The difficult birth of a European industrial relations system

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The difficult birth of a European industrial relations system

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Introduction

As the focus of the FORMULA project is on the mobility of services, and on labour mobility and migration in that context, this paper focuses on the tensions that arise when employed persons working side by side can be subject to different standards and regimes of social protection. Cross-border mobility, within and beyond the EU, is only one source of these inequalities and tensions. Dual employment regimes, which allow and institutionalise differences in the position and rights of ‘insiders’ and ‘outsiders’ in the labour market, are a widespread phenomenon in the European Union, however, with domestic – political and economic – origins as well (Gallie, 2007). Dualism and international mobility are likely to be closely related and reinforcing each other.

We approach these issues – dualism and labour or service mobility—from a sociological and industrial relations rather than exclusively legal perspective, because that is where our expertise is most useful in this project. That implies that we will discuss more broadly how labour, social and employment policies are organised in national systems of industrial relations, how these systems differ and have evolved under influence of various changes, among them EU laws and policies. In particular, our interest is in the multi-level nature of the evolving ‘system’ of European industrial relations.

The paper is built up in three sections. First, we try to identify and understand the diversity of national industrial relations – in our view still the core of present labour regulation and
social policy. We show that these differences are clustered among groups of countries, each based on a set of different principles. The differences show in each of the five pillars of post-war industrial relations in Europe: union representation, collective bargaining, workplace representation, macro-level policy concertation, and social protection. The consequence is that even where objectives of policies are rather similar, or have converged within the context of the European Union, the methods and instruments used remain different. The second section discusses the European level and how it interacts with these different national systems. The two main propositions in this section are that the EU integration process has followed a double track of opening up markets while – in the end unsuccessfully – closing their national systems of social solidarity organised on the basis of welfare states and industrial relations; and that EU labour and employment law and policy has an entirely different mission compared to national law, which is bound to clash. The third section discusses these tensions in the light of the conflict over the Service Directive.

Note: the present paper offers only the first two parts of the paper. The third part is in Jon-Erik’s contribution. We regret and offer our apologies that we have had no time to integrate the paper (and need still some discussion – as well as comments from our learned friends from the legal profession. The references will be included in our final paper.
I. The diversity of Europe’s industrial relations

The analysis of this arrangement must start with noting the massive diversity in labour market institutions and practices across European countries and the complexity of coordinating common policies (Visser 2004). There are different ways to approach this diversity.

1.1 Production regimes

The “Varieties of Capitalism” literature distinguishes between production regimes on the basis of the interaction between financial markets, company investment strategies, production of skills, social protection and wage policies. Employers and coordination of employer behaviour play a key role in understanding diversity. The main distinction is between coordinated market economies, like Germany or Sweden, and liberal or uncoordinated market economies like the United Kingdom or the USA (Hall and Soskice, 2001). There is some dispute how to classify France or the Mediterranean countries.

Given the prominent role of the state, especially in prompting or standing in for employer coordination, Schmidt (2002) has proposed to classify the production regimes in these countries as “state-centred”. The New Member States from Central and Eastern Europe cannot be classified unambiguously, though most seem to oscillate between liberal and state-centred, perhaps with the exception of Slovenia, which is closer to a coordinated economy. In the transition economies, generally, the state has continued to be a central and dominant actor in the governance of the economy, first, by virtue of its position in creating the legal
basis for the transition into a market economy and, subsequently, by the need to transpose the *acquis communitaire* (Kohl and Platzer, 2007: 615). The outcome is in most cases close to the liberal market regime, also because of the weakness of societal actors, such as employers’ organisations and trade unions.

1.2 Employment regimes

Duncan Gallie (2007) has proposed a classification of employment regimes, in which unions and employment strategies are the key variables. There is a strong connection with Esping-Andersen’s classification of welfare state regimes (Esping-Andersen, 1990). The main distinction runs between inclusive, dualist and market employment regimes.

*Inclusive employment regimes* “are those where policies are designed to extend both employment and common employment rights as widely as possible through the population of working age” (Gallie, 2007: 17). In inclusive regimes, “organised labour has a strongly institutionalised participation in decision making, both in its own right and through its influence over the party in government” (idem, 18). High employment levels, common employment rights and a strong safety net help to minimise differentials between different employment statuses and contain or prevent polarising tendencies in the labour market.

*Dualist regimes*, in contrast, “will be characterised by a consultative involvement of labour in the decision making system, reflecting its weaker organisational strength” (idem, 19). Labour’s influence on policies – Gallie infers - will be contingent on the political orientation of the government and the strength of unions will mostly depend on “a more easily mobilisable core workforce of employees in large firms”
(ibid). This tends to be reflected in larger differences between insiders and outsiders as “dualist regimes are less concerned with the overall employment levels but guarantee strong rights to a core workforce of skilled long-term employees, at the expense of poor working conditions and low security at the periphery” (idem, p 18).

The third employment regime is called a market-based regime: “the assumption is that employment levels and job rewards are self-regulated by a well-functioning market and that institutional controls by organised labour are negative rigidities.” As a consequence, labour is excluded from a significant role in decision-making. The distinction between insiders and outsiders based on employment rights should be less pronounced, since market employment regimes emphasise minimal employment regulation, but polarising tendencies based on skill, rewards and job quality might be large without the countervailing power of unions, collective bargaining or social protection.

1.3 Industrial relations systems

A third classification can be offered based on industrial relations systems proper, such as union and employer organisation, the power relations between them, levels and styles of bargaining, the space for social partner intervention in public policy and for state intervention in union-employer relations. On that basis it is possible to distinguish four arrangements or regimes (see Table 2.3): Nordic Corporatism; Social Partnership, mostly developed in continental (Western) Europe; Liberal Pluralism originating in the British isles; and a Polarised or State-centred regime found in Southern Europe (Ebbinghaus and Visser, 1997; also Crouch, 1993; 1996). In “Democracy in Europe”,

...
Schmidt (2006) produces a rather similar distinction based on the position of the state and the role of societal and economic interests in policy making.

Of the four countries she discusses, France is classified as state centred: policies are designed without the systematic input from societal actors, but actors are subsequently accommodated in a rather flexible implementation process, often based on derogation from the law. If this flexibility is not offered, actors will seek confrontation. How different this conception is from, for instance, the approach followed in Scandinavia, can be illustrated with the recent struggle over the modernization of collective bargaining law in France.

