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THE IMPACT OF THE EEC ON LABOR LAW

DR. BERND BARON VON MAYDELL*

I. PRELIMINARY REMARKS

For several years now, there have been discussions in Europe on the question of developing the EEC further into a social union. There is talk of European labor law and European social law, though it frequently fails to become clear specifically what the terms are supposed to mean. In any event, the discussion shows that the EC is no longer understood as a purely economic and customs union, but that it is considered possible for the EC to exert an influence on the labor system, which has so far been regarded as a strictly national matter.

In the last few years, this complex has acquired a special dimension because of the process of transition in the formerly socialist states of Eastern Europe. Those states would like to accede to the EC as quickly as possible. In this respect, it is taken for granted that the EC is not just an economic community, but—at least in part—also a social community. In the efforts of the formerly socialist states to bring about a transition of their legal, social and economic systems in such a way that integration into the EC is facilitated, the social order and in particular labor law therefore plays an important role. A question which is frequently asked in those states is: how can we align our labor policy in accordance with EC policy? It is more or less presupposed in this context that such an EC labor policy does already exist.

Whether and to what extent that is in fact the case is, however, by no means undisputed—even in Western Europe. In the following article, this question as to the influence of EC law on national labor policy1 will be studied in more detail. Only after that will it be possible to state whether we can already speak of European labor law.

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II. FROM THE ECONOMIC UNION TO A POSSIBLE SOCIAL UNION

A. The economic and customs union as the point of departure

There is no doubt whatsoever that the EC was founded as an economic union. The political fields which have been transferred to the competence of the EC institutions, such as agriculture, transport, trade, tariffs, etc., form part of the economy in the broader sense; similarly, the latest development, the Single European Market which is to be implemented by the end of 1992, is concerned with the Community's economy.

What was to be strengthened during the summit conference of the heads of State and other heads of government of the EC Member States in Maastricht on 9 and 10 December, 1991, was the EC's socio-political dimension. Due to the resistance of Great Britain, only an "Agreement by the Member States with the exception of the United Kingdom" was reached, by means of which the eleven Member States agreed on a quicker integration with respect to the Social Union.2 The Maastricht Treaty, which comprises the above mentioned agreements, has not yet come into operation. Whether and when the treaty will become operative is still unclear since a disapproving vote was obtained as a result of the referendum recently held in Denmark. In the following I will therefore start out from the present legal conditions.

B. Reasons for strengthening the social dimension

If, in view of this unambiguous point of departure, we ask the reason why we are being confronted with ever louder and more urgent demands that greater emphasis should be placed on the social dimension and that it should be extended, there are a series of reasons we could mention.3

1. Economic reasons

(a) In accordance with the original function of the EEC as a purely economic community, the social questions were at first considered mainly from the point of view of economic policy. The different expenditures on social welfare, in the form of social security contributions, for example, and even regulations concerning safety at work were regarded as competitive factors which could distort competition in the Commu-

2. For the difficult issues of law emerging from the construction of an agreement concluded by eleven Member States, see Gunnar Schuster, Rechtsfragen der Maastrichter Vereinbarung zur Sozialpolitik, 1992 Europäische Zeitschrift für Wirtschaftsrecht [EJZW] 178.

nity. This led to demands for an approximation of social and working conditions. An objection raised against this demand was, however, that social welfare costs only constitute one production factor among many. If that factor is changed and the others are left unaltered, this constitutes an intervention in the existing delicate balance, which will thus change the competitive situation. It was said that after the expansion of the EC to include Greece, Spain and Portugal, the effects of this intervention would be felt most strongly by those countries in the Community which, like Portugal or Greece, exhibited a low level of industrialization. Such countries would be interested in attracting foreign capital, offering their low labor costs as an incentive for investments. For this reason, these economic arguments are hardly used any longer today to justify the demand for an approximation of social welfare costs.

(b) Conversely, the EC itself has in fact recognized the importance of social policy as a means of cushioning the social effects of economic measures and structural adjustment, by granting structural allowances. The close connection between social policy and economic policy becomes apparent here. If responsibility for economic policy is transferred partially or completely to the Community, this will inevitably also have consequences on social policy sooner or later.

2. Prevention of social dumping

Labor unions in particular are worried that, despite social compensatory measures, the Single European Market might lead to a deterioration in working conditions in the Community if industry in the northern Member States of the EC shifts production to those states which have the lowest social standards and therefore the lowest labor costs, while at the same time claiming the benefits of the Single Market. Differences in social standards are historical in origin. As long as social policy is decided on the strictly national level, a conflict will thus arise between the interconnected fields of national social policy and supranational economic policy.

