CONVERGENCE AND/OR DIVERGENCE IN LABOR LAW SYSTEMS?: A EUROPEAN PERSPECTIVE

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I. PRELIMINARY REMARKS

In their famous book on *Industrialism and Industrial Man: The Problems of Labor and Management in Economic Growth* already forty-six years old, Kerr, Dunlop, Harbison, and Myers suggested that there is a global tendency for technological and market forces associated with industrialization to push national industrial relations (including labor law systems) toward uniformity or "convergence."[1] The modern version of this convergence hypothesis is the widespread globalization approach. Pressures associated with globalization are considered to be so overwhelming that they leave little scope for national differences. The inevitable result is a "race to the bottom." Or as Kohler in a recent article puts it: "Wherever one looks, one sees the same thing: a steep and continuing drop-off in union-membership, a decline in collective bargaining and in European countries at least, mounting pressure to diminish the sorts of elaborate legal protections traditionally afforded to individual employees."[2] However, it may well be doubted whether this is already the final answer to the title question of this short contribution.

The old convergence thesis by Kerr and others as well as the crude version of the globalization approach have met strong resistance in scholarly debates. It has been argued that national governments faced with similar economic pressures still have a choice to respond to these challenges in very different ways, not only in labor but also in monetary and fiscal policy. And in particular the fact was pointed out

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1. CLARK KERR ET AL., INDUSTRIALISM AND INDUSTRIAL MAN: THE PROBLEMS OF LABOR AND MANAGEMENT IN ECONOMIC GROWTH 384 (1960).

2. Thomas C. Kohler, *Comparative Labor Law: Some Reflections on the Way Ahead*, 25 COMP. LAB. L. & POL'Y J. 87, 90 (2003)

that differences in national-level institutions are likely to respond to common economic pressures in different ways.[3] This institutional approach turned out to be an important correction of the simplistic globalization perspective. In the meantime the two lines of thinking have been added by an integrated approach focusing on the interaction not only with national institutions as isolated and independent factors but also adding the strategic choice dimension on how the nation-states shape the interplay between employers, unions, and employees in seeking economic growth and development.[4] In short and to make the point: the relationship between the pressures associated with globalization and the effects on national labor law systems seems to be much more complex than the simplistic and one-dimensional globalization approach suggests.

Empirical research seems to support this hypothesis. To just give two prominent examples: In a research on the telecommunication industries in ten countries Katz found similarities across countries in relation to employment security, work organization, training, compensation, and governance. However, he had to admit that important national differences remain.[5] Bamber, Lansbury, and Wailes again on the basis of ten country reports provide little evidence for the blunt convergence thesis.[6]

Is "converging divergence," as Katz and Darbishire in the title of a recent book[7] suggest it, the way to escape the problem? At least it is enlightening in so far as it shows that both is true: there may be a tendency to convergence but national differences continue to play a role.

In spite of all the modifications of the simplistic version of the globalization theory the core of it remains: Pressures associated with globalization are undoubtedly a driving force of convergence toward lower standards. Therefore, the question whether there are counteracting mechanisms fighting this trend is becoming crucial. In this context the politics of setting universal minimum standards as

3. For this approach see Richard Locke & Kathleen Thelen, *Apples and Oranges Compared: Contextualized Comparisons and the Study of Comparative Politics*, 23 POL. & SOC'Y 337 (1995).

4. *See*, *e.g.*, Nick Wailes, *The Importance of Small Differences: The Effects of Research Design on the Comparative of Industrial Relations in Australia and New Zealand*, 10 INT'L J. HUM. RESOURCE MGT. 1006 (1999).

5. TELECOMMUNICATIONS: RESTRUCTURING WORK AND EMPLOYMENT RELATIONS WORLDWIDE (Harry C. Katz ed., 1997).

6. INTERNATIONAL AND COMPARATIVE EMPLOYMENT RELATIONS—GLOBALISATION AND THE DEVELOPED MARKET ECONOMIES (Greg J. Bamber et al. eds., 4th ed. 2004).

