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Für meine Eltern als Dank für all ihre Mühen und ihre Fürsorge.

Für meine Schwestern, für ihren Beistand.

Für Elke, die mir täglich neue Energie gibt.

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1. Introduction

a) Research questions

Industrial relations in Europe are changing. Different developments in the industrial realm – which are either present in industrialized countries worldwide, are regional in nature or concern merely national particularities – together lead to pressures that render political action necessary and ultimately lead to the transformation of systems of industrial relations. While such political action typically occurs within a certain nation state, as in many cases core areas of statehood are implicated, within the European Union we can find an additional political sphere that transcends nation state borders. This sphere is able to take measures, which may directly or indirectly affect member states' policies. Action by the European Union¹ therefore must be considered when researching the transformation process of systems of industrial relations in Europe.

As there are numerous falsehoods regarding such influence on national systems, it is even more necessary that political research differentiates between factors that play a role in transforming national systems and those that do not. Leibfried and Pierson – in their ground-breaking book about European social policy (Leibfried and Pierson 1995a) – have identified several factors that influence social policymaking in the member states. They argued:

“Within Europe, a wide range of policies classically considered domestic cannot now be comprehended without acknowledging the role of the European Union within an increasingly integrated but still fragmented polity.” (Pierson and Leibfried 1995: 1-2)

¹ Although – before the Treaty of Lisbon came into force - there were important (legal) differences between the European Community and the European Union, in this piece of work the term European Union refers to both alike.

This leads Leibfried and Pierson to the conclusion that social policy in modern Europe operates in a multi-tiered system, where different levels – though not necessarily directly – interact and, taken together, form what may be called European social policy. The definition of social policy by Pierson and Leibfried is broad, comprising all policies that “modify market outcomes to facilitate transactions, to correct market failures, and to carry out regional, interclass, or intergenerational redistribution” (Leibfried and Pierson 1995b: 43).

One possibility, among others, to achieve market modification and redistribution is found in industrial relations. A multitude of definitions of industrial relations currently exists, and they vary to some extent: while some take account of human resource management (Bamber, Lansbury et al. 2008), others do not (Visser 1996c; Hyman 2001). But all definitions agree that industrial relations are somehow “about the regulation or governance of the employment relationship” (Marginson and Sisson 2002: 671) and ultimately about the regulation of the labour market. Pierson and Leibfried’s definition would place them under the category of social policy.

Another link between industrial relations and social policy is given by Brandl and Traxler who note that “industrial relations and social policy have evolved as separate, institutionally differentiated policy fields” (Brandl and Traxler 2005: 635). Because both share the same purposes, interdependencies and externalities must arise especially due – on one hand – to collective bargaining and collective wage agreements and – on the other – to social protection policies, also referred to as welfare policies. Crouch (1999), pointing to the British example, denies an automatic connection between industrial relations and welfare, but nevertheless defines social policy as a combination of the two concepts. What becomes clear, indeed, is that industrial relations are a key component of social policy. In an analysis of social policy, we therefore must also account for the specific actors, traditions, and power relations in the field of industrial relations. Overall, we can say that European social policy is not only a multi-tiered system of governments, but in fact is a multi-tiered system of governments, business and labour – the three chief actors of industrial relations (Visser 1996c: 7-11).

The aim of this thesis is to assess the influence of the European Union in relation to

the pressure it places on the national systems of industrial relations. The influence of the European Union in the transformation of national systems of industrial relations, defined as all interactions of government, business and labour aimed at regulating the employment relationship – including welfare policies resulting from business-labour cooperation – may at first seem puzzling. It might be true that the European Union has a social deficit, defined as a misbalance in the consideration of economical and social interests (Streeck 1995; Scharpf 2002; Joerges and Rödl 2009). It is also true that competences in the field of social policy remain largely in the domain of member states (Leibfried et al. 1995b). This is not surprising given the historical goals of social policy, which have been nation-building and the creation of national identity (Davies 2006). What all authors agree upon, however, is that a considerable degree of influence from the European level nevertheless exists. If this influence exists in the general realm of social policy, it should exist in industrial relations as well, as such relations are a component of social policy.

Following one of the basic distinctions of industrial relations - those between labour, business, and government (Dunlop 1993) - it seems sufficient to focus on one of the three groups in order to limit the extent of the workload while nevertheless allowing for meaningful conclusions. Considering the previously mentioned importance of social policy in regard to national identity, the ongoing discussions of the European Union's social deficit, and its implications for legitimacy of European policymaking, labour seems a suitable choice for further analysis. Furthermore, various (economical) pressures on labour market policy increase the difficulties that organized labour faces, illustrated by recent discussions on the right to strike in the context of European law. Nevertheless, some of the discussions in certain parts of this thesis will be relevant to the other actors as well, and aspects concerning other actors will be necessary for analyzing trade unions' circumstances. In this case only will the situation of business and the state be considered. The research question of this master thesis therefore is: *How can European integration affect the possibilities of national trade unions?*

Analyzing the effects of European integration on trade unions can be complex, as this question is connected to at least three wider considerations (Marginson and Sisson 2004). First, the discussion of convergence or divergence, an age-old theme

dominant in research of industrial relations, underpins the importance of intra-state factors. Two scenarios are possible: European integration can lead to increased convergence of systems of industrial relations in Europe (or even a new single European level system of industrial relations); or national systems prove to be persistent, maintaining diversity as the main phenomenon in Europe. Convergence is usually explained by either business approaches, focussing on best-practice, or sociological approaches, focussing on isomorphism (Risse, Green Cowles et al. 2001: 15-18; Marginson et al. 2004: 76-78). Hay (2000; cited in Marginson et al. 2004) distinguishes between four types of convergence: input convergence, policy convergence, output convergence, and process convergence. This differentiation has proven useful, as research on the convergence-divergence theme in most cases has shown ambiguous results: convergence of industrial relations at one point and persistent divergence in another (Ferner and Hyman 1992; Ferner and Hyman 1998; Traxler et al. 2001; Marginson et al. 2002).

The second difficulty lies in discovering where the pressures leading to change originate. Are these global or European phenomena? Even if questions of the policy dimension are set aside, it is unclear where pressures set forth above find their source. It could be that developments at the European level that influence national systems are merely the regional version of global phenomena; alternatively, it may be that global trends are weak but are increased at the European level. However, it is not easy to separate global from European developments. It would, in fact, make little sense to do so.

If we wish to assess the role of the European level in altering industrial relations, it is sufficient in the present context if the European level plays some role, either as a mediator or a source. The participation of European level institutions is therefore a decisive element if we want to assess specific European developments, as only then is it possible to directly trace these back to the European level.

The third difficulty is the extent of choice available to actors of industrial relations. This brings back in the 'rules of the game', as these set the borders for – in our case – trade union action, and are heavily affected by changes resulting from various pressures. Questions concerning procedural rules are consistently questions about

institutions of industrial relations, as such relations have their own set of rules, traditions, etc. It does not mean, however, that if no institutions exist, or if they differ largely, that there are no rules or common characteristics. In fact, institutions of industrial relations create an additional layer of rules that exists in addition to the general rules guiding society.

b) Theoretical background

In order to understand the effects of European integration on national trade unions, the concept of Europeanization (Wincott 2003; Radaelli 2004) may be used as an aid: Integration in the field of social policy and, accordingly in industrial relations, is a reality that has evolved over several years. The results of the integration process touch upon national industrial relations as well as trade unions and lead to certain transformation pressures. Those pressures, in other words, are consequences of former integration steps. However, Europeanization is not an automatic process, as mediating factors must be considered. Still, the concept of Europeanization helps us to understand the pressures that national systems confront.

Pressures on national trade unions might be a result of European integration, but do not have to be Europeanization already. Europeanization has several different meanings (Olsen 2002): First, Europeanization can mean the penetration of systems of governance, i.e. the transformation of national systems towards a European role model. This would be the case for example with changes in the mode of consultation of trade unions by national governments as they align their decision-making procedures to fulfil standards defined at the European level (Schroeder 2009). Second, Europeanization can mean the creation of supra-national institutions, ending up in a fully-fledged European level system. This is integration in the classical sense. Third, Europeanization may refer to the geographical dimension, i.e. enlargement of the Union. Fourth, it may describe processes of transfer of political organization and/or governance, meaning imitations of those in non-European countries. Fifth, it may simply be used as synonym for the whole European 'unification' process, consisting of all four previous dimensions.

Not all of those five types of Europeanization set out above are useful in the present

context, as already Olsen himself (2002: 924) points to the problem that Europeanization does not automatically lead to more European integration, as Europeanization does not have to be regarded as positive or as desirable goal by domestic actors. Europeanization therefore has to be analyzed distinctly from integration, as it does not tell us enough about the conditions for future integration. Europeanization understood in the sense of the first meaning described by Olsen may nevertheless help us to achieve a better understanding of the integration process, as the transformation of national systems on the one side and integration on the other side may be linked insofar, as the pressures potentially leading to domestic transformation might under certain conditions as well encourage integration. This needs further explanation: integration theory aims at describing why and under which conditions power is transferred from regional entities to a new centre or – with the more sophisticated words of one of the most famous integration theorists, Ernst B. Haas (1958; cited in Diez and Wiener 2005: 2) – integration theory is defined as the process “whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions process or demand jurisdiction over the pre-existing national states”. Regarding European integration, there are two basic theoretical streams: neofunctionalism and liberal intergovernmentalism.

Neofunctionalism

Neofunctionalism goes back to Ernst B. Haas' book 'The Uniting of Europe' (1958), where he analyzed the emergence of the European Coal and Steel Community. Although Haas in the aftermath actually abandoned neofunctionalism, other authors have picked up his ideas. In very abbreviated form, neofunctionalism says the following: due to large exogenous pressures the problem-solving capacities of national governments are unsatisfactory. Usually those pressures have a transnational element, i.e. the problem is shared by several nations, as otherwise governments in their search for alternatives would not turn to the idea of integration. The problem in the beginning might be very limited in scope, just affecting for instance a single policy area. In this area, nations arrive at the opinion that tackling this problem at an international level with the creation of institutions would be a successful solution. The creation of these institutions follows what Schmitter (2005: 58) calls the “hypothesis of natural entropy”: as these institutions reflect the lowest

common denominator, nations are interested in securing this agreement and therefore attach these institutions with a self-maintaining set of rules that secures the status quo. This status quo is disrupted by so-called spill-over effects: ongoing exogenous pressures, contradictions within the created system including unexpected results generated for instance by the institutions themselves in pursuing the defined goals and frustrations with the actual outcomes all lead to the search for alternative solutions. According to neofunctionalists, nations are likely to look for solutions within the existing supranational institutions, revising their scope, level or area. This is also described by the differentiation between functional, political, and geographical spill-over (Falkner 1998: 8-9, summarising earlier writings):

- Functional spill-over refers to the effects of interdependencies between policy-areas: measures taken in the one area have a direct effect in another neighbouring area, which create the pressures that are the precondition for integration also in this field.
- Political spill-over refers to the shift of loyalties and expectations as well as to the extent of competencies of the supranational institutions: in order to solve the still existing problems, the level of commitment is increased. In other words: more competences are transferred to the supranational institutions.
- Geographical spill-over means the enlargement of the integrated area, i.e. the accession of new nations.

This whole process is not anymore seen as an automatic one: political will is a decisive element in further integration steps and institutions that are too limited in scope and level probably will never even have the possibility to start the process, as they have no implications at the national level - Schmitter calls this the “hypothesis of increasing mutual determination” (2005: 59).

If we now turn to the focus of this paper, the potential role of labour within neofunctionalism is easy to find: non-state actors play a major role within it, as they are not bound to the nation state but directly interact with the supranational institutions and their government at the same time. If their governments are unwilling or unable to fulfil the demands of non-state actors, they are free to turn to the supranational institutions and use them to pursue their goals. Thereby, they promote

integration, as – if this strategy proves successful – more and more non-state actors turn to the supranational institutions and in the long term shift their loyalties and expectations towards them (Rittberger and Schimmelfennig 2005: 36). Due to the primarily economic character of European integration, this has been especially true for business actors. But as the European Union spreads into other areas as well – like social policy – the same might happen with actors of labour, especially trade unions.

Liberal intergovernmentalism

Liberal intergovernmentalism treats the European Union as a typical international organization dominated by nation states. Originating in theory of international relations, liberal intergovernmentalism was mainly developed by Andrew Moravcsik (e.g.1993) and postulates that the European Union can be analyzed as any other international organization. Liberal intergovernmentalism consists of two elements (Falkner 1998: 14): on the one side, nations are the main actors at the international level. International politics therefore are made out of intergovernmental bargaining, in which nations act rational. This means that they constantly calculate benefits and costs of their actions and try to maximize their own advantages as much as possible in the respective circumstances. European integration accordingly is limited to the boundaries set by the member states, i.e. the boundaries of integration lie where their costs outweigh their benefits.

National preferences in liberal intergovernmentalism are defined by domestic interest groups and do not change during the negotiation process. Therefore national preferences may vary from issue to issue, as domestic power constellations and accordingly majorities may vary. Nevertheless, nation states at the international level are unitary actors, as the respective governments alone represent the aggregated national interests. There is no independent role at the international level for non-state actors.

But what happens after integration? For sure not necessarily more integration. Coming back to the concept of Europeanization outlined above, we can see that Europeanization not automatically leads to integration and must not even be the direct result of measures taken at the European level, but might as well be a parallel development in various member states as – due to their membership - they share

certain characteristics, which build the frame for these developments. The ideal-typical modes of influence of the European level on the domestic level (top-down) identified in the literature on Europeanization are the regulatory misfit approach, the opportunity structure approach, and the cognitive approach (Börzel and Risse 2003b: 490-492; Knill 2005: 157-166).

- Regulatory misfit describes the following: standards set at the European Union level have to be implemented in the member states. These European rules will be more or less compatible with the existing national arrangements. The higher the misfit between those is, the higher will accordingly the adaptation pressures be. One might now expect that higher pressures are more likely to lead to institutional change in the member states and therefore to Europeanization, but referring to new institutionalism (Hall and Taylor 1996) the proponents of the misfit approach argue that due to path-dependencies change just happens along those lines (or paths) already present in the national system. Therefore moderate adaptation pressures are the most likely to invoke institutional change. Low pressures are too weak to create the necessary incentives for change, while high pressures conflict that much with the existing arrangements that adaptation would be too costly and face too much resistance respectively. But even moderate pressures are not automatically generating change, as mediating factors have to be taken into account (Risse et al. 2001: 9-12; Börzel and Risse 2003a).
- The opportunity structure approach (Börzel et al. 2003b: 492-493; Knill 2005: 161-163) looks at the transformation of power and resource distribution between various national actors which results from new European level opportunities to these actors. Such transformations of opportunity structures are the more likely, the more contested the national institutional concept is, as support from the European level in this case might make the difference. The probability of transformation therefore is low where one actor has a dominant position, while in situations of balance the probability is high. But even if transformation occurs, it is unclear if this leads to Europeanization, as the direction of the transformation is unclear. It then depends on whether those actors, which support European solutions, gain from the transformations, or if it

is the other way round.

- The cognitive approach focuses on the changes in norms and values of national actors, which are induced by European level activity. Such activity sets a frame of cognitive values and norms. When national actors engage in processes where European level activity plays a role, those actors will try to reconcile their own values and norms with those set out in the European frame and by doing so will contribute to the transformation process. (Börzel et al. 2003b: 493-494; Knill 2005: 163-166).

All of these three approaches describe how Europeanization may work. But Europeanization is located at the national level, leading in best case to convergence towards a European model, and is a top-down process, in which European measures transform the domestic systems of the member states. But Europeanization – as Börzel (2002: 193) notes correctly – is a two way process, as well including a bottom-up dimension which also might be called European integration. It has already been mentioned that the top-down and the bottom-up dimension taken together do not form an automatic cycle of ongoing integration.

Nevertheless, using the two theories of European integration outlined above, we can form hypotheses how top-down pressures potentially leading to Europeanization might as well lead to integration.

In the case of liberal intergovernmentalism, there is not much room for the top-down side of Europeanization. Domestic changes may lead to different national preferences, but these changes are not the result of Europeanization, but of “the economic incentives generated by patterns of international economic interdependence” (Moravcsik 1998: 6; cited in Risse et al. 2001: 14). Variation therefore is mainly dependent upon exogenous factors and not on endogenous transformation. Nevertheless, Moravcsik allows for some role of ideological or geopolitical preferences, but subordinate to economic preferences.

If liberal intergovernmentalism holds true, there is only a limited role for Europeanization. Two effects of previous integration are possible: on the one side, integrating new issue areas might lead to the involvement of new national interest

groups and therefore to a change in the domestic power structure which decides the national preferences (Rittberger et al. 2005: 28). As long as also these new domestic majorities may gain from integration, the integration process in this issue area will continue.

On the other side, Moravcsik himself (1993: 515; cited in Rosamond 2000: 138) describes how national governments are strengthened vis-à-vis their domestic politics: "National leaders undermine potential opposition by reaching bargains in Brussels first and presenting domestic groups with an 'up or down' choice (...)". Additional information sources and agenda-setting power strengthen national governments as well. As in such a case governments gain from integration, they are more willing to accept it, although they have to transfer sovereignty. They are exchanging autonomy at the international level against improved domestic circumstances. In both cases it is important to note that the domestic consequences of European integration according to liberal intergovernmentalism are fully intended by the nations and the domestic majorities creating their preferences. This at the same time is one of the major differences of intergovernmentalism with neofunctionalism.

Both of these possible integrationist effects are to some extent similar to the opportunity structure approach outlined above, as they all are about domestic power structures. Nevertheless, liberal intergovernmentalism has severe problems in accounting for Europeanization, as it becomes just possible under very narrow conditions and even then the problem still exists that domestic politics have been defined as rather insulated domain by Moravcsik.

Linking Europeanization and neofunctionalism does not face the problem of encapsulated domestic politics, as interdependence across borders and sectors is a key element of this theoretical stream. This openness towards the European level basically allows for the functioning of all three Europeanization procedures outlined above, as neofunctionalism with regard to change of opportunity structures and to the cognitive approach expects a shift of expectations and loyalties towards the European level. In this sense, cognitive change caused by being engaged with another polity level and cognitive change due to ideational and normative attitudes is the same. In other words: Neofunctionalism takes both the opportunity structure and the cognitive approach as cases of political spillover. The regulatory misfit approach

in contrast does not create this shift of loyalties and expectations, but it might get relevant in another context: if misfit occurs and domestic change is not a preferred option to the relevant national actors as a result of path-dependencies, functional pressures might increase – either due to integration in another area or due to non-action – and ultimately lead to spill-over.

All of this is quite hypothetical and based on several assumptions, which have not yet been empirically proven. This is also why authors writing about Europeanization regularly point to so-called mediating factors that influence the degree of Europeanization (Risse et al. 2001: 9-12; Caporaso 2007: 30-33). Those mediating factors can be manifold. “Indeed, nearly every domestic structural condition that affects the impact of European integration could be conceptualized as mediating factor” (Caporaso 2007: 30). In research design, it is therefore necessary to be very clear on these mediating factors.

