

The “Europeanisation” of labour law: can comparative labour law solve the problem?

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The debate surrounding the nature of “Europeanisation” has been raging in the EU for a number of years. It raises a variety of issues regarding the impact of the EU and its effects on the domestic politics and institutions of member states. In terms of labour law, the EU has, over the years, attempted to Europeanise national labour law systems directly and indirectly by introducing measures under the banner of “European labour law”. However, there has always been a debate on the success of such measures as well as on the existence of a category of European labour law.

This paper examines the debate surrounding the Europeanisation of the German and UK labour law systems. Germany and the UK have been chosen as focal points as their different labour law systems illustrate the wide spectrum of national systems of regulation that European labour law must take into account in order to achieve some measure of harmonisation. The paper therefore suggests criteria for testing the success which measures of European labour law have attained in attempting to Europeanise the national labour law systems. These criteria are borrowed from the sphere of comparative labour law. In doing so, firstly, the debate on the Europeanisation of national legal systems is expounded, with specific attention being paid to the sphere of labour law. Secondly, in order to illustrate the problems surrounding Europeanisation, a number of examples are set out. These examples demonstrate circumstances in which the Europeanisation of labour law has been successful or, as the case may be, unsuccessful. Finally, a framework is set out within which to test the success of a measure of European labour law and criteria are also suggested which measures of European labour law need to fulfil in order to successfully Europeanise national systems of labour law.

Europeanisation and European labour law

The European Community has been attempting to Europeanise national legal systems in a range of ways and for a number of years. Europeanisation has been defined broadly in the academic literature by various writers. One of the earliest conceptualisations of the term was given by Ladrech who defined Europeanisation as:

an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making.¹

1 R Ladrech, “Europeanisation of domestic politics and institutions: the case of France” (1994) *Journal of Common Market Studies* 69, at 69.

A number of authors elaborated upon Ladrech's definition thereby widening it to include the development of political networks at a European level² as well as "transnational influences that affect national systems"³ within the concept of Europeanisation. Following on from these definitions, "EC political and economic dynamics"⁴ can be integrated into a member state's organisational structure through either a top-down or a bottom-up approach. In certain areas of law, the Europeanisation of national legal systems has been very successful. A typical example often given is that of competition law where the European Community has achieved a near-complete convergence of member states' legal systems. However, within the sphere of labour law, and, particularly, collective relations, a more nuanced analysis is necessary. Due to the socio-cultural context within which the labour laws of the individual member states have developed, a top-down approach has often resulted in fruitless attempts of approximation of laws and practices. Alternatively, a bottom-up approach is sometimes attempted in order to approximate labour standards across the EU. However, for similar reasons to those mentioned in the context of the top-down approach, a bottom-up approach is equally difficult to implement across the EU as a whole because transnational influences are often difficult to reconcile with the socio-cultural context of labour relations systems. As Weiss points out, "at best there is a chance to approximate the systems in a functional sense, thereby eliminating distortions of competition arising from existing differences".⁵ Other attempts, like the social dialogue, avail themselves of a mixed approach. It combines a top-down approach, with the European umbrella organisations negotiating framework agreements, while the national affiliates, in a bottom-up approach, should ideally have a strong input into those negotiations. However, despite the lack of success of the top-down and bottom-up approaches, any definition of Europeanisation must take into account the two-way process that takes place in the Europeanisation of national labour law systems. As Börzel points out, "approaching Europeanisation exclusively from a top-down rather than bottom-up perspective may in the end fail to recognise the more complex two-way causality of European integration".⁶ For the purposes of this paper, the following definition of Europeanisation is therefore employed. Europeanisation is, very broadly, a process of domestic change that can be attributed to European integration. This process of change can originate from the European and the national level. Europeanisation is, therefore, a two-way process.

2 T Börzel and T Risse, "When Europe hits home: Europeanisation and domestic change" (2000) *European Integration Online Papers* 4.

3 B Kohler-Koch, "Europäisierung: Plädoyer für eine Horizonterweiterung" in M Knodt and B Kohler-Koch (eds), *Deutschland zwischen Europäisierung und Selbstbehauptung* (Frankfurt: Campus 2000): Kohler-Koch includes "auf die nationalen Systeme einwirkende trans-nationale Einflüsse" within the definition of Europeanisation.

4 R Ladrech, "Europeanization and political parties", Working Paper 7 (Keele: Keele European Parties Research Unit (KEPRU) 2001), at p. 5

5 M Weiss, "Workers' participation: its development in the European Union" (2000) *Industrial Law Journal* 737, at 738.

6 T Börzel, "Towards convergence in Europe? Institutional adaptation to Europeanisation in Germany and Spain" (1999) 37 *Journal of Common Market Studies* 573, at 574.

