sheltered industries, and to undertake a comparative study of the legal provisions and the arrangements made for rehabilitation at national level	Directive 2000/78/EC[30]
seek solutions to employment problems confronting certain more vulnerable categories of persons (the young and the aged)	Anti-discrimination directives 2000/43/EC and 2000/78/EC[31] Directive 94/33/EC[32]
to protect workers hired through temporary employment agencies and to regulate the activities of such firms with a view to eliminating abuses therein	Directive 91/383/EEC[33] Directive 2008/104/EC[34]
the gradual elimination of physical and psychological stress that exists in the place of work and on the job, especially through improving the environment and seeking ways of increasing job satisfaction	Framework agreement on work related stress[35]

28. Council Directive 92/85 1992 O.J. (L 348) 1 (EC), on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual directive within the meaning of Article 16(1) of Directive 89/391/EEC).

29. Council Directive 96/34 1996 O.J. (L 145) 4 (EC), on the framework agreement on parental leave concluded by UNICE, CEEP, and ETUC.

30. *See supra* note 1.

31. *See supra* note 1.

32. Council Directive 94/33 1994 O.J. (L 216) 12 (EC), on the protection of young people at work.

33. Council Directive 91/383 1991 O.J. (L 206) 19 (EC), supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship.

34. *See supra* note 2.

35. *See supra* note 7.

to invite the Commission to submit a report on the problems arising in connection with coordination of supplementary schemes for employed persons moving within the Community	Directive 98/49/EC[36] Proposals for a portability directive[37]
progressively to involve workers or their representatives in the life of undertakings in the Community	Directive 2009/38/EC[38] Directive 2002/14/EC[39] Regulation (EC) 2157/2001[40], directive 2001/86/EC[41]
to develop the involvement of management and labor in the economic and social decisions of the Community	Article 138 and 139 EC-Treaty

b. Social Policy in the Actual Version of the EC-Treaty

Today's equivalent of the 1974 social action program is the social policy-chapter of the EC-Treaty with its base of competence in Article 137:

> 1. With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:
>
> (a) improvement in particular of the working environment to protect workers' health and safety;
>
> (b) working conditions;
>
> (c) social security and social protection of workers;
>
> (d) protection of workers where their employment contract is terminated;
>
> (e) the information and consultation of workers;
>
> (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
>
> (g) conditions of employment for third-country nationals legally residing in Community territory;

36. Council Directive 98/49 1998 O.J. (L 209) 46 (EC), on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

37. Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on improving the portability of supplementary pension rights*, SEC(2005) 1293, COM(2005) 507 final, http://ec.europa.eu/employment_social/news/2005/oct/dir_191005_en.pdf; Commission of the European Communities, *Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights*, COM(2007) 603 final, http://ec.europa.eu/employment_social/spsi/docs/social_protection/2007/com_2007_0603_en.pdf.

38. *See supra* note 3.

39. Directive 02/14 2002 O.J. (L 80) 29 (EC), of the European Parliament and of the Council establishing a general framework for informing and consulting employees in the European Community—Joint declaration of the European Parliament, the Council and the Commission on employee representation.

40. Council Regulation No. 2157/01 2001 O.J. (L 294) 1 (EC) on the Statute for a European Company (SE).

41. Council Directive 01/86 2001 O.J. (L 294) 22 (EC), supplementing the Statute for a European Company with regard to the involvement of employees.

> (h) the integration of persons excluded from the labour market, without prejudice to Article 150;
>
> (i) equality between men and women with regard to labour market opportunities and treatment at work;
>
> (j) the combating of social exclusion;
>
> (k) the modernisation of social protection systems without prejudice to point (c).
>
> 2. To this end, the Council:
>
> . . .
>
> (b) may adopt, in the fields referred to in paragraph 1(a) to (i), by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.
>
> The Council shall act in accordance with the procedure referred to in Article 251 after consulting the Economic and Social Committee and the Committee of the Regions, except in the fields referred to in paragraph 1(c), (d), (f) and (g) of this Article, where the Council shall act unanimously on a proposal from the Commission, after consulting the European Parliament and the said Committees. The Council, acting unanimously on a proposal from the Commission, after consulting the European Parliament, may decide to render the procedure referred to in Article 251 applicable to paragraph 1(d), (f) and (g) of this Article.
>
> . . .
>
> 4. The provisions adopted pursuant to this Article:
>
> — shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,
>
> — shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.
>
> 5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

At first sight, the questions remain the same as in 1974: Why allow harmonization in those fields of labor and employment law mentioned in Article 137(2)(a) EC-Treaty, and why not in others? Why generally exclude pay, the right of association, the right to strike or to impose lock-outs in Article 137(5) EC-Treaty, and not others? When giving it a closer look, however, a major difference appears: In 1974, the Council had no base of competence, but expressed a "political will" to adopt measures, whereas today, the Treaty empowers to harmonize, but neither the Treaty nor the Commission give directions when and how this option should be

used. As mentioned in the introduction,[42] the recent attempts by the Commission to find such a will in the so-called Green Paper and the flexicurity-initiative failed.

The European social partners are part of the regulatory process at the European level, and an agreement between them can in the end become a directive.[43] Have they used this extraordinary position to set out *their* European social policy agenda? They have not. Again, as mentioned in the introduction, the European social dialogue has come to a halt and shifted to soft law.[44] Therefore, there has been no definition of the social policy agenda of the European Union, thus the patchwork[45] of existing directives.[46]

3. Realization of the Internal Market: Further Pillars of European Labor and Employment Law

a. Pillar No. 3: Free Movement of Workers

From 1958 to 1974, the regulatory activity affecting employment and labor law was limited to implementing the free movement of workers. The regulatory activity lead to the adoption of two important regulations: Regulation (EEC) No. 3/58 concerning social security for migrant workers,[47] later replaced by Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons, and to members of their families moving within the Community,[48] both dealing with the social security issues linked to free movement of workers between Member States, and Regulation (EEC) No. 1612/68 on freedom of movement for workers within the Community,[49] addressing, among others, the rights of migrant workers and their families in the host Member State, also with respect to their position with their employer and in trade unions.[50]

42. *See supra* notes 9 and 10, with accompanying text.

