MORE HOLES IN THE BUCKET: TWENTY YEARS OF EUROPEAN INTEGRATION AND ORGANIZED LABOR

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INTRODUCTION

Twenty years ago European leaders adopted the Single European Act (SEA) and committed themselves to tearing down barriers to the free flow of goods and services across the continent. In only six years, helped by the upswing in the economy, the European Union (EU) pushed through a raft of legislation aimed to create a Single European Market. The institutional side of the SEA involved three reforms: the introduction of qualified majority voting (QMV); "mutual recognition," whereby only minimum standards are harmonized and Member States must accept any imports from other states in compliance with them; and, slightly greater powers to the European Parliament (EP) under the so-called "cooperation procedure." The SEA and the "Europe 1992" program "returned European integration to public prominence"[1] and prepared the conditions for the launch of a Single European currency in 1999. The timetable and conditions for the transition to economic and monetary union (EMU) and plans for a fully independent European Central Bank (ECB) were set in the Treaty of Maastricht (1992). QMV was further expanded, a separate Agreement on Social Policy was added, and the legislative powers of Parliament were further expanded and provide in some matters for co-decision, bringing the EP in direct negotiations with the Council of Ministers over its proposed amendments. Later Treaty amendments (Amsterdam, 1997; Nice, 2000) did not fundamentally alter the institutional set-up. The third largest change hitting Europe in these twenty years, possibly more momentous than the creation of a Single Market and Single Money, was the reunion of the European continent

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1. ANDREW MORAVCSIK, THE CHOICE FOR EUROPE, SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 35 (1998).

following the collapse of communism in Central and Eastern Europe in 1989. In May 2004, the enlargement of the EU from 15 to 25 Member States was completed.[2]

Market and money integration and the expansion of market capitalism changed the position of Labor. Wage settlements and labor costs came now under close scrutiny of more competitive markets. Tight monetary policies and fiscal restraint, defined by the Maastricht convergence criteria setting the terms of EMU membership, narrowed the space for independent wage and employment policies at national level. The end of communism and EU membership fifteen years later facilitated the organization of genuine labor unions and new practices of social dialogue, as well as a vigorous form of capitalism and competition. How this affects labor regulation is the subject of this article.

I proceed in three steps. In part I the scene will be set by highlighting some key changes in labor markets and labor regulation, arguing that in markets and regulation there is now a greater emphasis on choice and a smaller one on equality. This will lead to the question asked by Wolfgang Streeck in his recent contribution in the *Handbook of Economic Sociology*: "Will labor market regulation by collective intermediaries like labor unions be squeezed out by a liberalizing state from above and an expanding market from below, clearing the way for a new wave of commodification of labor in response to dynamically changing economic and technological conditions?"[3] I take this as the central empirical question of this article and I shall try to answer it in two steps. Part II surveys various indicators of union presence and involvement in European labor markets. Part III reviews the role of European and national law and bargaining practice.

2. This was the largest extension in EU history, which began in 1958 with six members (Germany, France, Italy, Belgium, Luxembourg, and the Netherlands), followed by Denmark, Ireland, and the United Kingdom (1972), Greece (1980), Spain and Portugal (1985), and Austria, Finland, and Sweden (1995). In 2004, eight CEE countries (Poland, Estonia, Latvia, Lithuania, Hungary, the Czech Republic, Slovakia, and Slovenia) and two small island states in the Mediterranean (Cyprus and Malta) joined. The accession of Bulgaria and Romania are planned for 2007, and negotiations are opened with Turkey and Croatia, and probably will be some time soon with other countries from former Yugoslavia and the Western Balkans.

3. Wolfgang Streeck, *Labor Markets and Trade Unions*, *in* HANDBOOK OF ECONOMIC SOCIOLOGY 254, 278 (N.J. Smelser & R. Swedberg eds., 2005)

I. THE NEW FOCUS ON CHOICE IN LABOR MARKETS AND REGULATION

It would be silly to separate institutional and political developments in Europe from global developments in economic trade, finance, technology, work organization, and politics. In the early twenty-first century, the biggest influence on European economies and labor markets is probably related to globalization. The rapid growth of China and India as economic competitors and alternative production sites has released new fears of decline as well as protectionist responses. Throughout the twenty years reviewed here, the political advent of neo-liberalism was strongly influenced by developments in thinking and practice in the United States, motivating de-regulation and privatization as well as qualms about a European Social Model which, according to its critics, protects the "insiders" in the labor market, slows down job growth, and aggravates long-term unemployment.

Beyond such real or imagined influences from without, labor markets have changed significantly from within. In 1980, 41% of Europe's labor force was employed in industry (including mining and construction) and 46% in services. In 2003, the share of industry in total employment had shrunk to 29% and two out of three employees found work in services.[4] During this period the share of married women in paid employment and those working part-time had nearly doubled. Since the early 1980s, unemployment has again become a mass phenomenon, affecting the lives of many, particularly the young and unskilled, and never below 8% on average in the EU. The share of people in non-standard employment contracts—fixed-term, on-call, and via temporary agencies—has risen from 7% to 12%, and a growing number of people are employed on "freelance" contracts or work as "quasi-independent" contractors. All this is, of course, not new or unique for Europe, but it did and does challenge existing labor laws and social security legislation. In *Beyond Employment* Alain Supiot discusses the proliferation of employment statuses that escape the legal framework of regular employment contracts and social security tied to the status of wage earners.[5] As a consequence of the

4. Figures in this paragraph are calculated from the OECD's *Labour Force Statistics*, Paris, various years, and adjusted to the present size of the EU of twenty-five Member States. Figures on the contractual status are from the *European Labour Force Survey* of Eurostat, Luxembourg.

5. ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001). The book augments the influential report for the European Commission, *Transformation of Labour and the Future of Labour Law in Europe* (Brussels, June 1999), written by a group of experts chaired by Supiot.

various emergency measures with which European politicians have sought to address the unemployment crisis and circumvent the difficulty of reforming standard employment protection, different contractual arrangements at variance with standard employment contracts have proliferated. This has, in turn, fuelled fears of dualization of labor markets.

The increase in women's paid employment took place at a time of profound changes in both the workplace and the family. Fewer and later marriages and less childrearing, more divorce, single parenting, and an ageing population, mean that now (as well as in the future) a much smaller share of the population live in a double parenting household. Family breakdown and lower fertility rates of especially higher-educated women lower the probability that children receive the support for the ever higher educational requirements needed to sustain them in increasingly competitive labor markets. The public policy implications of these developments are to invest in family-friendly policies in the workplace and in the capacities of families of all kinds to invest in children.[6] Currently, "mainstreamed" strategies of employment in the EU are to attract more women into paid employment, asking women and men to become more flexible in their discharge of family responsibilities and to be increasingly committed to their work. Consequently, this will make the productivity of firms and the stability of families dependent on each other and on support for childcare and flexible work schedules.

The nature of work has changed as well. More intensive competition on a worldwide scale has made firms acutely aware of costs and productivity. The solution many employers have reached is to reorganize work around decentralized management of human resources, customized products, and working schedules, and reorganize tasks in such ways that they can be partitioned in modules. This makes it easier to subcontract tasks, employ part-time workers, and hire temporary staff for some tasks, while core work is multi-tasked and carried out in teams. Employment security and remuneration tend to be defined less in terms of the seniority and job status of workers than in terms of the knowledge or competences they bring to the job and acquire while working. The effects of this differentiation and individualization is to separate the employee relations of more workers from the kind of permanent, full-time job in

6. Gøsta Esping-Andersen, *A Child-Centred Social Investment Strategy*, *in* WHY WE NEED A NEW WELFARE STATE 26 (G. Esping-Andersen et al. eds., 2002)

stable internal labor markets that had characterized post-World War II development in Western Europe, the United States, and Japan.

Fixing the standard pay rate for the job across firms in the industry was the pivotal "common rule" and most heralded union wage policy of that period.[7] Objective pay criteria, based on job descriptions and seniority, diminished the power of supervisors and the possibilities of discrimination and favoritism. Unions typically pressed for the standardization of employment contracts in order to protect workers against uncertainty, simplify collective regulation, decouple the economic situation of workers from that of their employing organization, and suspend as much as possible competition between workers, so as to enable them to act in solidarity.[8] Standardization involved explicit and agreed definitions of normal effort, normal hours, and normal pay, guaranteeing employers reliable performance of predictable routine tasks at an average level of effort, thus allowing the union to act as the guardian of the wage-effort bargain. Breaking away from centralized (multi-employer, sector) agreements gives firms more scope for merit- and performance-based pay.[9] This is usually associated with an increase in the dispersion of pay and more discretion for management to set individual pay by open-ended appraisal procedures.[10]

This raises questions about the role of the unions, collective bargaining, and labor law. Labor market regulation in the mid-twentieth century was based on the acceptance and promotion of *particularist* collective organizations like labor unions to represent *general* interests in social progress. In many cases, the law gave *collectively* defined and executed rights precedence over weakly defined individual universal rights, in recognition that the imbalance of power between employers and individual workers stands in the way of a "true contract" and undermines a trustful and productive relationship.[11] Zweigert and Kötz note that "in the acquisitive

7. ALAN FLANDERS, MANAGEMENT AND UNIONS: THE THEORY AND REFORM OF INDUSTRIAL RELATIONS (1970); J. SLICHTER, J. HEALY & R. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960).

8. Streeck, *supra* note 3.

9. Assar Lindbeck & Dennis J. Snower, *Centralized Bargaining and Reorganized Work: Are They Compatible?*, 45 EUR. ECON. REV. 1851 (2001).

10. William Brown et al., Dep't of Trade & Indus. Res. Paper, *The Individualisation of Employment Contracts in Britain* (June 1998), *available at* http://www.dti.gov.uk/er/emar/dti3646.pdf.

11. It is with regard to the contract of employment that Émile Durkheim wrote: "not everything in the contract is contractual . . . and wherever a contract exist, it is submitted to regulation which is the work of society and not of individuals, and tending to increase in volume and complexity." ÉMILE DURKHEIM, DE LA DIVISION DU TRAVAIL SOCIAL 189 (7th ed. 1960) (1893).

bourgeois society . . . it seemed paternalistic and prejudicial to legal security to have a rule which allowed courts to undo contracts just because they were unequal, for the individual was deemed smart and businesslike enough to act responsibly and look after his own interests."[12] Yet, many contracts, most prominently contracts of employment, "are subject to a ticket of rules which give some protection to the weaker party", rules which give such contracts "a life of their own outside the pale of general contract law" and "shrink the area over which the flag of freedom of contract can flutter."[13]

The changes in the labor market and diversification of employment statuses and contracts have produced growing tensions between collective and individual labor law. Neoliberalism and individualization as political tendencies have no place for collective intermediaries like labor unions. Their membership decline and limited representation among the young and in new sectors of the economy does them no good either and raises issues of democratic legitimacy. The characterization of recent legislation in the United Kingdom as supporting "an increasingly individuated rather than collectivized system of human resource management"[14] indicates a more general European trend.[15] In Britain this must be placed in context of two decades of weakening of collective organization and bargaining as the basis for worker rights.[16]

More generally, while focusing on minimum rights, EU law tends to open up new "regulatory space" in which individual choice of firms and workers plays a greater role, combined with attempts to recapture some of the customization of rights that is innate to collective

12. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 329 (Tony Weir trans., 3d ed. 1998).

13. *Id.* Restoring equality to the contract of employment is a key principle of classical labor law, because "in its inception it is an act of submission, in its operation it is an condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment." OTTO KAHN-FREUND, LABOUR & THE LAW 7 (Hamlyn Lectures, 24th Series, 1972).

