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SOCIAL POLICY NEGOTIATION IN THE EUROPEAN UNION

DISSERTATION

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ABSTRACT

The arenas in which European social policy are made have expanded with the development of the European Union. Not only are different venues – national and European – available for policy development, but there are a variety of policy making tools available in each venue. Recently, a new social policy making arena has opened that places initiation and drafting of social legislation in the hands of three autonomous “social partners:” European peak associations for labor and management that exclude the EU participants in their legislative negotiations. This may appear to be the emergence of corporatism at the European level, but upon further exploration, it is clear that that negotiation is not a corporatist exercise because it fails to meet core tenets of the theory, including the traditional tripartite arrangement between state, labor, and management. Similarly, social policy negotiation does not fit well, if at all, with either of the dominant integration theories of neofunctionalism or intergovernmental institutionalism. This classic debate about where power lies – with integrationist elites in supranational bureaucracies or with national leaders dedicated to retaining as much state powers as possible and ceding to the EU only reluctantly and under specified treaties – obscures the variety of policy-making options available within the EU.

To explore this new policy-making variant, I examine the first successfully negotiated and implemented social policy to result from this new negotiation procedure
negotiated policy that occurred outside of the traditional legislative process: the directive on parental leave. This policy area – parental leave – also raises gendered questions regarding its implementation and utility for women and men workers. Consequently, this dissertation explores the gendered implications of this, and the subsequently negotiated directives. It considers whether or not negotiated policies break new social policy ground or codify existing state practices into “minimalist” policies, and for equality issues in particular.

Based on field research at the EU institutions, this project attempts to penetrate a “closed” process of decision-making process to investigate the ways social policy developments are challenging the traditional theoretical understandings of integration and the affects of such developments on the policies’ subjects.
Dedicated to my parents.
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CHAPTER 1

INTRODUCTION

The European Union's long focus on economic integration has largely rendered invisible the development of social policy legislation. However, social issues are increasingly coming to the forefront as a central component of the emerging single market. As a common market for goods, services, and capital has developed, along with the introduction of a common currency, it has become necessary to build a common market for labor. Such a common market was outlined in the European Union's (EU) founding treaties, but the social policies that would facilitate such a common market for labor have been relegated to end of the agenda while other economic integration concerns were undertaken by EU leaders. While social policy has its origins in the founding treaties, it has developed slowly and in piecemeal fashion over the last half century.

After a relatively long stagnation in the 1970s and early 1980s, then Commission President Jacques Delors calls for the creation of a "European Social Space" to compliment the emerging common market efforts that begin in 1985 with the Single European Act. Unfortunately for him, the process of creating the single market swamped initiatives and interest in developing a comprehensive European social policy.

Frustrated, Delors revised his strategies for the Maastricht Treaty and pressed for two items that would strengthen the Community's hand in social policy development: a
change in voting among national leaders to allow social policy to pass with less than unanimity and to begin a negotiation procedure that would allow key interests groups to negotiate social policy legislation. He succeeded in getting both strategies into the treaty. The result has been the development of a parallel legislative process in the social affairs field that has produced five directives and expanded the policy-making landscape. An additional, and likely unintentional, consequence of this new legislative track has been the development of social policies that have had a disproportionate impact of women.

Much like social policy, gender equality policies have developed in fits and starts, primarily through European Court of Justice rulings, and only more substantially by Commission-led policy initiatives in the late 1980s and 1990s. Labor force participation, or the unemployment issue is a central concern for both the EU and the member states. Further, women's integration into the workforce on an equal pay basis with men has its roots in the Treaty of Rome. However, the EU remains a gender-stratified workplace with women and men working at vastly different rates, for divergent pay levels and with great regional/national variation in workforce access and benefits. Commenting on this labor market stratification in advanced industrial democracies, O'Connor, Orloff, and Shaver (1999) point to “two broad sets of policies that are relevant: policies to facilitate participation for those with caring responsibilities; and policies directed to enhancing the quality of participation. The key policies which can facilitate labour force participation are child care and maternity and /or care leave.” The negotiation procedure, and its first successfully negotiated directive on parental leave, fit this description and refocused EU attention on social policies that have a gendered impact on women and men workers. Not only does this parental leave directive serve as the cornerstone case study for this
research endeavor, it also leads to an additional consideration of the gender impacts of the negotiation procedure more broadly as all of its policy outcomes to date (on working time arrangements, telework) have had disproportionate impacts on women workers. Because negotiations are to produce social policies that facilitate the common market for labor, it is perhaps not surprising to find that policies would impact men and women differently, although the case study below will demonstrate the wide variation in attention to this important dimension.

Early EU theorists who observed these trends, especially the functionalists, noted that the gains in one policy area produced a "spillover" of policy development in related spheres of activity. By the 1990s, the spillover from market integration included the need for policies that would facilitate the labor market's growth. This in turn required the harmonization of social policies across the member states to allow for greater movement of workers, wages, and benefits. These new social policies represent an interesting area for scholarly study as the policy domain expands in both its scope and its depth. Social policy developments are increasingly seen as a key aspect to maintaining economic growth and propelling further integration of both economic policies and political unification.

Moreover, these recent initiatives in the area of social policy have raised intriguing process questions regarding policy-making in the EU. Beginning fifteen years ago, the European Commission initiated a process known as the social dialogue, in which key European interest groups were consulted on a range of policy undertakings and their views incorporated into recommendations and legislative proposals made by the Commission. Following the adoption of the Treaty on European Union (the TEU or
Maastricht Treaty), this social dialogue arrangement was codified and expanded. Three interest groups were selected to act as official representatives or "peak associations" on behalf of labor, management, and public sector services. Known as social partners, they have been vested with the authority to negotiate legislative proposals outside of the EU institutions and the traditional legislative process.

While these social dialogue and negotiation processes have been occurring, there has also been an expansion in the overall scope of EU legislative activity, and a general broadening of its mandate. As will be discussed below, the processes unfolding for social policy development have been markedly different from what standard theories have outlined for regional integration and institutional development. In the case of social policy, it appears that these standard theories no longer fit the process of social policy development.

This project examines these differences in the theory and practice of integration as it appears in the social policy arena. It examines the recent creation of a negotiation procedure for social policy, and will use the first successfully negotiated policy – parental leave – to illustrate the dynamics of negotiation and the implications for integration theory. These negotiations are unique to the area of social policy and indeed are unique to legislative processes of the EU. A brief overview of standard policy-making will set the stage for this distinctive negotiation process.

In traditional EU law making, draft laws known as directives are proposed by the EU's executive/bureaucratic arm, the Commission. Proposals are then sent to both the Council of Ministers (the EU's legislature) and to the European Parliament. Typically, the Council and Parliament engage in a process of co-decision making in which drafts are
exchanged, reviewed, amended, and finally approved, with the Council’s vote the official enactment. The directive is then returned to the Commission, which oversees its implementation within the member states.

In contrast, the negotiation procedure allows three European-level interest groups—peak associations known as Social partners—to negotiate “framework agreements” outside of the channels described above through which all other legislation must pass. The social partners then submit their agreement to the Commission, which formalizes the agreement as a draft directive and forwards it without modification to the Council of Ministers. The Council may accept or reject the proposed directive, but it may not amend the directive, nor may it engage the European Parliament. Consequently, the Parliament is formally excluded from the legislative process, the power of the Council is radically reduced to a simple vote of acceptance, and the Commission, which had no formal participation in the drafting where it would typically have been the author, is simply left to oversee the implementation of the law in member states.

Not only does social policy development in the European Union fail to conform to traditional law making; it also does not conform to the prevailing theories in the integration literature. The two prevailing theories of European integration have proposed that we are witnessing either neofunctionalism or intergovernmental institutionalism. The neofunctional approach suggests that self-interested EU elites would drive the process for integration. This appears not to be the case with social policy negotiation since it is these same EU officials who are relinquishing control of the policy domain. The intergovernmental approach suggests that power rests with national governments to shape the degree to which integration is allowed to move forward. This also appears not to be
the case with social policy negotiation because national governments have no representation in the negotiation, cannot amend a policy proposal, and can only vote to accept or reject a finalized policy, and the European Parliament has no authority in the process. Finally, some scholars (Falkner 1998, Roberts and Springer, 2001) have suggested that in the area of social policy, we are witnessing the manifestation of corporatism at the European Union level. This assertion does not recognize the ways in which the social dialogue and negotiation procedures fail to meet the basic tenets of corporatism. In this negotiation procedure, the EU has effectively removed itself from the policy making because it does not participate in the negotiation process and yet retains responsibility for monitoring both the take up of the directive and the effectiveness of and compliance with the legislation. Thus, corporatism is not a fully satisfactory explanation of the policy-making process.

This project challenges these perspectives because it falls outside the domains each claims to be diagnosing in the EU. The focus is on interest groups that are formally vested by both the EU itself and the member states through the Social Protocol of the Maastricht Treaty, to propose policy at the European level, without ties to their countries or their national level counterparts. The groups are now permitted, through a social policy negotiation procedure, to negotiate policy proposals among themselves (i.e., outside the scope and powers of either the EU bureaucracy or their national governments) and submit this directly to the EU for approval without revision or amendment by EU institutions. This challenges the major theoretical frames and suggests that other means of integration are at work that subvert the sovereignty of the states and the legislative control of the European Union. Indeed, future policy creation will likely involve more
interest groups at the sectoral rather than interprofessional, whose interests are tied neither to national governments nor to the EU, but who can impact policy at both state and supranational levels.

Given the significant difference in policy development represented by social policy negotiation, this research asks why a negotiation procedure is chosen for policy development, what kinds of social policies are formed through such a procedure, who decides to use this mechanism, and how these decisions shape the success and substance of the final policy proposal. Further, it considers the implications for integration of moving policy-making into this arena. For the purposes of this paper, the case of the Parental Leave Directive will be used to illustrate questions both of process and theory.

This theory-challenging dynamic can best be explored by examining the very first directive (i.e., EU law) that was created through negotiation. In 1996, the three interest groups known as the social partners (the European Trade Union Congress, the Union of Industrial and Employers’ Confederations of Europe, and the European Centre of Public Enterprises), successfully negotiated, and obtained EU executive acceptance, on a directive on Parental Leave. In 2001, a five-year review of the law began. While parental leave is intrinsically interesting as a social policy development, its method of creation, substance, and implementation, are now on the line in this review. Upon completion of the review, the social partners can re-examine the directive and modify,

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1 The social partners added this call for review to their first negotiated directive, although not to subsequent ones. The review, five years after implementation, allows the social partners an opportunity to revise their directive. The Commission is completing a review, as is each of the Social Partners. The scope of the reviews varies by organization. The Commission’s primarily examines the degree of implementation by member states and the rate at which leave is being taken. The social partners have concluded other reviews varying from casual surveys of problems experienced by firms (CEEP’s review) to fairly substantial systematic reviews of use of the leave provisions by workers (ETUC’s review).
but not diminish, its content or its rules of application. This directive provides an ideal study as we can evaluate both process and content in a complete case. We can also evaluate the actions of the social partners as they take up their original policy and consider the ways in which they seek to modify their work.

To access the policy negotiation procedure, the research methods have involved structured, focused in-depth interviews with individuals who have been a part of the policy negotiation in its initiation, preparation, passage, implementation, and currently its review. This includes members of the EU’s central institution (the Commission), as well as the Council of Ministers, the European Parliament, and of course, representatives from the three recognized interest groups involved in negotiation (business, labor and public services). Because this process occurs outside the traditional legislative channels, it is not subject to public hearings, minutes, or even reports to the Commission. Decision-making in the European Union is a complex, intricate process involving layers of government from the local, national, and supranational levels in addition to the social partners. Some of the objectives can be captured in public records such as news releases, media reports, and the official documents of the European Union. However, these prepared and public expressions represent only the outcomes of a complex policy development process. Because the negotiations are secret, more in fact, is left unstated and unreported. In order to understand the policy-making aspects of social policy negotiations, it is necessary to access those key decision-makers who were involved in policy negotiations as the representatives of the interest groups, governments, and the European Union itself. Interview data were collected during two field research trips to
the European Union institutions and social partner organizations in Brussels, Belgium and in Luxembourg, during the summer of 2000 and the spring of 2001.

This project is intended to be meaningful on several levels. In theoretical terms, it suggests that the prevailing integration theories do not adequately describe or explain recent trends in policy development and that the means by which integration is now occurring are more complex and nuanced than the literature allows. Integration, in the social policy arena, is likely to develop in terms of soft law, negotiation, cooperation, and flexible policies rather than by EU directives that narrowly define a few policy areas. In substantive terms, social policy will focus more on the social elements of workers' lives, and market compatibility and competitiveness for firms, rather than the development of what Jacques Delors envisioned as a Social Europe with full social citizens. And in procedural terms, this research suggests that the use of negotiation as a policy-making tool will increase in frequency and will encompass a greater array of social policy issues.

**Theoretical Frames**

For almost as long as the European Union has been under development, scholars and practitioners have debated the nature of integration that is, or should be, pursued. A fuller discussion of this debate will follow in a subsequent chapter, an overview is presented here. The approaches that have been proposed vary in the scope and level of authority that is reserved for European level governance. Immediately after World War II, new conceptions of European governance were offered by politicians, resistance leaders and scholars who offered methods and strategies by which Europe could prevent another great war. Among these post-war calls was one, in the Ventotene Manifesto,
from Italian resistance leaders Altiero Spinelli and Ernesto Rossi for a truly federal Europe. In their Manifesto, Spinelli and Rossi believed the crucial change for Europe had to be “abolition of the division of Europe into national sovereign states” (Spinelli and Rossi, June 1941 in Nelson and Stubb, 1998) and the creation of a European Federation. This new federation:

Will have at its disposal a European armed service instead of national armies; to break decisively economic autarchies, the backbone of totalitarian regimes; [an organisms] that will have sufficient means to see that its deliberations for the maintenance of a common order are executed in the single federal states, while each state will retain the autonomy it needs for a plastic articulation and development of political life according to the particular characteristics of its people. (ibid.)

This early articulation of a federal Europe, in addition to serving as a rallying cry for change, also articulates the core elements of any federal entity. These include the linch pin decision by national leaders to give up their national sovereignty to some higher form of government that becomes the federal state. In doing so, states lose their rights to refuse to participate or implement the decisions of the federal state, and further the ability of a single state to impede the progress of the federal state is limited by the removal of unanimity voting. In federal systems, simple majority votes determine policy which is both initiated and implemented by a federal bureaucracy that is created to be distinct from those of the national states. While the member states retain some powers of legislative and executive functions, others are explicitly those of the federal entity. This division or sharing of powers would be clearly articulated in a new constitution to which the states would be signatories. Spinelli and Rossi’s manifesto also highlights some of the key tasks a federal state performs on behalf of its member states, who have given up these powers to the federal entity. These include the maintenance of military forces and the
determination or foreign policy, as well as crucial economic decisions such as monetary policy. Perhaps the element of federalism not anticipated in such a revolutionary call as Spinelli and Rossi’s is the degree to which, as the new center of power, the federal government will become the place to which interest groups and other concerned actors will direct their attention for lobbying and shift these relationships from the national level to the new federal one.

Altiero Spinelli’s vision never came to fruition, and indeed he was frustrated by the seemingly slow, tedious, and ultimately not federal efforts of the integrationists like EU founding father Jean Monnet who took a more deliberative technical process of integration through a form of functional spillover that will be considered below. Spinelli, who devoted most of his political life after the EU’s creation to leading the European Parliament, the people’s assembly he hoped would offer the democratic call for a more federal Europe, lived long enough to see some of his federal dreams fulfilled in the EU’s growth and in the Draft of the Treaty on European Union. However, even today, the EU does not approach the form of “United States of Europe” that Winston Churchill called for in 1946, when he declared that “sovereign remedy” to the horrors of the great war “is to re-create the European Family or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety, and in freedom. We must build a kind of United States of Europe . . . The structure of the United States of Europe, if well and truly built, will be such as to make the material strength of a single state less important. Small nations will count as much as large ones” (James, 1974). While Churchill’s terminology has been frequently quoted, it is far from becoming reality.
Churchill's choice of terminology has since taken on a life of its own, but his personal preferences for Europe were not so far-reaching. He called, in that same speech, for a Congress of Europe, through which leaders could gather as a consultative assembly.

Because federalist approaches called for the abrogation of member state sovereignty as the first step to a new sovereign central government, it was unlikely that nationalist leaders like Charles de Gaulle, responding to both the atrocities of the war and the call for vengeance, were prepared to take this great leap forward to federalism when it would have entailed the inclusion of Germany as one the fully equal states of a federal Europe. However, federalists saw the assembly as a constitutional convention while unionists – leaders who were not eager to cede sovereignty but believed some level of unity was necessary – ultimately prevailed on their 600 colleagues and the congress with a victory for their position. The subsequent Council of Europe has done little beyond its Court of Human Rights to advance European unity.

Early European leaders like Robert Schuman and Jean Monnet conceded that a United States of Europe was the ultimate goal of integrationists' efforts, as Monnet observed in 1943 that “if States reestablished themselves on the basis of national sovereignty with all that this implies by way of prestige politics and economic protectionism” (in Dinan, 1999) there would not be a lasting European peace. Such leaders were far more pragmatic about the means of such integration than the federalists, and recognized that a federal Europe would be achieved through incremental growth. Monnet concluded that “the State of Europe must form a federation or ‘European entity’ which will make them a single economic entity” (ibid). This economic entity became the
cornerstone of more gradual approach to integration that subsequent scholars have described as functionalist and later neofunctionalist.

Following closely on the heels of the federalists were scholars such as David Mitrany, who offered a different organizational mechanism for regional integration that was far less dramatic that the federalist proposal. This was to be termed a functionalist view of the world. Mitrany, in his *Working Peace System* (1966), suggests that states can begin to interact by recognizing shared problems on which agreement among states to achieve collective goods is possible by pursuing less controversial matters. The difficulty in this approach lies in broadening the scope of the interactions to include increasingly complicated issues. Mitrany, whose aim was global rather than regional, claimed that over time political elites would embrace new issue areas through a process of learning from initial successes, to take advantage of economies of scale on such issues as health, education, or crime, while at the same time, not stoking the fires of cultural or political difference among the states:

> Our aim must be to call forth to the highest possible degree the active forces and opportunities for cooperation, while touching as little as possible the latent or active point of difference and opposition. (ibid)

In Mitrany’s conception, rational administration, not complex politics, would emphasize a “common index of need” across national borders using joint agencies. Mitrany’s functionalism has been applied to the European integration process for its attention to the processes that would foster integration. Specifically, his call for a process of functional spillover among noncontroversial issues on which countries could easily agree to the value of joint interaction. Initial success in joint action was assumed to foster in national leaders the “habit” of interaction and hopefully cooperation that would
encourage them to turn to one another again and again, and thus begin to wear away contentious relations among states. As a result:

A territorial union would bind together some interests which are not of common concern to the group, while it would inevitably cut a sunder some interests of common concern to the group and those outside it. The only way to avoid that twice-arbitrary surgery is to proceed by means of a natural selection, binding together those interests which are common, where they are common, and to they extent to which they are common. That functional selection and organization of international needs would extend, and in a way resume, an international development (ibid).

Functionalism however, did not prove to be a completely satisfying approach to European integration theorists who revised the theory with a more explicit focus on the European context that acknowledged the complexities of politics.

Like their functionalist predecessors, neo-functionalists also believed that cooperation on non-controversial issues would produce an expansion of authority to new policy issues. These scholars, of whom Ernst Haas (1958, 1967, 1970, 1975) is the central figure, pushed the theory further, advocating the development of supranational authority as the product facilitator of expanding cooperation. He defined political integration as “the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new center, whose institutions possess or demand jurisdiction over the pre-existing national states” (Haas, 1958). The emerging supranational authority of the Commission bureaucrats would be the figures who work at persuading the member states to shift their loyalties. Unlike the realist approach of Mitrany’s work, supranational cooperation prevents countries from opting-out of policy decisions but instead requires the commitment of member states, in the EU case through treaties, to specific policy areas and goals (e.g. the
creation of a free market for goods, labor, services, and capital). In this scenario, integration does not just progressively occur, but is actively facilitated by self-interested elites in the supranational body, the Commission. Haas claimed in his 1970 *International Organization* article that regional integration was the process of "how and why states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbors so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflict themselves." Such actions also require at least a minimal level of compatibility among the member states, particularly in terms of their economic complexity, and preferably in reasonably homogenous cultural and historical backgrounds. Supranational development would be promoted by seeing the merits in shared interaction with external forces rather than against one another. These scholars believed that the functional overlap between issue areas would lead to a "spillover" of political development from one issue area into its related counterpart.

Originally, Haas conception of spillover was quite basic – emphasizing the that a policy action at the new European level would lead to a situation requiring further integrative action, and so on in an almost automatic process. Haas found evidence of this in his original case study of the gradual expansion of the European Coal and Steel Community to include scrap metal production, transport of materials, and so on. Haas’s student, Leon Lindberg (1963) enhanced the concept of spillover:

The initial task and grant of power to the central institutions creates a situation or series of situations that can be dealt with only by further expanding the task and the grant of power. Spillover implies that a situation has developed in which the ability of a member state to achieve a policy goal may depend upon the attainment by another member states of one of its goals.
It is from this recognition that states may have differing and related goals that we can see the importance of other concepts of neofunctionalism. These are policy development tools employed integration-oriented elites in the new supranational body: package dealing and logrolling. These concepts result from the facilitation of EU bureaucrats creating linkages within a policy area (package dealing) or across policy domains (log-rolling) in order to create a set of policies sufficiently appealing to the member states to garner support for legislation or expansion of the European institutions competences.