This fear of social dumping is to be countered by ensuring that a minimum social standard is guaranteed in the Community. Various activities on the part of the EC serve that purpose. I shall be dealing with the subject in more detail later. In any event, the fear of social dumping is a major reason why the EC has been called upon to undertake activities in the field of social policy. This is an important element of the social

dimension of the EC, which has become a frequently heard buzzword in the meantime.

3. Implementation of free movement

The treaty establishing the European Communities does not only contain economic principles; it also lays down the principle of freedom of movement. Freedom of movement for citizens of the EC, especially for workers, is, however, to a not inconsiderable extent restricted by the differences which still exist between national social systems. As the Community feeling in the EC grows stronger, the citizens will become all the more aware of the restrictions on mobility resulting from the different social and labor policies, especially after state customs barriers and border posts have disappeared.

4. Creation of uniform living conditions

The emphasis in the EEC Treaty is on economics. Even so, there are also unambiguous statements that the Economic Community is not an end in itself, but that it is rather intended to serve the citizens. Accordingly, Article 2 of the EEC Treaty refers to an accelerated raising of the standard of living as one of the Community’s aims. This task must be performed on the Community level, i.e., by the EEC. This means that the great differences in standards of living existing in the Community must be levelled out step by step. If this is to be possible, there must be an approximation of working conditions. The demand that Europe's goal must be a community of citizens, not just for merchants, accordingly involves an element of social policy.

C. The supranational nature of the EC

When one talks, as I am doing in this paper, about the influence of the EC on labor law, one must be aware of the fact that EC law has a special character in comparison to international law in general. This means that, at least potentially, its influence also takes on a particular form.

Standards of labor and social law laid down in international law are substantially restricted to the creation of minimum standards which states undertake to observe in international treaties. As a matter of prin-

5. As to this principle, see Antoine Jacobs, Das Prinzip der Freizügigkeit der Arbeitnehmer in der EG, in SOZIALE RECHTE IN DER EG 34 (Bernd von Maydell ed., 1990), and Peter Hanau, Die arbeitsrechtliche Bedeutung der Freizügigkeit der Arbeitnehmer in der EG, in SOZIALE RECHTE IN DER EG 55 (Bernd von Maydell ed., 1990).

6. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY].
ciple, this does not establish any direct rights on the part of individuals. Infringements of the obligations assumed by the states are only noted and taken into account in the context of the respective control mechanisms. The most important example here is the ILO Conventions, whose observance is monitored by special control procedures. The fact that international obligations in the field of labor and social law can only be enforced to a limited extent is ultimately based on the principle of national sovereignty.

In this respect, there is a fundamental difference between the Community law of the EC and international law. In the EEC Treaty, sovereign rights have been transferred to the institutions of the EC. The EC can therefore itself make law which achieves direct validity. Rights and obligations on the part of individuals and the states are established by this EC law. There is a special court to ensure that the states also fulfill their obligations. This makes certain that supranational law takes precedence over national law both institutionally and in legal practice. This characteristic of EC law means that it appears fundamentally possible that law which has hitherto been regulated on the national level—such as labor law—could in future be standardized by the EC. That admittedly says nothing about whether this is already the case today or whether it can be expected in future.

**D. Interim conclusion**

Our reflections so far have shown that the original concept of the EEC as an exclusively economic community has been abandoned, if it in fact ever existed in an unadulterated form. In the last few years at least, there have been growing demands that the EEC should develop further into a social union.\(^7\) The set of instruments created by Community law would in principle permit such a further development, because the EC itself has a genuine law-making competence. In the following, we shall investigate the extent to which use has already been made of this competence and how the development might continue.

**III. The EC Rules Relevant to Labor Law\(^8\)**

Community law which might produce consequences for labor law

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7. The chances for a European labor law still find different assessments in the literature. The role of labor law in the European integration process is pointed out in Manfred Zuleeg, *Die Rolle des Arbeitsrechts in der Europäischen Integration*, 1992 *RECHT DER ARBEIT* [RDA] 133.

can be subdivided into primary Community law and secondary Community law. By primary Community law, we mean the EEC Treaty and the agreements between the Member States supplementing that Treaty. The EEC Treaty in effect acts as a constitution for the Community. Secondary Community law, on the other hand, is made by the institutions of the Community. 9 We are talking here primarily of regulations and directives.