14. Paul Davies & Mark Freedland, *The Role of EU Employment Law and Policy in the Demarginalisation of Part-time Work: A Study in the Interaction Between EU Regulation and Member State Regulation*, *in* EMPLOYMENT POLICY AND THE REGULATION OF PART-TIME WORK IN THE EUROPEAN UNION: A COMPARATIVE ANALYSIS 63, 154 (S. Sciarra, P. Davies & M. Freedland eds., 2004).

15. SILVANA SCIARRA, THE EVOLUTION OF LABOUR LAW (1992–2003) (Report for the European Commission 2004). EU law also pushes toward formalization and juridification, since informal or tacit agreements, defining customary practices, are difficult to interpret by third parties (courts) and individual workers may not be fully aware of them. This runs against the tendency of post-Maastricht social policy to enlist the support of non-governmental actors in producing "soft law" through agreements.

16. Brown et al., *supra* note 10; Linda Dickens, *Individual Statutory Employment Rights Since 1997: Constrained Expansion*, 24 EMPL. REL. 619 (2002).

bargaining. Wolfgang Streeck has characterized this post-Maastricht approach to social policy as *neovoluntarist*, a type of policy "that tries to do with a minimum of compulsory modification of both market outcomes and national policy choices, presenting itself as an alternative to hard regulation as well as to no regulation at all."[17] In particular, the new approach is more flexible and allows Member States to exit from common standards if they cannot sustain them; gives precedence to national customs and practice and encourages contractual agreements between market participants; tries to enlist for purposes of governance the cajoling effects of public recommendations and expert consensus on "best practice"; offers public and private actors menus of alternatives from which to choose; and hopes to increase homogeneity among national regimes through comparison, benchmarking, and education.[18]

Besides reflecting differences in interests and institutions across EU Member States, the new focus on choice reflects the idea that society has become more heterogeneous, even individualized, that people are more competent in making choices for themselves than is often assumed, and that public policies can no longer be designed in standard packages. This thinking is very prominent in the work of influential sociologists like Ulrich Beck, Anthony Giddens, or Catherine Hakim. Beck argues that the regulatory frameworks of classes and families are being replaced by the "reflexive modernity" of individuals.[19] Giddens claims that in late modernity the "pure" relationship entered into by one's own choice, and reflexively organized, will overtake those based on status rights intermediated by collective representations.[20] Underlying this argument is the sociological assumption that individual choice and preferences have become more dominant in determining life chances. A particular expression of this thinking is found in Hakim's work on women's employment and work-lifestyle preferences. She argues, in particular, that the heterogeneity of women's employment in terms of careers, commitment, working hours, and wages reflect different preferences of women for careers, homemaking, and children.[21] The heterogeneity of women's preferences and choices, in her view,

17. Wolfgang Streeck, *From Market Making to State Building? Reflections on the Political Economy of European and Social Policy*, *in* EUROPEAN SOCIAL POLICY: BETWEEN FRAGMENTATION AND INTEGRATION 389, 424 (Stephan Liebfried & Paul Pierson eds., 1995).

18. SCIARRA, *supra* note 15.

19. ULRICH BECK, RISK SOCIETY: TOWARDS A NEW MODERNITY (1992).

20. ANTHONY GIDDENS, THE CONSEQUENCES OF MODERNITY (1990).

21. CATHERINE HAKIM, PREFERENCE THEORY: WORK-LIFESTYLE CHOICES IN THE 21ST CENTURY (2001).

prevents them from acting together and wanting the same public policies regarding the combination of family and work.

The new emphasis on choice combines with a change in legislative and judicial technique, allowing more differentiation and bringing in a new type of economic test of why choice may or may not need the support or limitation of particular institutions and rules. Rather than seeking to correct an unbalanced distribution of power and outcomes, as had been the primary goal of traditional labor law, the new rationale for legal intervention in employment is whether it contributes toward the goal of maximizing the potential amount available for distribution and ensures equal opportunities to all citizens to participate.[22] More generally, the goals of competitiveness, equal access, and preventing social exclusion take precedence over equality as principles of justice.[23]

With these tendencies in mind, I will now turn to my central research question: Are collective intermediaries such as labor unions being squeezed out of labor markets and labor regulation? I shall first survey various indicators of union presence and involvement in European labor markets. Second, I will review the role of European and national law and bargaining practice.

II. IS THERE A DECLINE IN COLLECTIVE REPRESENTATION OF LABOR?

There are four indicators gauging the position of labor unions in labor markets and society: the proportion of employees who are members of a labor union (*union density*); the proportion of employees who work in workplaces or enterprises where unions or union-like institutions are present (*union presence*); the proportion of employees whose terms of employment are set or influenced by collective agreements negotiated by unions (*union coverage*); and the recognition and presence of labor unions in institutions representing employees vis-à-vis employers and/or the state (*union representation*). Union density, presence, and coverage can be measured in similar, comparable and quantitative ways. Union representation is a qualitative measure.

22. Hugh Collins, *Is there a Third Way in Labour Law?*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 449 (J. Conaghan, R.M. Fischli & K. Klare eds., 2001).

23. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY (2000).

A. Union Density

Union density sums up the membership support that unions are capable of mobilizing in their key constituency of workers and salaried employees and thus measures what Eric Olin Wright calls "associational power."[24] A large membership tends to bring organizational and financial independence, allows the payment of professional staff, and to devote energy and ideas to causes that *go beyond the survival* of the organization. It conveys to workers the self-assuring idea that they may count on others and it supports the group sanctioning mechanism needed to uphold the norm of membership.[25]

In most econometric treatments, union density is taken as indicator of union bargaining power.[26] Threats in bargaining games will be more credible when the identification with the union is strong and the pool of non-union workers or potential strikebreakers is small. However, as far back as early debates in French syndicalism, union leaders were aware that large memberships also meant moderation.[27] Mancur Olson has popularized this point, arguing that large unions will be internally heterogeneous and that their leaders will have *organizational* reasons to be prudent, because "the members of an encompassing union own so much of the society that they have an important incentive to be actively concerned about how productive it is; they are in the same position as a partner in a firm that has only a few partners."[28]

We have now reasonably reliable and comparable union membership and density statistics, often from different (administrative and survey) sources.[29] These statistics tell us that

24. Erik Olin Wright, *Working-Class Power, Capitalist-Class Interests, and Class Compromise*, 105 AM. J. SOC. 957 (2000).

25. Alison L. Booth, *The Free Rider Problem and a Social Custom Theory of Trade Union Membership*, 100 Q.J. ECON. 253 (1985); Jelle Visser, *Why Fewer European Workers Join Unions: A Social Customs Explanation of Membership Trends*, 40 BRIT. J. INDUS. REL. 403 (2002).

26. Robert J. Flanagan, *Macroeconomic Performance and Collective Bargaining: An International Perspective*, 37 J. ECON. LIT. 1150 (1999).

27. Albert Levy, treasurer (!) of the French *Confédération Générale du Travail* (CGT), believed that it was better for unions to have fewer but highly motivated members, "car le lourde modération entre avec le grand nombre," *cited in* JELLE VISSER, EUROPEAN TRADE UNIONS IN FIGURES, 1913–1985, 53 (1989).

28. MANCUR OLSON, JR., THE RISE AND DECLINE OF NATIONS 48 (1982).

29. For methods and sources, see Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LAB. REV. 38 (2006). The union density rates in Table 1 are calculated for employed workers and without retired workers, students, and the self-employed. In 2001, in the EU15 an average of 17% of the total membership had retired from the labor market, 1–2% were self-employed and 7 percent unemployed. These proportions vary across countries.

European labor unions share in a worldwide trend of declining membership density. On average, the EU15 density rate fell from 40% in 1980–83 to 26% in 2000–03 (or 24% if the ten new Member States are added (Table 1)). This average hides large cross-national differences, from high-density countries like Sweden, Finland, and Denmark to low-density countries like France, Spain, and Poland. The declining trend is general, however, and has begun to affect northern Europe too. This suggests that there is a rather general process behind union decline, which is *endogenous* to the labor market changes discussed earlier, but with a different timing and magnitude across countries and mediated by nationally differing *institutions* such as union involvement in the administration of unemployment insurance, union presence in the workplace, and union recognition by employers and in the political arena.[30]

30. Daniele Checchi & Jelle Visser, *Pattern Persistence in European Trade Union Density: A Longitudinal Analysis 1950–1996*, 21 EUR. SOCIOLOGICAL REV. 1 (2005); BRUCE WESTERN, BETWEEN CLASS AND MARKET: POSTWAR UNIONIZATION IN THE CAPITALIST DEMOCRACIES (1997).

Table 1
Union density rates 1980–2003

	UNION DENSITY RATES			UNION DENSITY RATES 2003-4			
	1980–3	**1990–3**	**2000–3**	**male**	**female**	**private**	**public**
Sweden	79	82	78	76	81	75	92
Finland	69	76	74	68	77	56	88
Denmark	80	76	72	70	75	68	85
Germany**	35[a]	31[a]/34	24	29	18	21	56
Austria	55	45	36	43	27	28	68
Netherlands	33	25	23	27	19	21	38
Belgium	53	54	56	..	..	(50)	(80)
France	18	10	8	9	8	5	15
Spain	9	15	16	..	..	14	32
Italy	48	39	34	..	..	(30)	(60)
U.K.	49	38	29	29	29	17	59
Ireland	56	50	36	37	36	30	68
Poland	-	33[b]	16	13	18	..	..
Czech Rep.	-	46[b]	26	..	..	..	..
Slovak Rep.	-	57[b]	36	..	..	..	..
Hungary	-	33[b]	20	17	23	..	..
EU15	40	33	26	(29)	(24)	(19)	(60)
EU25		(36)	24	..	..	..	..

Adjusted rates; [a)] West Germany; [b)] average 1994-1996; estimates between brackets

Source: Jelle Visser, *Union Membership Statistics in 24 Countries*, MONTHLY LABOR REVIEW 38 (January 2006).

The initial evidence of *divergence* in unionization trends in the 1980s suggested that labor unions could sustain their membership strength and influence if they were capable of making a productive contribution to restructuring the economy, by simultaneously preventing firms to follow a low-wage adjustment path and by helping

management to raise functional flexibility of workers in pursuit of quality competition.[31] This may have explained part of the relative stability of German and Swedish unions at the time, compared to the early demise of unions in Britain, France, and, even earlier, in the United States. (Labor unions in central and eastern Europe were never in a position to claim such a role and were immediately exposed to deep economic and social changes following the transition to the market economy.[32]) The strategy of social and productive modernization through partnership with the unions, working so well for such a long time in an economy in which the manufacturing industry was the key source of economic success and employment, is not easily translated to a service economy in which standards of quality, training, and effort are not readily available and measured. Moreover, its "terms of trade" have changed to the disadvantage of unions, due to higher social costs when workers made redundant are not quickly (re) assigned to new sectors, firms, and jobs. And like new entrants, those losing their jobs often faced the prospect of lower wages, less job security, and poorer work quality. Such developments erode the existing membership base, undermine confidence in the unions, and make them less attractive for newcomers. One of the almost universal problems of labor unions is to appeal to the young and recruit the workforce outside manufacturing and the public sector. Unsurprisingly, we witness the ageing of union membership, a growing concentration of membership in the public sector, and, related to this, a rapid feminization of labor union membership (and, albeit slower, of union leadership).