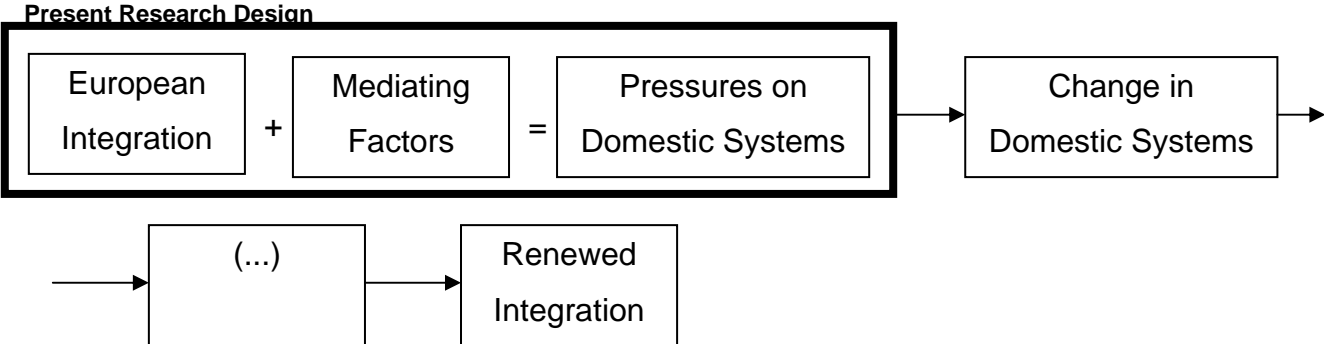
c) Methodology

The operationalization of the research question faces several problems, some of which already have been discussed. But how can these be solved? The effects of European integration on national trade unions, as illustrated above, are a question of a top-down relationship between the European and the domestic level, where we can employ the concept of Europeanization. In this concept, a certain extent of integration already is taken as given (for a description of the precise extent of integration in the field of social policy, see the next chapter). Empirical research designs use the existing European level system as an independent variable explaining the changes at the domestic level, themselves being the dependent variable. The mediating factors described above serve as intervening variables. Taken together, this is the standard top-down model of Europeanization (Caporaso 2007) in contrast to the bottom-up model described by Radaelli and Pasquier (2007), which concentrates on domestic politics. The problem of the standard approach is twofold: first, it focuses on the regulatory misfit approach. Héritier and Knill (2001) have shown to the contrary, that misfit is not a necessary precondition for domestic change (c.f. the two other approaches of Europeanization outlined above). Second, this model aims at describing domestic change, while in the present context we are interested in the

pressures resulting from European integration, not in change as a factual development. This has to be considered in the methodology and leads to the following design: European integration in the field of social policy is taken as given and does not vary between individual member states. Due to the level of integration that already has been achieved, the action capacities of national trade unions get under pressure, as national systems either show regulatory misfit compared to European models, national opportunity-structures are influenced and/or cognitive realignments occur.

The pressures on national trade unions, not changes in their actual possibilities, are the phenomena to be approached. Not domestic change is researched, but only the preconditions for change. Finally, those pressures are stronger or weaker depending on mediating factors formed by the national systems of industrial relations.

Graph 1: Research Design



Now we turn to the relevant factors in more detail: first, the status quo of European integration needs to be assessed more precisely, as referring to European integration as a whole only delivers a blurred picture. Therefore we have to detect the possible ways of influence through which the European level may exert pressure on the domestic structures. The more powerful these ways of influence are, the higher hypothetically the pressures. As we have ruled out the horizontal dimension of Europeanization, i.e. mutual influences between the member states, in order to avoid that adaptation pressures stemming from the European level are mixed with global, purely domestic or regional (in the sense of not covering all member states) pressures respectively, we can focus on top-down regulatory instruments of the European level in the field of social policy, which in their respective form can be

aligned on a continuum between hard and soft according to their degree of precision, delegation, and obligation (Abbott and Snidal 2000; for a critique of this approach see Barani 2006). Of course, the content of every single act would have to be analyzed in detail in order to align it on the hard-soft continuum. On a more abstract level, those instruments nevertheless may be divided in four distinct categories according to their procedural characteristics:

- First, the Open Method of Coordination (OMC), a procedure that combines „broad participation in policy-making, co-ordination of multiple levels of government, use of information and benchmarking, recognition of the need for diversity, and structured but unsanctioned guidance from the Commission and Council“ (Mosher and Trubek 2003: 64), is the most soft, as it is non-binding, not delegating any interpreting powers (for instance to courts), and with low precision as goals are frequently only broadly defined (Heidenreich and Bischoff 2008: 500-504).
- Second, the procedure of Articles 138/139 of the EC-Treaty, also called social dialogue procedure (Falkner 1998: 187-190). This procedure allows for independent European level bargaining between labour and business and may result in the adoption of binding acts by the Council which have been negotiated by the social partners (Welz 2008). It is not easy to assign the social dialogue procedure a stable place on the hard-soft continuum, as its outcomes might differ largely – from binding and precise agreements adopted by the Council to non-binding declarations of intent. Nevertheless, the mere possibility for business and labour of choosing the actual mode of regulation and implementation themselves justifies the existence of this category and its alignment between soft and hard law.
- Third, there is the classical Community method with involvement of the European Commission as agenda-setter, as well as the Council and the European Parliament as legislators. Although regulations are to be placed nearer to the hard pole of the continuum than directives, both do not differ in the law-making procedure.

- Finally, decisions by the European Court of Justice (ECJ) are arguably the hardest form, as they are both binding and precise. It might be contested that ECJ decisions deserve an own category, as they should give interpretations of other regulative instruments, especially those decided under the Community method. But several authors have shown how the ECJ has used the existing interpretational leeway to engage in judicial activism (e.g. Weiler 1991; Burley and Mattli 1993; Alter 2000; Stone Sweet 2005).

Now we can turn to the mediating factors, which might also influence the effects of European integration on the national systems of industrial relations, but do stem from the national rather than the European level. In case of our research question those are national systems of industrial relations. Of course, every single member state of the European Union has its own national system of industrial relations, including its own history, traditions, institutions, actors, and so on. Therefore it would be in fact necessary to analyze the pressures of European integration on trade union possibilities in 27 different national systems in order to make exact predictions for those systems each. But this would be - on one hand - impossible due to space, and - on the other - the scientific insights possibly achieved from this approach would be limited, as it is the goal of every comparative research to “maximise experimental variance, minimize error variance, and control extraneous variance” (Peters 1998: 30), and not to compare everything to everything else.

In order to fulfil the requirements set out by Peters, research design is crucial. Two basic research designs, that first have been described by John Stuart Mill and have been sophisticated by others (Barrios 2006: 40-42), exist: most similar versus most dissimilar design. While most similar designs “compare two or more cases that are as different as possible in terms of the independent variable(s) and as similar as possible on all the spurious and intervening variables” (Burnham, Gilland et al. 2004: 63), with most dissimilar designs it is the other way round.

Although in the present context potential effects are discussed and no values are assigned to variables, one should not be ignorant of potential future empirical research. Therefore it should be asked how it is possible to avoid too big a gap between the present deliberations and potential future research. Such future

empirical research would first have to establish from appropriate data whether there is a causal link between European integration and effects on national systems of industrial relations. In the present non-empirical context, it therefore seems appropriate to discuss if European integration could make a difference and if yes, under which circumstances. Such a discussion might provide some useful guidelines to future empirical research. This would especially be the case where potential effects can be found despite the differences in the exact arrangements of the national systems of industrial relations. Finding such similar effects would solidify the assumption that European integration indeed is a decisive factor.

But which are the differences in national systems of industrial relations in Europe? This question faces a serious problem: the diversity of real-life systems. This is what Peters called extraneous variance. He stated that “there are an almost infinite number of opportunities for extraneous variance to creep into the analysis” (Peters 1998: 33). As ideal-types of industrial relations systems cannot be found in real life, it is as well impossible to control for all the potential factors. At this point, theory comes into play: various authors have studied different systems of industrial relations and have come up with various ideal-types focussing on isolated aspects of industrial relations. Before we examine those ideal-types in more detail, another advantage of the usage of ideal-types should be mentioned: transferability. The ideal-types that will be used in the present context focus on industrial relations in Europe, but as for ideal-types there is the possibility to test them as well in non-European circumstances, a crucial point given potential future research (King, Keohane et al. 1994: 129-137).

Let us now turn to the ideal-types of national systems of industrial relations. Crouch's Theory of Exchange (1993: 28-49) includes four different types of which one, the authoritarian model, is not existent anymore, as it disappeared together with the fascist European systems. The other three models are: the contestational, the pluralist, and the corporatist model. These three models differ insofar, as due to the different structural characteristics of each system the costs and gains that may be imposed on one of the actors (business or labour) by the other actor vary and therefore the incentives to cooperate vary as well.

The structural characteristics are as follows: in the contestational model, business

and labour are “alienated, their relationship is unformed, interaction is likely to be thin on the ground and to take the form of conflict” (Crouch 1993: 31). Intervention by the state regularly is necessary in order to at least fence the conflicts. Typical characteristics of contestational models therefore are the absence of institutionalized bargaining structures, weak and divided organizations on both sides of the employment relationship, and a high density of open conflict (van Ruysseveldt and Visser 1996: 27-28).

In the pluralist model the density of interactions is higher than in contestational models as a result of “simple accumulation over time, or an increase in the power of labour (...) or of a multiplication of levels or points of interaction” (Crouch 1993: 35). Procedures for peacefully resolving conflicts have evolved. Nevertheless, the organizational structure is fragmented with no or only low central coordination and the state is abstinent, relying on the self-regulation of markets. In corporatist models, interaction is even higher and collective bargaining takes place at a centralized level with strong organizations of business and labour that share certain values. They are joined by the state which pursues its economic goals.

To these three types some authors have added a fourth type called social partnership as special type of the corporatist model (Ebbinghaus and Visser 1997: 338), while others have suggested typologies according to varieties of capitalism (Hall and Soskice 2001) and others again according to welfare state traditions (Esping-Andersen 1990) or state and legal traditions (Rhodes 1995). These approaches mostly are not typologies of industrial relations, but models explaining variation in national systems of industrial relations. Sticking to the idea of using ideal-types, the typology of Crouch seems most suitable for our purposes.

All in all, combining the ways of influence of European integration outlined above with the ideal types of industrial relations we get twelve different configurations. As already is obvious, we will collect the information we need to discuss each of these categories from the relevant literature. This becomes possible as ideal models of industrial relations and of ways of influence in fact hardly ever realize significant change. This is useful and problematic at the same time: useful as it allows for better modelling, problematic as it is separated from reality. Therefore the findings in the end have to be read with care, as empirical testing still is necessary.

Table 1: Overview of potential configurations

	Soft Modes	Social Dialogue Procedure	Community Method	ECJ Rulings
Contestational Model				
Pluralist Model				
Corporatist Model				

Source: own

Finally, we have to ask how we can actually identify pressures on national trade unions. At this point we turn back to the concept of Europeanization. To recapitulate - we have identified three different approaches to adaptation pressure, i.e. regulatory misfit, opportunity-structures, and cognition. In the first case, adaptation pressure would stem from the degree of fit/misfit between the European model and the domestic system (Caporaso 2007: 28). In the second case, a closer look is taken at the changes in opportunity structures, which lead to adaptation pressures. In the third case, it is the realignment of norms and values that is crucial. This realignment might change the behaviour of the involved actors and result in adaptation pressures.

To sum up, pressures on national trade unions would be either stemming from regulatory misfit, changes in opportunity-structures or cognitive realignments.

Table 2: Overview of adaptational pressures

	Soft Modes			Social Dialogue Porcedure			Community Method			ECJ Rulings		
	M	OP	C	M	OP	C	M	OP	C	M	OP	C
Contesta tional Model												
Pluralist Model												
Corporat ist Model												

Source: own; M=Misfit; OP=Opportunity Structure; C=Cognitive

2. Past integration in the social field

a) The social sphere of the European Union

Already at the founding of the European Economic Community, which had been the predecessor of the nowadays European Union, in 1957 some aspects of social policy made their way into the Treaty. Although they provided only for a small base of action in the social field, the development thereafter was characterized by a “significant extent of spill-over” (Falkner 1998: 76), leading to a massive increase in European-level activity in terms of issued directives and non-binding acts in the social field (Falkner, Treib et al. 2005: 53). Marginson and Sisson (2004: 84-85) identify six stages in the development of European social policy: the 1960s and early 1970s, the second half of the 1970s, the 1980s, 1990-1993, 1994-1999, and finally the time since 1999. Other authors come to similar classifications (Dolvik 1997: 117-122; Falkner 1998: 55 et seq.; Maydell et al. 2006: 22-23; Hantrais 2007: 2-15).

The 1960s and early 1970s

The initial stage of European social policy was dedicated to side-effects of the establishment of the European Economic Community, while it was agreed that all other areas except those foreseen in the Treaty should remain national competence. This compromise reflected two different approaches towards social policy in the early years: the free-market approach, which was especially promoted by Germany, believed that increased welfare would develop from increased economic growth resulting from the removal of intra-European trade barriers. The more interventionist approach, headed by France, feared competitive disadvantages arising from higher costs connected with its social system and especially its constitutional provision of equal pay for men and women (Falkner 2007). As a compromise, provisions on equal pay, paid holiday schemes, and the European Social fund found their way into the Treaty. Although especially the European Social Fund and the equal pay provision are important legal bases, market-correcting measures via the legal bases concerned with the common market proved more important, as under the social policy title of the Treaty the competences of the Commission at that time were severely restricted.

Social policy therefore entered the European Union through the front door of economic integration, instead of taking the back door of social policy. Two provisions of the Treaty have been significant: these are Article 100 (now Article 94 EC) and Article 235 (now Article 308 EC). Both of them are subsidiary clauses enabling the European-level institutions to act (unanimously) despite the lack of express competence in the Treaty, insofar as the establishment of the common market makes it necessary. Together with the provisions on the free movement of workers, these instruments built the array of European social policy action. Given this necessary link to the common market, regulation in the first stage was concerned with transferability of social security schemes, mutual recognition of qualifications, and the first provisions on occupational health and safety.

The second half of the 1970s

Most significantly influenced by the first Social Action Programme that has been adopted in 1974, the second half of the 1970s brought an increase of European legislation (Falkner et al. 2005: 46-47) in the fields of employment protection, occupational health and safety, and equal treatment. The requirement of unanimity voting in the Council, a situation described as joint-decision trap by Scharpf (1988), was achieved through a mixture of exogenous and endogenous pressures (Dolvik 1997: 118): on the one hand, high growth rates as well as industrial restructuring and social exclusion in the early 1970s and the following crash of the oil crisis had increased awareness on the importance of social policy. Additionally, enlargement made the European Union grow and shifts in national governments (the end of De Gaulle in France and the revival of Social Democracy under Willy Brandt in Germany) occurred. This rendered action of the European level via Articles 100 and 235 of the Treaty possible. The legal bases for social policy remained unchanged, as did the link to the common market. At the same time, taking a closer look at the substance of the new rules reveals lowest common denominator policies, where “the interests of the member state are necessarily safeguarded” (Pierson et al. 1995: 8).

The 1980s

The development of European social policy in the 1980s is closely linked to the person of Jacques Delors, who was French minister of finance and economics from 1981 to 1984 and who became the President of the European Commission in 1985.

Already during the French Council presidency in 1984, the idea of creating a 'European Social Space' brought social policy back into the discussion. But it was not until the Single European Act for the first time extensively amended the Treaties in 1987 that a new dynamic came into social policy. Although the innovations in the field of social policy of the Single European Act on the first sight are just minor, as the changes it brought were mainly in the economic area, they should not be underestimated. Two provisions were inserted: Article 118a and 118b. While Article 118b was occupied with acknowledging a role for a dialogue between management and labour, 118a for the first time allowed for qualified majority voting in the field of occupational health and safety, meaning that for the first time reluctant member states could be outvoted. This is just one essential outcome of the new Article 118b, Falkner (1998: 65) points to another – a phenomenon that Rhodes (1995) called "playing the Treaty-base game". Playing the Treaty-base game means the following: as already mentioned, the European Union may just act where powers have been conferred to it from the member states, in other words where they have created a satisfactory Treaty base for legal action. This is also called the principle of conferral and is seen as one of the basic principles of European Law (Chalmers, Hadjiemmanuil et al. 2006). But it is often the case that several Treaty provisions seem suitable for the regulation of a certain issue. Playing the Treaty-base game therefore means choosing the Treaty base that seems most suitable for the own policy goals, either one involving a qualified majority procedure or not. With a little bit of creativity it therefore became possible to use the qualified majority procedure of Article 118a as legal base for a wide set of social policy issues. Accordingly, the number of binding acts in the field of social policy from 1987 onwards increased constantly (Falkner et al. 2005: 53).

1990-1993

Already in 1989, the Community Charter of the Fundamental Social Rights of Workers was signed. Although it is not binding, the Charter nevertheless gave a clear statement of values and guidelines, which the European Union follows. The Charter was accompanied by another Social Action Programme, which led to 15 further health and safety directives, one equal opportunities directive and four labour law directives (Marginson et al. 2004: 85). Those measures simultaneously showed that with the existing legal bases it would not be possible to move much further. As the

internal market project created even more pressures also in the field of social policy, this topic was brought into the negotiations leading to the Treaty of Maastricht.

The main line of conflict in the field of social policy in Maastricht was between the Tory governed United Kingdom and all others: the UK was not willing to accept any increased social policy competence at the European level, while the others did not want the Treaty amended without the social policy provisions. This conflict for some time even threatened to jeopardize the whole intergovernmental conference and was more motivated by internal conflicts in the British conservative party than anxieties about an interventionist welfare state (Manow, Schäfer et al. 2004). The reasons why all other member states had been in favor of new social policy provisions, is explained by Falkner, who holds that “both institutional activism and the joint processes of preference and identity formation at the European level mattered” (Falkner 1998: 86). Finally, a compromise was struck, moving the social policy provisions to a protocol annexed to the Treaty and out of the Treaty itself, making it legally possible to grant an opt-out to the UK, while the others nevertheless would be able to use the European institutions for their purposes. This construction has led to considerable discussions of European law scholars about the uniformity of European law (Falkner 1998: 78-79), but in practice it worked, enabling European level action to some part even with qualified majority in the following fields and without necessary link to the common market as was the case when using Articles 100 and 235 (Manow et al. 2004: 27):

- health and safety of workers
- working conditions
- information/consultation of workers
- equal labor market opportunities and treatment of women and men
- integration of persons excluded from the labor market
- social security/social protection of workers
- protection of workers after termination of their employment contract
- representation/co-determination
- employment conditions of third-country nationals
- subsidies for job creation

Some areas *expressis verbis* have been kept exclusive member states competence

in order to safeguard national interests. These include the right to strike, the right of association, and the right to impose lock-outs.

The Agreement on Social Policy set up in Maastricht brought another important novelty – the possibility of setting up autonomous agreements between business and labour. This will be described in more detail in the following section.

1994-1999

In this period, with the possibilities of the Social Protocol in place, a leap in the number of European acts in the field of social policy could have been expected. In fact, this leap did not happen, although a constant increase can be identified (Falkner et al. 2005: 53). Use of the Social Protocol has been “only reluctant and incremental” (Falkner 1998: 147), as member states feared distortions of competition to the advantage of the UK. Instead, in many areas solutions under the old procedures were sought and for this purpose the level of protection envisaged was lowered in order to get the UK on board. In many cases, this was not successful. A new dynamic finally arose with the change of government from the Tories to the Labour party, when the Social Protocol was transferred into the Treaties with the Treaty of Amsterdam.

