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The Council or the social partners? EC social policy between diplomacy and collective bargaining

Gerda Falkner

ABSTRACT Contemporary EC social policy-making is characterized by the coexistence and entanglement of governmental negotiations in the Council of Ministers and collective bargaining between the major economic EU-interest group federations. This contribution outlines the issues so far negotiated under this post-Maastricht social policy regime and analyses the general as well as the specific framework conditions for each collective bargaining process.

The concluding section outlines relevant factors for the probability of any social partner agreement. First, the employer federation UNICE is only willing to negotiate with its labour counterpart in the ‘shadow of law’. Second, pre-existing national traditions of collective bargaining can be ‘uploaded’. Third, general considerations concerning the development of an industrial relations culture at the EU level have so far been as important as material interests, within the collective negotiations between ETUC, UNICE and CEEP.

KEY WORDS Atypical work; collective agreements; EU; European Works Councils; industrial relations; parental leave.

INTRODUCTION

Contemporary decision-making in European Community (EC) social policy is characterized by the coexistence and entanglement of governmental negotiations and collective bargaining. As in all other EC policy areas, the representatives of the member states negotiate in the Council of Ministers and its working groups, according to rules which have been shaped in various constitutional deals and in day-to-day practice since the 1950s. Euro-level negotiations by management and labour, by contrast, do not yet represent a long-standing tradition, and they are a specific feature of the social realm. The 1992 Maastricht Treaty set up the corporatist patterns which now characterize EC social policy. The Amsterdam Treaty introduced into the EC Treaty (which is binding for all) what had previously been rules among the member states with the exception of the UK, but it did not otherwise change the rules of this game.
The Treaty provisions effectively give primacy to agreements between management and labour. Euro-level interest groups may, on the occasion of obligatory consultation by the Commission on any envisaged social policy measure, inform the Commission of their wish to initiate negotiations in order to reach a collective agreement on the matter under discussion. This brings traditional EC decision-making (which involves the Commission as initiator, the Council and its working groups as most relevant decision-maker, and the European Parliament (EP)) to a standstill for at least nine months (Article 137 TEC). If a collective agreement is signed, it can at the joint request of the signatories be incorporated in a ‘Council decision’, on a proposal from the Commission (Article 138 TEC).

Since Maastricht, the social partners have thus become formal co-actors. In fact, the EC social policy procedures fit the classic formula for corporatist concertation, i.e. ‘a mode of policy formation in which formally designated interest associations are incorporated within the process of authoritative decision-making and implementation’ (Schmitter 1981: 295). As a policy-specific public–private co-operation, i.e. a meso-level pattern, EC social policy is nowadays decided in a ‘corporatist policy community’ (Falkner 1998).

In this article, a brief outline of each of the cases negotiated under the post-Maastricht social policy regime at the cross-sectoral level will be followed by an analysis of the framework conditions for such deals. The latter suggests, first, that industrial relations aspects have played as large a role in recent collective negotiations as questions of substance, and, second, that the EU-level social partners (above all, the employers) have so far understood their role to be limited to labour law issues in a rather traditional sense. The final section argues that the two arenas of contemporary EC social policy-making are distinctive, but nevertheless interdependent.

THE COURSE OF EURO-COLLECTIVE NEGOTIATIONS

Trial and error: European Works Councils

The issue of introducing Works Councils at the European level was the first one to be discussed using the Social Protocol as a legal basis. It was even a symbolic test case because it represented a special interest of both the European trade union movement and the European Commission who considered it as an essential counterpart to economic liberalization. If the Internal Market allowed industry to move more freely across borders and internationalize, the labour force which had to face these changes should at least not suffer disadvantages in terms of enterprise-level ‘democracy’.

It made this highly controversial case even more thrilling that by the time the Maastricht innovations came into force, it had already had a long and unsuccessful history. Neither the UK’s nor the Union of Industrial and Employers’ Confederations of Europe’s (UNICE’s) disagreement in principle had been dropped, despite many changes introduced since the very first draft
was presented by Commissioner Vredeling, in 1980. Under the new conditions of the Social Agreement, however, the outsider position of the UK plus majority voting among the other Council members allowed spillover pressures from the Single Market Programme to be translated into political action.

On 17 November 1993, the Commission officially started the procedure laid down in the Maastricht Social Protocol. For the *first round of consultations* with the social partners, it submitted a document to a series of Euro-groups. After explaining the history of the legislative project and its possible effects, the Commission’s text posed some questions about the scope and contents of a possible regulative act (EuroAS 3/1994: 4). Most Euro-groups responded within the specified six weeks and repeated their well-known policy options, e.g. UNICE favouring a flexible and voluntary approach, the European Trade Union Conference (ETUC) demanding binding EC law.

For the *second consultation*, the Commission set another six-week deadline (for 30 March 1994) and presented a new draft on European Works Councils which was less far-reaching than former ones. Despite their remaining criticism of certain aspects of the Commission’s text, the general cross-sectoral European employers’ federations (UNICE and the European Centre of Enterprises with Public Participation (CEEP)) soon declared their willingness to enter into collective negotiations with the ETUC. This departed from established scholarly expectations that ‘centralized collective bargaining between capital and labour . . . is entirely missing at the European level, and nothing is in sight that would indicate its impending appearance’ (Streeck and Schmitter 1994: 212).

