



## **Law and Democracy in the Post-National Union**

*Erik Oddvar Eriksen, Christian Joerges  
and Florian Rödl (eds)*

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Cover picture: *Immanuel Kant (1724-1804)*

# Chapter 10

## Approaching the 'Social Union'?

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The 'Social Union' is surrounded by open questions: How do we get there? What exactly are we aiming at? Why should we pursue this goal at all? There seems to be no answer to any of these questions – or maybe, there are too many answers. There is uncertainty and disagreement on almost every issue, and every question just generates the next, more fundamental one.

This contribution tries to tackle the issue anew, and it does so bottom-up, reviewing and reassessing the reasons why there should be a 'Social Union'. In a first step, the aim of a 'Social Union' is split into two components: the pursuit of social policy on the one hand, and European integration on the other (the first section). Secondly, a summary case is made as to why it might make sense to combine the two components (the second section), followed by a more thorough discussion of the core arguments involved (the third section). The article then turns to the other two questions and, in extrapolating from current law, tries to identify components for the future development of a 'Social Union' (the fourth section).

### **A marriage of the moribund?**

The development of a 'social dimension' features prominently on 'Europe's Unfinished Agenda'. At least, this is what the conference outline suggests. But who would doubt that this claim is correct? There is a wealth of material to support it, which include official documents from EU institutions, political statements on both the national and the supranational level, and academic

discourses across various disciplines. And this is not just a recent development. It would hardly be an exaggeration to maintain that the creation and advancement of a genuinely European social policy has continuously been on the agenda – certainly for more than a decade now, arguably ever since the very beginning of European integration.

But is it not astonishing that we are still discussing the same project, even today? The mission, without doubt, has not been accomplished, independently of whatever such accomplishment might have meant. Instead, it is the enterprise itself that appears to have turned into a nostalgic, maybe even anachronistic, endeavour. For are not both of them, the Welfare State and European Integration, in an appalling condition today, despite the capital letters that these concepts had been awarded in better times?

First, let us take the Welfare State: the provision against the 'social' risks, the prevention of poverty, and, more generally, the mitigation of substantive inequality – these aims have long been considered the *raison d'être* of the Welfare State,<sup>1</sup> and none of them have lost their relevance. The fact that some of these aims have been achieved does not render the respective policies dispensable, but instead calls for their continuation, while the fact that some have not yet been achieved might even be taken to suggest an intensified effort in this field, an extension, that is, of current social policies.

However, this is obviously not the direction in which today's debates point. Curtailment is on the agenda, even on that of the political left. This is because the dominant analysis has it that the Welfare State has grown beyond all sustainable measures, that it is now struggling with its own sclerotic administration, thus strangling the economic activities upon which it feeds. In this condition, the Welfare State is judged unfit for survival, especially in a globalised world of heightened transnational competition.

The other big project, European Integration, appears to be in similar shape: hypertrophic, due to its repeated extensions, sprawling bureaucracies inside, and fading popular support – and this had been the diagnosis long before the failed referenda. However, as with the Welfare State, the foundational

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<sup>1</sup> For a general discussion of these basic aims, see H.F. Zacher, 'Das soziale Staatsziel', in: Zacher, *Abhandlungen zum Sozialrecht*, edited by B. von Maydell & E. Eichenhofer, (Heidelberg: C.F. Müller, 1993), at 18 *et seq.*

aspirations are still in place. Peace and prosperity may have come to be taken for granted and thus have lost a bit of the appeal they had in Europe in the early post-war period.<sup>2</sup> But they no doubt continue to offer a firm basis for the supranational community that we have today, and they may also serve as forceful arguments for its spatial extension.

The problem, though, is that peace and prosperity cannot carry much further than what has already been accomplished. In particular, the ideal of 'an ever closer Union', which is at the core of the integration project, is not supported by these aspirations anymore, at least not to the extent it used to be in the project's earlier stages. Against this background, it is all but surprising that, for years now, there has been a vivid debate on Europe's *finalité*.<sup>3</sup> What is needed, however, is not just an answer to the question of *where* Europe could go. On this, we have heard many answers. What we would also need is a compelling reason as to *why* Europe should go in any of the suggested directions.

The Constitutional Treaty had no determinate message on either question: no ground-breaking reform, but merely consolidation; no unequivocal commitment to any specific vision, but mere scene-setting for future choices, providing various step-stones, so to speak, for the EU institutions to use, but leaving much leeway as to whether, when and in which precise direction the integration process should continue.<sup>4</sup> Maybe, one could not have expected more. Such 'openness' is quite common among constitutions. And even if the integration process may have called for more guidance, it is doubtful whether, under present conditions, a constitution could have responded to

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<sup>2</sup> On these foundational 'ideals' of European integration and their failure to carry the project any further, see J.H.H. Weiler, *The Constitution of Europe*, (Cambridge: CUP, 1999), (Chapter 7 'Fin-de-Siècle Europe') at 240–246. Weiler identifies a third foundational ideal: supranationalism (see, below, note 39 and related text). It seems, however, that to the extent that this ideal is not co-extensive with the first one, it is based on Weiler's very specific (although attractive) reading of the integration project.

<sup>3</sup> For a prominent contribution to this debate, see J. Fischer, *Vom Staatenverbund zur Föderation – Gedanken über die Finalität europäischer Integration*, speech delivered on 12 May 2000, available at [www.europa-digital.de/aktuell/dossier/fischer/rede1205.shtml](http://www.europa-digital.de/aktuell/dossier/fischer/rede1205.shtml); for a collection of reflections upon this topic in general and on this contribution in particular, see Ch. Joerges, Y. Mény & J. Weiler (eds), *What Kind of Constitution for What Kind of Polity? – Responses to Joschka Fischer*, available at [www.jeanmonnetprogram.org/papers/00/symp.html](http://www.jeanmonnetprogram.org/papers/00/symp.html).

<sup>4</sup> For a critical evaluation of the Constitutional Treaty's openness with regard to the social dimension of the EU, see Ch. Joerges, 'What is left of the European Economic Constitution? A melancholic eulogy', (2005) 30 *European Law Review*, 461, 485–487.

this need. This is because it would hardly make sense to impose a vision which lacks sufficient support.

In any event, this is where the integration project stood when it took the blow from the French voters. And in the absence of any compelling vision, its revival seems uncertain, to say the least.

Let us leave it for now with these simplistic sketches. The main point might have become clear: we are dealing with two grand projects – not outdated ones, to be sure, but two projects which are both crisis-ridden and tattered, if not doomed. So what is the idea, one might ask, behind tying them to one another? To have them join forces and perish together?

## Two patients – one joint therapy?

On a closer look, it might not be that absurd to connect the two projects after all. In fact, there are reasons to believe that this could be an important step towards their recovery. So, in what respects could our patients benefit from a joint therapy?

With regard to the Welfare State, the argument is well-known.<sup>5</sup> Transnational competition puts national regulations under pressure.

