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The social regulation of welfare markets
Chances and limits of social policy beyond the post-war welfare state

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Stream 9: Regulatory Social Policy

The interpretation of the (partial) privatisation of social services in European welfare states since the 1990s is controversial. Social critics diagnose a 'surrender of public responsibility' (Gilbert 2002) while reformers see privatisation as a better way to achieve welfare ends - 'welfare ends through market means', as Taylor-Gooby et al. (2004) described the rationale of New Labour policies in the UK. Both sides have a point. The critics argue that institutions serving the public good are subjected to market principles and economic interests. Social rights and entitlements give way to opportunities in the market, redistributory or budgetary policies are curtailed in favour of enabling and activating policies, and individual responsibility replaces public responsibility. By contrast, reformers maintain that social ends are upheld, only the instruments to exert responsibility change. Private providers are seen to meet welfare ends better than state agencies, by delivering welfare goods in a more efficient, cheaper and more responsive way. In the 2001 pension reform in Germany, reformers also referred to welfare ends when introducing a subsidised private pension, the *Riester-Rente*, with the explicit aim of closing the income gap in old age brought about by reductions in public pensions.

Surrender of public responsibility or welfare ends through market means? The answer depends on how welfare markets are regulated by governments. Regulation confined to basic legal rules could indicate a surrender of public responsibility or at least a minimal involvement of government. 'Social' regulation, by contrast, might aim to impose welfare ends on private welfare markets. Systematic research on the regulation of welfare markets is only beginning. However, there is a broad literature on the regulation of public utilities like gas and rail (see e.g. Grande/Eberlein 2000, for the EU Majone 1996). The studies found that privatisation ('de-regulation') gives rise to new forms of public involvement ([re-] regulation), even to a 'regulatory state' (Grande/Eberlein 2000, Jajasuriya 2001). Does this finding also apply to public welfare and if so, in which ways? Accordingly, in this paper we investigate the *chances and limits of transferring 'social' ends to private welfare markets by regulatory policies.* Furthermore, we inquire *what rules govern processes in welfare markets that are beyond the reach of conventional social ends?*

Kaufmann (1997), drawing on Girvetz (1968), has defined the welfare state as a state which explicitly assumes a social responsibility for the well-being of its citizens, linked to a set of institutions, a 'welfare sector', which implement the social goals defined by the government. According to this definition the welfare state has a normative side – social responsibility,

social ends - and an institutional side – the welfare sector. Both aspects are at stake in the ongoing transformation of European welfare states. Accordingly, a policy may transcend the welfare state in two regards: social policy may transcend the welfare state in terms of institutions, pursuing welfare ends commonly associated with the welfare state but relying on other means (with market means as the case in point). A policy may additionally transcend the normative side, relying neither on conventional means of the provider state nor following conventional welfare ends (but possibly following 'social' ends in a broader sense, as will be investigated). Drawing on these definitions we can rephrase our question: *Is there social policy beyond the conventional welfare state, either in institutional and/or in normative terms?*

In section 1 we review theoretical arguments that support either the surrender thesis or the 'welfare ends through market means' thesis. In section 2 we present an exemplary case study of a regulatory measure by the EU with regard to private pensions in Europe. The case study refers to the initiative by the Social Commissioner of the EU, Anna Diamantopoulou, to make gender-neutral tariffs mandatory for providers of private provision for old age. This may appear to be a very special case of regulation but it turns out to be particularly illuminating for general issues of regulation which this article addresses. The case study is based on original research of the policy process and related debates (for a full analysis see Kopischke/Leisering 2007, Kopischke 2006). As contrastive evidence, we briefly refer to a parallel initiative in Germany to establish unisex tariffs on a national base (for a full analysis see Kopischke 2007, 2006, Kopischke/Leisering 2007). In section 3 we derive general hypotheses regarding the chances and the limits of socially regulating welfare markets, of 'social policy beyond the welfare state'. In section 4 we draw conclusions for the transformation of social policy in an age of privatisation and regulation.

1. Privatisation: surrender of public responsibility or welfare ends through market means? A review of arguments

Each thesis – surrender of public responsibility as a consequence of privatisation on the one hand and retention of public responsibility by using markets to achieve welfare ends on the other hand – can muster theoretical arguments to support the thesis. To start with, there are reasons to assume that welfare ends can indeed be extended to welfare markets. Evidence is supplied both by welfare state research and by economic sociology and the study of markets.

In the post-war era, the *welfare state* has become a major source of the legitimacy of governments. Welfare state thinking is deeply entrenched in the attitudes of the citizens, in social structure and in social institutions: the welfare state has given rise to a 'collective social conscience' (de Swaan 1988), to 'welfare classes' (Lepsius 1990/1979), to provider elites and to national 'welfare state traditions' (Kaufmann 2003a). The collective experience of the welfare state as a major determinant of living conditions has created 'welfare state generations' (Leisering 2000) who share welfare-related attitudes and expectations vis-à-vis governments. These ingrained expectations may easily 'travel' to private welfare provisions, especially if citizens or even policy-makers see private welfare as substituting for reductions in public provisions.

For the field of *old-age security*, in particular, Myles and Pierson (2001) have predicted a sustained politicisation of private pensions: '... future pension politics will focus on the regulatory role of government, a role, however, that will create no small measure of political conflict around issues of income security.' (Myles/Pierson 2001: 317) The prediction refers to 'late comer countries' – countries which came too late to install a Bismarckian earnings-related pension tiers on top of a basic pension, resorting to extensive occupational and private (personal) pensions instead. In these countries, private pensions make up substantial parts of income in old age and may thus become the object of welfare-related expectations and demands directed to politics.[1] Although Myles' and Pierson's argument is plausible to a degree, it could be reversed: People in late comer countries may have become used to non-state pensions, perceiving them as a separate world , with goals and promises differing from state schemes. From this point of view, the other category of countries distinguished by Myles and Pierson – countries with 'mature systems' (Myles/Pierson) that established substantial earnings-related public pensions when it still was economically and demographically feasible – might be more likely candidates for transferring welfare ends from state schemes to private schemes. In countries with mature systems, the scope for private pensions is more limited than in latecomer countries and, as a consequence, the field for regulation is smaller, as Myles and Pierson rightly argue. But since privatisation is more recent (for instance in Germany, where it started in 2001) and designed to make up for reductions in state pensions, regulation is heavily politicised. Citizens may exert pressure on policy-makers to regulate private pensions according to ingrained welfare state standards.