The ETUC was sceptical *vis-à-vis* this (presumably tactical) new approach and suggested *preliminary talks* on the possibility of entering into formal negotiations. After two exploratory meetings between the three cross-sectoral peak federations, during the spring of 1994, an exchange of conditional offers to negotiate took place. Three days before the closing date of the second phase of consultation, UNICE and CEEP finally conceded to the ETUC’s principles (e.g. Gold and Hall 1994: 180). The compromise included a formal initiation of collective negotiations, specified some important aspects concerning their content and provided that implementation should happen via a Council Directive. Just before the deadline set by the Commission, however, the stance of the British organizations, the Trades Union Congress (TUC) and the Confederation of British Industry (CBI), changed the situation. The British employers’ federation withdrew from the negotiations, officially because the compromise reached in Brussels just before the weekend could not be submitted to the relevant decision-making body before the formal deadline on Monday. But reportedly, the latest preconditions for negotiations went too far towards conceding the establishment of a transnational structure for the CBI’s taste (cf. e.g. EIRR 243: 3). By the spring of 1994, UNICE was not yet prepared to outvote its British member organization. Furthermore, the TUC and the ETUC considered the participation of the CBI to be indispensable. That the ETUC immediately asked the Commission to present a draft
Directive to the Council was in any case considered by the employers to express labour’s initial preference for the legislative route (Agence Europe, 24 March 1994: 10).

After the failure of the social partners to conclude an agreement, the Commission proposed another draft Directive to the Council. Qualified majority voting under the co-operation procedure made a significant difference: a Common Position of the delegations was adopted very soon after that, in July 1994. Even co-operation with the EP was smooth, so that as early as 22 September 1994 the Council adopted Directive 94/45/EC ‘on the establishment of a European Works Council for a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees’.

The first deal: parental leave

Only a year after the failure of the talks on Works Councils, the Commission started another first round of consultations under the Social Agreement, under the heading ‘reconciliation of professional and family life’ (on 22 February 1995). The Commission’s consultation document outlined the importance of an initiative in the light of changing employment roles of men and women. It reported that all twelve member states had taken measures which offered varying leave conditions, ranging, for example, from three (Greece) to 36 months (France, Germany) of parental leave. The Commission argued that ‘the specific objectives of promoting reconciliation between family and professional life, laying down minimum standards of protection and establishing common rules ensuring fair competition within the Community cannot be sufficiently achieved by the Member States acting alone and can therefore, by reason of the scale and effects of the proposed action, be better achieved by general framework arrangements operating at Community level’ (first consultation document).

The answers of seventeen interest groups revealed support for the promotion of equal opportunities as well as a consensus in favour of Community action, at least in the form of a recommendation. The general opinion was that the social partners had to play an active role in drawing up the fundamental principles, and then in their implementation through collective bargaining (COM (96) 26 final, explanatory memorandum).

On 21 June 1995, the Commission launched the second round of consultations. This time, it issued another consultation document but not an outright legislative draft such as in the Works Councils case. It put forward a number of principles; for example, that parental leave is a right linked to employment, that the length of parental leave should be at least three months, that some flexibility was desirable in the implementation and that social security rights should be maintained during the leave (cf. Agence Europe, 22 June 1995: 14; EIRR 259: 30). Only two weeks after the start of the consultation, on 5 July 1995, the three major cross-sectoral federations – CEEP, ETUC and UNICE
– asked for a suspension of the legislative procedure in a joint letter to the Commission (Agence Europe, 8 July 1995: 7).

In contrast to some scholarly expectations, UNICE was indeed ready to negotiate ‘in the shadow of law’ (Bercusson 1992: 185). For the first time, formal collective negotiations under the Social Agreement were opened. They were successfully concluded after only five (of a possible nine) months, on 6 November 1995. A draft framework agreement was submitted to the respective decision-making bodies of the three institutions (Agence Europe, 8 November 1995; 15 and 11 November 1995: 12).

The Agreement entitles men and women workers to parental leave on the grounds of the birth or adoption of a child, for at least three months. However, the Agreement sets out only a few minimum requirements and leaves to member states and national social partners the establishment of the conditions for access and the modalities of application of the right to parental leave. With a view to the implementation phase, the ETUC, UNICE and CEEP requested the Commission to submit their framework agreement to the Council for a decision on the requirements binding in the member states of the Union with the exception of the UK.

Soon after the formal signature of the Agreement on 14 December 1995, the Commission indeed proposed a draft Directive to the Council with the aim of rendering binding the provisions of the Agreement concluded between the social partners (on 31 January 1996; cf. Agence Europe, 1 February 1996: 7). Also, the Council Directive was signed quite speedily: political consensus was reached on 29 March,8 and the Directive 96/34/EC was adopted unanimously without debate on 3 June 1996.

The second and third deals: atypical work

The first round of consultations on ‘atypical work’ under the Social Agreement started on 27 September 1995. Under the heading ‘flexibility in working time and security for employees’, the Commission tried to reconcile employers’ needs for greater flexibility with part-time and temporary workers’ needs for job security. It asked the social partners whether they agreed that rules on the conditions of part-time work, fixed-term employment relationships, and temporary work were necessary at the EU level. According to the Commission evaluation (cf. second consultation document), support for the principle of non-discrimination was a general feature of the responses. While most employer organizations (including UNICE) saw no necessity for regulatory action by the EC, some of them reportedly supported the elaboration of a social partner agreement.