7. HARRY C. KATZ & OWEN DARBISHIRE, CONVERGING DIVERGENCE: WORLDWIDE CHANGES IN EMPLOYMENT SYSTEMS (2000).

conducted by the International Labor Organization (ILO) is of utmost importance as in particular Hepple in his recent book on "Labor Laws and Global Trade" has shown. Therein he presents an optimistic view in this respect to turn the "race to the bottom" into a "race to the top."[8]

Instead of discussing the role of countervailing powers on a universal scale this contribution will focus exclusively on the question whether the regional arrangement in Europe, the supranational European Community (EC) as part of the European Union (EU), has the potential to be an efficient force against the indicated trend of lowering down convergence.

II. THE IMPACT OF EUROPEAN COMMUNITY-LAW: TWO EXAMPLES

A. The General Framework

The starting point is utmost diversity between the different Member States. This diversity has increased significantly due to the recent EU-enlargements where ten Central and Eastern European countries were integrated into the Union. The differences of the labor law and industrial relations systems between the Member States are deeply rooted in each country's history and culture. They cannot easily be changed. Therefore, even if the European Community is a supra-national entity with legislative, executive, and judicial powers it was clear from the very beginning that harmonization leading to uniformity cannot be the goal. The strategy from the very beginning, therefore, was to establish minimum-conditions by way of a very specific legislative instrument, the so-called Directive. The roof-confederations of both sides of industry on the European level play an important role in the production of such Directives. A Directive only defines the purpose to be achieved and fixes some cornerstones but leaves all the rest to the implementation by the Member States. Therefore, each Member State has the possibility to adapt the European rules into its very context in a different way.

Such minimum standards in the meantime cover quite a few areas, among them discrimination in the broadest sense, health and safety, working time, and atypical forms of employment. There is no systematic approach whatsoever. However, the amount of minimum standards is increasing. The European Court of Justice (ECJ) has

8. BOB HEPPLE, LABOR LAWS AND GLOBAL TRADE (2005).

played a predominant role in monitoring the transposition of these European rules into national law, thereby quite often correcting national legislation. Of course quite a few important areas still are left out, for example protection against individual dismissals.

It should be added that the policy of the European Union is guided by fundamental rights. The ECJ in its jurisdiction gradually—but not in a systematic way—developed fundamental rights.[9] There was, however, a continuous claim for integration of fundamental rights into the Treaty. This did not yet fully succeed. But at least after a long-lasting and very controversial debate in 2000 at the summit of Nice the Charter of Fundamental Rights of the EU[10] was passed as a legally-non binding declaration, expressing the consensus of all present Member States. It was supposed to become part of the Constitutional Treaty whose ratification unfortunately failed so far (for reasons that have nothing to do with the Charter). But even now the Charter already plays an important role as point of orientation.

Within the Charter there is a specific chapter for fundamental social rights under the title "solidarity." But even outside this chapter there is a whole set of such rights of utmost importance in the social context, including the freedom of association, which implies the right of everyone to form and to join trade unions for the protection of his or her interests (Art. 12). The chapter on "solidarity" as such contains twelve core rights, including the workers' right "to working conditions which respect his or her health and dignity" (Art. 31 par. 1), the right of collective bargaining and collective action that is guaranteed as a subjective right either for workers and employers or for their respective organizations (Art. 28), and the right for either workers or their representatives on information and consultation in good time in reference to management's decision making (Art. 27).

In evaluating the content of the chapter on "solidarity" it has to be stressed that it includes collective rights, it insists on the Community's and the Member States responsibility for providing job security; for providing working conditions that respect the worker's health, safety, and dignity; and for protecting young people at work. It furthermore insists on measures to make family and professional life compatible and to provide social security as well as social

9. For this development see Bob Hepple, *The Development of Fundamental Social Rights in European Labor Law*, *in* DEVELOPING THE SOCIAL DIMENSION IN AN ENLARGED EUROPEAN UNION 23 (Alan Neal & S. Foyn eds., 1995).

10. For the background, the content and the function of this Charter see Manfred Weiss, *The Politics of the EU Charter of Fundamental Rights*, *in* SOCIAL AND LABOR RIGHTS IN A GLOBAL CONTEXT—INTERNATIONAL AND COMPARATIVE PERSPECTIVES 73 (Bob Hepple ed., 2002).

assistance. Taken all together, it becomes pretty evident that this is a concept that would be incompatible with mere de-regulation, decollectivization and de-institutionalization. Or to put it in broader terms: it would be incompatible with a strict neo-liberal approach.