Since 1999

The situation of the Treaty of Amsterdam still is in place, as nothing has been changed in Nizza. The constant increase in social policy regulation still is present, at least until 2002, where the data of Falkner et al. ends (Falkner et al. 2005: 53). Even with the Treaty of Lisbon, there would be no substantial changes, although some clarifications would be made and some new aspects would be introduced into the goals of European policy-making which could be relevant to social policy (Falkner 2008).

Explanations of the history of European social policy as outlined above have for a long time been situated in line with the traditional conflict between intergovernmentalists and neofunctionalists. While intergovernmentalists (e.g. Lange 1992) assume that social policy is too important to the member states to allow for significant influence of the European Union and that they remain in total control of the developments, neofunctionalists hold that “the emergence of a multitiered structure is

less the result of attempts of Eurocrats to build a welfare state than it is a consequence of spillovers from the initiative to build a single market” (Leibfried et al. 1995b: 44), which cannot be controlled by the member states. Space precludes a detailed description of the two arguments, but what becomes clear is that what was outlined in this section – with or without member state control – constitutes the main legal base for binding European level action in the social field. Yet there is another source to be named.

b) The European Social Dialogue

The roots of European level industrial relations date back to the 1970s. Although the European business federation UNICE (nowadays called Business Europe) had already been founded in 1958, it was not until 1973 that the trade unions followed by establishing the European Trade Union Confederation (ETUC). With two peak-level organizations in place, new possibilities opened up: between 1974 and 1978 several tripartite conferences took place, involving UNICE, ETUC, the Commission, and representatives of the member states (Falkner 1998: 71-72). There had already been one tripartite conference in 1970, but only the involvement of ETUC added the necessary stability, as ETUC had an interest in these conferences, since it enabled close contact to Council members (Compston and Greenwood 2001: 4-5). But when results turned out to be meagre and at the 1978 conference the representatives of the member states did not make a single statement, ETUC withdrew from the conferences.

From Val Duchesse to the European social dialogue

When the French Council presidency in 1984 declared the creation of a European Social Space as one of its main goals, it also envisaged an important role for the social partners, i.e. UNICE and ETUC. During the presidency, UNICE and ETUC met three times in Val Duchesse. Although no substantive results were achieved in these meetings, when Jacques Delors entered the European stage he invited the heads of UNICE, CEEP (the association of the public sector employers) and ETUC again to talks at Val Duchesse. Delors wanted to add a social dimension to the European integration project with social partner involvement as one of its cornerstones. With

backing from the Commission president, this meeting “proved to be the first step in what became known as the Val Duchesse period of dialogue (1985-1993), characterized by bipartite social-partner activities” (Welz 2008: 248). As there was no legal base given for such social partner coordination, the outcomes remained non-binding, mainly laying down joint positions. But the outcomes were not the main achievement of the Val Duchesse period: On the one side, it created something that might be called trust between the social partners, which led to a completely new base for future agreements. “The intimate involvement of management and labour in policy networks resulted in a revised definition of interests and preferences” (Compston et al. 2001). On the other side, the policy entrepreneurship of the Commission under the lead of Jacques Delors stabilized and supported this development. “Social dialogue would constantly be marketed in official documents and brought up in meetings and conferences. It seems that a learning and even identity formation process was being induced” (Falkner 1998: 73).

The Val Duchesse dialogue received a formal backing with the coming into force of the Single European Act in 1987. Article 118b as already mentioned provided for the establishment of a coordination procedure between the social partners. French proposals to enable the social partners to make autonomous agreements, which could be transformed into a regulation or directive, went too far for the other member states. Therefore Article 118b in fact just laid down what already had been reality. The real brake-through concerning the integration of a social dialogue procedure into the framework of the European Union was achieved on October 31st, 1991, when during the negotiations leading to the Maastricht Treaty, UNICE, CEEP, and ETUC agreed on a joint agreement to the intergovernmental conference, in which they did not just ask for obligatory consultation of the social partners, but also for a procedure of autonomous bargaining between the European-level social partners the results of which could be transposed into regulations or directives. The wording of the agreement was to a large extent copied into the Agreement on Social Policy, which via the Protocol on Social Policy became part of the Treaty. Although some provisions were changed at the intergovernmental conference (for example some additional leeway for Commission and Council was inserted), with the coming into force of the Maastricht Treaty, also the social dialogue procedure came into operation.

With this institutional setting in place, negotiations on specific topics could start, but proved difficult. The first two cases to be negotiated under the new procedures dealt with the establishment of European Works Councils and parental leave respectively. First attempts to establish European Works Councils already had been made as early as 1980 (Falkner 1998: 98), but failed due to resistance from the side of employers and member states, especially the UK. Nevertheless, the proposal was brought up again several times, as especially the Delors' Commission understood this as crucial to balance the negative side-effects of the internal market project. As now with the Social Protocol and Agreement qualified-majority voting in the Council was in place, it became possible to increase the pressure for an agreement. The social partners were consulted, but with a long-standing history of opposition by UNICE to this proposal, they finally were not able to agree on a common draft, although negotiations looked promising. Nevertheless, the Commission sent a proposal to the Council under the Social Protocol to adopt the European Works Council directive. The Commission in its proposals tried to stick as much as possible to the discussions of the social partners, declaring its willingness to integrate the social partners into the policy-making process.

The parental leave directive was the first social partner agreement to be implemented by Council decision. This case compared to the European Works Councils was rather uncontroversial, nevertheless some UNICE members questioned the necessity of European level regulation on this topic, while ETUC, backed by the Commission, was very much in favor of adopting this directive. Welz (2008: 386-389) points to two significant reasons, why the topic of parental leave was the first to be negotiated and why at this time: first, it was as already mentioned a rather uncontroversial topic, without any longstanding history of negotiations in the Council. Therefore the Commission asked the social partners not to negotiate on a draft as in the European Works Council case, but on a basic outline, enabling more leeway. Second, the social dialogue procedure of Article 138/139 EC needed some results, as it was feared that the member states during the negotiations in the run-up to the intergovernmental conference in Amsterdam could try to do away with the social dialogue procedure.

Those two cases exemplify the problems of the social dialogue procedure, at least in its cross-sectoral version. Until September 2008 (European Commission 2009) just

three agreements have been implemented via Council directive, three more autonomous agreements have been concluded, and two frameworks of action have been established. Nevertheless, the amount of informal and non-binding opinions, papers, and recommendations – especially in the field of the sectoral version of the social dialogue - is high.

Several authors (Dolvik 1997; Falkner 1998; Zheng 2007; Welz 2008) examined why the cooperation between the European social partners intensified like it did and analyzed the problems it suffers from. Two different sets of reasons have been identified.

Ideas and the role of informal institutions

The core assumption of the corporatist policy community is that over some time the shared beliefs and preferences of the actors within the corporatist policy community have been changed with reference to normative concepts like the European Social Model, which according to Falkner (1998: 77; for a critique see Jepsen and Serrano Pascual 2005) consists of at least two major pillars - those are social welfare and employment relations. Using this concept enabled shifting “the causal assumptions in the policy core”, without substantially touching upon the policy core itself (Falkner 1998: 202-203). The lack of procedures enabling a structured dialogue between business and labour at the European level resulted in a lack of substantive content – also called corporatist decision gap – which had to be closed in order to fulfil the normative standards set up by the concept of the European Social Model. Preference formation within the corporatist policy community therefore aimed at redefining the means and instruments of European social policy and intensify them until they ultimately influence political behaviour without creating strong opposition by for instance questioning the dominant national competence in the field of social policy. Then it becomes possible that actors decide against their pure economic interests and instead act in order to do ‘something good’ or at least something that is welcomed by the peer-group. In the industrial relations literature, the importance of values and ideologies as frames of action is especially acknowledged in situations of conflict (Budd and Bhavé 2008; Gall and Hebdon 2008) and for Ebbinghaus and Visser (1997) the attitudes towards conflict resolution between business and labour are a distinguishing criterion between different systems of industrial relations. But

why? Once such an informal institution is established, with reference to historical institutionalism (Hall et al. 1996; Pierson 1998; Pierson 2000) one could expect the development of path-dependencies, which reinforce the whole process. These path-dependencies make it difficult to pursue strategies that are not on the path, leading to the stickiness of institutions.

Rational choice and self-interest

Although Falkner (1998: 151) underlines that “also at the national level the existence of a corporatist policy community does not imply that labour and management are involved in all relevant decisions to the same extent”, critique of the historical institutionalist approach has focused on the meagre outcomes of the social dialogue procedure. Compston and Greenwood (2001: 166) even conclude that “the role of ideas is marginal” and that they are just used as instrument to pursue the self-interest of actors. Changes in the belief system of the actors are denied. These rational choice accounts of the social dialogue procedure (some with an institutionalist notion, some not) emphasise the role of the shadow of law: “The central social dialogue is completely dependent on the capacity and commitment of the Community to bring European social policy forward”, summarizes Dolvik (1997: 356). This means that social partner agreements are just probable if there is a credible threat that without such an agreement there would be a regulatory act nevertheless and in this case the social partners would have decreased possibilities of influence. Would this shadow of law not exist, especially the business side would have no incentive to reach an agreement, as it would produce costs that otherwise, i.e. without regulatory action, would not have to be incurred.

c) Development of soft modes

The rise of regulatory acts in the field of social policy does not concern binding acts alone, non-binding acts are at least as relevant. In fact, “binding and non-binding decisions have developed approximately in parallel” (Falkner et al. 2005). This contrasts with the great attention soft modes received within the recent literature. Two different stages of research on soft modes like the Open Method of Coordination (OMC) can be separated: first, the theoretical discussion about the origins and potential outcomes of soft modes, and second the empirically informed evaluation of

the use of soft modes in the European Union.

When we take a look at the history of European social policy, we can observe a steady increase in European-level activity in this field as a result of spill-over effects from economic integration. At the same time, social policy remains intrinsically national, as it lies at the core of definitions of statehood (Maydell et al. 2006: 9 et seq.), preventing any big shifts from the national to the European level, as no majorities can be found for such shifts. Nevertheless, the pressures on national systems persist and at least multi-national coordination is deemed necessary. Soft-modes are therefore understood as an ideal possibility for compromise and help to resolve deadlocks (Schäfer 2006). As distinct features of soft modes, which at the same time render them attractive to policy-makers, are seen “broad participation in policy-making, co-ordination of multiple levels of government, use of information and benchmarking, recognition of the need for diversity, and structured but unsanctioned guidance from the Commission and Council“ (Mosher et al. 2003: 64). These procedures, collected under the term ‘Open Method of Coordination’, allow for policy coordination without far-reaching transfer of policy-making competences, as only non-binding measures are taken.

The European Employment Strategy has been the first procedure to take this soft form. In the mid-1990s the potential negative effects of the welfare state on employment rates started to endanger the financial balance of the welfare system, as the usual instruments for keeping unemployment low, i.e. early retirement and income maintenance programmes, took an ever-increasing part of government spending. The only strategy to effectively counter these tendencies was increasing workforce participation, but at the same time due to the fiscal guidelines set up by the Economic and Monetary Union, such programmes could not easily be funded. As neofunctionalists easily would predict, at some point various actors turned to the European level to look for the solution. Creating a centralized welfare regime would not have been possible, not only due to member states resistance, but, as Mosher and Trubek (2003: 66) suggest also for pragmatic reasons, as “the Union lacked competence and capacity for such a daunting task”.

The same authors point to four additional reasons why it was comparatively easy to

introduce new modes of governance exactly in the field of employment policy:

- First, as the unemployment rates kept rising, this was more and more traced back to unbalanced economic integration. This train of thought could already be found in statements by Jacques Delors, who exactly for this reason pressed for a reinforced social dimension already in the late 1980s.
- Second and following from the former argument, the Commission had already pushed for further integration in this field for some years.
- Third, the signing of the Stability and Growth Pact threatened to further increase pressures on national welfare systems.
- Finally, the 1995 enlargement with Austria, Finland, and Sweden brought three new countries into the Union, which were in favour of active employment policy.

As role model for the European Employment Strategy served the multilateral surveillance procedure within the Economic and Monetary Union, but without its coercive elements. The European Employment Strategy finally found its legal base in the new employment title of the Treaty of Amsterdam and in the aftermath served as example for the Open Method of Coordination as well in other policy areas, like social inclusion and pensions. The expectation was that also in these areas the OMC would “be a promising mechanism for promoting experimental learning and deliberative problem solving across the EU” (Zeitlin 2005: 8).

It is exactly the learning element that Kröger (2006: 1) tackles in her critique:

„Indeed, one can wonder why the tool box gathered by the OMCs and its non-bindingness should promote “learning” processes in a politically highly sensitive policy area where further integration was and remains judged undesirable for reasons of institutional diversity and political and ideological disagreements.“

Learning is a cognitive process that takes place over a certain period of time. Incentives for learning are crucial: if learning is constrained by institutional and ideational factors, the incentives have to be even stronger. Here lies the problem: due to its informality and non-coerciveness the institutionalization of soft forms of governance usually is low, leaving financial incentives the only possible instrument (Heidenreich et al. 2008). Eckhardt (2005: 262) comes to a similar result in her

analysis of the OMC on pensions and notes that “there are no strong incentives to subject oneself voluntarily to the outcome of the OMC on pensions”. But Eckhardt also speaks of the creation of a European social policy paradigm, which could result from the OMC and in the future build the base for binding actions. But maybe such cognitive shifts have already taken place: In a case study on the impact of the European Employment Strategy in Germany and France, Heidenreich and Bischoff found evidence that the OMC, although in different ways, contributed to a “convergence of perceptions, orientations, interpretative schemes and problem-definitions thus shaping the national reform projects“ (2008: 556). Such a finding supports the cognitive Europeanization approach and would strengthen the argument, that especially the Commission used the OMC to enter into highly sensitive areas of national interest.

Mailand, in another study on the impact of the European Employment Strategy in Denmark, Poland, Spain, and the UK concludes that “only to a limited extent has the EES had a direct impact on the employment policies of the member states” and that there is considerable variation between the various countries (Mailand 2008: 361). Although searching for the reasons of this variation has not been Mailand’s primary research aim and has not been empirically tested, he lines up three different explanatory hypotheses: the compliance hypothesis, the Europeanization hypothesis, and the consensus hypothesis. The terminology unfortunately is confusing, as, first, the compliance hypothesis only aims at the misfit argument, not mentioning other approaches of implementation research. Second, Europeanization is used to describe “national actors’ incentive to use the EES strategically” (Mailand 2008: 355). This is a very narrow definition of Europeanization, with some elements of what in this piece of work would be called opportunity-structure approach and some elements of a cognitive approach, as Mailand points to the importance of the “profile” of European employment policy in the respective country. Finally, Mailand’s consensus hypothesis in fact is the same as his compliance hypothesis, as it focuses on the resistance of domestic actors. If we remember the Europeanization model of Risse, Green Cowles, and Caporaso, this is step three of their model, called mediating factors and more precisely they refer to “multiple veto points” (2001: 9). Nevertheless, Mailand’s work is another study that has shown that the EES might have an actual impact on domestic policies, may it only be slight though and

dependent on a broad array of intervening factors. What is new is that an impact of a soft mode of governance not only on a cognitive level, but also shifts of opportunity structures are *expressis verbis* considered possible, while other authors (O'Connor 2005; Heidenreich et al. 2008) for various reasons only allow for a cognitive impact. What could such an influence of soft modes of governance on domestic opportunity structures look like? This is especially a topic of external legitimization (Zeitlin 2005: 16; Mailand 2008: 355). Governments may refer to an OMC as external source for policy change and for blame-sharing in order to pursue their own domestic agenda. An OMC here is used as a strategic resource of domestic actors. Those must not only be governments, also non-governmental actors and especially the social partners may use the OMC to strengthen their position. Such shifts may not only happen due to normative standards or certain domestic traditions (Falkner, Hartlapp et al. 2007; Falkner and Treib 2008), but also via increasing pressures aiming at policy-change into a certain direction. Raveaud (2007) in a more economically oriented analysis of the European Employment Strategy gives an example how this might work. Raveaud especially focuses on the employment systems of Denmark and Sweden, which he understands as models of solidarity instead of models of competition, and concludes:

„Also, while praising Denmark and Sweden for their high levels of employment, the EES criticizes them for their high level of taxes and unemployment benefits. The coherence of these social and economic systems, which articulate social cohesion with economic efficiency, is not understood by the Commission and the Council.“ (Raveaud 2007: 430)

Raveaud's statement that Council and Commission do not understand the model of solidarity could also be framed otherwise, namely that Council and Commission deliberately follow the model of competition. For both assumptions no evidence is available, but as this is not of any interest in the present context, we can move on to assert that there is some societal concept underlying the cornerstones of the OMCs – no matter if deliberately chosen or not. At the same time we have seen that the OMC has some impact on domestic systems. Therefore, even in areas, where European-level competence is restricted to soft modes of governance, the European level might be used by domestic actors to evoke domestic change, which otherwise would not

have been possible. Of course, such a strategy would take a lot of time and a lot of question-marks would have to be added, but it helps not to forget about other than cognitive effects of OMCs.

d) Social policy and the European Court of Justice

The role of the European Court of Justice (ECJ) in the evolution of European social policy has often been underestimated. Especially if the respective authors favoured state-centred accounts of European integration (Lange 1992; Streeck 1995), there was not much space for independent action granted to the ECJ (Garrett 1995; Garrett, Kelemen et al. 1998). Actually, ignoring the role of the ECJ in the development of European social policy can only be based on a severe misunderstanding of the principles of European law as protected by the ECJ in its case law. The line of argument against an independent role for the ECJ in this policy field usually refers to the allocation of competences between the various levels, i.e. between the European and the national level, in all areas of social and welfare policies and highlights the small competence base for European-level action in this field. In short: where there is no European level competence, there is no decisional space for the ECJ. But if we take a closer look into the history of the ECJ, we realize very soon that it is a history of constant widening of European-level competence even against the apparent meaning of the Treaties. By establishing the doctrines of direct effect and of supremacy, the ECJ already in its early years contributed largely to the constitutionalization of the Treaties (Stone Sweet 2005). Direct effect means that individual citizens may invoke European law before national courts, as it grants individual rights upon them, which national authorities have to consider. In fact, direct effect, first established in the famous case *van Gend en Loos* in 1963², was the very moment when the European Union legally was transformed into something not known before, as international law per se never grants rights upon individuals. But the doctrine of direct effect lacked a provision how national courts should proceed if they encounter conflicts between European and domestic rules. Without such a conflict rule, the doctrine of direct effect would have been useless, as it could have

² ECJ Case 26/62 *van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 00001

been easily ignored with reference to conflicting national provisions. Therefore already one year after *van Gend en Loos*, in *Costa vs. Enel*³, the ECJ held that European law is supreme to domestic law and that the latter in such a case should be set aside. While the wording of *Costa vs. Enel* was rather vague, leaving many questions unanswered, the ECJ refined the doctrine of supremacy in the years that followed and even held that European law is supreme to national constitutional law. This claim, of course, was heavily contested especially by national constitutional courts like the German Bundesverfassungsgericht, but over the years a kind of consensus emerged, making future conflict between the courts in this field unlikely (Alter 2001; Albi 2007; Charpy 2007).