[1] In this paper, 'private pensions' includes both personal and occupational pensions.

Systematic and theoretically oriented research on *welfare markets* is only beginning (in the British context see Taylor-Gooby 1999, in the German context Nullmeier 2001, 2002). Bode (2005) discusses the relevant literature from economics and economic sociology. The need of economic markets to be 'embedded' in social norms and social relationships is a key tenet of *economic sociology*. While conventional economic theory admits that markets rely on an external legal framework (but otherwise follow a market logic), the concept of embedding from economic sociology is stronger, implying a constitution of markets by non-economic norms (Bode 2005: 256-259): social norms and interactions are assumed not to be external to the market but to shape the very operation of markets, including the formation of products, preferences, norms and actors. Embedding also implies that the legal and normative framework of markets extends beyond general legal rules to include norms specific to the market in hand. Applied to welfare markets, Bode (2005: 259-264) shows that principles of the welfare state deeply imbue welfare markets. This includes 'social' regulation by governments as well as corporatist arrangements for occupational pensions.

Research on welfare markets by *political scientists* and *sociologists* equally assumes a strong presence of 'social' elements in welfare markets, at least in the German literature. These authors define welfare markets not just by reference to the nature of goods produced (as done by British authors who define welfare markets as markets for welfare-related goods, e.g. Taylor-Gooby 1999) but by a 'social' responsibility assumed by governments and related regulatory measures (Nullmeier 2001, Berner 2004, 2007). Nullmeier even requires that the goods traded in 'welfare markets' be originally under the responsibility of the state. Welfare markets that originated independently of the state would not be covered by the term. The difference between the British and the German traditions is related to national traditions of state and welfare. Especially in old-age security, Britain has a strong tradition of private (personal as well as occupational) pensions while in Germany public pensions have long dominated. The current German debate has only been triggered by the reforms of 2001 which introduced socially regulated private pensions. The difference between the two concepts of welfare market is also due to the ambiguity of the English term 'welfare' which may denote the nature of welfare goods without normative reference to specific welfare ends. The normative notion of welfare market found in German authors, by contrast, might be better captured by the term 'social market'. Accordingly, 'welfare ends' could more precisely be termed 'social ends'.

Finally, political science research on the state and new forms of governance has recently turned to 'governance in areas of limited statehood' (Risse/Lehmkuhl 2007). The hypothesis is that modes of governing without government rely on conditions that they cannot generate by themselves. Schuppert (1998), a legal theorist, speaks of the *'shadow of the state'* cast on such areas. Applied to private welfare production, our research question how far welfare ends reach into welfare markets could be rephrased as to whether welfare markets operate 'in the shadow of the welfare state'. Taking up the distinction of a normative and an institutional side of the welfare state (social responsibility – welfare sector) we could distinguish a normative shadow and an institutional shadow.

However, there are other pieces of research which rather support the thesis that the privatisation of social services entails a surrender of public responsibility. Three strands of thinking are relevant in this respect: welfare state theory, social criticism and market studies.

A strong tradition in *welfare state research* conceives of state and market as antagonistic realms with logics that cannot be reconciled. In this view, markets are not susceptible to welfare ends, rather the market represents insecurity of living and diswelfare (see Pinker's critique of Titmuss's dualist ontology of welfare, Pinker 1979). A shift from state to market would therefore fundamentally alter the societal production of welfare. Social policy is seen as a matter of 'politics against markets' (Esping-Andersen 1985). More specifically, Esping-Andersen's (1990) well-known definition of welfare regimes centres on 'de-commodification': according to this concept, social policy aims to restrict the operation of the labour market as source of living, by establishing rights to state benefits which make people independent of the labour market in periods of need such as unemployment, old age or sickness. Similarly, Lenhardt and Offe (1977) conceived of state social policy as political measures that create 'modes of living outside the (labour) market'. Social policy makes markets more 'social' not so much through market regulation but by curbing the scope of markets. In this view, social regulation would be seen as (undesirable) 'politics *with* markets' (our term), not as 'politics against markets'. The social democratic notion of a strict antagonism between the social state and the economic market has centred on labour markets, though, and has not been elaborated with regard to welfare markets.

Leftist *social critics* relate privatisation to the rise of 'neo-liberalism' as ideology in the 1990s. They view privatisation as a strategy by neo-liberal actors to expel the ghost of the welfare state seen as detrimental to society. Olasky, a proponent of US-American neo-conservatism under George Bush jr., has criticised what he sees as 'entitlement revolution'. In this view, markets shall not be burdened by undue welfare rights. The criticism extends to democracy at large: privatisation also aims to depoliticise welfare issues. Other social critics of neo-liberal tendencies have provided a more complex analysis of the shift from the conventional provider state to the enabling state in social welfare but with a similar conclusion - Gilbert (2002) speaks of a 'silent surrender of public responsibility'. Taylor-Gooby et al. (2004) ponder the successes and failures of New Labour's market-oriented welfare reforms in Britain. They diagnose problems of the Labour government in regulating private providers, tracing the problems to the 'incompatibility between welfare and market objectives' (p 573).

Other strands of research to question the possibility or necessity of imposing 'social' ends on welfare markets include two strands mentioned earlier, *economic theory* and the British literature on *welfare markets*. If, according to conventional economic theory, markets only need a basic framework of general rules rather than specific social norms induced, among others, by political regulation, then social ends are not needed, indeed they potentially hamper the operation of the market. If the concept of welfare markets, as Taylor-Gooby (1999) assumes, relates to the nature of goods traded in the market and not necessarily to a 'social' orientation of private welfare production, then welfare markets do not require social regulation. Taylor-Gooby analyses the problem of trust which welfare markets require to operate but trust is a general category which is also relevant to markets for non-welfare goods. Moreover, trust has no specific reference to 'social' ends. Therefore the analysis of the trust requirement does not make a case for social regulation of welfare markets.