A. The EEC Treaty (Treaty of Rome)

If we first consider primary Community law, we should note that the term “labor legislation” only occurs expressly in Article 118, para. 1, of the EEC Treaty. 10 Apart from that, the term used is “social policy,” which comprises both labor law and social law. What is important for labor law in the EEC Treaty are the rules establishing the Community’s competence in the field of labor law, 11 and Community institutions, such as the European Social Fund under Articles 123 and following, EEC Treaty, 12 from which subsidies and allowances can be granted in order to improve employment possibilities in the Community. However, economic provisions can also be of significance to the sphere of labor law. 13 Finally, the ECC Treaty contains general principles, in particular the principle of freedom of movement, which can be of some importance for labor law.

1. Competence rules

Legislative activity on the part of the EC presupposes a specific allocation of competencies. Where there is none, the individual states retain their law-making competency (principle of limited authorization for specific cases). While the EEC Treaty contains a separate chapter on social

9. For the procedure, see MarieThérèse Huppertz, Das Gesetzgebungsverfahren der EG, 1992 NACHRICHTENDIENST DES DEUTSCHEN VEREINS FÜR ÖFFENTLICHE UND PRIVATE FÜRSORGE 102.

10. EEC TREATY art. 118 para. 1.


13. See, for example, the decision of the European Court of Justice on the monopoly of placement with respect to the Federal Employment Office (E.C.J., 23.4.1991 - Mem. C - 41/90 (Höfner-Elser/Macroton GmbH), reported in 44 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2891 (1991). The European Court of Justice held that the Federal Employment Office was an enterprise under Arts. 86, 90 EEC Treaty and subjected it to the control of abusive practices as stated under these provisions. On this decision compare Eberhard Eichenhofer, Das Arbeitsvermittlungsmonopol der Bundesanstalt für Arbeit und das EG-Recht, 44 NJW 2857 (1991).
policy, there is only one place in that chapter where we find any law-making competence.\textsuperscript{14} This competence is grounded primarily in social policy and gives the power to establish minimum regulations in order to improve the working environment and the safety and health of the work force.

Special competences can also result in order to implement the principle of freedom of movement.\textsuperscript{15} In particular, however, there is general, functionally specified competency covering a number of fields and disciplines to harmonize law by means of directives under Articles 100, 100a and 235, EEC Treaty. These can also affect labor law, should that be necessary for the implementation of the Single Market. That is in particular the case whenever different labor law arrangements lead to restrictions on competition. At this point, the close interpenetration of social policy and economic policy again becomes apparent. In individual cases, the EC even possesses an additional competence by virtue of a material link.\textsuperscript{16} Articles 100 and 235 of the EEC Treaty, in particular, which establish a general competence, require unanimity in the Council of Ministers. This considerably waters down the competence rule. If all states are in agreement with a regulation, the question of competence will in general not be raised at all. Another conclusion which can be drawn from this is that, if all the Member States are in agreement, secondary Community law could also be made, even though there is no express competence in that respect.

2. General Principles

The EEC Treaty also contains a number of general principles which have a direct effect on labor law or can at least have indirect consequences for labor law.

(a) Particular importance is to be attached to the principle of the free movement of workers, which has already been mentioned, and which is settled in Articles 48-51, EEC Treaty. Freedom of movement means that all rules which provide for different treatment of employees, based on their nationality, with regard to employment, remuneration and other working conditions must be abolished.\textsuperscript{17} In order to implement freedom of movement, the EEC is granted special powers to act,\textsuperscript{18} which it has invoked in particular with regard to the social security of migrant

\textsuperscript{14} EEC TREATY arts. 117-128, especially art. 118a(2).
\textsuperscript{15} EEC TREATY arts. 49, 51.
\textsuperscript{16} E.g., EEC TREATY art. 54(g), on protective regulations in the context of company law.
\textsuperscript{17} EEC TREATY art. 48.
\textsuperscript{18} EEC TREATY art. 49.
workers. In this respect, a web of coordinated European social law has been woven.

(b) Another general principle of the EEC Treaty which is important for labor law is the prohibition of discrimination laid down in Article 7, EEC Treaty, which is closely connected with the principle of freedom of movement. All discrimination on the grounds of nationality is prohibited in Article 7, EEC Treaty, except where the Treaty permits an exception.

(c) Finally, Article 119, EEC Treaty, refers to the principle of equal remuneration for men and women. This principle has been given concrete embodiment in numerous directives. In practice, substantial difficulties are prevented in particular by the problem of overcoming indirect discrimination, as it is known. This is when we find regulations which, while not specifically distinguishing between men and women, nevertheless principally affect women. Even so, it can be said that the EC's activities, especially taking into account the judgments handed down by the European Court of Justice, have consequences for labor law. This is true even in countries—such as the Federal Republic of Germany—where the principle of equal treatment for men and women is already laid down in the constitution.