<table>
<thead>
<tr>
<th>Table 1: Industrial Relations Regimes or Arrangements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Production regime</strong></td>
</tr>
<tr>
<td>‘North’ coordinated market economy</td>
</tr>
<tr>
<td>Centre-West statist market economy</td>
</tr>
<tr>
<td>South liberal market economy</td>
</tr>
<tr>
<td>West statist or liberal?</td>
</tr>
<tr>
<td>Centre-East statist or liberal?</td>
</tr>
<tr>
<td><strong>Welfare regime</strong></td>
</tr>
<tr>
<td>universalistic segmented (status-oriented, corporatist)</td>
</tr>
<tr>
<td>segmented (status-oriented, corporatist) residual</td>
</tr>
<tr>
<td>residual segmented or residual?</td>
</tr>
<tr>
<td><strong>Employment regime</strong></td>
</tr>
<tr>
<td>inclusive dualistic liberal</td>
</tr>
<tr>
<td><strong>Industrial relations regime</strong></td>
</tr>
<tr>
<td>Organised Corporatism Social Partnership Polarised / State-centred Liberal Pluralism Fragmented / State-centred</td>
</tr>
<tr>
<td><strong>Power balance</strong></td>
</tr>
<tr>
<td>labour-oriented balanced alternating employer-oriented</td>
</tr>
<tr>
<td><strong>Principal level of bargaining</strong></td>
</tr>
<tr>
<td>sector variable / unstable company</td>
</tr>
<tr>
<td><strong>Bargaining style</strong></td>
</tr>
<tr>
<td>integrating conflict oriented acquiescent</td>
</tr>
<tr>
<td><strong>Role of social</strong></td>
</tr>
<tr>
<td>institutionalised irregular / rare / irregular /</td>
</tr>
</tbody>
</table>
in public policy

<table>
<thead>
<tr>
<th>Role of state in labour relations</th>
<th>limited (mediator)</th>
<th>&quot;shadow of hierarchy&quot;</th>
<th>frequent intervention</th>
<th>non-intervention</th>
<th>organiser of transition</th>
</tr>
</thead>
<tbody>
<tr>
<td>employee representation</td>
<td>union based / high coverage</td>
<td>dual system / high coverage</td>
<td>variable*</td>
<td>union based / small coverage</td>
<td>union based / small coverage</td>
</tr>
<tr>
<td>Countries</td>
<td>Sweden</td>
<td>Germany</td>
<td>France</td>
<td>UK</td>
<td>Poland</td>
</tr>
<tr>
<td></td>
<td>Norway</td>
<td>Austria</td>
<td>Italy</td>
<td>Ireland</td>
<td>Estonia</td>
</tr>
<tr>
<td></td>
<td>Denmark</td>
<td>Belgium</td>
<td>Spain</td>
<td>Malta</td>
<td>Lithuania</td>
</tr>
<tr>
<td></td>
<td>Finland</td>
<td>Luxembourg</td>
<td>Portugal</td>
<td>Cyprus</td>
<td>Latvia</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Netherlands (Ireland)</td>
<td>Greece (Hungary)</td>
<td></td>
<td>Czech Rep.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(Finland)</td>
<td></td>
<td></td>
<td>Slovakia</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Slovenia</td>
<td></td>
<td></td>
<td>Hungary</td>
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<td></td>
<td></td>
<td></td>
<td>Bulgaria</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Romania</td>
</tr>
</tbody>
</table>


In France employee representation in firms incorporates both principles, in Spain and Portugal it is dualist, in Italy and Greece merged with the unions, but based on statutory rights. Following the imposition of a 35 hours working week by the French socialist government between 1997 and 2000, the main employers' organisation started a major rethinking of their approach to industrial relations, finding an ally in one of France’s major union federations, the CFDT. The "refoundation sociale" project was an attempt of French employers at diminishing the rule of the state by reinforcing (or even creating) the regulatory function of rules stemming from contractual negotiations. This was placed in the context of “emancipation of the firm” and reassertion of entrepreneurial values. According to the main employers' federation, ‘it is the increasing, destabilising and unceasing state intervention that threatens the very existence of an autonomous “social sphere”’ (Medef 1999). The main
Socialist or should we say Republican union (CGT-Force Ouvrière) replied, predictably, that such an approach would not only give to much power to employers but also give up on core principles of what they consider Republican labour law, i.e., “that the right of (employment) contract is based on law and not on the rights that these parties give to themselves” (CGT-FO, 2000).

This is “a world apart” not only from Northern corporatism but also of liberal market economies. But let’s not make mistakes. As Mrs Thatcher has proven, especially in the industrial relations domain, in the United Kingdom, too, the state is powerful and may formulate policies without significant societal input. But because the state acts in a much more restricted sphere, far more is left to society or to the market. Rather than derogation from the law, there is simply less law in the socio-economic domain and more self-organisation. The law that does exist is much more supplementary to make the contractual approach work and offering choice (Collins, 2002).

In Germany, on the other hand, as in other corporatist economies, the state tends to formulate and implement policies in tandem with certain “privileged” societal actors, mainly business and labour. Rather than acting through open policy networks, and exerting their influence through lobbying, as is the case in the liberal-pluralist model, these interests are organised in peak associations (Schmitter and Lehmbruch, 1979). Compared to other “corporatist” countries, but with unitary states like Sweden or the Netherlands, the state in federal Germany is weaker and less effective in its bargaining with societal interests (Streeck, 2003). This weakness is partly compensated through a stronger legalism, especially in labour relations.
Italy can be placed between the state-centred and corporatist model. In Italy state and society do try to act together, but they tend to be weak on both sides and the state operates in a clientelistic rather than a corporatist manner. In 1990s the corporatist approach in industrial relations was strengthened, for instance with the 1993 pact on collective bargaining, which in itself could be seen as a preparation for EMU membership (Ferrera and Gualmini, 2004). But the corporatism in Italy is still weaker even than in Germany, “since the cooperative orientation of societal actors is of recent vintage, not backed up by public law, and much more dependent on action by a state that remains quite weak, despite changes for the better in the 1990s” (Schmidt, 2006: 147).

