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Slowing down Social Europe? The role of coalitions and decision-making arenas

Report 2 – the area of employee involvement

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1. Introduction[1]

The social dimension of the EU is as old as the union itself. However, it was not until the mid-1980s that the EU gradually developed a real social dimension to counterbalance economic integration. The social dimension includes hard-law regulation in the form of directives (the first of which was decided upon in the 1970s) as well as soft-law regulation[2] such as the Open Methods of Coordination and the European social partners' voluntary framework agreements.

In recent years, what can be labelled 'the regulation-sceptical actors' have been strengthened and 'the pro-regulation actors' have been weakened. Indeed, the number of socialist and social-democratic governments in the European Council has reduced and the same political forces have weakened in the European Parliament. In addition, the Barosso-led Commissions have followed a more liberal agenda than its predecessors and the European Trade Union Confederation (ETUC) has lost bargaining power due to its affiliates' loss of members and challenges from internationalization of production and labour migration. The enlargement in 2004 with new member states where the level of labour standards often do not match those in the old member state also served to strengthen the regulation-sceptical actors. While the enlargement itself made it more difficult to agree new regulation.

These recent changes are expected to have influenced the development of Social Europe. The project, which theoretical and methodological framework will be described in this working paper, aims to explore whether the strengthening of the regulation-sceptical actors has affected the scope and content of regulation as well as the relative weight between different forms of regulation. To address this question, we will analyse recent decision-making processes within the four most important types of EU regulations - the directives, the Method of Coordination (OMC), the social partners' autonomous agreements and case law. In this regards, we will analyse what stand the main actors (the European Council/the member states, the European Commission, the European Parliament, the European social partners and the European Court of Justice (ECJ) have taken with regard to the extent and content of regulation and the choice between the above mentioned different types of regulation. In doing so, we will examine and compare four work and employment related areas simultaneously. The areas will be labelled 'employment', 'employee involvement', 'work-life balance' and 'posting'.

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[2] 'Regulation' will in this report be used as an 'umbrella-term' for written rules of all kinds, no matter their juridical statue. 'Regulation' is also the name of a special kind of juridical binding rules formulated at the EU-level. It should be clear from the context which of the two meanings of the term are used in which situations.

There are two main reasons that a project with such a focus should be able to provide new and relevant knowledge. Firstly, the connection between changes in the various actors' power position on the European scene, and the outcome in terms of regulation agreed, have seldom been analysed. Secondly, in the rare cases this connection *has* been analysed, the researchers have exclusively focused on only one policy area or one type of regulation. Knowledge about changes in power positions and regulation outcomes across work and employment related areas and regulation types are therefore limited.

The four types of regulation represent a continuum from what is often named 'hard' (legally binding) to 'soft' (legally non-binding) regulation. Case law and the directives are the binding form of regulation, in that the ECJ rulings and the directives are supra-national legislation that the member-states are bound to follow. The OMCs represents soft regulation, in that the actors (in this case primarily the member-states) are not legally bound to follow them. However, most of the OMCs contain some measures to commit the member states, such as quantitative targets, indicators and feed-back reports. This increases the chances that member-states will perceive the regulation as politically binding. These elements are missing in the social partners' autonomous agreements as these just formulate general guidelines for national and sectoral member-organisations and therefore, can be seen as the softest form of regulation of the three.

Furthermore, the relative importance of the main actors varies between the types of regulation. Although variation is found from case to case, the Commission and the member states are the most important main actors in the OMCs, whereas the social partners generally have a greater role to play in relation to the directives and the framework agreements. In general the European Parliament's role is at its peak in relation to the directives, and is less important in relation to the autonomous agreements and the OMCs. Finally, the ECJ is the all dominant actor in relation to case law. These differences will be elaborated on in section 2 of this report.

The different actor-constellation in the various types of regulation can be seen as 'decision-making arenas' in line with studies of national level decision-making (Winter 2003; Torfing 2004; Mailand 2008). With the reservation that informal contacts always blur the picture, the decision-making processes behind some directives are mainly found on what could be named 'the politico-administrative arena' (including the European Council and the European Commission) and 'the parliamentarian arena' (the European Parliament alone). Those directives where the social partners are the initiator are at least partly found on 'the bipartite arena' (the social dialogue) or 'the tripartite arena' (for instance the commissions consultations of the social partner or the tripartite summit before the annual spring summits), the later where the Commission coordinates the process). Similar to some directives, the OMC decision making processes take place mainly in the politico-administrative arena, although the tripartite arena also plays a role (when the social partners are consulted). Con-

trary to these directives, however, the European Parliament plays only a minor role in the OMCs. The 'juridical arena' is mainly reserved for the ECJ.

Previous studies (Hooghe & Marks 1999; Nedergaard 2004; Mailand 2005 to name a few) have shown that, to maximize their influence, the main actors tend to seek alliances and create coalitions with other actors. This is not only the case for the member states in the Council, but also for the various party groups in the Parliament, the social partners and in some cases even the so-called 'directorates generals' (departments within the Commission). The multi-level and multi-actor nature of the European decision-making processes on employment and work certainly does not make it easier to study than national level decision.-making, but tracking down the coalitions on the European scene can help to find out who wants what, how they get it and why.

1.1 Research questions

Following this, the research project – being reported in this working paper - will address the following question:

Has the strengthening of the regulation-sceptical actors affected the content or the range of work and employment regulation at the EU-level?

This question will be addressed through analysis of the following:

- What role have coalitions played in decision-making processes in work and employment related areas?
- What glue the coalitions together and are they divided primarily into pro-regulation and regulation-sceptical groups?
- Has the strengthening of the regulation-sceptical actors affected different work and employment related areas to a different degree?
- How has it been possible for the actors to agree on a number of new regulation initiatives when the regulation-sceptical actors have been strengthened?

The possible effects stemming from the strengthening of the regulation-sceptical actors would be the adoption of less new regulation than previously - or of less binding forms of regulation - either due to the juridical status of the types of regulation used or to lower or fewer quantitative targets and minimum-levels.

1.2 Methods and structure of the working paper

Following this introduction, section 2 drawing primarily on secondary literature (published research) covers the historical development of European regulation in the employee involvement area. The sources of the two cases studied - section 3 on the revision of the European Works Council directive and section 4 on the attempt to establish a statute on European Private Companies - are semi-structured interviews with key decision makers from the Commission, other EU

institutions and the European social partners (see Annex A) as well as documents from the same actors. Section 5 summarises the findings and draws some preliminary conclusions.

2. History of European employee involvement regulation

In the industrial relations literature, employee involvement is usually split between direct participation (in the work-processes themselves) and indirect participation (consultation and information of employee representatives in various representational bodies at firm- or company-level). The history of EU regulation in the employee involvement area has primarily been about indirect participation. Moreover, to a large extent it is a history of directives. There have been no bipartite agreements transformed into directives (although this could have been the result in several cases); there have been no bipartite framework agreements; the issue has not been covered by the OMCs; and case law has only played a limited role[3]. However, while this could imply that the European social partners do not prioritise the area the opposite is actually the case. Employee involvement is one of the work and employment related areas that the European social partners give highest priority to, although trade unions certainly find the area more important than the employers. For the Commission too it is an important area, being one of just two sub-areas under 'labour law '– the other being 'working conditions'.

The first directive with important employee involvement consequences was one of the first work and employment related directives: The Collective Dismissals Directive from 1975 (Council Directive 75/129 of 1975). The context for the introduction of this directive was the economic difficulties following the oil crisis of 1973, which led to many closures and restructuring of enterprises. Hence, the Directive has come to be perceived as limited to dismissals of a particular kind: economic or technical dismissals. Importantly, it is the underlying principle of the Collective Dismissals Directive that dismissals are a collective issue, to be dealt with through collective information and consultation rights (European Foundation 2007). The Collective Dismissals Directive - which was revised in 1992 – was followed by the Directive of transfers of undertakings in 1975 (now Council Directive 2001/23/EC). This directive provided employees with a range of employment protection and involvement if their employer's business became subject to merger or transfer of ownership.

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[3] As regards the setting up of new European Works Councils, three cases brought before the European Court of Justice for a preliminary ruling have established the principle that the managements of all undertakings located in Member States are required to supply any information required to open negotiations on setting up an European Works Council, in particular information on the structure or organization of the group, to employee representatives, irrespective of where the headquarters of the group is located or of the central management's opinion as to the relevance of the Directive (www.eu.europa.eu/social).

After the adoption of these two directives it took nearly 20 years before the next directive in the employee involvement area was concluded. This was the European Works Council Directive from 1994 which had been discussed for years. Also the two other directives presented in this brief historical section, the European Company Statute and the Consultation and Information Directive both from 2002, were discussed for a long time before they were adopted.