B. Examples

Two examples are to be chosen to illustrate the politics of the EC in setting minimum conditions, thereby of course promoting convergence to a certain extent, but at the same time making sure that convergence does not lead to a lowering of established standards. The two Problem areas chosen for illustration are (1) the strategies developed to cope with the freedom of services and (2) the European input into employee involvement in management's decision making.

1. Freedom of Services

From the very beginning one of the main goals of the EU has been the establishment of one single market. This implied the guarantee of a whole set of possibilities to freely act trans-nationally, so called market freedoms: free movement of workers, free movement of capital and goods, freedom of residence, and, last but not least, freedom of services. Freedom of services means that companies from each Member States can offer their services in each other Member State.

Freedom of services led to dramatic effects in the building industry as recently as the late 1980s. Construction companies from Member States with significantly lower levels of working conditions and labor standards provided their services in high wage countries as Germany and France. Last but not least, due to the lower labor costs they were able to offer their services much cheaper than companies in higher wage countries. This led to a substitution effect: companies in higher wage countries had less work, many of them went into insolvency and many workers in the construction industry lost their jobs. This led in 1996 to the Posting of Workers Directive[11] according to which essential employment protection standards in the host country (minimum wage, maximum work periods, minimum rest periods, minimum paid holidays, health and safety standards, etc.) are to be applied to the posted workers. However, it turned out very quickly that it is extremely difficult to monitor the obedience of the

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

provisions of this Directive. The lack of sufficient administrative resources has been confronted with all kinds of strategies invented to undermine the rules of the Directive in practice. Therefore, the increase of the Directive's efficiency has been an ongoing topic of discussion.[12]

Up to now the problem of freedom of services still is not too dramatic due to the fact that the preconditions to provide a service have to comply with the rules of the host State. This often means a whole set of insurmountable bureaucratic and legal obstacles. However, in an attempt to effectuate the freedom of services the EC Commission launched a project of a Directive that not only tried to facilitate the trans-national offering of services but totally ignored the requirements of labor protection and stepped away from the philosophy of the Directive on posting workers. It was focusing exclusively on the country of origin principle: not only the requirements for providing services but also the conditions for the posted workers were supposed to be those of the country of origin and not in line with the requirements and standards of the host country.[13] This led to strong protest of the trade unions[14] and also to significant fears of workers in the potential host countries. And it became one of the main reasons why in France and the Netherlands the referenda for ratification of the Constitutional Treaty failed.

In the meantime the protest has led to results. The proposal for the Directive has been modified. The principle already expressed in the Directive on posting workers has been confirmed. Finally, the revised Directive was passed on December 12, 2006 and is to be implemented until the end of 2009.[15]

The debate on the proposal for a Directive on freedom of services shows a dilemma the EU has to cope with: the tension between unlimited market freedoms and social protection. In order to keep a decent social balance, protective strategies are necessary.

12. In this context see Mijke Houwerzijl, *Towards a More Effective Posting Directive*, *in* FREEDOM OF SERVICES IN THE EUROPEAN UNION—LABOR AND SOCIAL SECURITY LAW: THE BOLKESTEIN INITIATIVE 179 (Roger Blanpain ed., 2005).

13. For an assessment of the proposal see Wouter Gekiere, *The Proposal of the European Commission for a Directive on Services in the Internal Market: An Overview of its Main Features and Critical Reflections*, *in* FREEDOM OF SERVICES IN THE EUROPEAN UNION—LABOR AND SOCIAL SECURITY LAW: THE BOLKESTEIN INITIATIVE 3 (Roger Blanpain ed., 2005).; Niklas Bruun, *The Proposed Directive on Services and Labor Law*, *in* FREEDOM OF SERVICES IN THE EUROPEAN UNION—LABOR AND SOCIAL SECURITY LAW: THE BOLKESTEIN INITIATIVE 12 (Roger Blanpain ed., 2005).

14. For the position of the trade unions see Catelene Passchier, *The Point of View of the ETUC*, *in* FREEDOM OF SERVICES IN THE EUROPEAN UNION—LABOR AND SOCIAL SECURITY LAW: THE BOLKESTEIN INITIATIVE 141 (Roger Blanpain ed., 2005).