Another feature of ECJ case law is important: the ECJ for various reasons proved to act pro-integrationist and engage in judicial activism. This became possible as the ECJ compared to national courts enjoys a considerable decisional leeway, as the ways of disciplining courts used in the domestic context are not available at the European level. The only effective way to correct a judgment of the ECJ in fact is bound to a Treaty amendment, which requires a double unanimous majority – one at the intergovernmental conference and one in the national parliaments during the ratification process (Mattli and Slaughter 1998). Maybe the most famous case in the field of social policy with an integrationist stance has been the *Defrenne* case⁴ in 1976 (Falkner 1998: 60-63). In this case, a former stewardess of the Belgium airline Sabena relied upon the Treaty provisions for equal pay in order to combat inequalities in the pay schemes of Sabena. She was able to do so because of the doctrine of direct effect. Finally, she won. The judgment actually caused a new era of European legislation on anti-discrimination, although “none of the governments had in 1957 imagined that twenty years later, national law and individual work contracts might be invalidated by legal complaints under Article 119” of the Treaty (Falkner 1998: 61). *Defrenne* makes obvious how the ECJ has used the narrow existing Treaty foundations in the field of social policy to widen the European level influence in this field. Nevertheless, the foundations remained thin, setting borders even to the most daring interpretations of the Treaty. But another legal approach opened up the whole field of social policy to judicial review by the ECJ: the Court holds that every

³ ECJ Case 6/64 *Costa v ENEL* [1963] ECR 00585

⁴ ECJ Case 43/75 *Garbielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 00455

measure potentially disturbing the aims set out by the Treaties is illegal unless for legitimate reasons, which are defined by the Court itself. Even if in its judgements the ECJ regularly in principle asserts national sovereignty in the field of social policy, national sovereignty ends where the goals of the Treaties start:

„With the intention of realizing the internal market, Community law stimulates free movement by removing restrictive national measures even if they relate to aspects of the national welfare systems.“ (Lenaerts and Heremans 2006: 102)

This move has been heavily criticised from a democratic point of view, as without unambiguous legal base long-standing traditions of welfare distribution within countries are shifted, as Scharpf (2009: 30) argues:

„From a normative perspective, what matters is that the Court’s interventions are based on a self-created framework of substantive and procedural European law that has no place for a proper assessment of the national concerns that are at stake, and in which the flimsiest impediment to the exercise of European liberties may override even extremely salient national policy legacies and institutions.“

The decisions of the ECJ in the cases of *Viking* and *Laval* (Malmberg and Sigeman 2008) and subsequent judgements, to which we will return later, are the most actual examples of this deficit.

At the same time, the ECJ has contributed to the protection of fundamental rights in Europe. Already in the late 1960s, in the cases of *Stauder*⁵ and *Internationale Handelsgesellschaft*⁶, the Court held that fundamental rights are an integral part of European law. Nowadays, still with no binding fundamental rights charter within the Treaties, the Court nevertheless has referred to several different sources to derive European fundamental rights from (Chalmers et al. 2006: 232 et seq.): the constitutional traditions of the member states, the European Convention for the

⁵ ECJ Case 29/69 *Stauder v City of Ulm* [1969] ECR 00419

⁶ ECJ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 01125

Protection of Human Rights and Fundamental Freedoms (ECHR), and the European Union Charter of Fundamental Rights. Regarding social rights the ECJ has also referred to the Community Charter of Fundamental Social Rights of Workers and the European Social Charter of 1962 (for instance in the already mentioned *Defrenne* case) (De Witte 2005). Fundamental rights are as well regarded as a possible legitimate reason for disturbing the principles of the internal market, especially the four freedoms (Joerges et al. 2009: 12-13).

The incorporation of fundamental rights into the body of European law was necessary due to constitutional doubts in some member states: if the ECJ did not respect fundamental rights in an appropriate way, it would have been up to the national constitutional courts to guard the fundamental rights enshrined in their respective constitutions. But as the ECJ then fulfilled the requirements and established a system of fundamental rights protection that is at least not worse than in any member state, those constitutional concerns could be appeased. This development can also be seen in the case law of some constitutional courts, especially in Germany (Sadurski 2008).

But why at all has the ECJ become that powerful? Even if it enjoys a considerable leeway not comparable to domestic courts, why have the latter been so willing to accept the guidance of the ECJ? Research on legal integration has brought up several possible explanations: first, the self-interest of domestic courts may lead them to obey. Second, the incentives for private litigants to “play the Eurolaw game” are high. Third, legal expertise of the ECJ is convincing.

Domestic legal systems usually are multileveled, as it has to be possible to make an appeal and question decisions of lower courts in higher courts. Sometimes, there are as well different branches of the judiciary: administrative courts, civil law courts, criminal courts, constitutional courts, and so on. Not in all cases there is a clear hierarchy between the various levels and branches. If one understands a single court as an institution, with its own set of preferences and values, we can analyze the relationship between different courts either as inter-court rivalry (Alter 2001) or more generally as pursuit of self-interest (Burley et al. 1993). Adding the European legal system to existing domestic judicial systems opens up completely new possibilities especially for lower courts to strengthen their position vice versa higher courts. The

link between the lower courts and the European level has been identified in the openness and flexibility of the preliminary ruling procedure of Article 234 EC, which enables (lower courts) or obligates (courts of last instance) to refer to the ECJ all matters concerning questions of European law. Accordingly, the ECJ has held several times that it is the only body to legitimately rule on questions of European law. With such a position, after a preliminary ruling a case in fact is decided, as a higher court has only the possibility to refer the case again to the ECJ with a different set of questions. This gives lower courts the possibility to act as courts of last instance, although they are not, and sometimes they are even able to set aside national laws – a competence otherwise only granted to national constitutional courts. Those are powerful incentives to cooperate with the ECJ.

Another reason is the shift in the opportunity structure of private litigants: they may use European law to pursue their interests even where the national legal system would not grant such a possibility. At the same time, as Mattli and Slaughter (1998: 186) note, they as well serve the ECJ:

„Without individual litigants, there would be no cases presented to national courts and thus no basis for legal integration. The various identities, motivations, and strategies of litigants have inevitably influenced the nature and pace of integration.“

The same authors identify two different main types of private litigants: public interest pressure groups and large corporate actors. With reference to studies of several authors they describe how such groups have used European law to increase pressures on national actors in order to induce policy change. Again, the *Defrenne* case already mentioned above serves as an example. Those actors usually are so-called repeat players that are able to bring several cases before the courts and are big enough to get over defeats. Through constantly penetrating national courts with their cases, they try to achieve the success they want.

Finally, followers of a legalist approach as Weiler (1991) argue that the legal expertise present in the judges and staff of the ECJ is so high, that lower courts and national legal practitioners are easily persuaded of the points of view of the ECJ, as the knowledge of European law of the former furthermore usually is not that far-

reaching. But this approach has been heavily criticised (Burley et al. 1993; Alter 2001).

In the meantime, even the member states themselves have strengthened the ECJ, as they are interested in compliance with the established rules and try to avoid freerider effects. In other terms, the ECJ acts as powerful agent of the member states agreement laid down in the Treaties (Pollack 1997). The ECJ since Maastricht is even able to impose penalty payments and lump sums for non-compliance of member states with European rules (Chalmers et al. 2006: 360-365). In this way, the costs of non-compliance should be increased in order to make it less favourable.

3. Shaping European Social Policy without coercion: a way to success?

a) Soft modes in the social field

aa) Description of soft modes

Above, we have analyzed why soft modes have been introduced into social policy making at the European level and have approached the question which outputs may be expected from the employment of such new modes of governance. The findings up to now suggest that soft modes can indeed have an impact on domestic policies, although this impact might be smaller than expected and difficult to proof. Furthermore, claims that soft modes replace the classical instruments of European policy-making seem to be exaggerated, as the numbers of binding and non-binding acts in the field of social policy rise approximately in parallel. This rather indicates a development towards a “pragmatic mix” (Barani 2006: 29) of different regulatory techniques, where legal instruments are chosen according to the political preferences of the participating actors.

In order to assess the potential impact of soft modes on the possibilities of national trade unions, we now have to turn to the procedural characteristics of soft modes, as we need to know how trade unions can participate in the process leading to the adoption and implementation of soft modes. This is the precondition for assessing the implications of soft modes, as those then can be examined before the background of national systems of industrial relations.

The policy-cycle of soft modes consists of four elements (Trubek and Trubek 2005: 348):

- “1. Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines.*
- 2. National reports or action plans that assess performance in light of the objectives and metrics, and propose reforms accordingly.*

3. Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases.

4. Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.”

This is as well the procedure laid down in the Treaties (Article 128 EC) for the European Employment Strategy (Schäfer 2006: 206), beside the Broad Economic Guidelines within EMU one of the role models of the OMC. Article 128 EC at the same time provides – among others – for the consultation of the Economic and Social Committee (ESC) and the Employment Committee. The latter consists of two representatives of each member state and two representatives of the Commission, but according to Article 130 EC has to consult “management and labour”. This rather vague formulation aims at the organizations also represented within the European social dialogue, but there is no evidence of substantial influence of the social partners, as it is mainly a forum for discussion between the member states and the Commission. Experiences with the Standing Employment Committee established in 1970 (Goetschy 1999: 118) show that even with formal participation rights of social partners their influence is low in such bodies. With the ESC, the case is not much different: although the ESC has a long-standing tradition of representing societal interests within the European policy-making process and therefore fulfils an important legitimizing function, its impact on legislative proposals lies in the best case in correcting technical details (Smismans 2000; Jesús Butler 2008). With other OMCs that do not enjoy a Treaty base but are established by Council decisions (e.g. those on social inclusion and pensions), a similar picture emerges, as consultation takes place on an informal and irregular base (Kröger 2008).

For the European level, we therefore can summarize that the OMC is a mainly intergovernmental process without significant influence of any of the social partners. This is not especially surprising given the institutional configuration of the OMC, where the main actors are the European Council, the Council and the Commission, while all other institutions and even the European Parliament are just allowed an advisory role. Nevertheless, the idea of the OMC has as well been to promote better deliberation and increase legitimacy in the way of including more societal actors. At least for the European level, this goal has not been achieved.

Turning to the domestic level, it is with element two of the OMC procedure outlined above, the creation of National Action Plans (NAPs), that involvement of the social partners may be expected at the domestic level. As Kröger (2008) has shown in her case study of the administration of the OMC social inclusion in France and Germany, social partner involvement may take place at that stage but is largely dependent on the good will of the respective governmental bodies and traditions of public-private relations (Falkner 1999).

The incentive for the social partners to get involved in the creation of the National Action Plan lies in its potential influence on substantial policies in the respective areas, as many OMCs directly touch upon issue areas where social partners are one way or another involved, either as those areas are situated in their political domain, or as they even are involved in the administration of these systems, as it for instance is the case in the northern European states. This holds especially true for the OMC social inclusion, the European Employment Strategy, the OMC on pensions, and that on health care. All of those policy fields directly touch upon questions of the labour market or flanking areas, as pensions are directly linked to contributions from the work force - at least in the first pillar of public pension schemes (Eckardt 2005). Regarding the OMC on health care, the connection to the social partners can be easily established because of the importance of social security systems in healthcare as well as in employment policies (Hervey and Trubek 2007; Hervey 2008). It could therefore be expected that representatives of labour vie with those of business for influence in the creation of National Action Plans, but Kröger (2008: 8) in her study could not find evidence supporting this expectation in the long run:

„Yet, while hopes were quite developed that the European strategy could bring a new verve to the fight against poverty, enthusiasm about the process has decreased over the years as it became clear that the impact of the OMC inclusion on policy development was very weak.“

This would mean that there is a correlation between the potential substantive policy results of the domestic part of the OMC process on the one hand and social partner or non-governmental participation in general on the other hand. Kröger (2008: 14) traces this lack of substantial results back to the lack of political will: “This lack of

political will to implement the OMC inclusion at the domestic level reflects the lack of political will to go forward with positive integration at the European level.” What the social partners therefore would have learned from their participation in the OMC is that they should not shift their focus towards the European level but stay with the traditional domestic systems, as the European level makes no difference in this regard. Such a possible effect of De-Europeanization needs further exploration. We therefore now turn to the effects of the OMC on national systems of industrial relations and national trade unions.

ab) Effects on national systems

In order to assess the impact of soft modes of governance on national trade unions' possibilities, as outlined in detail above, we have to analyze how those could influence national systems of industrial relations by either increasing pressures due to misfit between the national and the European model, due to influence on domestic opportunity structures, or due to cognitive shifts. As we take the inputs coming from the European level as stable, we can search for similar patterns of adaptation within the three models of industrial relations we have already defined. So we are able to look for some of the reasons leading to the overall transformations taking place within national systems of industrial relations in Europe, which have been called converging divergence (Marginson et al. 2002).

The inputs coming from the European level with regard to soft modes are made out of different elements, some being of procedural nature like in the case of the creation of National Action Plans, some incorporating substantive policy goals like those set out by the Lisbon Agenda on which most OMCs are based (Kröger 2006). Although the inputs are stable, the domestic starting points are not. While differences in the domestic arrangements are a necessity regarding the present research design, those differences pose some problems in the evaluation of the outcomes, as we are not able to talk in absolute but only in relative terms. We therefore are looking for trends and developments supporting the transformation of domestic systems especially towards decentralized bargaining and free-market or neoliberal policies respectively, those being the main elements of current industrial relations' and welfare state transformation (Traxler et al. 2001; Starke, Obinger et al. 2008).

aba) Contestational model

In the contestational model business – labour relations usually can be described as a zero-sum game: the gains of one side are the loss of the other side (Crouch 1993: 32). As institutional relationships are weak not only between business and labour, but also in tripartite settings, the state is the dominant actor and intervenes regularly in order to solve conflicts between business and labour, which due to the lack of other conflict-solving procedures take the form of industrial conflict. Formal participation of business and labour in the policy-making process at the same time is weak and non-binding. How could soft modes of governance now exert pressures on the possibilities of trade unions in the contestational model?

First, we turn to the degree of fit/misfit between the domestic arrangement and the European model. Ferrera and Sacchi (2004: 1 - 2) in their analysis of the European Employment Strategy and the OMC on social inclusion identify four categories of procedural objectives both share: first, vertical integration. This means the close coordination of policies at the European level. Second, horizontal integration “requiring adequate representation of functional interests and a high level of participation of such interests to the decision making process – a policymaking mode which might be called governance through social partnership“ (Ferrera et al. 2004: 2). Third, cross-sectoral integration aims at resolving the divisions between different governmental departments. Fourth, strengthening the institutional capabilities. Both, the EES and the OMC on social inclusion provide for the involvement of business and labour within the domestic process, but this provision seems to be a mere guideline, as their involvement should foster effectiveness. Gold, Cressey and Léonard (2007: 20) support this statement and describe the involvement of the social partners within the EES as follows:

„This is a much reduced form of collaboration, where social partners appear to be co-opted into a process beyond their influence. They do not participate in the determination of the objective, as ‘partnership’ has been reduced largely to a managerialist façade.“

If this is the model prompted by the European level, the degree of misfit compared to the contestational model would be small, as in the contestational model too the social

partners only play the role of an onlooker, who sometimes might be helpful, but most of the time stays outside. The choice for the social partners is only one or the other: either support the domestic part of the OMC process, including the goals set out without their involvement, or stay outside and use industrial conflict as last resort. Ferrera and Sacchi (2004: 22) have observed exactly this behaviour in the Italian case of the OMC on social inclusion. In her analysis of the implementation of the OMC on social inclusion in France, another country assigned to the contestational model, Kröger (2006) found the same situation: trade unions only played a marginal and informal role in the setting up of National Action Plans, without the possibility of substantive influence.

Turning to changes in domestic opportunity structures, pressures might occur even without the presence of a considerable amount of misfit. Usually changes in domestic opportunity structures are induced by binding acts stemming from the European level, as only with the attribution of a binding character it is possible to overcome domestic traditions. But Mailand (2008) argues that such a binding character is not necessary, as in situations of conflict, where changes in opportunity structures are decisive, even soft modes may set a frame of reference that could be used to legitimize and strengthen certain positions. Mailand in this context points to the importance of political and media debates. These could get especially important in the contestational model, as broad public support for the own position might be an incentive for the respective government to take a decision that is nearer to the public opinion. In his study on the impact of the EES in Spain, he found that public debates “often include references to the EES, and the various actors – especially the trade unions – have often used the EES strategically in order to back up their arguments” (Mailand 2008: 360). Now Spain is not an example of a contestational model, although it shows some of its elements like low union density and fragmentation, but nevertheless is usually described as pluralist or even corporatist model (Estivill and de la Hoz 1990; van der Meer 1996). But one could use the Spanish example as an *argumentum a minori ad maius*, as if soft modes are used as frames of reference in systems where patterns of institutional conflict solution exist, moreover are they logically used in systems where such patterns are not present and conflict therefore is regular. But this remains only a hypothesis without empirical evidence supporting the effectiveness of such a strategy.