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<sup>5</sup> To quote but one recent statement of a prominent proponent, see H.-W. Sinn, *The New Systems Competition*, (Malden, MD: Blackwell, 2003), (see, in particular, Chapter 3, entitled 'The Erosion of the Welfare State'), also available at: [www.cesifo-group.de/pls/portal/docs/PAGE/IFOCONTENT/NEUESEITEN/PUBL/EINZELSCH RIFTEN/SINNBOOK1/PUBL-SINN-2002-SYSTCOMP-CH3.PDF](http://www.cesifo-group.de/pls/portal/docs/PAGE/IFOCONTENT/NEUESEITEN/PUBL/EINZELSCH RIFTEN/SINNBOOK1/PUBL-SINN-2002-SYSTCOMP-CH3.PDF); Clearly, the logics of the 'systems' or 'regulatory competition' argument are not as compelling as they are frequently presented to be, nor as they often seem to be perceived. In fact, much of this article is intended to question and qualify this argument, and for this very reason, the article takes as its starting point an unmitigated version of the argument. For a more differentiated assessment see, for example, S. Kuhnle, 'Survival of the European Welfare State', ARENA Working Papers, No. 19/1999, available at [www.arena.uio.no/publications/working-papers1999/papers/wp99\\_19.htm](http://www.arena.uio.no/publications/working-papers1999/papers/wp99_19.htm); for an in-depth study of the different 'vulnerabilities' of different types of welfare states, see F.W. Scharpf & V.A. Schmidt, *Welfare and Work in the Open Economy*, (Oxford: OUP, 2000); for an overview and instructive discussion of the literature on that issue, see P. Genschel, 'Die Globalisierung und der Wohlfahrtsstaat – Ein Literaturrückblick', MPIfG Working Paper Nr. 5/2003, available at [www.mpi-fg-koeln.mpg.de/pu/workpap/wp03-5/wp03-5.html](http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp03-5/wp03-5.html); for a recent account from a legal perspective, see U. Becker, 'Nationale Sozialleistungssysteme im europäischen Systemwettbewerb', in: Becker & Wolfgang Schön (eds), *Steuer- und Sozialstaat im europäischen Systemwettbewerb*, (Tübingen: Mohr Siebeck, 2005), at 3 *et seq.*

Interventionist policies become harder to pursue because, on the one hand, policies perceived as burdensome run the risk of being evaded, or at least of being punished by the bad market performance of local actors. Supportive interventions, on the other hand, face the problem of attracting free riders. Moreover, it might not just be such market mechanisms which loosen the regulatory grip of local jurisdictions. It might also be a weakening of the respective collective identities that could be entailed in such processes of transnationalisation.<sup>6</sup>

Social policies, the argument continues, are particularly vulnerable to these mechanisms. Not only do they typically involve both types of regulatory interventions, burdensome and supportive ones, but they are also generally said to rest upon – and are justified by appeals to – solidaristic attitudes within a community, which, in turn, may be viewed as a precondition for the viability of social policy.<sup>7</sup>

The bottom line is that, in order to survive, welfare states need borders – and boundaries probably as well. And, as European Integration has done a lot to dissolve them at national level, it is almost self-suggesting to explore what can be done at European level to restore them. If the problem arises from the disconnection of market and polity, why not try to reconnect them one level further up? And this would imply, in particular, the Europeanisation of social policy.

So far, our attention has been directed to the attempt to substantiate the hope that the Welfare State could benefit from a joint therapy. Let us now turn to our second patient's prospects. In which ways could it be beneficial for

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<sup>6</sup> For a pessimistic scenario 'some generations down the postmodern road', see M. Walzer, *On Toleration*, (New Haven: Yale University Press, 1997), at 88-91; David Miller, *On Nationality*, (Oxford: Clarendon Press, 1995), at 186-187; with a similar analysis, but a significantly more positive reading, see U. Haltern, 'Europäische Verfassung und europäische Identität', in: R. Elm (ed), *Europäische Identität: Paradigmen und Methodenfragen*, (Baden-Baden: Nomos, 2002), at 278 *et seq.*

<sup>7</sup> It is this assumption upon which C. Offe bases his sceptical assessment with respect to the development of a significantly stronger social dimension of the EU; see C. Offe, 'Demokratie und Wohlfahrtsstaat: Eine Europäische Regimeform unter dem Stress der europäischen Integration', in: Wolfgang Streeck (ed) *Internationale Wirtschaft, nationale Demokratie – Herausforderungen für die Demokratietheorie*, (Frankfurt aM: Campus, 1998), at 114-115.

European Integration if its social dimension were to be strengthened? The arguments here are manifold, even though they are probably more speculative than the previous ones.

As a starting point, we might take the big quest which has been mentioned before, namely, the quest for a new vision to (re-) animate European Integration. Striving for a Social Union could, indeed, be a way to fill this blank. However, this could be true for many other goals as well – provided they are sufficiently broad, demanding, and maybe also indeterminate. So, is there any quality which distinguishes this specific aspiration from others?

One possible answer might point to the fact that the Welfare State has repeatedly been referred to when looking for a common and genuinely European set of values.<sup>8</sup> It could be a cornerstone, so to speak, for the foundations of a value-based European polity. Admittedly, this suggestion is contestable, especially from a comparative perspective. Entrenched structures of institutionalised solidarity can be found in many places of the world nowadays, and it is more than doubtful as to whether there is any meaningful criterion by which we can distinguish (all) European (let alone, EU) systems from (all those of) the rest of the world. Just take, by way of example, Japan,<sup>9</sup> Canada,<sup>10</sup> or Israel<sup>11</sup> on the one hand, and the UK<sup>12</sup> on the other.

However, even if, strictly speaking, there is no ‘distinctiveness’, it is still possible, when it comes to defining a common ground for further integration, to rely on the Welfare State and the values embodied in it. Especially from a

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<sup>8</sup> For a recent example, see Jacques Derrida & Jürgen Habermas, ‘Unsere Erneuerung – Nach dem Krieg: Die Wiedergeburt Europas’, in: *Frankfurter Allgemeine Zeitung*, 31 May 2003, at 34.

<sup>9</sup> For a condensed description, see *Japan International Cooperation Agency* (ed), *Development of Japan’s Social Security System*, 2004, available at: [www.jica.go.jp/english/resources/publications/study/topical/index.htm](http://www.jica.go.jp/english/resources/publications/study/topical/index.htm).

<sup>10</sup> For a recent account, see Andrew Armitage, *Social Welfare in Canada*, (Oxford: OUP, 2003, 4th edition).

<sup>11</sup> For an overview, see the regularly updated reports by the National Insurance Institute. The most recent one is: Research and Planning Administration (ed), *National Insurance Programmes in Israel*, Jerusalem, 2004, (covering also non-insurance programmes) available at: [www.btl.gov.il/English/pirumim/publications.htm](http://www.btl.gov.il/English/pirumim/publications.htm); for a more extensive and analytical account, see Guy Mundlak, *Social Security in Israel*, annual reports to MPI for Foreign and International Social Law, on file with the institute’s public library.

<sup>12</sup> See Neville Harris (ed), *Social Security Law in Context*, (Oxford: OUP, 2000).



historical perspective, there is a good case to be made in favour of this choice. This is because it could, without doubt, be read as the continuation of a genuinely – and in this case, distinctive – European heritage, a deliberate collective appropriation, thus, of one the better traditions of 'ours'.<sup>13</sup>

Furthermore, one would have to expect there to be a strong prospective component as well. The mere 'conservation' of past accomplishments would certainly not qualify as the 'new vision' that is now sought to revitalise the integration project. But it seems that the aim of creating a 'Social Union' could meet this requirement as well. At least, if it held true that the Welfare State could not be maintained the way it has been at national level, but would require regulation at supranational level – and this is what the term 'Social Union' encapsulates – there would be a huge reformatory challenge involved in this ostensibly 'conservative' project.