The second round of consultations was launched on 17 April 1996. In its document for the social partners, the Commission referred to the need to review legal, administrative, financial and other barriers against atypical work. It suggested that aspects such as the conditions and means for the promotion of flexible forms of work should be central points in presumptive social partner
negotiations. Nevertheless, flexible forms of work should only be introduced after consultation with the workers. Referring to the answers submitted in the first round, the Commission suggested that equal treatment of atypical workers should be chosen as the fundamental principle.

The three major social partner organizations, UNICE, CEEP and ETUC, responded with a joint letter to the Commission asking for the suspension of the legislative process according to Article 4.3 of the Social Agreement, dated 19 June 1996. Still in June, a meeting between the representatives of the secretariats took place with a view to establishing the scope of the talks (EIRR 271: 3). On 21 October 1996, UNICE, CEEP and ETUC formally launched negotiations on an agreement concerning ‘flexibility of working time and security for workers’. Very antagonistic starting positions meant that the three federations were ‘stumbling over the content of the negotiation’ (Agence Europe, 28 January 1997: no. 35) for several months. UNICE argued that its negotiating mandate from the member organizations was (at least for the moment) restricted to ‘permanent part-time work’ only; thus excluding the huge number of part-timers on atypical contracts (notably fixed-term). The ETUC wanted to cover all forms of atypical work, i.e. part-time, temporary, casual and agency work, homework and telework (although not necessarily all in the framework of these negotiations). Another very controversial point was a presumptive reference to social security. The ETUC delegation threatened that the negotiations would reach an impasse unless the employers broadened their negotiating mandate. Only during the fifth meeting on ‘flexibility of working time and security for workers’ (24 February 1997) did employers agree to say something on social security, and to include part-time work, in general, in the agreement. On the other hand, they continued to stress the importance of thresholds to limit the application of any measures.

On the side of industry, the 1996–7 part-time negotiations showed that it is no longer true that its organizational weakness is a pure advantage. Because labour would not agree to the preferred narrow scope of a presumptive agreement restricted to ‘permanent part-time work’, organizational weakness indeed turned into a problem that endangered a basis for compromise. Under the specific circumstances, however, a collective agreement ultimately seemed desirable to UNICE (or, at least, less undesirable than Council legislation). It was a crucial sign to all other political actors and to the public that the desired negotiation mandate was given to the Euro-level by the member organizations, as soon as it was seriously demanded by the Brussels office.

The part-time negotiations were ‘far more complicated technically than the first negotiation between the social partners’ (Agence Europe, 28 January 1997: no. 35), and this made an extension of the nine-month deadline (with agreement by the Commission) indispensable. The final ‘draft European framework agreement on part-time work’ was drawn up by the drafting group after a meeting of the ETUC Industrial Relations Committee and of the UNICE Social Affairs Commission on 5 May 1997. This project was accepted during the final (i.e. eighth) plenary negotiation on 14 May 1997. It was submitted
to the three decision-making bodies for signature and subsequently submitted to the Commission with a proposal to the Council to implement. The Agreement was formally signed on 6 June 1997 (i.e. almost one year after the social partners had announced the opening of negotiations, and almost fourteen months after the Commission had started the second round of consultations). On 23 July 1997, the Commission proposed a Council Directive to the Council which adopted it in December 1997 (Directive 97/81/EC).

Following the ETUC’s demand, the part-time Agreement’s preamble included the statement that the signatories intended to ‘consider the need for similar agreements relating to other forms of flexible work’. Negotiations on fixed-term contracts were initiated at the end of March 1998 (EIRR 304: 14). This issue proved even more politically sensitive and technically difficult than the part-time one (see also statement by EC Social Commissioner Flynn, EIRR 304: 15). Towards the end of the official nine-month deadline in late 1998, the positions still seemed irreconcilable. UNICE stressed that fixed-term contracts were a vital means of enabling employers to respond to fluctuating market demands and wanted to secure a significant degree of flexibility and autonomy for companies. The ETUC, by contrast, fought for more security for workers on such contracts and against potential abuse of fixed-term work. Nevertheless, a compromise was hammered out in January 1999 and an Agreement formally signed by the ETUC, UNICE and CEEP on 18 March 1999.

This was made possible by the very strong framework character of the final text and by acceptance on the part of the ETUC that initial recourse to fixed-term contracts was not regulated. By contrast, the employers accepted measures against the potential abuse of successive fixed-term contracts. Clause 5 thus obliges member states to introduce at least one of the following measures: objective reasons justifying the renewal of fixed-term contracts, a limit on their total duration, or a limit on the number of renewals. While the Agreement states that fixed-term workers may not be treated in a less favourable manner than other workers, any details of terms and conditions are specified by the member states. In terms of affecting existing provisions in the existing member states, it seems that the latest Agreement will affect only the UK to a significant extent (EIRR 304: 17), but it might be of importance with a view to future EU member states (EuroAS 3/99: 30). As in the previous case, the Council Directive 99/70/EC giving force to the fixed-term work social partner agreement proceeded smoothly in the Council and was formally adopted speedily, on 28 June 1999 (see EIR 312: 31).

THE FATE OF ATTEMPTED AGREEMENTS: FAVOURABLE AND UNFAVOURABLE BACKGROUND CONDITIONS

European Works Councils: no collective agreement

When tracing the reasons for the failure of the social partner talks in the Works Councils case, interviews with the actors are not of much help because each
party puts the blame on the other (cf. Ross 1995: fn 75). This reveals the actors’ perception that a normative consensus on the desirability of collective agreements had already developed. It seems that labour and industry indeed felt a ‘moral obligation’ to agree. The failure was perceived to need a ‘good’ justification, and ideally the other side should carry the burden of responsibility for it. ‘Social dialogue’ was thus alive and kicking as a social institution with normative validity, in the heads of the actors.