2.1 European Works Council Directive 1994

The first attempts to introduce employee involvement rights in transnational companies took place as early as 1980, when the Commission, in the form of the so-called draft Vreeling Directive proposed, *inter alia*, that transnational and some national firms should be obliged to inform their employees on an annual basis on the structure as well as economic and financial situation of the enterprises. The ETUC backed this while the European employers' organisation, UNICE (now Business Europe), strongly opposed it. Despite the employers' resistance, the multipartite EU-level body of interest-organisations, the Economic and Social Council, managed to adopt a favourable Opinion on the proposal. Moreover, the Employment and Social Committee of the Parliament proposed a series of amendments in line with the ETUC's wishes. However, in October 1982 the Parliament ended up with no less than 217 amendments that watered down the draft directive substantially. In the end, the proposal was blocked in the Council by the UK (Danis & Hoffmann 1995). In 1986, the Commission gave up on reaching a compromise on its proposal, but the Council asked the Commission to continue its work by studying national developments and communicating with the social partners (Falkner 1998). This partly moved the issue into the bipartite arena, but only limited progress could be made.

With the 1989 Social charter signed by all member states except the UK, member states were obliged to develop some minimum level of employee involvement (ibid.). Moreover, increasingly trans-national corporations established such bodies on their own initiative and the then influential Roundtable of European Industrialists was less sceptical toward such bodies than UNICE was (Gold & Hall 1994). Even more important for paving the way for a new directive was the change from the unanimous voting procedure to qualified majority voting in relation to social policy that was a result of the Maastricht social protocol. After this UNICE changed its former position of rejecting any binding EU-level regulation (Falkner 1998).

All these developments contributed to creating a more favourable environment for establishing EU-level regulation in the field. Therefore, the Commission attempted yet again to convince the European social partners to make an effort to reach an agreement (Danis & Hoffmann 1995). However, it was clear that the Commission still wanted a role in the process. Following from this, it was not only the bipartite, but also the tripartite arena, which would be used. A first round of consultation was sent out in November 1993 – the feedback confirmed that the ETUC wanted a legally binding approach, whilst UNICE favoured a voluntary and flexible approach. To increase the chances of striking an

agreement, a number of changes were made in the second communication, sent out from the Commission in February 1994. Most controversial was the proposal to oblige companies with more than 500 employees to set-up works councils – compared to 100 in the first draft. The ETUC was furious and asked the Commission to go back to its initial approach, while the changes made led UNICE and CEEP to declare them-selves ready to bargain. This was the first time in recent history that EU-level bargaining on a specific issue was about to take place and only happened because of the mediating role of the Commission. However, one day before the deadline of the second consultation on March 30, 1994, the British employers in the CBI withdrew from the talks that should have led into bargaining. They saw the preconditions for bargaining as going too far in demands to trans-national structures. UNICE would not continue without the CBI. Hereafter, the ETUC asked the commission to present an immediate draft to the Council (Falkner 1998).

The Commission granted the ETUC's request and headed for an adoption of the directive at the July Council. A new draft – partly building on the elements that the European social partners had managed to agree to – was presented to the Council and hereafter transmitted to the Parliament. This time the Parliament asked for 27 amendments in its first reading, but the Commission rejected the majority of these amendments in order to maximise the chance of the draft being approved at the Council. The strategy worked well because the Parliament did not ask for additional substantial amendments in its second reading and the directive was finally approved at the July Council. Apart from the UK, who had excluded itself from the Maastricht social chapter on which the directive was based, only Portugal expressed reservations as they found that the directive overstepped what was necessary in order to provide employees with adequate rights for consultation and information (ibid.).

In its final form the directive (Council Directive 94/45/EEC) stated that:

- member states are to provide for the right to establish EWCs in companies or groups of companies with at least 1000 employees in the EU/EEA, when they have at least 150 employees in each of two member states;
- a request by 100 employees from two countries or an initiative by the employer triggers the process of creating a new EWC;
- the composition and functioning of each EWC is adapted to the company's specific situation by a signed agreement between management and workers' representatives of the different countries involved. Subsidiary requirements are to apply only in the absence of this agreement;
- the obligations arising from the directive do not apply to companies which already have an agreed mechanism for the transnational information and consultation of their entire workforce;
- the Directive should take effect in 1996.

The revision of this directive will be analysed in section 3.

2.2 European Company Statute 2001

The European Company Statute (ECS) was first put forward in the early 1970s. It was intended to allow the creation of a new type of company, the European Company, incorporated under European rather than national law, and enjoying a number of tax advantages. Despite interest from the business community for this new form of company, successive proposals failed to result in new regulation, mainly due to disagreements regarding the nature of employee involvement in such companies.

From early on the ECS was split into two legal instruments. 'The Regulation' covered the legal structure of the European company, while the 'Directive' covered employee representation. Together, this new initiative intended to simplify the range of regulations otherwise applicable to companies in each member state, reduce administrative and legal costs, and promote economies of scale. Furthermore, according to the supporters of the initiative European Companies would be able to restructure themselves more easily across borders being able to relocate their registered offices without being restricted by national bureaucracies (Gold & Schwimbersky 2008).

The debate on the ECS was revived in 1997 with the publication of the Davignon report, which made a number of recommendations in relation to employee involvement in the European Company. The Davignon group – set up on the initiative of the Commission - proposals gave priority to negotiated agreements on worker involvement at the level of each European Company (High level expert group on workers involvement 1997). This approach was taken up by subsequent draft texts put forward by the Luxembourg and UK Presidencies. The UK Presidency's compromise proposal made some additions to the Luxembourg proposal and to a limited extent took some of the comments made by the social partners on the Davignon report on board. The proposal:

- ensured protection for existing board-level employee participation rights when the European Company was created, unless decided otherwise by a special weighted majority of the Special Negotiation Body (SNB)
- specified that where no such arrangements or rights existed in the participating companies, there was no obligation to introduce participation. However, the information and consultation procedures and minimum requirements should be similar to those contained in EWCs
- suggested that the employee representation on the board should be equivalent to the highest level found in any of the participating companies, unless this is opposed by the SNB
- allowed one additional seat in each SNB Member State where at least 10 percent of the workforce are employed, up to a maximum of nine additional seats
- allowed the SNB to request assistance from, and presence of, experts of its choice, including representatives of Community-level trade unions (Weber 1998).

The ETUC welcomed the inclusion of some of the social partners' responses to the Davignon report and that the Luxembourg presidency proposal had been incorporated in the British presidency's proposal. However, the ETUC complained that the European industry federations were only allowed an advisory role and the omission of an arbitration mechanism if negotiations in SNB failed (ETUC 1998). In their response to the same proposal, UNICE welcomed the attempt to achieve a flexible approach which in some regards recognised the role of existing national structures. However, they too had a number of suggestions for improvement, most importantly on the voting procedure and majority rules and the proposals regarding what actions should be taken should no agreement be reached, UNICE found these designed to maximise employee involvement regardless of national differences (UNICE 1998).

Only limited progress in terms of reaching a consensus on this issue was made during the Luxembourg and the UK Presidencies. Building on this the Austrian Presidency presented a text to the Council in October amid hopes that the new draft would succeed in allaying most of the concerns expressed in relation to previous 1998 proposals and be discussed again at the Council's December meeting. Essentially the Austrian draft included:

- the different company forms the European Companies could take
- an obligation of the employer, as soon as proposals to establish a European Company are drawn up, to enter into negotiations with employee representatives to discuss employee involvement and establish SNB
- a statement that where the SNB fails to reach an agreement on employee representation arrangements within a set period, subsidiary rules are to apply, similar to those stipulated in the European Works Council Directive
- rules securing proportional representation (in relation to number of employees).

An objection, based on a fear that a minority of workers could impose its traditions on a majority of the Spanish workforce was the main obstacle at this point. The Spanish delegation argued that this would have the effect of transposing a system of board-level participation that was inappropriate to national provisions in this area. This would, in the words of the Spanish delegation in the Council, 'jeopardise the preservation of a cultural model of industrial relations' (Foster & Weber 1998).

To escape this deadlock in December 2000 the Nice Council agreed an opt-out clause to meet Spain's reservations over this principle. This allowed member states like Spain and the UK to free companies from employee board-level representation when forming a European company by merger and where no companies had this kind of provision beforehand. The Council subsequently concluded a political agreement on both the Regulation and Directive, which was adopted in October 2001. The Parliament, however, prepared to challenge the alteration on the legal base under which the Regulation and Directive had

been adopted. Article 308 is the general Article that allows the Council – on a proposal from the Commission, and following consultation with the EP – to take ‘appropriate measures’ by unanimity to achieve one of the objectives of the EU. The Parliament called for a change in the legal base to Article 137 which covers ‘representation and collective defence of the interests of workers and employers, including employee involvement’ and would have allowed it a greater influence through its co-decision procedure. However, following debate, the Parliament chose to abstain from a legal challenge and the long decision-making process then finally come to an end (Gold & Schwimbersky 2008).