And there are further hopes that might be placed in such a project, hopes that extend well beyond the field of social policy and go to the core of the European *malaise*. Maybe, Brussels would gain a good deal of popularity if it were to run a fully-fledged social benefits programme – similar, say, to the former effect of Roosevelt's Social Security Act, which, for decades, earned the federal US government much credit. And if 'popularity' should sound too profane, why not try 'legitimacy' instead?

Moreover, could this not be a way to tackle even the infamous democracy deficit? There have been suggestions to use the high visibility and contestation of redistributive policies as a catalyst for the generation of public interest in politics at EU level – for the creation of a 'European public'.<sup>14</sup> It

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<sup>13</sup> The vocabulary is borrowed from *Habermas*; see, for example, J. Derrida & J. Habermas, note 8; for a more extensive reflection on the notion of identity building by a collective appropriation of shared traditions see J. Habermas, 'Geschichtsbewusstsein und posttraditionale Identität', in: J. Habermas, *Eine Art Schadensabwicklung*, (Frankfurt aM: Suhrkamp, 1987), at 171-175.

<sup>14</sup> For a sceptical assessment of the prospects for the formation of a European public sphere, see D. Grimm, 'Does Europe Need a Constitution?', in: Peter Gowan & Perry Anderson (eds), *The Question of Europe*, (London: Verso, 1997), at 251-55; or a more optimistic view, see P. Häberle, *Gibt es eine europäische Öffentlichkeit?*, (Berlin: De Gruyter, 2000) at 12 *et seq.*, claiming that such a common public already existed in the realm of (not only legal) culture (at 16).

was in this vein that Joseph Weiler once contemplated whether there could be any (true democratic) representation without taxation in the EU.<sup>15</sup>

And there seems to be a point to this. Just imagine that the level of pension benefits or contributions were determined by the EU. Would this not be likely to raise public attention significantly, thus to acquaint people with supranational institutions and procedures better; furthermore, would it not be likely to promote debates and alliances across national borders, and thus help to de-fragmentise the public sphere in Europe? Admittedly, this is only a thought experiment. Pension politics is not a serious candidate for such Europeanisation (yet). But there is no reason why smaller steps could not do as well.

Now, this might indeed all sound very speculative, but could it be otherwise when speaking about 'visions'? And one would not have to buy into every single prong of the argument to accept, at least, the overall plausibility of the claim that the 'Social Union' goal could be one way to fill the vacuum.

Against this background, it becomes more understandable why it might still make sense, even today, to connect the two projects of (continuing) European Integration and of (preserving) 'the Social Union', despite, or, indeed, precisely because of, their respective ills. For there is, at least, some hope that they could contribute to one another's recovery.

## The patients' prospects of mutual cure

The reasoning has still been rather sketchy so far, and certainly far from compelling. But in the light of the above, it seems at least worthwhile to undertake a more thorough assessment of what could be gained from such a joint therapy for both the Welfare State and European Integration. And as the previous section stated the respective cases in favour of such a therapy, the

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<sup>15</sup> The Constitution of Europe (Chapter 10 'To be a European Citizen: Eros and Civilization'), at 354 -355, succinctly summed up in the following phrase: '(...) taxation (...) instills accountability, it provokes citizen interest, it becomes an electoral issue [ ... and establishes] a duty (...) towards the polity!'; for a more extensive elaboration of this point, see A.J. Menéndez, 'Taxing Europe – Two Cases for a European Power to Tax', (2004) 10 *Columbia Journal of European Law*, at 1, 15; for an attempt at making a parallel case in the field of redistributive social policies, see A. Graser, *Dezentrale Wohlfahrtsstaatlichkeit im föderalen Binnenmarkt?* (Berlin: Duncker & Humblot, 2001), final chapter.

next one will take the opposite perspective and start out from the objections to it.

### (Why) should the welfare state go European?

Starting again with the social policy perspective, the assessment is largely determined by the initial diagnosis of what exactly the Welfare State is suffering from. This has already become apparent in the above. If it were mainly endogenous problems – namely, the premise in the first section – then there would be little reason to trust in the Welfare State's salvation at EU level. Things would look different, though, if transnational competition were the core problem – namely, the starting assumption of the second section. And these are just two of the innumerable variations which are conceivable – and actually also observable – when it comes to analysing the current problems of the Welfare State.

It will therefore not be possible to present any comprehensive and well-balanced diagnosis here. Instead, the approach, again, has to be selective. Only a few issues which are specifically relevant for the given context of a Europeanisation of social policy will be touched upon.

#### *To what extent can the problem be explained by regulatory competition?*

First of all, there are the problems of the Welfare State which have not been caused by transnationalisation, and these are certainly not just minor ones. Take, for example, the steep increase of health care costs.<sup>16</sup> To a large extent, this is a consequence of progress made with regard to new or improved forms of treatment,<sup>17</sup> many of which are very expensive. The policy choice here is either to restrict access to such forms of treatment, or to levy more money in order to finance them. Regardless of the level at which social policy takes place, it would, nonetheless, be faced with this trade-off.

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<sup>16</sup> For detailed comparative data, see K.-D. Henke & J. Schreyögg, *Towards sustainable health care systems*, (Berlin: ISSA, 2004), at 27 *et seq.*

<sup>17</sup> There are many factors involved. Therefore, estimates as to how large a share of the increase is attributable to improved treatments appear to be difficult. But even if the treatment factor should turn out to be less weighty than expected, the above argument would remain unaffected because the other causal factor which is presumed to be of major relevance, namely the demographic changes towards a 'greying society', does not seem to be related to regulatory competition either.

Or consider, as another example, the effects of expanded lifespans on pension systems.<sup>18</sup> If people live longer – and life expectancy has been increasing constantly in the industrialised countries for more than a century now<sup>19</sup> – then either the overall output of old age benefits has to be cut or the input raised. Again, this has nothing to do with the political level at which the problem has to be solved.

It is another question, however, as to whether governmental capacities to respond to these challenges are being reduced by competitive pressures from outside. This may well be the case. A polity with completely impermeable borders will find it easier to react to these changes by increasing the burdens on those who finance the respective system, whereas this option might be more limited in an open economy.

Furthermore, the above should not be taken to mean that the Welfare States were not also suffering from problems which are caused exogenously. In particular, regulatory competition cannot only operate as an aggravator, but can also be the source of problems for social policy. Consider, for example, the field of basic income support. Even if there were such a programme, which was not perceived as problematical in itself, it would still be susceptible to pressures from outside as they are predicted by the paradigm of regulatory competition.

However, it is worth noting that, even within this theoretical model, the degree of predicted pressure varies depending on the specific type of social regulation. It depends, first, on the extent to which the individual who bears the burden receives something in return. Compared to purely tax-financed programmes, social insurance should thus be affected less. For even though it involves significant burdens, it offers some benefits in return – namely, services, which otherwise would – at least to some extent – have to be purchased elsewhere.

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<sup>18</sup> For a comparative account, see H.-J. Reinhard (ed), *Demographischer Wandel und Alterssicherung – Rentenpolitik in neun europäischen Ländern und den USA im Vergleich*, (Baden-Baden: Nomos, 2001).

<sup>19</sup> On the empirical data and on the question whether there are any limits to this seemingly linear increase, see J.W. Vaupel & J. Oeppen, 'Broken limits to life expectancy', (2002) 296 *Science*, at 1029 *et seq.*

Secondly, it is not only individual returns which mitigate the pressure, but also collective ones, such as an improvement of the competitive potential of the respective polity. So, even within the field of (broadly-speaking) redistributive policies, the predicted pressure is not always the same. Educational grants, for example, can be considered as a long-term investment in this competitive potential of the community, and even basic poverty alleviation might be read as an (even short-term) investment in a community's political stability.