In the area of labour law, the Europeanisation of national systems has largely been attempted under the banner of a so-called European social model⁷ since the early 1990s.⁸ The current EU Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimír Špidla, describes the European social model as “an integrated strategy where social politics are perceived as an investment in human capital and therefore contribute to productivity”. Its objective is, therefore, to “reconcile economic performance with worker well-being”.⁹ This description of the European social model as an arbitrator between economic interests and social protection is, however, not unproblematic. There has been a long-standing debate as to whether the European social model exists and, if so, what its role is. It is often stated, for example, that the European social model “is not really a model, it is not only social, and it is not particularly European”.¹⁰ In contrast, Vaughan-Whitehead recognises the existence of a European social model but lists myriad criteria that it must fulfil in order to count as such.¹¹ A number of more general arguments are frequently proffered when discussing the existence or lack of a European social model. First, it is impossible to define a Europe-wide social model. Every member state has its own system which has developed varying standards, institutions and structures.¹² It is thus difficult to define a European norm and social model. Second, even where European standards exist, these are often implemented to varying degrees and in different ways in the member states. It is therefore difficult to speak of a clearly defined European social model. Pontussen, for example, borrows Esping-Andersen’s terminology¹³ and argues:

The concept of a “social Europe” is by no means clearly defined. For political and analytical reasons, it is better to differentiate between two “social models” or even between two different visions of “social Europe”: the Northern European model on the one hand, and the Continental model on the other. There are no clear lines of division between these two categories, however, there are differences in emphasis. Both models protect the individual against the risks of a free market economy but whereas the Northern European model emphasises social equality, the Continental model emphasises social stability.¹⁴

7 This is the collective name given to the EU’s involvement in social policy which was seen as a necessary component in the economic integration project. For more information, see J Shaw, J Hunt and C Wallace, *Economic and Social Law of the European Union* (Basingstoke: Palgrave 2007), pp. 341–67.

8 J Bischoff and R Detje, “Das Europäische Sozialmodell und die Gewerkschaften” (2007) (Supplement) *Zeitschrift Sozialismus* 1ff.

9 V Špidla, “Une nouvelle Europe sociale”, speech 05/598, at PES Conference “A New Social Europe”, Brussels, 11 October 2005, at p. 5: He describes the European social model as “une stratégie intégrée où la politique sociale est conçue comme un investissement dans le capital humain et donc un facteur productif”. The objective is, therefore, to “concilier performance économique et solidarité”.

10 A Diamantopoulou, “The European social model – myth or reality?,” address at the fringe meeting organised by the European Commission’s Representation in the UK within the framework of the Labour Party Conference, 29 September 2003.

11 D Vaughan-Whitehead, *EU Enlargement versus Social Europe?* (London: Elgar 2003).

12 J Alber, “Das ‘europäische Sozialmodell’ und die USA” (2006) (2) *Leviathan* 208–41.

13 G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (New Jersey: Princeton UP 1990).

14 J Pontussen, “Wohin steuert das soziale Europa?” (2006) 10 *WSI Mitteilungen* 532: Pontussen argues “dass das Konzept eines ‘sozialen Europas’ unklar ist. Aus politischen wie auch aus analytischen Gründen ist es vielmehr sinnvoll, zwischen zwei verschiedenen ‘Sozialmodellen’ bzw. zwischen zwei verschiedenen Visionen eines ‘sozialen Europas’ zu unterscheiden: das nordeuropäische Modell einerseits und das kontinentale Modell andererseits. Die Unterscheidung zwischen diesen Modellen erzeugt zwar keine absolut trennscharfen Kategorien, jedoch legt sie unterschiedliche Schwerpunktsetzungen offen: Beide Modelle schützen den Einzelnen vor den Risiken des Markts, doch während das nordeuropäische Modell die soziale Gleichheit betont, stellt das kontinentale Modell die soziale Stabilität in den Vordergrund.”

All of the above-mentioned arguments illustrate the difficulty encountered in trying to pin down the idea of a European social model. However, the problem may not only lie with the availability of EU norms which may or may not make up a European social model. Rather, the difficulty in definition may be due to the criteria used. It is often argued, that the European social model cannot be compared to national social models which regulate a vast array of social matters.¹⁵ Instead, the European social model should be seen as a political tool which enables the EU to create minimum standards in those areas that fall within its competence. These minimum standards are meant to reduce competition between member states which should lead to further European integration. The hope of the EU is that, by combining economic and social welfare, the EU will achieve “stronger, lasting growth and the creation of more and better jobs”.¹⁶ By accepting that a European social model can only set minimum standards in certain areas, one recognises the existence of a so-called European social model which can complement rather than replace national structures and institutions. As Giddens points out, the European social model is “a mix of values, achievements and hopes which differ in their form and in the extent of their development in the individual Member States”.¹⁷ While this recognises the existence of a European social model it does not create expectations of a model akin to national social welfare systems.

Within the European social model, the EC has enjoyed a limited amount of competence in the field of labour law since the adoption of the Single European Act in 1986. Apart from the provisions contained in the EC Treaty, which enable the community to act in order to facilitate the free movement of workers, Article 137 EC allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work between men and women. Limitations on legislative competence operate in other areas of labour law and, as an alternative, soft law techniques must be used. This has been most visible with the increased reliance on the Open Method of Coordination (OMC) in the sphere of labour law since 2003. The method originated under the EU’s Employment Strategy and is essentially a coordinated and Commission-facilitated inter-governmental process.¹⁸ As Scott and Trubek explain:

the OMC aims to coordinate the actions of several Member States in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence. Under the OMC, the Member States agree on a set of policy objectives but remain free to pursue these objectives in ways that make sense within their national contexts and at differing tempos.¹⁹

However, there are conflicting views on the effectiveness of the OMC which, due to space constraints, cannot be examined in this paper.²⁰

15 Špidla, “Une nouvelle Europe sociale”, n. 9 above.