2.3 Information and Consultation of Workers Directive 2002

The third important decision-making process leading to a major piece of regulation was the information and consultation directive agreed upon in 2001. With information and consultation rights in place in relation to transnational companies and with European Companies well established all over Europe (Gold & Schwimbersky 2008), it was a priority for many pro-regulation actors to extend these rights to all companies other than those covered by these two specific groups, to improve information and consultation of employees in general.

The Commission’s 1995 Social Action Programme included a proposal on an EU-level regulation for employee information and consultation. In June 1997, the Commission opened its first consultation with the European social partners on possible new regulation. This new regulation proposal, which had been under consideration for some years, was promised by the DG Employment in the aftermath of the Renault Vilvoorde affair. The closure of the Renault plant at Vilvoorde in Belgium in 1997 had launched a debate on the appropriate legislation and the closure was seen by many to have demonstrated the inadequacies of current EU legislation (Pochet 2007).

In the text of its first consultation, the Commission acknowledged that most member states already had some form of extensive provision in the area of employee information and consultation. However, it argued that in many cases the fundamental right to information and consultation was not sufficiently guaranteed in terms of the timing of consultation, the availability of sanctions and the scope for matters of consultation. Furthermore, European legislation in this area was seen to be fragmented and its impact limited. The EU-regulation of measure on information and consultation of workers at national level should according to the Commission:

- recognise the principle of information and consultation
- define the scope of consultations and in particular the threshold for the number of workers employed in the companies concerned
- entitle member states to grant priority to agreements between the social partners
- lay down the principle of maintaining the most favourable system
- define the level at which procedures are to be applied

- refer to national legislation and/or practices for selecting worker representatives.

At this stage the social partners had an opportunity to decide to negotiate a framework agreement or not to do so. Important, but unclear, in this regard was whether UNICE could be persuaded to engage in negotiations. Finally, in the autumn of 1998, after having send signals of the opposite, UNICE decided not to enter into negotiation. The Commission then decided to act and in November 1998 issued a proposal for a directive establishing ‘a general framework for improving information and consultation rights of employees in the European Community’.

This draft directive provided rules on the information and consultation of workers at national level whether based on collective agreement or legislation. The UK had no such institutions and the new UK government was strongly opposed to the draft directive. It had secured the support of the German government to block the proposal in the Council. The agreement between the two governments was that the German government would back the UK in opposing the draft Directive, in return for which the UK would support the German position in the European Company debate. The Parliament had its first reading in April 1999, but because of the Anglo-German ‘deal’ the topic did not appear on the Council’s agenda until June 2000. Then, the Portuguese presidency initiated the discussion of the proposal and extensive discussion continued under the French presidency during the second half of 2000. The majority of member states supported the Commission’s proposal but the UK, Germany, Ireland and Denmark – gathering enough votes to constitute a ‘blocking minority’– maintained reservations, preventing the Council from proceeding with the process (Pochet 2007).

Reservations regarding the content of the Commission’s November 1998 proposal were that all undertakings with at least 50 employees would be required to inform and consult employee representatives about a range of business, employment and work organisation issues. The exclusion of the issue from the Council's agenda under the German Presidency during the first six months of 1999 was reported to reflect an understanding with the UK government, who were particularly critical of the Commission's proposal. Similarly, there was no discussion of the issue under the following Finnish Presidency, whose priority was to make progress on the European Company Statute (see above). While there had yet to be any progress on the proposal within the Council, in April 1999 on its first reading the Parliament gave approval to the proposal, putting forward a series of amendments. The multipartite forum for interest organisations, the European Economic and Social Committee, adopted an Opinion on the proposal in July 1999. This commented positively on the benefits of effective information and consultation procedures but noted that there were differences of opinion in the Committee as to the appropriateness of the Commission's proposal (Hall 1999).

However, progress in the attempts to reach consensus on the European Company Statute (ECS) meant that the German government would not continue its opposition to adopting the Directive beyond the UK general election. Denmark and Ireland's concerns were accommodated by revisions to the text. Faced with the disintegration of the blocking minority, the UK government was forced to abandon its opposition to the Directive following the June 2001 general election, though it secured concessions in the common position on the timetable for applying its requirements to smaller undertakings. Hence, the Council could formally adopt its 'common position' in July 2001. In October 2001, the Parliament proposed a series of amendments on second reading. Designed to reach a final agreement, a so-called 'trialogue' in a conciliation committee was initiated with participation of representatives from the Parliament's Social and Employment Committee and the Council and assistance from the Commission. The committee agreed on a final joint text of the Directive in December. The key amendment adopted was the reduction to six from seven years of the transitional period for implementation for countries without 'general, permanent and statutory' systems of information and consultation and employee representation. The UK and Ireland could phase in the Directive's requirements, applying them in three stages to progressively smaller undertakings or establishments. The other changes made were minor (Pochet 2007).

2.4 Assessment

First and foremost, the brief historical account shows it is possible to establish a European regulation framework on employee involvement in the member states, although it took the pro-regulation actors several decades before the first directive was adopted and almost another decade before the next two were added.

There are a number of other observations apparent in the three decision-making processes. Firstly, changes to the institutional set-up, more specifically being able to have new regulation adopted with the support of a qualified majority, has facilitated the development of the regulatory framework. However, this could also be seen as a mechanism for slowing the process of setting up European regulation framework.

Secondly, it is evident that participation of - and pressure from - the Commission is necessary in many cases for the flow of the decision-making processes. The social partners have often not been able to reach an agreement among themselves. Hence, the tripartite more than the bipartite arena has been used, although, especially in the early phases of the decision-making process the bipartite arena played a role. Therefore the choice of decision making arena, addressed in the second research sub-question, also seems to be influenced by the degree of bipartite consensus, on procedures as well as on outcomes. Some minimum degree of consensus is necessary for using the bipartite arena – if this cannot be reached the use of this arena is limited and the social partners must rely on the tripartite arena as well as on lobbying in the politico-administrative and parliamentarian arenas. Less variation is seen in the role of the politico-administrative and the parliamentarian arena in the three selected directives.

The use of these arenas is largely determined by rules laid down in the treaties, for instance the issuing of consultations, the proposals, the role of the Parliament's reports and the Parliamentary readings. In general, the role of the parliamentarian arena increases in the last part of the process.

Thirdly, the role of coalitions, addressed in the first research sub-question, is most clearly seen in the case of the information and consultation directive, where a coalition including the UK, Germany, Denmark and Ireland were able to block the directive, albeit for different reasons. This coalition could not be seen simply as a coalition of regulation sceptical actors in that Germany is not usually found among these actors. The information in the brief historical accounts is not sufficient to analyse the relations between the other actors, but it is not surprising that the ETUC took a pro-regulation and UNICE a regulation sceptical position in all three directives. And, from the decision making process of the EWC Directive, it is clear from the role of the British CBI that some member-organisations have a very strong influence on the positions of European social partner's. The accounts are also too general to allow for analysis of the positions of different groups of MEPs and the various member-states, but it seems that the UK has taken a regulation sceptical stand across all three directives.

3. Revision of European Works Council Directive 2008

After the brief historical description of the regulatory framework's development in the employee involvement area, the first of the two in-dept cases will be analysed below.

3.1 Agenda setting

The 1994 EWC Directive could first be adopted after more than a decade of bargaining. Since it was a new instrument the text of the directive asked the Commission to undertake a review of the directive in September 1999, after consultation of the member states. In the late 1990s the ETUC supported a revision of the directive, and noticed that often the real consultation of the EWCs did not take place as the councils were informed so late in the process that nothing could be changed. Therefore, in 2000 the ETUC had asked for comprehensive information to be provided at an early enough stage to enable changes to be made. Also the European Parliament pushed for action in the field, among other things with its report from 2001 (European Parliament 2001). On the other hand UNICE having been sceptical from the beginning as the1994 directive as described above was adopted against their will remained sceptical towards a revision of the directive during most of the 2000s.