Thirdly, one should bear in mind that, under this paradigm, the transmitter of competitive pressure is the potential mobility of both things and persons, and capital and goods, in other words, of welfare recipients, tax payers, *etc.* It would not make sense, however, even under a theoretical model, to presume that there were no differences in such mobility. Employees still tend to be even? more immobile than machines, and this implies that different sectors of the economy also differ in their susceptibility to competitive pressures.

So, the analysis offered in the second section needs to be qualified in some important respects. The dissolution of borders accounts only for a part of the Welfare State's problems. And it does not affect all areas of social policy and all sectors of the economy in the same way.

*To what extent could the problem be solved by Europeanisation?*

It is not only the analysis, but also the remedy suggested in the second section that calls for closer scrutiny. The question is whether a Europeanisation of social policy would really suffice to win back the regulatory grip that has been lost at national level. For would not the European level be exposed to similar – global – pressures?

In order to answer this question, one would have to assess how large a share of the competitive pressure felt by national welfare states is to be ascribed to global, as opposed to European market, integration. This is not an easy task because the empirical quantification of such pressure is difficult. And undoubtedly, the results would have to differentiate between different types of social policy and between different sectors of the economy.

So, there is no way to get into the realm of concrete answers here.<sup>20</sup> Suffice it, thus, to underscore that the Europeanisation of social policy might mitigate competitive pressures, but not totally overcome them. And even if such mitigation should today seem sufficiently promising to advocate Europeanisation, one should bear in mind that this might only be a temporary solution. For the EU could soon be faced with a future trend towards further market integration on a larger scale, and resisting it could then prove a very costly choice.

*To what extent is regulatory competition beneficial?*

A third issue is to what extent regulatory competition calls for any such response at all. For – if, once again, we go back to the diagnosis from the first section – such competition need not, in all instances, be harmful. Quite to the contrary, some of the Welfare State's ills might even be cured by being exposed to competitive pressure: excessive growth, sclerotic administrations, strangled economies – does not this all look exactly like the type of inefficiencies against which (opening) the market is said to be the first-choice remedy? So, in the light of this, would it not seem best to leave the Welfare State where it is, and would not Europeanisation be but a short-sighted attempt to spare it the necessary regimen?

Take, for example, the German public health insurance system.<sup>21</sup> As a general rule, insured persons are free to choose where to get their treatment, medication, *etc.* However, they do not themselves negotiate the terms of the provision of these services. Instead, it is the insurers who determine these terms by way of collective agreements with the providers. Accordingly, the freedom to choose a provider of health services is, in principle, limited to the pool of (typically national) providers with whom such collective agreements have been concluded. Of course, provision is made that services can also be obtained abroad, if necessary, in particular, when the need for health services arises in the course of travelling. But this is an exception.

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<sup>20</sup> For a highly differentiated account, see the two-volume study by Scharpf & Schmidt, note. 5.

<sup>21</sup> A general and up-to-date description is available at the web site of the German Federal Ministry of Health at:  
[www.bmgs.bund.de/cln\\_041/nn\\_603402/SharedDocs/Download/DE/Themenschwerpunkte/Soziale-Sicherung/Uebersicht-ueber-das-Sozialrecht/05\\_\\_Krankenversicherung2004-pdf,templateId=raw,property=publicationFile.pdf/05\\_Krankenversicherung2004-pdf.pdf](http://www.bmgs.bund.de/cln_041/nn_603402/SharedDocs/Download/DE/Themenschwerpunkte/Soziale-Sicherung/Uebersicht-ueber-das-Sozialrecht/05__Krankenversicherung2004-pdf,templateId=raw,property=publicationFile.pdf/05_Krankenversicherung2004-pdf.pdf).

There are quite a few cases in which these structures may be viewed as protectionist, inefficient, and unduly restrictive. It is, for example, hard to see why people should not be entitled to insurance coverage when they deliberately choose to go to another country in order to buy their glasses.<sup>22</sup> Arguably, competitive pressures from outside would not call for any Europeanisation. All that is needed are open borders and the patience to wait for competition to take its beneficial effects.

The problem, however, lies in distinguishing such cases from others in which competitive pressure is detrimental. At times, this might just be an exercise of confronting opposing *Weltanschauungen*, such as in the case of, say, determining the levels of basic income support, public pensions, *etc.* Those who consider the current level too high will welcome any downward pressure from outside, whereas those who consider them too low will accordingly think the opposite about the effects of competition.

But, typically, the choices to be taken are, in practice, not that straightforward. What, for example, if we are dealing with a regulation which is restrictive on competition, but which, at the same time, is supported by some reasonable consideration? What if, to follow up on the above health care example, internet pharmacies are not admitted to the pool of providers so that there is no refund for medication purchased from them.<sup>23</sup> This has an impact mainly on foreign providers, and it may be viewed as inefficient in that internet pharmacies are likely to be cheaper. On the other hand, they will not be able to offer any individualised advice. Although not everybody will need such advice, the mere presence of the 'virtual' competitor on the market might also force 'real life' pharmacies to reduce such service across the board and thus undermine the regulatory goal of providing counselling services within the system.

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<sup>22</sup> On this issue, see the decisions of the ECJ in *Decker* C-120/95 and on a similar issue relating to dental care in *Kohll* C-158/96.

<sup>23</sup> For an extensive analysis of the problem from a comparative perspective, see C. Malz, *Die Internet-Apotheke in Europa*, (Frankfurt aM: Lang, 2003). This issue had been debated quite intensely even in the general media in Germany in 2002; see press release No. 365 of 2002 of the Bavarian minister of social affairs, who had initially restricted such internet trading by the Netherlands-based firm DocMorris, available at: [www.stmas.bayern.de/cgi-bin/pm.pl?PM=0205-365.htm](http://www.stmas.bayern.de/cgi-bin/pm.pl?PM=0205-365.htm)). In the meantime, the ECJ has decided that internet trading may not be restricted as far as it related to medication, the purchase of which does not require a prescription under national law; see C-322/01.

So, in this example, the decision as to whether or not the effects of competition from outside are desirable requires a balancing of countervailing goals, *viz.* on the one hand, the efficiency-enhancing effects of increased competition, and, on the other, the detrimental consequences for the said aspect of quality maintenance within the health care system. No different from a wealth of similar cases from many fields of European integration, such balancing involves not only basic value judgements on the merits of the regulation at hand, but also a good deal of factual assessments, many of which will, moreover, be quite uncertain.

And such multi-valence is by no means exceptional in social policy issues. One is faced with a very similar setting, for example, when dealing with waiting lists for certain types of medical treatment.<sup>24</sup> This is, without question, not a very popular device, and some would certainly be glad to see it eroded by market forces. But it is, arguably, one legitimate way of dealing with the inescapable problems of scarcity. Under conditions of open borders, however, national health care systems might *de facto* be foreclosed from using it, as they cannot refuse to assist patients who choose to go abroad for such treatment.