Explaining these different “state traditions in industrial relations”, Crouch (1993), following the footsteps of Stein Rokkan, has offered a very elegant explanations based on only two variables: Catholicism and early development of commerce and urbanisation. Catholicism, by fighting with the modern state over the allegiance and loyalties of its citizens, produced either states that did not accept any competing organisation on its territory (France) or, where it failed to do so, weak states (Italy, Spain). In Protestant lands, states tended to be neutral or, if they had to overcome religious divisions, like in the Netherlands or Switzerland, they were in favour of sharing responsibility for overcoming and settling conflict with societal organisations. Such tendencies were reinforced where the self-organisation of trade and crafts had left strong legacies.

Whether the transition economies of Central and Eastern Europe (CEE) form a separate regime or must be classified according to one of these arrangements is a matter of
debate. They tend to mix several elements. In a recent contribution, Kohl and Platzer (2007: 617) argue “that based on the typology proposed by Ebbinghaus and Visser (1997), no national CEE system of industrial relations can be unambiguously assigned to one of the Western European models […]. Only Slovenia exhibits reasonably close parallels with one of the Western European models – the Continental social partnership model, with a strong Austro-German flavour.” Absence of sectoral collective bargaining and low bargaining coverage rates tend to orient the CEE economies towards the liberal or uncoordinated model. But the state and collective labour law play a much stronger role and this makes them more like the state-centred models of Southern Europe. However, in contrast to the latter, the interaction between unions and management, and between unions and the state, tends to be less confrontational and more determined by the weakness of the union actor. With the exception of Slovenia and perhaps Slovakia, the transition economies do share the absence of sector level and unstable structures of workplace representation.

Obviously, as with any classification, the real world is messier than these typologies and the application to single countries is an approximation at best. Ireland, for instance, after the experience of two decades of social pacts, has developed features of social partnership or “roundtable corporatism”. There are distinctions between Finland and the Scandinavian countries in matters of labour law, the role of the state and wage bargaining (Elvander, 2002), or between Germany and its western neighbours in the autonomy of wage bargaining from state interference and the institutionalisation of the social dialogue (Streeck, 2003). Italy (and Spain) do not share all the features of French
industrial relations, especially as Italian trade unions have a much stronger social support and the state is less present in collective bargaining. Further distinctions can even be made between sectors and regions within states, for instance in Italy or Belgium.

1.4. The five pillars of post-war industrial relations

A test of the classification of industrial relations is obtained by verifying how it matches the variation according to the five institutional pillars on which post-1945 industrial relations in Western Europe have rested: (1) strong or reasonably established and publicly guaranteed trade unions; (2) a degree of solidarity wage setting based on coordination at the sectoral level or above; (3) a fairly generalised arrangement of information, consultation, and (4) perhaps codetermination at the firm level based on the rights of workers and unions to be involved; and routine participation in tripartite policy arrangements, and (5) a high level of social protection (Streeck, 1992; Traxler, 1998; Visser, 2006a).

<table>
<thead>
<tr>
<th>years</th>
<th>“North” Organised Corporatism</th>
<th>“Centre” Social Partnership</th>
<th>“South” State-Red</th>
<th>“West” Liberal</th>
<th>“Transit” Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>union density</td>
<td>2000-06 74,7 35,4 20,2 33,9* 22,8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>union authority</td>
<td>2000-06 0,500 0,474 0,357 0,243 0,251</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>union concentration</td>
<td>2000-06 0,375 0,344 0,217 0,413 0,276</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>centralisation</td>
<td>2000-06 0,476 0,538 0,378 0,370 0,318</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The data in Table 2 confirm the qualitative portrait based on industrial relations systems in Europe, presented in Table 1. As expected, union density is significantly higher in the North and union authority and centralisation is highest under conditions of Northern corporatism and social partnership. Union fragmentation – the opposite of concentration or ‘unity’ – mostly affects the unions in Southern and Eastern Europe. Bargaining coverage does not differ much between the industrial relations systems based on Labour-led Corporatism, Social Partnership or State-Centred systems, though the mechanisms through which this is achieved differ.

In the North the unionisation rate of workers is higher than the organisation rate of employers and high levels of coverage are the product of high rates of unionisation and the capacity of unions to make non-organised employers

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1 The organisation rate of employers is calculated by taking the size of the firms that affiliate with employers’ into account. This makes this statistic comparable with the way in which the union density rate is calculated (see Industrial Relations in Europe 2004 report).
comply with the union rate. In continental Western and Southern Europe, coverage rates are two to three times higher than the union density rate and much more driven by high rates of employer organisation combined with the legal extension of collective agreements to non-organised firms by the state. Coverage rates are much lower in the UK and in the CEE countries (with the exception of Slovenia, here grouped together with the other Social Partnership countries). This is the result of much lower levels of employer organisations and the absence of sectoral agreements. Thus even where the law does provide for the possibility to extend agreements to non-organised firms, usually on condition that the original agreement has the support of at least half the firms, weighted by size, the absence of sectoral agreements or the small minority of firms covered by any multi-employer agreement makes such provisions ineffective.

The sectoral organisation of collective bargaining and the corresponding sectoral organisation of the social partners is clearly most developed in Northern and continental Western Europe, and mostly absent in the UK and Ireland (as well as Cyprus and Malta) and ill-developed in the other transition economies (with the exception of Slovenia and, partly, Slovakia).

Employee representation in the firm reaches its highest levels under conditions of Northern corporatism and social partnership, though on this dimension the differences with Southern Europe are small, thanks to highly institutionalised forms of employee representation in Spain, France and Italy in particular. The main differences are with the 'voluntarist' regime in the UK and Ireland, and many of the new member states, with limited employee representation, especially in
non-union firms (with Slovenia and Hungary as the main exceptions). As a result of the Directive 2000/14/EC establishing a framework for informing and consulting employees, adopted in March 2002, there was considerable change between 2000 and 2006, and the differences across Member States have narrowed, but the transposition has not yet been fully completed in all Member States and effective coverage is often unclear (European Foundation, 2008; EC, 2008b).

Finally, the scores for national concertation or the institutionalised involvement of the social partners in social and economic policy making also show the expected variation across these five clusters of industrial relations ‘systems’. In this case the score of ‘2’ is reached when there is an institutionalised practice of such consultation extending over many years and over issues of social and economic policy making, including macro-economic policy, social security and social protection, and work-family policies.

1.5 Minimum wage setting

Statutory or collectively agreed minimum wages are the bases for the fifth pillar of post-war industrial relations in Europe. Together with high coverage, statutory minimum wages are a major instrument in improving the ratio of minimum to average wages or the ratio of the lowest to the medium percentile of the earnings distribution (Hassel, 2008; Checchi and Visser, 2009). We find essentially two approaches in Europe: law or collective bargaining, with a number of hybrids (the Netherlands, Belgium, now also Austria and Germany) in between.