In September 2004, the Commission launched its first phase consultation of the social partners on a review of the directive with the consultation paper 'European Works Councils: fully realising their potential for employment involvement for the benefits of enterprises and their employees' (European

Commission 2004). UNICE were still strongly opposed to a revision of the directive. They argued that there was no need for one, and it was wrong to agree on further legislation at a time when the accession countries faced major challenges in implementing existing legislation (UNICE 2004). The ETUC, on their part, welcomed the communication and the Commission's acknowledgment that employees are not always are involved on a sufficient level during restructuring processes. Further, they asked, inter alia, for improved definitions on 'information and consultation'; improved rights to information and consultation; improved rights for training for EWC-representatives; and for rights to trade union support of EWC-representatives. The ETUC also pointed to their resolution on an 'ETUC strategy in view of the revision of the European Works Councils' (ETUC 2004a) with no less than 26 priorities (ETUC 2004b).

Together, EUC and Business Europe along with UEAPME and CEEP publiced in 2005 a document with the title 'Lessons learned from the European Works Councils', where they recognise EWC as a useful tool to organise transnational information and consultation, emphasise the importance of trust and discuss problems such as how to managing multiple layers of information and consultation (ETUC et al 2005).

After having delivered their opinions, the social partners agreed to examine specific cases in order to access the functioning of the EWCs. They agreed on some issues, e.g. the usefulness of the councils and the need for training of members and assistance from experts. Moreover, they notified that it is difficult to organise useful information and consultation without delays and uncertainties (European Commission 2008).

A second round of consultation took place in 2005 when the Commission issued the communication 'Restructuring and employment', which encouraged the social partners to negotiate on ways to locate best practice EWCs. The Commission specified that their attempts to push for a revision should both be seen as a part of the revised Lisbon Strategy and as part of their better regulation agenda (ibid.). The ETUC expected a separate consultation on EWC and was disappointed with the broad scope of the communication. In response, they repeated their demand for a revision of the directive, but doubted that this was the intention of the Commission (ETUC 2005). UNICE responded that it found the second communication on EWCs neither desirable, nor necessary, and they wanted to deal with the issue of EWCs within the social dialogue. In connection to that they pointed to a joint study of restructuring (UNICE 2005). Moreover, on their own-initiative the multipartite European Economic and Social Committee issued a report in 2006 supporting a revision process, although far from unanimously. More than a third of the members voted against a revision as this was not needed as the original directive was functioning well (EESC 2006).

Hence, the middle of the decade saw the social partners clearly divided regarding the need for a revision of the EWC Directive, and the Commission's communication did not promise action in the field. Most member states in the Council and the European Parliament supported a revision. On the other hand,

the Council was not very active on the issue as first and foremost the Council saw this as an issue to be dealt with by the social partners.

In contradiction to the relatively backward-leaning attitude of the Council, the European Parliament was very active from an early stage clearly pushing for a revision. This pressure culminated in its 2007 declaration 'Strengthening Community legislation in the field of information and consultation of workers' and called the Commission for a timeframe for the review of the directive (European Parliament 2007).

3.2 Policy formulation 1 - on the politico-administrative arena

According to all but one of the interviewees, who pointed to the European Parliament's 2007 declaration as an important driver, the interviewees agreed that the reason that the Commission (European Commission 2008) announced that a revision was scheduled for 2008 had to do with its wish to be re-elected. To be re-elected the Commission needed to strengthen its social profile – something that a completion of a revised EWC-directive could help with. The opinion of many pro-regulation actors was that the Commission with its strong focus on growth and jobs, its streamlining of the Lisbon strategy in 2005 and its other priorities in the field had neglected social issues. Therefore, the Commission feared that a failure to carry though a revision of the directive would not help the assessment of the Commission at the end of its term (see also Jagodzinski 2009).

The Commission published a second consultation in February 2008 targeted the European social partners (European Commission 2008). The consultation highlighting the need to address the following problems:

- complexities encountered in linking the different levels of information and consultation
- uncertainties about what happens to European works councils in the event of mergers, acquisitions and other changes in make-up
- lack of any no role assigned to European trade unions by the Directive, thus limiting the number of councils established since it entered into force
- lack of a general response to employee representatives' training needs.

Moreover, the Commission found that the following objectives should be met:

- to ensure the effectiveness of employees' transnational information and consultation rights, currently lacking in a significant proportion of situations
- to resolve the problems identified in the practical application of the Directive and to remedy the lack of legal certainty resulting from some of its provisions or the absence of certain provisions
- to ensure a better link between Community legislative instruments on information and consultation of employees.

The ETUC was partly positive in their response to the communication– something that the interviewees confirmed. In their relatively long response (the length reflecting the high priority given to the issue) the ETUC emphasised nevertheless, inter alia, the need to: strengthen the definitions of information and consultation; support the administrative capacity for the EWC participants; support the role of trade unions organisations; better protect the legal rights of EWC representatives; include sanctions; and the clarification of what 'transnational' means (ETUC 2008). Moreover, since the issue was a high priority issue for the ETUC, they started the design of a campaign targeted at all the EWCs in Europe in 2007 when they got the impression from contacts in the Commission that the Commission was seriously going for a revision. At this point Business Europe on their part chose not to make its priorities public, possibly because they considered the negotiation obtain on the bipartite arena.

3.3 Policy formulation 2 – in and out of the bipartite arena

During spring 2008, the ETUC and Business Europe were seeking opportunities to make a bipartite agreement. Extrapolating Business Europe's previous positions, other actors did not expect a lot from this attempt. However, to the surprise of many, including the ETUC, Business Europe published its readiness to bargain in a press release on April 1, 2008 (Business Europe 2008b).

Business Europe knew - according to explanations given in some of the interviews - that the Commission meant business this time. To limit the role of the European Parliament and its allies and to be able to steer the process to some extent, Business Europe therefore chose the social partners arena for the decision making process. This was done despite strong scepticism from a number of the member organisations. The EWC's had never been the British CBI's cup of tea and the UK was, as described above, one of the member states where the 1994 directive lead to real changes and the extension of employee involvement. Nevertheless the CBI decided to back the bargaining track. The most sceptic member-organisation was accordingly the Confederation of Swedish Enterprises. However, contrary to earlier in the decade, many of the large individual companies backed up a social dialogue process on a revision.

Another explanation from the interviews emphasise that Business Europe's willingness to bargaining was fake and a way to delay the process so as to ultimately end up with a result less to the taste of the ETUC under the Czech or Swedish presidency where the expectation was the issue would be given a lower priority and to be more business friendly than under the French presidency during the second half of 2008. By pretending to bargain for just a couple of months Business Europe could have obtained this effect.

Regardless of the correct explanation, the unforeseen situation set the ETUC a dilemma of what decision-making arena to chose. This decision was not easy, should the ETUC choose to believe that Business Europe's readiness for bargaining was sincere, or should they not, and instead trust that the Commission, the Council and the European Parliament would carry through a decision making processes favourable to the ETUC on the politico-administrative and the

Parliamentarian arena before the end of the Parliament's term? The later would partly exclude the ETUC from the decision-making process, but the communication looked favourable to the ETUC. And if

On April 3, the ETUC issued a press release where they welcomed 'the readiness of European employers to negotiate' and stated that 'we are ready to negotiate, but only on a basis which includes a tight timetable and a quick conclusion to the negotiations' (ETUC 2008b). Despite the precondition included in the press release the other main European-level actors concluded that bargaining would begin – the Commission even issued a press release with this message.

However, on April 11, the ETUC issued another press release stating that it was not practical for the negotiations to commence within the framework of the social dialogue due to 'insufficient time' and that 'it has not been possible to identify a realistic agreement on certain issues' (ETUC 2008a). According to some of the (non-ETUC) interviewees the reason for what seemed to be a u-turn was that although the ETUC Brussels secretariat were ready for bargaining, resistance from some of their most influential member organisations prevented this path. In some of the interviews the German IG Metall was said to have played an important role in raising the demand for a revision of the EWC Directive. They wanted - among other things - the ETUC to be allowed to appoint members to the EWCs. When IG Metall realised that Business Europe would not deliver such a thing in bipartite negotiations they aimed to change the decision-making arena. Still, the interviewees were not able to explain what really happened between April 3 and April 11 that seemingly made the ETUC change its mind about its strategy.

Hence, in mid-April 2008 the decision-making process was back in the politico-administrative arena. The proposal from the Commission was published on July 2 (European Commission 2008). Compared to the communication, the Commission had modified a number of issues for example in relation to the provisions aimed at effective decision-making in undertakings, limiting the transnational scope, seeking balanced representation of employees, reinforcing the select committee and making pre-Directive agreements more secure without applying the adaptation clause. However, according to several of the interviewees, it was surprising that the proposal had not been more open to the trade union suggestions from the consultation process.