Or, to mention yet another current example, take the case of the German system of insurance against workplace accidents.<sup>25</sup> This is a mandatory social insurance scheme which is run by the social partners in sector-specific corporations. Again, it might increase efficiency to open the system to market forces by means of allowing private insurance companies from abroad to offer similar services. On the other hand, under the traditional social insurance system, the corporations do not only administer insurance services, but are entrusted with other tasks as well. In particular, they have the authority to issue and control regulations in the field of workplace safety. So, again, if one has to appraise the effects of competitive pressure on this specific social insurance scheme, there is no simple answer. Would it mean finally cutting

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<sup>24</sup> For a short statement of a pending case (C-372/04) on this issue, see C. Newdick, 'Rights to Treatment in the EU?', available at [www.ethics-network.org.uk/comment/newdick.htm](http://www.ethics-network.org.uk/comment/newdick.htm).

<sup>25</sup> A general and up-to-date description is available at the web site of the German Federal Ministry of Health at: [www.bmgs.bund.de/chn\\_041/nn\\_603402/SharedDocs/Download/DE/Themenschwerpunkte/Soziale-Sicherung/Uebersicht-ueber-das-Sozialrecht/07-Unfallversicherung2004-pdf,templateId=raw,property=publicationFile.pdf/07-Unfallversicherung2004-pdf.pdf](http://www.bmgs.bund.de/chn_041/nn_603402/SharedDocs/Download/DE/Themenschwerpunkte/Soziale-Sicherung/Uebersicht-ueber-das-Sozialrecht/07-Unfallversicherung2004-pdf,templateId=raw,property=publicationFile.pdf/07-Unfallversicherung2004-pdf.pdf).



back on the sprawling corporatist structures which the national system itself has lacked sufficient resources to fight? Or would it mean running down a highly functional, well-balanced institutionalisation of legitimate social policy goals?<sup>26</sup>

*To what extent is regulatory competition a real phenomenon?*

The above examples may be taken to illustrate yet another point. In each of them, transnational competition has not been a long-established reality, but is instead a recent or current development, or even just a future option. This shows that welfare states are, in fact, still surrounded by borders, even in Europe, after decades of market integration. Undoubtedly, these borders have become increasingly permeable, but important parts of them are still in place to shield national social policy.

This is by no means surprising, given the historical background of significantly greater national enclosure. From a legal perspective, this observation might seem so evident as to be trivial. But it is often overlooked in today's political debates.<sup>27</sup> The discussions on the recent EU enlargement were a case in point. Many of the concerns about an immediate erosion of the welfare systems of the old Member States were based on the false assumption that none of their benefits could be restricted to national citizens. Apparently, the paradigm of regulatory competition is so pervasive as to obscure that we do not (yet?) live in a world of completely open markets.

And it is not only with regard to legal rules that it is worth questioning how much reality there is behind this paradigm. Also, with regard to the presumed market mechanisms which underlie the model, it could well be that its theoretical plausibility sometimes replaces empirical evidence. Clearly, this is only a suspicion, and there is no way to prove it here because such proof would require the very kind of empirical evidence on the actual effects of the

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<sup>26</sup> For an early analysis of the conflict between European law and this branch of the German social security system, see R. Giesen, *Sozialversicherungsmonopol und EG-Vertrag*, (Baden-Baden: Nomos, 1995), at 203 *et seq.*; for a more recent account, see, again, Giesen, 'Wettbewerb und Berufsgenossenschaften', in: Stiftung Marktwirtschaft, (ed), *Berufsgenossenschaften und Wettbewerb*, (Berlin: Stiftung Marktwirtschaft, 2003).

<sup>27</sup> For a recent analysis of the regulations and the case law in point as well as of some of the misperceptions in this field, see Becker, note 5, sub. IV.

alleged competitive pressure which the model's proponents have largely failed to adduce so far. But the suspicion can, at least, be substantiated.

There is an example from the field of US welfare law, which has been studied quite thoroughly<sup>28</sup> and seems to offer exceptionally meaningful data on this point. It is about a tax-financed cash benefits for 'incomplete' needy families with minor children. This benefit had existed for many decades up until the mid-nineties.<sup>29</sup> It was based on federal regulation and co-financed by the state and federal governments. However, the states were free to determine the level of the benefit. And, in fact, there was considerable variation in this respect across the states. From the recipients' perspective, this meant that, by moving to a more generous state, they could raise their level of income support. And the states, accordingly, feared that if they were to set the benefit level too high, they would become a magnet for all recipients in the US.

Clearly, these are ideal conditions to put the paradigm of regulatory competition to an empirical test. And the results seem to be quite in line with the theoretical predictions, at least at first glance. There was no indication that, at any point in time, the states had engaged in a ruinous race to the bottom. Instead, there seems to have been something like a 'stately walk'<sup>30</sup> downwards, a slow, yet steady, trend towards lower benefits which could be observed over a period of more than two decades.<sup>31</sup> Not surprisingly, this trend began right after the Supreme Court issued a pertinent decision which declared the equal treatment of migrant US citizens a constitutional right.<sup>32</sup> Opponents of this decision had argued that it would expose states to competitive downward pressure and thus reduce benefit levels. Apparently, their prediction was correct.

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<sup>28</sup> See, in particular, the studies by P. Peterson, *The Price of Federalism*, (Washington DC: Brookings Institution, 1995); again in: 'Devolution's Price', (1996) 14 *Yale Journal on Regulation*, at 111 *et seq.*, and jointly with M. Rom, *Welfare Magnets*, (Washington DC: Brookings Institution, 1990). For a more thorough discussion of the empirical evidence and the legal setting, see Graser, *Dezentrale Wohlfahrtsstaatlichkeit*, (note 15. Part II).

<sup>29</sup> Until then, it was called 'Aid for Families with Dependent Children' (AFDC). The successor's name is 'Temporary Aid for Needy Families' (TANF).

<sup>30</sup> See P. Peterson, 'Devolution's Price', note 28, at 120.

<sup>31</sup> See P. Peterson & M. Rom, *Welfare Magnets*, note 28, at 8-9.

<sup>32</sup> *Shapiro v. Thompson*, 394 U.S. 618 (1969).

Furthermore, it could be shown that a change of the benefit level in one state would typically induce neighboring states also to change their benefit levels. The average impulse was found to amount to some 30% of the initial change.<sup>33</sup> Again, this matches quite well with the theoretical predictions, and with the above results as well. Apparently, regulatory competition does not sweep everything away at once. But there are considerable effects, especially in the long term.

A puzzling question, however, is how the pressure was conveyed. At first glance, one might expect the mechanism to be the type of benefit-related migration which underlies the cited fear that the states had of becoming a 'welfare magnet'. On a closer look, however, there is little to support this interpretation. Quite to the contrary, the evidence seems to point in the opposite direction, *i.e.*, that there were only negligible numbers of such migrants. Admittedly, it might be hard to establish the motivation of any single migrant. But even if one looks at all potential recipients who moved to a state with higher benefit levels, the numbers are still very small. For example, there are relatively recent data for California,<sup>34</sup> which was among the states with the most generous benefit levels. The immigration of welfare recipients was so little that it would have sufficed to cut the benefit level by less than one per cent per year in order to leave overall spending unchanged. And note that these numbers might include many who were attracted not by welfare benefits, but by other factors such as, in particular, employment opportunities. This seems to suggest that regulatory competition did work here, but it did so regardless of real migration.<sup>35</sup> Apparently, it is sufficient for such migration to be feared – or used as an argument – in the political debate.

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<sup>33</sup> See P. Peterson, 'Devolution's Price', note 28, at 117.

<sup>34</sup> The data were used in the 1999 U.S. Supreme Court decision in *Saenz v. Roe and Doe*, 119 S.Ct. 1518.