The two conflicting theses – surrender of public responsibility vs. welfare ends through market means – share the assumption of *conflicting logics* between state and market. But the theses differ as to whether the two logics can be reconciled. The surrender thesis implies a notion of social policy as containing markets – 'politics against markets', 'decommodification'. As a consequence, reliance on markets to produce welfare, even if regulated, cannot serve social ends, cannot be social policy in the sense of the post-war welfare state. The 'welfare ends through market means' thesis, by contrast, assumes the

possibility of modifying the logic of the market by bringing in elements of the logic of the welfare state, through 'social regulation'. The strategy of social regulation of welfare markets respects the logic of the market – by only regulating markets, not containing their scope – but brings it to bear on welfare ends. This is politics *with* the market.

The two theses also have in common that the *limits* and thresholds of public activity are not specified. The 'welfare ends through market means' thesis leaves open what specific welfare ends are to be pursued through market means and how far welfare ends can be imposed on markets. Obviously, a total imposition of welfare ends would extinguish the market and turn it into a provider state. On the other hand, the surrender thesis leaves open what political modifications of markets are considered to be marginal to the logic of the market. Welfare markets are always subject to some modification, to some basic regulation. The surrender argument assumes that even social regulation would not to change the logic of the market in a relevant way.

This paper inquires into the nature and the scope of social regulation as the key to weigh and test the two competing hypotheses. The inquiry will lead us beyond the two theses, identifying precise limits of the public and the social and analysing how welfare markets are regulated beyond conventional 'social' ends.

2. Reasons for regulation – the case of the 2003/2004 unisex initiative by the EU Commission in the field of private pensions

While gender issues are common in research on public welfare schemes, the implications of private schemes are only beginning to be explored. The initiative by the then Social Commissioner of the EU, Anna Diamantopoulou, to make gender-neutral tariffs mandatory for providers of private provision for old age was part of the Anti-discrimination Directive which the Commissioner drafted in 2003 to promote equal opportunities also beyond the realm of employment and work. The unisex initiative testifies to the attempts by the European Union to intervene in private pension markets by regulatory measures. The case study is based on a reconstruction of the arguments of the proponents and the opponents of unisex tariffs in the European debate.

In unisex tariffs, issues of social security intersect with general issues of non-discrimination and gender equality. The issue of gender-neutral tariffs reflects changes in both areas, in old-

age security and the politics of equal opportunities. While state pensions in European countries are still mainly shaped by national policies, subject only to soft interference by the EU by way of the Open Method of Coordination (OMC), private pensions are more directly subject to EU law because regulating private markets is a core competence of the EU. Moreover, the Europeanization and globalization of financial markets entails a growing *debordering of national markets for private pensions* (Ferrera 2005). All in all, the growing privatization of old-age security in EU member states gives rise to a growing regulatory activity of the EU with regard to European markets for private provision for old age (Blömeke 2007). This includes issues of non-discrimination of consumers in the financial sector. Non-discrimination has been an issue in EU policies for a long time but the politics of non-discrimination between citizens had been restricted to labour law and employment. But equality of opportunity and anti-discrimination in general have become human rights issues and are considered to be basic principles of the European Union (KOM 2003: 11, 22f.; for a historical analysis see Ostner/Lewis 1998).

The call for gender-neutral private insurance contracts has evolved over a longer period of time. In some EU member states like the Netherlands, France and Sweden unisex tariffs had already been established in some sectors (KOM 2003: 13). In the year 2000 the European Union put gender equality beyond employment and labour law onto the agenda (KOM 2003: 2, 4, 23; Bulletin 2003; EP 2004: 25). Gender-neutral calculation in private provision for old age entered the political agenda of the EU in 2003. On November 5th, 2003 the then Social Commissioner Anna Diamontopoulou drafted a *proposal for a Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services* (in short: Anti-discrimination Directive; KOM 2003: 1). The draft Directive aimed to establish mandatory gender-neutral calculation in the entire European private insurance sector, not only with regard to provision for old age.

When the Anti-discrimination Directive No. 2004/113/EC was passed on December 13th, 2004, however, the provisions referring to the regulation of private provision for old age had changed, enabling the member states to retain gender-specific tariffs. Gender-neutral premiums and benefits were established in principle (article 5, par. 1, of the Anti-discrimination Directive No. 2004/113/EC), but with an option for member states to retain gender-specific calculations if certain conditions (which could easily be met) were met. In addition, the scope of article 5 regarding old-age security was restricted to personal pensions,

thereby excluding occupational pensions which make up a substantial share of overall old-age security in many EU member states. Why did the unisex initiative fail?

The unanimity rule in the Council of Ministers reduced the chances of the unisex initiative to succeed. While most committees and agencies of the European Union, e.g. the European Parliament **, voted in favour of the unisex initiative, the Council of Ministers which has the last say, that is the governments of the member states, voted against. Our analysis of the EU-debate on gender-neutral tariffs in private provision for old age[2] has led us to reconstruct four types of arguments that were used both by proponents and opponents of unisex tariffs:

- 'social' or social policy arguments
- economic or economic policy arguments
- legal arguments (including human rights arguments) and
- gender arguments.

So the first finding is that the reasons brought forward in the debate are not only 'social' oder gender-related as the subject might have suggested. Economic and legal arguments also figured. The range of arguments reflects the heterogeneous logics faced by market regulation. Primarily, market regulation is caught between the logic of social policy and the logic of the market, but two further logics, law and gender, come in, making regulatory policies more difficult but possibly also opening the conventional deadlock of state vs. market arguments. Legal arguments have emerged from the legal aspects of gender-neutral tariffs, namely gender equality and anti-discrimination.

The distinction between social, economic, legal and gender arguments does not only reflect different logics or rationalities but also different types of politics: different discourses, different sources of legitimization and different epistemic communities. Therefore, the legitimatory weight of the four types of arguments may differ. 'Social' arguments are particularly contested in the EU, since the notion of a 'social Europe' is not universally shared among member states, as recently seen in the controversy over the draft Constitution. By contrast, legal arguments, especially equality-related ones, may meet with a higher legitimacy since they have a broader constituency than social arguments. Legal arguments can be particularly powerful in the EU since the EU is a strongly juridified institution. EU policies

[2] We evaluated all (29) published EU documents about the Anti-discrimination Directive and 44 articles from leading German media on the EU unisex debates.

are framed by the treaties which constitute the EU and by the European Court of Justice (ECJ). In the history of the EU/EC spill-over effects between different logics or spheres have occurred, especially from civil to social rights, for example, when the ECJ extended social entitlements from one group to other groups on grounds of equal treatment (Grabenwarter 2006). Economic arguments, too, can generally be strong arguments, putting pressure on proponents of social arguments to react. Finally, the power of gender arguments largely depends on the potential of the women's movement to mobilize their constituency and to dramatize the issue at stake. Gender arguments can be assumed to be more powerful if linked up with general legal arguments of non-discrimination.