An important – and to some interviewees surprising – decision was taken in relation to the procedure to be followed. The Commission had the choice between making a recast or a revision of the directive. A revision includes the power that all relevant actors have the opportunity to make amendments to an unrestricted number of provisions in the directive. Recast is a strictly defined category of legislative provisions that only includes the possibility for other actors to come up with proposals in relation to the changes suggested by the Commission. As explained by Jagodzinski, the recast procedure is designed for processes where several acts regulating the same matter overlap and need to be intergraded into one single regulation. This was not really the case with the EWC Directive. However, the Commission chose the less commonly used re-

cast procedure. This might have been done because of the Commission's wish to squeeze the whole process into a limited time-frame so that the process could be closed by the end of the Presidential term. Moreover, in this way the existing proposal was difficult to weaken. Several MEPs disapproved this (Jagodzinski 2009).

The interviewees supported these arguments, but some emphasised one part, while other interviewees emphasised the other. Some interviewees explained that the recast procedure allowed actors to focus only on the original directives, whereas a review procedure would have made it necessary to include both the original directive and the extension added when the UK joined the social dimension of the EU, as well as the technical updates. This would, accordingly, have created a text hard to read and would be difficult, if not impossible, to carry through within the timeframe. These interviewees acknowledged that choosing the recast procedure limited the opportunities for other actors to influence the directive to only parts of it, but emphasised that this was not the reason for choosing this procedure.

Alternative explanations for the choice of the recast procedure were given by other interviewees. One was simply that the recast procedure was chosen by the Commission to limit the influence of other actors, either for the process-related reason (the need to stick to the tight deadline) or content (the fear that the Parliament would include too many employee rights in the revision). A variation of the process-related explanation focuses on the role of the French Presidency. The French Presidency gave very high priority to a successful revision of the EWC-directive and the recast procedure could facilitate a conclusion of the decision-making process before this presidency ended. The high priority of the French government to the issue was accordingly grounded in the French government's need to improve their social face domestically. As the presidencies following the French (the Czech and the Swedish) were not expected to give priority to the revision of the directive served to strengthen the time pressure.

No matter the correct explanation(s), the choice of the recast procedure was met with strong criticism from several MEPs. The ETUC and UNICE, on the other hand, did not strongly oppose this. Like the Commission, the ETUC was eager to get the process through quickly, fearing that the window of opportunity would close after the French presidency. According to the ETUC interviewee, the expectation of a more right-leaning Parliament after the 2009 election was however not part of the reason for their hurry. More important was the predicted low priority of the issue of the coming Czech and Swedish presidencies.

The high priority given to the issue by the French government became very important to the process. Soon after failure to use the bipartite arena in April, representatives from the French labour ministry - in preparation for having the presidency of the EU in the second half of 2008 - contacted the ETUC and Business Europe so see if there were possibilities for striking some sort of a bipartite agreement that could smooth things out for the Presidency, the Commission, the Council and the Parliament in their attempt to conclude the recast procedure during autumn 2008. This suggestion was not rejected by the social

partners, but they wanted to await the proposal from the Commission before they would make an attempt.

At the informal meeting of the ministries for labour and social policy hosted by the new French presidency on July 10-11 in Chantilly, France, the time was right. At these informal meetings not only the social and labour ministers of the member states, but also the European social partners, were invited. However, the discussions were agreed beforehand and not prepared. Hence, the ETUC representatives, general secretary John Monks and deputy general secretary Maria Helena André and Business Europe's representative, acting director of Social Affairs, Jørgen Rønnest, brought very few staff members to the meeting. Moreover, the person usually dealing with EWCs in the ETUC, deputy general secretary Reinar Hoffmann, was on holiday. Together with the extremely tight schedule this created an unusual context for the talks, but the French government's aim of having the revision finished during its presidency and the ETUC dissatisfaction with the Commission's proposal – issued on the 2nd of July - meant that at least two of the three actors had strong incentives to strike an agreement. The French minister of labour, social affairs and solidarity Xavier Bertrand, Monks and Rønnest - with the help of cell-phone contacts to other key-persons in their organisations - succeeded in agreeing on eight difficult issues. The proposal changed the Commission's proposal on eight issues (proposed changes in italic):

- Re: Information: '"Information" means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives *to undertake an in-depth assessment of the possible impact and where appropriate prepare consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings*'
- Re: Consultation: '"Consultation" means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content (as) enables employees' representatives to express an opinion on the basis of the information provided *about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management*, and within a reasonable time, *which may be taken in to account within* the Community-scale undertaking or Community-scale group of undertakings.'
- Re: Assistance in negotiations: 'For the purpose of the negotiations, the special negotiating body may request assistance with its work from experts of its choice *which can include representatives of competent recognised Community-level trade union organisations*. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.'

- Re: Resources: 'Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall *have the means required to apply the rights stemming from this Directive, to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.*'
- Re: Training: 'In so far as this is necessary for the exercise of their representative duties in an international environment, the members of the special negotiating body and of the European Works Council *shall be provided* with training without loss of wages.'
- Re: Information about important changes: 'Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing *and consulting are conducted in the European Works Council as well as in the national bodies* in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged'.
- Re: Exceptions: Without prejudice to paragraph 3, the obligations arising from this Directive shall not apply to Community-scale undertakings or Community-scale groups of undertakings in which there was already an agreement on 22 September 1996, *or in which an agreement is signed or an existing agreement is revised during the two years following the adoption of the present text*, or in undertakings in which such agreements exist and which are due to negotiate under paragraph 3, covering the entire workforce providing for the transnational information and consultation of employees. When these agreements expire, the parties to those agreements may decide jointly to renew them. Where this is not the case, the provisions of the Directive shall apply"
- Re: Agreements in force. Deletion of the last paragraph in Article 13.3 (ETUC et al. 2008).

After having been approved by their member-organisations and from the CEEP (the European organisation of public employers) and the UEAPME (the European organisation for small and medium sized enterprises)[4], a letter including the eight points was send to the Presidency in late August. The letter not only communicated the eight points but, importantly, accepted the Commission's proposal on all other matters and accepts the wishes to conclude the process before the end of the year.

So, after this brief 'visit' on the bipartite arena, the decision-making process was back in the politico-administrative arena, in that the Council and its workgroup Working Party on Social Questions - with assistants from DG Employment - discussed the recast of the directive at several meetings during the late summer and autumn.

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[4] CEEP and UEAPME played a very limited role in the decision-making process, and have therefore not been mentioned previously.

After the social partners' agreement in July, the message from the Commission and the French presidency to the Council and member states was to make as few changes as possible. According to the interviewees, nearly all member states accepted this and focussed their comments only on technical issues. One of the exceptions to this was, according to some of the interviewees, the British government who throughout the process expressed concern about the consequences for competitiveness of the revision. Another source confirms this and points to an internal paper from the British government expressing concern that the competitiveness of EU companies was in danger if EWCs hindered the implementation of restructuring and prescribed British resistance if a new version of the directive limited flexibility of businesses too much (see also EWC News 2008). However, another interviewee found that the British scepticism vanished severely after the joint advice by the social partners.

Documents from the Working Party on Social Questions confirm that although mainly technical issues were discussed other somewhat more substantial concerns were also. The UK seems to have had the most active delegations, raising questions and concerns in relation to the status and competitiveness of undertakings; the administrative burden; risk that the new version of the directive would weaken consultation and information processes at national level; the two year period to renegotiate EWC agreements; and the 50 employee threshold However, they were far from alone in raising these questions and concerns. The UK had support especially from Denmark, Sweden and Poland in several of these issues, and a number of new member states other than Poland also supported the UK position in a few cases. The nature of the issue as a labour law issue – potentially part of the social dialogue procedures - might also have helped the member states to limit the changes in the Commission's proposal.

3.3 Policy formulation 3 – mostly in the parliamentarian arena

Both the politico-administrative arena and the parliamentarian arena played a role in the end of the decision-making process. The Parliament was primarily involved from late spring/early summer 2008, when the Committee of Employment and Social Affairs were to allocate the roles of rapportuer and shadow-rapportuers (persons following the drafting of the report from other party groups than the rapporteur) among its members. It was – according to the interviewee from the Parliament – only realised that the decision-making process would be a recast process, and not a full revision, during the summer break. Hence, the point of departure in early September, when the work on the committee's report should begin for real, was not the best. Some of the parliamentarians in the committee were dissatisfied, firstly because the recast procedure was chosen (minimising the role of the Parliament), and secondly because after the summer-break they were told by the ETUC to minimise the pressure on all relevant bodies, having been told the opposite before the summer break.