<sup>35</sup> Clearly, this statement refers to the specific setting in the US described above and cannot be translated into a statement about the likelihood of welfare-induced migration in the EU. H.-W. Sinn *et al.*, for example, seem to have empirical evidence which led them to expect much more migratory effects with regard to the recent enlargement of the EU (see *EU-Erweiterung und Arbeitskräftemigration*, (Munich: ifo Institut für Wirtschaftsforschung, 2001), in particular, at 5-23). If the above reading of the US experience should be of any relevance in this context, it would be that it might suggest that the empirical grounds of such estimates be thoroughly (re-) assessed.

Without doubt, this does not falsify the paradigm of regulatory competition, and even supports it. It only suggests that, first, the mechanisms which the model is generally claimed to rest upon might not be as effective as is commonly believed, and that, second, these beliefs might operate in such a way as to replace the mechanisms themselves. In other words: it is a 'real' phenomenon, and, to the extent that this phenomenon is perceived as a problem, taking it less seriously might be part of its solution.

#### *Interim summary*

This first part of the third section was meant to scrutinise the argument presented in the second section in favour of a Europeanisation of the Welfare State as a reaction to the pressures of regulatory competition. It has been shown that the argument has to be qualified in some important respects. The effects of regulatory competition are not always detrimental, but can also be beneficial to the Welfare State. Also, there is reason to believe that either type of these effects tends to be overestimated. Furthermore, Europeanisation could not put an end to, but only reduce, regulatory competition. And finally, some of the most important problems of the Welfare State do not arise from, but may only be aggravated by, regulatory competition.

All these objections, however, do not require a complete rejection of the initial argument. Regulatory competition does, indeed, seem to account for a good deal of the problems of the Welfare State. And Europeanisation is at least one plausible response to this – at least, from a social policy perspective. From an integration perspective, the plausibility has yet to be discussed.

#### (Why) should European integration become social?

In the second part of the second section, the argument in favour of creating a Social Union was made from the perspective of European Integration. The speculative nature of this reasoning has already been acknowledged. But there are more objections to this vision. For alluring though the prospect of reanimating European Integration might be, it is doubtful whether the suggestion to forge a 'Social Union' would be compatible with some of the other aspirations which have been connected with the integration project so far. Such objections can be directed at three tendencies, in particular, which the creation of a Social Union might imply.

*Centralisation*

First of all, a more social Europe seems almost tantamount to a more centralised one. At least, in the above context in which 'Europeanisation' was suggested as a response to regulatory competition, it seems to be virtually synonymous with 'centralisation' within the EU. Such centralisation, however, is likely to raise concerns about the preservation of heterogeneity among the Member States. And it has long been one of the core values of European Integration to respect the uniqueness of the cultures of the Member States and to foster such diversity.

One conceivable reply to this concern might ask whether, in the field of social regulation, we are really dealing with a type of diversity which is worth preserving. For undoubtedly not every minuscule regulation can qualify as a dignified expression of a community's cultural uniqueness. The amount of co-payment required under public health insurance for a certain medication appears to be such an example, and so does the treatment of old age pensions under tax law, and even the benefit levels within, say, the unemployment insurance scheme. It is well conceivable that such regulations become subject to significant changes in day-to-day politics within the respective Member States, and this might indicate that they do not really call for that much respect.

However, there are at least two objections to this reply. One is that these examples clearly prove little as long as counter-examples can be found, and the case of the German insurance system for the coverage of workplace accidents may be such an example. The transfer of regulatory authority, the established practice of the co-operation of the social partners in this field are features which might support a reading which would consider such institutional arrangements to be within the reach of the diversity ideal. Moreover, by referring to an arrangement rather than to a single norm, the example illustrates that even the type of ostensibly minuscule regulation cited above may be found to form a part of some larger arrangement which may well be an expression of the respective 'culture', as it were. So, again, the line might be difficult to draw.

The second objection, however, would imply that such line-drawing might not even be important. For it is not only the concern about diversity which militates against centralisation, it is also a problem of political autonomy. The argument behind this is well-known from the subsidiarity discourse. Even if

we leave aside the intricate questions of collective identity and social legitimacy,<sup>36</sup> there remains an issue of sheer size. The larger a community, the lower the potential impact of local (and individual) preference. And from this perspective, centralisation may be problematical even for a rather mundane issue like the actual benefit level in any social insurance scheme.

There is no way around this: to the extent that the pursuit of a Social Union entails centralisation, it would require a compromise on one or both of the other two goals. This may be a high price to pay. However, it does not mean that centralisation might not still be the right thing to do.

Those, for example, who believe that the major threat to the Welfare State is regulatory competition could argue that there is not much left to lose, anyway. For, according to this paradigm, one would have to expect that, once markets have been opened, they will start levelling off regional differences and narrowing down the scope for decentralised autonomy. So, we would have to ask our- (national) selves why 'we' should insist on remaining free to have it 'our' way, if 'we' cannot afford to make use of this freedom anymore. And even those who are more reluctant to go along with this paradigm might find that there are ways of partial centralisation which could strike a reasonable balance between the problems associated with such centralisation and the gains to be expected from it.<sup>37</sup>

### *Fortification*

It has been said before that Welfare States need to have borders, as shields against pressures from outside and as ties to enhance cohesion within the community – although the latter statement has, admittedly, not been developed here as thoroughly as perhaps required. But if we assume that the overall point is accepted, then there is no reason why this should apply only to national Welfare States, and not to a supranational version. So, it seems that the EU would need such borders, as well, if it were to become a Social Union.

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<sup>36</sup> For a succinct statement of the issues involved with regard specifically to European integration, see Weiler, 'The State 'über alles' – Demos, Telos and the German Maastricht-Decision', Harvard Jean Monnet Working Paper No. 6/95, available at: [www.jeanmonnetprogram.org/papers/95/9506ind.html](http://www.jeanmonnetprogram.org/papers/95/9506ind.html), sub II. and III.

<sup>37</sup> On such devices of partial centralisation, see, below, the fourth section including note 52.

One might reply that there is nothing wrong with this. In fact, the EU has borders already, very visible ones relating to immigration or international trade, and others which may be less visible, relating to third-country nationals within the EU.<sup>38</sup> Arguably, this is merely an inescapable necessity for every polity. Moreover, we are dealing not with additional borders here, but just substitutes for the former national ones. So why should it be a problem if, along the same lines, in exchange for tearing down the borders protecting the national welfare states, the EU established and reinforced such borders for the supranational community?

The objection to such a 'fortification' of the European Union is based on a specific reading of European Integration. For some, this project has been about the absolute opposite. They conceive of (capital letter) Supranationalism<sup>39</sup> as the civilising response to nationalism, a permanent check, that is, on tendencies of national enclosure, a recurrent institutionalised exercise in tolerance across borders. Probably, even on taking such a view, the EU could not do completely without external borders.<sup>40</sup> But they would have to be kept low, with the internal ones in place, in order to avoid the re-emergence of a monolithic, fenced-in community on an even larger scale. The creation of a supranational clone of the national Welfare State would certainly not be compatible with this reading.

### *Encapsulation*

In a related interpretation, European Integration can be viewed as a means of preventing international conflict. This view is very common, maybe even more so among observers from outside of the EU. And indeed, the initial bonding of former enemies in the post-war decades, the recent enlargement across Cold War frontiers, the projected reach into the 'Muslim' world – all these steps can very well be explained as attempts to stabilise the respective

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<sup>38</sup> For a comprehensive juxtaposition of the rights of third-country nationals and of EU citizens, see B. Laubach, *Bürgerrechte für Ausländer und Ausländerinnen in der Europäischen Union*, (Baden-Baden: Nomos, 1999).