The decline in density tends to increase the uncertainty of the unions and their dependence on the decisions and support of other actors in the political and industrial arena. Many unions and union federations are in financial dire straits and central organizations have been forced to deflate their coordinating role. Interlocutors may take continued membership decline as a sign that unions have become dispensable or can more readily be forced into making concessions. If lower density rates and more dependence on others means less bargaining power, uncertainty may nonetheless produce more assertive policies and instability.

31. WOLFGANG STREECK, SOCIAL INSTITUTIONS AND ECONOMIC PERFORMANCE: STUDIES OF INDUSTRIAL RELATIONS IN ADVANCED CAPITALIST ECONOMIES (1992).

32. Sabina Avdagic, *State-Labour Relations in East Central Europe: Explaining Variations in Union Effectiveness*, 109 SOCIO-ECON. REV. 25 (2005).

B. Union Presence

Union presence turns out to be a strong determinant of the willingness and capacity of employees to address grievances and claim individual labor rights. The idea that unions, besides "vested interests" in defense of status rights of their core membership, are also "swords of justice" was first expressed by Alan Flanders, who saw this as the dual face of labor unions.[33] In a careful analysis for the United Kingdom, controlling for selection effects, Metcalf et al. show that in firms where unions are recognized by the employer or where unions are present even if not recognized, the incidence of low pay is lower, the pay distribution between men and women, white and black workers, employees with and without health problems, and between manual and non-manual workers is smaller, that family friendly policies are more effective and the rate of work-related accidents is lower.[34] However, their evidence also shows that these effects have become smaller, following twenty-five years of union decline, and that the "sword of justice" is blunted. Unfortunately, a similar type of analysis is not available for the European continent and it would be less easy to design such a study given the difficulty in separating union from non-union firms in most sectors and countries. However, where collective agreements apply to all firms and both union and non-union members, the overall effect of these agreements tends to be toward a compression of pay differences.[35]

33. FLANDERS, *supra* note 7.

34. David Metcalf et al., *Unions and the Sword of Justice: Unions and Pay Systems, Pay Inequality, Pay Discrimination and Low Pay* (London School of Economics, CEPR Discussion Paper No. 452, 2000).

35. Jonathan Agell, *On the Benefits from Rigid Labour Markets: Norms, Market Failures, and Social Insurance*, 109 ECON. J. F143 (1999).

Table 2
Union presence and coverage rates, 1980–2003

	UNION PRESENCE			UNION COVERAGE		
	2000–3	**type**	**basis**	**1980–3**	**1990–3**	**2000–3**
Sweden	>80	union	A	>80	83	92**
Finland	>70	union	A	95	95	95*
Denmark	>80	union	A	>70	73	76**
Germany	>50	council	L	>70[a]	>60	>60*/**
Austria	>60	council;	L	98	98	98*
Netherlands	>50	council;	L	85	82	86*
Belgium	>60	council	A/L	95	95	95*
France	39	council	L	85	92	95*
Spain	>40	council	L	>60	>70	>80*
Italy	>50	union	L/A	>80	>80	>80*
U.K.	48	union	v	71	47	35
Ireland	53	union	v	..	,,	..
Poland	<25	union	v			<40
Czech Rep.	-	union	v			<40
Slovak Rep.	-	council	L			<50
Hungary	35	council	L			<40
EU15	>50			(74)	(70)	(68)
EU25	..			..	..	(60)

A=central agreement establishes representation right; L= mandatory law (usually excluding SMEs); v= voluntary

Adjusted rates: [a)] West Germany; estimates between brackets.

* Including non-organized firms bound by agreements through administrative extension (France, Spain, Belgium, the Netherlands, Finland, Germany; and Austria through compulsory membership) or court decisions (Italy).

** Including non organized firms not bound by a sectoral agreement but nonetheless applying the agreement (Sweden, Denmark, Germany).

Sources: European Commission, Industrial Relations in Europe (2004); national reports (*EIROnline*); OECD, *Wage-Setting Institutions and Outcomes*, EMPLOYMENT OUTLOOK 127 (2004); for Denmark 2000–03: Steen Scheuer, *Extra Holiday Entitlements in Denmark—Towards a Transformation of Collective Bargaining*, *in* LABOUR AND EMPLOYMENT REGULATION IN EUROPE 91 (J. Lind, H. Kudsen & H. Jørgensen eds., 2004); for Germany, recent years (1995–): IAB and WSI data.

My estimate is that in the EU15, before the enlargement of May 2004, between 50% and 60% of all employees worked in enterprises where there is union representation, directly as in Sweden, Italy, or the United Kingdom, or indirectly through the presence of union candidates elected to represent their colleagues in mandatory works councils and similar institutions, as in Germany, France, and the Netherlands (Table 2). With some exceptions, workers in large firms of, say, over 200 employees and in the public sector have access to union representation. In France, otherwise characterized by a very low level of union membership, 39% of the employees find themselves in workplaces where unions are present, varying from 31% in the private sector to 71% in public services, and from 8% in small firms (under 50 employees) to 81% in large firms (500 employees and more).[36] In Germany, too, there is a strong variation with firm size. Only 7% of the small establishments, with up to 50 employees, have established a works council, but this proportion increases to 80% (in the West) and 75% (in the East) for establishments of 200 employees or more.[37] In Ireland, union presence varies from 18% in micro-enterprises (1–4 employees) to 75% in enterprises of 100 and more staff. In manufacturing, 60% of the employees report that a union is present in their workplace, a proportion decreasing to 41% in financial services and 25% in private services.[38] Even in the United Kingdom, after twenty years of union decline and in the absence of a legal framework for employee representation in the enterprise, almost one out of every two employees reports that a union is present in the workplace, a proportion that has hardly changed during the past

36. Figures based on a representative household survey of 2003 conducted by the French Ministry of Labor and reported by Thomas Amossé, *Mythes et Réalités de la Syndicalisation en France*, 44 PREMIÈRES SYNTHÈSES ET INFORMATIONS (Paris, DARES, Oct. 2004).

37. Statistics of the federal Institut für Arbeitsmarkt- und Betriebsforschung in Nürnberg reported in Peter Ellguth & Susanne Kohaut, *Tarifbindung und Betriebliche Interessenvertretung: Aktuelle Ergebnisse aus dem IAB Betriebspanel*, 58 WSI-MITTEILUNGEN (2005).

38. Data based on a 2003 workplace survey conducted by Philip O'Connell, Helen Russell, James Williams and Sylvia Blackwell, *The Changing Workplace: A Survey of Employee's View and Experiences* (Dublin: ESRI and National Centre for Partnership and Performance, 2005).

decade.[39] However, in Britain there are quite a few large firms without unions, just as is the case in, for instance, Poland and the other CEE countries. Data for the early 2000s indicates that unions are hardly present in the extensive world of micro-enterprises in Poland, in only 7% of those with 20–49 employees, in 22% of companies employing between 50 and 249 employees, and in about half of the larger firms. Union presence is well established in public manufacturing and state services, with 70% of employees declaring that a union is present in their employing entity, but dwindles to 9% in commercial services.[40]

In most European countries, national law or national framework agreements does provide for employee information, consultation, and in some cases (i.e., Germany, Sweden, Denmark, Austria, the Netherlands, Belgium, and France) codetermination rights, either by assigning such rights to unions (Sweden, Denmark) or to elected works councils.[41] Such provisions existed in the United Kingdom and Ireland on a voluntary basis, usually only in a minority of firms and typically excluding foreign-owned multinationals, especially when owned by U.S. parent companies.

At this point we must also consider EU legislation. The European Works Council (EWC), applying to about 1,500 large firms with 1,000 employees or more and operating in two or more EU Member States, celebrated in 2004 its tenth anniversary. Seven hundred and fifty large firms with *transnational* activities in the EU, approximately 45% of them and representing 70% of the 17 million employees potentially concerned, have established an EWC or similar body. Many still operate on the basis of Article 13 of Directive 94/45/EC, allowing greater freedom to management in the design of the council if based on an agreement with employee representatives or unions. A number of these agreements are currently being renegotiated, with a view of extending coverage to the new Member States. The EWC is not to be compared with the works councils

39. U.K. statistics on union membership, union presence and bargaining coverage are based on the *Labor Force Survey* for the United Kingdom, with annual data from 1995 for the United Kingdom and from 1992 for Britain, reported in Heidi Granger and Heather Holt, *Trade Union Membership in 2004* (London: Department of Trade and Industry, Apr. 2005).

40. Survey data reported in the European Industrial Relations Observatory, *Enterprise-level Social Dialogue in 2005 Assessed* (European Foundations for the Improvement of Living and Working Conditions, Dublin, Dec. 2005).

41. Joel Rogers & Wolfgang Streeck, *United States: Lessons from Abroad and Home*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, CO-ORDINATION 375 (J. Rogers & W. Streeck eds., 1995); Martin Höpner, *Unternehmensmitbestimmung under Beschuss: Die Mitbestimmungsdebatte im Licht sozialwissenschaftlichen Forschung*, 11 INDUSTRIELLE BEZIEHUNGEN 347 (2004).

established under German, Swedish, or Dutch law, but allows for representatives of employees in Member States where the company operates to be informed and consulted on the state and progress of the business. It is foremost a conduit for extending regulations existing in the home country of a multinational to its foreign operations.[42]

In March 2002, the European Council and Parliament adopted a Directive (2002/14/EC) establishing a general framework for informing and consulting employees.[43] This Directive applies to firms employing at least fifty employees. In the United Kingdom, Ireland, Poland, the Czech Republic, and the three Baltic States where the statutory obligation to create a works council is new, coverage may be limited to 100+ firms (or, on a transitional basis until 2007, to 150+ firms). Like the EWC, the 2002 Directive contains no provisions for co-determination or representation on company boards, nor does it specify sanctions if companies fail to inform workers timely and adequately about major economic decisions. In contrast to national law as existing in, for instance, Sweden, Germany, France, and the Netherlands, or as available under national agreements with the unions in Denmark, Finland, or Belgium, European regulations do not require management to reconsider or renegotiate its policies as a result of consultation, for instance, if unions or councils seek to avoid or mitigate adverse consequences for employees of company restructuring or merger plans.

C. Union Coverage

We can measure union coverage fully comparable with union density as the share of employees working in firms covered by the collective agreements negotiated by the labor unions. In all countries coverage rates exceed density rates; in some countries (France, Spain, Italy, the Netherlands, Germany, Austria, and Belgium) by a wide margin (Table 2).[44] As a rule of thumb, there will be collective agreements in enterprises where unions are present, though there are

42. Wolfgang Streeck, *The Internationalization of Industrial Relations in Europe: Prospects and Problems*, 26 POL. & SOC'Y 429 (1998).

43. Article 17 of the *Community Charter of Fundamental Social Rights of Workers* provided already for a "right" of information, consultation and participation of workers "taking account of the practices in force in different Member States," but this was non-binding.