Most researchers of soft modes agree that they foremost might have cognitive effects on domestic systems. But as mentioned above, case studies in this direction show a poor delivery of the researched OMCs in this respect, no matter in which underlying system of industrial relations. To the contrary, the learning effect might even be one of De-Europeanization, as substantive results stemming from an OMC are missing and social partners therefore realign their efforts with traditional domestic ways of influence. Such effects might be weaker in contestational models of industrial relations, as possibilities for participation in the policy-making process are constantly rare and social partners are used to not achieving any substantive results. Therefore the hurdle to engage in new OMCs or in an altered framework of an existing OMC might be lower, as it is still possible to gain from participation, while in pluralist or corporatist models compared to the existing participation levels engaging in an OMC process would mean a loss of participation possibilities.

abb) Pluralist model

In pluralist models of industrial relations, “the density of interaction rises” (Crouch 1993: 35). As a consequence of this increase, it becomes more and more attractive to business as well as to labour to decrease the amount of conflict present in the system. The role of the state is one of abstinence: Resolving conflicts and manufacturing consent in the field of industrial relations is understood as challenge of the social partners only – the state does not interfere and stays neutral. Taking the goodness of fit between this model and European standards into consideration, this last point might lead to considerable misfit, as soft modes of governance initiated at the European level are foremost directed at state action. We therefore find a situation where a member state due to an OMC process is obliged to tackle certain issues although they traditionally had been discussed by its social partners autonomously. OMC processes therefore would introduce state intervention into pluralist models. But this as it seems has not been the case. Heidenreich and Bischoff (2008: 517), in their study on the European Employment Strategy, suggest two reasons for this: first, the setting-up of National Action Plans has no decisive influence on the formulation of national employment policies. If those plans are ultimately irrelevant, no one has to be worried about its possible effects. Second and partly explaining this irrelevance,

the misfit between the substantive policies enshrined and/or recommended in the European Employment Strategy and those already existing in countries with pluralist models like the United Kingdom is low. Therefore the need to take action is not given. Heidenreich and Bischofs argument is supported by a study of Armstrong (2006) on the adoption of the OMC social inclusion in the United Kingdom: although he does not focus on social partners specifically, Armstrong analyzes the involvement of social NGOs in general (including trade unions) within the domestic OMC process, as broad consultation with NGOs is one of the guidelines of the OMC social inclusion. Although Armstrong remarks that creating the National Action Plan on social inclusion has “redistributed the opportunities both for civil servants and for civil society to engage in dialogue on issues of poverty and social exclusion” (Armstrong 2006: 92), the substantive policy results are not present and that learning effects are not present either:

“However, the somewhat cool attitude of the Treasury towards NGO involvement in the domestic Lisbon programmes and the concerns surrounding the future of the ‘mobilisation’ objective within a streamlined OMC on social inclusion and social protection indicate that the battle may be more one of maintaining what has been achieved and less one of expanding the scope of NGO engagement beyond the NAPincl.” (Armstrong 2006: 94)

If we now focus on changes in domestic opportunity structures and cognitive effects, there is not much difference compared to contestational models. Also in pluralist models, opportunity structures may shift due to increased access to information or the role of European policies in public debates. Nevertheless, this does not seem to be of greater relevance, as the latest citation of Armstrong shows as well. Regarding learning effects Kröger (2006) has summarized various studies about the OMC social inclusion and comes to the result that general assumptions about such learning processes cannot be confirmed. Studies about other OMCs like the European Employment Strategy and the OMC on pensions have delivered similar results (Eckardt 2005; Heidenreich et al. 2008).

abc) Corporatist model

In the relationship between business and labour there might come a moment where both sides “try to play their conflicts in the context of the pursuit of certain joint interests” (Crouch 1993: 39-40). They then move from a pluralist model towards what we call corporatism. The high level of business – labour interaction in corporatist systems usually is coupled with high organizational density on both sides, enabling to burden each other with considerable costs in cases of conflict. Although conflict is rare, it constantly looms above the heads of both sides. According to Van Ruysseveldt and Visser (1996: 27), it is overlapping and integrative value systems that stabilize corporatist systems. This includes common goal-setting. If now goal-setting is externalized like in the case of OMC processes, those goals might either be seen as illegitimate influence or increase the instability of the system, as the benefit-cost-calculations of either business or labour might change (Crouch 1993: 40-47), if domestic procedural standards are not met. While the potential effects of OMC processes are high, there is no evidence anywhere in the literature that destabilizing effects have actually taken place. Somehow, this comes as no surprise, as it is easy to resolve tensions between national and European goals. Hervey for example shows how several member states in their National Action Plans either ignore or *expressis verbis* reject goals set out at the European level (Hervey 2008: 110). Such a result would have been expected according to the regulatory misfit approach, as misfit is too high and therefore it does not disturb the existing domestic path. Instead European goals are rejected. As domestic structures are cemented, also shifts in opportunity structures are hardly possible. Regarding cognitive shifts, the situation is the same as in the other two systems.

ac) Conclusions

Soft modes used in the context of the European Union have been hailed (Schäfer 2006) as solution to the stagnation of the integration process in certain policy fields which are of high domestic concern. Goetschy concluded that „the more nationally sensitive a subject and the more difficult to resolve at national level, the more likely are member states to become involved in an EU coordination procedure“ (Goetschy 1999: 133). Nevertheless, many problems have been identified which might obstruct the potential of soft modes and by now it seems as if there is academic consensus that those problems remained unsolved. In the present context it therefore is not

surprising that it was not possible to detect any substantial influence of soft modes employed at the European level on possibilities of national trade unions – no matter in which system of industrial relations. In the present research design it would have been a precondition to detect similar developments in all three systems in order to conclude that there is some influence. Of course, the potential of some of the OMC processes that have been started proved to be high, but could not realize. Procedural arrangements largely stayed the same. The only exception is formed by the increased access to information, which participants in OMC processes enjoy in systems where consultation usually does not take place at all. To speak of the creation of issue networks (Falkner 1998: 43) would be exaggerated though, as mutual dependencies are missing. Some authors at the same time have detected policy change that originated from OMC processes, may it only be slight though. Approaches focussing on policy aspects therefore seem to be more appropriate compared to those focussing on politics.

b) Social dialogue procedure

ba) Description of the social dialogue procedure

In the second chapter the evolution of the social dialogue procedure and the explanations behind the emergence of the social dialogue procedure have been described. Now we take a closer look into the procedure that might lead to social partner agreements at the European level in order to be able to assess in a next step the effects on the national systems along the lines of misfit, changes in opportunity structures and cognitive shifts.

Since the Treaty of Amsterdam, the social dialogue procedure is embedded in Articles 137, 138 and 139 of the EC-Treaty, which before Amsterdam have been Articles 2 to 4 of the Social Protocol annexed to the Treaty of Maastricht. The involvement of the social partners laid down in these provisions consists of several elements (Falkner 1998: 82-83):

- **Obligation to consult:** If the Commission wants to put forward proposals in the field of social policy (i.e. on the legal base of Art. 137 EC) it is obliged to consult the social partners. This consultation has to take place twice and before the proposal is submitted: first social partners have to be consulted on the general principles of the proposal (Art. 137 par. 2 EC) and if the Commission wants to continue, a second consultation has to take place on the details of the proposal – again before the proposal officially is submitted (Art. 137 par. 3 EC).
- **Autonomous negotiations:** Art. 137 par. 4 EC provides for the possibility that the social partners together inform the Commission that they want to try to strike an agreement autonomously. This means that on the one hand the representatives of business and labour have to agree that they want to enter negotiations and on the other hand that the Commission for a maximum time of nine months is not allowed to pursue the proposal on its own.
- **Council decision:** If the social partners are able to agree on a joint text within the mentioned period of time, they can choose to ask the Council to adopt their agreement and thereby incorporate it into Community law – including all consequences like jurisdiction of the ECJ. Usually qualified majority is needed for such an adoption, except the agreement touches matters which are reserved to unanimous decision.
- **European wide autonomous implementation:** If the social partners are unwilling to ask the Council for adoption of their agreement, they also may choose for autonomous implementation “in accordance with the procedures and practices specific to management and labour and the Member States” (Art. 139 par. 2 EC).
- **Domestic autonomous implementation:** According to Art. 137 par. 3 EC national governments may entrust the representatives of business and labour in their own countries with the implementation of acts adopted in the field of social policy. In such a case, the national government just has to secure that the deadlines for implementation set out within the act in question are met.

This is a very powerful set of possibilities social partners may use at the European level. One has nevertheless to be careful to state that those provisions enable autonomous bargaining of the social partners at the European level:

“Although there is an accepted convention that Council may not amend social partner agreements presented to it for ratification, it does have the power to reject them and to request the Commission to put forward a new legislative proposal through the ‘normal’ legislative procedure.” (Compston 2001: 9)

Important in the present context is furthermore the major role of business and labour at the national level in this process. This role is further underpinned by the recent developments in the social dialogue procedure, which shifted from striking ‘hard’ agreements adopted by Council decision to ‘soft’ autonomous agreements with autonomous implementation. Gold, Cressey, and Leonard (2007: 20) conclude that “the location of social dialogue has been redirected away from the EU intersectoral and sectoral levels towards ‘decentralization’ at the national level” and that this is a result of the general shift in the area of social policy towards soft modes of governance, ultimately weakening the role of the social partners as their involvement in soft modes is largely decreased compared to the social dialogue procedure. One might ask how this is possible, as it could on the first view not be in the interest of the European-level associations to return competences to the national level. But if one takes a look at the internal decision-making processes of BusinessEurope on the one side and of ETUC on the other side, it is absolutely clear that the national member organizations are eager to control every move of their European umbrella organizations, leading Dolvik (1997) to characterise ETUC as “loose alliance of national peak associations” (p. 171), which even after its reorganisation in 1991 was not able to considerably move away from decentralism, and BusinessEurope (UNICE at that time) as marked by a “strong ‘intergovernmentalist’ legacy of consensual decision-making” (p. 180). Nevertheless, there has been some success: three social partner agreements concerning parental leave (1995), part-time work (1997), and fixed-term contracts (1999) have been adopted as directives by the Council. From 1999 until 2009, no agreements have been sent to the Council for adoption, as the social partners – starting with the agreement on telework – preferred to choose autonomous implementation. Two more such agreements followed, the last one in

2007 on harassment and violence at work (European Commission 2009: 105). In the middle of 2009, a revised version of the parental leave agreement has been sent to the Council for adoption. It has to be mentioned, that this information just refers to the cross-sectoral form of the social dialogue. In the sectoral European social dialogue, social partners in more than thirty different sectors also engage in negotiations, with a considerable amount of output (European Commission 2009: 110-113). Therefore, since 1991 social partners at cross-sectoral and sectoral level have committed themselves to various goals they have commonly set. They would not have been able to do so without the support of their national member organizations, as the short side-step into the internal decision-making processes of the two largest social partners has shown. One might therefore assume that the social dialogue procedure has not been without effect on the domestic systems. It is to those effects we now turn to.

bb) Effects of social dialogue procedure on national systems

Assessing the effects of the social dialogue procedure on the possibilities of national trade unions faces some problems, as the ways of influence differ largely due to the several possibilities that are open to the social partners. As those range from 'hard' adoption through the Council until 'soft' autonomous implementation, it is not possible to make statements for the social dialogue in general. In the present context we therefore separate between the soft and the hard outputs of the social dialogue. Apart from that, the approach will be the same, regarding all three ideal-types of national systems of industrial relations behind each other, looking at the degree of misfit, the changes in domestic opportunity structures and at cognitive shifts within each of the systems.

bba) Contestational model

Comparing the European social dialogue, which created the possibility to close the "corporatist decision-gap" (Falkner 1998: 75-76) at the European level, with the contestational model of industrial relations does not reveal too many similarities, as cooperation between business and labour is a precondition for the emergence of

corporatist patterns (Crouch 1993: 39-40), while contestational models are dominated by the adversarial behaviour of the actors involved. In this sense, misfit is very high and adaptational pressure alike. But as path-dependencies and the stickiness of institutions prevent 'revolutionary' breaks within long-used traditions, this pressure is not going to have any effect. So the theoretical assumption goes. But one must not forget that the social dialogue procedure itself does not directly impose binding acts on the national systems, it always needs intermediary actors – be it the Council or the national representations of business and labour themselves. Choosing the first alternative would mean that the process of implementation is analogous to every other Community act, involving foremost governments, if they do not choose to delegate implementation to their own social partners (Art. 137 par. 3 EC). If implementation of social partner agreements follows the traditional paths of the community method, the degree of misfit would indeed realize, as those representatives of labour not used to collective bargaining in an institutionalized manner would need to turn to their European umbrella organizations and enter a new mode of cooperation. But this following the basic assumptions of the regulatory misfit approach would not be realistic, as they would prefer to resist those 'external' pressures. We will come back to this in the following section.

If the second alternative, autonomous implementation, is chosen, the domestic social partners themselves intermediate, enabling them to make adaptations to the European-level agreement in line with their domestic traditions, which reduces the degree of misfit. Furthermore, because of the double involvement of the national social partners in the policy process, a higher level of commitment could be expected. Double involvement means that the representatives of business and labour are first involved via their European umbrella organizations in the creation of the agreement and then again at the national level in its implementation, which usually needs an additional agreement. Autonomous implementation might follow several different ways, as the implementation report of the agreement on telework adopted by the Social Dialogue Committee on June 28th, 2006, shows (ETUC, UNICE et al. 2006): either another autonomous social partner agreement, or a collective agreement with legally binding force, or a legislative act by the government on demand of the social partners, or – finally – mere guidelines and recommendations to lower levels of bargaining at sectoral or company level.

If one looks at the implementation of the agreement on telework in countries which are usually assigned to the contestational model like Italy, France, Greece, and Portugal (Ebbinghaus et al. 1997: 337)⁷, one finds surprising results, as in three of these countries implementation was carried out by collective agreement. In France and Greece, the government in addition assigned erga omnes effect to those collective agreements, making them binding upon all employees in those countries (European Commission 2008). Similar results can be found regarding the implementation of the social partner agreement on work-related stress, where collective agreements have been signed in France (inter-sectoral) and in Portugal (sectoral), with negotiations still going on in other countries (ETUC, BusinessEurope et al. 2008).

Even in contestational models, collective agreements - as we see - are sometimes agreed upon. Now this is something that does not fit into the adversarial picture of the contestational model. What thus seems to be an anomalous situation indeed is a result of the logic beneath the contestational model. Crouch in his "Theory of Exchange" of the contestational model (Crouch 1993: 31-35) has argued that basically business – labour relations in this system are a zero-sum game, where the gain of one side automatically matches the loss of the other. Incentives for cooperation are just given if the costs stemming from a potential agreement are lower than the costs a potential conflict would produce. But as in case of conflict usually both sides suffer in one or the other way, contestational models in fact realize negative sum games, as no matter who in the end wins, the potential benefit of victory will be decreased by the conflict costs. It would therefore be rational if both sides try to reduce conflict costs. But Crouch mentions three scenarios where this is not going to happen: first, one side might think that in the long run it will get a lower share of conflict costs by pursuing conflict than its opponent. Second, one side might think that the conflict costs could be increased to an amount that destroys the conflict capacity of the other side. And third, one side might think that those costs the other side saves in the present conflict will increase its capacity in the next conflict. A key element in all three of these scenarios are the expectations of the involved actors

⁷ Ebbinghaus and Visser also mention Spain, but as the discussion in van der Meer (1996) shows, Spain has transformed in a corporatist direction.

and their prediction of future developments. Here, the involvement of the European level might make a substantial difference.

Making predictions about possible costs of conflict is a hard job, but as conflict for sure imposes some costs, it would be better to prevent conflict except in those scenarios mentioned above, where at least one side expects increased benefits from conflict. But here again a judgement about potential costs and benefits has to be made. Autonomous social partner agreements at the European level include that there has been agreement on the question whether or not business and labour may profit from such an agreement. Although it is not clear what exactly the benefits or potential costs of non-agreement are, it is clear that neither side would have had agreed at the European level if it would have been to its disadvantage. Therefore, the three scenarios avoiding cooperation in contestational systems will not come into effect:

Regarding the first scenario, it must be clear to domestic social partners that by waging conflict in their state, they will not succeed in influencing the overall relationship between business and labour in Europe. Therefore they cannot expect to get more concessions in the long run than their opponent, they would be moreover burdened with conflict costs as well. Therefore the first scenario is not a reason for non-cooperation.

What concerns the second scenario, it is absolutely unrealistic to destroy the conflict capacity of labour (to destroy business is not really an option to labour) in all member states by just waging conflict in one country. As long as there are enough other member states where cooperation is the dominant procedure, there is no incentive for business in the contestational model to wage conflict, as again they would just have to carry the conflict costs.

From those first two scenarios it becomes clear why autonomous social partner agreements might influence domestic systems although it seems as if the degree of misfit is too high in order to expect successful transformation. The key lies in the framing of the domestic negotiations by the European level agreement. It thus becomes possible to set a standard level of agreement to which the domestic social partners might return if they are unable to make a proper cost-benefit calculation of deviation from the European-level proposal. The European social partner agreement

therefore serves as compromise that has been struck before negotiations even have started at the national level.

If we now turn to the last scenario, we also have to take into account how the domestic opportunity structures might be changed: conflict around issues already agreed upon at European level would lead to a zero sum game regarding the conflict costs, as both sides are able to call upon the European level to intervene – or just have to wait as finally the Commission has made clear that it shares the goals the social partners have set out in their agreement. The side that blocks the transposition (i.e. the domestic agreement) would just be able to gain some time by this strategy, at the same time having to carry the costs. If the benefits from getting more time are higher or the expected costs stemming from European level intervention are lower than the conflict costs, this nevertheless might be a reason not to cooperate.

Another effect of autonomous social partner agreements might be found at the cognitive level. As has already been mentioned, the agreement of business and labour at the European level might have an effect on the cost-benefit-calculation of the involved actors. At the same time, there could also be cognitive effects. If one assumes that the loyalty between domestic and European representatives of business or labour is higher than that between domestic business and domestic labour, the positive attitude of the European level representatives towards a proposal might take away doubts about the content and benefit of the proposal. Due to the adversarial climate between business and labour in the contestational model, this is most likely in contestational systems of industrial relations. In this sense, the loyalty of domestic actors would be with the efforts of their European counterparts, which they do not want to jeopardize.

bbb) Pluralist model

Characteristics of pluralist models of industrial relations are an abstentionist role of the state, weakness of centralized bargaining institutions, and a low associational density on both sides (Visser and van Ruysseveldt 1996). Nevertheless, interaction between business and labour takes place at lower levels and is institutionalized to

some extent. The reason for this institutionalization lies in the potential conflict costs: if these rise above a certain level due to increased strength of one side (usually labour) or due to increased interaction, both sides will come to the conclusion that they in the long run would profit more from modest cooperation. The goal of this cooperation therefore lies in avoiding conflict (Crouch 1993: 36) instead of achieving shared social or economic goals like in the corporatist model.

If we now, first, try to analyze the degree of misfit between the pluralist model and the European social dialogue, we again have to distinguish between the path of implementation that has been chosen. If European social partner agreements are implemented by a Council decision, they in fact are addressed at member states' governments. It is up to them to secure implementation either by law or instruct their national social partners to engage in negotiations. In the pluralist model, the state therefore has to act as procedures to attach erga omnes effect to social partner agreements usually are missing because of the principle of neutrality of the state in industrial conflicts. What has started as social partner agreement at the European level in this way becomes an incapacitation of the social partners at the domestic level. As this is not different to any other acts of Community law in the social field, we will consider these aspects in the section on harmonization.

Autonomous implementation of European social partner agreements by the national social partners faces similar problems, but state intervention is not necessary and it is therefore possible to stick to the principle of neutrality. The lack of centralized bargaining structures poses a serious problem though: how could nation-wide implementation of European social partner agreements be secured despite of highly fragmented bargaining structures? As the road of coercion is blocked on every side, non-binding instruments like recommendations are the only possible approach. But even the usage of non-binding instruments at the national level is a considerable innovation: the incentives of European social partner agreements are strong enough to prompt tripartite action at the national level where such coordination was not in place before.

“The UK industrial relations system makes no provision for formal cross-industry collective bargaining, and the CBI and TUC [the peak associations of business

and labour; author's note] do not negotiate such agreements on behalf of their members. There was thus no precedent for a more robust instrument which the UK social partners could have used to implement the Framework Agreement.” (European Commission 2008: 33)

Why tripartite action? The implementation in the United Kingdom of the European social partner agreements on telework on the one side and on work-related stress on the other side show that in both cases the government played a considerable part, although it did not interfere directly in the negotiations. In the case of work-related stress, the responsible public authorities provided funding for dissemination activities, themselves engaged in dissemination by creating information material, and installed working groups. In this case, the government's activism could be motivated to some extent by the finding that central and local government are among the five sectors with the highest levels of work-related stress (ETUC et al. 2008: 26).

This pattern of tripartite non-binding action can also be found with regard to the telework agreement: here the UK social partners jointly published a 'guidance brochure' which incorporated the provisions of the European agreement. On the one side, the social partners themselves draw the attention of their members towards this brochure, on the other side the government has published the brochure as well.

The weakness of this approach is obvious, as due to the non-binding character of the brochure it is completely unclear if its content will be embedded into work-contracts or collective agreements at all. Unfortunately, research on actual implementation is missing.

Nevertheless, the emergence of cooperation patterns at the central domestic level seems to be the result of adaptation pressures stemming from the European level.