43. Before the Commission submits a proposal for regulation in the field of social policy, it has to consult the European Social Partners, Art. 138(2) EC-Treaty. On the occasion of this consultation, the European Social Partners can inform the Commission that they intend to negotiate the content of the regulatory act, Art. 138(4) EC-Treaty, in order to conclude an agreement in the meaning of Art. 139 EC-Treaty. In such a case the Commission is barred from carrying on the legislative process for a period of at least nine months, Art. 138(4) EC-Treaty.

44. *See supra* notes 6 and 7, with accompanying text.

45. CATHERINE BARNARD, EC EMPLOYMENT LAW 49 (3rd ed. 2006).

46. Most of which are quoted in *supra* notes 1–6, 22–24, 26, 28, 29, 32, 33, 36, 38, 39, and 41.

47. 1958 O.J. (L 30) 597.

48. 1971 O.J. (L 74) 1. This regulation shall be replaced by Regulation 883/04 2004 O.J. (L 166) 1 (EC) of the European Parliament and of the Council on the coordination of social security systems.

49. 1968 O.J. (L 257) 2.

50. The regulations were flanked by a number of directives addressing the immigration issues; those directives are not of any interest in this context.

The core idea of the free movement of workers is the principle of non-discrimination, i.e., of granting workers migrating from one Member State to another the rights enjoyed by the workers in the second Member State. Thus, in principle, the implementation of the free movement of workers does not lead to a parallel European legal regime of labor and employment law. It only obliges Member States, their trade unions, employers and employers' associations to apply the existing rules to employees from another Member State.

b. Pillar No. 4: Internal Market Harmonization

In the eyes of the European Treaties, an internal market presupposes an undistorted competition. Competition can be distorted by differences in Member States' laws. Article 100 of the original EEC-Treaty thus stipulated: "The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market."

This provision also empowered the Council to harmonize Member States' labor and employment regulation.[51] The Single European Act whose main objective was to facilitate the realization of the internal market and hence the necessary harmonization, added Article 100a:

> 1. . . . The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
>
> 2. Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.

When later versions of the Treaty introduced genuine bases of competence for European social policy, now embodied in Article 137, quoted above, the pertinent articles were given new numbers—now Articles 94 and 95—but not amended as to their applicability to labor and employment law.

51. Among others, Directives 75/117/EEC (*supra* note 23), 75/129/EEC (*supra* note 22) and 77/187/EEC (*supra* note 24) were based upon Art. 100 EEC-Treaty.

c. Pillar No. 5: Country of Origin Principle

The establishment of the internal market through regulation was accompanied and strengthened by the construction of the fundamental freedoms by the European Court of Justice. Starting in the 1970s, the ECJ began to extend the scope of application of the fundamental freedoms, beginning with the free movement of goods. It held that free movement of goods did not only bar, in principle, Member State provisions discriminating goods from another Member State, but that this fundamental freedom was also applicable to Member State rules applied without distinction to all goods irrespective of their origin.[52] The consequence is the so called country of origin principle:[53] A good that is lawfully tendered on the market in one Member State can, in that form, also be offered on the markets of the other Member States.

The ECJ, in further developing its jurisprudence, held—again in a case dealing with free movement of goods—that by "contrast . . . the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States . . ."[54] In other words: the fundamental freedom is not applied to the selling arrangements of the good in the second Member State. Hence, the selling arrangements are governed by the laws of that second state and not by those of the state of origin. When the ECJ applied these rules to the free movement of workers, the immediate effect upon employment law therefore was limited. The selling arrangements, transposed to the free movement of

52. Case 8/74, Procureur du Roi v. Dassonville, 1974 E.C.R. 837; Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649. In Case C-267/91, Criminal proceedings against Keck and Mithouard, 1993 E.C.R. I-6097 number 15, the Court phrased the principle as follows:

> It is established . . . that, in the absence of harmonization of legislation, obstacles to free movement of goods which are the consequence of applying, to goods coming from other Member States where they are lawfully manufactured and marketed, rules that lay down requirements to be met by such goods (such as those relating to designation, form, size, weight, composition, presentation, labelling, packaging) constitute measures of equivalent effect prohibited by Article 30. This is so even if those rules apply without distinction to all products unless their application can be justified by a public-interest objective taking precedence over the free movement of goods.

Case 279/80, Criminal proceedings against Webb, 1981 E.C.R. 3305; Case 81/87, The Queen v. H. M. Treasury and Commissioners of Inland revenue, 1988 E.C.R. I-5483; Case C-232/01, Criminal proceedings against van Lent, 2003 E.C.R. I-11525.

53. DAMIAN CHALMERS, EUROPEAN UNION LAW 678 (2006); PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW 670 (3rd ed. 2003); STEPHEN WEATHERILL & PAUL BEAUMONT, EU LAW 568 ET SEQ. (3rd ed. 1999).

54. Case C-267/91, Criminal proceedings against Keck and Mithouard, 1993 E.C.R. I-6079 number 16.

workers, would be the conditions of employment. Thus, the employment relationship in the second Member State is governed by this state's law.[55]

The country of origin principle, however, mirrors the fundamental principle underlying the internal market: a competition between the Member States' legal and economical systems. If everything but the selling arrangements are in principle governed by the law of the Member State of origin, products as well as services can take benefit of the competitive advantages of their home Member State on the market in another Member State. The country of origin principle also directly affects two situations in the context of labor and employment law: First the employer from one Member State who offers his services in another Member State, without establishing himself there, who brings his employees with him, and, second, the company formed in accordance with one Member State's law wanting to establish itself in another Member State.