15. Directive 2006/123/EC on Services in the Single Market 2006 O.J. (L 376) 36.

However, they are in conflict with the market philosophy of the original Treaty. According to that philosophy the use of competitive advantages by companies of low wage countries would lead in the long run to a balance merely by the impact of market forces. This problem has become even more dramatic recently by the integration of low wage countries from Central and Eastern Europe. The question remains whether it is possible at all on Community level to develop a regulatory pattern that might guarantee that the extension of cross-nationally provided services will not lead to socially unacceptable and thereby politically dangerous effects, dangerous not only for the respective Member States but for the future of the Community as such. As long as the gaps in reference to essential working conditions, in particular to wage, are as big as they are presently, there is a danger that any attempt in this direction will be counter-acted by all kind of strategies that can only be monitored to a very limited extent, as the experience with the Directive on posting workers shows. Seen from this angle, the debate on the Service Directive leads to the much broader, and for the Community's survival, crucial issue on how to reconstruct the framework of the Treaty in order to finally organize a fair balance between economic and social goals. For a long time the basic market freedoms embedded in the Treaty in 1957 with a mere focus on optimizing the allocation of economic resources have been interpreted in way as if there would be no social dimension. Fortunately, this has changed. Progress in the direction on how to generate a balance between the economic and the social dimension, thereby stepping away from the philosophy of the original Treaty of the European Economic Community (EEC), has definitely been made. This development so far has its most significant symbol in the already mentioned chapter on "Solidarity" in the Charter of Fundamental Rights of the EU. However, in spite of this development and in spite of some lip service to the contrary, the agenda of the Community is sometimes in danger to continue to treat the social dimension as a mere annex to the economic project that still is considered to be the core of the matter. Attempts of the ECJ to better reconcile the two dimensions unfortunately have not yet led far enough.[16] Therefore, the debate caused by the project of the Directive on freedom of services is a good opportunity to finally initiate efforts to bring the social dimension on equal footing with the economic one.

16. In particular judgment of the ECJ of September 21, 1999, Case C-67/96, Albany International, 1999 E.C.R. I-5751; see in this context the brilliant essay by Silvana Sciarra, *Market Freedom and Fundamental Social Rights*, *in* SOCIAL AND LABOR RIGHTS IN A GLOBAL CONTEXT—INTERNATIONAL AND COMPARATIVE PERSPECTIVES 95 (Bob Hepple ed., 2002).

2. Employee Involvement in Management's Decision-Making

As already indicated above, great diversity exists between the labor law systems of the Member States. This particularly applies to the schemes of employee involvement in management's decision making. Some countries, for example Germany, Austria, the Netherlands, or Luxembourg, have systems with a dual structure where the scheme of employee involvement of management's decision making institutionally is separated from the trade unions, even if in actual practice the links between the two are significant. In other countries workers' participation is based on two pillars: both the trade unions and a body elected by all employees. This is the case in France, Greece, Portugal, and Spain. In the Scandinavian countries workers' participation is exclusively in the hands of the trade unions. For a long time, in countries like Ireland and the United Kingdom employee involvement in management's decision making was more or less a taboo subject for the trade unions. The fear of being compromised in opposing measures through their industrial strength prevented them becoming integrated into the mechanism of decision making in companies. Only recently, mainly due to the EU input, this attitude gradually is changing. Italy has developed an interesting mixture of its own. Even if it may be possible, as just indicated, to discover organizational similarities between the systems of different countries, the differences remaining should not be overlooked. It has to be added that in some countries employee involvement in management's decision making is exclusively based on legislation (for example in Germany), in others exclusively on collective agreements (for example in Scandinavia) and again in others on a mixture of both (for example in Belgium). The subject matters for workers' participation are as different as the degree of participation, ranging from mere information to co-determination. And only some countries know employee involvement in the company boards whose systems again differ significantly from each other. In short, there is a wide spectrum of patterns of employee involvement and some countries where such participation is virtually unknown.