Three explanations are possible:

- either the autonomous implementation of European social partner agreements reduces the misfit to such an extent that it is still strong enough to induce change but does not prompt resistance, or
- the domestic opportunity structure has been changed, or
- cognitive effects have persuaded the relevant actors to move on with implementation according with European standards.

The misfit approach has good arguments on its side: while the autonomous implementation enables the national social partners to act within the paths laid by their own systems, nevertheless the European level has set the agenda and prompted action on this issue, while otherwise it most probably would not have been a priority topic. But if the national social partners would have been able to ignore the European proposal, why did they nevertheless introduce central coordination? Or asked differently: what exactly is adaptation pressure, if there are no coercive measures to sanction non-compliance?

In order to answer this question we take a closer look at domestic opportunity structures. In the usual situation of the pluralist model it is completely up to business and labour to resolve their conflicts or to negotiate agreements. If conflict resolution or negotiations fail, state intervention is most unlikely. This has in the case of the United Kingdom been described as “a system of collective laissez-faire” (Visser et al. 1996: 43). With the state as neutral actor, the industrial relations system presented itself as encapsulated subsystem, where the logic of the system could work without external disturbance. Adding the European level therefore means that the government could have to act in policy fields, which beforehand were assigned to social partner regulation. Now this is for sure the case with acts of Community law, but autonomous agreements of the European social partners are not sanctioned directly. But it has to be remembered that even with autonomous social partner agreements, the ‘shadow of the law’ still is alive. This means that if one country fails to implement the autonomous agreement properly, the Commission might still consider the goals of the agreement as important enough to submit a new legislative proposal – this time by means of Community law. Either European business or labour would then be in the position to accelerate this process by not agreeing to start social partner negotiations again. It then would depend on the Commission’s position and of course on the necessary majority in the Council. All in all, free-riding is not an alternative to domestic social partners, as in the long run they would have to cope even with issues that made part of autonomous social partner agreements in the first place. In a long-term perspective, this makes a strategy of blockade unattractive, as long as intervention of the Commission looms.

Finally, cognitive effects might stem from the involvement of the national representatives of business and labour within their European umbrella organizations. As with the social dialogue procedure in place at the European level, the cooperational patterns there could induce learning effects at the national level as well. This would mean that in certain areas where negotiations have taken place at the European level, loyalty with the representatives of the own side could lead the domestic actors to easier accept the standards set at the European level.

bbc) Corporatist model

One of the most important differences between pluralist and corporatist models of industrial relations is the degree of centralization of the collective actors of business and labour. While in pluralism, the structure of business associations and trade unions is fragmented, in corporatism it is concentrated (Visser 1996c: 28). This concentration enables bargaining that includes a long-term perspective and the pursuit of common goals. Moreover, due to their powerful situation, social partners in corporatist models have a wider array of possibilities at their disposal, which especially includes inter-sectoral collective agreements negotiated at the level of national peak-associations. Nevertheless, in implementing the social partner agreements on telework and work-related stress, the social partners in corporatist countries followed completely different paths. What is striking is the high amount of non-binding measures that have been taken by corporatist social partners: recommendations and guidelines to lower bargaining levels have been used as instruments in Austria (final agreement yet missing), Denmark, Germany, Finland, and Sweden, sometimes accompanied by collective agreements at the sectoral level, sometimes not. In the case of the implementation of the telework agreement in Sweden, the national-level social partners agreed on common guidelines how to fulfil the provisions stated in the European agreement. Astonishingly, the representatives of labour sometimes have been satisfied with mere informational activities:

“In other cases, the matter has been discussed between the social partners and employers have taken the responsibility of informing their members of the provisions of the EU framework agreement so that they serve as guidance when concluding an individual agreement on telework.” (ETUC et al. 2006: 9)

That the Swedish representatives of labour leave the protection of individual employees to their employers even in a model where as well labour as business act integrative is a surprise, but it brings us to one possible explanation of the reluctance of social partners in the corporatist model to implement European standards with hard law as collective agreements. What countries in the corporatist model share is a high level of protection of individual employees. This level is far higher than those levels granted to employees in contestational or pluralist models. But agreements struck at the European level always are a compromise between the various systems present in Europe, so that in the end the corporatist level of protection for sure will not be reached. Fully implementing the European standards therefore would mean that the level of protection in corporatist models in fact is decreased, although those standards aim at protecting employees. Therefore the degree of misfit is a mixture between the good intention of the European agreement and its substantial provisions.

Non-binding measures therefore are a welcome tool, as especially labour does not want to risk to endanger levels of protection already achieved, but at the same time might miss the opportunity to grant increased protection to workers in circumstances not thought about, for instance non-regular jobs. The decision, whether additional protection is necessary, therefore is left to lower levels of bargaining or even to the individual employee, as centralized organizations except for homogenous sectors like public administration (e.g. the collective agreements in this sector in Sweden) are obviously not able to account for all potential costs and benefits in these new situations of work. This is the rationality underlying the pluralist model for a long time already: decentralized bargaining fits the requirements of business and labour better. Acting in such a way might prove dangerous for trade unions: If the central organizations of labour are not able to negotiate satisfying agreements, the individual employee might want to have more leeway in his contractual negotiations with his employer, building up pressure to deregulate the working relationship even more. Such cognitive effects in the beginning might not endanger the whole system, but start transformations, which might lead to a different system of industrial relations. Crouch (1993: 38-40) has lined up three situations where the foundations of the corporatist model would be upset:

- First, increasing the levels of protection of the individual employee due to its positive connotation is a shared goal of business and labour. If business wants to achieve another more conflictual goal, it just has to establish a direct connection between the conflictual goal and the common goal. If business is able to reasonably argue that without agreeing on the conflictual goal the common goal would be in danger, pressures on labour to agree are high, even if they otherwise would not have agreed. If such a strategy becomes obvious, the base for long-term bargaining would be diminished.
- Second, it is a hard job to determine whether an issue has the potential to be a positive-sum game and therefore one that could be shared by business and labour together. If the costs of one side are deemed too high, there will not be cooperation. The creeping decentralization of bargaining could induce considerable costs at least for trade unions, although they originally intended to raise the levels of protection of individual employees.
- Third, if the decentralization has already gone too far, there could be not enough left to bargain about – at least at the central level.

Of course, all three of those scenarios are far away from being reality in the corporatist model, but they show the potential effect of inputs from the outside of the domestic industrial relations system.

bc) Conclusions

While soft modes of governance in the form of the Open Method of Coordination do not create pressures on domestic systems of industrial relations, the soft approach of the European social dialogue and the corporatist policy community do so. In all three different models of industrial relations we have found developments that were set in motion by autonomous social partner agreements at the European level. Although at first glance those developments are not the same, as in two cases there is pressure towards increased centralization, while in one case we find pressure towards decentralization, all three systems despite their differences might converge towards

each other. This convergence at the moment might be restricted to issues at the edge of the employment relationship, but the same issues will get more important in the future as they make part of general trends in the employment relationship like individualization and increased regulation.

4. Social vs. economic sphere – which place for workers' interests?

a) Harmonization in the social and other fields

aa) Description of the Community method

Although binding legislation - as has been shown above - also happens as a result of the social dialogue procedure, the instruments used there are the same as in the so-called Community method. This term refers to the regular decision-making procedures at the European level, where under involvement of the European Commission, the Council of the European Union, and the European Parliament, legislative proposals in the field of the EC-Treaty are made into law as regulations or directives. The EC-Treaty in Article 249 also mentions a third category of binding acts called decisions, which have binding force only upon an individual person and are especially important in competition law. The procedures leading to the adoption of a legislative proposal may differ considerably, especially with regard to the involvement of the European Parliament, but there is a general trend towards increased involvement of the European Parliament (Chalmers et al. 2006: 111-120).

Regarding the representation of workers' interests in particular and of the social partners in general, an important distinction has to be made between those legislative acts that are based on the social policy provisions of the EC-Treaty and those that do not. The reason is simple: one of the guiding principles of European law is the so-called principle of conferral (also called principle of attachment). It has its legal base in Article 5 EC where it is stated: "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein." The European Union does not have general law-making power, it always needs a legal base within the Treaty in order to act, as only then the member states have agreed upon transferring some of their legislative powers to the supranational level. But the restrictions to national sovereignty member states are willing to accept differ from policy field to policy field, as some of them are of more importance to

domestic politics than others. In every policy field covered by the Treaty, we therefore find a different amount of competences, different procedures, and different actors. The social dialogue procedure only exists within the limits of the social policy provisions of the Treaty. The extent of the social policy provisions is described in Article 137 par. 1 EC:

“With a view to achieving the objectives of Article 136, the Community shall support and complement the activities of the Member States in the following fields:

- (a) improvement in particular of the working environment to protect workers' health and safety;*
- (b) working conditions;*
- (c) social security and social protection of workers;*
- (d) protection of workers where their employment contract is terminated;*
- (e) the information and consultation of workers;*
- (f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;*
- (g) conditions of employment for third-country nationals legally residing in Community territory;*
- (h) the integration of persons excluded from the labour market, without prejudice to Article 150;*
- (i) equality between men and women with regard to labour market opportunities and treatment at work;*
- (j) the combating of social exclusion;*
- (k) the modernisation of social protection systems without prejudice to point (c).”*

Read alone, this list except for wages includes the most important areas of the employment relationship. But if this is the legal base for social policy, what at the same time means that the member states already agreed to integrate those areas, why is the degree of integration in the overall field of social policy not higher? The answer comes in the subsequent paragraph of the Treaty: only with respect to the points (a) to (i) is the European Union allowed to adopt binding acts at all. Combating social exclusion and the modernisation of social protection system therefore is limited to coordination measures (cf. the part in this thesis on soft modes).

Even within the areas where binding legislation is possible, the rules of procedure may hinder legislation. In the cases of social security and social protection, job protection, workers' representation, and third-country employees, an unanimous decision of the Council is necessary in order to adopt measures in these areas. This makes it rather hard to reach an agreement (Pierson et al. 1995: 8-9). Also the social dialogue procedure is limited to those areas where the European Union has competences at all. As has been mentioned, it is not the case that social partner agreements are changed by the Council members, but nevertheless they might be rejected. It is therefore a good idea to stay within those limits set by the potential resistance within the Council. This means that although the social dialogue procedure grants considerable powers to the social partners, the scope where it could be used is limited to a rather small area given the magnitude of policy fields outside of social policy where the European level actually has a role, especially market integration, and the social partners are not involved, although considerable pressures on social policy stem exactly from those fields.

But how does social partner participation in general and workers' participation in particular look like in other areas than social policy? For sure, the social dialogue procedure forms the most influential mode of participation of the social partners at the European level, but beside this procedure, there is a considerable gap of participation possibilities of the social partners. In fact, there is just one formal involvement provided for in the Treaty – the European Economic and Social Committee (EESC). About two thirds of the Committee members are representatives of business and labour, the remaining third is reserved for various non-governmental organizations (Jesús Butler 2008: 564). The EESC has mere advisory status, but this advisory status exists in most policy fields covered by the EC-Treaty. In 30 cases (for a list see Chalmers et al. 2006: 129), consultation with the EESC is compulsory, meaning that it is not possible to adopt a legislative act without having heard the EESC before, although – of course – being heard does not mean to be able to make changes to proposals. Changes may just be suggested, as is the nature of an advisory status. In any other field, where there is no obligation to consult the EESC according to the Treaty, the European Commission, the Council and the European Parliament may nevertheless consult the Committee, if they deem this appropriate. The EESC itself in addition to this has the possibility to “issue an opinion on its own

initiative” (Art. 262 EC). Taken together, the EESC has the unique power to give an opinion on all matters of the Treaty and therefore on all legislative proposals. But its position remains weak and during the Delors era it was judged that the EESC “was too weak to fulfil the role of a social partners’ committee” (Schroeder and Weinert 2004: 203). Beside those formal consultation procedures, informal patterns are constantly present in European law-making (van Schendelen 2005; Greenwood 2007). Nevertheless, institutional power establishes the frame in which those informal processes take place. The privileged position within the whole European law-making process of the social partners can be based upon the same arguments that led to the emergence of the European social dialogue – foremost legitimacy and effectiveness. If there is by far more procedural participation of social partners in the social policy field than in other fields, adaptation pressures on domestic systems of industrial relations stemming from hard law could be expected to be lower in those fields than in other fields, as social partners should be able to oppose problematic provisions there more powerful than otherwise.

ab) Effects of the Community method on national systems

Hard law in the social field usually takes the form of directives, which have to be transposed into national law within a certain period of time provided for in the directive itself. As we have seen, the way of implementation is left to the member states: they may adopt new or change existing legislation or ask the domestic social partners to reach an agreement on the implementation by collective agreements, which then might be attached with *erga omnes* effect by the state. There are differing assumptions on the effect of social partner involvement in this transposition process: on the one side it might be expected that social partner involvement leads to better law-making and increased implementation success, as the societal base of regulation is broader. On the other side, social partner participation increases the amount of (arguably factual) veto-players (Héritier 2001) and therefore makes the transposition process more difficult, leading to various problems due to lengthy discussions and blurred solutions. As Falkner et al. (2005: 304-305) have shown in their study on the implementation of various social policy directives, none of those two assumptions seems to be true in general: “Our empirical results indicate that there is no systematic relationship between a certain category of social partner involvement and

a particularly good or bad transposition record.” What matters therefore are the specific circumstances of the case, but within the framework which is set by the model of industrial relations in which it takes place.

aba) Contestational model

In the contestational model, the relationship between business, labour and the state is one of hierarchy: the state is clearly dominant and regularly has to resolve the enduring conflicts between business and labour that stem from the fragmentation on both sides of industry. Possibilities for collective agreements exist on paper, but in practice they are hard to achieve. Of course, autonomous collective agreements are always possible. Problems arise around the question of erga omnes effects and judicial protection: To achieve the widening of the applicability of collective agreements to all employees and opening judicial protection in the courts, state action is necessary. Collective agreements therefore have to be declared as owning erga omnes effect by the respective constitutional bodies. In most cases this is done by governmental decision or decree (Leiber 2005). But in the contestational tradition, collective agreements nevertheless are the exemption to the rule of state legislation, as the obstacles to cooperation are too high (Crouch 1993: 31-35).

When it comes to the implementation of European directives in the field of social policy, differences to the usual patterns can be observed in countries with a contestational model, especially when the social partners at the European level had negotiated those directives according to the social dialogue procedure. In Spain, Italy and Greece, the transposition of the Parental Leave Directive started in an unusual way, as Falkner et al. (2005: 254-257) point out. In all three countries there are indicators that directives stemming from the social dialogue procedure possess a normative value and promote a role model of industrial relations. Such indicators could be found in autonomous social partner efforts to implement the directives, government efforts to promote autonomous implementation (Spain) and the creation of bi- and tripartite bodies (Greece). Although most of these efforts failed for various reasons, it is clear that the procedure applied at the European level can have an effect on the national industrial relations system. Nevertheless, those effects must not be overestimated, as the Spanish example shows in more detail, where despite

of government incentives the social partners were not willing to engage in negotiations:

“But obviously neither side estimated the possible gains for their clients or the advantages for strengthening the social partners’ national position as being any greater than the potential costs of the conflicts they expected to occur over how to implement the soft-law provisions of the Directive.” (Falkner et al. 2005: 255)

It has to be mentioned that the substantial level of protection foreseen in the directive and the level of protection already existing in Spain were more or less the same. Adaptation pressures therefore have been low, leading to the situation that no shifts in the cost-benefit calculation of the social partners were induced.

The Italian example shows how European directives have an influence on domestic opportunity structures: the social partners used the incentives coming from the European level to upload the discussion and struggle for a complete renewal of the existing regulations (Leiber 2005: 192). This has been possible, as Leiber argues, due to the fact that the European social dialogue served as role model for the procedures envisaged to implement European directives in the social field, remarkably not only those originating from the social dialogue procedure. A finding that supports the idea behind the ‘corporatist policy community’ (Falkner 1998). This development comes in combination with a general transformation of the Italian industrial relations system going on since the 1990s (Visser 1996a). As well the Italian social partners as the Italian government have taken measures that move the Italian system of industrial relations towards more cooperation. According to the “theory of exchange” of Crouch (1993: 35), if “for some exogenous reason the density of interaction rises”, “both capital and labour are likely to decide that, in the long run, they would stand to gain from a reduction of conflict”. By promoting cooperation the incentives stemming from the European level could be such an exogenous reason and therefore ultimately lead to a shift away from a contestational model of industrial relations.

abb) Pluralist model

In the pluralist model the density of interaction between business and labour is higher, with bargaining taking place at company and sectoral level but without cross-sectoral coordination due to weak peak associations (Visser 1996c: 37). The abstentionist role of the state prevents state intervention in case of conflict, but also means that both sides of industry are blocked from access to governmental decision-making, as there is big trust in the principles of the free market that finally will contribute to the best solutions without state influence. Of course, informal relations between the social partners on the one side and the government on the other side exist. Taking the United Kingdom as an example shows that it highly depends upon the governing party how informal relations look like. Nevertheless, they remain weak compared to other forms.

Adding the European level, a new channel of influence for both sides of industry opens up, especially when we talk about the European social dialogue procedure. In the last chapter, we already have discussed some of the key influences of the European level on the pluralist model, especially the strengthening of centralized structures and the doom of long-term blockade. The picture that evolves is that taking the “Brussels route” (Greenwood 2007: 30 et seq.) seems more promising to the social partners of pluralist models than pursuing solutions at the national level. This is the result of two parallel factors: first, there is a considerable gap between the domestic possibilities and those at the European level, as only the European level grants access to state power and authority. This is a new opportunity structure that enables the social partners to exert pressure on their national governments even if they are in a weak position in the domestic arena. Second, the misfit between the extent of social partner participation at the national and at the European level increases pressures on national governments to strengthen the involvement of national social partners, as this is seen as part of good governance.