16 European Commission Communication to the Spring European Council, *Working Together for Growth and Jobs: A new start for the Lisbon Strategy* COM (2005)24.

17 A Giddens, *Zukunft des europäischen Sozialmodells* (Bonn: Friedrich Ebert Stiftung Politikanalyse 2006), at p. 1: As Giddens points out, the European social model is “ein Gemisch aus Werten, Errungenschaften und Hoffnungen, die hinsichtlich ihrer Form und des Grades ihrer Verwirklichung in der einzelnen europäischen Staaten unterschiedlich ausfallen”.

18 P Marginson, “Europeanisation and regime competition: industrial relations and EU enlargement” (2006) 13(2) *Industrielle Beziehungen* 103.

19 J Scott and D Trubek, “Mind the gap: law and new approaches to governance in the European Union” (2002) *European Law Journal* 1, at pp. 4–5.

20 For an overview of different opinions on the OMC, see, for example, C de la Porte, “Is the open method of coordination appropriate for organising activities at European level in sensitive policy areas?” (2002) *European Law Journal* 38 and V Hatzopoulos, “Why the open method of coordination is bad for you: a letter to the EU” (2007) *European Law Journal* 309.

There is also the option to make rules on matters related to employment law through the social dialogue mentioned above. Introduced by the Treaty of Maastricht, the social dialogue consists of representatives of the two sides of industry: management and labour. The agreements concluded between the two sides may be given force of law through a European Council decision under Article 139 EC, thereby turning the agreements into a directive. National trade unions are thus afforded a direct role in the legislative process through their membership in the European trade union confederations. At a national level, the negotiated directives can either be implemented through legislation or by the social partners. As a result, collective agreements at a national level have been accorded a role in legislation implementing EU standards. However, recent caselaw of the European Court of Justice (ECJ)²¹ illustrates the difficulties encountered when national social partners acting in their specific social context are accorded a role in implementing EU legislation. As a whole, the legislative initiatives taken at a European level, ranging from directives to soft law techniques such as the OMC, as well as rulemaking under the social dialogue, are often seen as comprising the category of European labour law. However, there has been a long-standing debate as to whether such an overarching category of laws has actually developed. Many academics in both Germany and the UK are sceptical as to the existence of a European labour law. Schmidt, for example, writes:

In reality, there is not really such a thing as a set of “European Labour Laws”. This is due to the absence, at a European level, of the usual division prevalent in Germany and other Member States between labour law as a form of private law and social security law as a form of public law. At a European level both categories fall under the umbrella of “European social policy”.²²

This rejection of the idea of a category of European labour laws is based on an understanding of labour law in a national context with its inherent divisions into public and private law, collective and individual labour law. This categorisation is nigh impossible at a European level which leads to the conclusion drawn by Schmidt above.

In contrast, Schiek argues that European labour law is the “counterweight to national labour law. European labour law describes those labour law norms that originate at a European rather than a national level”.²³ This allows for a much broader interpretation of the term European labour law. It permits the recognition of such a category of laws as long as one limits the ambit of the subject matter to those rules emanating from a European level, rather than requiring a complete system of labour law at a European level. This view

21 C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* ECR [2007] I-11767; and Case C-346/06 *Dirk Ruffert v Land Niedersachsen* ECR [2008] I-01989. In both cases, provisions of Directive 96/71/EC on the posting of workers were implemented by collective agreement in Sweden and Germany respectively. The ECJ held that the collective agreements in these cases did not adequately implement the provisions to the directive as they had not been declared universally applicable. This then caused further problems for the social partners beyond the realm of this paper.

22 G Haverkate, M Weiss, S Huster and M Schmidt (eds), *Casebook zum Arbeits- und Sozialrecht der EU* (Baden-Baden: Nomos 1999), p. 15: “Ein ‘europäisches Arbeitsrecht’ gibt es, genau genommen, eigentlich nicht. Denn auf Gemeinschaftsebene ist die im deutschen Recht übliche Trennung zwischen dem dem bürgerlichen Recht zugeordneten Arbeitsrecht und dem öffentlichen Recht zugerechneten Sozialrecht – ebenso wie in den meisten anderen Mitgliedsstaaten der Gemeinschaft – unbekannt. Beide Materien unterfallen vielmehr gleichermaßen dem Begriff der ‘europäischen Sozialpolitik’”.

23 D Schiek, *Europäisches Arbeitsrecht* 2nd edn (Baden-Baden: Nomos 2005). European labour law is the “Gegenbegriff zum nationalen Arbeitsrecht . . . [es bezeichnet] arbeitsrechtliche Normen, die keinen nationalen sondern einen europäischen Ursprung haben”.

is shared by other writers²⁴ who recognise the presence of labour law norms originating from a European level and who therefore classify these norms as European labour law. For the purposes of this paper the expression European labour law will be used (with caution) to refer to those hard and soft law mechanisms originating from a European level which aim to approximate national labour law systems. It is recognised that these rules of European labour law are by no means comparable to the systems of labour law prevalent at a national level, for example, in the UK or Germany. Moreover, to a large extent, these rules (especially in the case of directives) must be implemented within national systems in order to take effect. However, as Schiek writes:

European Labour Law is part of a supranational legal order which has direct effect in the Member States of the EU. It is, therefore, EU law which can lead to a complete system of European Labour Law.²⁵