In view of this diversity the EC's input in structuring employee involvement in management's decision making has been facing serious constraints. First it would have been totally unrealistic to expect that the EC might be in a position to establish a uniform model for the Community as a whole being the same in each Member State. Such a perspective would neglect the cultural and historical roots and links of the different systems. They are to be understood as a sort of

expression of each country's identity and cannot be simply changed or even eliminated. But even if the EC would have attempted and succeeded to impose all Member States a uniform model, this by no means would have meant that such institutional uniformity also implies functional uniformity. It has to be understood that institutionalized employee involvement is only a fragment of a complex overall framework of industrial relations in which collective bargaining, strike and lock out, mechanisms of conflict resolution in the broadest sense, structure and mentality of the actors play a decisive role. These again are different in each country. Therefore, the same institutional arrangement for employee involvement might have quite different functional effects in different countries.

Of course the EC could have decided not to do anything and leave everything as it was. Instead of opting for this abstention the EC has chosen another alternative. Employee involvement in management's decision making has been promoted. The EC legislator was and is convinced of the advantages of cooperative structures in comparison to unilateral decision-making: better legitimacy of the decisions and the measures to be taken, easier implementation, increase of employees' motivation and productivity, conflict absorption, etc. This understanding also finds its expression in the European Charter of Fundamental Rights whose article 27 defines the employees' right of information and consultation as a fundamental right. The EC has chosen two strategies complementing each other: Introduction of minimum standards for information and consultation to be applied in each Member State and introduction of systems of employee involvement for trans-nationally operating undertakings or groups of undertakings.

a. Minimum Standards for the Member States

As recently as the 1970s, the first fragments for employee involvement in the Member States were developed. The Directive on Employee Involvement in the Event of Collective Redundancies was the reaction to a spectacular case in which it turned out that uneven structures among Member States in this area may be abused by trans-nationally operating companies. The Directive of the same period on transfer of undertakings was driven by an attempt to increase job security in such situations. And the Framework Directive on health and safety could be built on the widespread consensus of a need of

employee involvement in this area.[17] However, all these directives cover only relatively narrow subject matters. Therefore, the real breakthrough came with the directive on a framework for information and consultation of 2002. Nevertheless it is worthwhile to look at these older directives at least in a sketchy way.

In 1975 the Directive on the Approximation of the Laws of the Member States Relating to Collective Redundancies[18] was passed and two years later the Directive on Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses and Part of Businesses[19] followed. Both directives establish an information and consultation procedure in the context of collective redundancies and transfers of undertakings. The actors on the employees' side are the workers' representatives according "to the law and practice" of the respective Member State. However, there was and is no guarantee that a body acting as workers' representative will be available everywhere. To take just the most interesting example: in the United Kingdom, due to the factual decline of trade union power such a representation was not guaranteed,[20] the European Court of Justice (ECJ)[21] held this situation not to be in line with the spirit of the Directives. Therefore, the United Kingdom had no chance but to amend its legislation[22] to make sure that at least in principle workers' representatives are available.

Both directives related only to cases where the decision on collective redundancies or on transfer of undertakings was made within the particular company concerned. However, they did not cover cases where employees of a subsidiary are affected by decisions taken by the holding company of a group that may be located within the same country or abroad. Consequently, the Directive on Collective Redundancies was amended in 1992[23] and 1998[24] and the Directive on Transfer of Undertakings in 1998[25] and 2001.[26] According to the amended versions, the directives now apply

17. For a detailed discussion of these first Directives see Manfred Weiss, *Workers' Participation in the European Union*, *in* EUROPEAN COMMUNITY LABOR LAW—PRINCIPLES AND PERSPECTIVES 213, 218 (Paul Davies et al. eds., 1996).

18. 1975 O.J. (L 48).

19. 1977 O.J. (L 61).

20. For this development see GILLIAN S. MORRIS & TIMOTHY J. ARCHER, TRADE UNIONS, EMPLOYERS AND THE LAW 139 (1991).

21. Cases C-382/92 and C-383/92; Commission v. United Kingdom, 1994 I.C.R. 664 (EC).

22. *See* SIMON DEAKIN & GILLIAN S. MORRIS, LABOR LAW 860 (4th ed. 2005), .

23. 1992 O.J. (L 245) 3.

24. 1998 O.J. (L 225) 16.

25. 1998 O.J. (L 201) 88.