B. Secondary Community Law

1. Directives and regulations

The Community institutions, i.e., the Council of Ministers in collaboration with the Commission and the Parliament, can create Community law above all in two forms, namely the regulation and the directive. The recommendation, which is non-binding in nature as a matter of principle, can be ignored for our purposes. Like a municipal act, the regulation makes directly binding law. The regulation is binding with regard to its object and its execution. The directive, on the other hand, is only binding in stating the objective, leaving it to the states to decide on the way in which the objective is to be achieved in the course of implementation. Directives will therefore be the instrument of choice when national regulations are to be approximated to one another.

2. Coordination, harmonization and approximation\textsuperscript{20}

There are already a large number of European legal instruments dealing with questions of labor law. They are concerned primarily with the free movement of workers, questions of industrial safety, and equal treatment for men and women at work. We shall need to look at the content of some of these provisions later. At this point, we shall only consider the different objectives pursued by these legal instruments.

First of all, it can be stated that it is not a question—at least, not yet—of achieving complete uniformity of the national systems of labor law. On the contrary, the national systems and competences have remained in existence, and it will probably stay that way for the foreseeable future.

There has only been an approximation on individual points, the extent of the approximation varying according to the degree of the Community’s interest in creating uniformity. Wherever freedom of movement is particularly restricted by different national regulations, there is a need for approximation. One example is the social regulations in the field of road transport which affect employees who typically exercise their professions in different countries. There can also be an interest in approximation where, as in the field of industrial safety,\textsuperscript{21} for example, different standards can effectively act as obstacles to competition. Finally, the EC has also dealt with a number of other fields in which it was intended to ensure a uniform minimum standard.

Apart from approximating and assimilating national systems, an important function is exercised in European law, and in particular in the law of social security, by the attempt to coordinate different systems so that employees do not suffer disadvantages in their social security when they change their country of employment. This is concerned, for example, with the question of calculating and paying pensions in the case of residence abroad.\textsuperscript{22} This aspect of coordination is not so important for


\textsuperscript{21} Industrial safety in a broader sense also includes statutory accident insurance. See Hans Sokoll, Die Gesetzliche Unfallversicherung und der EG-Binnenmarkt, in SOZIALE SICHERUNG IM EG-BINNENMARKT 136 (Winfried Schmähl ed., 1990).

\textsuperscript{22} On the so-called coordinating European social law, see Bernd Schulte, Sozialrecht, in EG-HANDBUCH, RECHT IM BINNENMARKT 331 (Carl Otto Lenz ed., 1991); Bernd von Maydell, Das Recht der Europäischen Gemeinschaften und die Sozialversicherung, in 78 ZEITSCHRIFT FÜR DIE GESAMTE VERSICHERUNGSWIRTSCHAFT 1 (1989); Yves Jorens, WEGWIJS IN HET EUROPEES
labor law in the narrower sense of the word.\textsuperscript{23}

\textbf{C. Decisions of the European Court of Justice}

The number of rules in primary and secondary Community law relating to labor law does not per se tell us anything about their importance for substantive labor law. It must also be borne in mind that the European Court of Justice, to which the national courts may have recourse and which examines the conformity of national legal systems with European law, sees itself as an engine of European unification and interprets the provisions of Community law in line with a preference for European integration.\textsuperscript{24} This becomes especially clear wherever the European Court of Justice bases its decisions directly on the fundamental principles of the EEC Treaty, such as the prohibition of discrimination or the principle of freedom of movement, without requiring a specific act of implementation in Community law.

\textbf{D. European basic social rights}

Going further than the specific provisions contained in primary and secondary Community law, there are efforts within the EC to lay down a minimum social standard. This is to be done by means of a new Social Charter. After lengthy negotiations, however, the Member States were only able to agree on a legally non-binding declaration, the Community Charter of employees' basic social rights, because the United Kingdom refused its consent.\textsuperscript{25} This Charter is addressed to the Member States...
and is thus a political program which is not legally binding in nature. Even so, this Community Charter means that eleven of the twelve Member States of the EC have recognized that securing a standard in the field of social and labor law is one of the Community’s tasks. This Charter, dating from 1989, is the basis of a social action program on the part of the EC Commission providing for a series of specific legal instruments. It can therefore be said that, while there are still no guaranteed basic social rights in the Community, the social dimension has nevertheless been given widespread recognition in the political field, as was confirmed at the summit conference in Maastricht in 1991.