The EU has legislated in a range of areas in recent years in order to achieve a certain degree of harmonisation in the area of labour law across the member states. A number of directives were issued between 1994 and 2002²⁶ in the area of labour law²⁷ with a large proportion of these having been negotiated by the social partners through the social dialogue. Due to the relatively large amount of directives and the limited scope for discussing them in this paper, two particular directives²⁸ are analysed briefly below, by way of example, in order to demonstrate a case in which the Europeanisation of national labour laws was successful, as well as a case in which it was not successful. It is argued that successful implementation also indicates a successful Europeanisation of national labour law systems in this case. Europeanisation has been defined in this paper as a process of domestic change that can be attributed to European integration. Directives aim to bring about domestic change. Therefore, successful implementation implies successful Europeanisation.

The two directives have been chosen for a variety of reasons. On the one hand, the first directive – Directive 94/45 on the establishment of a European Works Council (EWC) – is frequently cited as an example of a very successful attempt to Europeanise national labour law systems. The framework provided by the directive for transnational cooperation illustrates how a European approach can solve community-wide issues often encountered

24 See, for example, B Bercusson, “The dynamic of European Labour Law after Maastricht” (1994) *Industrial Law Journal* 1.

25 Schiek, *Europäisches Arbeitsrecht*, n. 23 above, p. 18: “Das Arbeitsrecht der EU ist Teil einer supranationalen Rechtsordnung mit vorrangiger und zum Teil unmittelbarer Geltung in den Mitgliedsstaaten der Europäischen Union. ... Das EU-Recht kann daher am ehesten dazu führen, dass ein gemeinsames Europäisches Arbeitsrecht entsteht.”

26 Even though directives were issued on social matters prior to 1994 (see, for example, Directive 75/117/EC on equal pay for men and women), the Maastricht Treaty marked the turn towards the pursuit of a social policy by the European Commission as well as an active involvement of the social partners. The first directives following the Maastricht Treaty were issued in 1994. Directive 2002/14/EC on the information and consultation of employees marked the culmination of an eight-year period of active legislating in the area of social policy by the commission and the social partners. Even though directives on social policy are still sporadically negotiated (see, for example, the current negotiations in the sectoral social dialogue with a view to reaching an agreement on the issue of blood-borne infections due to sharp injuries that mainly affect nurses, doctors and healthcare workers: http://ec.europa.eu/employment_social/social_dialogue/index_en.htm), soft law mechanisms have, since 2002, taken over as the preferred method for achieving an approximation of labour standards across the EU.

27 Beginning with Directive 94/45/EC on the establishment of an EWC and ending with Directive 2002/14/EC on the information and consultation of employees.

28 Directive 94/45/EC on the establishment of an EWC and Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.

in the operation of so-called community-scale undertakings. On the other hand, the second directive – Directive 96/71 concerning the posting of workers – is given as an example of an unsuccessful attempt at the Europeanisation of national labour law systems. The problems surrounding the directive have become very topical following a number of rulings by the ECJ²⁹ and the debate surrounding the reform of the directive has been reignited.³⁰

A framework is needed in order to judge whether Directive 94/45 and Directive 96/71 have successfully Europeanised national labour law systems. The problem of judging whether a directive – as an example of European labour law as a whole – has been successfully implemented and used starts with the choice of terminology. It is, first and foremost, difficult to define what one means by “successful implementation”. It is argued that the literature on Europeanisation and on the directives has not come up with useful definitions or criteria. For the purposes of this paper, the “success” of an instrument of European labour law is assessed on the basis of whether it has perceptibly altered the *Rechtswirklichkeit*, that is the law in practice rather than the law in theory. In determining whether something has successfully influenced a national labour law system one will always come up against differing degrees of success. Of course, the true extent of the Europeanisation of a legal system, using the present definition, can only be determined with the help of empirical research into individual legal systems and on the basis of individual measures. This goes far beyond the realm of this paper. However, even with the above-mentioned definition one can at least outline the success of a European measure.

The second step is then to look at the criteria that a measure itself, in this case a directive, must fulfil in order to be able to change the *Rechtswirklichkeit* of a national system, that is in order to be successful. It is difficult to generalise the criteria as every aspect of a certain directive that works well in a given situation may not work in a different setting. Much depends on the nature of the measure and on the way in which it is imposed and implemented. This is similar to the problem encountered in comparative labour law in the area of legal transplants. A large body of literature³¹ has been devoted to the topic of legal transplants and sharp controversies have arisen regarding the portability of labour law from one system to another. The difficulty with legal transplants is, above all, the different legal traditions and concepts encountered when transposing a rule from one system to another. This is the same for measures of European labour law.

Two main theoretical strands have emerged on the issue of transplantation. For Watson, “a rule transplanted from one country to another . . . may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries”.³² This implies that the transplantation of legal rules without adjustment of

29 C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* ECR [2007] I-11767; and Case C-346/06 *Dirk Ruffert v Land Niedersachsen* ECR [2008] I-01989. In both cases the ECJ was asked to consider the interpretation of Directive 96/71/EC on the posting of workers. In *Laval*, the ECJ ruled that the objective of the directive was to lay down a set of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a member state where the services are provided. The ECJ judged that the directive limited the level of protection guaranteed to posted workers. Neither the host member state nor the social partners can ask for more favourable conditions, which go beyond the mandatory rules for minimum protection in the directive. The ECJ followed this judgment in *Ruffert*.