The proponents of unisex tariffs relied on all four types of arguments we detected: social, economic, legal and gender arguments. Advocacy of the unisex initiative was decisively hampered since three of the four types of arguments turned out to be shaky:

The *gender argument* only appeared in the media, not in the inner circle of the EU policy community, though gender arguments may have implicitly fed into the legal argument of non-discrimination. The *social policy argument* was known to lack power beforehand and was not much used for this reason. One reason for the weakness of the social policy arguments was the absence of a unitary system of old-age security in Europe. The policymakers at the EU level had no common point of reference since national systems of old-age security differ widely in the member states. A most fundamental obstacle to mandatory unisex tariffs, however, was the definition of markets for private provision for old age as liberal markets, not as 'social' welfare markets in the strict sense by EU politics (for the liberal orientation of the regulatory policies of the EU in the field of old-age security see Davy/Leisering 2005). That is, politics and markets were seen as two distinct domains, with two incompatible logics. This made private welfare markets in old-age security less accessible to social policy arguments. The definition of European markets for old age as social welfare markets as implied in the social policy arguments of the proponents of unisex tariffs did not prevail.

The *legal argument* of anti-discrimination which normally is powerful in EU circles turned out to be inconclusive; Among the four types of arguments advanced by proponents of unisex tariffs the tenuous nature of the legal arguments seems to be the single most powerful factor to account for the failure of the unisex initiative. It was highly controversial whether the higher life expectancy of women is due to biological or to social factors. Biological explanations might have justified unequal treatment of the sexes while social explanations might have strengthened the case for equal treatment regarding old-age pensions. The

decision in favour of or against equal treatment was seen to depend on scientific research regarding the reasons for unequal life expectancy between men and women. But the scientific evidence was inconclusive (for a full account see Kopischke 2006).

The failure of unisex tariffs at the EU level can be further elucidated by contrastive evidence from one member state, *Germany*. In Germany, unisex tariffs were discussed with regard to subsidized and socially regulated private pensions ('Riester pensions', named after the then labour minister, Walter Riester). This was almost at the same time when the unisex initiative by the EU Commissioner was dealt with at the EU level (for a full analysis of the German case see Kopischke/Leisering 2007). In Germany unisex tariffs became effective from January 1st, 2006. The German case differs from the EU case in that social policy arguments assumed a considerable weight since regulation was to be restricted to a small segment of the market– the market for Riester pensions – and that this segment was defined by political actors as a 'social' welfare market to compensate for a reduction in state pensions. In addition, there were massive campaigns from the women's movement which pushed the gender argument.

3. Chances and limits of socially regulating welfare markets – some hypotheses

The case of unisex tariffs throws light on the chances as well as the limits of regulatory policies vis-à-vis markets. We derive two main hypotheses. First, welfare ends are carried by regulatory policies well beyond the provider state to extend to welfare markets: welfare ends familiar from the conventional post-war welfare state throw a long discursive shadow on welfare markets (section 3.1). That is, the quest for public responsibility extends well beyond the domain of the provider state to include private welfare provisions. However, welfare ends translate into concrete policies regarding welfare markets only in a very limited way, that is, the policy shadow of the welfare state is short (section 3.2). Insofar public responsibility is in fact curtailed when public services are dismantled to be replaced by private ones. Second, even beyond the normative shadow of the welfare state, new norms and varieties of public policy arise which can be termed 'social' even if not in the sense of the conventional post-war welfare state (section 3.3). The new social policy beyond the welfare state extends the space of the 'social', retaining and even extending public responsibility for the welfare of the citizens. But rather than transferring conventional welfare ends to markets, the new social policy goes along with new welfare ends and norms.

3.1 The politicisation of welfare markets – the long discursive shadow of the welfare state

The arguments that figured in the European debate on mandatory gender-neutral tariffs in private pensions included social policy arguments. This testifies to the assumption that welfare ends familiar from the post-war welfare state should be transferred to the private production of welfare. That is, markets for private provision for old age are defined as welfare markets in the sense of markets oriented to welfare ends. In this view markets are seen just as different means to pursue the same ends previously pursued by the welfare state. Evidence from the debate on the German Riester pension indeed indicates that citizens tend to judge the new subsidized private pension by standards stemming from state pensions. To the extent that such transfer of welfare ends takes place, privatization of old-age security paradoxically leads to an unprecedented *politicisation* of private welfare production in markets. Any change in private welfare markets is potentially subject to political observation.

Issues of regulation which had long been confined to expert communities have entered wider public debates and political contestations. The hypothesis of Myles and Pierson (2001) that the growing concern for regulatory issues establishes regulation as a new arena of conflict is thus confirmed. The question, however, is whether the transfer of welfare ends from the welfare state to welfare markets leads to novel lines of conflict Other types of arguments in the debate besides social policy arguments, especially the legal arguments, indicate lines of conflict which are not familiar from national welfare states. But the social policy arguments in the strict sense do not indicate new lines of conflict. The critics of unisex tariffs who relied, among others, on economic policy arguments mostly resorted to arguments familiar from conventional debates ‘state vs. market’. The privatization of old-age security, thus, does not do away with liberal criticism of the welfare state but such criticism is revitalised to find regulatory policies as a new target. Insofar the ‘new’ conflicts about regulatory policy basically echo the old conflicts about redistributory policy under the provider state. The main difference is that the old conflicts centred on labour markets while the new conflicts refer to markets for private provision.

3.2 The self-limitation of social regulation – the short policy shadow of the welfare state

Private provision is more politicised than before also in operative terms – we refer to this as the *policy* shadow of the welfare state, in contrast to the discursive shadow. In Germany, for example, no private pension before 2001 was as strongly regulated, even constituted by the state as the Riester pension. The growing resistance of providers of private pensions against

what they see as overregulation (for Britain see Davy 2005) reflects the politicisation of private welfare production in policy terms.

Still, the policy shadow of the welfare state on welfare markets is short. We can identify three limits or barriers of social regulation, two regarding the *extension* or scope of social regulation and one regarding the *intensity* or depth of regulation.