These concepts of neofunctionalism became increasingly specified and more widely used through the early 1970s, by which time the theory was intensely specified (as in the case of Schmitter's multiple conceptions of spillover, spill around, spill back, forward linkage, muddling about, etc), but without much additional theoretical leverage being gained. Consequently, various authors attempted to revise the theory to extend its utility. They recognized that supranationalism was not always a goal shared by both central government and member state actors, and spillover was not a continuous process. Leon Lindberg and Stuart Scheingold (1970), authors representative of this trend, offered a revision of the spillover theory by emphasizing the contingent nature of the process. Even Haas (1967) concluded that neofunctionalism was ultimately a 'pre-theory' of integration, but its legacy was to demonstrate the "integrative potential of contemporary elite transactions" (O'Neill, 1996). Both the European Community and scholars backed away from neo-functionalism during the 1960s as key political leaders expressed strong state-centered power. This period of stagnation in the 1960s and 1970s was precipitated by the empty chair crisis of 1965. With the completion of the common market ahead of
schedule, and eager to expand its powers, the Commission proposed that it and the
European Parliament expand their powers through wider use of qualified majority voting
(and the members states cede sovereignty to the EU proportionally) and the EU acquire
its “own resources” for budgetary matters ahead of schedule. French President, ardent
nationalist and anti-supranationalist, Charles de Gaulle rightly recognized this power grab
by the Commission. After much diplomatic wrangling, the Council meeting in June 1965
exploded as the break point in these tensions and the French recalled their officials and
refused to join the Council meeting. With a French empty chair, and voting still taken by
unanimity, there was little business that could be conducted and de Gaulle deepened the
crisis by announcing that he would not accept the move to qualified majority voting
outlined in the treaty and set to take effect. The other five member states held firm in
their commitment to the new voting rules and continued to encourage de Gaulle to return.
Ultimately, it was domestic pressures from farmers during a national election that
compelled de Gaulle to relax his stance and by 1966 the Luxembourg Compromise was
drafted to resolve the crisis. The Compromise reaffirmed the commitment of the six to
honor the treaty provisions on qualified majority voting, but on “very important issues” to
encourage the member states to reach consensus (i.e., unanimous agreement). Essentially
an agreement to disagree, the Compromise allowed the business of the Community to
resume, but effectively chilled integration efforts for almost 15 years as the Council
became reluctant to address controversial issues or to vote even on less controversial one
for fear of reactivating the debate.

Despite this period of “eurosclerosis,” the conclusions of the neofunctionalists are
not to be discarded. Many aspects of the theory continue to be present and relevant in the
EU today, including the presence of a strong bureaucracy in the Commission, the ability
of these officials to encourage package dealing and log-rolling in policy development,
and the continuing effects of spillover within policy domains, as we have seen most
dramatically in the creation of a monetary union and common currency, and across policy
areas as the EU has expanded the scope and level of its responsibilities to include new
policy domains such as environmental regulation. The empty chair crisis and resulting
compromise, though, encapsulate the dilemma of the nation-states’ power and the
transition to the next phase of theoretical development. Opposition from French
President Charles de Gaulle to the centralizing tendencies afoot in Europe resulted in a
compromise that returned all important issue areas to unanimous decision-making in the
Council of Ministers (the representatives of the member states). This change marked the
rise of intergovernmentalism. Alan Milward (1993), commenting on the prominence of
states, saw the rise of intergovernmentalism as natural “adaptive response” by states
facing global pressures. William Wallace (1990) has argued that states are the most
important intermediaries in the integration process. Similarly, Stanley Hoffman (1966)
reflecting the realist tendencies of many scholars in this tradition saw states as the most
persistent players in European relations. These scholars however, overlook the
interdependence and interpenetration of states that earlier theorists had acknowledged.
Such perspectives also do not acknowledge that contemporary states may be less singular
and less coherent actors.

This phase of European development is marked by power vested in the heads of
government in the European Council and Council of Ministers, and by their
representatives in Committee of Permanent Representatives. Policy decisions then rested
squarely with member states, while the Commission played a secondary role. The emphasis here is on states' advantages not those of a supranational organization. The focus of such research is on institutions and structures rather than processes or functions. This phase of EU development and scholarship persisted until well into the 1980s.

The changes brought about first by the Single European Act in 1985 and later by the Maastricht Treaty in 1992, have left scholars and politicians alike debating the nature of the "new" Europe. While the Europe of the post-SEA era may be "new" the debate that centers on the role of states, is not. The works of Stanley Hoffman (for example 1966) laid the foundation for the integration debate that would emerge again in the late 1980s. Where Hoffman sees Haas as applying the logic of the "blender" i.e., grinding down differences in an effort to synthesize them, he believes that the governing logic is that of diversity:

The logic of diversity is the opposite [of the logic of the blender]: it suggests that, in areas of key importance to the national interest, nations prefer the certainty, or the self-controlled uncertainty, of national self-reliance, to the uncontrolled uncertainty of the untested blender; ambiguity carries one only part of the way. The logic of integration assumes that is possible to fool each one of the associates some of the time because his over-all gain will still exceed his occasion losses . . . the logic of diversity implies that, on a vital issue, losses are not compensated by gains on other . . . issues. (Hoffman, 1963).

This so-called intergovernmentalism was not initially the dominant theory although certainly a strong counter to neofunctionalism. Over time, the foundation laid by Hoffman became the basis for a new debate on the forces shaping integration.

Andrew Moravcsik (1991, 1993) has been most instrumental in bringing scholarly attention back to the regional integration debate by claiming that the current nature of the European Union can be classified as intergovernmental institutionalism. By this term he
suggests that self-interested heads of member states (rather than supranational EU authorities) pursue their national interests at all times, including at the EU level. Indeed, he suggests that EU policy is nothing more than an extension of domestic politics (1991). Further, these heads of governments, especially the leaders of the largest member states, seek to identify the lowest common denominators for policies and simultaneously, to protect their national sovereignty by requiring as many decisions as possible to be taken by unanimity. The focus here is again on states, as Moravcsik claims that “the source of integration lies in the interests of the states themselves” (1991). Moravcsik’s approach has drawn attention and criticism, but newer theoretical frameworks have yet to emerge to challenge the shape of the new Europe.

With regard to social policy development, Moravcsik’s (1993) claims that the EU is effectively an intergovernmental regime that manages interdependence through negotiated policy coordination and gives credit only to states, but ignores the “interests of the interests.” Moravcsik argues that member state governments want to avoid “open-ended grants of authority” (1991) to central institutions. The use of social partners to draft legislation that the member states’ preferred institution, the Council of Ministers, is prohibited from modifying, further weakens the utility of intergovernmental institutionalism as the theoretical explanation for social policy negotiation. Indeed, negotiation has proven to be a fairly “open-ended grant of [social policy] authority” to the social partners. Based on the early success the Commission had with including the social partners in the implementation of some of its non-binding opinion documents, the possibility of expanding the social partners’ role to include crafting the directives may have developed greater appeal. In this scenario then, the choice of the negotiation
procedure may reflect the role of the Commission as a process manager (Pierson 1995) or process entrepreneur (Majone 1998) attempting to initiate social policy. It may reflect the member states’ desire to pursue social issues in a European context rather than face challenges at the national level (Pierson 1996). It may also reflect an initiative from the social partners to “short circuit” the Commission’s legislation-formation process in an attempt to secure policy more favorable to them.

There is one last theoretical issue that must be addressed. This is not great the integration debate per se, but a theory of national level governance that some scholars, notably Gerda Falkner (1996, 1998) and Jon Erik Dölvik (1999) are attempting to apply to the European level in regard to social integration specifically: neocorporatism. Classic consociational or corporatist arrangement as described by Arend Lijphart (1968) appeared in Northern European countries as an arrangement in which national peak associations representing broad interest sectors in society (such as labor and management) are formally recognized by and incorporated into the structures of governance. Schmitter (1977) defines corporatism as “characterized by a limited number of units, recognized or licensed by the state, and granted a representational monopoly within their category of interest” and a “mode of policy formation in which formally designated interest associations are incorporated with the process of authoritative decision-making. As such they are officially recognized by the state not merely as interest intermediaries, but as co-responsible ‘partners’ in governance” (ibid, 1981). This implies the classic tripartite arrangement of a national government and its major interest associations engaged in policy deliberation for which the interest groups bear responsibility for policy formation and for policy implementation and enforcement.
among their members. In order to fulfill this function, the interest groups must have monopolistic authority over and maintain loyalty from their members through the use of incentives and sanctions to control member loyalty and ensure member compliance with legislative agreements. As the discussion in this project proceeds, the principles of this theory will not be met as we examine the emerging social partnership arrangements for social policy development.

A final word is offered here on the general state of social policy theorizing. The types of issues that have thus far been taken up in the negotiation procedure reflect the Social Charter's emphasis on employment, education, safety and health, equal opportunity, quality of work life, industrial relations, and reconciliation of work and family life. Most social legislation (including that which has resulted from European Court of Justice rulings) has cast these equality issues in the terms of workers' rights (Hoskyns, 1996). Social policy has not yet been cast in terms of European citizens' rights. With this in mind, one possible explanation for the choice of parental leave as a policy for negotiation is that it fits within the frame of issues presented by the Social Charter and within the tradition of expanded social rights for workers. The negotiation procedure may further provide an opportunity for policy development that has been unsuccessful or uneven in its development in the member states. This notion responds to the problem of subsidiarity, which suggests that policy should rest with the member states unless it requires European level action for the sake of the market advancement or when action is not possible or welcome across the member states. The parental leave directive did address the problem of disparate policies, set minimum standards, and prevented those with higher standards from pursuing the "lowest common denominator" by
lowering existing policy to the directive's level. The substantive nature of the policies that have been negotiated to date may also suggest the distinction between social policy and social regulation. Regulatory social policies may be all that can be expected of the EU until the financial, enforcement, and administrative capacities of the Commission are expanded (Majone, 1996). Majone argues for this distinction using social policy in a broad market-correcting sense and including such efforts as redistributive policies (for example, the CAP as an income redistribution program with a specific occupational bent – farmers). Social regulation serves generally to facilitate market formation and places the implementation burden squarely on firms under the direction of national governments. Conversely, moving policy formation outside of the Commission may create greater opportunity for creativity of both substance and form of social issues.

It remains unclear who decides when a policy is negotiated among the social partners instead of developed by the Commission. In the case of the parental leave directive, the Commission suggested the issue to the social partners (ILR, 1997). While this is the current procedure, the Commission and Council are pushing the social partners to be initiators on topics of their own choosing – something that labor is far more eager to initiate than the employers' groups. The negotiation procedure is such that the social partners could enter a negotiation without the suggestion of the Commission and even draft and submit legislation to the Council of Ministers without any initiative or prompting by the Commission. If the legislation is passed and the Commission then enters the picture at the implementation stage, the quality and completeness of the

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2 The negotiated directives to date include parental leave and directives regulation part-time, fixed-term and atypical work.

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implementation may be in question because of the Commission's lack of clarity on the social partners' intentions for entering into or motives for concluding a negotiation.

Social Policy

The foundations of European social policy were established early in EU history but the full structures of social policy have been built slowly and in piecemeal fashion. The founding document of the Union, the Treaty of Rome, contains social provisions, which are centered around workers, labor mobility, and the expansion of the internal market. Initial social efforts focused on the specific terms of the Treaty of Rome and slowed by the 1960s. However, enthusiasm returned in the mid-1970s after the Hague Summit and attention centered on the first Social Action Program in 1974. Legislation was slow to follow the Program, with a few noted successes including directives on worker consultation and on equal treatment and equal pay for men and women in the workplace. By 1980 however, Europe-wide economic troubles had turned attention away from social policy to the more basic problems of confronting recession and growing unemployment.

The 1985 passage of the Single European Act included a social dimension that then-Commission President Jacques Delors strongly endorsed as a key to the single market's success. With the SEA securely underway by 1988, Delors' Commission released a working paper effectively adding social policy as a second "pillar" of the single market. A year later, the "Community Charter of the Fundamental Social Rights of Workers" was introduced and adopted by all except the United Kingdom. The twelve categories of fundamental social rights of workers included:

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While the Charter had important symbolic value because it attracted political support from high levels of government, it did not have binding legal force or popular support. It did however, call for annual reports on the status of social policy. Finally, even if policy action was taken, it still required unanimous support from the Council – a difficult bar to reach.

The passage of the Maastricht Treaty in 1992 brought renewed attention, but not without controversy, to social policy with a number of key changes. Initially, the United Kingdom refused to accept the treaty with the social chapter included. To keep the treaty process intact, the member states removed the social chapter and offered instead a separate Social Protocol allowing all members, except the UK, to proceed with social policy development and to utilize the Union’s resources for that purpose. As a consequence, Britain did not participate in Council discussion or decision-making in social policy cases resulting from the social protocol, and thus the resulting directives were not binding on the UK. The other eleven effectively formed their own “social community,” and proceeded to attack questions of social policy. With the Blair government’s agreement to the Amsterdam Treaty, the British exclusion from social policy development ended and today UK workers and employers must comply with all social policies, and retroactively comply with previously negotiated directives.
The Maastricht Treaty’s social chapter produced significant changes to the policy formation process including qualified majority voting procedures extended to issues of worker consultation, working conditions, and equality of labor market opportunities and treatment for men and women; revised policy objectives, especially employment promotion; unanimous decision-making in redistributive matters such as social security; and an expanded role for the social partners (Dinan, 1999). The use of qualified majority voting should enhance the EU’s ability to promote a social agenda and should also enhance the claims of institutional intergovernmentalists who see such voting as a weakening of nation-state power. However, the national governments remain unable to influence the content of policies resulting from negotiation. The provisions of negotiation allow national governments in the Council of Ministers only to accept or reject a negotiated policy, not to amend it. The use of labor and management representatives reflects the notion that the two sides “as a rule are closer to social reality and to social problems [than the Commission]” (96/34/EC). The terms of negotiation described above, combined with an expanded role for social partners through mandatory consultation by the Commission on virtually all aspects of work and social life, have increased the power of the social partners and made their efforts more difficult to categorize under existing theoretical models of integration.

The social partners made labor law history in 1995 with the successful passage by the Council of the Framework Agreement on Parental Leave. Subsequently, the directive went into force in June 1996, with implementation expected two years later in March 1998 (96/34/EC). The framework agreement was completed by the social partners in December 1995, having spent six months in negotiation among the ETUC, CEEP, and...
UNICE. This agreement marked the first occasion on which the social partners had bypassed the Commission and drafted legislation by using the negotiation procedure from the Social Policy Agreement concluded at Maastricht. In this instance, the Commission had suggested the parental leave issue as one for negotiation, although such a Commission suggestion need not occur for negotiation to begin on a policy issue. When the social partners are able to conclude a negotiation and produce a framework agreement, it is then given to the Commission, which submits it in the form of a draft directive, directly to the Council of Ministers for approval, which if granted, requires the member states to implement it. Interestingly, the Commission is not a participant in negotiations, but bears responsibility for implementation, monitoring and enforcement of enacted directives.

The Parental Leave Directive

The Directive on Parental Leave (96/34/EC) is remarkable in its creation and in its substance. Procedurally, the directive was the first successful use of the negotiation procedure and substantively, the directive was the first significant piece of legislation to tackle the EU's goal of reconciling work and family life and to set new minimum standards for the provision of leave across the member states.

The issue of parental leave had been lingering on the EU agenda since its introduction in 1983 was blocked by the United Kingdom. A subsequent attempt to revive the issue in 1993-94 also failed to produce a directive with opposition again from the UK and also now from Luxembourg which thought the proposal was too far below their existing standards. At the suggestion of the Commission and with the pressure from
all parties mounting on the social partners to prove the utility of the social dialogue, the social partners took on the issue of parental leave in 1995. The issue appeared to be one that was not as intensely politically charged as issues involving social security and collective bargaining were and there were existing standards in many member states from which to begin discussions. A first round of consultation among the social partners was begun in February 1995 on the merits of parental leave as a European issue and having concluded that grounds existed for handling the issue as a European question suitable for negotiation, a second round of consultation began in June of the same year. A framework agreement was concluded and submitted to the Commission with a request from the social partners that the Commission convey it to the Council so that it would become binding on the member states. The Commission did so by forwarding the agreement in the form of a draft directive (the most binding form of Council decision as opposed to a recommendation) and the Council adopted the directive on June 3, 1996.

The resulting directive allowed for three months of unpaid leave to be taken by an individual employee for the birth or adoption of a child up to the child’s eighth birthday. The terms under which leave may be taken or exemptions allowed for firms were left entirely to the member states and/or social partners responsible for implementation. The directive went into effect in 1998 and is currently undergoing a five-year review that was written into the directive’s provisions and which will allow for changes should the social partners wish to revisit the terms of their original agreement.

So what does the parental leave negotiation procedure suggest about integration in the social policy arena and about our theoretical understanding of that integration? Drawing upon neo-functionalism, spill-over remains a useful tool for capturing some of
the interest in social policy harmonization as the process of monetary union advances. But the spillover into social policy has been limited to a small number of policies that do not take on the most pressing market-related questions for workers such as social protections like pensions. Further, there has been little spill-over between negotiations. While interviews with all the social partners suggest that communications and relationships have been built, each social partner organization stressed that each negotiation was an individual process with few connections to their predecessors in terms of procedures or substance. Further, the partners stress that because each negotiation is a discrete process, there is no package-dealing that carries from one negotiation to the next or between the member states that have voted to approve negotiated agreements. Finally, the social partners to date have not been the leaders of social policy development, despite the employers’ organization’s desire to do so. Negotiations thus far have been the result of Commission suggestion, although by rule this need not be the case.

The parental leave directive also points to the partialness of intergovernmentalism for understanding the negotiation process. Historically, EU member states have opposed efforts to create such a policy while the negotiation suggested by the Commission points to the role of the EU itself in shaping policy outcomes given a new arena outside of the Council in which to do so. Given the extremely curtailed role of states during the development of parental leave – the Council could only accept or reject and the EP is formally excluded from input – intergovernmentalism appears to be an insufficient explanation of social integration through negotiation.

Finally, those who suggest that a neocorporatist arrangement is forming with the use of negotiation over-value the role of a “state” (EU or national) in the negotiation
process. The EU itself has no seat at the negotiating table and only a very limited advisory role (essentially providing some support staff) during the negotiations. While the parental leave and other negotiations to date have been suggested to the social partners by the EU, the partners themselves (interview with CEEP and ETUC officials) stress their autonomy from influence of the EU and to their dismay, the degree to which they may have limited relationships with their national counterparts and national governments for either input during negotiation or influence during implementation. As one European Parliament official quipped (interview April 20, 2001), the social partners have been given “rights without duties” — referring to the treaty-based right to negotiate but lacking an official duty in implementation or oversight. This may have limited the social partners’ success in crafting legislation by keeping the EU institutions at arm’s length and by not taking leadership in policy implementation.

Methods

This dissertation project involved several kinds of research and travels to complete the project. These included archival research, the use of public records, case studies, and finally interviews with officials in both the Social Partner organizations and in the EU institutions who had contact with the negotiation processes. The focus is on social policies that were successfully negotiated, i.e., a draft directive resulted from the negotiation process. It is difficult to know the degree to which, or number of negotiations, which were never started because the parties agreed that no consensus was possible. As of the time of this writing, no negotiation, once formally begun, has broken down and failed to produce a draft directive.
In choosing to study the negotiation process, the scope of the potential cases that could be negotiated encompasses virtually any aspect of social policy development for which the EU has competence and/or for which the social partners wish to initiate a negotiation process. Consequently, focusing on the social policy development process does not limit the potential substance of the issue under consideration. The negotiation procedure is, however, unique to the social policy field, so that generalizations into other EU policy domains may be limited. Further, there is the possibility of assessing the change in the policy’s substance as well as the process of policy development as the issue of the primary case study – parental leave – has been on the EU’s agenda previously without legislation successfully resulting. Finally, the negotiation process in comparison to the standard legislative track allows for an examination of process differences. Each negotiated policy has a different negotiation team composition, potentially different commissioners in place at the EU, and substantively different outcomes for application. In this sense, the case of parental leave can be seen as a baseline for the development of the negotiation process against which future negotiation processes and outcomes can be measured. Because the substantive content of negotiation can vary widely within the social policy domain, and because the social partners have recently indicated a greater willingness to create an agenda for negotiation, an understanding of the negotiation process should be of interest beyond the specifics of the initial parental leave case under discussion here. Further, the expansion of negotiation among sectoral interest groups may be better understood with a more thorough knowledge of interprofessional negotiation.
Two trips were made to Brussels, Belgium for this research. The first, in the summer of 2000, was primarily for library, archival and public record research and to establish some contacts within the EU. The second trip, in April 2001, was primarily for the purpose of conducting interviews. Fourteen interviews were conducted with individuals from the three Social Partner organizations (CEEP, UNICE, and ETUC), the European Parliament and its Social Affairs committee, the Commission – both in the directorate for oversight of negotiations and the directorate for oversight of implementation and monitoring, and the Council of Ministers’ social affairs staff. Many of these individuals had worked with the negotiation process since its inception, while a few were relatively new to the process, but certainly not to the issues under negotiation.

The representatives from the social partners’ organizations had served as staff or liaisons to the negotiations and had often been part of the implementation process in conjunction with the Commission. The EU organizations’ staff, at the Parliament, Council and Commission, all had long personal histories in social affairs and had seen or shepherded many, if not all, of the negotiated directives through their respective institution’s review, approval or implementation processes.

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3 The interview subjects covered all the major EU decision-making institutions (Commission, Council and European Parliament) as well as the three social partner organizations (ETUC, CEEP, UNICE) and specifically included the senior staff for social affairs at the three social partners (these individuals were liaisons to the negotiations), the director of one of the social partners, a Member of the European Parliament and three senior social affairs staff at the parliament (one from the majority party during the early negotiations and two from the Economic and Social Affairs Committee which review negotiated directives), the principal administrator for social policy at the Council of the EU; and senior staff with responsibility for parental leave implementation monitoring at the Commission’s Equal Opportunities Unit; as well as senior staff working with the negotiations from Industrial Relations and Labor Law units of the Commission. Thus all social partners and all EU institutions involved directly or indirectly with the negotiation process were represented among the interviewees.
These individuals were chosen for their proximity to the negotiation process by virtue of their position in the social partners' organizations or in the EU or they were identified through a “snowballing” process of asking the initial respondents to recommend further contacts. Because the negotiation procedure is allowed to occur in private, indeed in secrecy, interviewing those close to the negotiators proved fruitful as they could act as “knowledgeable informants, not necessarily as respondents... they were important... not necessarily because they were themselves the decision makers, although many of them certainly were, but because they could inform me about the events and the perspectives of people in key locations” (Kingdon, 1995).

The questions (see Appendices) were designed to elicit both technical details of the negotiation process and specific policy substance, as well as more abstract considerations about the nature and spirit of the process. All of the interviews were conducted in the offices of the interviewees. The interviews were taped and transcribed by the researcher, but no specific attribution is made to named subjects.

Implications

Social policy is and will be a key component of EU integration, both in terms of the EU's expansion to new member states for whom social issues are especially pressing as new democracies, and in terms of a deeper union more fully integrated across all policy spheres, and able to realize a common market for labor. An understanding of the processes, issues, and participants in this relatively new policy negotiation strategy will

4 I wish to thank Peny Clarke, Stefan Clauwaert, Anna Colombo, Simon Duffin, Alan Evans, Nuncia Gava, Joelle Hivonnet, Alexander Kleinig, Fiona Kinsman, Terese de Liedekerke, Antionette Long, Diego
contribute to several levels of research on the European Union. These theoretical considerations will be developed more fully in subsequent chapters, but an overview of the major discrepancies between the negotiation process and the major integration theories is in order here. First, this study contributes to our understanding of the type of governance structures being developed by the Union. The negotiation procedure falls in between supranationalism, intergovernmental institutionalism, and corporatism, but the degree to which it furthers the development of any of these trends cannot yet be determined by its short history.