Nevertheless, various practical difficulties ruined the compromise, which had been within reach. The six-week deadline as imposed by the Commission proved too short for such a tricky issue. In the later issues under the Social Agreement, the Commission was careful to allow more time if labour and management needed it. Most importantly, however, the unclear position of the CBI with UNICE was problematic. According to the UNICE statute ‘any draft agreement negotiated in the framework of the dialogue between the social partners is to be ‘approved by the Association on the basis of consensus among all the members affected by the agreement in question’ (see Article 7.8). Thus, UNICE could not overcome the non-approval of the last-minute compromise concerning European Works Councils by the CBI in March 1994 because it was highly probable that the CBI would be affected by any collective agreement on Euro-level Works Councils. Although the UK was exempted from the obligation to implement the Directive on European Works Councils as finally adopted under the Social Agreement, it applied to the non-UK operations of firms with headquarters in the UK if they had more than a certain number of subsidiaries and employees in other member countries of the European Economic Area. Experts estimated the impact in the UK in terms of numbers of companies affected to be similar to that in France and Germany (Hall et al. 1995: 12).

Therefore, the position of the CBI would most probably have been a lethal stumbling-block to a European collective agreement on Works Councils even if the ETUC had not made it a precondition that the CBI should participate. Subsequently, the ‘rules of the game’ were clarified for the future, both within and between labour and industry associations at the European level. An internal agreement of UNICE specified that the CBI would continue to participate but not have a veto right in negotiations pursuant to the Social Agreement. On the other hand, the CBI would not be bound by an agreement of which it would not approve.

When the issue went back to the Council, the European employers had to recognize that there was a will to legislate among the necessary qualified majority of Council members (which was a favourable background condition for the following collective negotiations). The ETUC was rather successful in the end with its tough stand, stating preconditions before starting formal negotiations. It could rely on the fact that the debate on European Works Councils had already been running for many years, that many stalemates go by without the Commission and most member governments losing their
enthusiasm. It could thus expect a Commission proposal and a Council
decision (among the eleven) to happen in the absence of a collective
agreement. The results in terms of the existence and rights of Euro-level Works
Councils seem to have indeed been the crucial stake for the ETUC. These
substantive concerns were not traded for general industrial relations considera-
tions about the usefulness of reaching a first collective agreement under the
innovative post-Maastricht social policy rules (see also Dølvik 1997: 325).

Parental leave: standards by social partners, Directive by Council

The breakdown of the talks on European Works Councils was frequently taken
to suggest ‘that the dialogue route to policy-making will remain blocked’
(Rhodes 1995: 118). Nevertheless, the second round of social partner talks at
the Euro-level did lead to a collective agreement between labour and
management.

Two reasons seem crucial for this. First, the issue was less controversial than
Euro-level Works Councils. Establishing some minimum standards on parental
leave was perceived by the relevant interest groups as a comparatively easy
subject since no internal ideological cleavages in ETUC, UNICE or CEEP
were at stake. In the words of a Commission official, parental leave seemed a
suitable ‘guinea pig’ for Euro-level collective negotiations.

Second, the industrial relations aspect was by then a central concern of both
sides of industry since the impending intergovernmental conference preceding
the Amsterdam Treaty could have changed the corporatist patterns, if they were
not perceived to be workable. Interviews reveal that an advocacy coalition (cf.
Sabatier 1993) comprising Commission officials as well as members of the
Brussels offices of the major interest groups had already done backstage work
with a view to arriving at an agreement in the parental leave case, long before
the negotiations were formally opened.

The negotiation mandates were actually being drawn up as the first round
of consultations by the Commission was still running. As soon as CEEP,
ETUC and UNICE asked for a suspension of the legislative procedure in a
joint letter to the Commission (Agence Europe, 8 July 1995: 7), they expressed
their determination to reach agreement by the end of 1995. They ‘wish[ed] to
prove that they are capable of reaching binding agreements in the framework
of negotiations’ (Agence Europe, 13 July 1995: 15; cf. EIRR 259: 30). Indeed,
behind the scenes, they had already agreed on a schedule which envisaged an
agreement by October 1995, i.e. before the start of the intergovernmental
conference.

The great symbolic value of the parental leave agreement and its crucial
importance in terms of Euro-level industrial relations are also underlined by
the fact that the conclusion of the first collective agreement and the adoption
of the Parental Leave Directive in the Social Council of June 1996 were much
celebrated events.
Part-time and fixed-term work: confirmation of the corporatist patterns

The parental leave deal had shown that the post-Maastricht social policy provisions were operational, but the issue of parental leave had been considered rather uncontroversial. By contrast, the issue of atypical work is at the heart of the contemporary debates on deregulation versus worker security in the widest sense. Therefore, chances for further collective agreements seemed poor at the outset. Since 1982, various drafts had been discussed controversially in the Social Council. UNICE had always been opposed to regulative action at the Euro-level. However, political developments put pressure on the negotiators: in addition to the then current intergovernmental conference, the Renault affair brought to the attention of the wider public the question of whether European economic integration was sufficiently counterbalanced by social policy rules.