First. the *extension* or scope of social regulation is confined to a rather *small segment of the private pension market*. Even in a country with a strong welfare state tradition like Germany the unisex initiative and social regulation in general have been restricted right from the start to the small segment of the Riesterrente which is state subsidised and explicitly geared to 'social' ends. Social regulation extends, if to a lesser degree, to the new occupational pension called Eichel pension and to the Rürup pension mainly designed for the self-employed. Other types of pensions or insurances may also serve the welfare of the purchasers but they are not subject to substantial social regulation. In the EU policy process occupational pensions had been taken out of the domain to be regulated under the Anti-discrimination Directive. Regarding personal pensions, the failure of the EU Commission to establish mandatory gender-neutral tariffs may also be due to the fact that the initiative referred to *all* private pensions and not only to a small, specifically designed 'social' segment. The EU Commission may have aimed too high or it may simply have been impossible to restrict the unisex initiative to a socially regulated segment of private provision for old age since these segments vary widely in shape among member states and cannot uniformly be demarcated.

Second, the extension or scope of social regulation does not extend to general *financial markets*, as distinct from pension markets. The *social* regulation of financial markets has never been on national or EU agendas. Private welfare production relies on at least three levels of markets, each with a distinctive logic and with different challenges for regulation (Berner 2007, Leisering 1992: 181): general financial markets; private pension markets, that is, markets for various forms of private provisions considered as securing maintenance in old age; and financial service markets like consulting bureaus. For each of the three levels the issue of social regulation is different. In Germany, for example, as in other countries general financial markets are not regulated in a 'social' way - even though from a 'social' perspective financial markets would be prime field of regulation since the volatility of financial markets is the original source of undesired social inequalities and insecurities characteristic of private provision for old age. Only the minimum income scheme for the aged, introduced in Germany in 2001 with the Riester pension act, buffers risks from financial markets. Among three levels

of markets relevant to private provision or old age, financial markets come closest to a pure market logic. Regarding the level of financial service markets, there is growing legislation, e.g. in Germany, which strengthens consumer rights, but this regulation is only 'social' in that it regulates access to goods some of which may be welfare-related.

Third, the *intensity* or depth of social regulation of markets is limited. If we can speak of the rise of a regulatory welfare state (or a socially regulating state) it seems to be a residual regulatory welfare state which targets state subsidies and social regulation mostly at people with low income or at families with children or other needy people. This applies, e.g., to the German Riester pension. While the conventional provider state in Western and Northern Europe had been geared to the middle classes and thus secured political support, the new regulatory welfare state seems to cater more for lower strata of society. We therefore my transfer Titmuss's term 'residual social policy' to the new regulatory policies. Regulation of occupational pensions, by contrast, does aim at core strata of society, namely employees in larger companies. However, regulation of occupational pensions under the new policies, e.g. in Germany, is in two layers. The state establishes a kind of meta regulation by establishing a system of corporatist self-regulation between trade unions and employers' organizations (for Germany see Berner 2007 and Trampusch 2004, for Germany and Britain compared see Blömeke 2004, 2007, for the EU see Haverland 2007). All in all, the intensity of social regulation is limited, mainly confined to salary sacrifice.

It is open to question whether citizens will call for more than residual market regulation by the state when the middle strata of European societies will provide for old age by private pensions more than before, especially when market volatility will lead to disruptions in income in old age as happened in the USA in recent years.

We can conclude that in spite of strong national welfare state traditions in European countries and despite the rhetoric of a social and inclusive Europe in the documents of the EU, the shadow of the welfare state does not reach very far in policy terms – in our case study, the principle of gender-neutral treatment was not transferred from state pensions to private pensions by the EU. Why, then, is social regulation of markets so limited in operative terms?

In the EU-debate there were already indications of the weakness of social policy arguments in favour of unisex tariffs. Proponents argued that, since private provision often substituted receding public provision for old age, private provisions should be subjected to the norms and values that dominate public pensions. But in quantitative terms the social policy argument

figured less than other arguments in the debate. This may be rooted in more general characteristics of the EU.

'Social Europe', although often proclaimed, has a weak basis in the treaties and even in the draft Constitution of the EU of 2004. EU policy towards social security is largely directed by soft procedures as the Open Method of Coordination (OMC). The requirement of unanimity in the Council of Ministers regarding unisex tariffs also reflects the inferior status of the social. The weak basis of social Europe in the treaties even enabled opponents of unisex tariffs to maintain that there was no legal need for the EU to become active in this matter. Other reasons for the weakness of the social policy arguments mentioned earlier included the absence of a unitary system of old-age security in Europe and the definition of markets for private provision for old age as liberal markets, not as 'social' welfare markets in the strict sense by EU politics.

The weakness of social policy arguments in the debate also reflected the strength of economic arguments. However, despite of the discursive weight of market liberal arguments and despite the resistance of private providers against overregulation it would be misleading to assume that 'socially' oriented proponents of unisex tariffs had simply surrendered to strong neo-liberal ideologies and interests. Rather it seems to be a case of *self-limitation* by politics with regard to both the extension and the intensity of social regulation of pension markets, both in EU politics and in the member states. As analysed above politics never seemed to have considered to extend social regulation to the entire private provision market (beyond a small subsidized segment), to the middle classes (beyond families in need of social support) or to financial markets in general (beyond pension markets). The unisex initiative by the EU Commission did aim at the entire market for private provision but, as mentioned earlier, this may have been due to the impossibility of restricting the measure to a subsidized and socially designed market segment and the initiative was eventually not supported by even one positive vote in the Council of Ministers.

Since regulatory social policy relies on markets to achieve welfare ends, it has to respect markets more than conventional redistributory policies under the provider state do since redistributory policies restrict the market substantially. While redistributory policies reflects 'politics against markets', regulatory policies reflect what we termed 'politics *with* markets'. The self-limitation of regulatory politics with regard to the extension and intensity of regulation seems to reflect the reliance on markets. The self-limitation of social regulation

implies that the clash between the logic of politics and the logic of the market is eased by a self-restriction of the logic of politics.

3.3 Social regulation beyond the shadow of the welfare state

Since we found that conventional welfare ends 'travel' to private markets in old-age security only to a limited degree, the question arises what other principles rule markets for private provision in old age. Are these pure markets? In this section we show that the limit of conventional social regulation is not identical with the limit of social regulation or of social policy at large. We hypothesize that welfare markets and their regulation by governments rely on three principles that go beyond conventional social norms associated with the welfare state but are 'social' in a broader sense. The three principles include international norms, civil norms and social technology all of which figured in the debate on the unisex initiative by the EU Commission depicted above.