If the negotiation procedure reflected a traditional neofunctional approach to European integration, we would expect to see the dynamics and actors of this theory at work in the negotiation, but we do not. The self-interested bureaucratic elite, the Commission, assumed by neofunctionalism to be working overtly, and covertly, for deeper integration has given away the very role and powers that would allow them develop or harmonize social policy. Instead of serving as legislation initiators and drafters, the Commission has turned this role over to the social partners. To date, the social partners have drafted legislation only at the Commission’s urging, but even that is changing as the social partners begin to outline a policy agenda from which they will both initiate and draft framework agreements. Further, if this process was part of a neofunctionalist integration story, we would also expect to see these same integration-oriented elite bureaucrats engage in the construction of package deals and log-rolling across issue areas. This has not happened. Indeed, the structure of autonomous social

\[\text{Mellado, Bortho Pronk, and Jerome Roche.}\]

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partners engaging in bi-partite (labor and management alone – no state presence) precludes this option for the Commission or national government officials.

For neofunctionalists, the central means for increased integration is an incremental process of spillover – the expansion of EU competence from one issue area into another related issue area over time, and usually promoted by the integrationist-oriented elite in the supranational organization (in this case, the Commission). This spillover is not being seen across or within negotiated social policies. There has not been a cumulative effect from the first five successfully negotiated policies. While some of the topics may seem related (e.g., directives on various forms of atypical work), the outcome has not been an increasingly comprehensive, coordinated, or integrated set of social policies. Had this been the case, we would have expected the first successfully negotiated policy on parental leave to have been the foundation for a series of directives that promoted the reconciliation of work and family life. Instead, the parental leave directive has been a “stand alone” piece of legislation for the last decade.

If the negotiation procedure does not conform to the core tenets of neofunctionalism, perhaps it reflects a competing understanding of integration: intergovernmentalism. This does not appear to be the case. The negotiation procedure, if it conformed to the principles of intergovernmentalism as articulated by Moravcsik (1991), would show evidence of the strong preferences of national governments, that are assumed to be the primary actors in restraining the integrationist tendencies of EU bureaucrats in the Commission. We would expect to see the national governments acting during intergovernmental conferences, treaty negotiations, and regular meetings of the Council of Ministers to constrain the powers of the Commission, modify its drafted
legislation, and certainly we would expect to see national leaders blocking efforts to
"give away" legislating powers to social partners that the national leaders have no forum
through which to control. These expected patterns of intergovernmentalism have not
emerged. The national governments did block the attachment of the Social Protocol, that
included negotiation, to the Maastricht Treaty. Even where governments have had the
chance to constrain social policy development, not one single government has voted
against a single negotiated policy at the Council of Ministers.

Intergovernmentalists have also suggested that we should see the development of
interstate bargains as alternatives to non-agreements or the development of bargains that
create issue linkages to prevent the ability of some states to exit from the integration
efforts. These anticipated outcomes also have not come to pass in social policy
negotiation. National leaders have not used the Council of Ministers or treaty
negotiations to bundle social issues into linked issue bargains. Further, when voting on
negotiated policies, they have neither used a threat of veto (i.e., exit) or passed
agreements with less than unanimity -- thus obviating the need for bargains. Finally, we
have not seen the delegation or pooling of sovereignty by states anticipated by the
intergovernmentalists. At best, social policy negotiation has created new regulations that
allow member states flexibility in their implementation, without creating harmonized
rules and without threatening the core areas of national welfare policy such as the social
protections of pensions, welfare benefits and wage issues.

Finally, those who argue that the emergence of social policy negotiation is simply
the elevation of corporatist practices to the European level, overlook key aspects of
corporatism that are not practiced by the EU and the social partners. Most notable among

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these is the absence of the classic tripartite relationship of state-labor-management. With
the negotiation process, we see only bipartite practices of labor-management. This fact is
acknowledged openly by the social partners who prize their “autonomy” from the EU
institutions and by the EU itself, especially the Commission, as it recognizes its limited
involvement. Further, while the social partners may be officially recognized by the EU,
and have an official role to play in social policy consultation and negotiation, they lack
the characteristics that would allow them to behave as corporatists participants. They
have little if any responsibility for implementing their negotiated agreements. This,
compounded by tenuous relations with their national level members, their inability to
compel action from members and to administer sanctions, and their inability to be
monopolistic in either their representation of or the provisions of benefits to members,
severely curtails the ability to describe the social partners as purely corporatist actors.
These three theoretical disjunctures with the social policy negotiation procedure will be
discussed in greater detail in the following chapters, while below other implications of
understanding the negotiation process are discussed.

An understanding of this negotiation procedure sheds light on more applied issues
than the broad theoretical concerns just mentioned. For example, social policy
developments have raised real concerns captured by phrases such as “race to the bottom”
and “lowest common denominator.” These terms are used to suggest that EU policies are
not building a fuller social sphere for European citizens. Instead, these terms suggest that
governments or interest groups are taking the lowest standards among existing national
policies and applying them at a European level as the least common denominator for
members to adopt. The outcome of such policy development may be an effort by states,
or firms, to advocate such a low standard in order to capture a short term competitive
gain, such as the recruitment of new businesses to a “lower cost” business environment.
Those who favor moderate to robust social policies fear this race to the bottom, as
competitive market forces create short-term gain for some at the expense of long term
cohesive policy development. A clearer picture of how and why the negotiation process
is used sheds light on whether lowest common denominator policies and a race to the
bottom are actual outcomes that must be fought or accommodated in policy, or if they are
rhetorical devices used to impair the policy process.

The implementation of the Parental Leave Directive suggests that these fears are
not grounded. The implementation of the directive has raised (or created) standards in
several member states, while those with more generous leave policies have not reduced
their benefits to meet the minimum standards outlined in the directive. The Parental
Leave Directive (and subsequent negotiations on part-time, fixed-term, and atypical
work) raises additional questions about the social partners attention to questions of
gender. Are they responding to equity or gender-based concerns because of citizen
pressure, women’s mobilization, or Commission Social Action Programs? Indeed,
opportunities for equity or gender-based policy may be greater when the state is no longer
a principal actor (O’Connor, Orloff and Shaver, 1999). Thus, the Commission has
stressed and the social partners have acknowledged the gendered impact of the subjects
of their negotiations to date. Women workers have been the direct or indirect
beneficiaries of the agreements on part-time, fixed-term, and atypical work.

Third, as the parental leave directive’s development and implementation suggests,
there is a clearly gendered undercurrent to the negotiation process. This dynamic is
clearly recognized by the Commission, although there is often little that the Commission can do to utilize this gender component in either the negotiation or implementation phases. Further, there is division among the social partners on the degree to which they should be attuned and responsive to gender considerations as they draft social policies. While the EU has long histories in dealing with both social issues and equality issues, it is a fractured history of policy development in which progress is made in fits and starts and often without a cumulative effect developing between social and equality policies. These gendered implications, and the response of the various policy actors to them, will be taken up in Chapter Four.

This research project suggests that those engaged in social policy negotiation have mixed views about the intended use of the procedure. Some view the process as a means to develop policy efficiently, indeed to accelerate the process of policy development, after years of obstacles or simple neglect of the issues. The labor organization, ETUC, the Commission and indirectly the European Parliament fall into this category. Conversely, others engaged in negotiation take a more cynical view and see the process as a means of manipulating the policy outcomes. These participants and observers see negotiation as a means of limiting the scope of policy and the actions of the EU in order to prevent policy development or keep it confined to the lowest common denominator outcome. Business groups indeed fear that any negotiated policy may become the foundation of additional labor legislation that they view as burdensome and thus are reluctant to negotiate on virtually any item. Some politicians have suggested that ceding power to the social partners is a convenient way for the Commission to delay difficult social policy questions by claiming that “the social partners are working on that” and thus
it is off the legislative table until the social partners either reach agreement or announce a failed negotiation. There have not been a sufficient number of negotiations to fully assess this claim, but the social partners have successfully concluded agreements on all their negotiations to date.

Understanding when, how, and under what conditions the procedure is used will allow generalizations about the types of social policies we can expect to be negotiated, which issues will remain with the Commission or with the member states, and which issues are least likely to be taken up for policy discussion at all. This means more than understanding when the subsidiarity issue will push some questions back to the member states. It indicates when policies may be considered “European” in nature, and when they will be given to social partners or initiated by them.

I believe that negotiation will continue to be an important avenue for social policy development and may indeed expand the scope of the issues under consideration. The improved relations among the social partners spoken of by interviewees both inside and outside of the interest groups has laid a foundation for more detailed and extensive negotiations at the sectoral level, an increase in the number of joint opinions, and a responsiveness to calls from the Commission for promoting “best practices” that the social partners identify jointly. Social policy negotiation will never become the sole path to social legislation, but the willingness of all involved to allow the Social Dialogue to expand suggests that in the social policy arena integration will be allowed to follow two paths simultaneously. As a result, I believe we will see the Social Dialogue become a form of “parallel” legislating. This does not suggest that Social Dialogue will result in a “two-track” or “second tier” legislative path, the implications of which are lower quality
legislation with a poorer implementation record and low utilization by EU citizens. Rather, parallel legislation, despite its unusual path to passage, enjoys all the benefits of Commission implementation, high rates of efficient implementation by member states, low rates of contestation or infringement proceedings in the European Court of Justice, and a generally improved state of social regulation across the EU as policy comes forward on a more consistent basis and on a consistent set of issues under Social Partner initiation.

Overview of the Dissertation

The following chapters explore the institutional dynamics at work in social policy negotiation. Chapter Two examines in detail the degree to which the social dialogue conforms, or fails to conform, with the major tenets of the dominant theories of integration. Further, it reviews the context of social policy-making over the EU's history, the origins of the social dialogue, and the actors who participate in it. It then considers the perceptions these actors have about their roles, their relationships to other negotiating parties, and the influence these factors have on what is taken up for negotiation and when such action is likely to occur. Chapter Three applies this social dialogue discussion to the first successfully negotiated framework agreement: parental leave. The parental leave directive was not only the first successful negotiation, but the only one to date that has been both implemented and evaluated, and thus ready for review and possible revision by the very social partners who negotiated the original framework. Chapter Four examines the gendered implications of the social dialogue process generally, and the substance of
the early negotiated agreements. The chapter then considers the future of gender equity policy-making through negotiation and through traditional legislative channels.

The fifth and final chapter returns to the broader institutional questions and situates both the original negotiated directive on parental leave, and the broader negotiation process, within the theoretical understandings of European integration. This chapter concludes that the negotiation procedure does not fit easily into the two major theories of integration, nor does it conform easily to the strictures of neocorporatism. As such it lends itself to elements of each while embracing none of the major theories. It appears to be forging a middle level of governance divorced from national participation but not wholly within the EU’s official organizations. Consequently, its success – in creating and in implementing policy – remains to be seen as too few directives have actually reached implementation to assess the degree to which social dialogue will expand its policy-making role, recede into the background as an advisory consultation, or develop as a case-specific participant.
CHAPTER 2

THE SOCIAL POLICY NEGOTIATION PROCESS

Ask the typical European scholar about the debate among integration theorists and the concepts and issues raised in the preceding chapters are likely to be raised and to be applied to critical junctures in the European Union's history. Intergovernmentalists will point to the power of member states at moments like the empty chair crisis and Luxembourg compromise, or the negotiations and compromises between states during the drafting of the Single European Act. Neofunctionalists will point to log-rolling and package deals made using agricultural subsidies through the Common Agricultural Policy or the functional spillover successes of uniting coal and steel, followed by scrap metal, and then transport sectors to support coal and steel production, or the spillovers in the process of removing tariff barriers and forming a customs union to the creation of common exchange rates and common currency. The development of social policies is not likely to be at the top of any integration theorist's list of examples for how their preferred integration theory explains the EU's development. Perhaps this is not surprising given that the largely economic character of the European Union has been the focus of theorists' efforts and of the EU's own policy making as it sought to advance the treaty goals of the freedom of movement for goods, services and capital.
One central treaty dimension has remained underdeveloped in policy and underattended to by integration theorists: the call for the free movement of labor. Add to this dimension the call for equal pay for women and men in the Treaty of Rome, and the subsequent additions of reconciling work and family life, attention to employment, and education, and the integration theorists grow more quiet. As we move beyond the broad outlines of social policy to consider the specific means by which social legislation is made, we see that these major theories are unsatisfactory in their application to the social policy negotiation procedure as it has developed in the last decade. Before we consider the shortcomings of the theories in full detail, it is necessary to explain briefly the history of social policy as a European question. Then, we examine the traditional legislative track through which social policies, like most other EU policies, are made and contrast this to the legislative process that emerges with the advent of the negotiation procedure. Special attention is paid to the decision point at which the social partners assume responsibility for drafting an agreement to propose as legislation, and thus remove the legislative process from the influence of the EU institutions. A significant discussion will consider the negotiation procedure in light of neofunctionalist, intergovernmentalist and corporatist theories that typically define EU integration generally, and in the case of corporatism, the social integration specifically. First, we turn to the history and process of social policy development.

Social policy in the European Union has its roots in the founding treaties, case law and programs. The Treaty of Rome provided, for example, for the freedom of movement of workers with the aim of promoting greater integration. These provisions were addressed by the Commission in the 1960s and into the early 1970s. The middle of
the 1970s saw an increase in legislative activity in social affairs with the passage of directives on equal opportunities, labor law, and the very broad category of health and safety at work. At the same time, the European Court of Justice was enjoying an activist period in which it extended the scope of these, and other less explicitly social affairs, directives. The 1980s continued the legislative emphases in the areas of equal opportunity and workplace health and safety, especially with the adoption of the Single European Act that allowed the use of qualified majority voting by the Council to address health and safety issues. Of more significance to this research project, the Single European Act also recognized the social dialogue process as a Community activity. By 1990, the Commission had issued its second Social Action Program and had adopted the Charter of Fundamental Social Rights of Workers, both of which continued the themes of safety and equal opportunities. It was the passage of the Maastricht Treaty with its Agreement on Social Policy (ASP) that was a significant turning point in the pace and direction of social legislation. The ASP, which included all members except the United Kingdom, again extended the use of qualified majority voting to a greater array of social issues than occupational health and safety and most importantly, secured for the social partners a formal role in all aspects of social affairs – from mandatory consultations on all social issues to a formal role in policy-making. It is from the ASP that social partners gained their ability to negotiate social policies such as the agreements on fixed-term work, part-time work, and parental leave. The last of these agreements is the focus of study in the next chapter. Finally, social policy became more firmly established in the EU’s treaties in 1999 when the Amsterdam Treaty consolidated the ASP into the body of the treaty instead of allowing it to stand as an attached protocol. At the same time, the
United Kingdom ended its opt-out and adopted both the terms of what was the ASP and came into compliance with the three negotiated agreements concluded under its terms. The Amsterdam Treaty refocused the social agenda on combating unemployment, promoting equal opportunities, fighting discrimination, and enhancing and refining the role of the social partners. The bookend for the current era of social policy is the Social Policy Agenda (COM (2000) 379 final) which sets out a five year plan from 2000-2005 to tackle the issues of employment (especially unemployment, the rise of service and knowledge based economies, and improving worker mobility); improving social protections (from social security schemes to issues of inclusion, equality, and fighting discrimination); preparing for enlargement and greater international cooperation; and finally, further developing the social dialogue.

The Social Partners and the Social Dialogue

The social partners for interprofessional (or cross-industry) negotiation are three groups whose membership is sufficiently broad that they are considered the representative organizations for European labor and employers. There are three such partners at the interprofessional level and over 30 for the specific sectoral negotiations. Because sectoral and interprofessional negotiations occur separately and involve different actors, only the interprofessional groups are considered here. They are the European Trade Union Confederation (ETUC) on behalf of workers, the Union of Industries of the European Community (UNICE) on behalf of employers, and the European Center of Public Enterprises (CEEP) on behalf of enterprises of general economic interest, either public or private. CEEP is more often aligned with UNICE than with the ETUC. The
employers’ organization UNICE is the oldest of the social partners, formed in 1958 with an emphasis on improving the competitiveness of European businesses. Their current policy positions stress the need for management to have great flexibility in all aspects of employment and consequently are adverse to EU regulations of virtually every kind. Commenting in a recent press release on the current negotiations on temporary agency work, the president of UNICE summarized the position of the organization on most negotiations by saying “we are prepared to continue negotiations . . . but UNICE will not be an accomplice to the establishment of a system damaging employment” (UNICE, March 21, 2001). This view could be applied to UNICE’s stance in most of the negotiations to date.

In contrast, the ETUC believes that “in our European Model, the invisible hand of the market must be guided by the visible hand of politics” (Federal Ministry, 1999). It is this position that has made the ETUC, the youngest but best organized social partner, the one most willing to both initiate and engage in negotiation. To date though, their efforts at initiation have been rebuffed by UNICE and CEEP, who insist on Commission initiation. The ETUC agenda parallels many of the items found the EU’s Social Policy Agenda, including the call for fighting unemployment, advocating for social security and other social protections, fighting various forms of discrimination, and in general, working for the security of workers’ wages, positions and rights. The third social partner, CEEP, is typically aligned with UNICE. This is not surprising given that the organization was founded by enterprises of general economic interest that broke away from UNICE in 1961. Believing that as public sector organizations that were both profit-seeking and concerned with broader social issues, their interests were not well represented by the
employers, CEEP members established themselves as a separate institution. It has more recently come to be a close ally of UNICE’s as many of its affiliates have been privatized.

The social dialogue process falls under the Employment and Social Affairs Directorate of the Commission and more specifically, under the auspices of the Industrial Relations unit. The Commission’s overarching goal is to encourage dialogue between representatives of labor and management that will produce European level agreements. The dialogue was formally launched in 1985 at a conference that has since lent its name to the process – the Val Duchesse social dialogue. At this level, the Social Dialogue Committee convenes semi-annually for high level discussions between the three recognized social partners to address broad common issues and issue joint statements, such as promoting life-long learning. Summarizing the current Commission position, and relative lack of involvement in, the process, Odile Quintin, Deputy Director General for Industrial Relations said that “at the European level, two fundamental aspects of the Social Dialogue exist: the right to be heard and negotiation” (Federal Ministry, 1999).

Under the Agreement on Social Policy (formally incorporated into the Amsterdam Treaty), the Commission is now required to consult with the social partners on all proposals for social policy. After an initial consultation about possible “directions” for action, the Commission must decide if action is desirable, and if so (i.e., there is a sense among the social partners that the issue is a European one and would be served by some form of Community action), the Commission returns to the social partners on for a second consultation on the substantive content of a proposal. At this juncture, the social partners have two choices: (1) they can offer a recommendation or opinion to the
Commission and allow it to proceed with legislation or (2) they can notify the Commission that they wish to begin an independent negotiation, thus halting Commission work to develop legislation, and, if successful, could lead to a framework agreement.

The social partners have nine months to conclude their negotiations or to seek an extension (which the Commission routinely grants). If they are able to reach agreement, they can jointly request that the Commission forward their agreement to the Council for a decision (which has been the case to date) or they can attempt to implement it through their national level organizations. If they are unable to reach an agreement, the negotiations fail and the issue returns to the Commission for further consideration. To date, no negotiations have failed, so it is not yet known how the Commission would proceed with an issue on which the social partners had been unable to reach consensus.

The process, as described above, provides general guidelines and roles to the EU institutions and to the social partners. In the following section, the views of the actors who are actively engaged in negotiation will be used to highlight the varying perspectives on the process and the differences in both procedure and substance between the negotiation of legislation and its creation through the standard legislative process.

The Negotiation Procedure and the Standard Legislative Process

In the social policy arena, new directives can result either from the negotiation procedure just described or through the EU’s standard legislative process, i.e., the method by which all other EU legislation in all fields including social policy has historically been created. This process begins when the Commission proposes legislation which is then reviewed and approved by both the Council of Ministers and the European Parliament in
a process known as codecision in which amendments are made by both bodies and votes taken in each for final approval. Traditionally, the social partners can provide opinions to the Commission and can lobby at the Council and Parliament, but they would not normally have direct responsibility for a directive’s development. All three bodies - Commission, Council, and Parliament - have committees that would hear deliberations. The directive then returns to the Commission for implementation and oversight of violations. Clearly, the two processes are quite different. According to the interviewees, the processes have the potential to result in substantively different pieces of legislation and raise difficult procedural questions about the inclusivity of the process. There was remarkable agreement among subjects on these points as well as wide agreement on the high degree to which member states are willing to accept and implement a negotiated directive.

Among both the social partners and the EU institutions, the most significant procedural difference between negotiation and the standard legislative process is the institutional configuration rather than the fundamental substance of the directive. The exclusion of the European Parliament as an institution with no direct participation in the approval process was widely noted. The ETUC was most interested in seeing the Parliament included in the approval process for the negotiated directives in a capacity similar to the Council, i.e., to accept or reject a proposal without amendment. Given the strong Socialist Party presence in the EP and the relations between the trade unions, the party, and the Economic and Social Affairs Committee of the EP, it is not surprising that the ETUC sees an ally in the Parliament. Also not surprisingly, UNICE and CEEP, with historically less developed relations with the Parliament and a general aversion to new
regulations are not interested in promoting the inclusion of the Parliament. The Commission, it seems from the interviews, would like to include the EP in order to create a greater element of democracy in the process and to give greater weight to the opinions and recommendations the Parliament currently offers. A Commission official from the Labor Law Unit (interview, April 17, 2001) observed that "the process seems to work reasonably well, but it does seem strange to exclude the Parliament. Politically, the Commission would be just as happy if the Parliament was able to give its opinion – not just in a purely consultative role that nobody is obliged to take account of." Of course the Parliament itself would like to be involved in a more formal and binding way, but currently there is mixed opinion about the level of "damage" from their exclusion. Both an MEP and a Economic and Social Committee staff member indicated their desire to be included but felt that the low number of negotiated directives and the relative weaknesses of the issues left them reasonably unworried about their exclusion. For example, the MEP "never thought it was very dangerous for the Parliament [to be excluded], but I always thought we should be able to yes or no, but I personally would say yes 99% of the time. Because most of the time is very unlikely the procedure would go in the wrong direction and it is very unlikely that it would lead to something bad" (interview, April 26, 2001). From the staff side, the feeling is quite similar: "It doesn't frighten me that the Parliament would be completely out of the policy-shaping because the procedure has proven to be quite difficult [for the partners to reach agreements]. This procedure has limited scope [to social policy] so I don't really feel that the social partners are taking power away from the EP" (interview, April 20, 2001). These feelings have not, however, kept the
Parliament from requesting in intergovernmental conferences and treaty negotiations to be made part of the approval process for negotiated agreements.