In these negotiations, the ETUC in particular needed to take some very difficult tactical decisions. From the beginning, labour knew that these would be difficult talks in which compromise was crucial because the alternative, i.e. Council Directives, was itself not unproblematic. The danger was that there would be extremely minimalist compromises among the governments, as indicated, for example, by previous Belgian and German presidency compromise proposals on part-time work. The standards finally adopted by the social partners are not very high either, but the Part-time Agreement is, from the ETUC’s viewpoint, considered a qualitative leap in terms of the consolidation of contractual relations at the European level. Coming at the time of the integration of the Social Agreement into the Treaty, it indicated that the corporatist procedures worked on a more than singular basis. Furthermore, the agreement was seen to open the door for other Euro-level negotiations on different forms of atypical work, while a failure of the negotiations might have closed this door on a long-term basis.

It seems that these considerations of the ETUC were confirmed in the ensuing fixed-term negotiations and agreement. Once again, industrial relations considerations played an important role, because between the two negotiations on atypical work issues the UNICE members had given no negotiation mandate on the Commission draft on information and consultation in national enterprises. In this case, the internal UNICE decision rules became controversial. Reportedly, a minority consisting of Germany, Portugal, the UK and Greece blocked negotiations, which were desired by the majority of UNICE members and by the public employers represented in the CEEP (e.g. Agence Europe, 16 March 1998: 11a). When the Commission presented a draft Directive to the Council, however, the then new UNICE Secretary-General announced a revision of this decision – but all internal lobbying was in vain. This was considered a significant setback for Euro-collective negotiations. Against this background, a success on the fixed-term issue seemed even more important to the promoters of ‘social partnership’ in
all relevant Euro-federations. This is, for example, expressed in the CEEP's official statement on the fixed-term deal as 'a major contribution to developing the social dialogue at European level' (quoted in EIRR 304: 17).

Last, but not least, it should be mentioned that a multi-faceted role for the national social partners is foreseen in both the Part-time and the Fixed-term Agreements; for example, in the specification of details during the implementation of the agreement and in the periodical review of certain aspects. This applies also to those countries without participation of private interests in policy-making and is seen as a possible avenue for national unions to exert influence. In short, it seems that in both cases, low substantive standards were accepted by labour in exchange for greater involvement of the 'social partners' at all layers of the European multi-level system. Particularly in the part-time case, this may be considered as a trading of women's interests\(^{14}\) (as the overwhelming majority of part-timers) against the organizational self-interest of the ETUC and its member organizations. The ETUC Women's Committee's rejection of the deal did not, however, affect the result of the vote in the ETUC's executive committee because a simple majority of votes in favour was sufficient.\(^ {15}\)

**Several Council-only issues**

In total, seven acts have been debated under the Maastricht Social Agreement, up to April 2000. In addition to three sets of negotiations concluded at the cross-sectoral level (parental leave, part-time and fixed-term work), new Euro-collective negotiations seem to be on the agenda, at the time of writing, on temporary work (the ETUC negotiation mandate already being adopted, UNICE's negotiation mandate is expected in the near future (Agence Europe, 24 March 2000: 17)). Meanwhile, three legislative Commission proposals were not negotiated by the social partners (considering that the Works Councils were informally negotiated): the burden of proof in sex discrimination cases (Council Directive already adopted), an instrument on sexual harassment (still pending) and a Directive on worker information and consultation in national enterprises (still pending).

As outlined in the previous section, tactical industrial relations considerations are influential factors when the Euro-level peak associations decide whether they want to engage themselves in collective negotiations or not. In addition, the agreements concluded so far reveal a clear focus of the social partners on labour law issues, as opposed to other fields of social policy, in a wide sense. The EC Treaty's social provisions, which are the legal basis for the corporatist decision patterns, make no distinction between different sub-fields of social policy, as far as prospective collective negotiations are concerned. By contrast, even in those member states which are known for their corporatist policy-making patterns, the social partners are involved to a lesser degree in some issues which still fall within the wide field of the EC social chapter (note that the latter includes labour law, social security, equality between the sexes,
social exclusion and even employment concerns). For example, the Commission could not find any national collective agreement on the issue of burden of proof in sex discrimination complaints. That this issue – such as the draft concerning sexual harassment – falls outside the traditional field of labour law (it concerns procedural rules and litigation in court) was indeed UNICE’s main argument when it rejected relevant collective negotiations.

This indicates that existing national traditions of social partnership do play a role, even at the EU level. The exclusive labour law focus of recent Euro-agreements is also because of the exclusion of social security measures which were treated as belonging to the exclusive realm of the Council (and at best mentioned in very general and non-binding terms). That the classic topic of national collective bargaining, pay, has been omitted from the field of ‘negotiated legislation’ (Dølvik 1997: 47), by contrast, is not because of employer opposition but because of the relevant EC Treaty basis (see above).

TWO DIFFERENT BUT INTERDEPENDENT ARENAS OF EC SOCIAL POLICY-MAKING

Bargaining on social policy issues between either the social partners or the Council delegations is pursued in two different and quite distinctive arenas which are nevertheless interdependent. In the first place, the traditional pattern of social policy-making is dominated by the Council and its working groups. The adoption of an EC Directive furthermore demands a Commission proposal to initiate the bargaining process and outline the general thrust of the legislative project, as well as action by the EP which varies according to the specific procedure. The interests represented by the politicians (and bureaucrats) involved are predominantly territorial (Council) and party-political (EP). In this ‘intergovernmental arena’ (in the wider sense), negotiations proceed according to the detailed decision rules specified in the EC Treaty, complemented by informal rules which have resulted from decades of EC negotiation practice.