International norms

Historically the welfare state is a project of the nation state. Each EU member state has a deeply entrenched national tradition of welfare production (Kaufmann 2003a). By contrast, markets are a genuine field of legal regulation by the EU. The EU's core business is to regulate and even create markets. At the same time, the EU/EC has developed substantial 'social' concerns since the 1980s and the 1990s. Policies designed to liberalize markets may go together with social policies or even be developed in conjunction (Leibfried 2000). The EU may become active as a *social* regulator even in fields where national welfare states do without social regulation. For instance, while the German government confined social regulation (including unisex tariffs) and public subsidies to a small segment of the private pension market, to Riester pensions, the EU-unisex-initiative aimed to cover the entire market for private provision in old age. The unisex initiative by the EU, thus, testifies to 'social' orders and norms beyond the welfare state, that is, to norms and institutions of supranational social policy (EU). The limit of the normative shadow of the (national) welfare state, therefore, does not necessarily indicate the limits of social rules for welfare markets. Being subject to debordering (see section 2), *welfare markets tend to be more immediately exposed to supranational and international legal sources than conventional social policies under the national provider state.*

EU policies are the most immediate and strongest influences on national social policies, but the international dimension extends to the global level, especially to labour law and social law under the UN system (Becker/von Maydell/Nußberger 2006). Global social norms are part of 'global social policy' (Deacon 1997, 2007, Leisering 2007). The 'social' at the international (European and global) level differs from the 'social' at the national level of welfare states: social policy beyond the national state includes the proclamation of universal social human rights, the emergence of a European or even global public with a collective social conscience, and international organizations. At the EU level the 'social' can be traced in the draft Constitution of 2004, in the Treaty of Amsterdam (1997) and in the Treaty of Nice (2000). European declarations of human rights by the Council of Europe also include social rights. International social norms often phrased in very general terms, detailed social statutes are most likely to be found at the level of the EU. The increasing presence of globally operating welfare providers, especially in the pensions and health sectors (Holden 2002), adds to the relevance of international law in welfare markets.

Social law beyond the nation state has a logic of its own, even if national social policy traditions have informed international social law (Kaufmann 2003b). The construction, the interpretation and the implementation of norms differ from national social law. International courts of justice assume powers in interpreting and even creating law. This includes the European Court of Justice of the European Union (ECJ), the European Court of Human Rights of the Council of Europe and the International Court of Justice of the United Nations. Besides the (failed) unisex initiative of the EU analysed in this paper, international law includes various social and non-social regulations of private provision markets, especially the growing regulation of occupational pensions by the EU (Haverland 2007) and international accountancy rules for private companies that have established their own occupational pensions. International law is often 'soft law', adding to the hard law, for example codes of conduct for private companies under the label Corporate Social Responsibility (CSR), some of which include references to occupational pensions.

Civil norms

In international codifications human rights fall into two groups: civil and political rights as laid down in the International Covenants on Civil and Political Rights (UN, 1966, in short: 'Civil Covenant') and economic, social and cultural rights as laid down in a Covenant of the same year (short: 'Social Covenant'). Social rights tend to have a weaker status than civil rights. In the debate on unisex tariffs in the EU the prime arguments by the proponents were

not social but legal or civil arguments, namely *non-discrimination* and *equal treatment*. Non-discrimination with regard to work contracts and working conditions is a familiar principle of labour law, serving in particular to enhance equality between the sexes, between different groups of employees and more recently also between age groups. The norm of equality also pertains to social security. For example, the law concerning widow's pensions and widower's pensions in Germany had to be changed following a sentence by the German Constitutional Court. The Anti-discrimination Directive by the EU has extended the scope of the principle of non-discrimination far beyond work, including welfare markets. The extension of anti-discrimination beyond the realm of employment both by the European Union and by the Council of Europe is fairly recent, in case of the Council of Europe the extension dates back to 1996 (Birk 2006: 43).

Although non-discrimination is not a specifically 'social' principle it can lead to the strengthening of social rights, for example, when entitlements to social benefits are transferred from one group to other groups considered to be equal, e.g. from residents of a country to non-residents. Social rights (e.g. the right to social assistance or to legal aid) may even be created in order to enable the full use of civil and political rights, as happened in the context of the European Convention on Human Rights under the Council of Europe (Grabenwarter 2006: 84, 89-91). The European Court of Human Rights commented on such *spill-over effects* from civil to social rights: "… civil and political rights, many of them have implications of a social or economic nature … an interpretation of the Convention [the European Convention on Human Rights, which does not include social rights – L.L.] may extend into the sphere of a social or economic nature … there is no water-tight division separating that sphere from the field covered by the Convention." (cited according to Grabenwarter 2006: 84). All in all, civil human rights have become a major source of social rights and social policy. Human rights' policies may function as social policies. Similarly, in the EU, social policy regulations sometimes emerge as by-products of liberal policies geared to extending civil rights ('negative coordination', F.W. Scharpf).

Besides the principle of non-discrimination the political regulation of private provision markets also resorts to *procedural norms*. Though not 'social' per se, these legal norms may be applied to welfare markets in view of 'social' ends. If referred to in the politics of regulation, e.g. of the German Riester pension, the procedural norms are presented as flowing from the social responsibility of government – legal policy as social policy. Some norms refer to organisational procedures while other norms and rights refer to persons. Some norms link

the two aspects. Unisex tariffs include both person-related and organization-related norms. These legal norms can assume a social meaning in various ways. Person-related norms include rights of access to social services and rights related to the process of service delivery – above all a whole range of consumer rights. Organization-related norms include transparency, procedural security and accountability. Procedural norms do not normally imply entitlements to specific welfare positions (outcomes). For example, 'security' conceived as security of procedure falls short of conventional social security as found, e.g., in defined benefit pension schemes.

We may conclude that norms that rule welfare markets are more likely to derive from civil rights and legal policies – interpreted in a 'social' way - than norms ruling public social services under the provider state. The impact of civil law results in a 'civilization' of the social – the application of civil law and general legal rules to private welfare markets in view of social goals. The processes of internationalization and 'civilization' of social law in the wake of the rise of welfare markets described above are partly correlated since relevant civil laws are often codified in international bodies of law and since national policies are sometimes responses to international law.