The British conservative Philip Bushill-Matthews was appointed as a rapporteur and the Dutch social-democrat Jan Cremers became an influential 'shadow rapporteur'. Their approaches were quite different. While Bushill-Matthews did

not find a revision necessary at all no matter its form and thought no amendments should be made to the Commission's and the social partners' draft, Cremers initially had ideas for amendments to every single one of the changes made to the original directive. The dissatisfaction, mentioned above, found in several groups of the committee might explain that Cremer's position was supported by a majority in the committee and several amendments were added to the draft text, despite pressure from the Commission, the presidency, the ETUC and some of the ETUC's member-organisations to not do so. Hence, the draft report from October 2008 included no less than 55 amendments. However, the final report from November 19 (European Parliament 2008) included only 17 amendments, and this version was adopted with a firm majority of votes from the socialist, the green group, the left and part of the Christian-democrat group. Eight of these amendments were the same as those agreed by the European social partners. The rest considered issues such as the definition of transnationality; the threshold for setting up SNBs; the weight between information rights and consultation rights; and the SNB member access to training. The shadow-rapporteur and the members backing gave highest priority to three of the amendments: Firstly, a clearer wording of sanctions in cases of non-compliance or breaches, as the wording was found to be imprecise and vague. Secondly, an extension of the definition of transnationality to cases important for the European workforce irrespective of the number of member states involved. And thirdly, removal - both in relation to the negotiation body and in relation to the subsidiary requirements - of the 50 employee thresholds, on the grounds that the threshold was random and would discriminate against smaller member states (Cremers 2008).

After the voting procedure of the Parliament's report was finalised, there were just a few steps left in the decision-making process. In mid-November the social partners, the Council and the Parliament had all given their opinions on the Commission draft. To make sure that the process was not blocked at the last minute by the plenary vote in Parliament or in the Council's final meeting, an unwritten rule allows talks with the Council's Presidency trojka to begin as soon as the responsible Parliamentarian committee has given its final report. The Commission will take active part in these talks. This so-called 'trialogue' on the EWC recast directive took place during the first days of December 2008. Apart from the French presidency, the interviewees pointed to Germany, Netherlands, Belgium and the UK as the most active member-state delegations in these talks. The UK government remained sceptical to the very end and was not satisfied with the outcome. The European social partners had not taken part in these talks directly, but followed them from the sidelines and were asked for opinions on the changes made.

During the trialogue a further reduction of the Parliament's suggested amendments took place.

3.4 Outcome

The text, which resulted from the trialogue, passed both the plenary in Parliament and the Council meeting in the beginning of December without any further changes. In sum, the changes from the original to the adopted recast directive were:

- Information and consultation: The principle and norms for information and consultation, the amendments state that information transmitted from employer to employees' representatives must be ‘given at such a time, in such a fashion’ to enable employees' representatives ‘to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent body of the Community-scale undertaking or Community-scale group of undertakings in question’.
- Resources: The text stresses that members of the EWCs must have the means required to apply the rights stemming from this Directive and to collectively represent the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.
- The two-year period: The amendments mean, that obligations arising from the directive do not apply to Community-scale undertakings or Community-scale groups of undertakings in which there was already an agreement, or in which an agreement is signed or an existing agreement is revised during the two years following the adoption of this Directive, or in undertakings in which such agreements exist.
- Transnationality: the directive states that matters which concern the entire undertaking or group or at least two member states, or which exceed the powers of the decision-making bodies in a single member state in which employees who will be affected are employed, are considered to be transnational. Moreover, where a decision of closure or restructuring is taken in one member state but affects the workers in another, it must be considered transnational.
- Threshold: the threshold of 50 employees for setting up special negotiating bodies was abolished (as a first step to constituting European works councils) so as not to discriminate against small Member States which would have difficulty reaching this threshold.
- Special negotiation body (SNB): For the purpose of the negotiations, the special negotiating body may request assistance with its work from experts of its choice, who may include representatives of the competent recognised Community-level trade union organisations. Such experts and trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.
- Training: The members of the special negotiating body and of the European Works Council shall be provided with training without loss of wages.
- Sanctions: In relation to sanctions, member states must ensure that measures taken in the event of a failure to comply with this Directive are ‘ade-

> quate, proportionate and dissuasive' (Council of the European Union 2008a).

3.5 Assessment

Conclusions relating to the policy content as well to policy processes can be drawn from the analysis above.

To address the general research question it is worth estimating 'who got what?' from the revision. It is clear that the pro-regulation actors in the first place got they wanted – a revision. The most important reason for this should be found beyond the workers participation area, more specifically in the Commission's need to get new regulation in the social field completed during its term. This need prevented a continuation of Business Europe blocking of a revision. On the other hand, focusing on the content of the revision, the amendments were neither extensive nor impressive. Admittedly, most of the amendments were clearly priorities of the pro-regulation actors. This is the case with training; the sanctions; the resource amendments; the opportunity for external assistance; and the abolishment of the 50 employee threshold. Other changes could be seen as priorities from Business Europe, and dates back to the European social partners' informal meeting at the beginning of July. This is the case with formulation that the EWC should have the 'means required' in relation to the 'steaming of the directive' and changes made to article on training. Several of the interviewees, including one from the pro-regulation actors, were of the impression that more changes were expected from the revision prior to 2008, and that ETUC would have been better off if they had chosen the bipartite arena on an earlier stage.

If this interpretation is accepted, the role of - and relations between – the ETUC and the Commission might help to explain the outcome. The interpretation of several of the interviewees was that the ETUC thought they would be better off with what the Commission could offer them, compared to what they could get from a proper social dialogue process with Business Europe. Therefore they wanted to give the politico-administrative arena a greater role than the bipartite arena in the 'regime shopping' game. The February 2008 consultation paper from the Commission - according to the ETUC interviewee – gave the impression that to a large degree the revision process would incorporate the ETUC's priority for the revision. At the beginning of April, when the decision whether the bipartite arena should be used or not, the ETUC expected that the proposal would be more in line with their proposal than it turned out to be. The question is what happened in the Commission between February and July that lead their proposal in the direction it travelled to conclusion. It has not been possible to get clear answers to this question, but it is possible that the Commission was dissatisfied with ETUC choice not to barraging on the issue.

Hence**,** the actors, the ETUC and the Commission are of key importance to understanding the outcome of the process. The reason that it was possible to finish the recast process has first and foremost to do with the strong priority given to this by two important actors – the Commission and the Presidency.

Without the signals from the Commission that they meant business this time when they talked about the need to change the original directive, Business Europe would not have been willing to enter bargaining and would most likely have obstructed the process. And without the common interest and strong commitment of the Commission and the French presidency in the process being finished before the end of the French presidency the process would most likely have been prolonged substantially, considering the lower priority to be given to the issue by the following EU presidencies.

Also, in relation to the other sub-question of the role of coalitions in the decision-making process we are left with divergent evidence. On the one hand it is possible to see the division between pro-regulation and regulation-sceptical actors. The UK, British MEPs and CBI clearly had some kind of interaction in order to minimise the impact of the recast process, and they had some support from some old and newer member states. However, the support has been partial and many of the member states that have supported them in other decision-making processes (see report 1 of the present project), have not done so in this case. It is also noteworthy that the CBI and Business Europe – despite of the CBI giving the green light for Business Europe's attempt to bargaining – seemingly have not been on one and the same line in this case. Likewise, focusing on the pro-regulation actors, although the ETUC and a number of pro-regulation member states with France in front have clearly been among the strongest drivers in the process, a clear-cut coalition is hard to locate. The roles of pro-regulation actors were divided, more precisely on the extent to which the social partners' agreements should be added to or not. The usually good relations between the ETUC and left-leaning MEPs became tense and unusable, because the two took different stands on exactly this issue. Finally, and related to both the pro-regulation actors and the regulation sceptical actors, the Council's limited role in the process has in itself made the strong role of coalitions less likely.

In relation to the sub-question of what decided the choice of the decision-making arena, the unusual moving in-and-out of the bipartite arena illustrates that in this case, the actors have attempted to place the decision-making process in the arena where the likely outcome was most in their interest. The alternative interpretation, that prescribes an a priori preference for the bipartite arena among the social partners, a preference for the politico-administrative arena for Commission and the member-states and a preference for the parliamentarian arena for the MEPs have seemingly been less important in this, although it has naturally, played a role.

4. Towards a European Private Company Statue

The European Private Company (EPC) initiative should be seen in the context of the general European Company Statue, (presented above) and adopted in 2001 after a 31 year long process. The official aim of the regulation is to make possible the set-up of European companies including small and medium sized

companies to increase their competitiveness. As a decision-making process, the EPC differs from the other decision-making processes in this working-paper in that it has not yet come to end, although it was close to completion late in 2009[5].