<sup>39</sup> See Weiler, *The Constitution of Europe*, note 2, in particular, at 250-252.

<sup>40</sup> It is on this ground that N. Barber has launched a vigorous critique against Weiler's reading of supranationalism and his corresponding construction of European citizenship, see Barber, 'Citizenship, nationalism and the European Union', (2002) 27 *European Law Review*, at 241, 253 *et seq.*

regions by binding the involved national actors, first economically and then, to an increasing extent, also politically.

However, with increasing integration, the capacity to apply this strategy is likely to decrease. The current enlargement process has illustrated how demanding it has already become to join the EU. For even now, taking over the *acquis communautaire* requires a reception of 'foreign' law on a scale and at a pace that is unprecedented to date.

But there is not just this technical problem. Integration is not just about the accumulation of legal norms, but also about the formation of a community. Accordingly, a gradual enhancement of social cohesion within the EU can pose similar obstacles to any future widening of its borders. And the vision to create a Social Union is particularly liable to this objection as, arguably, it would require a heightened degree of such cohesion.<sup>41</sup> So there is concern that pursuing this vision would foreclose the option to use European Integration for securing regional stability.

#### Another summary, still preliminary

What does this mean for the initial question: is the 'Social Union' a project worth pursuing? Or in other words: would our patients benefit from a joint therapy?

We have seen that we should not expect them to be cured from all the ills they are currently suffering from, and we have been cautioned not to take the joint therapy too far. To create a fully-fledged supranational Welfare State is but a theoretical option anyway, but it has, moreover, turned out neither to be necessary from a social policy perspective nor to be desirable from an integrationist point of view. So, if anything, it would have to be a some more moderate form of joint therapy.

With regard to this more practicable option, we have seen that the case in favour of it might not be compelling. For there are a lot of value choices and factual uncertainties involved. But it can be maintained in principle, and to the extent that it is accepted, it opens up the discussion on the next – and

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<sup>41</sup> On the necessity of such preconditions, see, for example, C. Offe, *op. cit.* note 7.



arguably much more complex – questions of what kind of 'Social Union' should be envisaged and how it could be reached.

The discussion of the first question, however, does little to answer the next ones. The case for a Social Union does not determine what exactly it should look like. So, if we are thinking about a therapy, we have to do so without having a specific image of the recovered patients in mind. However, there is some guidance at least. The above discussion might have helped identify the problems which need to be solved, as well as the trade-offs involved in doing so. So, the overall direction is discernible. And so is the starting point. For underdeveloped though the social dimension of the EU might still be, the Social Union need not be invented from scratch.

## **Trajectories of recovery**

The current state of social policy in Europe has so far been presented in a gloomy narrative of erosion and decay. And whatever therapy there could be, it would still have to be started. However, this picture is over-simplified. For the threat which market integration might pose to social policy had been identified right at the outset of the integration project, and there have been continuous efforts to deal with it ever since. So, we can, at least, build upon existing structures, extrapolate from past achievements in substantive and procedural law, and thus, maybe, imagine trajectories of recovery.

If we proceed from the assumption that the European level is not going to replace the national one in the field of social policy, and that, accordingly, the concept of a 'Social Union' implies an interaction of these (and maybe other) levels, then there seem to be at least three ways in which the European level can be involved in such interaction. These are:

- that it supplements national social policies
- that it protects them, and
- that it corrects them.

These ways are often inter-related and thus are not mutually exclusive. Each of them is traceable in current law and capable of being extended. This will be illustrated in the following, although it will not be possible to present a comprehensive analysis of the current law according to this categorisation here.

## Supplementation

Hypertrophic though the national Welfare States in Europe are often portrayed to be, there are social problems to which they do not respond in a sufficient manner or just not quickly enough. Typically, these will be problems which have arisen only recently or – to the extent that this is distinguishable – have only recently been perceived as problems. And it is in these areas that the European level can take the lead and supplement the traditional structures of the national Welfare States.

There are some examples of such supplementation in current law, the primary ones being employee and consumer protection as well as anti-discrimination and equal opportunity regulation. The latter field, in particular, might well become paradigmatic for the successful supplementation of national social policy. This is because European regulation in this area (starting from the initial rules on gender discrimination<sup>42</sup> in employment up until the recent vast anti-discrimination directives<sup>43</sup>) seems to go to the core of even traditional Welfare State activity in that it is aimed at the promotion of substantive equality and targeted specifically at disadvantaged groups.

The regulatory techniques, however, are different. They are not the public provision of (predominantly) financial support and thus redistribution, but the abolition of discriminatory practices and structures, and are thus the advancement of factual inclusion and equal opportunity. And this difference illustrates both the potential and the limits of this approach. On the one hand, such regulation is particularly apt for European regulation as it is not – at least not in an immediate sense – redistributive, and thus, arguably, does not require the same degree of legitimacy capacity as, for example, traditional welfare regulation would.<sup>44</sup> Nor does it call for any relevant degree of administrative capacity at European level.

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<sup>42</sup> The remainders of this are still visible in today's Art. 141 TEC.

<sup>43</sup> See, in particular, Directives 2000/43 and 2000/78; for a very useful compilation of all regulatory activity in this field on European level up to today, see the material provided by F. Stork at [www.anti-diskriminierung.info](http://www.anti-diskriminierung.info).

<sup>44</sup> Lower demands in terms of legitimacy entail, however, that such measures at the time same bear a lower potential for the enhancement of public interest in EU politics; on this 'integrationist strategy', see, above, notes 14 & 15 and related text.

On the other hand, it is limited both in its application as well as in its reach. There is some scope, undoubtedly, for an extension of the current regulatory activities. For example, a significant part of the present anti-discrimination rules is still restricted to the field of employment-related discrimination, and a widening in this respect seems foreseeable.<sup>45</sup> But this would still remain confined to the specific area of anti-discrimination policies, and any further extension of the 'supplementation-approach' clearly depends not only on whether there is a legal competence and sufficient support in the decision taking bodies, but also on whether there is a suitable social problem which lends itself to a solution by the regulatory techniques available at European level.

This points to the other significant restriction of such supplementation. It is far from being capable of functionally replacing the traditional activities of the national Welfare States. It might be true that, in some instances, the provision of social insurance and tax-financed support could be replaced by regulation similar to the one described above. In fact, this interchangeability of regulatory approaches has been 'discovered' at national level as well.<sup>46</sup> But it is, no doubt, limited. There is no functional equivalent to the broad-based redistributive policies which remain a defining feature of today's Welfare States. Consequently, a purely regulatory approach can only be a supplement of national social policies.

## Protection

It has been seen that supplementation has not been extended to the area of redistributive policies to date. And it is here that the second mode of interaction, *i.e.*, the protection of national social policies, has its major field of application, although it might also be employed to protect other types of national regulation which are subject to competitive pressures, such as unfair dismissal or other kinds of employee protection. In all these contexts,

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<sup>45</sup> For such an extension see the recent decision on age discrimination under Directive 2000/78, C-144/04 in which the ECJ – quite boldly – declared the prohibition of discrimination related to age a general principle of community law (para 75).

<sup>46</sup> This 'discovery' is the basis to Zacher's distinction between 'internalizing' and 'externalizing' techniques of social regulation, see Zacher, 'Was ist Sozialrecht?' in: Zacher, note 1, at 261–262. Examples from existing regulation might be the continuation of wages in the cases of sickness or maternity, or the duty to employ persons with disabilities.