IV. SUPRANATIONAL INFLUENCE IN THE INDIVIDUAL SPHERES OF LABOR LAW

After this general survey, we shall now consider what specific influence supranational law has so far exercised on the individual spheres of labor law.26

A. Conflict of Laws

To begin this survey with the conflict of laws, we can say that the states of the EEC reached agreement in the Rome EEC Convention of June 19th, 198027 on the law to be applied to contractual obligations and also on uniform conflict rules for labor law (Article 6 of the Convention). This establishes that, where there is no agreement and where peremptory industrial safety regulations apply, the law of that state in which the work is usually performed shall be decisive; where the place of employment varies, the law of that state in which the branch hiring the employee is located shall apply. The Convention has not yet entered into force, because the required number of ratification documents have not yet been deposited. In the Federal Republic of Germany, however, the regulation applies as municipal law, because parliament has included the


26. As to the comprehensive literature, see, for example, Rolf Birk, Der Einfluß des Gemeinschaftsrechts auf das Arbeitsrecht der Bundesrepublik Deutschland, 35 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 6 (1989); EUROPAISCHES ARBEITSRECHT (Rolf Birk ed., 1990); Rolf Birk, Die Folgewirkung des europäischen Gemeinschaftsrechts auf das nationale Arbeitsrecht, 1 special issue EUROPARECHT 17 (1990); Wolfgang Leinemann, Die Zukunft des Arbeitsrechts im Gemeinsamen Markt, 1989 ZEITSCHRIFT FÜR INTERNATIONALES PRIVATRECHT [ZIP] 1224; Otfried Wlotzke, EG-Binnenmarkt und Arbeitsrechtsordnung—Eine Orientierung, 1990 NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 417.

27. 1980 O.J. (L 266) 1.
content of Article 6 in the general German rules on the conflict of laws.\textsuperscript{28}

This example shows that in the EC, in addition to the typical supranational instruments, law can also be made by international treaties, more or less parallel to the supranational bodies and law-making possibilities.

\textbf{B. The law of contracts of employment}\textsuperscript{29}

Substantive labor law which regulates the content of employment relationships is only partially determined by national laws; to a great extent, collective bargaining agreements, works agreements and individual agreements intervene in this respect. For this reason, there is little or no need for comprehensive approximation in this field. The European lawmakers have accordingly intervened only on specific points and have issued regulations for special situations which have mostly been concerned with securing a general level of protection to be assured in the EC. There is, for example, a directive of February 17th, 1975,\textsuperscript{30} concerning mass lay-offs. This creates an obligation to notify the competent authorities in the event of mass lay-offs, and providing that there must be consultations, though without any compulsion to reach agreement.

Another directive, dated December 14th, 1977,\textsuperscript{31} concerns the maintenance of employees’ rights in the event of the transfer of an enterprise, company or part of a company. That directive triggered some major adaptation processes in the Member States. The directive lays down that, as a matter of principle, the seller's rights and obligations under a contract of employment are transferred to the purchaser.

Other legal instruments are concerned with the protection of employees in the event of the employer's insolvency\textsuperscript{32} and the harmonization of certain social regulations in road transport.\textsuperscript{33} There are also draft directives, which have not yet been passed on questions of temporary work, voluntary part-time work and maternity and paternity leave, to mention only a few examples.

The directives on the implementation of equal treatment for men and women in working life are also concerned with employment relationships. These are concerned with the principle of equal pay,\textsuperscript{34} equal treat-

\textsuperscript{28} Introductory Law of the German Civil Code, art. 30 [EGBGB § 30].
\textsuperscript{29} See Birk, \textit{EUROPÄISCHES ARBEITSRECHT}, supra note 26, at 10.
ment in access to employment, vocational training and professional advancement and with regard to working conditions and equal treatment in company social security systems. It can be said that these directives in particular have made considerable activity necessary on the part of law-makers, e.g. in the Federal Republic of Germany, and have also occupied the courts on many occasions. We are thus concerned here not with general principles lacking any binding nature, but rather with very concrete regulations producing direct legal effects.

C. Freedom of movement

There are a number of EC legal instruments concerned with implementing freedom of movement for employees. They are concerned not only with matters of labor law and social law, but also with questions of residence and restrictions on entering and leaving the country.