A second, quite different pattern is represented by the negotiations between management and labour, i.e. between the European federations representing functionally differentiated groups of EC citizens. Here, procedures are not prescribed at the de facto constitutional level of European Union (EU) Treaties, since the Maastricht Social Agreement contained solely provisions concerning the interface between intergovernmental and collective bargaining (specifying what is needed to stop traditional decision-making or to initiate Council negotiations on implementation). The constitutions or rules of procedures of the individual Euro-groups, which are party to collective negotiations, have in recent years been changed with a view to regulating the internal decision modes for Euro-collective agreements. By contrast, there are no written rules at all concerning the interaction between the various players.

In fact, a pattern for the social partner negotiations was developed through a rather short-term process of learning-by-doing. In practice, there are only
two opposing parties, i.e. unions and employers, although three major Euro-
groups participate (ETUC, UNICE and CEEP). The negotiations are divided
between plenary negotiations (twenty-eight individuals on the labour and
management sides each), chaired by a neutral ‘umpire’, and a drafting commit-
tee (groupe restreint) of only seven very influential persons. While it is clear that
all three signatories must agree on any collective agreement (while the Council
mostly decides by a qualified majority), the internal voting procedures of the
single groups are in fact crucial in the social partner arena. This became
evident for the first time in the European Works Councils case, after which the
CBI lost its veto right. Since at Amsterdam the UK accepted the regime of the
Social Agreement, the CBI is back as a normal UNICE member also in social
affairs (but now has to include the changed domestic political conditions in its
calculation of the pros and cons of Euro-level collective agreements).

Legitimation varies greatly between the two arenas. In traditional EC social
policy-making, the Council members are indirectly legitimated via national
elections and controlled (although to a limited extent) by their national
parliaments. In addition, the members of the EP (which has a veto right at
least when the Council can act by a qualified majority under the co-decision
procedure) have been since 1979 directly legitimated by the EU citizens in
European elections. The recruitment of the negotiators in collective negotia-
tions, by contrast, is completely different. There are various practices in the
single national member organizations of European peak federations, but the
individual members of unions or employer associations usually do not have a
say. The draft collective agreements have to be approved according to the
specific rules of ETUC, UNICE and CEEP. This means so far that all affected
members have to agree in UNICE while a majority suffices in the ETUC and
CEEP.

Apart from the question of internal legitimation within the negotiating
parties, the representativeness of the signatories of the three collective agree-
ments signed so far is a relevant issue affecting political legitimacy. Since the
Maastricht Social Agreement did not even specify who ‘labour and manage-
ment’ should be, it was again day-to-day practice that decided a crucial issue.
The Commission and the Council did not directly designate a few Euro-
groups as responsible for carrying through the collective negotiations, but in
practice they confirmed the exclusiveness of ETUC, UNICE and CEEP who
had already been involved in the ‘Val Duchesse social dialogue’ since the mid-
1980s. The Commission stopped the traditional legislative processes on their
request and – just like the Council – found it appropriate to implement their
agreements by binding EC Directives. Some excluded smaller interest groups
complained, but the law suit filed by the Union of Small and Medium Sized
Enterprises (UEAPME) against the Parental Leave Directive was rejected by
the European Court of Justice (case T-135/96 of 17 June 1998). Most recently,
both UNICE and the ETUC (through its affiliate EuroCadres17) have con-
cluded co-operation agreements for the European social dialogue with smaller
groups while ultimately keeping their negotiation prerogatives intact.
It is important, however, to underline that the social partner negotiations on EC social policy issues are, on closer inspection, not completely independent from the intergovernmental arena. There is, in fact, dense contact and interdependence between all relevant actors in EC social policy, i.e. Council, social partners, Commission and, to some extent, also the EP. Even on the contractual path to EC social policy, the Council has an important role to play, both formally and informally. First, there are many indicators that a high probability of Council deliberation on a matter represents a spur for industry to look actively for a compromise with labour (see above), as expressed most recently in UNICE’s reconsideration of its earlier refusal to negotiate on worker consultation in national enterprises. If the governments (and the Commission) put pressure on management by indicating the will otherwise to adopt social regulation themselves, the employers will be much more ready for compromise. Just as at the national level, corporatist negotiations thus need some backing from ‘the state’ (i.e. here the EU institutions).

Second, the governments are in practice also crucial when it comes to the implementation of agreements by means of EC law. Since the relevant Euro-groups decided that implementation via EC law is their preferred way of action, they have so far asked the Commission to submit all their Agreements to the Council. It is noteworthy, however, that the Commission successfully convinced the governments that the specific social standards resulting from social partner agreements are, in fact, not negotiable in the Council. The Commission argued that the Council ‘decision’ on the implementation of a collective agreement should be restricted to making the provisions of the agreement binding. In the end, the governments accepted that the texts of collective agreements are not even included in the Council Directives but only annexed to the latter. This is even more surprising considering that the formulation that a collective agreement had to be implemented by the Council as it stood had been proposed by the social partners but eliminated during the intergovernmental conference preceding Maastricht. The primary law would therefore have allowed the Council to, for example, further specify unclear provisions. However, when the first Euro-Agreement, on parental leave, was implemented, the Council could not be sure if the innovative patterns would indeed work. It seems that the Commission could convince several reluctant delegations that a public ‘success’ for the new corporatist decision-patterns was more important than legally specifying several details which remained unclear in the text of the Agreement, and that unpacking the deal between ETUC, UNICE and CEEP might cause never-ending dispute in the Council. This set an example, and the Council has since been in a take-it-or-leave-it situation whenever confronted with a decision on implementing a social partner agreement. The extremely flexible and often non-binding character of the three agreements clearly sweetened this pill and prevented any serious dispute among the Council delegations in the part-time and fixed-term cases. In any case, that their agreements have to pass the Council if they are to become binding EC
law is a fact that cannot be forgotten by the interest groups during their
negotiations.\textsuperscript{19}

