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The regulation of welfare markets: a new avenue of social policy?
The case of pension privatisation in Europe

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> *'... 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 regulation of private welfare provisions is becoming a scholarly topic, influenced by recent changes in research from two sides: regulation research is discovering the field of social welfare (as evidenced by this panel) and, vice versa, social policy research is turning to non-state welfare provision and related regulatory activities of the state (as evidenced by the panel 'Regulatory Social Policy' at the conference of the European Social Policy Analysis Network [ESPAnet]), 20-22 September 2007, Vienna). Regulation research has long centred on the regulation of public utilities, of science and technology and of ecological systems. More recently, there is a tendency towards a more comprehensive theory and analysis of regulation which may also extend to a much neglected area of regulation, namely private welfare provision. At the same time, with the move towards privatisation of social welfare in many Western countries, social policy research is increasingly transcending the conventional focus on state provision and redistributory policies to include issues of private welfare and regulation. So two fields of research, regulation studies and social policy research, are intersecting.

The paper explores the nature of regulation in social welfare. Regulation of private welfare markets is not necessarily *'social'* regulation. Regulatory policies may also serve economic ends or just define general rules for market processes. The paper investigates to what extent regulatory policies can shape welfare markets in a 'social' way, i.e. constitute a new kind of social policy rather than merely enforcing market principles. The 'social' in social policy and in welfare states is reflected in social norms and in instruments of social intervention.[1] Against the background of the recent move towards pension privatization (section 1) we investigate instruments (section 2) and norms (section 3) of pension regulation in order to examine whether social regulation can turn into a new, fully-fledged variety of social policy in a new, regulatory welfare state rather than just acting as a prop of 'neoliberal' marketisation. In the concluding section (section 4) we summarize the finding that social regulation may indeed constitute a new avenue of social policy. The paper has emerged from case studies of both national and EU regulatory policies, especially from analyses of the unisex initiative of the European Commission of 2003/2004 (Kopischke/Leisering 2007) and of the new state-subsidised private 'Riester pension' introduced in Germany in 2002 (Berner 2007). The general Anti-Discrimination Directive of the EU issued in 2004 originally (as draft) included mandatory unisex (gender-neutral) tariffs for private pensions but unisex tariffs were rejected in the Council of Ministers. The case studies throw light on the chances as well as the limits of regulatory policies vis-à-vis welfare markets.[2]

1. Pension privatization in Europe – dismantling or reconstructing the welfare state?

Regulation is not a new phenomenon in social policy. To the contrary, 'factory legislation' or, in more recent terms, workers protection and the regulation of safety at work were among the earliest forms of social policy in the 19th century. In the field of old-age pensions,

[1] Cf. Kaufmann's (1982/2002) distinction of four forms of socio-political 'intervention' and Hall's (1993) distinction of policy goals, policy instruments and policy parameters as three orders of policy change.

2 The paper stems from the research project REGINA, an ongoing comparative study of the regulation of private pensions in Europe, funded by the German Research Council (Deutsche Forschungsgemeinschaft, DFG; principal investigators Lutz Leisering, sociology, and Ulrike Davy, law). The paper draws on results of the research project, especially on Leisering (2005, 2007) and on Kopischke/Leisering (2007).

regulation of private[3] pensions is not new either. In Germany, for example, there is a long history of the state regulating occupational pensions. But during the post-war years such regulations had been geared to the interests of companies rather than to achieving 'social' ends (Berner 2007). Since the 1990s, with increasing privatisation of social security, the public regulation of private pensions is becoming a bigger issue in politics. In the process, we maintain, regulation is assuming a more 'social' side because private pensions may make up for cuts in public pensions.

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 without burdening the economy by additional non-wage labour cost.

Surrender of public responsibility or welfare ends through market means? In pursuing this question, *regulation* is a crucial variable. *To what extent are welfare markets regulated in a 'social' way?* Is social regulation just a minor modification of market processes as implied in the surrender thesis – is it part and parcel of a move towards dismantling the welfare state? Or does social regulation transform private markets in a 'social' way - is it a new kind of social policy contributing to a reconstruction of the welfare state?