In the first situation, the employment relationship of the employees is governed by the law of the Member State of origin, Article 6(2)(a) Rome Convention[56] and Article 49 EC-Treaty.[57] As a consequence, employees from the second Member State as well as employees having moved to that Member State on the one hand, and employees performing their work in that same Member State only temporarily on the other hand are subject to different labor and employment law regimes—even if their tasks are identical, and even if they work side-by-side on the same construction site. An employer, while offering his services in another Member State, thus can take advantage of lower salaries in his home Member State.

In the second situation, freedom of establishment of Articles 43 and 48 EC-Treaty guarantees that the company can establish itself in the second Member State without having to be (re)formed in accordance with the laws of that second Member State.[58] Although this first of all is a company law

55. Case C-415/93, Union royale belge des sociétés de football association ASBL v. Bosmann, 1995 E.C.R. I-4921 number 98.

56. Rome Convention on the law applicable to contractual obligations, 1998 O.J. (C 27) 46.

57. Case C-60/03, Wolff & Müller v. José Filipe Pereira Félix, 2004 E.C.R. I-9553; Case C-341/02, Commission of the European Communities v. Federal Republic of Germany, 2005 E.C.R. I-2733; Case C-164/99, Portugaia Construções, 2002 E.C.R. I-787; Case C-49/98, C-50/98, C-52-54/98, 68/71/98, Finalarte v. Urlaubs- und Lohnausgleichskasse der Bauwirtschaft et al., 2001 E.C.R. I-7831; Case C-165/98, Criminal proceedings against Mazzoleni and Inter Surveillance Assistance SARL, 2001 E.C.R. I-2189; Case C-369/96, Criminal proceedings against Arblade, 1999 E.C.R. I-8453; Case C-3/95, Reisebüro Broede v. Sandker, 1996 E.C.R. I-6511; Case C-222/95, Parodi v. Banque H. Albert de Bary et Cie, 1997 E.C.R. I-3899; Case C-272/94, Criminal proceedings against Guiot and Climatec SA, 1996 E.C.R. I-1905; Case C-43/93, Vander Elst v. Office des Migrations Internationales, 1994 E.C.R. I-3803; Case C-113/89, Rush Portuguesa Ldª v. Office national d'immigration, 1990 E.C.R. I-1417; Case 62/81, 63/81, Seco et Desquenne & Giral v. Etablissement d'assurance contre la vieillesse et l'invalidité, 1982 E.C.R. 223; Case 279/80, Criminal proceedings against Webb, 1981 E.C.R. 3305; Case 33/74, Van Binsbergen v. Van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299.

58. Case C-212/97, Centros v. Erhvervs- og Selskabsstyrelsen, 1999 E.C.R. I-1459; Case C-208/00, Überseering v. Nordic Construction Company Baumanagement GmbH, 2002 E.C.R. I-9919;

issue, it also has consequences for labor law: If a company, formed in accordance with the laws of a Member State, can establish itself in any other Member State without having to take the form provided for by the company laws of those Member States, a company established in Germany can avoid Germany's particularly tough laws on codetermination of employees on the company board[59] if it originally was incorporated in a Member State without such a system of codetermination.

d. Pillar No. 6: Labor Rights as a Restriction of Fundamental Freedoms

Three fundamental freedoms—free movement of goods, freedom of services and freedom of establishment—protect cross-border entrepreneurial activities within the European Union. Collective action can—accidentally or intentionally—restrict these freedoms.

When French truck drivers block roads and ports, as it occasionally happens, goods from Spain, Portugal, or the United Kingdom cannot leave their country. Can the non-interference-approach of the French State vis-à-vis the truck drivers' actions amount to a restriction of the free movement of goods, Article 28 EC-Treaty? The ECJ ruled that: "by failing to take all necessary and proportionate measures in order to prevent the free movement of fruit and vegetables from being obstructed by actions by private individuals, the French Republic has failed to fulfil its obligations under Article 30 of the EC Treaty . . ."[60]

When a Latvian company posts workers in Sweden, and the site at which they are supposed to work is blocked by a Swedish trade union to force the Latvian Company into a collective agreement covering the posted workers, can this blockade be precluded by the freedom of services, Article 49 EC-Treaty? The ECJ held that:

> Article 49 EC and Article 3 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services are to be interpreted as precluding a trade union (. . .) from attempting, by means of collective action in the form of a blockade ('blockad') of sites such as that at issue in the main proceedings, to force a provider of services established in another Member State to enter into negotiations

Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art, 2003 E.C.R. I-10155; Case C-9/02, Lasteyrie du Saillant v. Ministère de l'Économie, des Finances et de l'Industrie, 2004 E.C.R. I-2409; Case C-411/03, Sevic, 2005 E.C.R. I-10805.

59. Drittelbeteiligungsgesetz 2004; Mitbestimmungsgesetz 1976; Montan-Mitbestimmungsgesetz 1951; Mitbestimmungs-Ergänzungsgesetz 1956; for a comparative analysis, see Abbo Junker, *Unternehmensmitbestimmung in Deutschland—Anpassungsbedarf durch internationale und europäische Entwicklungen*, ZFA 211–224 (2005).