26. 2001 O.J. (L 82) 16.

irrespective of whether the decision on collective redundancies or on transfers of undertakings is made by the employer or by the parent undertaking controlling the employing company.

As previously mentioned, the narrow perspective on specific subject matters was significantly widened by a directive that was passed[27] in March 2002. The directive is covering public or private undertakings of at least fifty employees and establishments of at least twenty employees in Member States and provides "a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community."

The structure of information and consultation is precisely defined. Timing, content, and manner of information have to be such that it corresponds to the purpose and allows the employees' representatives to examine the information and to prepare for consultation. Consultation has to meet several requirements: (1) it has to be ensured that the timing, the method, and the content are effective; (2) information and consultation have to take place at the appropriate level of management and representation, depending on the subject under discussion; (3) the employees' representatives are entitled to formulate an opinion on the basis of the relevant information to be supplied by the employer; (4) the employees' representatives are entitled to meet with the employer and to obtain a response, and the reasons for that response, to any opinion they may formulate; and finally (5) in cases of decisions within the scope of the employer's management powers an attempt has to be made to seek prior agreement on the decisions covered by information and consultation.

Information has to cover the recent and probable development of the undertaking's or the establishment's activities and economic situation in its broadest sense. Information and consultation has to take place on the structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged in particular where there is a threat of unemployment. Finally, information and consultation has to take place on decisions likely to lead to substantial changes in work organization or in contractual relations, including those covered by the Community provisions.

On the whole the Directive remains very flexible and leaves the institutional arrangement and the modalities to a great extent to the

27. 2002 O.J. (L 80) 29.

Member States. Since the Directive only provides for a minimum framework it of course does not affect more favorable arrangements in Member States. In addition the Directive cannot be used to justify the reduction or destruction of existing patterns.

b. Employee Involvement in Transnational Corporations

Evidently national institutional arrangements on employee involvement in management's decision making can operate only within the national framework. If the decisions are taken by the headquarters outside the country concerned, information and consultation rights become useless. It is therefore no surprise that the main initiative to establish a framework for information and consultation on a European scale came from the labor movements in countries where such arrangements already existed and where the degree of frustration had steadily increased because, on the one hand, the trans-national perspective was becoming more and more important but, on the other hand, it was not subject to the traditional instruments available within the national framework.

The first attempt to overcome this deficiency was the so-called Vredeling proposal of 1980,[28] amended in 1983.[29] The proposal did not affect the given structure of employees' representation. As in the directives on specific issues, the actors in the case of information and consultation were "the employees' representatives provided for by the laws or practices of the Member States." The chain of information had to go down from the parent company to the subsidiary where information and consultation were supposed to take place. The content and procedure of information and consultation were prescribed in detail. Mainly due to the latter the proposal was considered to be much too inflexible and therefore had no chance to become a directive. The attempt was given up in the mid-eighties.

The Directive on European Works Councils[30] is the result of fresh efforts to revitalize social policy. Both the legitimacy of such an instrument and the pressure to introduce it had increased tremendously compared with the period when Vredeling was being debated.

28. 1980 O.J. (C 297) 3.
29. 1983 O.J. (C 217) 3.
30. Council Directive 94/45, 1994 O.J. (J 254) 64 (EC) (Council Directive of September 22, 1994 on the establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees).

The Directive on the Establishment of a European Works Council seeks to achieve the same goal as the Vredeling proposal, but uses a very different strategy: the change of paradigm from substantial regulation to a merely procedural solution. It covers only trans-national undertakings and groups of undertakings with at least 1000 employees within the EU and with at least 150 employees of the undertaking or of different undertakings of the group in each of at least two different Member States.

The focus of the Directive is on the establishment of a body representing the interests of all employees of the undertaking or group of undertakings within the Community: the European Works Council (EWC). In order to establish such a EWC a relatively complicated procedure is provided for the so-called special negotiating body composed of representatives of each Member State in which the Community-scale undertaking or group of undertakings employs at least 100 employees. It has to conclude a written agreement with the central management of the Community-scale undertaking or of the controlling undertaking of the group. Where a Community-scale undertaking or group of undertakings has its central management or its controlling undertaking outside the EU, the EWC must be set up by written agreement between its representative agent within the EU or, in absence of such an agent, the management of the undertaking or of the group of undertaking with the largest number of employees on the one hand and the special negotiating body on the other.