The broad literature on the regulation of public utilities like gas and rail has shown 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 the field of social welfare, and if so, in which ways?

Clearly, private welfare provisions are regulated by governments. But not every regulation of welfare markets is *social* regulation. The regulation of private welfare is not necessarily oriented towards 'social' goals, i.e., is not necessarily 'social policy' in a strict sense. Regulation may just mean setting up *basic legal rules* for welfare markets as for any other markets. Such basic regulation allows markets to operate but does not impinge on the market process in a specific way, e.g. it does not influence the preferences of market actors or the kind of products traded in the market (see Bode 2005). A more specific kind of regulation often found in private welfare is orientated towards *economic* goals, either relating to the economy as a whole or to business corporations. Policy makers may take an interest in private pension to boost national saving in order to promote economic growth. Tax deductions for private pension plans that reward high-income groups indicate such an economic point of view. In Germany, as in some other countries, the regulation of occupational pensions has long served economic ends (Berner 2007). Companies used to instrumentalize their pension funds for the management of their financial reserves, and the

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

government's regulatory policy had been geared to support these corporate policies. So social regulation needs to be distinguished from other forms of regulating private welfare.

Social welfare differs from other fields of privatisation and regulation normally investigated in regulation research like gas or electricity. Institutions and policies relating to social welfare affect the lives of the citizens more intensely and more extensively than institutions and policies in other fields do. This may create pressure to regulate social welfare in a particularly thorough-going way. 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. Citizens may wish to transfer these ingrained expectations to private welfare provisions and push for social regulation by the government, especially if citizens or even policy-makers see private welfare as substituting for reductions in public provisions.

Regulation takes place on several *levels* or tiers. Nation governments as well as the EU create regulatory frameworks. Regarding mandatory unisex tariffs for private pensions, one member state (Germany) and the EU Commission even became active side by side during 2003-2005. EU policies and EU law affect both public and private pensions. While public pensions in European countries are still largely 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, Davy/Leisering 2005, Haverland 2007; for unisex tariffs in private pensions see Kopischke/Leisering 2007).

2. Instruments of regulatory policies

The rationale of social policy is to enhance the *social inclusion* of citizens (social citizenship). To achieve this end, social policy needs to rely on a broad range of instruments and institutions – a broader range than found in other policy fields, e.g. science policy or environmental policy. Kaufmann (1982, 1988) has distinguished four dimensions of inclusion that map the range of full social citizenship: individuals need to have rights, resources, opportunities and individual competences in order to fully participate in society. The four dimensions of inclusion give rise to *four forms of socio-political intervention:* legal intervention, including protective rights like workers protection and tenants rights; economic intervention, including diverse cash benefits; ecological intervention, including the availability of social services like nursery schools, hospitals or advice centres in the living environment of the citizens; and what Kaufmann (somewhat oddly) terms 'pedagogic' intervention, including diverse kinds of personal social services like medical treatment, counselling and education.

This broad repertoire of instruments defines the scope of social policy against which we can measure the scope of social regulation. Regulation in a narrow sense seems to mean legal

intervention only. Workers protection and safety at work are the classical examples. Economic intervention would not normally be associated with regulatory policy, sometimes a regulatory welfare state is even contrasted to a redistributory or budgetary welfare state (also done in one of my earlier papers, Leisering 2005/2003). But the evidence from our case studies on the regulation of private pensions in Germany, Britain, Sweden and by the EU suggests that regulatory policies, like conventional social policy under the provider state, rely on all four types of socio-political intervention distinguished by Kaufmann. This indicates that - in terms of instruments and scope of policy - social regulation can be a substantial form of social policy.

The breadth of the repertoire of social regulation reflects the need of welfare markets to be *embedded* in a complex socio-political setting that goes beyond general legal rules (see Bode 2005). The forms and instruments of regulation in this broad sociological sense include:

Legal intervention

Statute and other forms of law define rules for the operation of private agencies, covering procedures, parameters, entitlements and benefits etc.. Legal regulation may also specify the conditions under which private providers qualify for special state schemes that entitle citizens to claim subsidies for private pension plans. Legal regulation pertains to three institutional levels relevant to welfare markets (Leisering 1992, Berner 2007): to general financial markets, with related institutions, especially the stock exchange; to private pension markets and related actors like life insurance companies and pension funds; and to local sales agents that sell financial products and provide financial services. Private provision for old age rests on the operation of these three levels of the economic market. Regulation, therefore, has to address market failure on three levels. In Germany, though, only the second level, pension markets, is *socially* regulated to a relevant degree.