That the Council has a role to play even when social policy is specified by
the social partners does not, however, imply that recent EC social policy
complies with the expectations of intergovernmentalism. This integration
theory is state-centric since it perceives states as defending their national
interests against each other like hard 'billiard balls', as the solely dominant
actors of international affairs. The EU is usually described by intergovernmen-
talists as just an international organization, considered to serve the interests of
states without challenging their sovereignty (e.g. Moravcsik 1993). The corpo-
ratist patterns of EC social policy-making since Maastricht challenge such
an intergovernmentalist approach to European integration. National govern-
ment are no longer the sole gate-keepers of national societal interests in the
social realm. Labour and industry are formal co-actors in the European social
policy process. EC social policy regulation may even happen without any
bargaining between governments in the usual sense, i.e. on specific standards.
In principle, at Maastricht the social partners were not only given the possi-
blity of bringing classical EC decision-making to a halt and adopting social
standards instead of the Council (and Parliament). They could, in terms of EC
law, even implement their Agreements 'in accordance with the procedures and
practices specific to management and labour in the Member States' (Art. 4.2
Social Agreement, now Article 138 TEC), hence without any Council involve-
ment. Although this has not been the chosen path so far (and various practical
difficulties exist), the 1990–1 intergovernmental conference went far in sacri-
ficing powers hitherto exerted by the governments. At least in the field of EC
social policy, the Euro-polity is nowadays not only multi-level in a geographical
sense (Marks \textit{et al.} 1996) but also in functional terms.

CONCLUSIONS

The previous sections have outlined in detail how recent EC social policy has
been decided in two distinctive but interdependent arenas. In fact, the repre-
sentatives of labour and industry in the European social dialogue as established
under the Maastricht Treaty's Social Agreement now participate in a 'corpora-
tist policy community' (Falkner 1998), together with the Commission, the
Council, and the EP. All members of the specific policy network have some
kind of say under both tracks towards EC social standards, but the social
partners are the core actors under the innovative 'negotiated legislation' pro-
cedures. Looking at the experiences with this specific decision pattern, three
factors seem influential with a view to the probability of social partner
agreements, on the one hand, versus traditional Council legislation, on the
other hand.

First, the employer federation UNICE is only willing to negotiate with its
labour counterpart in the 'shadow of law' (Bercusson 1992) since industry
would so far always have preferred no social regulation at all. It is therefore a
necessary precondition for the corporatist patterns to work out that the Commission submits proposals which would otherwise be negotiated and presumably adopted in the Council of Ministers. The ‘best alternative to negotiated agreement’ (Fisher and Ury 1981) is also relevant with a view to the specific bargaining power of the various social partner organizations in particular collective negotiations. If there is a high probability that the Council will not be able to adopt a Directive autonomously, or if the level of compromise between the governments will presumably be very low, the ETUC’s ability decisively to influence the content of collective agreements is impaired (see the atypical work cases). By contrast, UNICE has shown itself to be more flexible in negotiations when Council compromise is in sight and the alternative to negotiated agreement therefore seems rather less attractive than striking a deal with labour.

Second, pre-existing national traditions of collective bargaining do play a role in Euro-level bargaining, in accordance with the core assumptions of institutionalist theory. Matters which are outside the realm of national social partnerships, such as enforcement rules and court procedures relating to equal treatment provisions, have not been accepted as subjects of collective negotiations even at the EU level.

Third, general considerations concerning the development of an industrial relations culture at the EU level have been as important as material interests in the negotiations between ETUC, UNICE and CEEP. If an issue is perceived as a touchstone for proving that the corporatist procedures are at all operational (as in the parental leave case) or that they can be successfully practised more often than just once or twice (as in the atypical work cases), the common interest of all ‘EU social partners’ tends to be upgraded and each of the negotiators is rather more ready for compromise.

In short, post-Maastricht EC social policy negotiations are more than ‘just’ a two-level game (Putnam 1988). It is true that the politicians adopting social directives in the EC Council are under pressure on both the domestic and the European levels, as indicated in the metaphor of two-level games. As opposed to classic international negotiations, however, there are more relevant players than just the governments at the EU level – even in the frame of ‘traditional’ EC social policy decided in the Council. The European Commission and the EP are nowadays of great significance, too. Furthermore, there are Euro-level interest groups which have to be consulted and which can potentially influence the wider public, which is hardly the case in classic international negotiations.