This agreement must determine specific matters: the nature and composition of the EWC; its functions and powers; the procedure for informing and consulting the EWC; the place, frequency, and duration of its meetings; and, last, the financial and material resources to be allocated to the EWC. Whether such an agreement is concluded, and in what manner, depends entirely on the parties on both sides. If the special negotiating body decides by a two-thirds majority not to request such an agreement, that is already the end of the matter. Only if the central management refuses to commence negotiations within six months of receiving such a request or if after three years the two partners are unable to reach an agreement do the subsidiary requirements of the Annex to the Directive apply.

These subsidiary requirements are the only form of pressure available to the special negotiating body. They expressly limit the EWC's competence to information and consultation on matters that affect either the trans-nationally operating undertaking or group of undertakings as a whole or at least two subsidiaries of the undertaking

or two undertakings of the group situated in different Member States. The organizational structure of the EWC is prescribed to a certain extent. In addition to the EWC, a specific committee consisting of at most three members is provided for. The EWC must be informed and consulted once a year on general aspects of the undertaking's or the group's policy. If measures with significant disadvantages for employees are at stake, additional information and consultation of the committee is required before these measures are executed. Those members of the EWC representing the constituency affected by measures in question are entitled to participate in the meeting. It is important to stress that the right of the EWC or the committee to meet alone before the meeting with the central management is guaranteed and that support by experts is provided if necessary. All costs are to be borne by the central management. However, the Member States are entitled to specify these guarantees, especially to limit the volume of funding.

The Directive has put in place a dynamism of its own that may well develop to stronger forms of employees' influence in management's decision making in the future. To a bigger and bigger extent agreements between EWC and central management of trans-nationally operating groups of undertakings on all kind of topics (health and safety, fundamental rights, job security, codes of conduct, mergers, closures, relocation, restructuring, etc.) are concluded.[31] Thereby, the narrow concept of information and consultation is transgressed and has already become a bargaining structure.

The Commission impressed by the success of the Directive on European Works Councils was considering whether the method applied there could not be repeated in the case of employees' involvement in the European Company.[32] Finally, after long discussions. a respective directive was passed.[33]

The Directive has to be read together with the Statute on the European Company that contains the rules on company law. The main goal of establishing a European Company as an option is to save

31. For this development see Thomas Blanke, *European Works Council Agreements*, *in* COLLECTIVE BARGAINING IN EUROPE 395, 413 (Comisión Consultativa Nacional de Convenios Colectivos ed., 2004).

32. For a discussion of the genesis, the content and the impact of the Directive supplementing the Statute of the European Company see Manfred Weiss, *Workers' Involvement in the European Company*, *in* MARCO BIAGI, QUALITY OF WORK AND EMPLOYEE INVOLVEMENT IN EUROPE 63 (2002).

33. Council Directive 2001/86, 2001 O.J. (L 294) 22 (EC) (Council Directive of October 8, 2001 supplementing the Statute of the European Company with regard to the involvement of employees).

transaction costs and to increase efficiency and transparency. It no longer should be necessary to create complicated structures of holding companies in order to overcome the problems arising from national company law. Ideally this goal only could be achieved if the statute would regulate all the details of company law at stake. Then the company law structure of the European Company would be identical, no matter where its seat would be. However, the Regulation is not meeting these expectations. It only contains rules for about one-third of the problems to be resolved. For the solution of the remaining problems it refers to the national law on joint stock companies. Even if in some important aspects national company law has been harmonized, there are still significant differences.

There are four types of foundation of a European company: (1) a merger between several companies, if at least two of those are covered by the law of two different Member States; (2) the establishment of a holding company by several companies if at least two are covered by the law of different Member States; (3) the creation of a joint subsidiary by several companies if the respective companies have their headquarters and their seat within the Community and if at least two of these companies are covered by the law of different Member States or if a company has a subsidiary in a different Member State covered by the law of that State for at least two years; and, (4) transformation of an existing company into a European Company, if this company has a daughter company or a subsidiary in a different Member State for at least two years. The Member States only are entitled to permit the transformation if the body in which the workers are represented agrees with either qualified majority or unanimously. And it is not possible to transfer the company's seat to another Member State in the course of transformation.