30 See, for example, the position of the ETUC at <http://www.etuc.org/a/5418>.

31 Authors who have written on transplantation include: R Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (The Hague: Kluwer Law International 2004); O Kahn-Freund, “On uses and misuses of comparative law” (1974) 37 *Modern Law Review* 1; P Legrand, “The impossibility of legal transplants” (1997) 4 *Maastricht Journal of European and Comparative Law* 111; A Watson, *Legal Transplants: An approach to comparative law* (Edinburgh: Scottish Academic Press 1974).

32 Watson, *Legal Transplants*, n. 31 above, at p. 20.

those rules is possible albeit, while positive examples of this form of transplantation can be found, the success of rules borrowed from one legal system and directly imported to another system is rare. The second strand of thinking on the transplantability of legal rules stems from Otto Kahn-Freund. For Kahn-Freund, the degree to which a rule can be transplanted depends on the extent to which it conforms with the foreign political and legal structure.³³ Thus, “we cannot take for granted that rules or institutions are transplantable . . . any attempt to use a pattern of law outside the environment of its origin continues to entail the wish of rejection”.³⁴ For the purposes of this chapter, Kahn-Freund’s position³⁵ on legal transplants is preferred over the alternative arguments due to the inherent pragmatism of his approach. According to Kahn-Freund, rules and regulations are usually closely connected with the social and political structure of a country. This is particularly so in the area of labour law. These rules and regulations cannot easily be directly imported to a different legal system without undergoing some form of mutation.

In general, the measures of European labour law are loosely connected to one or more national legal systems. By way of example, it is very rare for a directive to have a completely European content. Even where this might arguably be the case, as in Directive 94/45 on EWCs, one can still discern ideas which have been borrowed from various national legal systems. In order for the measure to be successful, according to Kahn-Freund’s theory, these borrowed aspects from national legal systems must be “mutated”. It is argued that this is done at a European level in the area of European labour law before then being “transplanted” into the member states. To clarify, when legislation is initiated in European labour law (e.g. a directive), elements of the European legislation are often borrowed from national legal systems. These are mutated in the course of the discussions on the legislation until an acceptable agreement is reached. This is then passed on to the member states for implementation.

In mutating borrowed measures of national law, the EU must ensure that certain criteria are fulfilled in order to ensure for the success of the measure in Europeanising national labour law systems. The criteria that a European labour law measure must meet are:

1. flexibility, i.e. leaving sufficient room for national systems to adapt the rules contained in the measure to their own system;
2. neutrality, i.e. the avoidance as far as possible of state-specific concepts; and
3. appropriateness, i.e. using the right mechanisms in the appropriate context.

A measure of European labour law that is aimed at the Europeanisation of national labour law systems must fulfil these three criteria in terms of its content. This framework is applied to Directive 94/45 and Directive 96/71 below, in order to illustrate whether or not these measures are successful in Europeanising national systems of labour law.

Directive 94/45 on the establishment of an EWC was adopted with the goal of improving the availability and provision of information to employees and ensuring their consultation at a transnational, European level.³⁶ It must be noted at the outset that the directive did not, originally, affect the UK as it was negotiated when the UK opt-out to the

33 Kahn-Freund, “On uses and misuses”, n. 31 above.

34 *Ibid.*, at p. 27.

35 *Ibid.*

36 For a good overview of the background to the directive, see e.g. J Pipkorn, “Europäische Aspekte der Informations- und Mitwirkungsrechte der Arbeitnehmer” in F S Everling, Bd. II, Vorträge & Berichte, Zentrum für Europäisches Wirtschaftsrecht, No. 50, 1995.

European social policy was still in place.³⁷ The directive requires multinational enterprises, which fulfil the requirement of being “Community-scale undertakings or groups of undertakings”,³⁸ to establish transnational information and consultation bodies in the form of EWCs or, alternatively, to set up information and consultation procedures (ICPs). This is meant to ensure that employees are involved whenever decisions are taken in another member state that may affect them. UK companies who fulfilled the transnational requirements of the directive could therefore still be caught by its provisions despite the UK opt-out. Following the reversal of the UK opt-out by the Labour government in 1997, the directive was adopted³⁹ by the UK, thereby rendering it fully applicable. Space precludes a discussion of the ways in which these EWCs or ICPs can be established.⁴⁰

Overall, the directive is considered to be an effective piece of European legislation in the area of labour law. It is generally accepted that EWCs which have been set up in approximately one-third of community-scale undertakings have enhanced the level and quality of communication between management and employees. They are also seen to have great potential for the promotion of the social dialogue between multinationals and trade unions.⁴¹ However, the directive also displays negative aspects. A majority of multinationals have not set up EWCs. Furthermore, while information is provided to EWCs set up in undertakings, the EWCs are often not involved in the decision-making itself. Meaningful consultation does not always, therefore, take place.