Consumer protection in financial affairs is a growing field of political activity also to be grouped under regulation in a broad sense. When ordinary citizens increasingly become consumers in financial markets (and/or in financial service markets) the traditional institutions of consumer protection acquire a new role. The scope and the required expertise of consumer councils becomes wider. Consumer protection pertains to legal, ecological and pedagogical intervention: laws, agencies, counselling, education – 'financial literacy' - and media activity are being geared to the new financial field. In Germany, for example, a consumer magazine specializing in financial products *(Finanztest)* was founded in addition to the general consumers' magazine.

Laws need enforcement. *Bureaucracy* may also be seen as an instrument of regulation. Regulatory authorities aim to ensure compliance by corporate actors with the legal rules. The authorities monitor the operation and outcomes of providers, e.g. with regard to the quality of financial products, to security standards, transparency of transactions, responsiveness to clients needs etc. We hypothesize that in social welfare, semi-independent regulators tend to play a lesser role than in public utilities, due to the pronounced legitimacy requirements of welfare production which put immediate pressure on governments to control regulation . This is an open question for research.

Economic intervention

Private provision is not really 'private' since in practically all countries it relies on tax deductions granted by the state. Tax deductions make it attractive for citizens to invest their money with a private pension fund. Tax policy is a vital requisite of the operation of private

providers. Tax policy is not necessarily social policy but it may have 'social' sides to varying degrees. Titmuss (1976; article from 1956) spoke of *'fiscal welfare'*.

When governments aim at spreading private provision to the whole population, they need to pay allowances to citizens with insufficient income to enable them to provide privately for their old age *(state subsidies)*. More generally the government may choose to grant selective support for groups of people defined as being in special need or having special merit. In addition to low-income people this may include families, women and other social groups, as found in the German Riester pension.

Even if privatization is the overarching political strategy there may be situations when the state has to step in. In cases of acute failure of private providers only the state may be available as security net of last resort *(financial safeguards)*. This applies to corporate actors in the financial market (in case of insolvency) as well as to their clients. Most Western countries have established some kind of social assistance as a basic system of income maintenance. We can expect that the spread of private provision in European countries will lead to an increase in social assistance claims. Moreover, some – though not all – state pension schemes include a minimum pension. Germany was a latecomer in this respect, introducing (not a genuine minimum pension but) a minimum income scheme for pensioners as late as 2001 – together with the first major cuts in public pensions and the introduction of the subsidized private Riester pension in the same year. In some countries, for example in Britain, a flat-rate pension had originally been designed to act as a minimum pension but benefits are so low as to leave many pensioners in poverty. Under New Labour, a meandering process of pension reform and introduction of new private pension schemes has been going on, with pressure to strengthen state pensions ('back to the state', Marschallek 2005).

Ecological and pedagogic intervention

The spread of private pensions to broader strata of society – especially in countries like Germany with a small private and occupational pension sector – has increased the need to educate and counsel citizens with regard to financial affairs and provision for old age. Evidence from Sweden and Germany also suggests that internet-based information technologies are becoming more important in pension politics (Schwarze 2006). Ecological and pedagogic intervention are also related to consumer protection.

All in all, in terms of instruments, the social regulation of welfare markets is not as different from conventional social policy under the provider state as it may seem. Social regulation potentially embraces the full repertoire of social policy instruments needed to fully address diverse forms of deficient social inclusion. More than regulation in other policy fields, the social regulation of welfare markets addresses not only organisations but also individuals in their living conditions

Several of the instruments named above apply to public and private pensions alike, e.g. the increasing role of counselling and client-orientation. German legislation of 2004 has established a uniform taxation of public and private pensions. In some cases regulated private provision cannot be distinguished from public schemes. The basic tariff in private health insurance recently mandated by the German government to emulate the public health insurance is a case in point.