44. There is hardly a correlation between the two measures. Taking all years together, the Spearman correlation coefficient between density and coverage rates in the 16 countries of this study is 0.28 and weakening over time.

exceptions.[45] In the United Kingdom, it is not uncommon that unions are present in the enterprise, but not recognized. It is also possible that agreements cover only part of the firm's workforce (although that part would normally also be outside the union). When unions and employers conduct their bargaining at sector level, workers in non-unionized firms will be covered if their employer is, by virtue of membership of the employers' association, signing the agreement. In most European countries high coverage rates are the product of employer organization.[46] In many EU countries, moreover, Labor Ministers have the power to extend collective labor agreements to non-organized employers, usually on request of the negotiating parties and on condition that they meet certain criteria of "representativeness" and "public value."[47]

Unlike union density rates, union coverage rates are remarkably stable and not trended downward. This reflects the continuation of multi-employer bargaining, usually with an added layer of company bargaining. In western Europe, the United Kingdom is the only case in which less than half of all employees is covered by collective bargaining and this is clearly related to the breakdown of sector bargaining and employer organization. In Germany since unification, we witness a process of erosion rather than breakdown, due to the withdrawal of small firms and those in eastern Germany from employers' associations and multi-employer agreements. Bargaining coverage in the private sector was more or less stable—around 70% or more—in West Germany before unification and is currently estimated at 59% in western and 36% in eastern Germany.[48] However, half of these non-organized firms nonetheless orient themselves toward the sector agreement and follow its basic features on pay and working time. This pushes the German coverage rate up by 10–15 percentage points. This practice of applying the agreement "by invitation" of the unions is quite widespread in Scandinavia and reflects the power of unions. Such quasi-voluntary wage following behavior thus retains an element of coordination and confirms that firms do want more

45. Where there is no bargaining, there is usually no recognized union presence either. For instance, in Germany only between 2–3% of the firms not covered by collective agreements had a works council in 2002. Together these firms employed some 7% of German employees (these included some large firms like IBM with an anti-union policy).

46. European Commission, *Industrial Relations in Europe 2004*, (Luxembourg: Office for the Official Publication of the European Communities, 2004).

47. Franz Traxler & Martin Behrens, *Collective Bargaining Coverage and Extension Procedures*, Dublin, Report for the European Foundation of the Improvement of Living and Working Conditions (2002).

48. Data from the IAB Panel Database, referring to 2004.

autonomy but nonetheless apply the union contract if that earns them an implicit "peace offer" and lowers the risk of conflict.

This is different in central and eastern Europe. With the exception of Slovenia, bargaining practices are unstable and fragmented in most CEE countries, with large parts of the economy beyond the reach of collective bargaining and with limited effectiveness of the agreements that exist. The company tends to be the main and most effective level of bargaining.[49] In Poland collective bargaining, which occurs primarily at firm level, has relatively little overall impact on labor relations, with many issues regulated either by legislation or by tripartite bodies at national (minimum wage) or regional level. Collective bargaining activity decreased after a hike in 2002 when, following a Constitutional Tribunal ruling that waived the duty to apply the terms of a dissolved collective agreement until a new one is signed, many firms rid themselves of older agreements in favor of new ones with less benefits for employees. Only about one million workers are covered and agreements rarely contain more favorable regulations than general labor law regulations. The State Labor Inspectors report for 2004 indicates that one in four collective agreements contains provisions in contravention with the law. In Hungary, workplace agreements reach a quarter of the employees and another 10–15 is covered by regional, group or sector agreements. Coverage varies from 50% in public transport and utilities, to only 10% in private manufacturing and services. In the Czech Republic 29% is covered by enterprise and 15% by multi-employer agreements. In Slovakia 37% of the firms and a somewhat larger proportion of employees is covered by sector agreements, with an additional small proportion covered by enterprise agreements.

D. Union Representation

Even though this may not come naturally to all twenty-five Member States, some of which lack a tradition of social dialogue or have abandoned its practice, social dialogue is a mainstay in the EU. Since Maastricht, it is explicitly acknowledged in the Treaty (Articles 136–139). The European Commission, as the Union's executive, goes out of its way in advocating social dialogue as a "force for innovation and change" and "condition for successful social and economic

49. The information in this paragraph is based on the *Annual Reviews for 2003 and 2004* on Poland, Hungary, Slovakia, and the Czech Republic, published on-line by the Dublin Foundation as part of EIRO, *available at* http://www.eiro.eurofound.ie/2004/01/index.html.

reforms."[50] In September 2005, a large gathering of European institutions and social partners met during a so-called Tripartite Summit for the purpose of celebrating "20 years of social dialogue,"[51] praising its achievements and declaring the social dialogue "an essential tool for the future."[52]

In most Member States and at the European level there are provisions for tripartite consultation with public authorities, for instance, over the implementation of European labor legislation, the adjustment of statutory minimum wages, and national macroeconomic and social policies. In Belgium, Luxembourg, the Netherlands, Ireland, Italy, Portugal, and Greece, these provisions are embodied in national councils for policy concertation with formalized consultation rights for the unions. Preparing for EU accession and with support of the European Commission and the International Labour Organisation (ILO), tripartite structures of this kind have been copied in Central and Eastern Europe (CEE). At the European level there is an elaborate structure for structured concertation between the European federations of labor unions and employers and European institutions (see Table 3).

50. European Commission, *The European Social Dialogue, a force for innovation and change*, COM (2002) 341final (June 26, 2002), *available at* http://europa.eu.int/eur-lex/en/com/pdf/2002/com2002_0341en01.pdf.

51. The start of the Social Dialogue is usually dated in 1985, when Jacques Delors became President of the European Commission and "launched the social dialogue" with a series of high-level meetings with representatives of Business and Labor. GEORGE ROSS, JACQUES DELORS AND EUROPEAN INTEGRATION (1995).

52. EIRO, *Summit marks 20 years of EU social dialogue*, (Oct. 2005), *available at* http://www.eiro.eurofound.ie/2005/10/feature/eu0510204f.html.

Table 3
Bipartite and tripartite relationships, 2000-2003

	BIPARTITE	TRIPARTITE
Sweden	strong	weak
Finland	strong	strong
Denmark	strong	medium
Germany	strong	weak
Austria	strong	medium
Netherlands	strong	medium
Belgium	medium	medium
France	weak	medium
Spain	medium	medium
Italy	medium	unstable
U.K.	weak	absent
Ireland	medium	strong
Poland	weak	unstable
Czech Rep.	weak	unstable
Slovak Rep.	medium	medium
Hungary	weak	medium
EU	weak	medium

Source: Based on EU, 2004

The Treaty gives the European social partners a special role as potential co-legislators in the social policy domain (Articles 138–139). In addition, preceded by more than a decade of Social Dialogue initiated and organized by the Commission, the European Council has met with unions and employers on the eve of its half-yearly summit meetings since 1997. Based on a Council decision of March 6, 2003, there is now a Tripartite Social Summit under responsibility of the Council Presidency and dealing with issues of macroeconomics, employment, social protection, and education and training. Since 1999 a so-called macroeconomic dialogue involves technical meetings of union and employer representatives with the Employment and Economic Policy Committees (with officials from Member States) and a sounding out of policies with representatives of the European

Central Bank, the Commission, and the Council Presidency. In a number of policy domains, for instance social security of migrant workers, the European Social Fund, vocational training, equal opportunity policies, and health and safety at the workplace, there are tripartite cross-industry advisory committees. At the sector level, finally, the Commission has promoted a large number of so-called sectoral social-dialogue committees.[53]

This elaborate structure has no parallel in other countries or regions of the world. In fact, it is more elaborate than what is found in most EU Member States, some of which, for example the United Kingdom, Germany, France, or Sweden, hardly engage in structured or formalized tripartite consultation. It is possible and even likely that the excess of formalism and complexity at the European level hides very thin structures of social relationships and trust between unions and employers, and the lack of steady informal practices. Thus, in most CEE countries, but also in France and the United Kingdom, bipartite relationships between employers and unions are lacking, unsteady, fragmented, and restricted to isolated occasions.[54] This is particularly true for the sector level.[55]

Despite recent attempts to refurbish the bipartite social dialogue at sector and cross-sector levels, bipartism at the European level is frail or absent.[56] Employers have no incentive to do serious business with the unions unless threatened by political initiatives from Council, Commission, and Parliament, although they have shown a certain resolve to defend the European social dialogue and Treaty Articles 138–139 in particular. At least some of past agreements, the joint pluri-annual joint agenda with the unions and the "voluntary" agreements on telework (2002) and work stress (2004), may be explained that way. In the sector committees the possibility of joint action seems mostly determined by offers of economic support from the Commission and by the possibility to gain exemptions from regulations following privatization.[57] It is certainly premature to see these developments as constitutive for European collective

53. *See* European Commission, *supra* note 46.

54. *Id.*; Maria Ládo & Daniel Vaughan-Whitehead, *Social Dialogue in Candidate Countries: What For?*, TRANSFER 9 (2003).

55. Youcef Ghellab & Daniel Vaughan-Whitehead, *Sectoral Social Dialogue: A Link to Be Strengthened*, *in* SECTORAL SOCIAL DIALOGUE IN FUTURE EU MEMBER STATES: THE WEAKEST LINK 1 (Youcef Ghellab & Daniel Vaughan-Whitehead eds., 2003).

56. European Commission, *DG Employment and Social Affairs, Report of the High-Level Group on Industrial Relations and Industrial Change* (Luxembourg: Office for the Official Publication of the European Communities 2002).

57. HESTER BENEDICTUS ET AL., THE EUROPEAN SOCIAL DIALOGUE: DEVELOPMENT, SECTORAL VARIATIONS, AND PROSPECTS (2002).

bargaining, as suggested by Marginson.[58] Pay, the right of association, the right to strike, and the right to impose lock-outs are explicitly and completely excluded from the competence of European-level institutions.

One might nonetheless value the attempts at institution building at the European level and the deliberate diffusion of tripartism to the new Member States as the expression of a genuine political will to involve labor unions (and employers) in social and economic policy, a political will that sets Europe apart from domestic politics in, for instance, the United States. Surely, in recent documents, the Commission and Council justify the social partnership with the unions (and with employers) pragmatically as a way to design and deliver policies better tailored to the needs of industry and supposedly meeting with less obstruction from employers and resistance from workers.[59] Even so, it also reflects an appreciation of the political and industrial relevance of labor unions and confers additional political legitimacy on them.

III. EUROPE'S CUSTOMIZATION OF LABOR REGULATION

I begin this part with considering changes in collective bargaining. The main argument is that firms want more control over wage settlements and less standardized payment systems across workers. Collective standards across similar (sector) product markets have come under increased strain with international competition. The historical response of the union movement has been to try and extend regulation to producers beyond the reach of bargainers through law and campaigning, both nationally and internationally. Because this was often also in the interest of nationally-based employers, the national state, and internationally leading countries and producers,

58. Paul Marginson, *Industrial Relations at the European Sector Level: The Weak Link?*, 26 ECON. & INDUS. DEMOCRACY 511 (2005).

59. The usual reference in recent documents and Council decisions, for instance the decision of March 6, 2003 to establish a Tripartite Social Summit, is the need of structural reforms and "deliver" the promises of Lisbon to become the most competitive economy of the world. *See*, *e.g.*, European Commission, *Partnership for Change in an Enlarged Europe*, COM (2004) 557 final(Aug. 12, 2004), *available at* http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0557en01.pdf; and European Commission, *Restructuring and Employment; Anticipating and Accompanying Restructuring in Order to Develop Employment: The Role of the European Union*, COM (2005) 120 final (Mar. 31, 2005), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0120en01.pdf. The report of the Employment Taskforce, chaired by Wim Kok, chose "better delivery" through investment in "partnership" as one of its key messages. *See Jobs, Jobs, Jobs—Creating More Employment in Europe* (Report of the Employment Taskforce, Nov. 2003), *available at* http://europa.eu.int/comm./employment_social/publications/2004/ke5703265_en.pdf.

the regulatory response of the unions has frequently provided a common agenda with domestic employers, national politicians, and "progressive" international forces such as the United States directly after 1945, the ILO and the European Community. However, with vastly greater competitive pressures and major employers less committed to their "country-of-origin," these coalitions have become unstuck or thrown in a minority.