Given this difference in institutional participation between negotiation and the traditional legislative track, can we expect substantively different directives? Should we also expect that directives from the two processes would have differing levels of implementation success? Among all the actors – from both the social partners and the EU institutions – there was broad agreement on the answers to these questions. Substantively, it was said that negotiated agreements were more practical and flexible than if comparable directives had emerged from the Commission’s own efforts. Similarly, virtually all parties agreed that had the same topics been proposed by the Commission through the standard legislative procedure, there would have been "tighter" language, by which it was meant more detail and less flexibility, and the directive would probably have been more "progressive" by which it was meant that the directive would have been more generous for worker security, for example including paid leave in the parental leave directive. The second major point of agreement was that upon implementation, negotiated directives have just as much standing as directives that emerged from the standard legislative track. They are taken seriously by the member states, and the Commission, despite its limited role in the directive’s creation, is just as willing to monitor transposition into national law and to enforce violations.

A Commission staff member in industrial relations said rather enviously of the negotiation process that "what is really important about social partner directives is that they can obtain a level of acceptance we can never dream of. If you have a directive signed by the employers’ federation at the European level, the pressure for the company
to implement is much bigger [than with a standard Commission-drafted directive]" (interview, April 10, 2001). The direct application of this can be seen in the following chapter on parental leave when an MEP observed that it is much harder for businesses to complain to him about legislation when they are a member of UNICE. That same MEP goes on to say "the advantages of the agreement are first that a lot of the detail problems are solved and secondly the texts are often better and more thought out in concrete situation than if the texts were done in a normal legislative process" (interview, April 26, 2001). The social partners concurred, with one claiming that while "the result is a framework, it fits the needs of the employers and the unions because they did it so they may negotiate what they want to have with the tools of negotiation" (interview, April 24, 2001).

From the perspective of those who must monitor the transposition of a directive into national law and take proceedings against states that don’t transpose the directive correctly, the Commission is also committed to treating the negotiated directives as any other piece of legislation. From the Equal Opportunities Unit (overseeing the implementation of parental leave) came the emphatic response of a Commission lawyer on the question of lesser standing for a negotiated directive: "No. No. No. Not a territory thing, quite the contrary. No definitely not. If we have taken a framework agreement and turned it into a directive than it is now our directive to implement" (interview, March 27, 2001). And a former staff member of the same unit concurred by saying, "Once it is a directive, it’s a directive. In terms of examining it or implementing it properly, it is just like any other directive . . . Since we had all the information on parental leave because of the reporting requirement, we took it very seriously" (interview, April 19, 2001)
The second substantive difference noted by most of the interviewees was the likelihood that a proposal for a directive that went through the standard legislative process would most likely include "tighter" language in the clauses on implementation, granted the member states less flexibility, been more progressive in providing for the security/protection of workers, and generally been more "prescriptive" of actions for member states and companies to undertake. Both employers and trade union representatives recognized the very flexible terms of their negotiated directives. By flexibility, both they and the EU officials, mean the degree of maneuverability given to member states and companies to implement the directive. One Commission official described it as a "menu" of options. As will be seen in the next chapter on parental leave, virtually every aspect of the directive had a degree of flexibility on the terms and conditions of the leave. While the ETUC strives to offer maximum benefits and security to workers, even they recognized the need for this flexibility to get concurrence on the agreement. Said one social partner official: "there is no way to be less flexible, because there are fifteen member states, because the cultures are different, because some already have more protection, so it is very difficult to have precise language. For now, we cannot reach something more than a framework agreement – its title is framework – which puts limits, but inside these limits the social partners or the member states, depending on how they are organized, can have some room for maneuver" (interview, April 24, 2001).

In contrast, the officials at several different Commission directorates, as well as the EP and Council, believe that if comparable proposals had been achieved through the traditional negotiation process, much of this flexibility would have been curtailed. The adjective of choice for these officials was that the language of the directives would be
"tighter" and thus, would more specifically detail conditions for employers to apply the directive and would be more generous in providing for workers. Said one Commission official, whose comments were representative of several other interviewees, "you can probably tell a directive that has been negotiated by the social partners is written differently than a normal directive because the language is loose and legally not very clear . . . [had the directive been done by the Commission] it would have been better written, things would have been clearer and less would have been left to the member states to have special and piecemeal. I think that was too much catering to subsidiarity" (interview, April 19, 2001).

The last procedural point of difference between negotiation and the standard legislative process is the degree of consensus needed among the social partners in order to conclude an agreement. Clearly, in a standard legislative process through which the Commission proposes and the Council and Parliament each have two opportunities to review and amend, there is substantial room for changes to be made to the directive. Among the interviewees, there was a marked difference of opinion on the degree of consensus that had to be reached concerning the language of the agreement before a negotiation was considered concluded. Those from EU institutions generally believed that the social partners understood their text to be a "package" on which there was some give-and-take. For example, the MEP who observed "it is a package, but I will say every point and every comma is dealt with, otherwise they would not have agreement, but everyone realizes it is a package and everyone realizes every small concession they make, so they would say 'this point we do not like, but because it is a package, I am responsible for this part of it even if I do not like the rest of it'" (interview, April 26, 2001).
The social partners, by contrast, are quite adamant that it is not a "package," but a word-by-word, comma-by-comma negotiation to the end. According to one social partner, "at the end of the day we take into account all the positions meaning that if we do not agree on one sentence then the sentence is not written. It is better for all the social partners . . . I mean if you have a joint proposal of all the social partners it has to be agreed on by everyone. If we do not agree on the terminology and nobody makes concessions then it will not be" (interview, April 24, 2001).

Given the complexities in process and substance of the negotiation procedure and given its differences from the traditional legislative track, what are the factors that would influence a social partner to participate in a negotiation? The discussion that follows examines the five factors that combine to influence the likelihood that the social partners will jointly agree to begin a negotiation on a new social policy topic.

**The Decision to Negotiate**

In the development of a social policy, the Commission is required to consult the social partners in an initial round of discussion on possible policy directions for a given subject. The social partners offer opinions to the Commission the degree to which they think European level action is needed or desirable for the policy domain. If, between the Commission and the social partners there is general agreement on need or utility of European action, the Commission again consults the social partners on the content of the possible proposal. At the time of this second consultation, the social partners face a choice: to inform the Commission of their joint desire to begin a negotiation (and thus the Commission halts further efforts to develop the legislation while the social partners
work) or that the social partners do not view the policy as one where they wish to negotiate, in which case, the topic returns to the Commission for follow-up (a directive proposal, a recommendation, a regulation, a report, or no action at all).

What, then, are the factors that most influence the decision of the social partners at the point of choosing whether or not to negotiate? I believe that there are five factors, that operate in varying combinations of intensity, that help us understand the decisions of the social partners. These are: the ease with which the social partners believe they can address the issue; the diversity of the existing situation across the EU on the topic of consideration; the expertise the social partners believe is possessed or needed to enter negotiations on the subject; the degree to which an issue favors the preferences of a single social partner; and the proximity of the issue to the politically charged questions of social protections and collective bargaining. Below, I will take each one of the factors in turn to examine situations in which the factor has facilitated or hindered a negotiation.

First, the question of the perceived easiness of a negotiation. In other words, is this topic so basic and there is such common agreement on the issue at the outset, that negotiation is simply a matter of codifying existing national practices into EU policy? At first glance, this factor might seem to explain most of the negotiations. For example, virtually all member states had maternity leave and quite a few had some form of parental leave, so an agreement should not be hard to reach. However, parental leave had been on the EU agenda since 1983 with British opposition consistently keeping it off the table. Further, three member states had no parental leave provisions and the remaining states had wide variation in length of leave and level of payment. However, the interviews I conducted did reveal a general sense that this was an issue with which most states,
employers, and employees were familiar and on which there was not great controversy over its provision, especially if unpaid, and thus agreement would be fairly likely. On the other hand, the easiness or simplicity of an issue at the outset is not a complete predictor of success, as the current negotiation on temporary agency work have proven. What seemed like a straightforward definition of regulations have proven to be far more complicated given the varied status of temporary agencies and workers across the EU member states.

This leads us to the second factor that influences the decision to negotiate: the diversity of experiences and situations across the EU. The social partners have been reluctant to begin negotiations on topics for which there is considerable divergence in practice and culture across the European members. For example, the initial consultation from the Commission on a proposal for a sexual harassment directive ended after the consultation. The social partners indicated that they were not interested in pursuing a negotiation given the level diversity in cultures, legal standards, and corporate practices with regard to sexual harassment rules. One social partner remembered saying of the issue “we don’t think it is a matter to be the subject of regulation at the European level because of the differences in culture between the member states because there are already many provisions at the national levels for this and also because at this time we have no knowledge of the question.” This last comment leads into the discussion of expertise below. The issue was returned to the Commission, but to date, they have not drafted a directive of their own to pursue through the traditional legislative track. The current negotiations on temporary agency work have stymied on this factor as well, with social partners in countries with little or no use of temporary agency work and those who structure is broadly different ways find reaching agreement on regulation difficult.
Third, the social partners prefer not to negotiate when they believe that their negotiating teams would lack the expertise necessary to create an agreement. The example cited by the interviewees in this case was the directive on the burden of proof in cases of sex discrimination. After consultation, the social partners indicated that they would not negotiate because they saw the issue as fundamentally a legal, i.e., judicial, matter for which they lacked the appropriate officials to provide guidance. The issue returned to the Commission, which authored a directive that largely codified existing practice and is generally considered a very weak directive (interviews, April 19, 2001 and April 26, 2001).

The fourth factor that influences the decision to negotiate is quite difficult to measure. This the degree to which an issue would favor the preferences of a particular social partner. Thus, for example, CEEP and UNICE were quite unwilling to begin negotiations for the European Works Councils, that required all multinational corporations to create bodies for sharing information and consulting with workers. Perceived as an issue mostly favored by the ETUC and the Commission, there was no joint agreement to negotiate, and subsequently the Commission authored the proposal and secured its passage over the objection of business groups. There is not a clear case of the ETUC seeing an issue as so pro-business that it has refused to engage a negotiation, although the difficulties in concluding an agreement on temporary agency worked are suggestive of the degree to which the ETUC wishes to provide job security on an issue where employers groups have argued for great flexibility in the rules on job protection.

Finally, while the social partners do not have the authority to draft agreements on wages, pensions, or other social protections currently under member state control, many
of their issues are closely related to welfare provisions. The more the subject requires a
social protections solution, the less likely that all three social partners, but especially the
employer groups, are to engage a negotiation. Parental leave already has raised this
challenge with the ETUC and originally the Commission encouraging the development of
a policy for paid leave, but the resulting agreement only provided for individual rights to
unpaid leave. This has prompted repeated complaints, as will be seen in the chapter
below, about the lack of "progressive" legislation from the social partners, by which
observers mean the tendency of the social partners not to provide potentially costly
protections such as paid leave or other paid benefits for part-time working arrangements.
However, where there is opportunity for regulation (of both workers and employers)
without those regulations involving state contributions, and to a lesser degree without
high contributions from employers, directives have been successfully negotiated.

Given these five factors – ease, situation diversity, social partner expertise, bias
toward a single social partner, or proximity to social protection and collective bargaining
– we can expect to see them influencing in combination the substance of the issues
undertaken by the social partners in response to Commission initiatives. Typically, these
factors will favor negotiations on policies with which most social partners have
familiarity with an issue because of a European wide experience with the issue in a more
basic form allowing for the development of expertise and avoiding diverse situations that
cannot be overcome in negotiation, and that do not require substantial contributions to
social protection schemes. These are not minimalist policies however, since many
member states will ultimately be required to change existing policy and practice in order
to comply with new regulations and standards negotiated by the social partners. This
tendency to provide new standards for some members, modify those of others, but not rise to the level of the most generous member states, has been the case with the negotiated directives to date and appears to be a constant in pending negotiations as well.

Before considering a specific instance of negotiation, the case of the parental leave directive, it is necessary to return to the theoretical frames discussed in the opening chapter and to consider, in detail, the ways in which the negotiation procedure conforms, or fails to conform, to the prevailing theories of integration. Following that discussion, the case of parental leave will be examined as an applied example of the process of negotiation and an example of the shortcomings of existing integration theories with regard to social policy formation. These theories will be revisited in Chapter Four’s discussion of gender implications to examine the ways in which modifying the negotiation procedure along the lines of the integration theories would have differing impacts on the creation of equality policies.

Negotiation as a Functionalist or Neofunctional Exercise?

Prior to examining the degree to which the negotiation procedure conforms, or fails to conform to the tenets of the major integration theories, a word should be said about establishing a baseline for such comparisons. I will argue in each of these theoretical categories that the core tenets of the theory either do not apply or fail to be met by the negotiation procedure, and consequently are insufficient to explain negotiation’s fit in the integration debate. In essence, three questions are asked, and the answers are consistent across all three theories explored below. First, is the criteria met at all? In most instances the answer is no, or at best, only partially. Second, if the criteria
is in anyway met, is it met consistently, i.e., across multiple negotiations? Again, the answer appears to be no. Finally, is there any potential that the tenets of the theory are likely to become more applicable in the future (i.e., as more negotiations occur)? Again, the answer appears to be no in most instances. Exceptions will be considered below.

Among the early theorists considering new systems of international organization, David Mitrany’s contributions (1966) in the form of functionalism began the debate on categorizing the type and mechanisms driving integration. For functionalists, cooperation among sovereign states could begin around non-contentious issues that would be addressed in small, cooperative steps through which participants needed only to agree on subsequent actions rather than reach agreement on a large ultimate goal. Functionalists believed that these cooperative gestures would have a cumulative effect and would eventually increase interdependence among states while simultaneously decreasing their desire and ability to withdrawal from the system. This would produce a certain fluidity in sovereignty – indeed a loss of sovereignty over time. Functionalism, while perhaps adequate to explain early European Community activities like the formation of the non-contentious European Coal and Steel Community, fails to be an adequate explanation for the development of social policy generally, or of the negotiation procedure specifically. These shortcomings can be seen in the failure of each major principle of functionalism to be addressed by social policy negotiation.

First, social policy has always been a contentious domain for the member states who wish to retain control over welfare provisions that have historically played such an important role in nation-building. Further, the move from non-binding social dialogues in the late 1980s to social partners fully vested with legislation drafting and implementing
authority in the early 1990s can hardly be considered either non-contentious or the result of cumulative, cooperative steps. Second, functionalism insists that participants agree on next steps rather than an ultimate goal. In the case of the negotiation procedure, neither steps nor goals are clearly agreed. The incremental process of choosing what policies will develop in the social affairs arena has been a subject of much debate between the Commission and the social partners, as well as among the social partners themselves. The social partners do not even agree to start a new negotiation at the conclusion of a negotiation. Each is treated as a discrete process not a logical next step, and Delors’ “European social space” is far from being agreed as an ultimate goal.

Third, functionalism’s suggestion that there will be an increasing interdependence of states gradually ceding sovereignty from the accumulate effects of small decision-making steps, has not been substantiated by negotiation. There has been no cumulative effect to the social policies developed through negotiation. The subject and outcome of negotiations has varied from one to the next with no cumulative effect or issue continuity across the directives. Further, the negotiating teams vary across negotiations and the social partners work actively to treat each negotiation as a discrete process. A cumulative pattern is also not likely to develop as the Commission pressures the social partners to take greater leadership in establishing a social agenda and choosing to initiate topics jointly from their agenda. Further, the Commission is pressuring the social partners to assume greater responsibility for implementation of their agreements, thus reducing the ability of the Commission to foster interdependence among the states or shape a more cumulative impact through enforcement measures. Finally, member states, that functionalist presume will be affected by a more fluid or lost sovereignty, experience
little if any sovereignty loss here. It is the Council of Ministers alone (i.e., no codecision with the European Parliament) that approves agreements negotiated by the social partners and to date, it has been the member states who bear responsibility for implementing regulations. Substantively, these regulations have challenged some states more than others, but non-compliance has not been a problem to date, indicating an acceptance of whatever sovereignty is lost. Negotiation then, does not conform to the core tenets of functionalism, but this theory has been expanded by scholars of the neofunctionalist tradition who expanded and clarified its principles to more directly apply to the European situation.

To what degree then, does neofunctionalism more fully capture the type of integration developing through social policy negotiation? Again, the answer is only weakly. Neofunctional principles are not seen at work in negotiation, nor are they likely to become applicable. For neofunctionalists, for whom Ernst Haas' (1958, 1968, 1970, 1975) and especially Philippe Schmitter's work (1966) has defined the theory, the central tenets of functionalism needed to be expanded and clarified for the European context. Like their functionalist predecessors, neofunctionalists also believe that small, incremental steps will have cumulative results and refer to this as the process of spillover (either functional spillover from related technical areas such as the spillover from coal and steel regulation into the scrap metals market, or political spillover in which initial losses of sovereignty in one policy domain carry over into another as we have seen with the creation of a customs union to a common currency). Neofunctionalists believe this spillover will be assisted by a self-interested, integration-oriented bureaucratic elite at this new supranational level. In the case of the European Union, this was presumed to be the
Commission President, Commissioners, and Commission staff who composed the executive-bureaucratic arm of the EU. Further, these elites would engage in a series of political tactics to further promote integration. These tactics included the use of log-rolling through which all the major actors of a political sector were “bought off” through issue-linked deals. This was to be known as package dealing, the tactic through which the supranational elites would bring together conflicting groups by offering various incentive packages to facilitate deal-making among the states. Neofunctionalists saw both these tactics and the spillover processes as incremental in nature, but cumulative in effect.

The key actors in neofunctionalist theory were to be supranational bureaucrats and actors in the national governments whose interactions were often private (i.e., out of the public political arena as deals were made that would expand the scope of the supranational organization’s authority through the gradual erosion of state sovereignty). Further, neofunctionalists identified a stable political and economic environment as beneficial if not required for successful spillover to produce greater integration. Where neofunctionalist activities failed, it was typically at the hands of a strong anti-integration national leaders, such as French President Charles de Gaulle or on economic factors such as recession, or the stagflation of the 1970s. The subsequent retrenchment by national governments would slow or even halt integration efforts.

The neofunctionalists have been persuasive and dominant theorists in the integration debate, and the traits of the theory outlined above echo throughout EU history, but the tenets of theory do not capture the dynamics of integration is seen in the social policy negotiation process. Where they are tangentially relevant, they do not
consistently apply, and the future of negotiation does not suggest that neofunctionalism will be adequate to explain negotiation as a long term policy trend. Thus, by the baseline standards originally outlined, neofunctionalism does not capture the integration dynamic at work in the negotiation process. Below, I examine the degree to which neofunctionalism's tenets have been, or have not been, at work in negotiations.

First, if the negotiation procedure was part of an neofunctionalist story of European integration, we would expect to see patterns of spillover across policy negotiations and in the development of the negotiation as an integration tool. Neither is the case. The emergence of the negotiation procedure as a legislative tool emerged as the result of last minute treaty negotiations at Maastricht in 1991 (Dolvik, 2000). The social dialogue had only a short five year history of highly formalized, semi-annual meetings among dozens of social partners. The results of these discussions were occasional joint positions on non-binding matters, but nothing approaching the structured relationship of three organizations with powers to initiate and conclude agreements that would have binding effect with passage by the Council of Ministers. Thus, the establishment of the procedure in the Social Protocol attached to Maastricht was a significant policy and procedural change, not a logical "spillover" from previous decision-making procedures. Further, economic spillover would suggest carry over from market coordinating principles for goods, services, and capital into social policies that would further integrate the common market for labor. After 40 years of integration efforts, little policy development had occurred to suggest that spillover would be a means by which the common labor market would come into effect along the same lines as the other common markets. Lastly, the logic of spillover should at least suggest that spillover would occur
across negotiations, once the procedure has been put into place. This also has not come to pass. Consequently, each negotiation is a discrete process in both procedure and substance. Had the spillover been present, we should have seen further explicit attention to the reconciliation of work and family life based on the initial successful negotiation of parental leave or to discussion of paid provisions such as paid leave benefits. This has not been the case. From working time directives, to current negotiations on temporary agency and telework, the issues change from one negotiation to the next without a cumulative effect.

The second key dimension of neofunctionalism is the presence of an actively integration-oriented supranational elite bureaucracy, in this case the Commission. Certainly Commission President Jacques Delors' calls for a European Social Space and his advocacy of the negotiation procedure show the work of an integration-promoting executive, however, since the procedure's initiation, the Commission has been actively relinquishing control of the process while simultaneously lamenting the substance of the very policy areas they turned over to the social partners for negotiation. Further, where negotiations have not proceeded, the Commission has not consistently followed through on a promise or threat to take action when the social partners have not. Thus, neofunctionalism does not help us to understand why the Commission wants the social partners to assume full responsibility for initiating negotiations and a greater role in the implementation of their concluded agreements. This is counterintuitive to neofunctionalism. We should expect the Commission to lobby for a greater role at the negotiating table in order to advocate for more comprehensive policies and spillover
across negotiations. Instead, they appear to be giving away their powers to initiate legislation and to shape its content through interaction with the Council and Parliament.

Because the Commission is sidelined during negotiations, the bureaucratic elites cannot fulfill their strategist roles that neofunctionalism suggests they engage. Consequently, we do not see during or between negotiations, Commission officials trying to broker deals through log-rolling or package dealing tactics. If log-rolling were to occur, we would expect to see EU leaders trying to buy off all concerned actors of the social policy sector by structuring deals on issues of concern to all. The classic example is the development of the Common Agriculture Policy as a tool for early integration. However, this has not occurred with a deal among states or a deal among social partners.

In fact, the Commission faced a legal challenge from a large social partner organization, UEAPME, representing small and medium-sized enterprises, that was not accepted as one of the designated negotiating parties. Ultimately, UEAPME lost their challenge in the European Court of Justice (UEAPME v. EU Council, Case T-135/96), but the dispute shows the degree to which the Commission has not facilitated interaction or achieved the buy in of all concerned parties. Further, since the passage of negotiated agreement requires only a qualified majority vote in the Council, the Commission does not need to facilitate a deal among member states in order to prevent a single country from using a veto. Along similar lines, neofunctionalism predicts that integrationist elites will try to create packaged deals to bring together conflicting parties by offering incentives to the groups. This too, has not occurred, and indeed cannot occur, given the Commission's limited and declining role in the negotiations. First, because the Commission is not a party to the negotiation they cannot facilitate deals among the social partners on the
current issue under discussion or by creating a linkage to a future negotiation since there is no negotiating agenda. Second, once the social partners conclude an agreement, it is not subject to any modification by the Commission or Council. Indeed, as a Council staff member noted with frustration, even questions of translation require approval by the social partners, so there is no room for maneuver on the part of the EU institutions. Third, because the Council can only vote to accept or reject the agreement, there is no ability for the Commission to broker deals between member states on social policy topics because there is no option for amendment. Finally, as every Commission staff member made clear, the result of negotiation is usually less comprehensive than what the Commission would prefer (or would try to create in a deal) if the neofunctional principles could be applied. Examples of this frustration can be seen in the following chapters examination of the parental leave directive.