Those two factors have been supported by the findings of Falkner et al. (2005: 254) regarding the role of British trade unions and business associations in the transposition of social policy directives: “The government wanted to profit from this insider knowledge at the implementation stage and thus had an interest in holding intense discussions with those who had been sitting at the negotiation table in Brussels.” Here, again, the European level participation contributes to a stronger role of social partners in the domestic arena.

abc) Corporatist model

Although all systems belonging to the corporatist model share that their social partners pursue common long-term interests, there might nevertheless be differences in the role of the state (cf. the difference between the various definitions of corporatism and social partnership in chapter 1). While especially in the Scandinavian systems the state has a rather abstentionist role, in Austria and Germany it is tripartite bargaining with a strong role of the state – at least when it comes to implementation. These differences have been accounted for in the EC-Treaty with the so called ‘Christoffersen clause’ (Falkner and Leiber 2004: 247) that provides for autonomous social partner implementation of social policy directives. Autonomous implementation means that the social partners conclude collective agreements that cover as much of the workforce as possible. As trade union affiliation in Scandinavian countries is very high, coverage of collective agreements usually is above 80 per cent. Nevertheless, in the transposition of social policy directives in Denmark and Sweden, it became clear that the Commission is not willing to accept the exclusion of any worker from the scope of the directive due to non-affiliation with a trade union and therefore in the case of the working time directive transmitted a Reasoned Opinion to the Danish government, threatening with infringement procedures before the ECJ (Falkner et al. 2005: 245). The result was that the Danish government adopted complementary legislation to include even those workers that are not affiliated with a trade union. Such a step was contrary to the traditions of the Scandinavian systems, but does not directly influence the underlying mechanisms of the industrial relations system. Nevertheless it shows that even corporatist systems may be influenced by European level industrial relations that are made out of many corporatist elements as well. Therefore, misfit is low, but opportunity structures are dramatically changed, as actors might want to increase their power with assistance of the European level. That’s how the official complaint filed by two small Danish trade unions to the European Commission in the case of the working times directive can be explained.

ac) Conclusion

Hard law is transforming national systems of industrial relations towards a European standard – at least in the field of social policy. In all other fields that are not covered by the social dialogue procedure, most of the pressures leading to this transformation are missing, as the position of the European level social partners is considerably weaker. But if the social partners play an important role in the law-making process at the European level, the pressures on domestic systems are directed in the same way. The contestational and the pluralist model of industrial relations could therefore change insofar, as the role of the social partners gets more important and that they form an increasing part of the domestic law-making process as well. In the corporatist model, which is the most similar to the procedure applied at the European level, pressures are felt towards tripartite bargaining, moving the national corporatist systems away from autonomous social partner action.

b) Spill-overs from the economic sphere: Case law of the ECJ

ba) Description of the ECJ's case law

Apart from soft modes, the social dialogue procedure and harmonization by means of hard law, there is a fourth category of instruments available to the European level to potentially contribute to change in domestic systems of industrial relations: judicial law-making. In chapter 2 it has already been described how the ECJ contributed to the evolvment of a real supranational polity by constitutionalizing the Treaties. Now we focus on the role of the ECJ with respect to industrial relations in general and trade unions in particular. As our starting point we use the existing case-law of the ECJ with regard to trade unions and collective bargaining, two fields that have been highly contested in Community law in recent time. The leading decisions in this respect are those in the cases of, first, Viking Line⁸, and, second, Laval or Vaxholm⁹

⁸ ECJ Case C-438/05 International Transport Workers' Federation, Finnish Seamen's Union v Viking Line [2007] ECR I-10779

⁹ ECJ Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767

(for a detailed description of the facts see Davies 2008; Malmberg et al. 2008; Joerges et al. 2009). Azoulai in short summarizes what those cases are all about:

„However what makes these cases interesting is not their complexity, but the uncertainty involved. That uncertainty concerns a problem which is fairly simple: can the exercise of the social rights to negotiate and of collective action protected by the national constitutions of some Member States preclude the exercise of an individual economic freedom guaranteed by the EC Treaty?“
(Azoulai 2008: 1335)

In both cases the litigants have been companies, while their opponents have been trade unions. In both cases, the litigants asked the ECJ to declare industrial action taken by the trade unions illegal on grounds of breaches of Community law, especially restrictions to the freedom of establishment. In both cases, in the end the judgements have been more in favour of the litigants' side. As Catherine Barnard put it simply: "Socialism has been dumped." What emerges after those judgements and as well gets clear from the subsequent case-law (Joerges et al. 2009: 18) are several cornerstones with serious impact on the legal possibilities of trade unions:

- Applicability of the EC-Treaty:

Even before the mentioned judgments had been handed down, it was already accepted that social partners must respect Community law when they conclude collective agreements, as otherwise it would have been too easy to circumvent the obligations imposed by the Treaties and other European acts. Therefore since 1976 and the judgement in the well-known Defrenne case¹⁰ the ECJ constantly holds that those provisions of the Treaty having direct effect also extend their validity to agreements concluded by the social partners in order to regulate the employment relationship. As nowadays nearly all Treaty provisions except for the "most open-ended and aspirational" (Chalmers et al. 2006: 369) seem to be capable of having direct effect, it comes as no surprise that collective agreements have to obey Community law. What comes as a surprise nevertheless is that industrial action taken - as in the present case - by trade unions has to fulfil this requirement as well.

¹⁰ cited above nr 4

This is even more puzzling, as the EC-Treaty speaks of “representation and collective defence of the interests of workers and employers” (Art. 137 EC) as a Community competence, but in Article 137 para. 5 it is said *expressis verbis* that “this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs”. But this has not been an obstacle to the ECJ in similar cases before and it wasn’t one in *Viking* and *Laval* either, although there are serious doubts if it is really possible to apply the pre-existing case-law to trade unions engaging in industrial conflict. Azoulai (2008: 1341) comments this development in the case-law of the ECJ by simply stating that “it means that no types of rules or regulations, whatever the field or the underlying intention, are a priori excluded from the field of the EC Law’s empire”. The key question with regard to *Viking* and *Laval* was, however, if industrial conflict may be understood as regulating the employment relationship like collective agreements do (Azoulai 2008: 1344). The ECJ answered in the affirmative.

- No restrictions to the common market:

As soon as Community law has to be obeyed, the whole array of Treaty provisions and secondary law opens up. Especially the four freedoms guaranteed by the EC-Treaty may not be limited. Therefore, the ECJ in *Viking* and *Laval* moved on and tried to figure out if the action taken by the respective trade unions was capable of potentially or actually disturbing the rights granted to the litigants by the Treaty. As in both cases, the litigants were companies having their seat in another member state, the answer of the ECJ to this question also was yes.

- Right to strike as fundamental right:

A restriction of rights conferred by the Treaty to individuals is possible if there are legitimate reasons to do so. The Treaty itself regularly cites public health, public security and public order as legitimate reasons. The protection of work places of course is not mentioned as legitimate reason *expressis verbis*, but fundamental rights like the right to strike might protect the pursuit of this goal. The ECJ has already in earlier cases like *Schmidberger*¹¹ decided that fundamental rights could legitimize

¹¹ ECJ Case C-112/00 *Schmidberger v Austria* [2003] ECR I-05659

breaches of the free movement provisions. And indeed the ECJ with reference to various sources like the European Social Charter and the European Union Charter of Fundamental Rights accepted the right to strike as a fundamental right protected by Community law.

- Proportionality of actions taken:

Although the ECJ acknowledged the right to strike as fundamental right, it did not say that there are no limits to the use of this right. Industrial action has to be proportional. Over the years, the ECJ has developed methods to test this proportionality. Astonishingly, the Court used one of the strictest tests and asked if there would have been less restrictive means. Davies (2008: 141) argues that „the way in which the ECJ uses proportionality in this setting substantially undermines the significance of its recognition of the right to strike as a fundamental right“.

Taking everything together, the case-law of the ECJ has severely shifted the balance between business and labour in the industrial relations system. In the next part, we will explore this in more detail.

bb) Effects on national systems

In every system of industrial relations, the patterns of cooperation or non-cooperation between the social partners over time have created a legal framework, which assigns a certain role to the state in case of conflict. This role usually is one of formal neutrality, as without an unbiased state a system of industrial relations in fact would be obsolete, as there would be nothing to negotiate about. As an expression of this neutrality, all European states have granted fundamental rights to both sides of industry, which protect business and labour equally from illegitimate state action. Those fundamental rights are - among other social rights – basically the right of association, the right to strike and the right to impose lock-outs (De Búrca, De Witte et al. 2005). As we have seen those are exactly the fields *expressis verbis* excluded from Community competence in the EC-Treaty. Of course, restrictions to fundamental rights are possible, as calling upon fundamental rights cannot be used to legitimize illegal activities. The most prominent example of such a restriction has

its origins in voluntary social partner behaviour: if there is a valid collective agreement, those agreements usually include a so-called peace obligation, which prohibits industrial action of both sides while the collective agreement is in force. Industrial action taken despite this obligation is illegal and may therefore be met with state power. Historically, this has - especially in the corporatist model - been an instrument to secure agreements once they are struck, as such an obligation makes industrial action by non-affiliated workers impossible. It is with the right to strike and this peace obligation, where the case-law of the ECJ hits the hardest.

bba) Contestational model

Systems belonging to the contestational model have the strongest tradition of industrial conflict (Visser 1996c: 12) with a high rate of workers involved in stoppages, but with a low union density at the same time (Visser 1996c: 15). Due to the adversarial attitude of both sides of industry towards each other, the relevance of the rules governing industrial conflict is obvious. As has been mentioned, in most member states the right to strike is a constitutional right (Warneck 2007). This is especially true for those member states whose industrial relations systems are assigned to the contestational model. In France and Italy, the right to strike is granted to individual workers, while in Greece trade unions must participate in order to render a strike legal. The main restriction on the right to strike, however, is that it has to be legal. In other words, the constitutional right to strike does not protect illegal strikes. But what is a legal strike and what is not? In the case-law of the member states' courts and the domestic laws respectively, there is a rich amount of situations, where strikes are illegal. This is especially the case if they are against a peace obligation laid down in a collective agreement or if they are violent, endangering the constitutional order, and so on (Warneck 2007: 9-11). Since the Viking and Laval judgments, it is also clear that breaches of Community law found by a court may render a strike illegal. This means that as soon as there is a cross-member state element given in the situation of the case at hand, Community law has to be respected within the narrow limits set out by the ECJ we described above. It could therefore be possible that a strike by French workers directed against a French employer is legal, while the same strike would be illegal if the employer were Dutch. To explore what such a situation means to the industrial relations system, we have to

ask what the consequences of illegal strikes are. Usually those are the potential termination of the individual work-contract, obligation to pay damages, and prosecution according to criminal law. Such consequences are directed at the individual worker or at the trade union, but if Community law is applicable, even the state might be held responsible, as the Spanish Strawberry case of the ECJ¹² shows (Chalmers et al. 2006: 195):

“French farmers launched a violent campaign targeting the importation of Spanish strawberries. Their action involved threatening shops, burning lorries carrying the goods and blockading roads. The French government took almost no action either to stop these protests or to prosecute offences committed as a result of them. While the acts stopping the import of Spanish strawberries were performed by private actors – the farmers – and while the relevant provision of EU law, Article 28 EC, imposed obligations only on states not to prevent the free movement of goods, the Court ruled that France had breached EC law.”

Now is Spanish Strawberrys a very drastic example, as the action of the farmers without doubt was unlawful. But nothing prevents this reasoning to be applied to other cases of illegal strikes, no matter on which grounds. Although the court in another case accepted that fundamental rights could be a reason why member states do not have to police the EC-Treaty, this nevertheless is just possible as long as the strike action is legal also under Community law. If it is not, member states have to intervene and end the illegal strike. Otherwise they would have to pay damages themselves to those the strike was directed at (Harlow 1996). In other terms, we can call this an adaptation pressure: due to the degree of misfit between the European rules and the domestic rules regarding industrial action, there are contradictions between both systems that cause costs for the actors involved. Those costs form the incentive to reduce the misfit, but only as long as the costs of adaptation are not higher than the costs of maintaining the misfit. In the contestational model, state intervention is not unusual, but it is political intervention and not intervention with police forces. This could have two basic consequences for the industrial relations system: either the willingness of the state to accommodate its trade unions could rise, as strikes should be prevented or business takes the opportunity to “smash

¹² ECJ Case C-265/95 European Commission v France [1997] ECR I-06959

organized labour once and for all” (Crouch 1993: 35). While the first scenario implies that the costs to accommodate trade unions are lower than the costs of maintaining non-compliance, the second scenario shows how domestic opportunity structures might be changed by European initiatives. Although misfit in this respect is more a precondition than a necessary requirement (Börzel et al. 2003a), it enables domestic actors to pursue strategies that would not have been able without the European level. In our present context, this means that it is very easy for business to construct a situation where Community law applies and therefore the limits to the right of strike are narrower. In fact, business could use this to dictate agreements with labour, as the most effective possibility of labour to resist this would be strike action, but „the more the strike restricts the employer’s free movement rights — and thus the more effective it is from the union’s perspective — the harder it will be to justify“ (Davies 2008: 142-143) in light of the case-law of the ECJ.

What is even worse is that such a case-law supports the cognitive impression that “European integration represents a form of ‘subversive liberalism’, in which transnational liberalization undercuts national social models” (Wincott 2003: 289). This third effect is the same in all three models of industrial relations, as we will see. What has been said about the right to strike in this context stems mainly from the Viking judgement. Although the reasoning on the right of strike is the same in Laval, this judgement deals too a large extent with the role of collective bargaining. What the ECJ in short states is that autonomous collective bargaining that does not cover all employees is not a suitable instrument to implement directives. It could only be such an instrument if complementary legislation is adopted that grants erga omnes effect to the agreement. In the contestational model this is not a problem, as the state always has to act to make collective agreements work, as union density is too low in order to make other methods possible. Insofar, the case-law of the ECJ in Laval has a conserving effect on the contestational model. The level of interaction between business and labour according to Crouch’s Theory of Exchange might never reach the point where cooperation becomes the preferred option. Accordingly, the industrial relations system will remain unstable.

bbb) Pluralist model

The effects of the Viking and Laval case-law on the pluralist model could be expected to be low, as the right to strike in this model is not a fundamental right and therefore there already are ample restrictions to this right (see for the United Kingdom Visser et al. 1996: 52-55; and Warneck 2007: 70-71). But it could be otherwise, as Davies (2008: 146) notes: "Of course, it is already the case that the law on industrial action is highly restrictive. Secondary action is clearly unlawful, for example. But Viking adds a new set of restrictions in cases with a cross-border dimension." In the pluralist model, the state is abstentionist and neutral. It is a model of industrial voluntarism, where business and labour have to resolve their conflicts on their own. Therefore, "English law's approach to the regulation of industrial action seeks to avoid 'politicising' the courts by preventing them from ruling on the merits of the dispute" (Davies 2008: 146). But this is exactly what now has to be done in the light of the Viking and Laval judgements. As it is also up to the domestic courts to enforce Community law, now the British courts would have to assess whether or not industrial action taken is proportional regarding the restrictions it means to the rights granted by the EC-Treaty, especially the four freedoms. Here again we find the same situation as with business in the contestational model: just inserting a cross-border element to the dispute enables them to set stricter legal borders to any kind of trade union action. How this will finally transform the respective industrial relations system cannot be answered here, as further research would be necessary.

Regarding collective agreements, the reasoning of Laval makes autonomous bargaining impossible that aims at performing functions defined as state competence by EU law. As central bargaining structures are not given in the pluralist model, autonomous bargaining has not been an alternative until now. It will not be in the future either, if the ECJ does not change its mind.

bbc) Corporatist model

Both cases, Viking and Laval, took place in corporatist countries, i.e. Sweden and Finland. Scandinavian corporatism differs from other corporatist countries insofar, as the social partners are more or less autonomous in their bargaining from the state, as long as they do not "create major problems, for instance, unemployment, inflation, low growth, industrial unrest" (Visser 1996b: 189). At the same time, unions opposed mechanisms of statutory extension of collective agreements to non-affiliated workers,

as they feared that union membership could become unattractive (Visser 1996b: 195). Such mechanisms still do not exist, but at least in Sweden changes have been made to the law regarding posted workers (Strath, Tejning et al. 2008). This has been argued to be the least invasive solution in Swedish labour law. Applying the misfit approach, this would mean that adaptation pressures stemming from the ECJ judgements have been too high to lead to actual transformations and that efforts have been made to somehow accommodate the ECJ, especially when it comes to the right to strike. Also with opportunity structures, business as in the other models of industrial relations has now a new possibility available, but this is only true for single companies, while associations of business still have to deal with very powerful trade unions in the domestic arena. Nevertheless, this could have a destabilizing effect, in case single companies move away from their associations, as they could gain more if they act on their own and for example move one of their undertakings to another member state.

bc) Conclusion

Judgments of the ECJ are the hardest possible instrument that exists on the European level. Although the decisions are directed at a single situation and a single case, the reasoning adopted by the Court in this case might have enormous impact on subsequent decisions as it might serve as precedent and should not be underestimated regarding its impact on the development of Community law in general. The same happened with the reasoning in *Viking* and *Laval*, which now has to be considered as established practice of the Court, as two more cases follow the same line (Joerges et al. 2009: 1-2). Furthermore, it is not possible to deviate from the case-law with reference to domestic specialities, as the case-law is part of Community law, which according to the ECJ itself must be applied uniformly in every member state. Only different circumstances of the individual case may deliver a different result, but those differences have to be accepted by the Court. Therefore, differences in national traditions, if they are not accounted for within Community law, do not matter. The reasoning in *Viking* and *Laval* does for sure not account for national traditions, as the balance that existed in the national systems between the interests of business and those of labour, no matter how it looked like, at least in cross-border situations has been deferred by a system derived from Community law.

While in the national systems, restrictions to the right to take industrial action must go only so far as it is necessary, this is different in cases where Community law has to be applied, as then industrial action must only go so far as restrictions to the four freedoms are appropriate to make use of fundamental rights, do not go beyond what is necessary and are only legal if there are no lesser means. Those criteria taken together are known as proportionality test. Davies (2008: 141) argues “that the way in which the ECJ uses proportionality in this setting substantially undermines the significance of its recognition of the right to strike as a fundamental right”. This reversal of the burden of proof has the same effect in all of the three models of industrial relations: the possibilities of trade unions to take industrial action are decreased and therefore their power in the negotiations with business is weakened. At the same time, states are in an unpleasant situation as well, as they by Community law are expected to intervene, if the industrial action taken is illegal. Those parts of business in national systems of industrial relations, which reject cooperation with labour, get into a more favourable situation. As soon as the company is resettled or creates subsidiaries in other member states, the applicability of Community law is given and the possibilities of trade unions to offer resistance become weaker than they would be in the national system. Such a strategy could even be pursued without the consent of other parts of business and insofar the case-law of the ECJ as established in Viking and Laval has a potentially destabilizing effect on national systems of industrial relations, as such an adversarial attitude leads towards a contestational system. Even more, with such instruments provided by the case-law at hand, the centralization of bargaining is endangered as single companies might judge that their individual benefits of acting according to a strategy covered by the case-law are higher than their costs of non-compliance with their peak association. This would have a destabilizing effect insofar, as the power of the central level to conclude agreements would decrease, especially if those are foremost autonomous agreements without involvement of the state.

5. Conclusions

Trade unions, still embedded in their national traditions of interaction with business and the state, may be in a process leading towards a more convergent system of industrial relations in Europe. It is nothing new that industrial relations systems everywhere in the world face various pressures. Such pressures lead to an overall tendency within industrial relations in developed market economies that has been described as 'converging on divergence' (Bamber et al. 2008). What is new in Europe, though, is the considerable influence of a supranational polity on the systems of its member states. Although already at the very beginning of the European integration process some elements of social policy have fallen within the scope of European level action, it took several years and a considerable extent of spill-over before the European level, with the Social Protocol annexed to the Maastricht Treaty, obtained a consistent legal base for action in the field of social policy (Falkner 1998). With this legal basis and the possibility of autonomous bargaining for social partners enshrined in it, at least the formal requirements to close the corporatist decision gap present at that time were available. With such procedures in place, the European level has several instruments at its disposal to directly influence the social policies of member states. As social policy is necessarily interwoven with industrial relations, action of the European level in this field is also of importance to the developments in industrial relations. Nevertheless, there are few scientific statements on effects of European level procedures on national trade unions and the respective systems of industrial relations in the member states.

The research question of this thesis asked how European integration could influence the possibilities of trade unions within their national systems. Although no empirical research is contained in this paper, a discussion of the pressures national systems of industrial relations face because of European integration allows for statements about this influence. If European integration makes a difference, the pressures it poses on national systems of industrial relations should be comparable regardless of the type of industrial relations given. As in the literature (Crouch 1993) three ideal-types of industrial relations are identified (the contestational, the pluralist, and the corporatist model), those are used in the present context as well.