4.1 Agenda setting

The attempt to set-up a new special European legal form for small and medium sized cooperation (SMEs) - the EPC - intends to increase their competitiveness. The potential advantages should - according to the Commission – be that it allows entrepreneurs to set-up all their companies and subsidiaries within the same flexible management structure no matter where they are, and that it offers a European label that is easily recognisable throughout Europe. Although the initiative targets SMEs the proposal so far contains no limits on the size of the companies. The process has had its centre in the DG Internal Market & Services (DG MARKT), not the DG Employment. This is so because although the EPC has consequences for labour law issues, it is basically a company law regulation proposal. According to the interviewees DG Employment had a very limited role in formulating the Commission's proposal.

The initiative to make a separate status for European private companies according to the Commission was developed in business and academic circles in the 1990s. Also some of the interviewees point to the role of interest organisations as important for keeping the issue on the agenda. In this connection the French Business organization Mouvement des Entreprises de France (MEDEF) was mentioned. MEDEF was of the opinion that the European Company - the company form in the centre of the European Company Statue - was difficult for big enterprises to handle because of the demands included on employee involvement and therefore wanted another tool, de facto allowing them to bypass SE. Other interviewees saw the need of the Commission itself as the main driver behind the initiative, and pointed more specifically to the role of DG and its former influential Commissioner Günter Verheugen. Verheugen and DG Enterprise wanted, according to this explanation, to 'do something good for the SMEs' in relation to reaching the Lisbon goals, although the SMEs themselves did not see the need for it, pressed hard to get the initiative through. Verheugen managed according to this explanation to convince the responsible DG MARKT. Which of these explanations, if any, are right is difficult to access, but it is telling that in the beginning the initiative was not supported by the SMEs and that in its present form does not include any size-limit on the firms who can be recognized as EPCs.

Also the EU-level committee for social partners and NGOs, the European Social and Economic Committee, was active in relation to the issue. In 2002 they issued an Opinion with the title 'the European Company Statute for SMEs'. The same year the Commission listed an EPC statute as a possible

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[5] The fact that the decision-making process is ongoing has caused difficulties for the research process in that the Commission's representatives – referring to the ongoing negotiations – have refused to participate in interviews.

measure in the ‘2003-09 Action Plan for Modernising Company Law and Enhancing Corporate Governance’ (European Commission 2003). The 2006 public consultation on the future priorities of the Commission in the fields of company law and corporate governance confirmed this support. Moreover, in June 2006, the Legal Affairs Committee of the European Parliament held a public hearing on the SPE and on its own initiative drafted a report and a resolution calling on the Commission to present a proposal for an EPC before the end of 2007.

In July 2007, the DG for Internal Market and Services (DG Markt) found it was ready to launch a specific public consultation on the EPCs. In addition, a survey among companies in the 27 member states was conducted through the European Business Test Panel. Moreover, in October 2007 the Commissioner Charlie McCreavy told the public that the EPC had the highest priority (www.fagligt.eu 09.10.07).

4.2 Policy formulation 1 – in and out of a multipartite arena

After their promise to give the issue the highest priority the Commission held a conference on the EPC in 2008. In relation to this, the European Commission's advisory group on corporate governance and company law provided information in relation to the impact assessment and advised on the substance of the EPC Statute. The group also drafted examples of provisions for the articles of association of an EPC, which were made available to facilitate the understanding of the draft Statute.

Most important however, in June 2008 the Commission published its proposal (European Commission 2008), attempting to explain the Commission’s aims in regard to this highly complex legal issue. The aim was described as being to create a new European legal form intended to enhance the competitiveness of SMEs by allowing entrepreneurs to set up an EPC following the same, simple, flexible company law provisions across the Member States. The proposal covered ten chapters about issues such as formation of EPCs; shares; capital requirement to start an EPC; organisation of EPCs; employee participation; transfer of registered office of the EPC; and restructuring and dissolution of EPCs.

One of - or the most - controversial issue in the EPC initiative was employee participation. The proposal introduced the issue by stating that employee participation in small companies only existed in a few member states, and as a general principle the EPCs are subject to the employee participation rules of the member state where it has its registered office. Accordingly, the SPE, as regards employee participation, will be no more and no less attractive than comparable national companies. However, the proposal made it clear that the Commission found it necessary to establish special rules in the case of the transfer of the registered office of an SPE. Apart from employee participation, other issues that were – or later would be – controversial in the proposal included taxation issues and the minimum capital that was required to set-up an EPC. This was set at 1 Euro. Also the lack of any requirements for cross-border operation as well

as the lack of a size-limit for EPCs turned out to be issues that many actors could not support.

Regarding the consultation of the social partners, this had a different form compared to the case of the EWC-revision. Since the EPC-initiative was not a labour law initiative, but a company law initiative, the social partners could not use the bipartite arena (the social dialogue) to the same extent. Moreover, since the social partners did not have any privileged position in the consultation process (that was done on-line and had no specific target group), raises the question whether this process could be said to take place in the tripartite arena. It would be more accurate to label the arena in which the consultation took place as a 'multipartite arena'.

The European social partners' responses to the Commissions publications were divided. The response from Business Europe was supportive having been in favour of alternative legal framework for SMEs from the beginning. They had responded to the Commission's first Communication in 2007 and emphasised that an EPC statute should provide for a more simplified, flexible and clear framework for SMEs (Business Europe 2007). Their response to the Commissions June 2008 proposal was also generally positive. Regarding information and consultation of employees, they argued that these should be determined by the laws governing the SPE registered office (i.e. national laws) (Business Europe 2008a).

The response of the UEAPME (European Association of Craft, Small and Medium Sized Enterprises) to the EPC initiative can be said to be of special importance because their membership-base was the main target group of the initiative. In response to the Commission's 2007 consultation they gave the initiative full support provided the statute would follow 'the opinions of the SMEs' (UEAPME 2007). On the Commissions 2007 proposal they repeated the necessity to adapt the statute to SMEs and their needs, and furthermore, limit access of the statute to SMEs criticising the proposal for having only one limitation, to prohibit the offer of shares to the public. The interviewees provided background information for the position taken by UEAPME who in the beginning of the process did not support the initiative, seeing no need for it. However, their position changed during the process, due among other things, to members showing an increasing interest in the EPC initiative. Hence, in their response to the Commission's 2008 consultation UEAPME supported the initiative, but only if fully adapted to the needs of SMEs. In this regard, UEAPME asked that the proposal to be limited to SMEs only (UEAPME 2008).

The ETUCs responses were much more critical than the employers'. After having questioned whether a new statue was necessary (ETUC 2006b), and formulated their general position on the SPE in October 2006 (ETUC 2006a). Whereas Business Europe and UEAPME responded to all aspects of the SPE, during the whole process they focused most of their interest on the employee involvement aspects. Their position paper called for the member states to make sure that the relevant national legislation concerning employee involvement was in place. The ETUC's main worry was that new regulation would undermine

existing regulation of employee involvement in the member states. Moreover, they called for the setting up of a European level 'SPE[6] Works Council' (analogous to the one embodied in the European Company Directives) where the SPE covers establishments in more than one member state.

The ETUC did not respond to the Commission's early 2007 communications, but responded in October to the Commission's 2007 proposal. This time the ETUC did not only focus on employee involvement (which will nevertheless be the focus in the summary here). After having complained about the non-targeted online consultation from 2007, the organisation criticized what they saw as a step backwards regarding employee involvement compared to that achieved for the European Company, and like UEAPME, saw a danger that the EPC statute could be used by companies to avoid the most protective legislation. Moreover, the ETUC raised a number of issues, *inter alia*: that the EPC should be subject to the rules of employee involvement of the country where it has its registered office; there should be minimum criteria for employee participation rights; the proposal contained many loopholes that could be used to undermine existing participation rights; the 'one third of the workforce 'threshold' was problematic (ETUC 2008c).

4.3 Policy formulation 2 – Parliamentarian arena and beyond

The ETUC also addressed their concern in a number of letters to DG Markt, but there was very little contact the other way around and only a few informal meetings were held. This spurred the ETUC into using their Parliamentary contacts more than usual and included contact with a German MEP whose political background differed from those left- and centre-left MEPs the ETUC normally work with. But Dutch socialist MEPs were also included in their attempt to influence the part of the process placed in the parliamentarian and politico-administrative arena. These broader than usual contacts were made possible by a widespread perception among the relevant MEPs that the EPC initiative should not be used to put into question what already existed in national law – and the contacts were important for the compromise behind the Employment and Social Affairs committee's report from November 2008. The Committee on Economic and Monetary Affairs and the Committee of Legal Affairs (the main responsible committee) also issued reports on the issue. A joint report from the Parliament - having regard to these three reports - was passed in Parliament in March suggesting 69 amendments. Most importantly, in various ways the amendments aimed to prevent the undermining of workers' rights by the EPC status.