Nonetheless, the directive has largely had a positive impact. A review process that began in 1999 and ended with the adoption of a slightly revised directive on 5 June 2009⁴² suggested that the directive has largely been satisfactorily received and implemented by the member states.⁴³ It can therefore be said that the directive has changed the *Rechtswirklichkeit* in the member states. It seems to have bypassed the usual difficulties associated with labour legislation originating from the EU. In part this appears to be due to the fact that:

its aim is not harmonisation of existing national systems of information and consultation but the adoption of new measures in each Member State to create a Europe-wide legal framework for a transnational tier of information and consultation within “Community-scale” undertakings or groups.⁴⁴

The directive is, therefore, flexible and neutral enough to be well-received in the member states. In the eyes of some academic writers, it embodies a typical application of the principle of subsidiarity. Pipkorn, for example, writes:

37 A Protocol and Agreement on Social Policy which broadened the EU social competences and provided a particular procedure for European social dialogue was attached to the Maastricht Treaty after only 11 member states signed it. The UK refused to sign at this point and was given an opt-out. It was only when the Labour government under Tony Blair came to power in 1997 that the opt-out was reversed.

38 Article 2 prescribes that the undertakings must employ a minimum of 1000 employees on the territories of the member states, with at least 150 employees in each of at least two member states.

39 It was implemented through the Transnational Information and Consultation of Employees Regulations 1999.

40 For a good overview see e.g. P Lorber, “Reviewing the EWC Directive: European progress and United Kingdom perspective” (2004) 33 *Industrial Law Journal* 191.

41 For a list of other benefits see list in Appendix III of European Economic and Social Committee Opinion, SOC/139 on the Practical Application of the EWC Directive, September 2003, available at www.esc.eu.int. Also, the EWCs Bulletin 43 highlights a number of benefits recognised by the social partners.

42 The revised directive strengthens workers’ rights and improves the practical application of the directive so as to encourage the formation of more works councils.

43 See e.g. COM (2000) 188 final communication on the implementation of the directive by the commission after consultation with member states and European social partners.

44 M Carley and M Hall, “The implementation of the European Works Councils Directive” (2000) 29 *Industrial Law Journal* 103, at p. 103.

[t]he Directive is characteristic of the original principle of subsidiarity, i.e. the differentiation between the sphere of influence of the State and that of non-state actors who, within their confines, can effectively develop an economic and social order.⁴⁵

Moreover, the provisions of the directive are largely procedural in nature rather than rights-based, thus making them more easily adaptable to national systems of worker representation. This is an example of where the right mechanisms were used in an appropriate context to achieve the aims stated in the directive. As a result, Directive 94/45 fulfils all three criteria set out above which are necessary for the successful Europeanisation of national labour law systems. A further positive characteristic of the directive is “the considerable scope it gives for devolved, national-level regulation of key aspects of the legal framework for the establishment of EWCs”.⁴⁶ Weiss echoes this sentiment by describing the directive as a “flexible new concept” which is the “secret to the success” of the directive.⁴⁷ A working party convened by the European Commission oversees the implementation process, therefore ensuring quite a high degree of harmonisation of procedures. It is this mixed and flexible approach that seems to have had a positive impact and brought about the successful implementation of the provisions of the directive. Although EWCs contain certain core characteristics, they vary greatly from undertaking to undertaking, and from country to country, in terms of the exact model they adopt. While there is therefore some degree of harmonisation of transnational employee representation, there is also sufficient scope for diversity across the member states, thereby reflecting the differences in their labour law systems and structures. This is particularly evident in the UK implementation of the directive. Whereas the majority of European member states, particularly Germany, could draw upon existing representative structures in their industrial relations systems, the UK had to create a “statutory standing works-council-type employee representation body for the first time ever . . . albeit on a transnational basis”.⁴⁸ While this caused some difficulty in the UK, the directive left sufficient freedom for legislators to create a system of representation specifically tailored to UK industrial relations. Conversely, German legislators profited from the ability, under the directive, to draw upon existing representative structures. The legislation on German works councils, which are already established in a large majority of national undertakings, was used as a basis and then expanded upon to cover EWCs.⁴⁹ Directive 94/45 therefore illustrates, particularly due to its flexibility, neutrality and appropriateness, the potential of European labour law to successfully establish a basis for the harmonisation of national labour law systems across the EU.

In contrast, Directive 96/71 concerning the posting of workers in the framework of the provision of services has caused great controversy in the EU. It is a useful example of the difficulties encountered in the Europeanisation of national labour law systems. Directive 96/71 aimed to establish:

45 Pipkorn, “Europäische Aspekte der Informations”, n. 36 above, at p. 1127: “[S]ie ist eine Ausprägung des Subsidiaritätsprinzips in seiner ursprünglichen Ausformung, nämlich der Abgrenzung der staatlichen Sphäre von derjenigen, in der nichtstaatliche Organisationen und gesellschaftliche Kräfte wirksam die Wirtschafts- und Sozialordnung gestalten können.”

46 Carley and Hall, “Implementation”, n. 44 above, at p. 104.

47 M Weiss, “Arbeitnehmermitwirkung in Europa” (2003) 4 *Neue Zeitschrift für Arbeitsrecht* 179; Weiss echoes this sentiment by describing the directive as a “flexibles neues Konzept” which is part of its “Erfolgsgheimnis”.