Most notably, however, the collective negotiations on EC social policy represent another arena where a second multi-faceted game is being played. It can, in fact, be modelled as another two-level game in the sense of Putnam, since the Euro-level peak representatives of labour and industry are also under pressure at both the EU and the national levels. It was a few central Brussels staff members of UNICE, CEEP and ETUC who, in fact, managed the 1991 Agreement on future social partner involvement in EC social policy (which
was then incorporated in the Maastricht Social Agreement.\textsuperscript{20} These mostly internationally oriented labour or management experts are in intense and daily co-operation with both the Commission and their counterparts from the other peak federations, and they are influential promoters of Euro-level social dialogue. Draft collective agreements have, however, not only to be agreed among their negotiators, but also to be accepted by the latter's national affiliates – which is by no means a trivial condition. At the social partner level, too, recent EC social policy negotiations have thus been two-level games. Considering all these intricacies, it seems that Tsebelis's (e.g. 1990) concept of multiple 'nested games' is a more appropriate metaphor for the multi-level and multi-actor negotiations in contemporary EC social policy.

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\textbf{NOTES}

1 An early version of this text was presented at the Third Pan-European International Relations Conference and Joint Meeting with the International Studies Association (Vienna, 16–19 September 1998). Thanks to the participants and to Ole Elgstrom and Michael Smith for comments.

2 Most notably, the 1957 Rome Treaty, the 1986 Single European Act, the 1992 Maastricht Treaty and, most recently, the 1997 Amsterdam Treaty which came into force on 1 May 1999.

3 On the often neglected importance of day-to-day politics for Treaty reform, see Christiansen and Jorgensen 1999.

4 The Commission and the social partners may jointly decide to extend this period.

5 The Council acts by qualified majority, except where the agreement in question contains one or more provisions relating to one of the areas which needs unanimous decision-taking. The alternative to implementation of Euro-level collective agreements via EC law is via 'the procedures and practices specific to management and labour and the Member States' (Article 138 TEC). For background information on the new decision patterns, see, for example, Gorges 1996; Keller and Sorrries 1998a, 1999a; Liebfried and Pierson 1995; Platzer 1997.

6 Recently, there have also been interesting developments at the sectoral level, notably in the maritime, rail transport and civil aviation sectors. See EIRR 312: 31. For a sceptical view on the prospects for sectoral agreements, see Keller and Sorrries 1998b, 1999b.

7 All 'representative' organizations mentioned in the Commission's Communication on the Application of the Social Agreement (COM (93) 600 final, 14 December 1993) are included in the consultations while the Commission leaves it to the social partners themselves to decide who actually negotiates agreements.

8 There was unanimous agreement but adoption was postponed with a view to parliamentary approval in Germany (Agence Europe, 30 March 1996: 7).

9 Employer representatives considered the European federation as blackmailed by the British TUC which wanted to force its national counterpart into an agreement; because the strong German unions would not support the agreement, the TUC was crucial for the necessary two-thirds majority within ETUC (Hornung-Draus 1994: 4). This view is, however, contested by TUC officials. According to
Buda (1995: 302; translation by GF) ETUC could ‘for political reasons’ not conclude an agreement which did not include British workers.

This was agreed in an unpublished letter of the CBI to UNICE of April 1994 (confirmed to the author by both UNICE and the CBI). ETUC accepted this special status of the CBI.

A plant in Vilvoorde (Belgium) was shut down in order to profit from cheaper labour and higher subsidies in Spain (cf. e.g. Agence Europe, 3 March 1997: no. 34). This provoked renewed controversies on the role of labour costs (and subsidies) in the Internal Market, and prompted ETUC support for simultaneous protest actions and strikes in Belgium, France and Spain. This may be considered a new quality of European trade union activism.

According to Art. 7.3 UNICE Statutes, the Council of Presidents approves a proposal unless thirty-six votes are cast against (i.e. at least the representatives of three member states).

The public explanation for rejecting negotiation was that, according to the principle of subsidiarity, decisions on worker information and consultation in national enterprises should be left to the national level.

Thirty-two per cent of female but only 5 per cent of male employees are part-timers (cf. Eurostat data; Agence Europe, 20 September 1997: no. 30). It should be mentioned that some aspects, which would have been of central interest from a working mother’s point of view, were put forward without success by the ETUC (e.g. the inclusion of the organization of work in those potential obstacles to part-time work to be periodically reviewed). It was, however, by no means obvious that a Council Directive instead of an agreement might have performed better with a view to improving the rights of (especially female) part-timers.

According to participants, there were many women among the labour negotiators on part-time work. However, they would represent their national or sectoral organization, while the ETUC Women’s Committee, which represents women’s interests as such, had only one seat.

For details, see Falkner 1998.

The Council of European Professional and Managerial Staff (for details on all important Euro-groups, see Greenwood 1997).

Autonomous implementation would raise difficulties with a view to an encompassing and uniform character since UNICE, CEEP and ETUC agreed in their joint proposal for the implementation of the Social Agreement (29 October 1993) that their agreements will ‘bind their members and will affect only them and only in accordance with the practices and procedures specific to them in their respective Member States’ (point 10.2).

In turn, the social partners have at least to be consulted (twice – on matters of principle first and on matters of detail later) in any traditional social policy process, so that whenever the Council legislates it has to pay some attention to the view of labour and industry.

For details, see Falkner 1998.

REFERENCES

Agence Europe, Agence internationale pour la presse, daily news bulletin on European affairs, edited by Agence Europe SA, Brussels/Luxembourg.


EIRR (European Industrial Relations Review), edited by Andrew Brode, London.

EuroAS, Informationsdienst Europäisches Arbeits- und Sozialrecht (monthly information bulletin), edited by M. Bobke et al., Neuwied (Germany): Luchterhand Verlag.