'protection' translates into the alleviation of competitive pressure, and there are various ways of doing this.

The 'open method of co-ordination' (OMC) may be considered the most recent, and, arguably, also the least demanding, strategy to this end. Given its relative<sup>47</sup> novelty,<sup>48</sup> current assessments as to its effects are necessarily speculative. Still, it has triggered high expectations with some<sup>49</sup> – and quite surprisingly so. For, as of now, there seems to be little ground to consider this 'new mode of governance' as a device 'tailored to overcome Europe's social deficit',<sup>50</sup> unless, of course, this is taken just as a symptom of extreme modesty with regard to the aspirations of a 'Social Union'.

This does not mean, however, that the OMC could not prove instrumental at all. This is because there seems to be a chance, at least, that by fostering mutual information, informal agreements, and also a more formal, albeit not legally-binding recognition of minimum standards, the OMC will contribute to the prevention of a competition-induced downward tendency of social standards – be it a literal race or just a creeping erosion. And possibly, it might also generate consensus between the relevant actors across the Member States and thus, in the long run, pave the way for future regulation at central level with regard to minimum standards, in particular.<sup>51</sup>

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<sup>47</sup> For a study of the initial stages of the omc in the context of its procedural precursors, see M. Göbel, *Von der Konvergenzstrategie zur offenen Methode der Koordinierung: EG-Verfahren zur Annäherung der Ziele und Politiken im Bereich der sozialen Sicherung*, (Baden-Baden: Nomos, 2002).

<sup>48</sup> It has been only recently that a first wave of reports on the experiences in the various fields of application has been published; see, for example, B. Cantillon (ed), *The open method of co-ordination and minimum income protection in Europe*, (Leuven: Acco, 2004); F. Ruland (ed), *Open method of coordination in the field of pensions – Quo Vadis?*, (Frankfurt aM: DRV-Schriften, 2003); Y. Jorens (ed), *Open method of co-ordination*, (Baden-Baden: Nomos, 2003) (related to health care); W. Eichhorst & T. Rein, *Die Europäische Beschäftigungsstrategie – Beispiel der Methode der offenen Koordinierung*, in: Deutscher Sozialrechtsverband (ed), *Offene Methode der Koordinierung im Sozialrecht*, (Wiesbaden: Chmielorz, 2005).

<sup>49</sup> Christian Joerges, reports that it had 'become something like a *Leitbild* on the political Left'; see Joerges, note 4, at 479.

<sup>50</sup> See the position referred to – and called into question – by Ch. Joerges, *ibid.*

<sup>51</sup> This is, admittedly, still an optimistic reading of the OMC. The assessment by Joerges, for example, is significantly more critical, see *ibid.*, at 478-485. Such divergence, however, might be attributable mainly to a difference of perspectives. For what is criticised about the OMC is generally not that it might facilitate exchanges and possibly also agreements on minimum standards, but, instead, that the objections are directed at the possibility that this

This prospect is closely related to the next and clearly more demanding way of protecting Member State policies. At the most general level, it might be called 'techniques of partial centralisation', and there is a wide spectrum of measures which come under this heading.<sup>52</sup> Apart from the regulation of substantive minimum standards, it comprises 'softer' measures such as the provision of financial incentives for the Member States to meet certain standards, or 'harder' ones such as a co-funding of certain national benefit programmes at EU level.

There is, however, no significant example for this kind of regulation in the law of the European Union – and understandably so, one might say. For would this not entail a significant new encroachment upon national sovereignty? Maybe – and maybe not – depending upon the degree to which such sovereignty is *de facto* constrained by competitive pressures, anyway. And, after all, there are techniques of partial centralisation that are quite sensitive to the concerns about Member State autonomy. The central financing of a benefit floor in the field of minimum protection, for example, would not seem too bold an assault on the freedom of Member States to design their own social policies, a least no more than the introduction of, say, a prohibition on age discrimination to a legal system which had not incorporated any such principle before. And, in fact, such European co-funding could be kept at a level just below the level in force in the most restrictive Member State so that virtually no changes would be required. It thus seems that the major 'threat' involved in such a proposal would be the leverage of the required means on central level. But, as we have seen before, this might also be considered to be a chance for the enhancement of public interest in European politics.

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forum be used (1) for a substantive redefinition of social policy goals outside the legitimacy structures of formal law-making, and (2) that it be also used for their implementation, which, albeit 'soft', might be all the more problematical as it is beyond the reach of the protective structures available against the traditional forms of law-bound governance.

<sup>52</sup> For a comparative study of the various devices of such partial centralisation as employed under the co-operative structures of US federalism, see Graser, *Dezentrale Wohlfahrtsstaatlichkeit*, note 15; for a shorter overview in English, see 'Confidence and the Question of Political Levels – Towards a Multilevel System of Social Security in Europe?' in: Danny Pieters (ed), *Confidence and Changes: Managing Social Protection in the New Millennium*, (The Hague: Kluwer, 2001), at 215 *et seq.*

A third technique of alleviating competitive pressures and thus of protecting national social policies is to maintain what is still left of the national borders, or maybe even to reinforce what remains of them. This is not as 'utopian' an option as the previous one. This is because there are plenty of such rules present in current law. Some of them have already been mentioned.<sup>53</sup> Further examples include the restrictions on the free movement of persons, both those which apply specifically to the new Member States as well as the few general ones which are still in place.<sup>54</sup>

However, the viability of this third strategy may be doubtful. At least as far as a reinforcement of national borders is concerned, it seems that such an endeavour would, in most cases, be likely to encounter significant resistance. But viable or not – it should, in any event, be noted that, from an integrationist perspective (the endorsement of which has been one of our premises here), this option seems to be the most problematical and should thus only be considered if there is no way of combining the pursuit of both social policy and integration.

### Correction

The third mode of interaction is for the European level to correct national social policy. More specifically, here, we are dealing with the market-oriented, liberalising effects which European law can have on national systems, thus welcoming the resulting competitive pressures as a necessary corrective device against the Welfare State's endogenous *malaises*. Admittedly, this kind of interaction hardly corresponds to the therapeutic concepts as they were spelled out before. This is because it is about the curtailment of existing structures of national social policy by the European level. But, on the other hand, there are cases where such curtailment seems to be beneficial to the national structures, as, for example, appears to be true for the case of the cross-border acquisition of glasses cited before.<sup>55</sup> And there is no reason why this efficiency-enhancing potential of the common market structures should not be a component of a European social policy – provided, of course, that sufficient sensitivity to legitimate Member State concerns be maintained.

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<sup>53</sup> See, above, the third section.

<sup>54</sup> For an overview, see Becker note 27.

<sup>55</sup> See note 22 and related text.

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Admittedly, these are only some possible components of an extended social policy at European level. The collection, moreover, is not particularly inventive, as it mainly draws upon what has already been developing. Nor does it come anywhere near a comprehensive and specific plan upon which to assemble, step by step, the envisaged polity, the 'Social Union', as it were. But, on the other hand, even if one day someone were to develop such a master plan – who should be the agent of the purposive social transformation required to implement it? If, indeed, Europe was to approach a 'Social Union' further, such a transformation would come about incrementally, promoted by multiple actors, in various forums, with different interests. And this would suggest that we should direct primary attention to the study of these actors, of their respective functional limitations and capacities, and of the structures required for connecting and reflecting their respective actions.