60. Case C-265/95, Commission of the European Communities v. French Republic, 1997 E.C.R. I-6959 number 10.

> with it on the rates of pay for posted workers and to sign a collective agreement the terms of which lay down, as regards some of those matters, more favourable conditions than those resulting from the relevant legislative provisions, while other terms relate to matters not referred to in Article 3 of the directive.[61]

If a Finnish shipping company plans to reflag one of its vessels to the flag of another Member State, and if the Finnish trade union gives notice of a strike requiring the shipping company to give up these plans in a collective agreement, can this industrial action be seen as a restriction of the freedom of establishment, Article 43 EC-Treaty? In the words of the ECJ:

> Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against a private undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.[62]

The crucial aspect of these decisions in this context is the fact that, in applying the rules developed in its general case law upon the restrictions of fundamental freedoms, the ECJ creates (some) rules of European law upon the lawfulness of industrial action.

4. Pillar No. 7: Anti-Discrimination Protection

Starting with the European Court of Justice's 1976 decision in Defrenne II,[63] Article 119 of the original EC-Treaty, quoted earlier, developed into one of the most important treaty provisions, and became the first source of European anti-discrimination law. The mid-1970s also brought two directives, one intended to implement the principle of equal pay,[64] and another one extending the prohibition to discriminate on the grounds of sex to the other conditions of employment.[65] In later years, the European regulator went on to further implement[66] and, in the end, to rephrase[67] its anti sex-discrimination legislation.

When, in 1999, the Treaty of Amsterdam, in the new Article 13 EC-Treaty, empowered the European legislator to pass anti-discrimination regulation on the grounds also of racial or ethnic origin, religion or belief,

61. Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet, 2007 E.C.R. number 53 E.C.R. I-11767.

62. Case C-438/05, International Transport Worker's Federation, Finnish Seamen's Union v. Viking Line ABP/Eesti, 2007 E.C.R. number 55 E.C.R. I-10779.

63. *See supra* note 24.

64. Directive 75/117/EEC (*supra* note 23).

65. Directive 76/207/EEC (*supra* note 25).

66. E.g., Council Directive 97/80 1998 O.J. (L 14) 6 (EC) on the burden of proof in cases of discrimination based on sex.

67. Directive 2006/54/EC (*supra* note 4).

disability, age, or sexual orientation, the reaction was quick: Directives 2000/43/EC[68] and 2000/78/EC[69] set up a comprehensive regime of European anti-discrimination protection, thus making use of almost all of the possibilities granted by the new base of competence.[70]

B. The Incoherency of Various Components of European Labor and Employment Law

If this mix of different Treaty policies could be assembled to a consistent picture, the European regime of labor and employment law would simply be different from national labor and employment law systems with no further consequence. The problem is that a number of the different components are not coherent.

1. Pillar 1 (Minimum Standards) v. Pillar 5 (Country of Origin Principle)

The concept of the country of origin principle, although of limited immediate impact for European labor and employment law, is the opposite of the idea embodied in Articles 119 and 120 of the original EEC-Treaty as well as Article 68(2) ECSC-Treaty: The latter were trying to prevent competition between the different Member State systems, the former boosts such a competition, as a product or services can bring competitive advantages from its home Member State (lower costs) to the second Member State on which the good or service is put on the market.

The European legislature has reacted to the so called posting of workers, i.e., the situation described earlier in which an employer from one Member State offers his services in another Member State, bringing his employees with him.[71] Directive 96/71/EC[72] exempts this situation from the country of origin principle. It obliges the employer of the posted workers to apply the following rules of the host Member State to his workers during the period of posting: maximum work periods and minimum rest periods; minimum paid annual holidays; the minimum rates of pay, including overtime rates; the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings; health, safety, and hygiene at work; protective measures with regard to the terms and conditions of employment of pregnant women or women who

68. *See supra* note 1.

69. *See supra* note 1.

70. Both directives leave it up to the Member States whether they should adopt so-called positive measures, Art. 5 Directive 2000/43/EC and Art. 7 Directive 2000/78/EC.

71. See the text accompanying *supra* notes 56 and 57.

72. Directive 96/71 1997 O.J. (L 18) 1 (EC), of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services.

have recently given birth, of children, and of young people; equality of treatment between men and women and other provisions on non-discrimination. On the other hand, the country of origin principle has continuously been strengthened for all other situations covered by the fundamental freedoms. The result: the limited attempt to reconcile Pillars 1 and 5 has lead to incoherencies within pillar 5, revealed for instance[73] by the difficult birth of Directive 2006/123/EC, the services directive.[74]

2. Pillar 2 (Social Policy) v. Pillar 4 (Internal Market Harmonization)

From a conceptual point of view, the relationship between social policy and the internal market is unclear. Is social policy a counterweight to the consequences of the competition between the Member States' systems furthered by the idea of an internal market, or are Member States' labor and employment laws affecting the establishment of the internal market, as they distort competition? Articles 94 and 95 EC-Treaty would suggest the latter: in exempting labor and employment law (only) from the possibility of harmonization by a qualified majority provided for in Article 95(1) EC-Treaty, Article 95(2) EC-Treaty e contrario shows that such provisions still can be changed unanimously, Article 94 EC-Treaty. The European legislature thus could unanimously pass directives harmonizing the different levels of employee protection in the Member States. But how can this be reconciled with Pillar 2, as Article 137(2)(b), (4) EC-Treaty merely empowers the European legislature to adopt minimum standards legislation, thus allowing Member States to set higher standards, with the result of having different standards in the Member States even though a subject has been dealt with by a directive?