D. Industrial safety

A fourth complex is concerned with industrial safety. Questions of safety labelling at the place of work, the safety of machinery, and special protection against risks at work, in particular when using certain materials, are regulated in numerous directives. In typical cases, those will be concerned with protection rules motivated by social policy, intended to lay down a minimum standard. This means that the states are not prevented from requiring a higher standard of protection on the national level.

There are, however, also directives in the field of industrial safety which are intended primarily to ensure freedom of movement of goods. These regulations concern machinery safety standards. Different national standards act as obstacles to the free movement of goods. Accordingly, the safety standards provided for in the machinery directive are not variable in either an upward or downward direction, which means that they prohibit in particular higher standards of protection. Since standardization is different in the various EC states, there will need to be

37. See Birk, supra note 20, at 9.
joint standardization procedures in future, with common standards laid down. Until that aim is achieved, every Member State of the EC is required to recognize certificates issued by the other states attesting compliance with the safety standards of the machinery directive. In states with a high safety level, this leads to a lowering of standards. In the Federal Republic of Germany, there have been considerable discussions among the general public on this point.40

E. Company and inter-company codetermination 41

While there is widespread agreement in the Member States of the EC about the general regulatory principles to be applied in the law of contracts of employment and industrial safety, this is not the case where workers' codetermination on the company and inter-company level is concerned. In Germany, employees participate not only on the company level, but, in accordance with the Industrial Constitution Act, are also integrated in the executive bodies of larger corporations—the Supervisory Boards. In a few Member States, however, employees may enjoy only trade union representation on the company level. The different systems are not only concerned with technical questions, but rather are based on fundamentally different political evaluations of the relationship between capital and labor as factors of production and of the effectiveness of management. The consequence of these differences has been that the EC has so far been unable to achieve any success in the field of codetermination. None of the Commission's proposals have been accepted by the Council of Ministers. These have been, on the one hand, proposals to consolidate employees' information rights on the company level42 and, on the other hand, an initiative in 1991 to create a European works council for companies active on a cross-border level, with operations in different states.

Questions of workers' codetermination are likewise addressed in a draft directive on the structure of stock corporations and, a further proposal for a European stock corporation which could become active in all

40. For a critical look, see Günther Sokoll, Soziale Sicherung im Binnenmarkt aus der Sicht der Unfallversicherung, 1989 MITTEILUNGEN DER LANDESVERSICHERUNGSANSTALT OBERFRANKEN UND MITTELFRANKEN 475, 477.

41. As to the extremely abundant literature, see, for example, Roger Blanpain, Representation of Employees at the Level of the Enterprise and the EEC, 1992 RDA 127; Walter Kolvenbach, Mitbestimmungsprobleme im Gemeinsamen Markt, 7 ZENTRUM FÜR EUROPÄISCHES WIRTSCHAFTSRECHT (1991); John Richards, Die Unternehmensmitbestimmung im Europäischen Recht, in DAS KOLLEKTIVE ARBEITSRECHT IN DER EUROPÄISCHEN GEMEINSCHAFT 152 (Hermann Heinemann ed., 1991) [hereinafter DAS KOLLEKTIVE ARBEITSRECHT]; Jorn Pipkorn, Arbeitnehmerbeteiligung im Unternehmen auf europäischer Grundlage, 1992 RDA 120.

42. The "Vredeling Directive" of July 13th, 1983.
the states of the Community. All these initiatives have so far remained unsuccessful. In those states in which substantial codetermination rights exist, such as the Netherlands and the Federal Republic of Germany, the governments cannot agree to curtailing employees’ rights, because in such a case, the European stock corporation, for example, could be used to circumvent the German provisions on codetermination. Such an approach would encounter sharp resistance on the part of the German labor unions. On the other hand, the states with no or only limited codetermination are unwilling to adopt the high standards existing in Germany or the Netherlands. As a consequence, it has so far been impossible to launch the European stock corporation, which has been under discussion for decades, as a uniform corporate structure for all the Member States of the EC. There is no consensus in industry about whether this constitutes a real disadvantage. There are several indications that industry largely compensates for the lack of a uniform corporate structure by means of groups active on a cross-border basis.