In response, firms do not always favor company bargaining, at least not when labor unions still wield considerable political and industrial influence and there is a risk that distributional conflict will disturb work organization and unsettle supplier networks.[60] A sector agreement with wide-ranging hardship and opt-out provisions or a multi-level arrangement with minimum pay and conditions determined at sector level and procedures for additional bargaining under a "peace guarantee" offers more attractions. The competitive pressures on firms and wage bargainers resulting from the "one-size-fits-all" European monetary policy, add further fuel to this process of customization of contractual standards. The result is a bucket with more holes.

A. Opening and Softening Sector and National Agreement.

Judged by union coverage rates, European collective bargaining appears a masterpiece of stability. With the exception of the United Kingdom, the sector had remained the main bargaining unit or level in the EU before May 2004. Coverage has remained in the neighborhood of 70% of the employees. Labor unions have remained the privileged contracting partner, in spite of falling membership densities. Governments continue to give support to collective bargaining, by means of extending its reach to unorganized (small) firms and workers in marginal employment; by upholding the legal right of unions to engage in solidaristic industrial action; and by favoring broadly based unions, representing heterogeneous interests, over small firm- or occupation-based organizations.

The four major changes were the shift from multi-employer to single-employer bargaining in the United Kingdom; the move from national to sector bargaining in Sweden; the strengthening of sector bargaining over firm-level bargaining in Italy; and the establishment

60. Kathleen Thelen, *Why German Employers Cannot Bring Themselves to Abandon the German Model*, *in* UNIONS, EMPLOYERS, AND CENTRAL BANKS 138 (J. Pontusson, T. Iversen & D. Soskice eds., 2000).

of collective bargaining of any kind in central and eastern Europe. The trend toward decentralization of wage setting, with more room of maneuver for firms is checked by attempts to maintain, strengthen, or reintroduce some form of coordinated wage setting, sometimes reversing experiments with decentralized and uncoordinated bargaining (as in Ireland, Spain, and Italy). Preparing for membership in the EMU, many Member States negotiated tripartite Social Pacts and reformed their bargaining system in order to achieve outcomes compatible with monetary stability.

National (inter-sector) wage coordination has not disappeared but rather than producing enforceable central agreements it tends to work on the basis of recommendations. In a trend pioneered by the Dutch Wassenaar agreement of 1982, a looser type of coordination relying on setting guidelines or targets and working via moral suasion substituted for formal centralization of wage bargaining in a situation when economic, organizational, and cultural trends pushed firms and unions toward decentralized wage bargaining.[61] The success of this substitution depends upon many conditions like the governance capacities within associations, the ability of their leaders to gain each others' trust and that of their members, the articulation of national or sector agenda's and norms at the local or firm level, and procedures of democratic legitimacy, for instance through use of membership referenda.[62]

Beneath the surface of stability of sector bargaining, there has been a shift away from standard to minimum pay settlements in Denmark, the Netherlands, France, and Spain, or toward the use of "opening clauses" in Germany. The number of German employees covered by agreements with opening clauses increased to 6.6 million in 1999 and affects currently 40% of the firms under jurisdiction of *IG Metall*, the main union in manufacturing.[63] In the negotiations for 2004, German employers in engineering wanted a general "opening clause" with authority for local management and works councils to deviate from sector norms. In the final settlement, *IG Metall* gained the concession that they and the employers' federation need to be informed and give prior consent. Many larger firms negotiate special

61. Lars Calmfors et al., *The Future of Collective Bargaining in Europe*, *in* THE ROLE OF UNIONS IN THE TWENTY-FIRST CENTURY 1 (Tito Boeri, Agiar Brugiavini & Lars Calmfors eds., 2001); JELLE VISSER & ANTON HEMERIJCK, A "DUTCH MIRACLE": JOB GROWTH, WELFARE REFORM AND CORPORATISM IN THE NETHERLANDS (1997).

62. Lucio Baccaro, *What is Alive and What is Dead in the Theory of Corporatism*, 41 BRIT. J. INDUS. REL. 683 (2003).

63. For recent figures on local and company agreements, *see* http://www.boeckler.de/cps/rde.

"employment" or "investment" pacts with their workforce, often gaining considerable concessions with regard to longer working hours, fewer holidays, work on Saturdays, or abolishment of overtime pay.

Such developments are not unique. An innovation in the 2004–2006 agreements in Denmark is that local negotiators may conclude agreements above and below standards defined in the sector agreement. This means more flexibility for firms, but local union representatives may gain something, since deviations are allowed only in enterprises that have union-elected employee representatives and only by agreement. The "value" of Danish sector agreement can now only be measured *ex post facto*, after one or two years of supplementary local bargaining. A similar condition holds for Italy, where two-level involves larger firms in the north and center of Italy, giving rise to very different outcomes according to the size of the firm and where it is located.[64] In Spain, employers have on various occasions tried to rid themselves from so-called "wage guarantee clauses" that award compensation for price rises above the level predicted at the moment of negotiating the agreement. Unions have resisted this pressure, but employers may invoke a "drop-out" clause for situations in which companies face hardship.[65] The Irish central agreement of 2002–2006 contains similar "inability-to-pay" provisions, with the duty to report so as to allow central-level monitoring. In the Netherlands, many agreements now present a menu to local bargainers and *à la carte* provisions offering employees an annual choice to sell or buy working hours for extra pay and fringe benefits. A choice provision with regard to working hours is offered through "delegation clauses" in sector agreements in Austria and Belgium. In successive steps, beginning in 1982, French governments have allowed "derogation" from the law, thus seeking more space for company bargaining, especially over working hours. In the pluralistic union landscape of France this creates many tensions, since any labor union can sign a contract that binds all employees, including the members of (a) rival union(s). The new law on collective bargaining of May 2004 retains the principle that any of the five recognized national labor

64. Francesco Rossi & Paolo Sestito, *Firm-Level Bargaining, Collective Bargaining Structure and Decentralised Wage Setting*, *in* STUDIES IN LABOUR MARKETS AND INDUSTRIAL RELATIONS 95 (M. Baldassarri & B. Chiarini eds., 2003).

65. Guarantee clauses allow negotiators to take greater risks in face of uncertainty. Opening or opt-out clauses, instead, permit negotiators to be less thoughtful: "if people were stuck with agreements, they would take more care over constructing them" (an Irish labor court judge, commenting the change from voluntary to mandatory law in his country, in Tony Dobbins, *Irish Industrial Relations System No Longer Voluntarist* (Apr. 22, 2005), *available at* http://www.eiro.eurofound.ie/2005/03/feature/ie0503202f.html.

unions may sign a binding agreement, even if it acts on its own and represents a very small minority. However, the law introduces a new "right of opposition" to such agreements by the union(s) that gained a majority in the last works council elections. This is intended to encourage coalition formation among labor unions, for or against the agreement, and thus create a greater legitimacy for them, especially when they derogate from the law.

The same conflicts now apply to the public laws that extend the reach of collective agreements. The issues are everywhere the same: the introduction of general dispensation or opening clauses in collective agreements as a pre-condition for public recognition and extension to non-organized employers, and the assignment of negotiation rights to minority unions and non-union bodies. In the Netherlands, the law has remained unchanged but the rules have been tightened and collective agreements that qualify for extension must now exempt starting firms. In France, where extension plays a very large role especially in the setting of minimum wages and employment conditions, employers have proposed new rules, allowing more flexibility. In the negotiation over labor market reforms before the 2005 general election in Germany, employers and opposition demanded that sector agreements should legally be required to contain "opening clauses," but this was successfully opposed by the unions and put "on ice" by the grand coalition that took office after the election. The Polish Parliament, however, gave in to employer pressure and in 2002 adopted a revised Labor Code with a statutory "hardship clause." Accordingly, the signatory parties can agree to suspend a collective agreement for up to three years, if a company claims financial problems. Hungary went in the opposite direction and in 2002 a provision mandating non-union bodies to negotiate in the absence of unions was revoked. In the Czech Republic, instead, such a provision was introduced in the Labor Code.

B. Bargaining in the EMU

As argued elsewhere, this development toward allowing firms to exit from common standards if they cannot sustain them and offer firms and workers menus of alternatives from which to choose, is influenced not only by decentralizing tendencies in work organization and HRM, but also by macroeconomic developments, in particular the

shift to EMU.[66] The ensuing low inflation environment made it possible to write employment contracts for longer periods (two or three years), but nominal wage contracts have become less flexible in real terms. That will make open-ended and union covered contracts less attractive to employers and for firms or business units operating in volatile markets it will be another reason to shift new jobs and assign new hires to fixed-term or temporary contracts. Under such contracts employers can evade employment protection legislation and quickly and unilaterally cut nominal wages by not renewing the contract and hire cheaper replacements, within the limits set by the statutory minimum wage.[67] It may be expected that an enduring situation of low inflation and slow productivity growth will fuel employer demands for contractual flexibility and concession bargaining.

There are other means of adjustment. Reducing basic pay and introducing more flexible components tied to individual or company performance can (though not always does) make nominal earnings more flexible. Although variable pay currently affects an increasing number of manual as well as white-collar workers, it usually covers only a small proportion of their total earnings. But if the room for nominal wage increases is extremely limited, unions will not want that large part of what is likely to be very small is under control of management. They will fear that there is nothing left to bargain over at sector level or that sector bargaining loses its function when wage setting is no longer part of it or is reduced to fixing minimum wages only. This fear will be larger if the workplace institutions representing employees are fragile and beyond the control of the union.

Another form of adjustment that becomes salient under these conditions is when longer working hours are reorganized in such a way that higher rates for overtime or unsocial hours need not be paid. The main employers' organizations in countries with the highest wage cost levels and low inflation rates (e.g., Austria, Belgium, France, Germany, the Netherlands) are currently demanding a return to the 40-hour working week.[68] It would lower hourly wages without changing monthly wages, thus circumventing the resistance of workers

66. Jelle Visser, *Beneath the Surface of Stability: New and Old Methods of Governance in European Industrial Relations*, 11 EUR. J. INDUS. REL. 287 (2005).

67. Since the adoption of a statutory minimum wage in the United Kingdom and Ireland in 2000, 18 of 25 EU members have a legally defined minimum wage. The introduction of a statutory minimum wage in Germany is currently under review. In Scandinavian countries minimum wages are set by wide-covering collective agreements.

68. The average contractual working week varies between 35 and 39 hours, while the actual average lies somewhere between near 37–38 hours per week according to the ELFS (Eurostat).

against taking a cut in nominal wages. There are several recent examples across Europe of workers and local representatives conceding longer or more flexible working hours in order to avoid lay-offs and relocation.

A longer working week or year without additional pay is the mirror image of the union campaign for working time reduction without the loss of pay, starting some twenty-five years ago. That campaign, organized as the union's answer to rising unemployment, was the first European-wide union campaign orchestrated by the *European Trade Union Confederation* (ETUC) and had the support of most governments at the time. That campaign may now be dead, not because unemployment is lower, but mainly because the real wage increases and overtime earnings needed to convince workers to buy more leisure are no longer there. Consequently, labor unions have a hard time galvanizing support for what was often presented as an altruistic strategy. Shorter working hours may not have fulfilled the job redistribution promise that unions thought it would have. Yet, reversing the process in times of high unemployment, even if motivated by direct appeals to keep jobs from moving to cheaper places, is not a very appealing strategy for them.