The consequences of the influences of civil law and civil rights on social policy are ambivalent. On the one hand the process of 'civilization' *narrows* the space of the social since civil rights relating to private welfare markets, even if interpreted in a social way, have less social substance than conventional social rights under the provider state, related to specific welfare outcomes.

On the other hand, the 'civilization' of the social *extends* the space of the social in welfare markets: Legal arguments, as seen in the unisex debate, can underpin social policy initiatives even if conventional social policy arguments are not applied to the issue or are too weak to support the measure. Legal arguments lead beyond the conventional confrontation 'social policy versus economic policy' and thus can ease the tension between the 'social' logic and the logic of the market. Legal arguments are a third point of reference that may break the deadlock of the conventional dual contestation 'social' vs. 'economic'. Civil rights may claim broader political support than both social arguments (the legitimacy of which is generally weaker) and economic arguments (which may be seen to reflect vested interest).

If legal arguments refer to *human rights* as in the Anti-discrimination Directive by the EU, legal arguments can be particularly powerful. Human rights are a key element of the

internationalization of the social. Although often also codified in national constitutions, for example in the German *Grundgesetz*, international human rights are more differentiated and prior to national law if a country has ratified the relevant Convention. In the field of human rights, the process of 'civilization' of the social reinforces the process of internationalization of the social since civil human rights enjoy a higher legitimacy. Especially in the field of social security the Human Rights Committee of the UN has just started to specify the relevant articles of the Social Covenant (Riedel 2006). The first General Comment on articles 9 and 11 of the Social Covenant relating to social security issues was published in May 2007. Civil rights, if interpreted in a 'social' way, can be more powerful than genuine social human rights.

As a consequence we can expect that political conflicts regarding social regulation will revolve around the ambivalence of the 'civilization' of the social, namely the simultaneous extension and narrowing of the space of the social. Consumer protection on welfare markets, corporate law regarding private providers and human rights fuel a new arena of conflict in social politics.

Social technology

[incomplete]

The debate on the unisex initiative by the EU Commission has shown that private providers of pensions do not only rely on economic arguments but also on social arguments. These are social arguments that contradict the conventional social arguments of the proponents of unisex tariffs. In fact, welfare markets may generate internal social norms independent of norms stemming from the welfare state. In the EU unisex debate a norm of intertemporal equality was invoked – treating the sexes equally over the life course – which justifies higher premiums for women because they live longer. Intertemporal equality challenged the social and gender norm of gender equality in provision for old age.

Such internal market norms are associated with 'social technologies'. Social technologies are institutional devices of producing and/or delivering welfare goods based on expert knowledge; they may operate both in a market environment and in a welfare state environment. Life insurance and annuities are among the oldest social technologies, they spread since the second half of the 19th century (Berner 2007). We hypothesize that *the growth of welfare markets promotes the spread of social technologies.* The 'social' orientation

of social technologies may convey legitimacy to welfare markets in 'social' terms – legitimacy which is more specifically welfare related than the general justification of markets by market freedom and macroeconomic performance. Reliance on welfare markets, therefore, may be seen as a new kind of social policy, oriented to social norms generated within the market. There seems to be an increasing emphasis on social technologies both in welfare markets and in conventional public welfare programmes. In the process, the definition of the 'social' shifts from general *Weltanschauung* to social technologies and related operative norms like intertemporal equality and actuarial fairness.

However, it is an empirical and historical question if social orientations of welfare markets are indeed internally generated. Social technologies may be devised under the welfare state and later travel to private markets, or vice versa. Tracing the historical co-evolution and interaction of public and private welfare is a new research agenda (for old-age security see Berner 2007).

4. Conclusion: the 'socialisation' of social policy

In this paper I have investigated the type of policy which has been gaining weight in European welfare states since the 1990s, state regulation of private welfare production. This is not a new but a growing policy, especially in social security. We have asked to what degree regulatory policies can draw on 'social' ends that characterize the conventional redistributory policy under the provider state, and what rules govern welfare markets beyond the scope of 'social' ends. Put differently: is there social policy beyond the (conventional post-war) welfare state - 'beyond' either with regard to the institutions that provide welfare (public welfare sector) or with regard to the 'social' ends to which welfare state governments commit themselves? The hypotheses we derived from a case study of the unisex initiative of the EU regarding private pensions suggest that such policy exists, in two ways.

First, there is a growing social policy that relies on markets – that is, transcends the institutional shadow of the welfare state – but operates *under the normative shadow of the welfare state*. 'Social' expectations which have developed over the post-war decades in the course of the expansion of a mass welfare state are transferred to welfare markets through social regulation. In this sense, the welfare state casts a long discursive shadow. However, 'social' discourses translate into policies only in a limited way (short policy shadow). These

findings partly confirm and partly refute or qualify the two opposing views of privatisation from which this paper started: the pessimistic view advanced by social critics that privatisation indicates a surrender of public responsibility, and the more optimistic view propagated by reformers who claim that privatisation only introduces new means to achieve the same welfare ends, and even achieves them better.

Second, there is a growing social policy *beyond both the institutional shadow and even beyond the normative shadow of the conventional post-war welfare state* – a policy which relies on private markets (institutional side) and pursues new ends which are not 'social' in the conventional sense but in a broader sense (normative side). Privatisation and regulation of privatised welfare production, we maintain, is not just about transferring or not transferring certain social ends to economic markets but about changes in social ends, the emergence of novel ends and principles.

All in all, we conclude that the social regulation of welfare markets is a new kind of social policy even when some of the ends pursued by regulation are not social in the conventional sense. While our first finding qualifies both the surrender thesis and the 'welfare ends through market means' thesis, the second finding goes beyond both opposing theses. Both underestimate the policy innovations attendant on the privatisation of social services and the expansion of related regulatory policies. The social critics are too pessimistic about the ability of welfare reformers to develop the welfare state in its post-expansive phase while the reformers are too optimistic about the conditions of welfare production through markets.