In countries where wage bargaining is strong and all-embracing, statutory minimum wages are rare and, if
existing, supplementary, covering a minute part of the workforce, usually young people. The actual lowest wage floor is set by collective agreement. Where collective agreements and, especially, where unions are feeble, statutory minimum wages play a major role. It is, however, not clear how both aspects are causally related. While some authors claim that statutory minimum wages lead to trade union membership decline because employees no longer have a reason to join (Aghion et al. 2007), there is also empirical evidence that the weakness of collective bargaining might have led to the introduction of minimum wages, in the UK, for instance. Also the debate about the minimum wage in Germany can point in this direction (Hassel, 2008).

Currently, 18 of the 27 EU member states have a system of statutory minimum wages are: Belgium, Bulgaria, Czech Republic, Estonia, France, Greece, Hungary, Ireland, Latvia, Lithuania, Malta, Netherlands, Poland, Romania, Slovakia, Slovenia, Spain, and the UK. Austria (and Germany?) is about to join this group. Based on a general agreement between the social partners, the government will introduce a statutory minimum wage of EUR 1000 for full-time employees as from 2009 (Adam, 2007).

Within the group of countries with statutory minimum wages several distinctions can be made with regard to the level of the minimum wage, the ratio to the average wage level within the country, and the share of workers covered by the minimum wage. In January 2008 the statutory minimum wage varied from EUR 92 to EUR 1570. While minimum wages are lowest in countries like Romania, Slovakia and Estonia, these countries do show a significant increase of the minimum wage level during the last ten years). The
Kaitz-index, which measures the ratio of the minimum to the average wage varies from 33% to 51%, with the highest rate in France, Ireland and Luxembourg and the lowest in Estonia, Latvia, Lithuania, Poland, Romania, Slovakia and the UK (Eurostat 2007). A high score on the Kaitz index usually corresponds with a large share of workers covered by the minimum wage.

In countries without a statutory minimum wage (Austria, Denmark, Finland, Germany, Italy, Norway and Sweden), the social partners agree on minimum levels of wages in sector-based collective agreements. The collective bargaining coverage within these countries is generally the highest within the European Union, leading to the conclusion that some form of minimum wage also covers the majority of employees in these countries. The highest coverage rate is reached in Austria, where all employers are members of the national employers' organisation and collective bargaining coverage rate reaches approximately 98%.

Among the countries without a statutory minimum wage, Germany has the lowest coverage rate of collective agreements. Therefore, the share of employees who are covered neither by a statutory minimum wage nor by a collective agreement is higher than in any other EU Member State. Minimum wages in collective agreements can be extended to all employees in a sector via a ministerial decree based on the consultation with the social partners. In some branches, construction in particular, statutory minimum wages have been established as a result of the implementation of the 1996 Posted Workers Act. Currently minimum wages in Germany have been extended up to six sectors in 2007 covering approximately 1.4 million workers (Dribbusch, 2007). As from January 2008, the collective
agreement between the trade union and the employers' association in the postal sector has been declared binding leading to a minimum wage in the postal services sector (Dribbusch, 2008). After the introduction of a minimum wage for the postal sector, the private competitors of the Deutsche Post have successfully challenged the decision in court (EurActiv, 2008). In July 2008, the Cabinet has decided to introduce a statutory Minimum Wage in some branches by extending the existing regulations. This decision is based upon a compromise great coalition, which excludes temporary work until now.

The following table shows that even within a statutory system the involvement of the social partners varies a great deal. The different combinations for setting the minimum wage, on a scale from least to most 'etatism', are as follows (Visser, 2008).

<table>
<thead>
<tr>
<th>Code</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>No national (cross-sectoral or inter-occupational) minimum wage;</td>
</tr>
<tr>
<td>1</td>
<td>Minimum wages are set by collective agreement in (some) sectors;</td>
</tr>
<tr>
<td>2</td>
<td>Minimum wages are set by national (cross-sectoral or inter-occupational) agreement (&quot;autonomous agreement&quot;) between unions and employers;</td>
</tr>
<tr>
<td>3</td>
<td>Minimum wage is set by agreement (as in 2) but extended and made binding by law or Ministerial decree;</td>
</tr>
<tr>
<td>4</td>
<td>Minimum wage is set through tripartite negotiations;</td>
</tr>
<tr>
<td>5</td>
<td>Minimum wage is set by government but government is bound by fixed rule (index-based minimum wage);</td>
</tr>
<tr>
<td>6</td>
<td>Minimum wage is set by government after (non-binding) tripartite consultations;</td>
</tr>
<tr>
<td>7</td>
<td>Minimum wage is set by judges or expert committee, as in award-system;</td>
</tr>
<tr>
<td>8</td>
<td>Minimum wage is set by government, without fixed rule.</td>
</tr>
</tbody>
</table>
Applying these scores the following picture emerges for Europe in 1997 and 2007. The differences are profound and the role of the state is strongest in the CEE countries, France, Spain and Portugal, and the Benelux. Changes between 1997 and 2007 are few but point toward convergence: more countries introducing statutory policies, but also more social partner involvement in the setting of minimum wages.
II. The Europeanization of industrial relations

2.1 Different views and contrasting effects

The possibility of creating one EU-level industrial relations system, superimposed on these diverse national systems of industrial relations, has been described in various ways. Hyman (2001) groups these views into three approaches. One of them sees the EU as a ‘vehicle of social regulation of the internationalising labour market’ (see Falkner, 1998). Supporters of this view argue that in recent years a European industrial relations system has been emerging. This is evidenced by existence of EU-level actors, like ETUC or BusinessEurope, who produce EU-level agreements and rules and espouse a specific European ideology (of “social partnership”), in short they resemble loosely Dunlop’s definition of a “system” of industrial relations.