At the European level, there are four different modes available to influence national systems of industrial relations. These modes of influence are: soft modes of governance, the social dialogue procedure, the Community method, and the ECJ's case-law. The pressures on national systems of industrial relations resulting from European level activity can then be assessed by discussing the potential effects of those modes of influence on the ideal-types of industrial relations.

Table 3: Overview of results

	Soft Modes	Social Dialogue Procedure	Community Method	ECJ Rulings
Contestational Model	No	Yes	Yes	Yes
Pluralist Model	No	Yes	Yes	Yes
Corporatist Model	No	Yes	Yes	Yes

Source: own; yes/no indicates whether or not pressures are given

The first mode of influence of the European level on national systems of industrial relations, soft modes such as the Open Method of Coordination (OMC), only in limited settings might be the source for adaptation pressure: where consultation of trade unions is generally low in the national policy-making process, like in the contestational and the pluralist model, OMC-processes might initially enhance such consultation in fields in which the OMC is employed. But the typical lack of substantive policy results stemming from OMC processes (Kröger 2008; Mailand 2008) impedes learning effects, as the incentives for trade unions to engage in the consultation process in the end are not given.

In the corporatist model, the failure of soft modes to influence domestic systems might be based on their narrow scope: soft modes externalize goal-setting and therefore directly constrain the possibilities of social partners in corporatist models to choose their common goals independently. But without mechanisms to secure

compliance with those goals, the adaptation pressures on the corporatist model are too low to induce change.

Regarding the second regulatory method, autonomous social partner agreements, the setting is different: with the introduction of the social dialogue procedure by the Social Protocol annexed to the Maastricht Treaty, European social partners attained the possibility to strike autonomous agreements that would either be transformed into European law by a Council decision or autonomously implemented by the domestic social partners. As the first is similar to the Community method, it has been dealt with there. The latter faces some serious problems: implementation even of autonomous social partner agreements must fulfil the requirements set up by the Commission. But not in all member states are there centralized bargaining structures that work effectively. In fact, it is characteristic of the contestational and pluralist model that central institutions are weak as powerful peak-associations are missing.

Nevertheless, autonomous social partner agreements have to be transposed. Central bargaining institutions are therefore strengthened, as they are called upon to strike an agreement regarding the transposition of the autonomous social partner agreement. Concluding such an agreement is made easier due to the double participation of national trade unions in this process: while they are first participating via their European umbrella organizations in the negotiations at the European level, they again get the chance to negotiate at the national level. Engaging in such a process has clear benefits as the degree of influence is very high. At the same time, the position of the state is influenced by two phenomena: first, by what Falkner (1998) calls the “corporatist policy community”. Social partner participation in this concept is seen as part of an ideational system shared within the European Union, and has a high normative value. Second, and accounting for the critics of Falkner’s approach (Compston et al. 2001), the state also profits in a rationalist sense from supporting autonomous social partner implementation: The potential costs of having to take, implement and enforce a state-lead decision on the transposition of an autonomous social partner agreement may be (partly) saved, while the state nevertheless maintains considerable influence on the entire process. State action due to low union density remains needed to include all workers of the country (*erga omnes* effect) into the social partner agreement. Taken together, autonomous social

partner agreements exert pressures to transform contestational and pluralist systems towards increased tripartite concertation.

For the corporatist model, these potential effects could lead to the opposite: as the levels of protection in the corporatist model usually are already very high, the potential risks for trade unions accompanying the transposition of European autonomous social partner agreements are also high. Therefore, in the existing examples of such transposition in corporatist systems (ETUC 2006 and 2008), the social partners opted for non-binding measures in order to transpose the agreements. In the long-term, such a strategy could lead to increased decentralization and ultimately endanger the pillars of the corporatist system, as fragmentation increases and common goals shared by the social partners become blurred.

If we now turn to the third regulatory technique, the Community Method, the potential effects should be higher, as this instrument is the first one to be of binding nature. But the discussions in this thesis suggest that potential effects are more or less to the same extent achieved by formal as well as informal coercion. With regard to the Community method, similar pressures as discussed with regard to autonomous social partner agreements have been found in the contestational and the pluralist system, as social partner involvement in the policy-making process has been supported by the European level inputs. This might have its reasons in the procedure that has been employed at the European level, as those pressures have especially been present when transposing results of the social dialogue procedure, even if they have been incorporated into EU law directly by Council decision. The idea of social partner involvement nevertheless is not restricted to results of European social partner negotiation, as also some other acts in the field of social policy have been delegated to the social partners for national transposition. This indicates that an involvement of the social partners is seen as normative standard of good law-making. In corporatist countries, where social partner involvement is a key element of the industrial relations model, again the effects of European level incentives have gone in the other direction: while social partner involvement usually is welcomed, too much leeway for the social partners does not seem to be supported by the European institutions – neither by the European Commission, when it comes to potential

infringement proceedings, nor by the European Court of Justice as will be explained later. Such a situation especially hits the Scandinavian countries as they have a long-standing tradition of autonomous social partner activity, while in other corporatist countries like Austria and Germany the role of the state is much more proactive. Insofar, here again incentives stemming from the European level towards tripartite concertation can be found.

If we now turn to the fourth and last mode of influence used in this paper, the case-law of the ECJ, the legal need for uniform applicability of the reasoning standing behind such decisions makes it impossible to account for particular national traditions or sensitivities. Noteworthy, the recent case law of the ECJ regarding trade unions has focused on corporatist countries. Nevertheless, those decisions also have effects in the other models of industrial relations. Therefore, as the reasoning employed in these cases by the Court may be seen as established practice of the Court, there are several points regarding the right to strike that might impede trade union action. Two of these points have to be highlighted at this place: first, although the right to strike might be a legitimate reason to restrict the four freedoms granted by the EC-Treaty, there are considerable limits to the exercise of this right that go beyond the restrictions present in the national systems of industrial relations beforehand. Even in the pluralist system which is very restrictive when it comes to industrial action, such case-law might have negative results for trade unions, as the complexity of such situations, where European law including the ECJ's case-law has to be applied, easily casts doubts of illegality on the industrial action envisaged. If such doubts exist, courts are able to forbid industrial action. Second, in the context of European law member states have a big incentive to cooperate with their trade unions in situations of conflict, as they themselves might be held responsible after the state liability doctrine, if they do not take the necessary steps to avoid damages of those persons or companies invoking the four freedoms. Note that the state liability doctrine is not to be found within the Treaties, but has been developed by the ECJ. To sum up, the case-law of the ECJ might lead to a less influential role for the trade unions in all models of industrial relations, as taking industrial action is made more difficult.

Conclusions with regard to European integration

Although it was not part of the research design of this master thesis, one might want to ask where the intentional or unintentional promotion of tripartite concertation may lead in terms of future European integration. By turning to liberal intergovernmentalism and neofunctionalism, the two dominant theoretical streams on European integration, we may find some hints, where future research might want to start from.

If we first turn to the effects of soft modes, there is a broad consensus in the literature that procedures like the Open Method of Coordination have not met their potential. The problem with soft modes that also has been identified in this paper is their low output, while they nevertheless do not allow for common goal-setting in the national arena. The goals of soft modes are defined at the European level and usually not by the social partners. Therefore, trade unions do not have an incentive to participate in soft modes, as they - on one hand - cannot influence the goals pursued. On the other - they do not need to be afraid of major changes stemming from soft modes, as they have no influence on actual policy-making except for some singular examples (Mailand 2008). There is therefore no reason to believe that trade unions would shift their loyalties to the European level one day or another like neofunctionalism would suggest, or that their cost-benefit calculation would be more positive with more integration as liberal intergovernmentalism would require. Soft modes therefore do not promote integration – at least not with trade unions.

Autonomous social partner agreements create a split within the labour movement: while trade unions in corporatist countries are afraid of losing the status they achieved in their home country, trade unions in the pluralist and contestational model may gain influence and other benefits as their actual levels of involvement in the policy-making process lie beneath the level envisaged by the European system. The problem for integration, at least in liberal intergovernmentalism, would be situated at the other side of the employment relationship, as resistance should be expected from business in those two models, as higher standards of protection also mean higher costs. We end up in a situation where the actual outcome regarding the domestic attitude towards integration would have to be judged on a case-to-case base,

depending on how powers between business and labour, and other societal actors respectively, are distributed. While this uniformity of the state is a key determinant in intergovernmentalism, this would not be a problem to neofunctionalism, as here the actors which favour integration shift their expectations and loyalties towards the European level, ultimately increasing pressures on the domestic system with their actions taken. The problem with autonomous social partner agreements is that it is not clear how much the European level has actually contributed to the final results, as the participation of the domestic actors has been high. Dolvik called this “Zweckrationalität” (Dolvik 1997), as the European level associations are seen only as instruments to achieve the domestic results and due to their organizational structure do not enjoy leeway. Solutions to problems and unintended consequences could not easily be found at the European level, as the necessary European level compromise would be hard to achieve.

When we now turn to harmonization of laws all over Europe by means of the Community method, at first glance the social partners in the contestational and the pluralist model should be in favour of integration, while those in the corporatist model should not, if the discussions in this paper regarding the transformation of the industrial relations systems hold true. But a more detailed analysis of the cost-benefit-calculation of the social partners reveals that although they might become more powerful in the domestic arena, horizontal integration might decrease the fields in which such increased participation would be of benefit. Insofar, even those social partners in the pluralist and contestational model would not support the widening of European level competence, but should be willing to support deepening to a certain extent, if – like liberal intergovernmentalism suggests – the cost-benefit calculation is decisive. Regarding neofunctionalism, the decisive question would be if the social partners are able to correctly set up such a cost-benefit-calculation in order to get clear on their self-interest. If they agree that although they might win influence in some areas, they would lose influence in others due to competence delegation to the European level, the result would be the same as in liberal intergovernmentalism. What is sure, though, is that if they do not see clear benefits from integration, they will not regard integration as a qualified instrument for solving the problems they face.

The effect on integration of the last mode discussed, the decisions of the ECJ, is simply summarized: trade unions' opposition towards Europe integration would be increased, and the one of business potentially as well. The restrictions trade unions suffer due to the case law directly influence their situation to the negative, as their main instrument of power, industrial action, is circumscribed. In such a situation, neither liberal intergovernmentalism nor neofunctionalism would assume a positive effect on the attitude towards integration in any way. Business is in a complicated situation as well, as single companies may profit from the situation created by the ECJ, while associations have to fear negative effects like increased costs due to a more adversarial climate. This argument as well has a pro-integrationist element: single companies that are able to create a cross-border situation use the existing situation to pursue their own self-interest and therefore increase transactions between member states, ultimately leading to even more unintended consequences. Whether or not such a neofunctionalist prediction is likely depends on how many single companies are indeed able to pursue such a strategy.

6. References

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Annex I: Deutschsprachige Zusammenfassung der Diplomarbeit

Die sozialpolitische Kompetenz der Europäischen Union hat seit deren Gründung stetig zugenommen. Auch wenn die europäischen Sozialsysteme nach wie vor zum überwiegenden Teil in der Gestaltungsmacht der einzelnen Mitgliedsstaaten liegen, so liegt dennoch ein beachtlicher Einfluss der europäischen Ebene auch auf dieses Politikfeld vor. Gleichzeitig wird die Sozialpolitik in den Mitgliedsstaaten in unterschiedlichem Ausmaß von den Interessensvertretungen der ArbeitnehmerInnen und der ArbeitgeberInnen, also den Sozialpartnern, beeinflusst und mitgestaltet. Dennoch existieren nur wenige Versuche, die langfristigen Auswirkungen von Integrationsprozessen auf die jeweiligen Systeme der Arbeitsbeziehungen wissenschaftlich zu betrachten.

Die vorliegende Arbeit beschäftigt sich mit der Frage, welche Auswirkungen die europäische Integration auf die Möglichkeiten nationaler ArbeitnehmerInnenvertretungen haben könnte. Im Vordergrund steht dabei nicht eine empirische Untersuchung der tatsächlichen Auswirkungen, sondern eine Diskussion des durch verschiedene europäische Instrumente erzeugten Anpassungsdrucks auf nationale Systeme der Arbeitsbeziehungen. Erst durch das Vorliegen eines entsprechenden Anpassungsdrucks werden Transformationsprozesse in den jeweiligen nationalen Systemen angeregt. Es handelt sich bei den schlussendlichen Ergebnissen der vorliegenden Arbeit daher um Rückwirkungen von bereits abgeschlossenen Integrationsprozessen auf die nationale Ebene und daher um Europäisierungsprozesse.

Um die angesprochenen Phänomene näher fassen zu können, bedient sich die vorliegende Arbeit folgender Konzeption: Durch die Tätigkeiten der Europäischen Union entsteht in den Mitgliedsstaaten ein Handlungsbedarf, der je nach gewähltem Instrument unterschiedlich stark ausfallen kann. Grundsätzlich lassen sich vier solcher Instrumente unterscheiden: Erstens, ‚soft-modes of governance‘ - wie etwa die Offene Methode der Koordinierung – deren Charakteristikum in ihrer rechtlichen Unverbindlichkeit liegt. Zweitens, der Europäische Soziale Dialog, wie er in den Art

137 bis 139 des EG-Vertrags (i.d.F.d. Vertrags von Nizza) vorgesehen ist und der durch die Zusammenarbeit der europäischen ArbeitnehmerInnen- und ArbeitgeberInnenorganisationen gekennzeichnet ist. Drittens, die klassische Gemeinschaftsmethode, die rechtlich bindende Bestimmungen zum Ergebnis hat. Viertens, Judikatur des Europäischen Gerichtshofs.

Die Anforderungen der europäischen Ebene, die in Form der genannten vier Instrumente artikuliert werden, treffen in den Mitgliedsstaaten auf unterschiedlich ausgeformte Systeme der Arbeitsbeziehungen. Diese Systeme lassen sich entweder als konfliktisch, pluralistisch oder korporatistisch beschreiben. Trotz der Unterschiede in diesen Systemen müssten europäische Vorgaben in all diesen Systemen zu vergleichbarem Anpassungsdruck führen, da ansonsten andere Faktoren als die europäischen Inputs für allfällige Transformationsprozesse ausschlaggebend wären. Die Kombination der verschiedenen Systeme der Arbeitsbeziehungen mit den der europäischen Ebene zur Verfügung stehenden Instrumenten ergibt folgendes Bild:

In Hinblick auf soft modes of governance ist kein nachhaltiger Anpassungsdruck zu erwarten. Dies liegt daran, dass in konfliktischen und im pluralistischen System die Beteiligung der Gewerkschaften am politischen Prozess zwar zumeist schwächer ausgeprägt ist, als dies durch die in den soft modes enthaltenen Vorgaben gedacht ist und somit eine Stärkung des Einflusses der Gewerkschaften stattfindet. Jedoch hat sich herausgestellt, dass soft modes wie die Offene Methode der Koordinierung keine langfristigen Resultate ergeben. Dadurch verschwindet ein allfällig vorhandener Anreiz in Richtung tripartistischer Konzertierung. Außerdem enthalten soft modes das Problem, dass die Zieldefinition des Prozesses den nationalen AkteurInnen nicht zugänglich ist und somit auch nicht deren Konsens widerspiegelt.

Das zweite Instrument ist der Europäische Soziale Dialog. Dabei sind zwei unterschiedliche Erscheinungsformen auseinanderzuhalten: jene, bei der die Einigung der Sozialpartner durch einen Beschluss des Rates rechtsverbindlich wird und jene, bei der diese Einigung autonom durch die nationalen Mitgliedsverbände umgesetzt wird. Da Erstere näher an der Gemeinschaftsmethode liegt, wurde sie in deren Kontext behandelt. Bei der Zweiteren zeigt sich, dass Anpassungsdruck in Richtung tripartistischer Konzertierung gegeben ist. Während sowohl die ArbeitnehmerInnen- als auch die ArbeitgeberInnenseite in konfliktischen und

pluralistischen Systemen deutlich an Gestaltungsspielraum gewinnen können, gilt dies genauso für den Staat. Dieser kann einerseits die europäischen Vorgaben zur Einbindung der relevanten Zivilgesellschaft erfüllen als auch Kosten in Zusammenhang mit nationalen Umsetzungsprozessen sparen. In korporatistischen Systemen ist hingegen der gegenteilige Effekt zu beobachten, da die Sozialpartner Mechanismen abgeneigt sind, die hinter ihrem bisherigen Einfluss zurückbleiben könnten. Durch Nicht-Beteiligung könnten jedoch Dezentralisierungsprozesse ausgelöst werden, die zur Schwächung des korporatistischen Systems führen.

Das dritte europäische Instrument besteht in der Gemeinschaftsmethode. Hier deuten die Diskussionen in der vorliegenden Diplomarbeit darauf hin, dass wenig Unterschiede zwischen informellem und formellem Zwang bestehen. Selbst wenn Ergebnisse der Gemeinschaftsmethode mit juristischer Hilfe durchsetzbar sind, so erzeugen sie dennoch den gleichen Anpassungsdruck wie nicht formell durchsetzbare Sozialpartnerabkommen.

Die vierte und letzte Variante stellt die Judikatur des EuGH dar. Durch die universelle Anwendbarkeit der hinter den konkreten Urteilen stehenden Erwägungen stellt diese Form das schärfste Instrument dar. Nationale Partikularitäten können nur in geringem Maße (im Rahmen der Rechtfertigungsgründe) berücksichtigt werden. So hat sich etwa in der Judikatur des EuGH zum Streikrecht gezeigt, dass diese großen Anpassungsdruck insbesondere auf die korporatistischen Systeme erzeugt.

Annex II: Lebenslauf Florian Steininger

Persönliche Daten:

Geboren: 1984

Staatsbürgerschaften: Österreich, Niederlande

Ausbildung:

- 2/2009 – 6/2009: Auslandssemester an der Erasmus Universität Rotterdam
- seit 10/2004: Diplomstudium der Politikwissenschaft an der Universität Wien
- seit 10/2004: Diplomstudium der Rechtswissenschaft an der Universität Wien
- 10/2003 – 7/2004: Diplomstudium der Politikwissenschaft an der Universität Innsbruck
- 9/1995 – 6/2003: Bundesgymnasium Dornbirn, Matura mit ausgezeichnetem Erfolg

Tätigkeiten:

- Seit 11/2009: Junior Scientist am Institut für Europäische Integrationsforschung der Österreichischen Akademie der Wissenschaften
- Seit 7/2009: Wissenschaftlicher Mitarbeiter des Abg.z.NR Dr. Hannes Jarolim
- 11/2008 bis 1/2009: Freier Dienstnehmer am Institut für Europäische Integrationsforschung der Österreichischen Akademie der Wissenschaften
- 3/2008 bis 10/2008: Wissenschaftlicher Mitarbeiter des Abg.z.NR Christian Hursky
- 10/2006 bis 2/2008: Öffentlichkeitsreferent der Bundesvertretung der Österreichischen Hochschulinnenschaft
- 3/2007 bis 11/2007: Zivildienst

Zusätzliche Qualifikationen:

- Englisch: fließend
- Französisch: gute Kenntnisse in Wort und Schrift
- Niederländisch: Muttersprache