Neofunctionalism further suggests that integration will proceed in an incremental manner. Certainly one could argue that five negotiated policies in a ten year period, couple with a 50 year history of piecemeal social policy development qualifies as an incremental process! However, this incrementalism in negotiation has resulted in not resulted in consistent, coherent or cumulative social policy-making, nor has it helped fulfill the five-year social action programs in any consistent manner. In this sense then, the negotiation process is incremental in the most basic understanding of the term.

Finally, neofunctionalists warn of several conditions that can negatively impact on integration. The negotiation procedure has only been mildly affected by these conditions. First, we have not seen the re-emergence of a de Gaulle-like figure in the anti-integration camp whose activism, perhaps at the Council, would result in negative
votes against negotiated agreements. Quite to the contrary, all negotiated agreement to
date have passed unanimously. Second, neofunctionalists worry about economic factors,
primarily an unstable economic environment impinging on integration efforts. While
European unemployment remains fairly high, the growth in the common market, the
development of the Euro, and the passage of the Amsterdam Treaty have all strengthened
the integration environment for economic policy action. However, this has not led to
calls for the completion of the common labor market which would require expansion of
the social policy realm. In this sense, economic factors, i.e., increased financial burdens
for employers and states has likely slowed the development of social protections at the
EU level.

Despite this last slowdown, we have not seen the last complication that concerns
neofunctionalists: retrenchment by national governments. There have certainly been
opportunities for such retrenchment to occur. The Amsterdam Treaty, coming five years
after the negotiation procedure became available through the Social Protocol at
Maastricht, provided ample opportunity for the member states to remove the Protocol or
restructure the terms of the negotiation procedure (for example, to modify the
accept/reject voting rule in the Council). This did not occur. Indeed, quite the opposite
happened. The Social Protocol was folded into the text of the Treaty, which was then
adopted by all of the member states, making the terms of the protocol and the negotiation
procedure binding on all member states, including the formerly exempted United
Kingdom.

The last baseline consideration outlined above for evaluating theoretical “fit” was
the degree to which the theory may become more applicable in the future given current
trends in negotiation. In the case of neofunctionalism, it appear that unlikely that it will become a useful tool for understanding negotiation’s role in integration. The trend in negotiation is a continued shift away from Commission initiation and implementation to an expanded role for the social partners. There is also movement away from binding agreements that take the form of directives, to greater emphasis on soft law, i.e., non-binding joint positions, recommendations, and emphasis on best practices for issues of immediate concern, like unemployment, rather than legislative attention to core social policy issues that would facilitate the development of equality policies or the social protections that would enhance the common market for labor. Thus, there is less room for entrepreneurial, integrationist bureaucrats to foster deals for member states to enact or for social partners to negotiate.

Neofunctional theorists have dominated the debate on European integration for much of the EU’s history. Following the passage of the Single European Act in 1985, some scholars began to formulate a competing theory – institutional intergovernmentalism – that has subsequently become the primary rival to neofunctionalism for explaining the nature of integration. Below, we consider the ways in which the negotiation procedure conforms, or fails to conform, to this competing theory.

**Negotiation as an Intergovernmental Exercise?**

Has the social integration process, as seen in the development of the social dialogue from the Single European Act and the negotiation procedure in the Maastricht Treaty, really been the culmination of incremental, supranational neofunctionalism in
which those self-interested elites won the day by getting agreement on greater economic integration? Or is it really that national government leaders have allowed the EU to move forward in a limited capacity, i.e., national leaders are only ceding a little bit to the EU and otherwise putting the breaks on further integration? Scholars such as Andrew Moravcsik (1991, 1993, 1998) launched this counter to the neofunctional understanding of integration following the SEA’s passage. However, there is little evidence that an intergovernmentalist account of social affairs adequately describes the negotiation procedure’s contributions to integration. At time of the Maastricht Treaty in 1992, national leaders allowed the Social Protocol to be appended to treaty at the last moment (literally 24 hours before approval). Further, agreement allowed 11 of the then 12 members to proceed with new social policy provisions after the United Kingdom was granted an opt-out, so all but one member state were willing to give away legislative powers to social partners.

If anything, the Commission used intergovernmentalism as threat to social partners by suggesting: “either agree you to more dialogue and the right to negotiate or we’ll push for more qualified majority voting on more areas of social policy.” Was this a credible threat or even a neofunctionalist triumph by the Commissioners? In retrospect, this seems unlikely because the additional qualified majority voting would have applied to areas already described as “off-limits” to the social partners under the terms of the Protocol - like social security. Further, because the Protocol took wage rates, collective bargaining, and striking out of the social partners’ competence, member states had little to fear that the negotiation procedure would radically undermine welfare state sovereignty.
Using the baseline considerations described above, to what extent do we see the principles of intergovernmentalism at work in negotiation? Once again, this theory of integration is also an unsatisfactory tool for understanding negotiation’s contribution to integration. First, intergovernmentalism suggests that integration efforts should be guided by the preferences of national governments, which cede power to the new organization. Second, such national preferences are often expressed in interstate bargains that link issues together in order to make it difficult for states, once committed, to threaten an exit or the exclusion of other states. These bargains are further constrained by, but ultimately don’t reflect, the views of the most reluctant member states. Given this focus on state preferences exercised by national leaders, it is not surprising that intergovernmentalists attribute a very minimal role to supranational actors and their ability to influence policy outcomes. Finally, intergovernmentalism predicts that when states do delegate or pool their sovereignty in specific policy domains, they will be willing to do so only to get commitments from other states when there is uncertainty about the conditions for policy development. They will relinquish sovereignty when they can establish linkages or compromises on issues that would otherwise tempt members not to comply.

While intergovernmentalism has proven to be a significant force in the overall integration debate about the European Union, the conditions it predicts as relevant do not bear out for the negotiation procedure. First, if national preferences were the dominant force, we would not expect to see the national governments allowing a protocol on which there was not a separate vote to be attached to the Maastricht Treaty. We would also not expect them to allow a single government to opt out, while all of the others became subject to the policy preferences of social partners under the Protocol’s terms. Finally,
we would not expect the national governments to fold the terms of the Protocol into the Amsterdam Treaty unmodified if they were concerned about asserting national social policy preferences at the European level. Further, we would expect to see a highly critical Council of Ministers exercising some disent in their votes on negotiated agreements. To date, qualified majority votes have never been needed, as all negotiated agreements have passed unanimously. Indeed, a senior social affairs staff member at the Council noted that “all social partner agreements are welcome because there has been so little progress in the social field” (interview, April 3, 2001). Also, there is no opportunity during a negotiation for the preferences of national governments to be expressed as they are not among the social partners. While national variation may be expressed by social partner representatives from across the EU, their role is to represent their organizations, not their national governments.

Intergovernmentalism also suggests the development of interstate bargains to bind the states together, although these are sometimes constrained by the wishes of recalcitrant member states and are made outside of the influence of supranational bureaucrats. At first glance, attaching the Social Protocol to the Maastricht Treaty could be viewed in intergovernmentalist terms as an example of an alternative to non-agreement, however it was done without any amendments or deals that one might suspect states to engage in to cement a bargain. Further, there was no issue linkage between the social affairs aspects of the protocol and the monetary union dimensions at the heart of Maastricht. Had such issue linkage occurred, we might today see a more developed common market for labor emerging along side a common currency and completed customs union. Finally, because the Protocol was appended to the document, there could be no threat of exit on the part
of states who did wish to follow its terms. Indeed, the United Kingdom did opt out without penalty at that time or when they accepted the Protocol’s provisions later at Amsterdam. Interestingly, while the British government opted out of the Protocol, the British trade union and business organizations continued their membership in the social partners, further weakening the credibility of a threat of exclusion or exit.

Once concluded agreements reach the Council of Ministers, we might again expect to see interstate bargains in order to ensure the passage of an agreement. This too has proved unnecessary, although the availability of qualified majority voting allows for the possibility. Agreements have passed unanimously, states have implemented them quickly and with limited enforcement violations. Negotiated directives have also granted remarkable flexibility in the terms of their implementation, allow even the most recalcitrant member states room to “customise” the application of the agreement to their national situation. Thus, where recalcitrance is relevant is in the preference of recalcitrant social partners, like UNICE, to shape negotiations rather than in the power of the states. This interstate bargaining criteria is also supposed to minimize the role of supranational actors, yet is was the social partners and the Commissioners who advocated for the Protocol and succeeded without the assistance of a key domestic ally as the theory would suggest.

The last significant consideration of intergovernmentalism is the degree to which member states delegate or pool their sovereignty to bind other states into commitments in order to reduce the uncertainty between them and to minimize the risk of non-compliance. Social affairs is still a limited policy area for the EU. There has been little pooling of sovereignty to date especially on the key areas that strike at the heart of
national welfare provisions, such as social protections for workers. Thus, there have not been key areas where states might be tempted by non-compliance to maximize a short-term market advantage, as might happen for example, with delayed or uneven implementation of paid social security or pension benefits if the EU succeeded in creating them. Parental leave for example, as an unpaid benefit, did not present this type of scenario. Had there been an unevenness in application of the leave policy, the social partners had mandated a five year review of the policy allowing for revisions if the partners saw such revisions as necessary. Intergovernmentalism is unlikely to be a useful theory for understanding negotiation until, and unless, the social partners begin to develop policies that challenge member state control over social protections. Thus, by all three of the baseline considerations – are the criteria of the theory met, met consistently, have the potential to be met in the future if the negotiation procedure changes – institutional intergovernmentalism does not prove to a sufficient integration theory for understanding the negotiation procedure.

Negotiation as a Neocorporatist Exercise?

Those who have attempted to call negotiation corporatism at the European level are quick to note that such a label should only be applied if we acknowledge that national models of corporatism can not be expected at the European level and are inappropriate for direct comparison. It that is the case, it seems a great deal of ink has been split attempting to categorize negotiation as neocorporatist, corporatist, eurocorporatist (Falkner, 1996, 1998; Schmitter 1996; Scharpf 1996; Dölvik, 1999). Of course, corporatism in any of its forms is not an explanation for European integration, but rather
a specific notion for the development of social policy in the EU. Even in that more limited context, it fails to be a satisfactory explanation for the negotiation process. The critical distinction to be made is that negotiation lacks key defining elements of corporatist organization. Most notably, it lacks the class tripartite relations of government, labor and management interaction in policy formation. Instead, as the Commission has noted in print (Commission, Industrial Relations, 2000) and in interviews (April 10, 2001), and as the social partners all agree, negotiations are autonomous bi-partite relations between labor and management alone.

Traditionally, corporatism has included the study of the segmentation of policy-making into regularized relations between the government and political sub-communities. This study has focused on how groups or interests have interacted in an institutionalized manner with the government in policy formation or change. Lijphart's work (1968) on consociationalism painted a picture of corporatist relations in the countries of Northern Europe in which major segments of society were represented in negotiations with legislative and bureaucratic leaders to form policy that these groups would in turn help implement. These relationships were regular, structured, and institutionalized processes that served the mutual interest of government officials and the organizations.

The study of corporatism has been refined in neocorporatist studies that sought to examine how the groups in question were responsive and responsible to both the government and their membership, especially as policy issues were becoming increasingly specialized. Corporatism was an arrangement that was recognized, even actively promoted by national governments. National leaders might seek to create a group partner, or recognize an existing organization, to which it could effectively grant a
negotiation monopoly. In exchange for this exclusive negotiation access to government officials, groups would assist in policy implementation, especially as the rules applied to their membership. Groups were able to discipline or incent their members to mobilize on behalf of policy issues and ensure their compliance once policy was adopted.

Katzenstein's (1984) work on industrial policy formation in Switzerland and Austria illustrates the nature of these relationships and also the contention that this type of relationship may best be utilized for policy concerns on which there is already high agreement, few significant groups, and highly specialized information (such as economic/industrial policy, and technical issues). These scholars, and this description, apply to the classic forms of neocorporatism found primarily in Northern European countries. As noted above, the negotiation procedure emerging in the EU violates the core tenet of corporatism as a tripartite relationship. Instead, it is an autonomous bipartite relationship among labor and management alone. This is not the only aspect of neocorporatism that has not transferred to the European stage. Many other presumptions about neocorporatist arrangements are not demonstrated by the current negotiation arrangements. Indeed, as one EP staff member noted “the problem is the imbalance between the right conferred on the social partners [to engage in negotiation] and the duties, because they have received the rights without any duties [for overseeing implementation” (interview, April 20, 2001).

First among these are the relations between the social partners and their membership bases. The social partners to not have monopolistic control over thei members in the the component organization may belong to multiple EU interest groups at both the interprofession/cross-industry and at the sectoral levels. The three social
partners engaged in negotiation do not have strong hierarchical coordination of their members, and this is most especially true of UNICE’s unanimity decision-making practices, despite changes to their procedural rules. An EP staff member observed that, “the social partners do not always represent their affiliates or the whole workforce. There are different [nation] traditions. It [representativeness] is a question” (interview, April 20, 2001).

The interprofessional social partners are not in a position to indoctrinate members or compel involuntary contributions from members as they are associations of national associations and do not have direct links with the membership. Consequently, they lack a great deal of organizational authority and must rely on national and subnational organization for policy implementation on rare occasions when such implementation is part of an agreement. Further, the social partners have little ability to sanction or incent their membership’s participation or punish noncompliance. Thus, while the social partners may have an “access monopoly” for negotiations, they cannot be the monopolistic provider of access at all time because members are free to lobby the Parliament and Council on non-negotiated issues or on their issue preferences if a negotiation were ever to fail.

In relation to the European Union (which would normally be discussed as relations with the national government) we see again that the social partners do not have the traditional state-interest group relationship. The Commission has granted explicit recognition to three social partners for the purposes of interprofessional negotiation, however, at the sectoral level, the social partners vary by negotiation and the recognition, while explicit, is inconsistent and issue specific. Further, the three interprofessional
social partners (ETUC, CEEP, UNICE), their structured incorporation into a negotiative role is on a voluntary basis for which they (not the EU) have the decision-making authority. Neocorporatism in its classic national form also expects packaged deals to be made among the interest groups, but as has been highlighted above, we do not see such deals being made within or across negotiations.

When negotiations have produced agreements and the Council has approved them as directives, neocorporatism expects that interest groups act as compliance organization with responsibility for implementation, especially among their own membership. This has not been born out by social partner negotiation. These groups do not have the ability, nor have they chosen to develop it, to compel their members to implement agreements. Instead, the social partners have left this role to the national governments with oversight provided by the commission. Hooghe and Marks (1999) consider the rise of neocorporatist behavior in this context unlikely because the social partners lack the right to engage in collective bargaining, and even if they had such rights, are not organized, nor have the possibility for such organization, at the EU level because they lack the labor movements and social democratic government partners that would make it possible to replicate the Northern European corporatist experience at the EU level. Instead of co-responsibility for decisions shared with the EU, we have autonomous decision-making with implementation and enforcement left to the Commission.

Clearly social integration has not conformed to dominant theories, nor as of yet, emerged as a coherent and distinct policy process or a wholly new form of integration that begs the development of completely new approach to integration theorizing.

However, specific aspects of the social policy area, chiefly the social partners’
negotiation procedure, do allow us to consider other possible forms of integration. I will contend that we are witnessing the splitting of the legislative process for social policy. The traditional legislative track will remain in place and will be utilized for some social policy developments. Simultaneously, the negotiation procedure will continue and will be encouraged, especially in times of recalcitrant member state behavior as we saw with the United Kingdom’s original opt-out of the Social Protocol, in order to maintain some level of social integration, however gradual, in the process of fulfilling treaty obligations to be a common labor market with equality of women and men workers who have new employment opportunities and rights. This speculation, as well as the conditions that influence it, will be more fully explored in Chapter Five.

Before proceeding to a discussion of the parental leave directive, the first successfully negotiated agreement among the social partners, we will finish the current story of social policy negotiation with some of the more recent issues and processes since the parental leave directive’s passage.

New Developments in Negotiation

While the pages above describe the negotiation process as it has been practiced for the last decade, to what degree do the social partners expect it to change or are they satisfied that they have made a new legislative process a comfortable way to conduct relations with one another and with the EU? The answer, it seems, is a bit of both perspectives. The relationships that have formed between the social partners have developed a climate of communication, regular interaction, confidence, and even trust. However, the both UNICE and CEEP remain reluctant to embrace a process that
produces additional regulations, and potentially costly ones, on their operations. They are also aware that the alternative would be to have to receive such regulations without substantive input directly from the Commission. Consequently, the trend recognized by both the EU and the social partners is to expand the tri-partite "concertation," i.e., the mandatory consultation between the Commission, labor and management on virtually all issues of social affairs, but to try to limit the degree to which this concertation becomes negotiation and thus, a new labor regulation. Such concertation is likely to result in a greater number of joint positions and programs, joint recommendations, and what an EU official termed "soft law" provisions that advocate for open coordination between the social partners through guidelines, indicators, benchmarking and the use of best practices. The employer organizations in particular have found this strategy quite appealing and have been willing to move forward on issues such as technology training and lifelong learning. The current European Employment Strategy is the most significant example of a plan that does not dictate to the member states but tries to "incite them to cooperate" (interview, April 20, 2001) although it is not clear what incentives the Commission has to offer beyond the questionable threat of future legislation.

To examine the theoretical and process questions raised in this chapter, we turn now to a discussion of one particular negotiation and its conclusion: the adoption of the directive on the framework agreement for parental leave.
CHAPTER 3

THE CASE OF PARENTAL LEAVE

The first framework agreement to be concluded by the social partners using the negotiation privileges awarded to them under the Agreement on Social Policy at Maastricht became the parental leave directive (96/34/EC). The agreement, and the resulting directive, were precedent-setting in both substantive and procedural terms. Substantively, parental leave was the first major directive under the EU’s social agenda of reconciling work and family life – a new area of emphasis after Maastricht. Procedurally, it was the first time the social dialogue had been used to construct legislation and thus, its transmission through the Commission and adoption by the Council established the process by which social partners would be identified, the agreement would come into effect as EU policy, and the relationship with the EU institutions would be developed. This chapter examines the history of the issue, the substance of the directive, the process that created the directive and thus established the ground rules for subsequent negotiations, the significance of these initial choices, and finally, the implementation of the directive.

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The Directive

The original impetus for the parental leave directive began in 1983 with a Commission proposal on the subject. The United Kingdom’s opposition to social policies that it perceived to be burdens on the employers and the economy blocked the passage of the directive in the Council (COM (84) 631 final). Parental leave arose again in 1995 when the Commission issued a consultation on the broader issue of the reconciliation of work and family life, in light of this issue receiving renewed attention after the Maastricht Treaty and its attached social protocol. Originally, 28 organizations considered sufficiently representative of their constituencies received the consultation and 17 responded indicating a need for action, a recognition that community level action was appropriate, and a desire to address the equal opportunities nature of the directive (Schmidt, 1999). From this group of respondents, the Commission selected three interprofessional organizations to engage in a second consultation. These included UNICE, on behalf of employers, CEEP on behalf of public enterprises, and the ETUC on behalf of unions and employees. A fourth group representing small and medium-sized enterprises, UEAPME, was not selected and that decision prompted a legal challenge and ruling on representativeness by the European Court of Justice, that will be discussed later in the chapter. The three accepted social partners formally inaugurated the negotiation procedure on July 5, 1995 when they responded jointly to the Commission indicating their willingness to engage in a negotiation, having each secured a mandate internally from their national members to proceed on the issue of parental leave. The negotiations began a week later with the selection of “neutral umpire” - someone not affiliated directly with a social partner organization or an EU institution (Schmidt, 1997) - to chair the
meetings and within five months, the partners had concluded and signed the first agreement based on the Social Protocol’s provisions for negotiation.

The agreement concluded by the social partners could either be taken up by the member states and parallel groups there, or the partners could request jointly that the Commission refer the agreement to the Council of Ministers for a decision. They chose the latter arrangement, the implications of which are discussed below, most likely because the European interprofessional organizations due not have sufficient structures below the EU level to handle implementation. The Commission then requested that the Council take a decision in the form of a directive (i.e., EU law). Because the Commission indicated that the product of negotiation was not subject to amendment, neither the European Parliament nor the Economic and Social Committee have direct participation in the approval process and further, the Council received from the Commission a very brief procedural directive (i.e., the directive’s purpose is to ‘put into effect the annexed framework agreement’) to which the agreement was annexed. These precedent-setting choices are discussed below. The Council finally took up the directive on March 29, 1996 with final passage occurring on June 3 of the same year.

The provisions of the agreement set a minimum standard for the taking of parental leave for the birth or adoption of a child and/or for urgent family situations, such as the care of an ill family member. Such minimum standards were only minimum to the extent that several member states already had some form of parental leave available by law. The directive created the right to such leave in Belgium, Luxembourg and Ireland and expanded the terms of the leave for other member states. However, the modest nature of the directive is evidenced by the absence of financial considerations, such as the payment...
of social security or the requirement that the leave be given with pay. Further, the
directive does not exceed the legislation of the most generous member states’ parental
leave provisions, although it does prevent national governments from racing to the
bottom by lowering their existing benefits to conform to the baseline standard outlined in
the directive.

The right to take parental leave is provided as an individual right to men and
women who are engaged in full or part-time work. The leave is a minimum of three
months prior to a specific age of the child, but not later than to the child’s eighth
birthday. In an effort to promote equal treatment and encourage men’s use of the leave, it
is not to be transferred between parents. The other applications of the directive have
greater flexibility as they are to be determined by the member states within a set of
minimum conditions. Such considerations include the degree to which the leave is taken
on a part-time or full-time basis, the period of prior notice the employee is required to
provide to the employer, and the conditions under which an employer can postpone the
taking of leave. A length of service requirement by the employer is permissible so long
as it is not greater than one year. Special considerations can be made for smaller
enterprises. Much like the Family and Medical Leave Act (FMLA) in the United States,
the directive protects workers from dismissal because they have taken the leave and
guarantees the right to return to the same or an equivalent position. However, the
employer is not required to include pay or the provision of social security benefits,
although member states may choose to exceed these minimum standards. Also similar to
the American FMLA is the provision in the directive for taking leave, in an annual
amount to be determined by the member states, for force majeure to attend to “urgent
family reasons" (Clause 3, paragraph 1). Finally, the directive requires implementation within two years of its passage, while allowing member states to maintain or introduce more favorable conditions for parental leave, but prevents member states from reducing their current levels of provision below the standards defined in the directive.