A contrasting and much more sceptical view argues that European integration has been, as a matter of fact, ‘a process of economic liberalisation by international means’ (Streeck, 1998:429). Not building a new European system, but eroding the national systems is the main thrust of this development, in which the prevalence of competition law (and negative integration) over social and employment policy is one of the key drivers. Advocates of this interpretation of the European project claim that the industrial relations arrangement at EU-level is ‘a matter of form rather than substance’ (Hyman, 2001:290; see Streeck, 1998; Streeck and Schmitter, 1992)

A third approach adopts a perspective which, on the one hand, does not downplay the obstacles to building a
supranational industrial relations arrangement, but on the other hand recognises the achievements of the EU in constructing the 'social dimension' of the European integration process and the potential for further development. My position in this paper builds on the third approach and argues that Europeanization is both a mechanism promoting market building and a means to counter its negative effects by promoting social regulation.

On the one hand, it is obvious that national systems have to shore up their responses to new competitive conditions, often by reforming national welfare and labour market institutions and policies, in order to face the international and domestic pressures (ageing, changing family structures, changes in the labour market, etc. – see Visser and Hemerijck, 1997; Esping-Andersen et al., 2002). One the other hand, they must do so in order to comply with the market-building agenda of the EU, further reinforced by the Lisbon-agenda, especially since its 2005 relaunch as a Growth and Jobs strategy. As the recent ECJ judgements have shown, within a liberalising European market, “established forms of national cross-company standardisation of which the sectoral collective agreement has been the principal instrument” are under pressure, perhaps even threatened in their existence (Hyman, 2001:288). More freedom for multinational companies in selecting locations for production based on comparative advantages in labour costs between Member States as well as free movement of labour have posed challenges to the traditional industrial relations institutions.

On the other hand, Member States have to adopt the growing social acquis to ensure participation of social partners, information and consultation of employees, to
conform to health and safety requirements and anti-discrimination law and policies. This is also an aspect of “the central penetration of national systems of governance” (Olson, 2002) by Europe. Europeanization as “a process reorienting the direction and shape of politics to the degree that EU political and economic dynamics become part of the organizational logic of national politics and policymaking” (Ladrech, 1994: 69) has contrasting effects – opening up to international competition and to international standards.

These contrasting effects have been particularly visible during the processes accompanying the recent (2004 and 2007) EU enlargements. Upon joining the European Union, the post-socialist countries from Central and Eastern Europe (CEE) had to adopt and commit to implementation of the *acquis communautaire* including its social regulations. The challenge of reconciling market-building with social solidarity has had to be met in the context of an EU understanding of markets and social institutions that was relatively new in the CEE region (Visser and Kaminska, 2008).

### 2.2 The “dual track approach”

For decades after the inception of the European integration project, the capacity of the Community to build a EU-level industrial relations arrangement remained limited. Among the reasons, Marginson and Sisson (2004: 513) list “the economic focus of the political project which led to its creation and enlargement; the narrow scope of its competence in the field of industrial relations enshrined in the Treaty of Rome and subsequent revisions (...); the requirement to secure unanimity in the Council of Ministers for matters other than health and safety and the working
environment (...) and the weakness of the social partners (...) in relation to their constituent national affiliates’

It is perhaps useful to explore these reasons a bit deeper by analysing the nature of the European integration project. From the very start the European integration process in the social and economic field has proceeded along a dual track (Ferrera, 2006): promoting economic integration based on opening of domestic market to foreign products, services, capital and labour, while retaining national control over social policies. While initially successful in its delivery of higher growth and more social cohesion, lately the dual track approach to integration seems to have run into more manifest tensions as well as political opposition. Labour migration and ECJ rulings are but two manifestations of encroachments of the integrity of national systems of industrial relations, already under pressure by the impact of globalisation on firms and business organisations, the changing nature of labour markets, and the declining representation and powers of trade unions and regulatory agencies in general.

In the 1950s the key idea behind the integration project was that the European Communities would concentrate on economic opening, while the Member States kept for themselves the spheres of social solidarity and welfare politics. The political leaders – right, left and centre - of the time, supported by the mainstream unions, believed that the gradual ease of trade and migration would bring the economic expansion needed to underpin their national versions of the social market economy and welfare state. The welfare state, and social protection generally, was seen as a positive achievement, to be defended and organised along national lines (Ferrera, 2006: 93). The “trentes
glorieuses” of strong economic growth and welfare state expansion in Western Europe until the mid-1970s were (later) seen as an endorsement of this view (Judd, 2005). British historian Alan Milward stood on good grounds when he claimed that Community integration had decisively contributed to the rescue of the nation-state after World War II.

Sociology and common sense teach us that solidarity and sharing rest on bounding and closure. Sharing presupposes the existence of demarcated communities and identities – people feeling that they have something in common and are linked by ties of history, fate or reciprocal obligations dealing with common risks, needs and challenges. Since the 19th century the nation-state has provided the ‘closure’ conditions for practical sharing arrangements, nowhere more than in Europe. In contrast, the post-war European integration project rests on tearing apart the spatial and political demarcations of these national sharing arrangements. Europe has not replaced these weakened national systems with a common social constitution and a common set of principles of labour and employment law (Scharpf, 1993). The reason is not that social policy or proper industrial relations were seen as undesirable, as today’s liberals might see it. Instead, social policy, employment law and labour relations were considered the realm of the national state.

What remained at the European level was an optimistic notion of “egalisation dans le progress” of working and living conditions. In the French philosophy this should embody regulatory rapprochement, in the German view it was a process of upward convergence in social protection for mainly driven by economic growth (Ferrera, 2006: 94). In no way, was the Treaty to challenge the Westphalian notion of
sovereignty over social policy and labour relations i.e. the ability of national authorities to exclude external actors from having authority within their territory. Yet this was exactly what happened, at first incipiently – beginning with the doctrine developed by the European Court of Justice (ECJ), already in the 1960s2, followed by the consequences of labour migration in an environment densely populated by welfare states and social entitlement.

Many formerly neglected differences among Member States' domestic policies, first in the domain of social security, related to labour migration, but gradually expanding in coverage, and increasingly affecting labour relations and union action, have become exposed to international scrutiny, including judicial review. National governments must thus increasingly deal with “deeper” integration within their borders. As cross-border economic integration increases, governments experience greater difficulties in trying to control events within their borders, resulting in diminished autonomy. The core of the idea of political sovereignty is to permit citizens to conduct their lives and business in accord with their own democratically expressed preferences, but spill-overs and pressures from cross-border integration often require commitments to supranational coordination that challenge unlimited national sovereignty.