3. Pillar 2 (Social Policy) v. Pillar 6 (Labor Rights as a Restriction of Fundamental Freedoms)

Pillars 2 and 6 clash, when Article 137(5) EC-Treaty, as quoted earlier, inter alia excludes the harmonization of the Member States' legal rules

73. In three recent decisions (Case C-341/05, Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet and Others, 2007 E.C.R. I-11767; Case C-346/06, Rüffert v. Land Niedersachsen, 2008 E.C.R. I-1989; Case C-319/06, Commission v. Luxembourg, 2008 E.C.R. I-4323) the ECJ has reacted to some of the contradictions within the fifth pillar and built directive 96/71/EC into its general scheme of understanding of fundamental freedoms: If the host Member State applies its labor law to posted workers, it restricts freedom of services as guaranteed by Art. 49 EC-Treaty. This restriction can be justified if it serves the protection of workers as substantiated in directive 96/71/EC. The consequence: in principle, *only* the core rights defined in directive 96/71/EC may be applied to posted employees. Thus, these decisions have strengthened the gap between pillars 1 and 5.

74. Directive 06/123 2006 O.J. (L 376) 36 (EC) of the European Parliament and of the Council on services in the internal market. This directive furthers the country of origin principle and thus has to exclude labor and employment law issues from its scope of application, see Art. 1(6), (7), Art. 3(1)(a).

upon industrial action, while the ECJ creates European rules on the lawfulness of strikes when applying free movement of goods, free movement of services, and the freedom of establishment.

4. Pillar 3 (Free Movement of Workers) v. Pillar 4 (Country of Origin Principle)

While workers migrating from one Member State to another are to be treated like the employees of that second state (free movement of workers), workers coming from one Member State to another because their employer merely offers services in the second Member State are subject to the country of origin principle. Why this difference in the first place with the consequence that the European legislature enacted the directive, mentioned before, specifically to call off the applicability of the home Member State's labor and employment law?[75]

5. Pillar 2 (Social Policy) v. Pillar 7 (Anti-Discrimination Protection)

When Article 13 EC-Treaty empowered the European legislature to enact anti-discrimination directives, the Council passed directives making use of almost all of the possibilities granted by the new base of competence. Why was the reaction to Article 137 EC-Treaty, the base of competence for European social policy, which hardly brought any new European legislation, completely different?

C. Trying to Understand the Status of European Labor and Employment Law

Some of the incoherencies can be explained: European law, first of all, is a dynamic process. The actual Treaty, as well as all prior and probably future versions, is not the finalization of the Member States' ideas about Europe, but nothing more than yet another step in the development of European law. In this process, from the very beginning on, there constantly was a strong drive toward economic integration that culminated in the plan to establish the internal market while, on the other hand, the drafters of the different Treaty versions have not given Europe a specific mission in labor and employment law. But why was there no similar skepticism vis-à-vis European anti-discrimination legislation?

A second crucial feature of European law is that the process of its development has not only been in the hands of the Member States through Treaty drafting, but also in those of the ECJ. To point to some examples

75. Directive 96/71/EC (*supra* note 72).

relevant in this context: It was the ECJ that turned former Article 119 EEC-Treaty, quoted earlier, into a provision giving every employee a direct right against her/his employer to equal pay.[76] It was again the ECJ that extended the scope of application of the fundamental freedoms to rules applied without distinction.[77] And, once more, the ECJ ruled that the fundamental freedoms can also be applicable in the absence of state action, thus putting it in a position to apply these freedoms directly to industrial action.[78]

These two lines of development are, however, not always on a parallel course. Since the 1990s, new Treaty versions were also driven by the will of the Member States to retain competences, particularly in the field of labor and employment law. This will is reflected, inter alia, by the principle of minimum harmonization in Article 137(2)(b), by the fact that harmonization in the field of social policy is limited to supporting and complementing the activities of the Member States, Article 137(1), (2)(b), and, above all, by excluding, in Article 137(5), pay, the right of association, the right to strike or the right to impose lock-outs from the scope of application of this article.

The Member States' will to retain competences was also caused by the jurisprudence of the ECJ, sometimes seen as overdoing its job. But when Article 137(5) was added to the Treaty, did the Member States not see the possibility that the ECJ could one day apply the fundamental freedoms to industrial action? After all, it would have been possible to subject the Treaty passages on fundamental freedoms to an identical exclusion. Or did the Member States not want to restrict the scope of application of the fundamental freedoms even if this maybe meant that eventually there would be (some) European law rules on industrial action?

Finally, in the dynamic process of the evolution of European law, concepts have changed: Although the Treaty still provides for the possibility to look at different levels of labor standards as a distortion of competition that could be squashed by European regulation,[79] and although Articles 119 and 120 of the original Treaty still exist, this view has in practice been replaced by the concept that the Member States' legal and economical systems may differ, and that they will compete on these differences with one another.

All in all, the status of European labor and employment law is puzzling. The social policy part of it is by far the weakest: No concept, no systematic regulation, no recent regulation. The strongest components are

76. *See supra* note 63.

77. *See supra* note 52 et seq.

78. *See supra* notes 60 and 61. Note the difference to the earlier decision regarding France, *supra* note 60, in which the ECJ sanctioned the non-interference strategy of French state authorities.

79. *See supra* Pillar No. 4: Internal Market Harmonization.

first those related to the establishment of the internal market. The pertinent rules may (implementation of free movement of workers), may possibly (application of fundamental freedoms to industrial action), or may not (Directive 96/71/EC on the posting of workers in the framework of the provision of services) fit in the larger picture of the internal market principles. These rules often address only very limited issues.[80] Some of them are not more than accidental products of the construction of fundamental freedoms.[81] And, the second strong component is anti-discrimination protection; and one may wonder why.

III. THE POTENTIAL OF A EUROPEAN REGULATION OF LABOR AND EMPLOYMENT LAW

A. Theoretical Basis for a Regulation at the European Level

This puzzling image of what European labor and employment law is, calls even more for an answer to the question what, from a theoretical perspective, it *could be*.[82] How can it be justified to have a European rather than a Member State regulation of labor and employment law issues?