C. Can International Coordination Close the Holes in National Bargaining?

As in the case of their working hours campaign, European labor unions have tried to lower the pressure on national wage bargainers by stepping up attempts at coordination, within the ETUC and its industry federations, as well as between national federations and unions in countries bordering Germany as the leading economy. In 1992–1993, facing the triple pressure of the Internal Market, the EMS recession and the Maastricht convergence criteria, the *European Metalworkers' Federation* (EMF) was the first to start a coordinated approach to bargaining over wages and working hours.[69] Several national wage bargaining rounds had run into difficulties and with employers explicitly praising lower settlements next door, wage bargaining was no longer seen as a national issue only. In response, the EMF created a system for information exchange followed by an exchange of observers and the adoption of common minimum

69. Torsten Schulten, *Europeanisation of Collective Bargaining: Trade Union Initiatives for the Transnational Co-ordination of Collective Bargaining*, *in* INDUSTRIAL RELATIONS AND EUROPEAN INTEGRATION 112 (B. Keller & H.W. Platzer eds., 2002).

standards on working hours (1996) and vocational training (2001). In 1998 the EMF adopted a bargaining coordination rule, specifying that settlements should be equivalent to the cost of living plus a balanced share of economy-wide productivity gains, and a working-time charter of maximum annual normal and overtime hours.

It is very hard to implement such rules across borders. Even if all measurement problems were solved and the value of all agreements could be estimated at the time of their signing, which they cannot, it must still be doubted if interests are sufficiently aligned to make the rule stick. There is a clear prisoner's dilemma. In fact, the wage moderation course of German wage settlements since 1999 has really put the pressure on its European competitors, which in countries with higher inflation rates for reasons perhaps unrelated to wage setting, like Italy and Spain, has led to a severe loss of competitiveness. As recently as 2001, the EMF concluded that its coordination rule was hardly acknowledged in national bargaining and that many settlements did not comply.[70] Other unions have tried to follow the example of the EMF, but their capacities are as yet even more limited. Expectations of a jointly governed wage norm in the old *Deutschmark* zone, as expressed in the Doorn declaration of 1998 uniting labor unions in Belgium, Luxembourg, the Netherlands, Germany, and later France, have been disappointing and been toned down in recent years.

National-level and sector bargaining incorporates a *solidaristic* element that is absent in international and company bargaining. By setting standards for the entire economy or industry and orienting these standards toward the performance of the average or above-average performing firms, unions (and employers' federations) create incentives for laggards to catch up or leave the industry. This can work as an upgrading and modernizing process with benefits for the remaining firms and workers, and is socially and economically efficient if capital is freed to move elsewhere and labor is retrained for other activities and redeployed without long delays and depletion of human and social capital. These incentives, based on and contributing to within-industry earnings equality, work only under conditions of closure. They will be weakened if inefficient employers can chose not to apply the agreement or are allowed to side with works councils and workers faced with job losses in their attempt to lower or disregard the industry's wage and social standards.[71] There is no such closure in

70. Marginson, *supra* note 58; Werner Schroeder & Reiner Weinert, *Designing Institutions in European Industrial Relations*, 10 EUR. J. INDUS. REL. 199 (2004).

71. STREECK, *supra* note 31.

international bargaining and it would require something resembling a European state to get there. European law-making in social matters has been moving in an opposite direction, however, and we have seen that national sector bargaining now contains more "holes in the bucket."

There is robust empirical evidence relating centralization of wage bargaining with pay compression.[72] Wage dispersion has increased most in countries and industries where labor unions have declined most and collective bargaining has decentralized. There is an inverse relation between union coverage and earnings inequality, as measured by the D9/D1 ratio.[73] The same inverse relation holds for bargaining centralization or coordination, but these associations have become weaker in the 1990s compared to earlier decades. This is likely to reflect the greater use of "opening clauses" and the fact that sector agreements now tend to set minimum rather than standard conditions. Scholars studying the national social pacts of the 1990s have noted that these pacts served the purpose of macroeconomic stabilization, with an added focus on labor market and welfare reforms, but that the traditional objectives of re-distribution of income, typical for such tripartite exercises in the 1970s, were glaringly absent.[74]

D. Post-Maastricht Social Policy Legislation: Seeking More Flexibility

In the 1990s, facilitated by the conditions for qualified majority voting as defined in the SEA 1986, the Maastricht Treaty and the annexed Agreement of Social Policy,[75] there was significant EU legislation on social policy. In addition to regulations on health and safety for regular and fixed-term employees, there were EU

72. Francine Blau & Lawrence Kahn, *Institutions and Laws in the Labor Market*, *in* HANDBOOK OF LABOR ECONOMICS 1399 (Orley Ashenfelter & David Card eds., 1999); TORBEN IVERSEN, CONTESTED ECONOMIC INSTITUTIONS: THE POLITICS OF MACROECONOMICS AND WAGE BARGAINING IN ADVANCED DEMOCRACIES (1999); OECD, *Wage-Setting Institutions and Outcomes*, EMPLOYMENT OUTLOOK 2004, 127 (2004); Michael Wallerstein, *Wage-Setting Institutions and Pay Inequality in Advanced Industrial Societies*, 43 AM. J. POL. SCI. 649 (1999).

73. European Commission, *Employment in Europe 2005* (Luxembourg: Office of Official Publications of the European Union, Luxembourg 2005).

74. Bernhard Ebbinghaus & Anke Hassel, *Striking Deals: The Role of Concertation in the Reform of the Welfare State*, 7 J. EUR. PUB. POL'Y 44 (2000); Marino Regini, *Between Deregulation and Social Pacts: The Responses of European Economies to Globalisation*, 28 POL. & SOC'Y 5 (2000).

75. This Agreement granted the United Kingdom an opt-out of post-Maastricht social policy legislation. In 1997, following the return to office of the Labour government, Britain ended its exceptional status.

Directives on the provision of contractual information (1992); revision of the collective redundancies directive (1992); workers' maternity rights (1992); working-time (1993); consultation and information rights in transnational undertakings (1994); posted workers (1996); parental leave (1995); part-time work (1997); fixed-term employment (1999); and information and consultation in national firms (2002). Some of these—parental leave, part-time work, and fixed-term employment—were based on framework agreements concluded by the European federations of labor and capital, as foreseen in Treaty Articles 138–139. On all these matters, the Commission had to dilute its original proposals, some going back to the early 1980s (European Works Councils; part-time and fixed-term employment), in order to overcome the opposition of employers and stalwart Member States. The original proposals concerning part-time, fixed-term, and agency work had been intended to place curbs on these forms of "atypical employment," while ensuring equal treatment with full-time and regular workers. However, in 1986, the same year when the SEA was adopted, there was a redirection of policy, secured by a coalition of the United Kingdom, Ireland, and Italy: "Community policy was henceforth to be redirected towards freeing up the labor market, and existing legislation was to be streamlined to accommodate small-to-medium sized enterprises that provided the source of job growth."[76]

The European Commission accepted, reluctantly at first, that a more flexible and pragmatic approach to harmonization was necessary in order to gain support in the Council. This dovetailed with greater emphasis on subsidiary.[77] In the new "voluntarist" approach Member States, firms and individuals could obtain the right to opt-out from common minimum standards through blanket exemptions (the United Kingdom; SMEs), controlled derogation on the basis of agreements (EWC, consultation and information rights, working time), or uncontrolled on the basis of individual exemptions granted to firms and employees (working time). There is a convergence between arguments based on market efficiency and fundamental rights, especially in the two Directives on Part-time and Fixed-term employment, resulting in a dilution of standards. Both Directives establish the principle of non-discrimination in comparable work, but

76. John T. Addison & Stanley W. Siebert, *The Course of European-Level Labour Market Regulation*, *in* LABOUR MARKETS IN EUROPE: ISSUES OF HARMONIZATION AND REGULATION 9, 13–14 (J.T. Addison & S.W. Siebert eds., 1997).

77. Mark Hall, *Industrial Relations and the Social Dimension of European Integration: Before and After Maastricht*, *in* NEW FRONTIERS IN EUROPEAN INDUSTRIAL RELATIONS 281 (R. Hyman & A. Ferner eds., 1994); Streeck, *supra* note 17.

exclude social security issues. The agreements on which these directives are based cite, in Preamble 5, the conclusions of the Essen European Council of 1994 calling for measures to "increase the employment-intensiveness of growth, in particular by a more flexible organization of work in a way which fulfils both the wishes of employees and the requirements of competition." This was given a prominent place in the European Employment Strategy, adopted in 1997.[78]

There was a shift in methods, which Claire Kilpatrick describes as "using types of legal instruction other than legally binding commands which are backed by sanctions for non-compliance."[79] In his defense of this technique, Collins justifies the opt-out, assuming "that alienable rights are more likely to achieve efficient outcomes than fixed entitlements," because standards forced on employers will be resisted and therefore have an employment cost.[80] Consequently, only standards that are negotiated, and in the end accepted by employers, can pass the test of efficiency. As to the choice between derogation by collective negotiation or by individual contract, the test should be, according to Collins, whether individual employees will have the bargaining strength to achieve the optimal outcome. In the case of Working Hours Regulation in the United Kingdom, introduced in 1998 as implementation of the 1993 Directive, the Labour government deemed that individual workers were strong enough and should be granted an individual opt-out from the maximum working week of 48 hours established by the Directive. The counter-argument that this discourages management and workers to seek more ambitious solutions, less reliant on a long hours culture, which even the British government identified as problematic because unproductive, related to work accidents, and an obstacle to family-friendly employment and female careers,[81] is relegated to second place in view of employers' opposition.

78. David R. Cameron, *Unemployment, Job Creation, and Economic and Monetary Union*, *in* UNEMPLOYMENT IN THE NEW EUROPE 7 (N. Bermeo ed., 2001); J. Goetschy, *The European Employment Strategy, Multi-level Governance and Policy Coordination: Past, Present, and Future*, *in* GOVERNING WORK AND WELFARE IN A NEW ECONOMY: EUROPEAN AND AMERICAN EXPERIENCES 59 (J. Zeitlin & D.M. Trubek eds., 2003).

79. Claire Kilpatrick, *Has New Labour Reconfigured Employment Legislation?*, 32 INDUS. L.J. 135, 139 (2003).

80. Collins, *supra* note 22, at 467.

81. *See* HOUSE OF COMMONS, FAIRNESS AT WORK, 1998, Cm. 3968, *available at* http://www.parliament.uk/commons/lib.research/rp98/rp98-099.pdf.

IV. LIMITS OF THE NEW PARTNERSHIP APPROACH

Directives 94/45/EC and 2002/14/EC provide frameworks, allowing Member States to use their own methods of implementation, possibly through a labor-management agreement. They are not meant to have much impact on employee representation and participation in firms in Member States that have stronger legislation or framework agreements in place. Article 13 of the EWC Directive granted firms a general opt-out from its requirements if they had negotiated an agreement with employee representatives or unions in the Member States where they operated. Many availed themselves of this possibility. The requirements that these agreements had to fulfill were rather minimally defined, as the EU legislators had wanted to reward "trailblazing" MNCs in Germany and France, and were only too happy to divide the employers in their opposition against regulation on transnational companies. The 2002 Directive calls for "appropriate measures in the event of non-compliance" and "adequate sanctions to be applicable in the event of infringement," but this is left to Member States and not supposed to create an administrative burden on firms.