2 In *Van Gend & Loos* (26/62) the ECJ ruled that “the Community constitutes a new legal order of international law for the benefit of which states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals, independently of the legislation of member states.” In *Costa* (C6/64) the Court stated that “the transfer of the States from their domestic system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which subsequent unilateral acts incompatible with the concept of the Community cannot prevail.” This was meant to apply not only to the Treaties but also to secondary legislation (*Simmenthal*, 106/77, of 1978).
2.3. Migration and the incipient erosion of national sovereignty

The movement of workers is one of the four freedoms guaranteed under the Treaty (art 48, now 39 ECT). The implications are many: the right to remain in the destination country after retirement; portability of social benefits; extra-territorial consumption of social insurance, etc. A special Convention on the Social Security of Migrant Workers, organized by the Council of Europe in Rome, was signed in 1957. This Rome Convention dealt with the conflict of law issue and established the single law rule of applicability of the law where one works. It was the inspiration of the coordination regime which evolved, establishing the principles of non-discrimination and equality of treatment; eligibility of all periods of insurance, in whatever country; and benefit exportability.

This regime did not require regulatory standardisation of social insurance. That would even in the Europe of Six (before 1972) not have been feasible under the unanimity rule of art 100, now 94 ECT. The main problems arose when member states tampered with the rules, in particular with the definition of a “worker”, in other to limit claims. This was the issue in the Unger (C75/62) ruling against the Dutch government which had refused to reimburse the medical expenses incurred in Germany by somebody voluntary insured under a public scheme in the Netherlands but no longer working there. In order to clarify such legal ambiguities, Regulation 1408/71 speaks of ‘insured persons’ rather than workers (Pennings, 2001). In 2004 Regulation 88/2004 on ‘the coordination of social security regimes’ was adopted and replaced Regulation 1408/71. This was basically a mopping up operation, taking into account various
added rules and regulations, mostly in response to ECJ decisions.

The key story is that the weak coordination regime set up by Regulation 1408/71 has been institutionalised (Stone Sweet, Fligstein, and Sandholz, 1998) with ever more formal and informal add-ons along an expansionist track. Coverage has been extended from migrant workers to insured persons, then to the self-employed and part-time workers, to those seeking work and, eventually, to all EU persons regardless of their employment status. According to Leibfried and Pierson (1995) this development has turned EU member states into a state of ‘semi-sovereignty’ regarding their social policy as it has eroded their controls over the production and consumption of social policy along four dimensions: (1) the cross-national mobility of workers implies that access to social benefits and entitlement can no longer be limited to their own citizens; (2) benefit portability implies that these benefits and rights can be consumed out of state; (3) with the possibility of posting workers member states have lost their exclusive position within the national territory; (4) where there is “freedom of service”, as in private and supplementary schemes, member states have lost the control over provision.

In this view, the erosion was a slow process, of which most policy makers, and the public at large, became only aware in recent times. I suggest that something similar might happen in labour and employment law. It may be that the Rush Portuguesa and Albany rulings created a false sense of complacency, or perhaps in recent times the EC changed its position and became less reticent. According to Catherine Barnard, even before the 1980s “social welfare […] never constituted a reserved domain entirely protected from
incursion by EU law, but the Court nonetheless seemed to implicitly acknowledge that it had to proceed with caution in this area" (Barnard, 2005: 260). Has the position of the court changed? Perhaps, but not only since the recent Laval and Viking cases. A number of ECJ rulings in pension fund and health delivery cases in the late 1990s warned against the conclusion that internal market rules did not apply to major elements of the welfare state such as health care and pensions. Especially where insurance or state provision of social protection is privatised, as was the dominant trend in the 1990s supported by IMF, World Bank, OECD and various EU Directorates, “the rules of competition applicable to enterprises will become applicable to social services” (Temple Lang, 2005:46).

### 2.4 The feeble beginnings of a EU social policy

Part 1 (‘Principles’) of the Treaty of Rome expressed the Community’s commitments to, inter alia, maintaining a high level of social protection for workers. However, Part 3 of the Treaty (the Title on Social Policy) did not contain legal provisions for developing transnational industrial relations. Article 118 limited the Commission’s role to promoting ‘close collaboration’ between Member States in the fields of ‘- employment; - labour law and working conditions; -vocational training; -social security; -prevention of occupational accidents and diseases; -occupational hygiene; -the right of association, and collective bargaining between employers and workers’. And while Article 119 was explicit in formulating the ‘equal pay for equal work for men and

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3 Case C-244/94 FFSA, 16 November 1995; Case C-158/96 Kohl, 28 April 1998; Case C-120/95 Decker, 28 April 1998; Case C-67/96 Albany, 21 September 1999; C-115/97 to C-117/97 Brentjens, 21 September 1999; and Case C-219/97 Drijvende Bokken, 21 September 1999
women’ principle, it was only implemented years later (the 1975 and 1976 gender equality directives). Other legislation adopted by the end of the 1970s, apart from measures facilitating the free movement of workers, included directives on the procedures regarding collective redundancies, and the protection of workers’ acquired rights in case of a transfer of the undertaking to another owner (Threlfall, 2006).

The policy-making in the social area, including industrial relations, intensified in mid-1980s thanks to the vision of adding a ‘social dimension’ to European economic integration proposed by Commission President Jacques Delors (Threlfall, 2007). The social dialogue between social partners on the Community level received recognition from the Commission in the White Paper on completing the internal market (1985). Formal recognition of the European Social Dialogue, and of the Commission’s role in promoting it, came with the 1986 Single European Act, through Article 118B. In the discussions that accompanied the preparation of the 1989 Charter of Fundamental Social Rights and the Treaty of Maastricht (1991) ‘social dialogue was considered important first as an institution-building process necessary as a precursor to any European industrial relations system, and second as a potential joint regulatory procedure alongside other more centralised and legalistic forms’ (Gold et al., 2007:9). These functions were provided for by the Social Policy Agreement appended to the Social Protocol annexed to the Treaty of Maastricht.

The Social Policy Protocol extended the use of qualified majority voting to cover a broader area of employment and industrial relations issues. Further, it provided for agreements concluded between the social partners to acquire the force of legislation. This was a ‘procedural
breakthrough’ (Leibfried, 2005) in terms of an alternative means of introducing EU-level regulation by allowing the European social partners to act independently of the Council and the European Parliament.