Two concluding clauses of the directive highlight its uniqueness from those enacted through the traditional legislative channels and set the stage for the discussion below of the significance of the parental leave directive as turning point in policy development. First, the directive requires that disputes be referred through the Commission to the social partners for their opinions, thus circumventing other institutions. Second, the directive requires a review of its provisions and implementation five years after its application (passed in 1996, so review began in 2000). These provisions add to the role of the directive in establishing the “ground rules” of negotiations, discussed below in the significance section as well as the ability to assess the effects of the directive in the national settings, discussed below in the implementation section.

Significance of the development of the negotiation procedure

As the first agreement to be concluded by the social partners, the parental leave directive had significant effects on a number of levels. It set several precedents that have affected subsequent negotiations. These include: defining the representativeness of the three social partners; establishing the formal exclusion of the Economic and Social Committee and more notably, the European Parliament; defining the outcome of an agreement as a Council directive (rather than a decision or regulation); requiring that the
Council of Ministers accept or reject agreements without amendment and by qualified majority vote; using a "neutral umpire" (Schmidt, 1997) to chair the negotiations; and establishing the Commission as the point of initiation for any negotiation to date. Additionally, the effects of this negotiation have lingered through subsequent negotiations. Such effects include issues of democratic accountability, the failure of the process to become an agenda-setting one, the tendency of negotiations to result in lower common denominator agreements, and the improvement of the relationship between the social partners. These effects and precedents are evident in the responses of many of the interviewees and to some extent, are established by other research.

The first precedent set by the parental leave negotiations came as the result of an action for annulment, filed by the Union Europeene de l'Artisanat et des Petites et Moyennes Enterprises (UEAPME), just two months after the passage of the directive. UEAPME, which represents small and medium-sized enterprises, had applied to be one of the parties officially recognized as a social partner by the Commission. Their action for annulment (Case T-135/96) in the Court of First Instance sought to annul the directive on the grounds that the social partners were not sufficiently representative to conclude a European agreement. The Court rejected this argument, indicating that UNICE was sufficiently broad and inclusive in its representation of employers. Following UEAPME's loss in the Court, they formed a partnership arrangement with UNICE and participate in negotiation through UNICE's delegations.

However, the Court did suggest that the Council of Ministers, on receipt of a negotiated agreement, inquire of the Commission and social partners about the degree of representativeness brought to the table during the negotiations. As a staff member at the
Council indicated: "The job of the Council is not to assess such representativity but to make sure by asking questions to the Commission that that [representativeness] was fully taken into account." It is the Commission's job to reply only because it is they who present directives to the Council. The Commission however, turns to the social partners for the answer. Not only has this set the precedent for the interprofessional social dialogue (that which occurs between CEEP, UNICE, and the ETUC) but this has become especially important as negotiations occur among sectoral social partners. Thus, the Commission has to answer questions about which groups within a sector are sufficiently representative to cover a majority of those (workers or employers) in an industrial sector who would be affected by a negotiated decision. For example, the Council might inquire during a transport sector negotiation how many unions are represented and what percentage of workers are covered by those unions, in an effort to make sure that at least a majority, if not an overwhelming majority, of the affected workers are represented by the labor groups engaged in negotiation.

The second significant precedent set by the parental leave negotiation was the decision to exclude the European Parliament (EP) and the Economic and Social Committee (ECOSOC) from the approval process of a negotiated directive (or more accurately, the decision that certain groups need not be formally included). The Commission, in interpreting the Agreement on Social Policy annexed to the Maastricht Treaty, concluded that it would advise the EP and ECOSOC when negotiations were begun and invite the two bodies to offer opinions. This decision was actually more generous than the provisions of the Agreement provided, indeed, the Agreement does not require consultation of any kind. This, perhaps not surprisingly, has been a point of
contention for the European Parliament, which takes pride in its status as the only elected representative body of the EU. The EP has asked continuously at intergovernmental conferences and treaty negotiations to be made part of the approval process, but they have not succeeded in showing the harm caused by their exclusion so they have not even succeeded in getting this issue onto the agenda.

The relatively minor position of the EP was noted by virtually every interviewee, regardless of institutional or organizational affiliation. The Parliament takes seriously their opportunity to render an opinion on the agreement. While there was much grumbling about their exclusion from the process, the parental leave directive was welcomed by the MEPs and a positive opinion was provided. Staff members interviewed at the Parliament encouraged this researcher not to underestimate the EP’s informal influence. The social affairs committee has strong ties to the labor groups, and especially to the ETUC, including regular informal lunch gatherings. The committee is also increasingly lobbied by the business associations. Further, the socialist group majority throughout much of the 1990s ensured that worker-related policies such as these negotiated directives received attention in committee. One staff member to the committee indicated “I can see the political pressure that Parliament can bring to bear on the social partners and on the Commission to bring things forward so they do negotiate. That’s the limit to Parliament’s role, really, is pushing to get things on the table” (interview, April 10, 2001).

However, the EP began to toughen its stance on successive directives: “Parliament being Parliament likes to think that legislative power is the most effective and gets the best results. And, so we were very critical – publicly critical – of the fixed
term work agreement” said a staff member of the EP’s new position. The Parliament thought the directive should have been more progressive in terms of protecting workers.

An MEP caught up in the conflict made several observations about the process:

Even though formally speaking we cannot deny the proposal, if we really say no to the proposal, some member states in the Council would make objections about it and it would not come through . . . On part time work there was conflict . . . It was a useless exercise. Even if people who were against it were right, it would have meant for ten years you could have forgotten it [getting a similar issue passed] . . . It goes to the formality of the thing, namely that we are not involved. It was a deeper conflict behind all of it. I am convinced that we would miss an historic, well that’s too important, it would have killed it and not that it would have been a direct threat to the whole process. (interview, April 26, 2001)

On quite the other hand, another staff member quipped that “it doesn’t frighten me that the Parliament would be completely cast out of the policy-shaping because the procedure has proven to be quite difficult and limited in scope” (interview, April 20, 2001). If anything, it is possible that the social partners are able to limit the EP’s legislative agenda by holding a topic in prolonged negotiation, quite possibly for a couple of years, thus preventing any other institution from acting until the social partners produce an agreement or admit defeat. In either instance, the precedent set by the parental leave agreement was a continuous tension over the lack of democratic input in the negotiations and an on-going institutional debate. This situation was captured most harshly by one of the social partner representatives who said, “I know the EP is making these kinds of statements [about the lack of democracy] because they are not very happy to be out. At the beginning, some member states were not very happy to be out of the process. But it is in the treaty so there is no more question of being happy or not happy because it is in the treaty and the treaty is the Bible!” (interview, April 24, 2001)
The other “institutional” precedent set with parental leave was the use of a neutral individual to chair the negotiation. As parental leave was the first negotiation, the three social partners chose a Belgian former labor lawyer as their chair. Neither the Commission nor the social partners has yet to serve as chair of a negotiation, even in a rotating capacity. An “outsider” is always chosen. This has typically been a senior retired, trusted former Commission official or a prominent expert on the topic who is not actively involved in leadership of one of the social partner organizations.

The fourth precedent set by the parental leave directive was that it became a directive instead of a decision or a regulation (the two less binding forms of action the Council can take). Under the Agreement on Social Policy, the social partners can ask the Commission to implement their agreement through a decision of the Council. The question became what type of decision? The Commission and Council consulted and concluded that a directive was most appropriate in order to have binding legal application to be implemented by the member states. Subsequent agreements have also taken the form of directives. Directly related to this decision to submit the agreement to the Council in the form of a directive was the decision by the Commission that the Council was “not competent” to amend the agreement (COM (93) 660 final). Amendments by the Council would have undermined the role and work of the social partners. Thus, the Council through qualified majority voting simply accepts or rejects the text. The Council can ask questions of the social partners and Commission. To simplify the approval of this first negotiation, the actual directive is only three provisions detailing the procedure that the agreement will be implemented by the member states. The full text of the agreement is then annexed to the directive. This precedent has prompted its own tensions.
As the social affairs staff member at the Council noted: "because we gave the agreement [on social policy at Maastricht] the Council cannot touch the directive. So substance cannot be touched, because it is prearranged. It is in the rules that you cannot modify social partner agreements: take it or leave it. The only thing the Council can do is look at substance and make sure there are no atrocities. All we can do is ask questions to assess the scope of the agreement itself, then ultimately I suppose the Council could refuse to adopt such a directive, but that's all Council can do." To date, the Council has not refused any social partner agreements and has in fact adopted all of them unanimously.

The final precedent set by the parental leave negotiation was the decision of which organization would initiate a negotiation. Since the creation of the negotiation procedure, the Commission and Council have encouraged, called on, even urgently called on the social partners to initiate negotiations on topics of their choosing. The ETUC has always been willing to do so and has an active agenda of issues with which they would like to proceed. The employer organizations, as noted in the previous chapter, have been reluctant to engage any social policy topic for fear that it would result in a greater regulatory and/or financial burden on them. They have been pulled reluctantly into negotiation when they believed that policy-making, if it must occur, was better done by those most affected (i.e., employers and employees) than by the Commission. Consequently, all negotiations to date have been at the initiation of the Commission.

Indeed, both employer groups indicated their interpretations of the treaties were that only the Commission could initiate a negotiation, so they wait to be asked if they want to participate. The only nuance to this was from CEEP, and even within the organization there was no agreement. One individual said of the process: "We have the authority to do
it on our own, but it is very difficult to find the common ground. If I want to be simple, I would say the unions are trying to initiate debate and UNICE is trying to stop it” (interview, April 6, 2001). Whereas a more senior official at the same organization noted that there were few negotiated agreements to date “because we wait for the initiative of the Commission. For the employers as we have interpreted the treaties, we have to have before starting a negotiation, an initiative of the Commission” (interview, April 24, 2001). This precedent has held for a decade despite the Commission’s best efforts to encourage interaction and agenda-setting between the social partners that would produce topics for negotiation of their own initiation. For example, in June of this year, the Commission offered a communication that encourages the social partners to strengthen their relations and “to really develop their independent dialogue, which is currently too limited, through joint work programmes, which should produce concrete results, i.e., agreements that are incorporated into Community law” (COM (2002) 341 final).

Despite the fact that the social partners have not taken to forming a strategic plan for negotiation topics, the parental leave directive has had other lasting effects. Prior to the use of negotiation, the social dialogue was little more than annual or bi-annual high level meetings between organization and EU institution representatives. Clearly the relationship has been regularized and improved. One observation from the Parliament was that the negotiations have “definitely strengthened their relationship. That is because the dialogue forces them to work together. Because they are forced to work together they begin to know and to appreciate each other a little more. Normally, they do not see each other, but now they see each other every week – more often than ever. It has been very helpful in bringing things together” (interview, April 26, 2001). And from the “insider”
perspective of one of the social partners came this observation (noted by the speaker with pleasant surprise): “there is a climate of confidence, even if we don’t agree. There is a relation of true confidence between the organizations at the European level. During the [first] three negotiations, I never had the impression that one group tried to be unfair with the other group” (interview, April 24, 2001). It is hoped by all three of the EU institutions that this relationship will eventually produce negotiations of the organizations’ own initiative.

One of the effects that was hoped for by the Commission has yet to materialize: that the negotiations would be cumulative in their process and substance. In essence, that there would an agenda-setting effect with items unresolved or tangentially addressed in one negotiation carrying forward in more detailed fashion to another. This has not proven to be the case, and indeed, the opposite may be true. The only carry-over appears to be “downward” to the sectoral level where some issues, such as the directives on working time, have been further negotiated to be made more applicable to particular industrial sectors. At the European interprofessional level, a staff member from the labor relations unit involved with a recent negotiation complained that “one of the main problems eventually, when talking about the negotiation framework, is that the negotiations are ad-hoc negotiations. They are not part of a structure or strategy of a joint program or working plan . . . They want to make it a separate negotiation that is not the same as the previous one. It would be much easier if they [employers] had a program and they were accepting to be within the same framework each time they started a negotiation” (interview, April 10, 2001). This has contributed to the unwillingness of the
employers to re-open negotiations on the parental leave directive or to take up other reconciliation of work and family life or equal opportunities topics.

The final lingering effect of the parental leave directive has been the tendency for the social partners to conclude agreements that offer low common denominator proposals. Intended to provide flexibility to employers, the net effect has been legislation that is considered not to be particularly "progressive" in providing security for workers, or conversely very flexible for employers. While the parental leave directive did provide new rights for some member states, in general its baseline was generally below the provisions established in most countries. The specifics of the parental leave directive are taken up below in the discussion of the directive's implementation and in the following chapter on the gendered outcomes of the policy. Chapter Two above considered this lowest common denominator question in comparison to similar legislation from the Commission as well as what this same directive might have included had it passed through the traditional legislative process instead of negotiation.

Implementation

The legal transposition of the directive into national law occurred swiftly in most member states. However, the forms of implementation ranged from compliance with only the most minimum standards of the directive, for example in Great Britain, to leave provisions that are significantly above what the directive requires in both length of leave and pay provisions, of which Sweden's provisions are the most generous. Schmidt (1998) in setting the directive in perspective observed of its passage that "taking into account the long and unsatisfactory history of vain attempts to adopt a directive on
parental leave as well as the tremendous differences in national regulations with the
Member States on the one hand, and the huge leeway of discretion left to the Member
States and the resulting flexibility on the other hand, the concluded agreement can be
regarded as a first step in the right direction towards a society where working life and
family life are reconciled.”

Because the agreement included a provision (Clause 4, paragraph 7) indicating
that the directive would be reviewed five years after it took effect if any of the parties so
chose, there has been a concerted effort on the part of both ETUC and the Commission to
track the implementation measures taken by the member states beyond the transposition
into national law. The Commission’s report has not yet been released. Its primary
function will be to report on the success of the member states at transposing the directive
into national law and practice and to report any infringement proceedings or unusual
arrangements, and finally to make general observations about the application of the law
to individuals and sectors of the economy as well as about the take-up rates between
sexes and across member states.

The ETUC has been most active in monitoring the status of the directive. Indeed
it appears that they intend to use the review to reopen discussion on the directive if they
can convince CEEP and UNICE of the need to “revisit” aspects of the directive, such as
the unpaid nature of the leave. Because this was the first negotiated directive, and
consequently even more vague than subsequent ones in wording, one Commission
member commented that this was the ETUC’s attempt to “have another go at the cherry”
that they failed to get in the first negotiation: the requirement for paid leave. Neither
CEEP nor UNICE has commissioned a significant review or study of the directive’s

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effects, although they have queried their national member affiliates for information on any significant concerns with the directive. Neither group has a research institute of the magnitude of ETUC to handle such work. Indeed one of the business organizations said of their efforts that they thought they had “sent an email” to see if there were major concerns that the organization should be aware of, but none were reported.

The ETUC’s report (see Clauwert/ETUI, 2000) categorized the status of implementation by the degree to which new legislation was needed in the member states in order to transpose the directive. The largest group (consisting of 8 countries) required new legislation to be passed especially to add the leave for force majeure for urgent family reasons, an additional four countries needed simply to amend existing legislation, and the final three countries were already in compliance with the directive’s provisions. In response to the ETUI’s survey, most trade unions believed that the directive had been implemented appropriately, and that the social partners at the national level had in some way been involved in implementation or consultation with the governments during the implementation process. The means through which the directive has been implemented vary widely across the member states, especially among the provisions that allow the greatest flexibility. For example, there is wide variation in the special arrangements for adoptions, multiple births, and the care of disabled children, and the flexibility of taking leave on a part-time or full-time basis (although few allow the accumulation of leave “credits” for future use). There is greater consistency in the ability to decide whether or not to use the parental leave immediately after maternity, with 10 countries making no such requirement. Further, most countries have recognized the leave as an individual right and thus not transferable between parents.
The most succinct description of the directive’s use is provided by the European Network “Family & Work” and New Ways to work survey in 1998 (see also Moss, 1999) which found that:

Sweden has the most generous provision: 450 days, of which 30 days are non-transferable (which means that the parent who has not take the other 420 days must take these days or they are forfeited altogether). 360 days are paid at 80% of the salary and the remaining 90 days are a flat rate per day. Leave can be taken until the child is 8 years old. Many other countries are more generous than they need to be to comply with the minimum requirements of the Parental Leave Directive. For example, Luxembourg, the Netherlands, Portugal, Finland and Italy all allow six months leave and in nine countries the leave is paid in some way. These countries are: Belgium, Denmark, Germany, France (unpaid for 1st child), Italy, Luxembourg, Austria, Finland, and Sweden.

The only instance of transposition difficulty has been in the UK and Ireland, both of which have indicated that only parents whose children were born after June 3, 1996 can utilize the parental leave provisions. Two trade unions filed complaints with the European Commission. The Commission issued a reasoned opinion, a step prior to taking full infringement proceedings to the European Court of Justice. (ECJ). In its opinion, the Commission sided with the complainants by indicating that a cut-off date not in the spirit of the directive because it adds an additional condition to the leave that the social partners had not included. The Irish government is currently in its period of reply, during which it can reconsider its position or decide to challenge the Commission through the ECJ.

The most problematic aspect of the directive’s implementation results from what is excluded from the directive — the provision for paid leave. Clause 2, paragraph 8 of the agreement provides that “all matters relating to social security in relation to this agreement are for consideration by the member states according to national law, taking
into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care” (96/34/EC). However, no mention is made of pay. The member states can provide benefits that exceed these baseline standards (Clause 4, paragraph 1) but they cannot reduce the level of benefit below that which is outlined in the agreement (Clause 4, paragraph 2). The practical result has been low utilization in some countries by both sexes, or significant usage of the leave only by women. Explanations range from cultural and societal values that do not emphasize men’s child care responsibilities to the absence of pay which is a disincentive for both sexes, but especially for men who overwhelmingly remain the higher wage earners. In testimony to a parliamentary committee, Peter Moss (in Lourie, 1999) observes that “the one general conclusion about leave and payment is that it seems to be little used if it is not paid – indeed it tends to become quite invisible, since without payment there are usually no public records kept of the extent of leave taking.” All other studies of leave provisions reach this same conclusion, of which Bercusson and Weiler (1999) are representative in their observation that “the failure of men to take parental/paternity leave [is] because they lose money when befits are less than full pay. Full pay for parental leave is important, therefore, as it induces more men to take leave. It also reduces the stigma of the instability of female employment if men take leave more often” (see also Clauwert, 2000; Schmidt, 1999; Weiler, 2000; Latta 2000). Many of those interviewed for this project recognized the problems associated with unpaid leave, although the business interests, while conceding this point, do not feel obliged to revisit the directive and create this provision in a revised directive. Interviewees from various institutions commented on this dilemma. From the EP staff (interview, April 20, 2001), the
observation that “really essential parts in the end do not form part of the agreement, like social protection . . . which makes it very incomplete” to an MEP referring to the absence of pay as “making it a bit of an empty thing” (interview, April 26, 2001) to multiple Commission staff members, for which the observation that few people will use the leave “and you certainly won’t get both parents, and you won’t get many men either because they still tend to be the higher wage earners in the couple, and it makes no sense economically to do it” (interview, April 19, 2001). On this last point, the staff member could speak from both academic as well as personal experience – as she, not her husband, utilized the leave provisions after the birth of their youngest child.

“It could be said that the implementation of the parental leave has had considerable legal implications in the various member states, but this effect is minimized to a large extent by the fact that it has not been accompanied by a change in society where more men decide to take parental leave.” (ETUI/Clauwert, 2000). Although parental leave was the first major directive on the reconciliation of work and family life, it is the gendered effects of the implementation and take-up of parental leave that have prevented the directive from more fully realizing this objective and the promotion of equal opportunities between men and women. These effects are explored in greater detail in the following chapter.
CHAPTER 4

GENDERED IMPLICATIONS OF POLICY NEGOTIATION

Thus far, we have considered the major theoretical perspectives in the European integration debate and examined the degree to which those theories are inadequate for a current understanding of social policy development, and especially for an understanding of the social partners' efforts at policy negotiation. We have considered the principles of those theories in detail and the many instances in which the theories' core tenets are not met, are met so inconsistently as to largely dismiss the theory's utility for understanding negotiation, and are unlikely to be met in the future. We have seen so far that an unusual policy variant that fails to be explained by major integration theories is at work. Indeed it has worked on five separate occasions to produce a distinct policy list that exhibits two common characteristics: the policies emerged through social partner negotiations and the policies affected women disproportionately. So, we must now turn our attention to the gendered substance of the agreements produced through negotiation. In the preceding chapter, we examined the first successfully negotiated, implemented, and now reviewed, social partner framework agreement that became the directive on parental leave. This granted new rights to women and men workers with care responsibilities, and this in turn, allows us to consider the gendered effects of this and other negotiated agreements that have also had a disproportionate impact on women. This is a consideration of gender
issues. Is this gendered dimension endemic to policies that result from negotiation or is it an interesting coincidence? We will explore this question below, using evidence from the interviews that suggests the latter rather than the former. This chapter will conclude with some speculations on the possible connections between the integration theories and the trends that could occur in gender-related policies if negotiations were to more closely follow one of these theoretical prescriptions.

Gender equality between women and men is not a new policy issue for the European Union. Indeed, the 1951 founding Treaty of Rome, Article 2 included an equality provision that has served as the cornerstone for gender equity issues ranging from pay equity to the reconciliation of work and family life. The inclusion of gender equity in the Treaty of Rome had its roots in improving market efficiency by attempting to eliminate labor market wage variations across the EU, indeed the equal pay clause was originally included in the “distortions of the competition” section before being transferred unmodified to the social policy section (Hoskyns, 1996, 2001). Much like social policy at a broader level, progress on equality issues has moved forward in fits and starts, with the 1970s and European Court of Justice activism being a time of policy and precedent expansion in areas of equal pay and workplace safety, and the 1980s showing a slowed policy process that does not restart until after the Maastricht Treaty and the Social Protocol come into force. Observing the developments between the Maastricht and Amsterdam Treaties, essentially the 1990s, scholars (Hoskyns, 2001; Mazur, 2001; Elman, 1997) have found a renewed cause for optimism in treaty language that expands the scope of social policies that can be adopted by qualified majority voting in the Council of Ministers and the increased use of codecision, involving both the Council and
the EP on social policies. The use of codecision enhances the Parliament’s participation in crafting legislation, and this in turn, creates greater opportunities for women’s groups to have influence through lobbying members and committees in the EP. Similarly, scholars have positively assessed the more active agenda of action plans, infringement cases, and recommendations coming forward from the Commission’s Equal Opportunities Unit. Unfortunately, the very developments praised by these scholars are all unavailable during the negotiation procedure. Negotiation removes the EP from a formal role, thus limiting access for women’s groups, codecision is not applicable as the Council alone approves framework agreements, and to date, the only role enjoyed by the EOU has been oversight for the parental leave directive – no other directive has been assigned to the unit for implementation.