48 Carley and Hall, “Implementation”, n. 44 above, p. 114.

49 For a more substantial discussion, see Weiss, “Arbeitnehmermitwirkung in Europa”, n. 47 above.

a legal frame for labour conditions of workers posted for a temporary period to another Member State. Its content is about equal treatment, a guarantee of minimum protection, fair competition and respect for the regulatory frame in the host country.⁵⁰

With increasing cross-border activity in the form of posted workers in the EU, the European Commission proposed in 1991 to regulate the provision of services in an attempt to find a balance between workers’ rights and the free provision of services.⁵¹ This was also in response to decisions of the ECJ⁵² which found it justifiable to apply basic protections of national labour laws to posted workers even if this had a “chilling effect upon cross-border service providers”.⁵³ Following these decisions, member states were allowed to “take steps to extend their domestic regulation to posted workers”.⁵⁴ The European Commission, however, was keen to promote cross-border provision of services. This could only be achieved by providing legal certainty for employers posting workers across borders. The compromise was Directive 96/71 on the posting of workers which:

presents something of a paradox. On the one hand, [the member states] played their cards so as to produce a Directive which was highly protective of domestic labour regulation. On the other hand, the legal base chosen for the Directive required that a primary aim should be the promotion of cross-border provision of services.⁵⁵

As a result, the directive only aims to achieve “partial harmonisation”.⁵⁶ It prescribes minimum standards of core working conditions which should apply equally to national and posted workers. Posted workers are those workers who are sent temporarily to work in another member state by their employer. They are guaranteed certain labour conditions that the host member state considers to be of “general interest” to the worker at issue. The aim of the directive is to prevent distortion of competition through lower social standards.

The implementation of the directive has proved problematic due to the diverse interpretation of the provisions in national labour law systems. Certain commentators have levelled the criticism that the directive does not take sufficient account of diversity in national industrial relations systems.⁵⁷ As a result, effective national implementation has been lacking. In a 2003 communication on the implementation of the directive,⁵⁸ the European Commission concluded that the directive had encountered difficulties in its practical implementation. As a result of these difficulties, the directive has not managed to alter the *Rechtswirklichkeit* in the member states. Above all, there was a failure to monitor compliance, as well as a lack of access to relevant provisions applicable in the host country. Member states thus seem to be lacking in their effective implementation of the provisions of the

50 J Cremers, J E Dølvik and G Bosch, “Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU” (2007) 38 *Industrial Relations Journal* 524, at 524.

51 *Ibid.*, at p. 526.

52 Case C-113/89 *Rush Portuguesa Lda v Office national d’immigration* (1990) ECR I-1417 and Case C-43/93 *Vander Elst v Office des Migrations Internationales* (1004) ECR I-3803.

53 P Davies, “Posted workers: single market or protection of national labour law systems?” (1997) 34 *Common Market Law Review* 571, at 586.

54 *Ibid.*, at p. 590.

55 *Ibid.*, at pp. 591–2.

56 Case 105/84 *Föreningen of Arbejdsledere i Danmark v A/S Danmols Inventar* (1985) ECR 2639, at para. 26: this term was applied to the Acquired Rights Directive (77/187/EEC) to describe the situation where applicable rules are identified but they do not achieve harmonisation across the member states.

57 See, for example, Cremers et al., “Posting of workers”, n. 50 above.

58 Report from the European Commission on the Implementation of Directive 97/71/EC concerning the Posting of Workers in the Framework of the Provision of Services (COM 2003/458).

directive. Moreover, a resolution adopted by the European Parliament in 2004 considers the directive to be insufficient to combat unfair competition and social dumping. The European Parliament therefore called for a review of the substantive content of the directive.⁵⁹

Following the enlargements in 2004 and 2007 the debate on the effectiveness of the directive has been given a new lease of life due to large numbers of workers being sent from new to old member states. In practice, this has led to waves of protest across old member states against cheap labour originating from new member states.⁶⁰ Moreover, workers from new member states often fail to receive the rights due to them under Directive 96/71. In Germany, such allegations were raised in the meat industry by Polish workers.⁶¹ More recently, the debate surrounding “British jobs for British workers” in the UK illustrated the difficulty of using posted workers in host labour markets struggling with the current economic crisis.⁶²

In the UK, application of the directive has been made easier since the introduction of a statutory minimum wage in April 1999. This allows posted workers to demand effectively equal treatment with national workers. Nonetheless, countless workers fall through the loopholes present in the directive and are therefore not benefiting from the relevant provisions. Moreover, workers often suffer from a lack of information and, as a result, cannot avail themselves of the protection under the directive. While textual implementation of the directive is not an obvious problem, its practical application is.⁶³ The directive has thus failed to alter the *Rechtswirklichkeit* in the UK.

Likewise, implementation in Germany has proved difficult, but for different reasons. It is mainly the absence of a minimum wage that has resulted in a lack of successful implementation. The problem of the directive is, therefore, that it gives posted workers a right to a minimum wage that does not exist in such a form in Germany. Instead, the directive should have focused on providing workers with a procedure to follow in order to receive adequate pay which would have been easier to implement. The directive thus fails the requirement of appropriateness by not using adequate mechanisms in the given context. By requiring a minimum wage rather than leaving room for real alternatives, the directive is also not sufficiently neutral or flexible to allow for the successful Europeanisation of the national labour law system. While in certain sectors in Germany general collective agreements lay down the terms required by the directive, collective bargaining in other sectors is heavily fragmented and does not therefore lead to effective collective agreements. The

59 European Parliament Resolution on the implementation of Directive 96/71/EC in the member states (COM(2003) 458-2003/2168IINI).