In the mid 1990s, a piece of legislation contributing to the potential emergence of transnational industrial relations in the EU was the 1994 European Works Council Directive. The 2002 Information and Consultation Directive has further extended this procedure into national forums by establishing a general framework for informing and consulting employees in firms employing at least 50 employees. The 1997 Intergovernmental Conference and the Treaty of Amsterdam brought into the focus the issue of the failing European labour market. The Treaty specified, in Articles 125-130, that the Member States and the Community were required to work towards developing ‘a coordinated strategy for employment’. Later that year, the European Employment Strategy was inaugurated, based on an agreement of Member States to coordinate their employment policies through relying on common guidelines, indicators, decentralisation, evaluation and mutual learning. Preparing the special Employment Summit in Luxembourg of November 1997, the Commission had wanted to establish specific unemployment targets, similar to the EMU convergence criteria decided in Maastricht, but this was rejected by a majority of government leaders. Instead they settled for a “mutual surveillance procedure”, combined with peer reviews but without specific targets or legal sanctions. The result was a compromise between the pressure for increased EU action and contradicting pressure against expanding EU competence (Trubeck and Mosher, 2003) 38).
The historical account of the incremental developments in industrial relations at the EU-level suggests that the constraints to building a supranational set of industrial relations arrangements have been gradually softening, but only up to a limit. The economic focus of the European integration project has been, especially since the mid 1980s, paralleled by the development of the ‘social dimension’; qualified majority voting has been extended to cover a growing area of employment and industrial relations matters; the position of the social partners at the EU-level has been enhanced thanks to their gradual inclusion in the legislative process; finally, while the Member States remain unwilling to compromise their sovereignty over social policy areas, this happens nonetheless, among others as a consequence of ECJ decisions.

Overcoming member state resistance ‘by subterfuge’ (Heritier, 2002) has been possible thanks to a specific approach: rather than using the Community method, the Commission, assisted by European-level interest groups, has applied what might after Threlfall (2007) may be called ‘procedural innovations’, like stipulating soft charters on principles and values; annexing agreements to treaties; enabling social partners to influence and take decisions on social policy at the EU-level; and fostering benchmarking, learning and coordination between Member States. This approach has resulted in a mixture of hard (legally binding) and soft (non-legally binding) measures that add up to emerging EU-level industrial relations. As a result, during the five decades of the existence of the Communities, unique features of EU-level industrial relations arrangements have been constructed, consisting of common values and
principles; institutions; procedures and policies, and superimposed on the various national systems.

2.5 What role for EU employment law and policy?

In this concluding section I want to dwell on the role of EU labour and employment law and policy. My main point is that it is (should be?) very different from national laws and policies in this field. The main reason is not the diversity hurdle – in the end, while institutionalising different methods and approaches, national laws and policies are inspired by similar philosophies deriving from the problems of 19th and 20th century labour markets. EU labour law and employment policy, being young and new, has a chance to create a set of principles adapted to today’s labour markets.

Labour law in the industrialised western world developed in response to the classic monopsony (buyers) power of capital over labour. It took about a century, with much national variation in timing and methods (Crouch, 1993; Ebbinghaus and Visser, 2000) before national legislators overturned the prohibition of coalitions and enshrined in laws like Loi le Chapelier (1791) in France and the Combination Act (1799) in Britain, which can be considered the mother of all anti-trust laws.

In the 20th century in the western world national law, without exception albeit not without limitation, upheld the freedom of association and the protection of unions against liabilities in case of strikes and bargaining became protected in implicit or explicit recognition of the special characteristics of the labour market. As Ichino (2000) rightly observes, it would be hard to explain the universal acceptance of trade union immunity and the right to bargain (enshrined in ILO
conventions, UN and EU charters) as the outcome of a successful lobby of insiders, even if that captures an important aspect. It is rather a confirmation of the theory explaining the need of worker coalitions as a second best compared to the condition of perfect competition, which is not realizable due to problems of monopsony power, in particular in classic labour markets. Under such conditions, union representation, collective bargaining and the right to strike are instruments of *market making*. By limiting the reach of market relations into the social life of workers, unions contain the commodification of labour and thus *make labour markets less like markets*, at the same time, however, by creating institutions of contractual governance that protect workers’ investment in skills, unions overcome inherent imperfections of labour markets and *make them work in the first place* (Streeck, 2006).

The relevant question for now is: would or should labour law still be written in the same way, if it had to be done today? Probably not (Ichino, 2000). The static monopsony power of capital of classic (industrial) labour markets, to which collective labour law was a response, is no longer the dominant trait of modern labour markets. Higher levels of education, skill, mobility and a generally higher level of income, wealth and protection have made large segments of the ‘employed classes’ a powerful and in some ways equal force in labour markets. In such a situation labour law – both in its collective and individual variant – has still a role to play, but one in which it addresses problems of dynamic monopsony power related to asymmetrical information, hold-up problems in bargaining and the underprovision of particular public goods (for instance training).
One might argue that EU labour and employment law and policies, having only developed in the past twenty years during the decline of industrial labour market and the rise of a service or knowledge economy amidst signs of increasing inequality, dualism and insider power, has followed another track than national law. For political reasons – as part of the dual track approach – EU law did not develop a collective bargaining safeguarding principle bearing constitutional rank, as in national law. Also in later year, it has stopped short of elevated such a principle to the same status as the competition principle of EU primary law. In stead it has created a regime, mostly through ECJ rulings and hence not entirely stable or predictable, in which employment law, and collective bargaining, can be under conditions accommodated to the principles of competition and anti-trust law (Albany; Rush Portuguesa; the Laval quartet).

In terms of positive integration, the main contribution of EU labour law is in another area – addressing problems of dynamic monopsony power and dualism (also related to insider and union power), attempting to address obstacles and insufficiencies in workers’ mobility, training and information, and issues of social protection in relation to these problems. This has become very clear in the course of the common employment policy in response to the Job Crisis of the mid 1990s and the 2000 Lisbon Agenda, especially after its relaunch in 2004/5, and approach which – inter alia – was mostly promoted by the Nordic countries, in alliance with Ireland, the UK and the Netherlands.
2.6 EU employment law as opening up a new regulatory space

The changes in the labour market and diversification of employment statuses and contracts have produced growing tensions between European and national, and between collective and individual labour law. Neoliberalism and individualization as political tendencies have no place for cartels and collective intermediaries like trade 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 UK as supporting “an increasingly individuated rather than collectivized system of human resource management” (Davies and Friedland, 2004: 154) must be placed in context of two decades of weakening of collective organization and bargaining as the basis for worker rights (Brown et al., 1998; Dickens, 2002).