There are also disputes about the extent to which the lack of codetermination in multinational groups is felt to be a shortcoming. One argument in favor might be the fact that there are a number of corporations which voluntarily agree on institutions with the labor unions which are called European works councils, even though they do not meet the criteria of a genuine works council under German laws. Essentially, those voluntarily created institutions are entitled to obtain information from the top management of the group and to pass it on to the employees. It goes without saying that agreements of this kind can only come about with the consent of the employers. This argues in favor of the fact that the employers also recognize a certain interest in information. In various French corporations, for example, and also in the German Volkswagen Group, there are agreements between the labor unions and the corporate management, according to which the works councils are regularly informed about European subjects, such as relocations across national boundaries. In the Volkswagen Group, the different group works councils in Europe are assembled into a kind of European group works council, which has certain rights to information on the basis of agreements. There is no specific legal basis for this practice either in German

43. As to the comprehensive literature see, for example, Bernd von Maydell, Die vorgeschlagenen Regeln zur Mitbestimmung für eine europäische Aktiengesellschaft, 35 DIE AKTIENGESELLSCHAFT 442 (1990).
44. See Gerd R. Wiedenmeyer, Betriebliche Arbeitnehmervertreter in grenzüberschreitenden Unternehmen, in DAS KOLLEKTIVE ARBEITSRECHT, supra note 41, at 126; Hans-Jürgen Uhl, Perspektiven einer europäischen Betriebsvertretung, in DAS KOLLEKTIVE ARBEITSRECHT, supra note 41, at 141.
national law or in European law. It does, however, show that the formation of cross-border corporations also creates a need for a corresponding structure of workers’ codetermination, or at least certain information rights.

F. Collective bargaining agreements and the law of industrial disputes in the EC

Similar conclusions to those concerning codetermination can be drawn with regard to collective bargaining agreements and the law of Industrial disputes in the EC. In this field, there have not even been any proposals by the EC Commission so far. The reason for this might be that the labor unions are organized on a national level at present, and that they only negotiate collective bargaining agreements on that level. Accordingly, there are not yet any European, i.e. cross-border, collective bargaining agreements. Likewise, there are no rules concerning cross-border Industrial disputes. There have occasionally been sympathy strikes intended to support an industrial dispute abroad; these phenomena have, however, so far been judged purely according to national labor law.

Ultimately, we can do nothing but approve and accept the EC’s reticence in the field of collective bargaining law, because it is primarily the task of the labor unions to create appropriate organizational structures to make possible European collective bargaining and European collective bargaining agreements. Obviously there is not yet any sufficiently strong feeling of solidarity across national borders in the trade union movement. In that case, it cannot be the task of the EC authorities to create these missing organizational structures by means of legal rules.

Consequences have been drawn from the Maastricht Agreement concluded by the eleven EC Member States inasmuch as the social partners have to be heard by the Commission if the latter intended to submit a proposal belonging to the field of social policy. Moreover, the social partners are given the right to reach an agreement on the elements of a rule within a certain time limit, to which the European Community intends to lay down a Community regulation. Whether this possibility will become legally binding depends on the destiny of the Maastricht Treaty. Even if the Treaty becomes operative, it is only the practical

administration of the new regulations which will show whether veritable progress has been achieved.

V. OUTLOOK FOR FUTURE DEVELOPMENTS

In the last section of my paper, let me give you some reflections on future developments. If we are not to become lost in the realm of pure speculation, we should proceed from the findings established so far and ask what has been achieved in the past and what has not been achieved. After that, we should analyze the reasons for this development. Only in that way shall we create a basis for consideration of future developments.

A. Assessment of the current situation

The developments so far permit us to make a number of statements:

(1) In the law of contracts of employment, there is no comprehensive arrangement under Community law. The EC only makes law on specific points where special circumstances, such as guaranteeing freedom of movement or ensuring a minimum social standard, make this necessary. The need for uniform arrangements is found in particular in the conflict of laws; in that respect, the necessary uniform framework has already been established.

The fact that there is no all-embracing regulation in the law of contracts of employment, and that no efforts are being made in that direction, is primarily because there is no need for it; substantive labor law is, after all, in the main not developed by state lawmakers.

(2) In industrial safety law, the emphasis of the EC's law-making activities so far—also in terms of quantity—has been on the field of labor law. Here there are specific Community law interests, some of which are economic in nature and others of which are concerned with social policy. It can be assumed that, in line with the announcements connected with the program of action in social policy, the activities in this field will even tend to increase in the future.

(3) In collective labor law, there has so far been no law-making by the EC—despite intensive efforts in some fields. That cannot be explained by the absence of any need, at least as far as codetermination is concerned. As is demonstrated by the efforts to set up a European works council in some groups, an instrument for informing the work force

47. See the analysis of Rolf Birk, Der Einfluß des Gemeinschaftsrechts auf die Entwicklung des Arbeitsrechts der Mitgliedstaaten, in SOZIALPOLITIK IN DER EG 155 (Hagen Lichtenberg ed., 1986).
across national borders is obviously regarded as meaningful in practice. Furthermore, agreement on a common codetermination model might lead to success in the efforts to establish a European stock corporation, which have been bogged down for decades.