The organisations also used other connections. The ETUC, for instance, kept close contact with Swedish trade unions in an attempt to influence the Swedish Presidency, and also contact to Germany, Austria, Spain and Belgium actors in order to work for a blocking minority, in case the proposals turned out to be unacceptable. UEAPME also had close contact to the Germans, and also to

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[6] SPE is the Latin abbreviation for European Private Company (EPC).

Klaus Heiner Lehne, a German Christian Democrat and chair of the Parliament's Legal Affairs Committee, who shared the UEAPMEs perspective on the EPC initiative.

In the Council, steps towards consensus on the issue progressed slowly over the same period. During their presidency in the second half of 2008 the French government gave priority to the EWC (see above) and not to the EPC statute. Nevertheless in mid-November 2008, after several meeting in the Council's working group 'Working Party on Company Law', they managed to narrow the controversial issues to three: The cross-border element, start-up capital and employee participation (Council of the European Union 2008).

The Czech presidency put a lot of effort in developing the proposal and made some limited progress. However, it was under Swedish presidency in the second half of 2009 that real progress was made and a final agreement seemed to be within reach. But contrary to the case with the revision of the EWC-directive, the Council did not limit itself to technical details in the final part of the decision-making process, so disagreements between the member states had to be overcome first. In late November - again after several meetings in the working group on company law and other relevant bodies - the presidency was ready with a compromise text where only a few questions relating to two issues were found among the 'main outstanding issues'. With regard to the seat of EPC's, the Commission's proposal allowing the EPC to have its registered office and central administration in different Member States was supported by several delegations. However, some delegations argued for obliging EPCs to have their central administration and their registered office in the same Member State, while other delegations would have preferred the matter to be governed entirely by national law. With a view to finding a compromise between those diverging positions, the Presidency suggested a transitional period of two years as from the date of application of the Regulation, during which EPCs would be obliged to have their registered office and their central administration and/or principal place of business in the same member state. After that period national law would apply (Council of the European Union 2009).

As regards employee participation rights, the outstanding issue remained that of the threshold which the rules on employee participation foreseen in the proposal would be applied. Although most delegations welcomed the lowering of the threshold of the number of employees from which the rules on employee participation would have to be applied and the simplification of the rules presented in the Presidency compromise text, some delegations preferred the threshold to be further lowered, while a few delegations considered the threshold of 'at least 500 employees' to be too low. The Presidency suggested setting the threshold of at least 500 employees and at least half of the employees habitually working in a member state that provides for a higher level of participation rights for employees than is provided for those employees in the Member State where the EPC has its registered office. Additionally, the Presidency suggested adding a recital clarifying that the rules on employee participation in

EPCs would not have to be applied for national private limited-liability companies (ibid.).

In the final part of the decision-making process it was also clear, that although other member-states had reservations, Germany especially was sceptical of the initiative. According to an interviewee, initially Germany was very interested in the initiative, but became worried that the EPC could be used to undermine the German employee board level representation, an important part of the German employee involvement model.

At the Competition Council session on 4 December 2009 the Swedish presidency presented the compromise proposal regarding the Council meeting. In the Council's discussions, the German representative made it clear that the Swedish proposal was unacceptable for three reasons: the lack of a minimum capital requirement of €8000 for all SPEs; the possible separation of the statutory seat and the de facto head office of the SPE; and the inadequate board-level participation rules. After this clear statement, the Swedish presidency broke up the discussion. As unanimity in the Competitiveness Council is required, Sweden did not press for a decision. Besides Germany, other member states – such as Austria, Hungary and the Netherlands – also did not agree with the proposal's board-level participation rules (workers-participation.eu 2009). Nevertheless,– according to some of the interviewees – a consensus was nearly reached.

4.4 Outcome

Hence, the outcome of the decision-making process in the period studied was the proposal of the Swedish presidency, which however cannot be used to evaluate the process because the Council rejected it.

As expected the SPE initiative was again subject to negotiation under the Spanish presidency and Belgian Presidency. However, this part of the decision making process has not been covered by the analyses connected to this report. According to some of the interviewees the state of the initiative is, at the time of writing (September 2010), that after several proposals have been discussed in the first half of 2010, the Commission finds that the proposals are still not ready – they require more work before an attempt to have them adopted can be made.

4.5 Assessment

As in the case of the revision of the EWC Directive, the case of the EPC directive shows that it has not only been the need to address a certain social problem that has driven the decision-making process, but also the need of some of the actors to send certain political signals.

Considering how the discussions of the draft EPC directive focused on its potential deregulatory potential and considering that at least some of the interviewees see the directive as a way to bypass other directives, supporting this directive could not be seen as taking a pro-regulation position. Rather, supporting this directive should be seen as taking a regulation sceptical position. So far, the pro-regulation actors seem to have been most successful, in that the directive has still not been adopted. However, it is still too early to appoint them as

victorious. As the Swedish presidency ended the draft directive was immediately taken up again by the Spanish presidency.

It has not been possible in this case to locate clear coalitions. However, Germany was the most sceptical member-state, and supported by Austria, Hungary and France – all four countries that are often found among the pro-regulation actors. The Netherlands, however, was also found among the most sceptical member-states alongside member-states they are not so often on line with. The position of the ETUC (sceptical) and Business Europe (supportive) are not surprising, whereas the initially sceptical position of the UEAPME emphasise that the real reason for the initiative might not have been to support the SMEs.

Whereas only weak shadows of coalitions are seen as in the EPC directive recast process, the encoring of the decision-making process in DG Markt reduced the influence of the European social partners, particularly the ETUC, and made them search for new allies among the MEPs and work harder than usual to get their member-organisations to influence their respective governments.

5. Conclusions

Taking the brief historical descriptions and the two in-depth case stories together, the following observations can be made:

First, although it is not possible to answer the main research questions drawing on the results from only one area of work and employment regulation, the two in-depth case stories nevertheless show that the pro-regulation forces are still strong enough – under the right conditions - to get new regulation adopted as well as to prevent the adoption of unwanted regulation, at least in the short term.

Second, new regulation can be problem-driven, as when new forms of employee involvement were introduced with the EWC Directive in 1994 and later the information and consultation directive. However, new regulation can also be driven by the actors search for legitimacy, as both the EWC Directive revision and the attempt to establish a statute on EPC illustrates.

Third, this study of the employee involvement area illustrates the relatively well-known feature of the EU-level decision making, which is that proposals tend not to disappear when first introduced even though attempts to conclude regulation fails. Actors backing them up will always look for the next window of opportunity to put them 'back on stage' and proposals can survive for decades. This is in many cases an advantage for the pro-regulation actors, but - as illustrated by the case of the EPC – it can sometimes be to the advantage of the regulation sceptical actors.

Fourth, especially as the adoption of the EWC Directive in 1994 illustrates, a change of the institutional framework can have important spill-over effects on the actors' strategic choices. Without the Maastricht Treaty's shift from demanding unanimity to only requiring a qualified majority on new regulation in (some) labour market issues, the regulation sceptical actors would have been in a position to uphold their resistance to the EWC Directive.

Fifth - and more directly linked to the sub-question on choice of decision-making arena - the brief historical description and the case-stories indicate that the choice between decision making arenas is first and foremost guided by the actors attempts to maximise outcomes compliant with their interest, more than it is guided by the need for direct policy control or for respecting traditions for using certain decision-making arenas. The revision of the EWC Directive especially illustrates a game, where priorities for decision making arenas change fast. Traditions still matter, though, and can also be used in strategic argumentation – as in the case of the EPC initiative where the ETUC complained about the use of a multipartite rather than the tripartite arena for the consultation.

Six - and related to the sub-question on coalitions - the brief historical descriptions and the two case-stories shows, on the one hand, that solid coalitions cannot be seen in any of the decision-making processes analysed. For various reasons, a number of countries take stands that cannot be read off from their 'usual' position within a pro-regulation or a regulation sceptical position that have been described in other studies. On the other hand, the ETUC and Business Europe take positions as expected in all cases, and so do a number of member states, most importantly the UK. Also, the Parliament and especially its Social and Employment Committee tend to act in accordance with one of the coalitions (the pro-regulation coalition). Hence, at this stage of the project, no solid conclusions regarding the role of the coalitions can be made.

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Annex A – List of interviews

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Evelyne Pichot, Labour Law Unit, DG Employment, March 1, 2010.

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Jørgen Rønnest, former Social Affairs Director, Business Europe, March 3, 2010.

Jan Cremers, former MEP Dutch Social Democrats, March 8, 2010 (telephone-interview).