We identified three characteristics of the new social policy beyond the conventional welfare state, compared to social policies under the provider state: more direct exposure to international law; an emphasis on civil rights and general legal principles interpreted in a 'social' way; and a strong role played by social technologies. While the provider state has emerged as a project of nation states, as a prop to nation building, the social regulation of welfare markets is more directly exposed to *international norms*, both European and global. This entails an influence of the EU, of international codifications of law, of human rights, of international organisation, of international courts, and of law in general (in contrast to politics). Unspecific declarations, consensus formulas, agendas and soft law are characteristic of international norms. While the provider state relied on a construction of the 'social', of altruism and collectivism as distinct from the egoism and individualism of the economic market (see Pinker's critique of the Labour tradition in British social policy, Pinker 1979) or, in theoretical terms, of a juxtaposition of civil, political and social rights (Marshall 1950), the

regulation of welfare markets relies heavily on *civil rights and general legal norms* which are interpreted in a social way or applied to a social context. This includes civil human rights and their spill-over effects on social human right, procedural norms relating to persons and/or organisations (access to services, consumer protection, transparency and security, corporate law) and general legal principles, above all legal equality and non-discrimination. While the European welfare state, especially in its Western and Northern Europe origins, was heavily underpinned by general 'social' *Weltanschauungen*,[3] the 'social' in welfare markets is enshrined in *social technologies* (like annuities or Disease Management Programmes) which draw on social-scientific concepts, rationalised social models, expert knowledge and operative norms specific to certain social technologies like actuarial fairness. Welfare markets reflect a general rationalism rooted in the enlightenment (Janowitz 1976).

Social regulation of welfare markets – a policy which, as we found, transfers some conventional social ends to markets and additionally relies on civil law, international norms and social technologies in view of broader social ends - is a new kind of social policy. Social regulation dilutes and narrows down traditional welfare concerns of West European governments but, at the same time, extends the scope of 'social' ideas and activities of governments beyond the conventional sphere of public welfare institutions to encompass markets and related policies. The growth of regulated welfare markets does not simply indicate a 'loss of substance' (Bode 2005: 266). Rather, reduced intensity of social policy goes along with an increased extension of social policy: markets are politicised in social policy terms more than before, and 'social' aspects invade spheres of society and branches of government hitherto not or less affected by social aspects, especially markets for welfare-related goods, consumer protection, financial policy (fiscal welfare), education (fiscal literacy), law and legal policy (as evidenced by the civil rights aspect of the new social policy depicted above) and gender relationships (as seen in the case of unisex tariffs). We propose to speak of this expansion in scope as *'socialisation of social policy'* - the (re-) discovery of 'society' by social policy makers.

Why is social policy being socialised? The recent emphasis on welfare markets and social regulation reveals a characteristic of the welfare state which had been eclipsed during the golden age of the post-war welfare state, especially in countries with a strong state tradition like Germany and France, and in social democratic thinking as in Old Labour in Britain: the

[3] Kaufmann (2003*) names Christian social thought, social democracy and social liberalism as the main ideational sources of the welfare state.

welfare state, even if defined as a form of statehood, heavily depends on societal, non-state forces. In fact, both components of the term 'welfare state' – 'welfare' and 'state' - can be misleading.

At this point we go back to Kaufmann's definition (1997) of the welfare state with which we started: welfare state means the explicit commitment by government to assume a *social responsibility*, combined with an institutionalised '*welfare sector'* which implements the social goals defined by the government. Kaufmann's analysis of the 'welfare sector' reminds us of the institutional diversity of the welfare state: private actors in the welfare state are not new, to the contrary, even and in particular in the German welfare state the social sector is a heterogeneous arrangement of diverse types of actors and modes of control. Actors include actors from the state, from civil society (such as the voluntary welfare associations), corporatist actors and arrangements, social professions and private actors, e.g. pharmaceutical companies and providers of medical technology in the health insurance and private providers in the long-term care insurance. Hence, even conventional social policy under the provider state already encompasses a broad range of non-state institutions.

The same holds true for the normative dimension of the welfare state. While the concept of 'welfare sector' exposes the institutional dependency of the welfare *state* on 'society', the concept of the 'social responsibility' exposes the normative or ideational dependency of the *welfare* state. By taking 'social responsibility' or 'social end of government' to define the normative dimension, Kaufmann explicitly rejects more specific definitions of the 'social' or of welfare ends because the meaning of social policy is subject to changing definitions in politics which in turn reflect changes of ideals in the wider setting of society.[4] There is no well-defined normative realm of the 'social'. As early as 1958, the doyen of post-war social policy thinking, Hans Achinger, stated: 'the idea of an autonomous normative sphere of social policy is a delusion. Social policy relies on ideas of order stemming from other social spheres.' (Achinger 1979, first published in 1958). In fact, contrary to the dominant dualist debates state vs. market there is an 'elective affinity' (Max Weber, after Goethe; see Rieger 1992) between the welfare state and other societal spheres.

Therefore, narrow notions of the welfare state like provider state or outcome-oriented social policy are only *images* of social policy or even *fictions* – the fiction of a self-sufficient realm of the welfare state distinct from the economy, and the fiction of the ability of public policies

[4] In his path-breaking historical and theoretical analysis of the concept of social policy, Kaufmann (2002, first published 1982; 2003c) similarly rejects specific definitions of social policy.

to achieve welfare ends by themselves (Leisering 2007, Berner 2007). The post-war welfare state had already been 'socialised' to a relevant degree, drawing on diverse non-state institutional and norms. Moreover, the narrow notions of the welfare state only belong to a certain historical period of the welfare state. Berner (2007) analyses in depth the historical construction of 'two worlds' of old-age-security in the 1950s in Germany: statutory old-age pensions were constructed as 'social' while occupational and personal pensions were constructed as non-social, with different ends and different policy networks. Before, from the late 19th century, both public and private old-age security had been considered to be 'social' and developed in conjunction. Even in the 1970s in Germany, during the social-liberal period social policy was defined as 'societal policy' *(Gesellschaftspolitik)*, reaching out beyond the provider state and redistribution to a kind of enabling and activating state with an emphasis on social investment, education, prevention and the creation of opportunities (Schmidt 2005). The analysis of the 'co-evolution' (Berner 2007) of 'public' and 'private' welfare institutions is a promising agenda for research. The co-evolution of public and private and images thereof will differ by the welfare tradition in a country, by policy field and by specific institutions. The social regulation of welfare markets departs from dominant images of post-war social policy. But it is only a new phase in the changing history of the pursuit of the 'social'.

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