As the Member States, and in particular the older Member States, have fully developed labor and employment law systems with longstanding traditions reaching back to the nineteenth century,[83] as trade unionism and collective bargaining are Member State oriented and as the labor markets are still national in character,[84] there is not much point in arguing that Europe should take over the task of employee protection from the Member States. Another blind alley: Quite often, the European legislature is called for by those who did not prevail in an inner Member State argument on the level of employee protection, in the hope that the European legislation would alter the unwanted Member State provision. Europe, however, is not

80. The rules developed by the ECJ in the two cases on industrial action, *supra* notes 60 and 61, for instance do not permit any kind of industrial action. Whether a particular kind of industrial action is legal in a Member State is governed and thus answered by this Member State's law. These decisions create additional, parallel limitations to the lawfulness of industrial action, and those additional limitations only are applicable within the scope of application of the pertinent fundamental freedoms. Very critical upon the effects jurisdiction in general, see ROLF STÜRNER, MARKT UND WETTBEWERB ÜBER ALLES? 182 et seq. (2007).

81. Again the rules developed by the ECJ upon the lawfulness of industrial action.

82. Rules developed accidentally in the context of free movement of goods and of services as well as the freedom of establishment (*supra* note 81 with accompanying text) are not taken into consideration in the following thoughts.

83. For an early comparative overview, see Stephan Bauer, *Arbeiterschutzgesetzgebung*, *in* 1 HANDWÖRTERBUCH DER STAATSWISSENSCHAFTEN 401–608 (Ludwig Elster, Adolf Weber & Friedrich Wieser eds., 4th ed. 1923).

84. European Commission, *Employment in Europe 2006*, 211–214: out of a workforce of 180 million people in Europe (when the European Union still only had 15 Member States), only 600,000 or 1.5 % came from a different Member State.

and cannot be a kind of higher instance, a second arena to fight inner Member State conflicts.

To make a convincing case in favor of a regulation at the European level, there has to be some sort of nexus with this level. The clear-cut case in favor of a regulation at the European rather than at the Member State's level therefore are situations in which the Member States' legislatures would not have the necessary jurisdiction to legislate: intra-European Union cross-border issues, for which (only) European law can impose a Europe-wide legal regime. Cases in favor of European legislation can also be made when the rationale of the regulation is to deal with problems generated by other rules of European law: minimum labor standards as a counterweight to the internal market. The last case to be looked at: The European Union is standing in the global competition.

B. Cross-Border Issues

The most apparent case of the European regulation of a cross-border issue is the coordination of the social security systems of the Member States in the context of free movement of workers[85] that, technically, is not labor or employment law. Another example is Directive 94/45/EC,[86] now directive 2009/38/EC,[87] establishing European works councils. The bulk of the existing European legislation, however, does not address cross-border issues.

Even in this context, a regulation at the European level can run into difficulties: Since the late 1950s, Member State pension schemes have continuously been supplemented by occupational pensions schemes provided for by employers. Just as European law in its legislation upon the coordination of the social security systems guarantees that rights under state pension schemes are not lost when moving from one Member State to another, it would seem desirable to provide for a similar guarantee for occupational pensions. However, there currently is no such guarantee. Directive 98/49/EC,[88] though on the subject, is of very limited substance and specifically does not provide for the transferability. Recent proposals addressing portability of supplementary pension rights[89] so far have failed. The reason probably is that transferability of supplementary pension rights

85. *See supra* notes 47 and 48.

86. Council Directive 94/33 1994 O.J. (L 216) 12 (EC), on the protection of young people at work.

87. *See supra* note 3.

88. Council Directive 98/49 1998 O.J. (L 209) 46 (EC), on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community.

89. *See supra* note 37.

within Member States is far from being the general rule.[90] In other words: The regulation of cross-border issues by the European legislator is easiest when it is limited to extending existing Member State concepts. The less this is the case, the weaker the justification for a regulation at the European level becomes.[91] It would in fact seem odd not to have transferability of supplementary pension rights when an employee moves from one employer to another within the same Member State, while he would keep those rights if the new employer were in another Member State.

C. Minimum Labor Standards as Counterweight to the Internal Market/Plain Employee Protection

The European legislator has reacted to one particular consequence of the internal market: Directive 96/71/EC[92] on the posting of workers in the framework of the provision of services. This directive, as mentioned earlier, exempts one particular fact pattern from the rules governing the internal market. Directive 96/71/EC shows that the European legislature is willing to impose limits to the concept of an internal market based on the competition of the different Member States' systems. The classical limit to such an understanding of the internal market, though, would be the idea incorporated in Articles 119 and 120 of the original Treaty: the minimum standards in liberalized trade approach, which neutralizes some employee rights in this competition because they would apply in all Member States. Could the mission for a European social policy be to define such standards?

Only in theory. In practice, there is a major flaw to this idea. In recent years, the Member States have reacted to the fact that their labor and employment law systems compete with one another in the internal market, and that, because of the liberalization of world trade, they also compete with the systems of non Member States worldwide. In order to improve their position in this competition, old Member States have taken the path to creating incentives for employers to hire employees. A major construction site in this context has been reforms of the protection of the employee at the termination of the employment relationship: lowering the level of unfair dismissal protection and/or increasing the admissibility of fixed-term

90. For a survey on transfer-in and transfer-out practices, see Hewitt Associates, *Quantitative Overview on Supplementary Pension Provision, Final Report*, Prepared for the European Commission Directorate General EMPL, Nov. 2007, http://ec.europa.eu/employment_social/spsi/docs/social_protection/2007/ec_report_final_nov_2007_en.pdf, 22–24 (synopsis), 42–43, 50 (Belgium), 64–65, 70 (France), 86–87, 94 (Germany), 108–109, 116 (Ireland), 128–129 (Italy), 150–151, 157 (Netherlands), 172–173, 177 (Poland), 192–193, 199 (Spain), and 216–217, 224 (United Kingdom).