In the literature, the term *'regulation'* is not clearly defined, it has a variety of meanings. In a very broad sense any government interference can be referred to as regulation, like in

phrases 'market or state regulation?'. By contrast, a narrow use of the term as preferred by some legal scholars and economists only covers basic legal rules and controls with regard to private actors. Against the background of our case studies and the instruments described above, we propose a sociological definition of regulation that lies between or rather beyond the broad and the narrow usage. We define regulatory policy in the field of social welfare as those political measures that frame non-state welfare production by legal, financial, organizational, professional and normative means while preserving the relative autonomy of 'private'/non-state spheres. This broad definition reflects the general sociological assertion that markets rely on prerequisites that they cannot generate themselves and, more specifically, that these prerequisites extend beyond general basic legal norms.

The definition of regulation also includes normative framing. Indeed, some of the instruments described above, e.g. taxation, may serve 'social' as well as non-social (particularly economic or family-related) ends. To ascertain if and how the regulation of welfare markets can be 'socially' oriented, we therefore have to examine the norms prevalent in regulated welfare markets.

3. Norms of regulated welfare markets

The evidence from our case studies on pension regulation by the EU Commission and in Germany suggests 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. 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. 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. 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.

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. In the following we specify the two main hypotheses.

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 regarding mandatory unisex tariffs in private pension (2003/2004) 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 not normally 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 on unisex tariffs 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.

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, untouched by social regulation? 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.

(a) 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, *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, 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.

(b) Civil norms

In international codifications human rights fall into two groups: civil and political rights as laid down in the International Covenant 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.

(c) Social technology

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 *Weltanschauungen* 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: 'social' regulation of welfare markets as a new avenue of social policy

In this paper I have investigated a 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 extent regulatory policies can shape welfare markets in a 'social' way, i.e. constitute a new kind of social policy rather than merely enforcing market principles. The hypotheses we derived from case studies of the unisex initiative of the EU regarding private pensions and the German Riester pension suggest that such policy exists, in a qualified way. These findings or

rather hypotheses have to be validated, specified and differentiated by in-depth cross-national evidence.

The general finding is that the regulation of welfare markets by governments and, to a lesser extent, by the EU indeed has a substantial *'social' side* regarding instruments and norms used. This is not a trivial assertion to make since, e.g. in Germany, occupational pensions have been regulated more according to economic rather than social ends during most of the post war period. '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. More specifically:

First, the 'social' side of the regulation of welfare markets seems to be *growing* in weight. In the course of the growing privatisation in social security, private provisions increasingly take over welfare functions earlier met by public social services.

Second, regulatory policies potentially (increasingly in some European countries) embrace the full repertoire of instruments of conventional social policy under the provider state, needed to address diverse forms of deficient social inclusion (or risks) attendant on private provision for old age. Regulation can do more than setting a general legal framework for markets – regulation can contribute to enhance *social citizenship*.

Third, there is a growing social policy that relies on markets but operates under the *normative* shadow of the welfare state. 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 mentioned in the first section of this paper: 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.

Fourth, there is a growing regulatory policy towards private welfare markets which pursues new ends which are not 'social' in the conventional sense but in a broader sense. In this way, social regulation even *extends the realm of the 'social'* beyond the confines of conventional social policy under the provider state. We identified three characteristics of the new social policy beyond the conventional welfare state: more immediate 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 and related operative norms. 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, social regulation of welfare markets may extend the realm of the 'social' in two respects: by transferring conventional social ends from the provider state to markets (institutional side); and by extending the narrow conception of 'social' ends (normative side) which has prevailed especially in Continental post war welfare states (or, more precisely, in the public images of the welfare state; see Leisering 2007) but also e.g. under the Labour tradition in Britain before Blair. 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). Both the surrender thesis and the 'welfare ends, market means' thesis 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 prerequisites of welfare production through markets.

The social regulation of welfare markets may indicate the rise of a post post-war welfare state, a regulatory welfare state. At least we can expect that the provider state will be complemented by substantial regulatory social policies. This could be a new historical compromise between liberal critics and social democratic advocates of the conventional welfare state. There is much to do for researchers in the new research area, the regulation of private welfare markets.

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