The Statute provides for two organizational alternatives: a two-tier system and a one-tier system. In addition to the shareholders' assembly the two-tier system has a managing board and a supervisory board whereas the one-tier system only has an administrative board. In the two-tier system the members of the managing board are appointed and recalled by the supervisory board whose members are elected by the shareholders' assembly, whereas in the one-tier system all members of the administrative board are elected by the shareholders' assembly.

A European Company only can be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on workers' involvement cannot be ignored. The structure of the

Directive is very much the same as in the Directive on European Works Councils: it provides for a special negotiating body, lists the topics for negotiation, and leaves everything to negotiations. In case the negotiations fail, there is a fall back clause, the so called standard rules.

The Directive contains two different topics that have to be distinguished carefully. The first refers to information and consultation. Here the structure is very similar to the one developed in the Directive on European Works Councils, even if it has to be recognized that some improvements that are in line with the foreseeable amendments of the Directive on European Works Councils are already contained in the Directive supplementing the European Company Statute (e.g., the definitions of information and consultation). The application of the Directive on European Works Councils is excluded in the European Company.

No minimum number of employees is required for the crucial and most interesting topic of the Directive: employees' participation in company boards. Normally it is up to the negotiations how such a scheme must look. Only in case of transformation does the agreement have to provide at least the same level of all elements of employees' involvement as the ones existing within the company to be converted into a European Company. If in other cases a reduction of the participation level would be the result of the negotiations, qualified majority requirements apply ensuring that, by way of agreement, the existing highest level cannot be easily or carelessly reduced. However, a European Company can be registered irrespective of employees' participation in company boards if none of the participating companies has so far been governed by participation rules prior to the registration of the European Company. In this case neither an agreement is needed nor do the standard rules apply.

If no result is reached in negotiations the fall back clause applies: in cases of transformation, everything has to remain as it was before. In other cases the highest level in force in the participating companies is the decisive criterion for the level of participation in the European Company.

The concept of the European Company in the meantime has been taken up by further legislation: the Directive on employee involvement in the Societas Cooperativa Europea (SCE)[34] and, at least in principle, by the recent Directive on trans-national mergers.[35]

34. 2003 O.J. (L 207) 25.
35. 2005 O.J. (L 310) 1.

III. CONCLUSION

The two examples indicate different aspects of the EC's role in coping with the tension between divergence and convergence. The example of the debate on freedom of services illustrates the attempt to stop the race to the bottom by establishing minimum standards in cross-border activities. Thereby it is becoming more difficult to use social dumping as an instrument to obtain a competitive advantage. The EC, therefore, is not trying to harmonize the labor law systems but simply to impose the existing minimum standards in order to stop the erosion of the social systems in the host countries. However, the example also shows that due to the huge gaps in working conditions between different Member States such efforts only are of limited efficiency. Monitoring is only possible to a certain extent, in particular due to the many strategies invented to deviate the imposition of minimum conditions.

The example of employee involvement in management's decision making is not only setting minimum conditions but establishing a pattern of industrial relations based on cooperation. This goes much further than the input in the first example. Information and consultation are defined as being a European pattern that is to be respected by all Member States. This of course implies an intervention into national systems, bringing them closer together towards convergence. However, this is supposed to be a convergence to the top, not to the bottom. And it is only a convergence of the concept of information and consultation, leaving the Member States the choice of how they transform the idea of employee involvement into institutional arrangements. The latter still are very different and will remain to be.

Institutional differences between Member States will continue to play a big role within the EU. However, seen from a functional perspective the systems in spite of the institutional differences are brought closer together toward more convergence. As previously mentioned, the points of orientation for this development are the values expressed by the fundamental social rights contained in the Charter of Fundamental Rights of the EU. The process is a dynamic and to a great extent open one in which the EC can intervene only to a limited extent. This intervention should not be overestimated but also not underestimated. It has already led to significant progress in the attempt to construct the European Social Model as an alternative to a convergence leading to a race to the bottom. Or to put it differently: due to the interaction between the EC and its Member

States there is reason in Europe for more optimism than the simplistic globalization theory suggests.