91. The European Works Council Directive (*supra* note 38) did not first apply to England, whose labor law does not provide for works councils.

92. *See supra* note 72.

contracts of employment. However, Member States typically[93] did not simply cut back the general level of employee protection. They rather created specific exemptions for groups of persons particularly affected by unemployment in the respective Member State. Some examples:

- The French *contrat nouvelles embauches*, which exempted newly employed persons in enterprises with up to twenty employees from the protection against unfair dismissal for a period of up to two years after hiring.[94] The *CNE* was repealed in June, 2008.[95]
- France's *contrat première embauche*,[96] which was repealed shortly after it entered into force,[97] and that exempted employees under twenty-six years of age from the protection against unfair dismissal for a period of up to two years after hiring in enterprises with more than twenty employees.
- The 2003 *Biagi*-reforms in Italy brought a *contratto di inserimento*, which permits an employer to employ a person for a period of nine to eighteen months, on a lower salary, if one of the following conditions is met by the person to be employed: eighteen to twenty-nine years of age, long-term-unemployment plus twenty-nine to thirty-two years of age, unemployed and older than fifty, a break in employment for at least two years, women in regions with a below-average quota of employed women.[98]
- The same reform also makes it possible for an employer to employ a person on the basis of *lavoro intermittente*,[99] a particular type of part-time work: The employer calls the employee to work when needed. *Lavoro intermittente* is only lawful if authorized by a collective agreement or a state regulation. However, in an experimental way,[100] *lavoro intermittente* is lawful for employees younger than twenty-five

93. An exception is Spain who in 2006 generally lowered the indemnity due in the case of an unlawful dismissal. Article 56, No. 1 a Estatuto de los Trabajadores now gives the employee a right to 33 daily salaries for each year of employment with a maximum of 24 monthly salaries. Formerly, they received 45 daily salaries for each year of employment with a maximum of 42 monthly salaries.

94. Ordonnance 05-893 2008 J.O. du 2.8.2005 relative au contrat de travail nouvelles embauches, J.O. du 3.8.2005, Art. L 1223-1 - L 1223-4, L 1236-1 - L 1236-6 Code du Travail.

95. Article 9(1) Loi 08-596 J.O. du 25.6.2008 portant modernisation du marché du travail, J.O. du 26.6.2008.

96. Article 8 Loi 06-396 2006 J.O. du 31.3.2006 pour l'égalité des chances, J.O. du 2.4.2006.

97. Loi 06-457 2006 J.O. du 21.4.2006 sur l'accès des jeunes à la vie active en entreprise.

98. Article 54 et seq. decreto legislativo 276/2003, Gazetta Ufficiale No. 235, 9.10.2003—Supplemento Ordinario Nr. 159.

99. Article 33 et seq. decreto legislativo 276/2003.

100. "*[I]n via sperimentale*," Art. 34 (2) decreto legislativo 276/2003.

and older than forty-five years of age who are unemployed and have dropped out from the production cycle.

- Spanish employers can employ a person on a lower salary on the basis of the *contrato de trabajo en prácticas*, during up to four years after graduation or termination of another formation for a period of up to two years, even with different employers.[101]
- German law, which generally requires an objective ground for a fixed-term employment relationship after the first two years, makes an exception for newly created enterprises (four years without an objective ground) or employees of fifty-two years of age or older who have been unemployed for four months (five years without an objective ground).[102]

These reforms have enhanced the degree of diversity of Member States' labor and employment law regimes. This diversity is a strong argument against European legislation. A theoretical example: If France lowers the level of protection for the young, while Germany does the same for the elderly employees, what could a European directive prescribe? It could crush both France's and Germany's effort by setting a minimum standard. On what grounds? If, on the other hand, it opts for setting a minimum standard only for one group, it defeats the other Member State's effort. A third option could be to lower the level of protection itself for both groups, but such a directive would be useless: As Member States are free to set higher protective standards,[103] France could keep its higher standard for the elderly and Germany could keep its standard for the young employees. They do not need a European regulation to achieve this.

There is already one practical example for the destructive effect of European harmonization: One of the results to be achieved by Directive 1999/70/EC[104] on fixed-term contracts is to "establish a framework to prevent abuse arising from the use of successive fixed-term employment contracts or relationships."[105] The ECJ has made clear that Directive 1999/70/EC requires some limit for fixed-term contracts not justified by an objective ground.[106] No Member State can therefore opt any more for a no-limit attitude toward fixed-term contracts in order to create incentives for an employer to hire personnel. England, whose law traditionally did not require an objective ground for a fixed-term contract and thus did not

101. Article 11 No. 1 Estatuto de los Trabajadores.
102. Section 14 Gesetz über Teilzeitarbeit und befristete Arbeitsverträge.
103. *See infra* Section III.D.
104. *See supra* note 6.
105. Section 1(b) of the framework agreement implemented by Directive 1999/70/EC.
106. Case C-212/04, Adeneler v. Ellinikos Organismos Galaktos (ELOG), 2006 E.C.R. I-6057 number 71 et seq.

impose a limit, reluctantly[107] adapted its law to the directive even before the ECJ decision and introduced a four-year limit for fixed-term contracts not justified by objective grounds.[108]

Is it legitimate for the European legislature to force such limits on the Member States' fantasy? Arguably, yes. But there is a strong case against importing the minimum standards in liberalized trade approach from the international arena[109] into the European union: As mentioned before, old Member States are long time, often first minute, and definitely professional players in labor and employment law. With their longstanding traditions and experience, they have created elaborate systems of employee protection. When they decide that they have to reduce their protective level in order to fight their high levels of unemployment, they do not go back to the nineteenth century and practically abolish employee protection. Instead, they only lower it cautiously. When a Member State generally opts for a relatively low level of employee protection, as England arguably has done, it again does not go back to the nineteenth century. In all of these situations, one can assume that the Member States have good reasons for their actions, while there is absolutely no cause to believe that the European legislature has any better knowledge or better solutions than the Member States. The design of employee protection therefore in principle is in much better hands if it is left to the Member States. To recall the words of Article 137, which implements this idea in the EC-Treaty: "(1) . . . the Community shall support and complement the activities of the Member States . . . (2) To this end, the Council . . . (b) may adopt . . . by means of directives, minimum requirements . . .", i.e., harmonization only to the end of supporting and complementing the activities of the Member States.