Implementation will probably be a large issue, especially where the capacities of the state with regard to enforcing labor laws are poor and no nation-wide or sector agreements exist that can pave the way for employee representation and help monitoring implementation. This is already an issue in the new Member States with regard to the *acquis communautaire* of EU laws, regulations, and EJC jurisprudence.[82] According to a recent study, only in Hungary and Slovenia are councils comparable with the fully-fledged types in Germany or Austria and there is a clear lack of workers' representation, especially in companies without labor unions, the number of which is growing.[83]

The approach of both Directives is germane to a partnership philosophy that is seen as crucial for gaining employee support for sustaining an ongoing process of company restructuring associated with globalization and the knowledge economy. In this philosophy, firms are presented as a "unitary" system in which all interests are assumed to be in common and employee consultation serves an integrating and trust-building function. In this idealized world, there

82. European Community, *supra* note 46, at ch. 6.

83. European Foundation for the Improvement of Living and Working Conditions, *Social Dialogue and Conflict Resolution in the Acceding Countries*, (2004), *available at* http://www.uni-mannheim.de/edz/pdf/ef/04/ef0421en.pdf.

is no room for sanctions or hard bargaining with "external" interests like labor unions. Paradoxically, however, the same "unitary" firm is increasingly held accountable to only one interest, that of financial interests and shareholders, a development that is encouraged by the European Commission's departments responsible for the Internal Market, competition law, and financial markets, albeit not without criticism from Parliament, the unions, and some Member States.[84] In their study of "partnership" in U.K. firms, Deakin et al. show that institutions like employee information and consultation are distributive regarding the power of various stakeholders.[85] Only if willing and free to interpret the requirements of financial markets and securities' legislation loosely can management develop a strategic view in which the interests of *all* stakeholders count, with partnership with unions or works councils playing a role of significance.

Some scholars have expressed high expectations of the EWC as precursor of the Euro-company and European collective bargaining.[86] There is a lot of activity varying from meetings to negotiations over the institution itself, but there is a dearth of research on outcomes. In her careful study of eighteen Dutch-based EWCs, José Lamers found that EWCs helped companies mobilize support for company objectives, promote organizational identity, and ease the resolution of conflict over international restructuring proposals.[87] Evaluating the past ten years and wanting to sound positive, the European union and employers' federations adopted a so-called "joined opinion" in which they claim that EWCs often improve the information flow between workers and management, develop a corporate culture in transnational groups, and gain acceptance for necessary change.[88] In their study of Swedish-based EWCs, Huzzart and Docherty uncovered that both labor unions and management wanted to keep the EWC informal and that neither of them saw these councils as a vehicle for

84. *See* European Community, *supra* note 46.

85. Simon Deakin et al., *Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations* (Centre for Business Research, University of Cambridge, Working Paper No. 200, 2001).

86. EUROPEAN WORKS COUNCILS: NEGOTIATED EUROPEANIZATION, BETWEEN STATUTORY FRAMEWORK AND SOCIAL DYNAMIC (Wolfgang Lecher et al. eds., 2002); Paul Marginson, *The Eurocompany and European Industrial Relations*, 6 EUR. J. INDUS. REL. 9 (2000); Paul Marginson & Keith Sisson, *European Collective Bargaining: A Virtual Prospect?*, 36 J. COMMON MARKET STUD. 505 (1998).

87. JOSÉ LAMERS, THE ADDED VALUE OF EUROPEAN WORKS COUNCILS (1999).

88. *Lessons learned on European Works Councils*, joint declaration by the ETUC and the three European federations representing business (UNICE, UEAPME and CEEP) Apr. 7, 2005, *available at* http://europa.eu.int/comm./employment_social/social_dialogue/docs/300_20050407_ewc_en.pdf.

collective bargaining.[89] Like German or Dutch unions, but unlike those in southern Member States with weaker legislation, Swedish unions feel that national law and national labor relations give them more leverage in securing concessions from management. Companies do generally look unfavorably at the prospect of international bargaining. Consequently, European Works Councils in the eight Swedish MNCs of their study "did not function as a means for labor to significantly check the power of multinationals" and they found "little evidence, moreover, to suggest the evolution of transnational bargaining structures through EWCs."[90] Another outcome would have been very surprising.

V. LIMITS OF "NEW GENERATION" TEXTS AND "VOLUNTARY" AGREEMENTS

Since the Agreement on Social Policy, there are two routes to implement agreements negotiated by the European federations of labor and business. Under Article 139.2 these agreements shall be implemented either "in accordance with the procedures and practices specific to management and labor and the Member States" or, at the joint request of the signatory parties, "by a Council decision on a proposal by the Commission." The three agreements reached in 1995 (parental leave), 1997 (part-time work), and 1999 (fixed-term employment) were implemented by a Directive, based on a Council decision. Implementation at the national level is usually done by law or a combination of national-level agreement between the social partners and the law, as happens in Belgium.[91]

In recent years and rather surprisingly, the social partners have reached two European level agreements, on telework (2002) and on work-related stress (2004), which they have chosen to implement "in accordance with the procedures and practices specific to management and labor and the Member States." This means that the social partners themselves are responsible for implementing and monitoring these agreements. At the time of signing the Maastricht Treaty, legal and industrial relations experts doubted that this route would ever be

89. Tony Huzzard & Peter Docherty, *Between Global and Local: Eight European Works Councils in Retrospect and Prospect*, 26 ECON. & INDUS. DEMOCRACY 541 (2005).

90. *Id.* at 543.

91. Denmark is, to my knowledge, the only Member State where Directives concerning labor law and employment relations are implemented exclusively through nation-wide central agreements. However, in response to criticism of the EJC and the European Commission recent agreements contain a special provision to ensure application to non-members in order to comply with European law.

used, given the huge diversity in rules and practices across Member States. They assumed that such agreements, being a substitute for legislation, ought to have an *erga omnes* effect, which, given varying and incomplete coverage rates, cannot be obtained without a state guarantee.[92] Such a state guarantee is lacking as was made clear by an interpretative declaration annexed to the Agreement and, later, to the Amsterdam Treaty. This annex clarifies that the arrangement under article 139(2) "implies no obligation on the Member States to apply the agreements directly or work out rules for their transposition, nor any obligation to amend national legislation in force to facilitate their implementation."[93] There is nothing that prevents Member States from implementing these agreements through legislation, but from a European legal perspective they are entirely free to choose not to do so. The unequal application of minimum labor regulation across the territory of the Union, problematic if seen from the perspective of traditional labor law and its concern with equality, is fully consistent with the neovoluntarist logic of European social policy and the new focus on efficiency and competitiveness.

Presently, employers are rather in favor of such "voluntary" deals, in contrast to their earlier hostility to this extra-legal approach. We observe a recent upsurge of so-called "new generation texts," for instance on corporate social responsibility and continued vocational training, with sector or peak associations of labor and capital agreeing on common guidelines or targets, making recommendations to their national member organizations and committed to undertake some form of monitoring or benchmarking.[94] This approach tallies nicely with a greater emphasis on bipartite relationships, as recommended by the High-Level Group on Industrial Relations and Change[95] and in line with the Open Method of Coordination (OMC) as the new mode of EU policymaking in areas where Member States oppose legislation but the EU cannot afford to be seen doing nothing.[96]

92. CATHERINE BARNARD, EC EMPLOYMENT LAW 92 (2000); Brian Bercusson, *Maastricht: A Fundamental Change in European Labor Law*, 23 INDUS. REL. J. 177, 181 (1992); ROGER BLANPAIN, EUROPEAN LABOR LAW 102 (2002).

93. Declaration 27 annexed to the Amsterdam Treaty. The original wording, included in Agreement on Social Policy and signed by the European union and employers' organizations in their agreement of October 31, 1991, was "that the delivery mechanism via national collective bargaining has no legal value." Apparently, this had been a concession to the *Confederation of British Industry* (CBI) during the negotiations (communication of Ann Branch).

94. Ann Branch, *The Evolution of the European Social Dialogue Towards Greater Autonomy*, 21 INT'L J. COMP. LAB. L. & INDUS. REL. 321 (2005); European Community, *supra* note 46.

95. European Community, *supra* note 56.

96. Jonathan Zeitlin, *The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Reality, Reform Strategy*, *in* THE OPEN METHOD OF CO-ORDINATION IN ACTION:

Like OMC, "voluntary" agreements and "new generation" texts are supposed to work on the basis of the cajoling effects of public recommendations and expert consensus on "best practice." They offer menus of alternatives from which to choose and hopes to increase homogeneity among national regimes through comparison, benchmarking, and exhortation.[97] In some Member States the "voluntary" agreement on telework may provoke new laws or agreements with *erga omnes* effect; in others it may lead to central agreements binding only the signatory parties and their members; in yet others they may become the benchmark of social standards and targets for contracting (the most frequently used option to date); and they may also fail to be gain much attention at all. This is not all that different from the risk that is taken with European labor regulation enshrined in Directives, the transposition of which is always left to the Member States. "To date, the equal treatment principle defended by the European Union has always meant equality at national level."[98] For instance, there are significant differences between the minimalist way in which the United Kingdom has, after 1997, implemented the Directives on working time, parental leave, or part-time work, compared with Germany, France, the Netherlands, or Sweden.[99]

Yet, even minimalist transpositions of EU Directives led to the introduction of minimum rights that had previously been denied to British workers. It may be questioned whether "voluntary" agreements will even do that. Voluntary in this case means, in the understanding of employers, non-binding, a recommendation of "good practice" to member organizations and firms, possibly with a commitment to monitoring. This view contrasts with the interpretation of the unions, which see these bipartite agreements as having been negotiated without recourse to the European legislature but nonetheless obliging both sides "in honor" to do everything possible to ensure full implementation, if need be by calling upon the European legislature and the national state to assist with proper legislation. This dispute has remained unresolved, complicated by not just the resistance of especially British employers but also by the weakness of unions and employers in most CEE Member States. The

THE EUROPEAN EMPLOYMENT AND SOCIAL INCLUSION STRATEGIES 447 (J. Zeitlin & Ph. Pocher, with L. Magnusson eds., 2005).

97. Streeck, *supra* note 17.

98. Antoine Jacobs & Alphonso Ojeda Avilés, *The European Social Dialogue—Some Legal Issues*, *in* A LEGAL FRAMEWORK FOR EUROPEAN INDUSTRIAL RELATIONS 60, 68 (B. Bercusson et al. eds., 1999).

99. GERDA FALKNER ET AL., COMPLYING WITH EUROPE: EU HARMONISATION AND SOFT LAW IN THE MEMBER STATES (2005).

Commission, while stressing the need for effective monitoring and implementation, but increasingly unable to push social legislation through a Council of twenty-five Member States, is forced to sit on the fence. In its recent communication on partnership[100] the Commission retracts from its earlier enthusiasm for "voluntary" agreements and advocates a limitation of the scope of this route, ruling out its use in cases where "fundamental rights or important political options are at stake" or when previously adopted Directives need revision. The Commission also reserves for itself the "institutional obligation" of monitoring the implementation of these agreements if they are initiated by consultations under Article 138.

The view that European social policy is about establishing uniformity in labor regulation, adjustment to a common model, or harmonization of rules and regulation is a complete exaggeration. There is however, potentially, a *dynamic harmonization* view, which projects social policy as a dynamic process in which transnational labor standards interact with economic integration to produce an upward movement in labor conditions and social provision. This does not imply uniformity or equal speed, but what it does require is that Member States do not regress to lower levels of provision resulting from competitive underbidding.[101] It is doubtful whether current EU legislation satisfies this condition.