There must therefore be other reasons for the EC’s failure in the field of codetermination and collective labor law as a whole. We must also ask why the EC has remained completely inactive so far in the field of collective bargaining law.

Our analysis of the developments so far enables us to offer a series of reasons.

(a) There are far more differences in collective labor law in the various states than is the case with industrial safety legislation, for example, where the regulations are largely mapped out by technological necessities. The differences in collective labor law are not purely technical in nature, but are based on the different histories and differences in mentality in the various states. It will be a long and difficult process before these differences can be overcome.

(b) A prerequisite for this would be for political opinion-forming to become possible on the Community level. That, however, is not the case in view of the weakness of the European Parliament, which only has very limited legislative powers. If the Parliament had a genuine law-making competence, an opinion could form in Parliament on the politically controversial questions, which are answered differently in various states. If the Parliament does not have these rights at present and accordingly cannot exercise the function of political opinion-forming on the Community level, that is not just a constitutional failing, which could be cured by the Member States by means of a treaty amendment. Ultimately, the current situation is based on the fact that the vast majority of citizens still have the feeling of belonging to their states, and not—or at least only on a secondary level—of being citizens of the EC. There is therefore no Community awareness which would be the precondition for allocating comprehensive competences to the European Parliament.

(d) This weakly developed Community awareness exists not only among the individual citizens; the situation is also similar with the associations which are particularly important for the development and formation of labor law, namely the labor unions and the employers’ associations. So far, there is no powerful trade union organization on the

48. See also Hilf & Willms, supra note 3, at 368, 372. Beyond this, still further institutional deficits are to be perceived in the field of social policy, as pointed out in Rainer Pitschas, Die soziale Dimension der Europäischen Gemeinschaft, 45 Die Öffentliche Verwaltung 277 (1992).
European level. The same applies to employers' associations. The discussions between employers and employees on the European level at the initiative of the EC, which are expressly provided for in the EEC Treaty, have not been able to change anything in this respect. That is the prime reason why there have so far been no European collective bargaining agreements and why few demands have been raised in this respect. On the other hand, the extremely varied substantive conditions of work in the Member States do not exclude the possibility of European collective bargaining agreements, because there are enough questions which could be settled in a uniform manner for the entire EC, at least as a minimum standard. It would also be possible to retain regional differences, such as already exist in collective bargaining law in some countries, such as Germany.

(e) A further obstacle to mention, which admittedly is not limited to collective labor law, is the fear of additional bureaucratization and additional rules in all spheres of life in which the EC intervenes with regulations. This also applies to labor law, where many people would be more inclined to demand deregulation. It is hardly surprising that the EC bureaucracy is particularly ponderous and involved, if one bears in mind that the officials are drawn from very different countries and that an independent EC administrative tradition is only slowly developing. Moreover, there are the language problems, which constitute an additional obstacle to law-making and to the application of law.

B. Further developments

If, after this analysis of the obstacles and difficulties, we ask what effects the influence of European law will have on labor law, it will certainly depend primarily on the development of the EC. If the Community develops in the direction of the European federal state, it is difficult to imagine how the national systems of labor law could remain unchanged. On the contrary, it would in that case be probable and ultimately also necessary for a European labor law to develop. The difficulties on the way to that goal have become clear. A uniform European labor law, partially or completely displacing the national systems, could only exist if:

(1) a European Community awareness develops on the part of the citizens which would make it possible to abandon national peculiarities.

49. See also Zachert, supra note 8, at 161, 167.
50. See the appropriate description of Stiller, supra note 45, at 194.
Whether such a development is desirable or not is another matter, which is the subject of extremely controversial discussions;

(2) the labor unions and employers’ associations organize on a European level and negotiate collective bargaining agreements on that level;

(3) the European Parliament is granted genuine and comprehensive legislative competence, so that it becomes possible for political opinions to form on the Community level.

It is impossible to predict the extent to which these conditions will be fulfilled in the next few decades. In particular, the integration process can be slowed down considerably by the association and accession of new Member States, and indeed it could be stopped altogether. There are consequently many arguments to suggest that in the foreseeable future, we shall be left with national systems of labor law, with the EC intervening with specific Community rules.51 There are therefore good prospects of the status quo being perpetuated—perhaps with minor modifications.