The aforesaid is based on the assumption that Member States keep a certain minimum standard. In the very theoretical and highly unlikely situation, that (some) Member States were to cut back employee protection to offensively low levels, allowing, for instance, child labor, forced labor, discrimination of women, or taking away occupational health protection, European legislation would be an effective tool to rectify such developments, as the European Union has the power to legally bind Member States to its acts. However, in the given examples, there probably would be no need to resort to this power, as they would be covered by national and/or European human rights guarantees with their supervisory

107. PAUL DAVIES & MARK FREEDLAND, TOWARDS A FLEXIBLE LABOUR MARKET 87-88 (2007).

108. Section 8 Employees (Prevention of Less Favourable Treatment) Regulations 2002.

109. Even in the international arena, there is a certain shift from this approach, when Article 3 NAFTA Labor Side Agreement (NAALC) and other U.S.-trade agreements seek to guarantee the enforcement of domestic law rather than of supranational standards. *See* BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 116–17 (2005); CHRISTINE KAUFMANN, GLOBALISATION AND LABOUR RIGHTS 192 et seq. (2007).

and enforcement systems. The interesting aspect of this thought therefore is when exactly it should trigger the shift to the European level. Some will argue that no limit on the renewal of fixed-term contracts would suffice. What about a Member State that were to give up its unfair dismissal protection? Without analyzing the issue in depth here: If one takes the stand that employee protection primarily is the business of the Member States, and that Europe is not the arena to re-fight inner Member State struggles, only extraordinary situations meet this requirement—not the issue of renewal of fixed-term contracts, and not the giving up of unfair dismissal protection either. Anti-discrimination protection? Arguably, at least for some grounds mentioned in Article 13 EC-Treaty and dealt with in Directives 2000/43/EC and 2000/78/EC,[110] if no such protection existed in the Member States before the relevant directives were passed. This, however, was not the case.[111]

D. The European Union's Standing in the Global Competition

As demonstrated by the few examples from the Member States' employment laws mentioned earlier, the Member States have reacted to the European and the global competition by lowering their protective standards. If they had not reacted in this way, could the European legislature, worried about Europe's standing in the global competition, pass directives in order to *lower* the level of employee protection in the Member States' laws? It could not: Articles 94 and 95 EC-Treaty only apply to the internal market, and the social policy base of competence, Article 137 EC-Treaty, only allows minimum harmonization, Article 137(2)(b), (4). Such a directive therefore would have no effect at all.[112]

IV. CONCLUSION

The standstill of the European regulation of labor and employment law is not a coincidental break. It reflects the fact that employee protection is a mission of the Member States. It is hence not surprising that the European Commission has never found a consistent mission in the field of labor and employment law: there is no such mission. The regulatory task of the European Union is limited to cross-border issues as well as the enforcement of its internal market concept, including free movement of workers.

110. *See supra* note 1.

111. For an overview of Member States' constitutions, see Sven Hölscheid, *Nichtdiskriminierung*, *in* CHARTA DER GRUNDRECHTE DER EUROPÄISCHEN UNION ART. 21 NUMBER 7 et seq. (Jürgen Meyer ed., 2nd ed. 2006).

112. *See supra* note 103 and accompanying text.

In this setting, the European institutions have two options: The first is a shift from regulation to coordination,[113] as for instance proposed by the Commission in its initiative on flexicurity,[114] mentioned in the introduction:

> The Impact Assessment concludes by highlighting the third option as the best choice. This option would start a policy process between the Commission, the Member States and the other stakeholders, fully within the framework of the Lisbon strategy and the Open Method of Coordination. . . . The precise impact of flexicurity will depend on how Member States will define their own pathways, and on how policies are implemented. Since flexicurity falls into the broader scope the Lisbon Strategy, it will be monitored, assessed and evaluated in that framework.[115]

The European Union also could consider forging model labor and employment laws, to be opted for by Member States or possibly the parties. The model law approach is not unfamiliar[116] in the European context,[117] and some are calling for it in labor and employment law.[118]

113. On the so-called open method of coordination, see BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 225–30 (2005).

114. *See supra* note 12.

115. Commission staff working document, *supra* note 13, at 4.

116. Though the model law approach is not very popular. For a critical comment on the low esteem of this tool by European institutions, see ROLF STÜRNER, MARKT UND WETTBEWERB ÜBER ALLES? 195–97 (2007).

117. *See, e.g.*, the Societas Europaea, Council Regulation (EC) No 2157/2001, *supra* note 1, and Council Directive 2001/86/EC, *supra* note 1, which is meant as an additional form of corporation and whose legal regime applies only when this form is opted for.

118. For instance Michael Stein, Deutsche Bank head of the collective bargaining policy department, spoke on this at a Congress in November 2007, *available at* http://www.zaar.uni-muenchen.de/fileadmin/ZAAR-Dateien/pdf/Veranstaltungen/4LB.pdf. His speech will be published in 11 DAS GRÜNBUCH UND SEINE FOLGEN – WOHIN TREIBT DAS EUROPÄISCHE ARBEITSRECHT?, ZAAR-SCHRIFTENREIHE (Volker Rieble & Abbo Junker eds., 2008).