With the 1997 Amsterdam Treaty, the EU has called on all its institutions and member states to engage in gender “mainstreaming” by which it means “the systematic integration of the respective situations and needs of women and men in all policies and with a view to promoting equality between women and men and mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking account, at the planning stage, of their effects on the respective situations of women and men in implementation, monitoring and evolution (COM(96) 67 final).” Today, the Commission operates an Equal Opportunities Unit (EOU), plans five-year gender equity frameworks, and encourages the development and enforcement of equal opportunity policies and case law. Given this historical and current commitment to equality, it is not surprising to find that the social partners, charged with negotiating in the social arena, might take up issues in which gender is an important consideration. In
its 2001-2005 Gender Equality Framework, the Commission notes that its earlier attempt at promoting equality has "shown that the commitment and participation of the traditional players are not enough to achieve the aim of gender equality [and it] is essential to involve key actors from the economic and social life and strengthen the partnership aspect" (COM (2000) 335 final). This current framework draws from the Amsterdam Treaty's emphasis on the social dialogue by "encouraging the social partners to make a full contribution to promoting gender equality, in particular to assess the impact of their framework agreement [on women]" (ibid.). The development of the parental leave directive is the clearest case in which there is a gendered component both to the development and to implementation of the directive. Other negotiated directives, including those on part-time, fixed-term, atypical work and teleworking all have disproportionate impacts on women as they comprise the majority of workers in any of these categories (Commission, Women and Work, 1999).

Despite this long institutional commitment to the principles of gender equity, and even some legislative efforts at promoting equality in the workplace through the reconciliation of work and family life, the European Union remains a place of gender inequity in the workplace and in popular attitudes about women's participation in work and political life. Before discussing the specific gender interpretations of recently negotiated directives, it is important to consider the political and social context in which such rules are being applied.

In 1998, the EU's Eurobarometer 44.3 polled the public on attitudes about equal opportunities for women and men. Seventy-four percent agreed with the statement "a mother should give priority to her young child rather than to her work . . . and 53% of
people think that it is not the father's responsibility to give up work in order to look after the children, even if he earns less. In other words, the traditional image of the family in which the husband goes out to work and the wife stays at home to look after the children is still very much rooted in people's minds" (Commission, 1998, 36). This survey result comes four years after the passage, and two years after the final implementation deadline, of the parental leave directive giving all Europeans the ability to take leave for the birth, adoption, or early years rearing of new child. Since respondents, both male and female, are generally against the idea of the father giving up work to provide childcare, it is perhaps not surprising the both ETUC and EU initial studies (unpublished, but mentioned in interviews) indicate that the take-up rate of parental leave by men is extremely low to virtually non-existent.

Despite these general observations about who should provide care for young children, European women currently engaged in the workforce do believe (at a rate of 56%) that "women can combine working and having children" yet at the same time among non-working women, a majority (59%) believe that "women are often forced to choose between having children and working" (Commission 1998, 43). Thus, even the Commission and Social Partners' efforts at helping caregivers reconcile work and family life have not produced results that have had noticeable public effects. Given the newness of parental leave at the time of Eurobarometer 44.3 in 1998, the survey asked respondents whether they would consider taking an unpaid sabbatical leave (essentially what the parental leave directive provides) for the purpose of childrearing. Working women with children were most likely to consider an unpaid leave for childrearing attractive (58%) at a rate twice the level at which men would consider taking such a leave, and when pressed
for an explanation of their choice of not taking a leave, a significant majority of women (62%) indicated they could not afford to do so (Commission 1998, 46, 48).

Response of Political Actors

Given these distinctions among the public’s attitudes on issues of gender in the reconciliation of work and family life, to what degree did the actors involved in the social dialogue or its implementation understand their efforts to have a gendered impact on European workers? Among the social partners, neither UNICE nor CEEP directly commented on the fact that parental leave (or any of the working time directives since) would have a disproportionate impact on or use by women workers. When questioned specifically about the degree to which women’s needs were considered during the negotiation process or in the five-year review of the parental leave directive, UNICE and CEEP again believed that these were “workers” issues — applying uniformly regardless of the gender of the worker. Indeed, a staff member at the Council of Ministers observed that while the social partners may be able to reach agreement on policy areas either more quickly than the Commission or succeed where the Commission had formerly abandoned an issue, it was still the case:

As in most cases, the problem is more that of the employers seeing any kind of special leave as destructive and costly to business. So in that respect, [negotiation] might work better [than regulation legislation] if the employers feel their interests are better represented at the European level than by the governments. Some governments might have a different agenda and might take other things into account, like equality between men and women, which is not necessarily a concern that many employers would have. (Council staff member)
In contrast, the interviewee at ETUC noted both the presence and participation of union women on the ETUC negotiating team for parental leave and the long commitment of the ETUC to issues of equality and women’s interests. Many European labor scholars (Garcia, 2000, Cockburn, 1995, 1997, Latta 2000 among many others) with an interest in gender confirm this ETUC perspective as well as the “obliviousness” of business groups. Martikainen (1997, quoted in Latta, 2000), referencing a collective bargaining situation in Finland observes that “most of the negotiators . . . were gender blind; in other words, they act as if workers are sexless creatures. As a result the decisions on terms of employment are made in a process in which nobody stops to think about what effects decisions have for women and men.” In contrast to the business groups, the ETUC also asked specifically about the sex-differential impacts of the parental leave directive when the period for review was initiated five years after implementation. Not only did the ETUC ask this question, it was the only social partner to conduct a state-by-state review of any of the directive’s impacts.

The European Union’s long commitment to equality manifests itself on the parental leave issue in several aspects. Perhaps most notably, the division of the Employment and Social Affairs Directorate to have oversight for the implementation, enforcement and infringement proceedings of the directive was given to the Equal Opportunities Unit (EOU). Despite the disproportionate number of women affected by the subsequent working time negotiated directives, only the parental leave directive is to be monitored by Equal Opportunities. Queried on this observation, the EOU staff member currently assigned to the issue (and relatively new to the post at the time of the interview) was unable to offer an explanation for the assignment of parental leave to his
unit or the failure to assign any of the working time directives to EOU beyond a generic explanation that “everything must go somewhere so it came naturally here.” A former EOU staff member now in another directorate, noted that with the parental leave directive there is a high degree of flexibility built into the rules – to the point that directive lacks uniformity because the member states can make so many features of it subject to qualification (for example, insisting that the leave be taken first by the mother rather than the father, or prohibiting parents from taking leave at the same time (even if employed by separate firms), thus serving as a disincentive for the father to use the leave at all).

Further, she noted that the biggest “loophole” of the directive (to be discussed in greater detail below) is that the leave is unpaid, and in light of the unpaid nature of the leave, states did not feel compelled to maximize the flexibility or special clauses on the assumption that such efforts were not needed because:

They [the member states] just figured that people aren’t going to take it. I mean, how many people are actually going to use this directive? Not many, and certainly you won’t get both parents, and you won’t get many men either because they still tend to be the higher wage earners in the couple, and it makes no sense economically to do it. There are others who try to give women priority, and the Commission is trying to change that so that men will take it, but it is still unpaid. The idea is to try to encourage men to do it, but it is hard when it is unpaid. (interview, April 19, 2001)

The political actors with the greatest sensitivity to gendered dynamics of parental leave and the working time agreements were those with the least ability to act on their concerns. A Member of the European Parliament, and two Economic and Social Committee staff members clearly noted the sex-differentiated impacts of these directives as well as the Parliament’s interest in and promotion of equality issues. A socialist MEP observed on part-time leave that “it was important to women, and they are not
represented in the unions as much, and in the higher levels" (interview, April 26, 2001) and therefore it was important for the socialist group to call this to the attention of the social partners when they provided a copy of the framework agreement (the directive before it is voted on by the Council) to the EP for comment. A member of the Economic and Social Committee staff at the EP, recalled having the first opportunity to review the parental leave framework agreement when it was sent to the Committee on Women's Rights for its first EP review. That committee offered the position for the EP that was forwarded back to the social partners and commission through the Economic and Social Committee. In this instance, the institution appeared to recognize the gender aspect of the legislation. Also in the Women's Rights committee, this staff member recalls that his role was to ensure the gender dimension was considered so that it would be passed forward to the Social Affairs committee:

My role in that committee was to make sure the gender aspect was taken on board, and to point out the gender aspects of it. Take part time work – certainly more women than men do part time work – and it was really highlighting the gender differences, and they are not all the same across the member states so it is quite easy to point out the anomalies. It was part of gender mainstreaming. (interview, April 24, 2001)

**Social Dialogue's Positive Link with Equality**

Under the European Employment Guidelines, the social partners are called on to work on a host of equal opportunity concerns from improving women's employment, career opportunities and presence in traditionally male-dominated fields to the reconciliation of work and family life. A significant advantage to the use of the social dialogue has been the ability to tackle issues that had previously faltered or languished on the EU's agenda. This was the case for parental leave that had failed as a legislative
proposal before the Council in 1983 when Great Britain opposed its passage and
succeeded in keeping the issue dormant. Indeed, only by including the social dialogue
into the Social Protocol of the Maastricht Treaty and then allowing Britain to opt-out did
the issue return to the agenda and pass the Council. The Commission is currently
considering issues of sexual harassment and sex discrimination as topics for the social
dialogue to consider. Both issues have met with little enthusiasm for legislative
proposals from the Commission but are considered another opportunity for which the
social partners might be able to agree on a basic framework of procedures for use in
workplace complaints.

The directives that have resulted from negotiations among the social partners have
laid a baseline from which member states can begin their policy development or below
which their policy provision cannot fall. This has meant new or expanded opportunities
for women to take leave and created new and comparable opportunities for men to do so.
In this sense, parental leave helps both women and men begin to reconcile work and
family life. With regard to parental leave, the majority of EU member states did have
various kinds of leave policies on the books, but this directive was the foundation for the
development of leave that applied to both parents in countries such as the UK and
Ireland, and compelled other states to move beyond maternity leave to a provision that
encompassed both parents as in the case of Luxembourg. For countries with parental
leave, this directive did raise the standard of provision by outlining minimum standards
that some countries, such as Austria had to meet. Finally, Dickens (2000) has argued that
the promulgation of parental leave has had an agenda-setting function for national
governments and national collective bargaining by giving women "not only a safety-net

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but also a resource or lever to be used in bargaining” and further study will be needed to see if subsequent negotiated agreements do the same for women specifically or workers more generally.

On a procedural level, the conclusion of framework agreements by the social partners provides the Council of Ministers with an opportunity to advance social policy by qualified majority vote, thus allowing easier passage of new legislation. To date, all framework agreements have been passed unanimously by the Council as a symbolic gesture of support for the process, as much as for the content (interview, Council staff member). Further, there has not been conflict between the member states during the implementation process. While Great Britain was initially exempt from parental leave because they had not signed onto the Social Protocol at Maastricht, the incorporation of the Protocol into the Amsterdam Treaty, and Britain’s full acceptance of that treaty, have brought them fully into the social policy realm and they have implemented the parental leave directive that the treaty signing requires. The social partners’ promotion of equality legislation strengthens the EU’s overall mandate to advance equality and begins the process of transferring the issue beyond its traditional equal opportunities pillar to other employment policy domains such as the promotion of workplace flexibility and adaptability – areas of Commission policy of greater interest to the employers’ groups. Other institutions, despite the EU’s overall commitment to gender mainstreaming, have not successfully moved equal opportunity concerns into these other employment policy areas.

Given the EU’s limited legislation on equality issues, could the social dialogue provide for greater acceptability of, flexibility in and enforcement of equality measures?
An interview with a member of the Commission staff who worked on the initial review of parental leave noted that the directive was of a more "practical nature" since it was negotiated by the very workers' and employers' groups who would be affected by the legislation's outcome. Most member states transposed (i.e., implemented via national law) the directive very quickly and the Commission did not have to file infringement proceedings with the Court of Justice to finalize the directive's implementation, thus indicating a widespread acceptance of both the substance of and negotiation procedure that produced the directive. As noted previously, the social partners wrote a very "loose" directive (an adjective used by virtually all of the interviewees) in terms of the ability of member states to make qualifications to various procedures to suit national interests but maintain an EU-wide standard. As a current EOU staff member noted: "It is very loose so it means that the member states should in theory be pleased by that. In some ways, the people having to implement find it more interesting if they are given more leeway as they have in the parental leave directive – more freedom to work out precisely what to do."

It appears then that the social dialogue has not hindered the development of flexible enforceable legislation. Indeed it is quite possible from this early example that their participation has increased the acceptability of equality legislation by giving governments, firms, and unions greater room for maneuver as they apply the directive. For example, some countries allow for the leave to be taken in sections, rather than all at once, and allow an alternation of parents using the leave, as in the case of Germany. Many of the Nordic member states continued to offer paid leave for maternity and have expanded payment more fully to fathers, while some member states, such as Britain have taken the legislation in its most minimalist form and have complied by providing the
specified unpaid leave to both women and men. Finally, as an MEP observed delightedly, “there is one additional benefit for directives from negotiations: a lot of people can’t complain about them anymore because they are a member of one of the small groups [that comprise the social partners]. I had these Irish small businesses come to complain about the agreement. And I said ‘aren’t you a member of these groups?’ and they said yes, BUT . . .” (interview, April 26, 2001). (It should be noted that the Irish were one of the few not to have any form of parental leave and who failed to make use of the flexibility provisions of the directive to exclude small businesses from the provisions.) This same example reinforces the earlier contention that social dialogue at the EU level has the ability to set national agendas on equality issues that had not been taken up by the member states.

Four years after the social partners negotiated the parental leave directive, they began a series of negotiations on working time. While those directives are beyond the scope of this research, it is interesting to note that in the first of these working time directives, one on part-time work, an attempt to continue gender mainstreaming was made by including provisions that would encourage the creation or promotion of part-time working opportunities at all levels of an organization in an effort to prevent the stereotyping of women (who make up the vast majority of part-time workers) as part-time “mommy track” workers. The subsequent directives on fixed term, atypical, and temporary agency work have not had such a mainstreaming element.

What if these initial social dialogue efforts at equal opportunity and reconciliation of work and family life actually have a double-edged component to them, making them both a new avenue for equal opportunities between parents or more darkly a barrier to
women's career advancement wrapped up in the gender neutral language parents/workers' rights? The potentially negative connections between recent social partner negotiations on the promotion of equal rights are discussed below.

Social Dialogue's Potentially Negative Link with Equality

The social dialogue process, regardless of issue, is a closed, confidential, and many would say an undemocratic or unrepresentative process given the few number of partners, the exclusion of the European Parliament, and the secretive nature in which negotiations are conducted. Women's groups wishing to lobby on behalf of equality issues under negotiation do not have an opportunity to do so during a negotiation. In this sense, the social dialogue can be negatively perceived with regard to equality because the partners have little external expertise on these issues because only one (the ETUC) has a women's committee and further there is no point in a negotiation process at which women's groups could lobby the social partners. When a framework agreement is reached through negotiation, it is submitted without modification to the Council, thus blocking any access that either women's groups or the Equal Opportunities Unit might have to influence the final text. When asked about this lack of consultation with external groups, one social partner organization indicated that because they were "autonomous" organizations they had "no need or obligation" to consult with anyone during the negotiations — women's groups included.

The social dialogue's potentially negative link with equality is unfortunately strengthened by the fact that those groups with the greatest sensitivity to women's and equality issues are the weakest actors in the negotiation process. Within the ETUC, the
social partner with the highest representation of women in leadership and membership (Cockburn, 1995), there is still less than a critical mass of women on negotiating teams. Only the negotiation for parental leave had a significant presence of women and especially women already experienced from work on the Women’s Rights Committee. Many women trade unionists have noted that when they are present they are assumed to be arguing for women’s or equality issues, and in their absence, it cannot be trusted that men will work for greater equality measures (Garcia, 1999; Cockburn, 1995). Further, CEEP and UNICE who do not emphasize gender balance on their negotiating teams nor do they have women’s policy groups, have a distinctly different focus on the “subject” of negotiations. For these groups, the workers for whom they are making policy are assumed to be gender neutral, and are thus constructed as male, primary earners with no care responsibilities. This tendency compounds a problem identified by O’Connor, Orloff and Shaver (1999, p. 221) in their study of liberal welfare regimes (not the EU):

An important issue relating to the exercise of citizenship rights [is]: in addition to the fact that gender-neutral citizenship rights must be exercised within a gender-structured labour market where the traditional ideal worker is full-time and assumed to be without domestic or caring responsibilities, even when citizenship rights are based on an equality principle they must be exercised with a labour market which is structured on a principle of occupational inequality... This points to the importance of focusing on the differences among both women and men in terms of labour market experiences.

To date, the business interest have not focused on these differences and as a consequence, their policy contributions have not advanced equality and gender issues to the degree sought by the ETUC or by the Commission and EP.

The European Parliament, especially the Socialist group (in the majority for virtually all of the directives that were negotiated to date), the Economic and Social
Affairs committee staffs, and the Commission’s Equal Opportunities Unit can, at the most, offer only advice and recommendations. The EP has no formal role in negotiation by has been provided with final agreement drafts on which they may offer only “recommendations” which are non-binding and have no vote for veto or approval. It is in these bodies, as the quotes above indicate, that there is a particular sensitivity to the status of women. Further, the Equal Opportunities Unit has been given implementation oversight for the parental leave directive but not for subsequent working time directives and was not consulted for advice during the negotiation procedure.

Indeed, the most significant gender implications of these directives have been noted well after their passage. Implementation of the directives thus far has indicated that the directives will be most successful in promoting equality only to the extent that they do not stereotype women or serve as greater obstacles to career development than they do as opportunities. At present, the low take-up rate by men of parental leave has been attributed to both the lack of paid leave and the financial situations of couples. In the case of parental leave, this requires not only that both parents be able to avail themselves of the leave policy, but that doing so does not imperil the careers of those with children. If this requirement is not met, the provision of parental leave may inhibit the fulfillment of equal opportunities. The same is true for directives on working time.

The single greatest barrier to the promotion of equality through these directives has been unwillingness by CEEP and UNICE to address the issues of pay, pensions, and social security. The Equal Opportunities Unit of the Commission is acutely aware that this has been not only a controversial aspect but also a significant shortcoming of the negotiations. In seven different interviews across three institutions, interviewees
observed that had these same issues been drafted by the Commission rather than negotiated by the social partners, the likely outcome would have been a directive that "went further." To borrow a definition from the Council staff interview:

It is interesting to know what people mean when they say go further. To me, it means to go further for the protection of workers. That is one of the problems with negotiations. From the employers' point of view, they need a kind of flexibility in working. From the workers' point of view they need more security. And very often the member states are in the middle, with various tendencies (interview, April 3, 2001).

Commenting on the possibility of the social partners revising the parental leave directive after its five year review "to go further" with the policy, a former EOU staff member was quite clear that there was only one significant issue: pay, "because it is really the big failing of the thing. Something that wasn't clear in the directives is what happens to your pension - state and occupational? If you stop getting paid for three months, what happens to your social contributions during that time? Not only are you not getting paid, but you are potentially losing money at the same time" (interview, April 19, 2001). This same staff member represented the views of all three social partners, the Council and the Commission as to why the issue isn't included in the directive by saying simply: "It is fantastically sensitive. The states just don't want to touch it." Social security is an issue of concern for both employers, who do not wish to pay it, and for the Council of Ministers that sees the issue as a truly national concern. The socialist MEP observed that "what was a big problem in the parental leave was that there was no possibility to talk about social security there. Parental leave without social security - as in the payment for your leave - is a bit of an empty thing. They [social partners] couldn't agree on it and the Council would not accept it" (interview, April 26, 2001). It appeared
that there was a cycle of assumptions about social security and pay issues, especially among the social partners, that prevented these issues from being negotiated into the framework agreements. In this pattern, the ETUC wants to include issues of pay and social security, as would the Commission if they had responsibility for drafting the legislation. The ETUC understands that the business groups do not wish to make these payments. The business groups in turn believe they need “flexibility” and can best achieve this by guaranteeing access to leave or various working time arrangements without adding the burden of payments. Beyond this, they claim that even if they wanted to take on these financial considerations it would not be worth doing because social security falls outside their negotiating scope and/or the Council would claim that these welfare issues are the exclusive domain of national governments. The Council has never been presented with a framework agreement that included any kind of social protection language, so there has not been a vote on this issue. The realm of social protections and mobility of pensions and social security have not received any significant attention from the Council despite calls from the Commission and Parliament to take up these issues to fully achieve a common market for labor and truly free mobility of workers in the Union.

It appears then, that the social partners have ‘self-censored’ their framework agreements on the assumption that they would be rejected by the Council. The absence of this issue has clearly had a negative impact on both the use of the new rules and the perceptions of the process by EU officials, as can be seen in the words of another EP staff member:

If you look at previous framework agreements, you see that really essential parts in the end do not form part of the agreement, like social protection. Which makes it, I don’t mean to say ridiculous, but very incomplete. Of course, the social partners have no mandate to negotiation on things that [currently] fall within the administration of the members.
Instead, we try to agree on something which has to reflect very, very different realities. (interview, April 20, 2001)

The degree and frequency of this self-censoring of policy content is difficult to gage given the confidential nature of the negotiations, and the resulting documents certainly do not reflect this type of debate. To what extent then, are negotiated policies used to create minimalist social and equality policies by establishing a “lowest common denominator” approach? Indeed Hoskyns (2001) after praising the more expansive provisions of the Amsterdam Treaty wonders “although much of this [parental leave] framework may be beneficial, in the current political climate the focus on equality may well be used to legitimize and generalize the leveling down of rights, and the reduction rather than the enhancement of social protection.” Fortunately, despite early dire predictions, the negotiated directives to date have shown that they have not established the lowest possible denominator of policies. Indeed, in every instance, including parental leave, several members have had to create policy from scratch, while many others have had to modify existing policy. The extent of these changes are discussed in the preceding chapter. We would expect the business organizations to be significantly more excited about the prospects for future negotiations if they had been so successful in “leveling down” and reducing rights, protections, and regulations. While the outcomes of negotiations have not been as progressive or expansive in their provisions as the Commission had hoped, in every instance social and equality policies have expanded the scope of workers’ social rights. Hoskyns further worries that the discretion of implementation left to governments will enhance the minimalist nature of these policies. Surprisingly then, in the case of parental leave, many governments implemented the
directive using its broadest provisions and choosing not to take advantage of loopholes or exceptions that would have made the leave policy inaccessible to more women (e.g., by maximizing the exceptions clause for small business, an option most governments did not take). In this sense, the social dialogue's potentially negative link with equality is centered on who is excluded from the procedure than on an inherently negative outcome.