EU law, too, 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 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” (Streeck, 1995: 424). In particular, the new approach is more flexible and allows Member States (1) to exit from common standards if they cannot sustain them; (2) gives precedence to national customs and practice and encourages contractual agreements between market participants, but only if it can go through the “needle’s eye” of
EU competition law; (3) tries to enlist for purposes of
governance the cajoling effects of public recommendations
and expert consensus on ‘best practice’; (4) offers public and
private actors menus of alternatives from which to choose;
and (5) hopes to increase homogeneity among national
regimes through comparison, benchmarking and education
(ibid.)

The new focus on choice reflects the idea that society has
become far 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 (1992) argues that the regulatory frameworks of
classes and families are being replaced by the ‘reflexive
modernity’ of individuals. Giddens (1990) 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.
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 (Hakim, 2001). The heterogeneity
of women’s preferences and choices, in her view, 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 monopsony power, as had been the primary goal of traditional labour 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 (Collins, 2002).

2.6 Flexicurity: a rare Nordic victory?

Member States do not passively undergo EU policies, but actively shape them. The European employment strategy is one example – with a Nordic influence far beyond their weight in votes in the Council or the Parliament. They actually helped inaugurate a policy that very much underlined the new role and philosophy of labour and employment law and policy, adapted to 21st labour markets.

In the early 1990s (when the Nordics also struggled with high unemployment), economists offered two main explanations were offered for Europe’s underperformance. The first explanation stressed the inability to handle economic shocks. Since the 1970s periods of job growth had been followed by periods of heavy job losses. After each recession, unemployment stabilised at a higher level and more people joined the ranks of the long-term unemployed. In addition to the search for macroeconomic stabilisation, the so-called rigidities of labour markets protecting the job and wage interests of “insiders” became a target for research and reform. Although this may explain who are unemployment
rather than how many, the dominant view – voiced by the OECD, the IMF, and the ECB – is that in the mid 1990s Europe’s unemployment was largely structural.

A second explanation for Europe’s bad employment record hinged on the inability of Europe’s welfare states to handle the structural transformation of industrial in service economies. The danger existed of a two-speed labour market, stratified between on the one hand older, mostly male workers and heads of family with well protected jobs and social entitlements, but increasingly made redundant, and on the other hand newly entering cohorts, among them many more women than in the past, working in services and jobs without the career prospects, employment security and social protection that had become associated with jobs in industry and in the public service. The consequence of the misallocation of rights and benefits was high social expenditure and high non-wage labour costs, creating a vicious circle of “welfare without work” especially for people with little education and productive skills. Against this danger, it was argued, Europe’s various welfare states needed recalibration from protecting old rights to covering new risks, investing in skills and education, lowering non-wage labour costs or even subsidising those at the bottom of the labour market, decreasing the risks of dependency and encouraging labour market participation (Esping-Andersen et al., 2002).

Rather than attributing the problems of slow employment growth and job destruction to globalisation and technological change, both explanations underlined that Europe’s problems were of its own making and that they could, or should, be addressed without abandoning the cause of free trade and product market liberalisation. Monetary union,
based on central bank independence, was presented as part of the solution to the problem of enhancing macroeconomic stabilisation, creating the necessary (though not sufficient) conditions for long-term growth. Additional, micro-economic conditions are to be found in the reform of labour and product markets and in an overhaul of wage and social protection policies, adapting the rights and expectations of workers, unions and firms to the new monetary, economic, social and demographic realities. In this dominant vision of Europe’s predicaments, and how they are to be solved, there is no room for demand-oriented policies, as tried in the 1970s. In fact, whenever proposed such policies were struck down for the most by Europe’s self-imposed legal rules: competition policies ruling out state aid; privatisation policy restoring public investment and employment; central bank independence with a mission to keep inflation down; and a Stability and Growth Pact limiting fiscal discretion in times of need. “In short, compared to the repertoire of policy choices that was available two or three decades ago, European legal constraints have greatly reduced the capacity of national governments to influence growth and employment (…). In principle, the only options which remain freely available are supply-side strategies involving lower tax burdens, further deregulation, flexibility, wage differentiation and welfare cutbacks to reduce the reservation wage (Scharpf 2002: 4).” These strategies are those of the OECD Job Study and constitute the major only message of the Lisbon Strategy, especially since its relaunch as a Growth and Jobs Strategy.

It is interesting to note that many policies of the new approach – currently repackaged by the Commission as the “flexicurity” approach – has their origin in Scandinavia – especially Denmark and Sweden. It is a clear demonstration
that Europeanization or the “central penetration of national systems of governance” (Olson, 2002) by European laws and policies, is not a one-way street, but crucially influenced by the legal and policy approaches that member states “upload” to the EU level (Wallace, 2000; Börzel, 2003). If successful, the political transaction costs of change in the domestic polity are small.

Comparative case in Zeitlin and Pochet (2005) have for instance revealed that EU policies hardly plaid a role in labour market reforms in Sweden and Denmark, as these countries were rather the source of inspiration for the EES. The Netherlands, too, saw its own policies more as an export product, though on one or two occasions it did change its policies in response to the EES. Similarly, the New Deal for the Unemployed in the UK, started under the Conservatives and in 1997 developed when Labour gained power, preceded the EES, while elements that did not fit New Labour’s agenda were ignored. The case studies of Germany, Italy, and France showed a mixed response, varying from initial resistance (Germany) to marginal adjustment or formal adherence (France) and a rather political and variable use of the EES in Italy. Heidenreich and Bischoff (2006) showed that after 2002, with Agenda 2010, German policy makers bought into the EES diagnosis, whereas the French, under similar pressure of high structural and much higher youth unemployment did not. The reluctance of France to adopt the new message of the OECD or EES was also noted by Serré and Palier (2004) and was manifested in the unease over the ‘activation’ agenda (Barbier, 2005). Summing up the evidence, we cannot affirm the hypothesis that convergence, learning, reform and failure are directly and positively related. It is
plausible that learning and failure are related, but to travel “from thought to words to deeds” is a political enterprise in which each Member States faces different conditions and difficulties for coalition building and normative consensus. There appears more support for the idea that early reformers gained an advantage all along, in part by uploading their ideas and policies to the EU level.

III. The importance of the struggle over the Service Directive
(see Jon-Erik’s paper – to be integrated?)