60 For examples, see T Krings, “A race to the bottom? Trade unions, EU enlargement and the free movement of labour” (2009) *European Journal of Industrial Relations* 49.

61 C Tenbrock and B Wielinski, “‘Kapitalismus Pur’: Hungerlöhne, miese Arbeit: Polen in deutschen Betrieben fühlen sich getäuscht”, *Die Zeit*, 10 May 2007.

62 The Lindsey oil refinery dispute provided the catalyst to this debate. In January 2009, workers at Lindsey oil refinery began unofficial strike action in protest against perceived discrimination against British workers. The owners of the refinery had awarded construction of a new unit at the plant to an American company which had sub-contracted part of the work to an Italian company. Workers at Lindsey oil refinery commenced unofficial strike action after learning that the sub-contractor would post its own permanent workforce of foreign nationals (Italians) to the refinery to complete the project rather than employing British workers. This illustrates the feeling, as evidenced by many of the placards bearing Gordon Brown’s pledge of “British jobs for British workers”, that British workers should be accorded preference over foreign nationals, in this case EU workers, in the allocation of employment contracts.

63 Cremers et al., “Posting of workers”, n. 50 above, at pp. 529–30.

implementation of the directive has been confined to the building sector for the time being⁶⁴ and the debate on an effective form of implementation of the directive is ongoing.⁶⁵

Control mechanisms at a national level are weak and uncoordinated across member states. This has given rise to criticism from the European Trade Union Confederation (ETUC) in its position on the directive. According to the ETUC, coordination and cooperation among member states is, in practice, almost non-existent.⁶⁶ This makes compliance with the directive difficult. As Cremers et al. point out:

the over-riding challenge in all the countries is to develop effective mechanisms of enforcement compatible with the constraints of EU principles and regulations. At the European level, in the meantime, the shift in political climate seems to indicate that the weight is shifting in the opposite direction, towards the supremacy of the free provision of services.⁶⁷

This suspicion is confirmed by recent ECJ caselaw.⁶⁸ Directive 96/71 is therefore an example of a failure by the European Commission and the member states to harmonise national labour laws, due to a lack of understanding of the prevalent national systems. As a result, the directive does not fulfil the criteria set out above and fails to successfully Europeanise the national labour law systems.

Conclusion

National labour law systems have been struggling to accommodate the process of domestic change brought about by the EU through its policy of Europeanisation. This has become more difficult following the recent European enlargements in 2004 and 2007 which have enhanced social and political diversity in the EU. As a result of the very different industrial relations systems prevalent in the new member states, the norms and values underpinning the legislative aspects of the EU’s policy on Europeanisation have slowly been eroded.⁶⁹ In addition, there has been the movement examined briefly above towards soft law mechanisms like the OMC which complicate the process of Europeanising national labour law systems. The underlying rationale for the European social policy has hitherto merely been the demand for broad equivalence in labour standards rather than a uniform harmonisation.⁷⁰ However, as such standards, in order to be adopted, need to be acceptable to all member states and can only be so if they are economically viable in the less wealthy

64 Entsendegesetz BGBl 1996. For more detail, see W Däubler, “Posted workers and freedom to supply services” (1998) 27 *Industrial Law Journal* 264.

65 Cremers et al., “Posting of workers”, n. 50 above, pp. 530–1.

66 ETUC position on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services available at <http://www.etuc.org/a/2222>.

67 Cremers et al., “Posting of workers”, n. 50 above, at p. 535.

68 C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* judgment of 18 December 2007 and C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* judgment of 3 April 2008: The ECJ was asked, in both cases, to interpret Directive 96/71 on the posting of workers and to determine the relationship between it and the right to free movement of services as contained in the ECJ Treaty. The ECJ, in its judgment, favoured the free movement provision and established that the rights contained in the directive should be seen as a maximum rather than a minimum level of worker protection which cannot be improved upon by the member states.

69 R Hyman, “The Europeanisation – or the erosion of – industrial relations?” (2001) *IRJ* 280, at 289.

70 N Adnett and S Hardy, *The European Social Model – Modernisation or evolution?* (Cheltenham: Elgar 2005).

countries and compatible with existing industrial relations and welfare state institutions, they are usually relatively permissive.⁷¹

Following the European enlargements and the accession of 12 new states with their differing labour relations systems, the EU's task of bringing about domestic change as a result of European integration has become increasingly difficult. It is argued in this paper that the mechanisms used in comparative law to assess the viability of legal transplants may aid the EU in its attempts to successfully Europeanise national labour law systems. By establishing criteria that are sufficiently broad to encompass different labour law systems, the method of comparative law enables the author to judge whether a measure of European labour law has been successful or unsuccessful. In doing so, the paper provides a framework as to the factors that must be taken into account in order to successfully Europeanise aspects of national labour law systems. By illustrating an unsuccessful measure of European labour law, the paper demonstrates the pitfalls that are to be avoided. Comparative law may, therefore, contribute to solving the EU's difficult task of Europeanising national labour law systems.

71 W Streeck, "Neo-voluntarism. A new European social policy regime?" (1995) *European Law Journal* 31 and W Streeck, "Industrial citizenship under regime competition: the case of European Works Councils" (1997) *Journal of European Public Policy* 643.