For instance, the Posted Worker Directive (96/71/EC) helps Member States that want to protect their higher standards to extend the regulations to foreign companies and workers operating in their territory, and thus defends the principle of territorial integrity common to national labor law. The only requirement, consistent with EU law, is that national regulations can only bind foreign firms and workers operating in their territory to rules that apply equally to domestic firms and workers. If Member States want to avail themselves of this protection in, for instance, the case of minimum wages, they must either have a statutory minimum wage or extend the collective agreements that set the minimum wage for an industry or economy. Article 3.10 of the Directive gives Member States the option to declare the relevant stipulations of collective agreements that have been declared binding applicable to other sectors. Austria,

100. *Partnership for Change in an Enlarged Europe: Enhancing the Contribution of the European Social Dialogue*, COM (2004) 557 final (Aug. 12, 2004), *available at* http://europa.eu.int/eur-lex/en/com/cnc/2004/com2004_0557en01.pdf.

101. Simon Deakin, *Integration Through Law?: The Law and Economics of European Social Policy*, *in* LABOUR MARKETS IN EUROPE: ISSUES OF HARMONIZATION AND REGULATION 118 (J.T. Addison & W.S. Siebert eds., 1997).

Belgium, Spain, Finland, France, Greece, Portugal, and Luxembourg have availed themselves of this possibility; the Netherlands is currently preparing legislation. Article 3.10 also allows host countries under certain restrictions to expand the hard core of labor law and include employment protection rights beyond minimum conditions, but only where this does not contravene the Treaty. The key point of the Directive is that it leaves Member States fully free not to have regulations. While limiting the full potential of the key "country-of-origin" doctrine, reaffirmed in the SEA 1986 as the main tool of market integration, the Posted Worker Directive does nothing to prevent regression resulting from regime competition.

A brief discussion of the implementation of the Working Time Directive (93/104/EC), currently under review, may serve to illustrate this point. This Directive allows Member States to derogate and set another reference period for calculating average working hours if so decided by collective agreement. Article 18(1)(b) also allows countries to make use of a so-called individual opt-out from the obligation to limit the maximum working week to 48 hours, if individual workers are willing to sign.[102] Only the United Kingdom availed itself of this possibility when, in 1998, it decided to implement the Directive as part of Labour's acceptance of the Social Chapter of the Maastricht Treaty.

New Labor presented the new "Working Hours Regulation" as contributing to fairness and efficiency, helping firms and workers to overcome the unproductive "long hours" culture existing in Britain while keeping the regulatory burden on firms to a minimum. Seven years on, research shows that the individual opt-out continues to be widely used; its application being very easy and driven by employers' perceived need of flexibility and workers' desire to top up earnings.[103] Overtime has remained a "flourishing institution," used habitually and indiscriminately, rather like Flanders' had described it back in the 1960s.[104] The number of employees who work over 48 hours per week has in fact risen from 3.3 to 4 million people (16% of the employed), with 1.5 million working 55 weekly hours and more. Thus, the unproductive long hours culture, identified by New Labor as

102. This provision has a limited life span and must be reconsidered seven years after the Directive is in force, in this case November 23, 2003.

103. Catherine Barnard, Simon Deakin & Richard Hobbs, *Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(B) of the Working Time Directive in the UK*, 32 INDUS. L.J. 223 (2003); Linda Dickens & Mark Hall, *The Impact of Employment Legislation: Reviewing the Research* 7 (London: Department of Trade and Industry, Employment Relations Research Series No. 45 2005).

104. ALAN FLANDERS, THE FAWLEY PRODUCTIVITY AGREEMENTS (1964).

problematic when it gained office, continues to bedevil employers and trap workers.

How much of this is choice, we cannot know for sure. The *Confederation of British Industry* (CBI) reports that in 2004 nearly one-third of the employees in their member firms had signed the individual opt-out. A poll commissioned by the *Trades' Union Congress* (TUC) in 2003 found that a quarter of the employees who had signed an opt-out felt that they had no choice and that two-thirds of the employees who actually worked more than 48 hours weekly said that they had not been asked to sign an opt-out.[105] Barnard et al. write that the opt-out is often presented as a "standard contract term," but they also cite union officials who admit that their members just sign because they need or want the money.[106] Dickens and Hall conclude that the "reliance on the individual opt-out has been the key route to flexibility" and that the absence of employee representation and collective bargaining in many U.K. firms "may well have inhibited the flexible application of the statutory rules."[107] Weakening collective bargaining turns out to have created a handicap for making full use of European law. The Working Time Directive, and national legislation in many Member States, allows derogation from the law by collective agreement, thus creating a framework as well as incentive for negotiating the annualization of working hours, longer reference periods, and limiting the use and cost of overtime. A major reason why British employers insist on the individual opt-out lies in the fact that, with the decline of collective bargaining, derogation by means of collective agreement with the unions is only available to a minority of them.

If the government's aim had been to stimulate "a high skill, high productivity economy achieved through high performance workplaces,"[108] this has limitations in the British case. If the aim or potential of the Working Time Regulation had been to modernize work practices and drive out an unproductive long hours culture, this was certainly frustrated by the easy and uncontrolled opt-out provision in the law. Yet, the Chancellor of the Exchequer defends British flexibility as a competitive advantage and an example for

105. *Cited in* Dickens & Hale, *supra* note 103.
106. Barnard, Deakin & Hobbs, *supra* note 103.
107. Dickens & Hall, *supra* note 103, at 15.
108. Department of Trade and Industry, *High Performance Workplace: The Role of Employee Involvement in a Modern Economy* (July 2002), *available at* http://www.dti.gov.uk/er/consultation/informconsult.pdf.

Europe.[109] Meanwhile, the European Commission is busying itself with a revision of the Time Directive. Its most recent proposals are very modest and fail to address the criticisms of British and European labor unions and of the European Parliament. The Commission seems resigned to the British opposition to removing the individual opt-out, but insists on better checks on its proper use opt-out, limiting the possibility that employees sign upon taking employment. Unrelenting opposition of the British government to any limitation of the opt-out has prevented a decision in the Council, backed by an unlikely deal with the German government, in exchange for British assurances that it will not support the Commission's proposals to strike down the special voting arrangements protecting German firms like Volkswagen against foreign takeovers.

This is a clear illustration that Member States, while negotiating social policies and labor rights guard the national economic interests as they perceive them: a particular version of flexibility to which the British are now hooked and a particular version of corporate governance that the Germans associate with quality production and export success. The examples also show how Member States are inclined to keep the impact of European legislation on their own institutional arrangements to a minimum. European social policy regulation does not suspend regime competition in Europe and although it does not necessarily revert to "lowest common denominator" policies, it leaves Member States to their own defenses.

V. CONCLUSION

Will labor market regulation by collective intermediaries like labor unions be squeezed out by a liberalizing state from above and an expanding market from below? In Part II of this article we saw that, despite decline, labor unions are still a significant social and political force. In larger workplaces in the private sector and in all of the public sector, unions are present. With few exceptions they are regarded by governments and by mainstream employers as legitimate and perhaps indispensable partners. At the European level and many Member States this is expressed through various forms of social dialogue. However, labor unions have weakened and their under-representation among the young, in the new service sectors and among the growing numbers of those in non-standard employment

109. Catherine Barnard et al., *Fog in the Channel, Continent Isolated: Britain as a Model for EU Social and Economic Policy?*, 34 INDUS. REL. J. 461 (2003).

contracts, challenges their political and industrial legitimacy and power. Unlike their counterparts in the United States, New Zealand, and currently Australia, political attacks on labor unions in Europe have been rare, with the exception of the United Kingdom under the Conservative governments (1979–97). In general the public mood in Europe has been favorable to (moderate) unionism and there is still a basis in public opinion considering labor unions a "core institution of democratic capitalism."[110] But the institution has seen better days and its future is uncertain.

Europe's labor unions have had a large and positive contribution in European integration from the early days of the European Coal and Steel Community[111] to the introduction of the Euro.[112] They have actively supported the enlargement of the EU to central and eastern Europe and the ETUC has come out in support of opening borders to migrating workers from CEE countries.[113] Popular opposition against further liberalization of services proposed by the Commission,[114] which is also organized and expressed by Europe's mainstream labor unions, may be a harbinger of change. The SEA and the "Europe 1992" program had abolished border controls and eliminated obstacles to cross-border trade resulting from national differences in indirect taxes and technical regulations. But barriers to cross-border consumption and production of services, now valued at about 60–70% of the total EU internal product, still remain. The Services' Directive proposes freedom of establishment for service providers and free movement of services by fully applying the country-of-origin principle, already used in EJC case law. The statement, in the original draft, that the Directive does not affect existing labor law and employment regulations is disingenuous, however. The possibility to protect social

110. Wolfgang Streeck & Anke Hassel, *Trade Unions as Political Actors*, *in* INTERNATIONAL HANDBOOK OF TRADE UNIONS 335, 362 (J. Addison & C. Schnabel eds., 2003).

111. ERNST HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL AND ECONOMIC FORCES, 1950–1957 (1958).

112. EUROS AND THE EUROPEANS: MONETARY INTEGRATION AND THE EUROPEAN MODEL OF SOCIETY (Andrew Martin & George Ross eds., 2004).

113. Currently, all but three (United Kingdom, Ireland, Sweden) EU15 Member States have placed restrictions on the migration of workers from CEE countries, but it is expected that most of them will drop restrictions in May 2006.

114. January 2004 the European Commission submitted a proposal for a Directive on services in the internal market, the so-called "Bolkestein Directive," which soon became a symbol for the failing social dimension in European integration through market making and played a major role in the rejection of the Constitutional Treaty by popular referendum in France in May 2005. European Commission, *Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market*, COM (2004) 2 final (Jan. 13, 2004), *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2004/com2004_0002en03.pdf.

standards by extending the reach of national regulations to workers posted by foreign companies, as is allowed under the Posted Workers Directive (96/71/EC), will be weakened by the removal of administrative controls on employing firms and service providers, brandished as a tool of protectionism by the framers of the Service Directive. The lack of European regulation of the market for temporary employment agencies, especially when they operate across national borders, makes it easy to circumvent standards. Finally, the lack of clarity on the definition of "worker" and uncontrolled use of economically dependent self-employer workers, contracted by "employers" out of state, makes it very difficult to actually control the observance of standards. In February 2006, the European Parliament voted in favor of a diluted version of the Directive, exempting social and health services as well as temporary agencies and limiting the applicability of the country-of-origin principle. The *Financial Times* commented that the diluted Services Directive, unlike the original proposal, creates "unfortunately no legal possibility of east European or any other service provider of floating, say, France's 35-hour working week."[115]

Policies that seek to raise the level of individual employee rights, for instance in favor of flexible working hours or against discrimination in the workplace, but at the same time weaken collective standards and representation of employees in labor unions or works councils, are deeply contradictory. Individual rights, in particular where they present or suppose choices of employees and firms, rely on awareness, confidence, foresight, and, if need be, support. Unions and other intermediaries have an important role to play in this. Based on evidence for the United Kingdom, Brown et al. report "an independent and significant association" between union density and the provision of written details of rights.[116] Not only do labor unions raise the awareness of choice and knowledge of contractual details, "the extent to which employers are complying with their legal obligations depends significantly on the presence of active trade unions at workplaces and organizational level." They conclude that "collective procedures are the custodians of individual rights."[117] We might take that a step further. Where representation and collective procedures offer protection in defense of choice,

115. Editorial Comment, *Dilution is Disservice to EU's Draft Directive*, FINANCIAL TIMES, Feb. 10, 2006, at 14.

116. Brown et al., *supra* note 10, at 627.

117. *Id.*

participation, and full and equal access to individual rights, substantive standards offer ambition toward more productive and social standards. This article has shown that changes in European integration and labor regulation went in the direction of less collective as well as less ambitious standards.