Certainly the inclusion of women's groups, and greater opportunities for the Commission and EP to influence the drafting process would enhance the potential for gender mainstreaming during negotiations, however, the fear that unusable or minimalist policies would be the regular outcome of negotiation has not been justified.

Equality and Integration Theory

The initial directives to emerge from the social dialogue offer a mixed view of success for equal opportunity issues such as the reconciliation of work and family life in the case of parental leave or pay equity and career development for women in the cases of the working time directives. In this sense, it is clear that gender mainstreaming has not made its way to mainstream social dialogue. The degree to which we see gender concerns at the heart of the social dialogue, or at least seriously considered in some policies, will depend on several factors, all of which are quite possible to obtain, but not necessarily at the height of any one organization or institution's objectives. This section will review these factors and then consider the ways in which integration theories, should the social dialogue move in the direction of one of them, impact gender equality.

One category of changes that would promote gender mainstreaming in the social dialogue is activities that relate to the Commission's role. First, the Commission must be
clearer and consistent in its pressure and rhetoric on the importance of gender mainstreaming. Despite the best efforts of the ETUC to initiate negotiations, to date, the Commission has initiated all negotiations. Consequently, the Commission must make gender issues central proposals for negotiation and where the issue may not seem gendered, especially to business groups, the Commission must include this aspect in its negotiation proposals. The Equal Opportunities Unit's (EOU) suggestion that sexual harassment in the workplace is a viable negotiation topic is an important step in this direction (interview, March 26, 2001). Also within the Commission's sphere of influence is their policy-monitoring and enforcement role. Stepping up their willingness and speed of enforcement and the taking of infringement procedures to the European Court of Justice will give greater strength to negotiated directives. The initial reluctance to take infringements because of the “newness” of negotiated directives is no longer a sufficient justification for inaction almost a decade and six agreements later.

Third, the Commission should encourage the social partners to include in their directives a requirement for five-year review as they did in parental leave. In addition to helping the Commission identify violations, it provides the opportunity for the social partners to revisit and if necessary, revise their proposals. At present, the only social partner willing to do this is the ETUC. With parental leave, the proposed revisions would be to require paid leave. However, both CEEP and UNICE do not see a need to reopen negotiation – a defense against the very possibility of creating pay rules. Beyond financial considerations, such a review/revision policy allows the social partners to assess the degree of (in)flexibility of the directive and to correct for any previously unplanned consequences (e.g., part-time work rules that stereotype women in "mommy-track" jobs).
The degree to which women's issues will be taken up in negotiation will continue to be affected by the presence or absence of significant numbers of women - on the negotiating teams and with access to the negotiation process. While the ETUC has made the most progress at diversifying their negotiating teams, positive action programs are likely to be needed to ensure women's consistent presence. For the business groups, there is greater work to be done, beginning with basic awareness-raising about the importance of women's involvement and significant recruitment will be needed to bring women into senior leadership positions in these organizations. One last structural note should not be overlooked: the informal role of the Parliament. The ETUC has extensive informal contact with the Parliament’s committees and especially with the socialist group and the business groups have recognized the need to develop a closer working relationship within the Parliament’s committees. To that end, the ability of the EP members and committee staffs to make recommendations before and during negotiations and to structure agenda items from outside the formal negotiation procedure can be quite significant. This involvement provides opportunities for both the Women’s Committee and the Economic and Social Affairs Committee of the EP to advocate for gender concerns. Further, the EP is the institution that provides the most access to lobbyists from the European Women’s Lobby to comment or influence the drafts of a negotiated agreement or to gain access to the social dialogue process. As the representativeness and democraticness of both the negotiation process and the negotiation teams remains a point of contention between the elected parliament and the social partners, there appears to be some willingness on the part of the social partners to heed the advice and suggestions provided by concerned MEPs.
Because the negotiation process is still a relatively new tool for drafting legislation and its full impact on equality concerns not yet known, what might be the consequences for equality and gender mainstreaming if the negotiation procedure begins to more closely follow the patterns prescribed by the major integration theories? I would contend that gender equality interests would be best served by a negotiation process that comes to manifest stronger elements of neofunctionalism. Because this theory recognizes the importance of integration-oriented elite bureaucrats, chiefly the Commission, as central to promoting new supranational policies, a more neofunctional negotiation procedure would bring the Commission more actively into a facilitator role in the negotiations. This would allow the Commission to promote gender mainstreaming in any and all negotiations by making equality concerns part of the initial proposals for agreements and/or through their active facilitation between the social partners. Because it has been the Commission that has most consistently advocated for equality issues and developed policies to pursue women's issues, strengthening their direct involvement in negotiation is the more likely means for promoting women's interests. Further, as neofunctionalism stresses the importance of spillover among related policy domains, an increasingly neofunctional negotiation with greater Commission involvement is likely to produce greater issue continuity across negotiations and a greater cumulative growth in equality legislation as Commission officials would likely structure "packaged deals" among the social partners. Such package deals would allow the completion of more integrated policy developments. Thus, for example, from parental leave, a more neofunctional negotiation procedure would likely lead to either paid leave or agreements on child care – the logical "spillovers" from an initial agreement on parental leave.

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If negotiation procedures begin to more fully develop their corporatist tendencies, this may also serve gender equality interests. However, two significant changes would have to occur in the negotiations for this to be possible. The first is a redefinition of the Commission’s role. This would be even broader than a neofunctional level of participation and guidance in the negotiation. It would entail a shift from the social partners having autonomous bipartite negotiations to tripartite negotiations in which Commission officials became the third equal negotiating partner. Clearly in this role then, the Commission could structure a more consistent, cumulative social policy agenda that mainstreamed gender issues in all agreements. The second major corporatist element that would enhance gender concerns involves the social partners themselves. Corporatist arrangements best serve women’s interests where women are represented among the negotiators (Cockburn, 1996; Liakkanen, 2001). Certainly this element of corporatist behavior could be developed without Commission participation in a tripartite negotiations, but the two in combination would give the greatest leverage to women have critical mass to advocate for equality concerns and to be reinforced by an equality-oriented Commission bureaucracy.

Finally, an intergovernmentalist version of negotiation would offer the least positive path for advancing equality issues. Should the negotiation procedure take an intergovernmental turn, we would expect to see the Council assert itself by passing framework agreements using qualified majority votes (as opposed the unanimity the policies have achieved to date). This would likely slow the pace of subsequent negotiations as the social partners become nervous about their support from the governments. Additionally, they would be likely, as the previous chapter suggested, to
‗self-censor‘ their agreements to make them weak, and thus more palatable to the Council. Further, we might begin to see the Council raise more challenges to the representativeness of the social partners in an effort to slow social partner agreements from coming to a vote. Because such challenges are to concern sectoral representation (i.e., are the affected employee/employer groups represented) rather than gender, race or other characteristics of the negotiators themselves, these challenges will not provide an opportunity to ensure women’s representation among the negotiators. Finally, we might expect the Council to reject an agreement, for either symbolic reasons of wanting to curtail negotiation generally, or because of the scope of the substance. It is this latter scenario that would most affect equality developments. Because gender equality advocates are increasingly concerned with social protections, beyond basic regulations, we would expect to see agreements that might include paid benefits or other social security concerns – the very topics for which national governments are loathe to relinquish their control of policy or of the purse-strings attached to welfare.

Conclusion

All of the negotiated policies created in the first decade of the process’s existence have disproportionately affected women. Clearly though, not all of the organizations and actors involved acknowledge this impact. The interviews quoted above, this history of social and equality policy to date, and the observations of other scholars all suggest that at the current level of EU integration, gender mainstreaming activities do not occur without the guidance and pressure of the Commission and concerned sectors within other organizations, such as committees in the EP and the women’s section of the ETUC.
Unfortunately, most groups with the most interest in women's issues are excluded from formal participation in negotiation, including the EOU, the European Women's Lobby and the Women's and Social Affairs Committees of the European Parliament.

The weak link in the connection between negotiation and the development of social policies that due justice to gender equality issues is the inherently economic nature of the European Communities. Despite 50 years of increasing social and equality policy legislation, the national governments have yet to yield on the issue of social protection (i.e., welfare, pensions, social security, wage issues and state provided benefits). This is not to suggest that the negotiation procedure has faltered on the rocks of intergovernmentalism. It has not. It has in fact succeeded at producing social policies that the member states had been unable to reach consensus on previously, all of which have been successfully implemented by those very same member states. Rather, it is to suggest that the European Union is still most fundamentally an economic community. Despite calls for a common market in labor, only the common markets in goods, services and capital have been achieved. This is not simply a response to the call for subsidiarity in community policy leaving these issues to the member states. The sticking point for a common labor market is common social protection – the very foundations of a common European welfare community! Social policy negotiation has succeeded in securing common regulations, but it has not progressed either to harmonization or to common social protections because it is these areas which are most at the heart of national welfare policies and are thus most closely guarded by the member states. Until the European Union's competence is expanded in this regard, negotiation may in fact be the best we can expect for producing regulations. Further, without the foundations of a European
welfare policy, it will be difficult not only to expand social policy for women workers, but to expand social provision for European women citizens. Consequently, all European social and equality policy to date has applied strictly to workers and has not had broader societal impacts. The explicit prohibition on the social partners preventing them from taking up core aspects of social protection further limits their role as change agents for EU social policy.

When Jennifer Curtin (1999) reminds scholars to ask always what it will take to get women, in this case European women, full citizenship rights, the answer is clearly that it will take more than the social partners’ best efforts. In the absence of a truly corporatist European polity, social partner decisions cannot have citizen-wide impacts. Constrained to addressing European workers, the best case scenario would see the social partners (and women’s groups if they had the access) promoting full economic citizenship for women workers as the stop-gap measure until the EU acquires the necessary competence to expand social policy to all Europeans regardless of their workforce status.

The social dialogue, however, may yet prove to be an effective means for developing gender sensitive and equality policies. Unlike many of areas of European life that the EU would like to include within its competence, gender equality, reconciliation of work and family life, employment concerns, workplace health and safety and the completion of the common market for labor (the stepping stone to European social protections) all have a basis in the treaties to justify continued and expanding attention to these issues. The degree to which labor and employers can balance competing needs of flexibility, security, and equality in the workplace, and the degree to which actors in the
EU institutions can pressure the social partners to focus on equality and gender, will together determine the degree to which the social dialogue is positively associated with equality and the reconciliation of work and family life.
CHAPTER 5

CONCLUSIONS

This project has considered why the social policy negotiation process is chosen, for what kinds of social policy, who decides when to use negotiation, and how those three decisions shape the substance and success of the final policy proposal with particular attention paid to the case of parental leave. The development of this new alternative legislative channel for social policy has been an incremental process beginning in 1980s with the institutionalization of the social partners and the beginnings of the process of social dialogue, progressing in the Agreement on Social Policy that gave the social partners the right to draft agreements and submit them to the Commission for a Council decision, and culminating in the use of that process beginning in 1995. There have been only five concluded agreements to date, indicating that the process is used infrequently, but that when used, has been successful in producing agreements. A social partner commented that the progress to date has been "difficult, but it may not always be difficult, because it is a process and it is progressing in my view, and it is unique to the world for this kind of negotiation among social partners" (interview, April 24, 2001).

The relative newness and novelty of the negotiation procedure has left many scholars wondering how the process fits into broader theories of integration. The interpretations of the nature of the negotiation process have been varied but have also
been made largely prior to the first use of the negotiation procedure. Scholars have variously described negotiation as a "legislative intervention" (Biagi in Federal Ministry, 1999) because it has the potential to "accelerate and improve" social policy making. Reflecting on the interaction among the Social Partners after Maastricht, Martin Rhodes (1995) has described the negotiations as consensus decision-making. While that is true for the process that occurs to varying degrees among the social partners, the consensus is only on the framework agreement. There need not be consensus from the Commission and the EP, or in the Council’s voting on the final directive, in order for policy to be enacted. Consensus decision-making does describe the act of negotiation but does not help to place the negotiation process in broader integration theories. Some in the Commission describe the process as ad hoc negotiations, changing in substance, direction, and to some degree process with each new negotiation. Much like consensus decision-making, this may describe the negotiation itself, but it does not place it in an integration framework.

In light of the literatures reviewed in the first chapter, it appears that if we insist on forcing negotiation into one of the integration theory “boxes” then it fits most closely with the integration theories offered by neofunctionalism with its emphases on the role of interest groups (the social partners), integrationist-oriented elites interested in promoting social policy at the European level (in the EU institutions), the potential use of package-dealing within a negotiation (although not between negotiations), and the minor role afforded member states by the exclusion of a vote for the EP and the use of qualified majority voting in the Council of Ministers to approve the framework agreements. Negotiation, what the EU refers to as autonomous bi-partite decision-making
(Commission, 2000), appears to be more accurately characterized as "parallel legislating" that borrows from both the neofunctionalist and at this point to a lesser degree from neocorporatist traditions.

First, we return to the neofunctionalists like Ernst Haas, Philippe Schmitter, John Caporaso, and Leon Lindberg. These scholars argued forcefully for an integration process centered around various described forms of spillover. This notion suggests that supranational integration in Europe would take place with the careful private attention of self-interested, integration-oriented supranational elites in the EU (chiefly in the Commission) fostering packaged deals and log-rolled processes among national actors and national interests groups in a gradual process that would encourage the member states to cede ever greater control over logically-related policy areas, to the supranational institution. There is ample evidence, from the earliest spillover of coal and steel to scrap metal and from customs union to common currency, that technically related economic fields can gradually and skillfully be encouraged to integrate by EU elites. However, this process cannot be applied in sum or in parts to the social policy negotiation.

When neofunctionalism is applied to negotiation, we immediately see the theoretical gaps. The very elites who are to foster and facilitate integration through package deals made for the member states are ceding this power to the social partners who operate autonomously in their negotiations on framework agreements. The member states can only accept or reject proposals by qualified majority voting and this eliminates the Commission's ability to create packaged deals and log-rolled arrangements within or across negotiations. Further, there has not been a cumulative expansion in the scope or level of spillover. The number of social partners at the interprofessional/cross-industry
level has not expanded, nor has the frequency of their negotiations, and further they have
not expanded their competences in negotiation beyond regulations that some argue are
minimalist in nature because they are compromises on which the integrationist-oriented
elites are unable to structure because they are excluded from the bargaining table. We
will return to this minimalist question below in examining the content of parental leave
and the women and men who gained new rights under this supposedly minimalist policy.

Intergovernmentalists, in contrast to the neofunctionalists, see national leaders of
the member states as the central actors in the integration story. They expect national
governments to relinquish only the most minimal level of national sovereignty to the EU
and then only after those conditions are enshrined in treaties. These interstate bargains
are supposed to tend towards preferences of the most recalcitrant members as we saw
happened when the EU bowed to the pressures of anti-supranational French President de
Gaulle after the Luxembourg Compromise resolved the Empty Chair Crisis discussed in
Chapter 1. In social policy negotiation, however, the member states and their preferences
are largely absent. Member states have no representation on negotiating teams composed
solely of interest groups representatives. They have no ability to amend agreements that
come before the Council of Ministers for adoption as directives. The national leaders at
the Council can only accept or reject a concluded agreement, and their hands are further
tied by the application of qualified majority voting that prevents the most recalcitrant
member states from blocking adoption of an agreement.

Finally, we return to the question of corporatism. Classic neocorporatist
arrangements are tripartite interactions between a national government and key national
peak associations of labor and management who are instrumental in jointly crafting
legislation in conjunction with government leaders. In exchange for this formal legislative participation, such groups are expected not only to have wide coverage of their affected sector’s possible members, but they should foster that loyalty with incentives, sanction its members when their loyalty wavers, and use that loyalty to ensure that members comply with the jointly arranged policy decisions. In this way, governments are able to capitalize on expertise from and compliance by the peak associations and the groups are able to directly shape the policy that affects their members.

Is corporatism creeping into European level policy making? Gerda Falkner (1996, 1998) argues that because member states may allow social partners to implement social legislation, because the Commission must consult with the European social partners before proposing directives, and because the social partners may choose to negotiate a policy, we are seeing the rise of corporatist governance at the EU. But is this really the case? The national level social partners, beyond basic membership in the ETUC, CEEP, or UNICE, are often quite disconnected from their European counterparts and have limited participation in a negotiation. Further, initial implementation of negotiated social policies has been born by the member states, only some of which have chosen to engage their social partners in consultation or implementation. Second, as the director general of industrial relations is quoted earlier as saying, the social partners have the “right to be heard” in social dialogue situations, but the Commission essentially has little obligation to listen or to take on board their recommendations, especially if they anticipate conflict with the EP or Council during the normal legislative process.

We do not see in negotiation the emergence of these same corporatist patterns at the EU level. Instead we see a bipartite autonomous interaction between labor and
management social partners that excludes a negotiating role for the government, i.e., EU, officials. Further, these groups lack the incentive and sanctioning structures to ensure loyal members participate in the formation of, and more importantly, in the implementation of negotiated agreements. Indeed there is a distinct gap between the EU social partners and many of their national/sectoral/local level counterparts that weakens the representativeness of the social partner organization. There is no indication that negotiation is developing in such a way that it will more closely resemble the classic tripartism we see in the Northern European member states. Indeed, quite the opposite appears to be occurring as the Commission is encouraging the social partners to take a greater role in formulating an agreed agenda of issues for discussion and for which they will take responsibility in initiating the negotiation process to produce agreements.

On a secondary substantive level – the gender concerns raised in Chapter Four - the degree to which the integration theories do not apply to social policy negotiation does not in itself explain the coincidence of gendered effects produced by the social partners’ agreements. However, recognizing the discrepancies between negotiation and the expected forms of integration suggested by the theories lets us take an even more nuanced look at the substance of the directives produced by this emerging process. One of those key substantive areas is the affects of these negotiated directives on women. The history of the negotiation process is not yet sufficient to determine the degree to which gender concerns will continue to be the direct or indirect outcome of concluded agreements, but as the discussion below suggests, part of the answers lies in the degree to which the social partner negotiations tackle policy issues that begin to build cumulatively toward social protections for women and men that are sensitive to the different workforce.
participation of women and men and the different care responsibilities of women in men in various national cultural contexts.

Negotiation is clearly not neocorporatism extended to the European level, nor does it follow neatly or even indirectly the tenets of neofunctionalist or intergovernmentalism, and it is decidedly different from the traditional legislative track. It is neither fish nor foul: not purely one theory in practice nor the other. I contend that we are witnessing the emergence of a parallel legislative track. Clearly negotiation removes legislative initiation and drafting control from the Commission on occasion, but does not yet bear the responsibility for legislative passage (which still belongs to the Council) or for implementation (which belongs jointly to the Commission and the member states. As a second legislative track, it is not second tier. The results of negotiation have received unanimous approval from the Council, been implemented swiftly and completely by member states, have faced little challenge in the Court of Justice, and while the results of negotiation are still very new, appear to be fulfilling the intentions of the negotiators.

Given the success of the first five negotiated directives it seems puzzling, at first glance, that we have not seen the spillover that has advanced integration in so many other policy domains occurring here – either within or across negotiations. The social partners have the potential to address critical issues that would facilitate the development of a common market for labor. Caporaso (1970) summarizes the spillover dilemma as one in which “the sector in which the integrative process emerges is, according to the theory, technical, functionally specific, and economic. The sectors to which these integrative patterns spread are thought of as more controversial, less technical, and more political.”
This is latter description of controversial and political is certainly the case in the field of social policy beyond workplace safety and unemployment issues!

Consequently, we should not expect to see the emergence of a more coherent European social policy until the Commission and social partners’ competences in the area of social protections are expanded. This will require treaty revisions. The inclusion of the Social Protocol in the Amsterdam Treaty is not sufficient to create either the tools or the legal basis through which the European Union can begin to challenge the national governments for authority to complete the common market in labor. To do so requires the ability to provide the functions and benefits normally associated with a traditional welfare state. Neither the EU, nor the social partners, are positioned or empowered by the treaties to do.

The time for such a change, however, may be approaching. Enlargement and monetary union were widely seen by my interviewees as providing the impetus and leverage for expanding social protections. One of the social partners was quite animated in his answer to a query on what motivates the social partners to see an issue as a “European question.” He replied: “the most important thing is the huge principle from the beginning of the EU which is mobility to create a common market to go everywhere and this is a huge problem! There is the free movement of capital, there is the free movement of goods, but the free movement of people is a huge problem. So, concretely speaking you have to find out what it [a common labor market] means and what it covers and it is a huge problem for every individual - and I am not talking just about employers and employees - but every individual” (interview, April 6, 2001). Unfortunately, the social partners and the Commission do not have a legal basis in the treaties to begin to
untangle or to define what this common labor might mean and what it might cover. This was observed most clearly by an EP staff member who noted that “I think it is also a problem of their [the social partners’] competence to regulate certain things in a coherent way because everything has a financial aspect, and administrative aspect, which overlap with national legislation and the competence of the national legislature. So, they have basically no way to do social protection” (interview, April 20, 2001). Currently, the social partners are prohibited from engaging the issues of collective bargaining, wages, and social protections. This confines the social integration process to minimal cost regulations (although not minimal scope as the expansion of parental leave demonstrates) of workers and employees, not social policy for European citizens regardless of their workforce participation.

It is possible that the success of monetary union and the pending enlargement will provide the basis for a treaty change in the area of social policy to enable the Commission or the social partners to draft legislation that contains true social protections. The EP staff member quoted above continued his observation by noting that “it is quite clear that social partner negotiation on the member state level have been most effective where they have been backed actively by the government – in many cases where government policy and social partner policy are the same. In many cases, the government reacts to the social partner initiatives, not the other way around.” Establishing such a situation in the EU, where member states react to the European social partners will require that UNICE, CEEP and the ETUC develop and independent negotiating agenda and initiate negotiations without prodding from the Commission. It will also require them to take a more active role in implementation. These changes can be begun, indeed are now under
discussion at the time of this writing, by social partners without a treaty change. However, agendas and negotiations that develop European social protections must wait for new treaty language to provide the legal basis for action.

Regardless of treaty provisions, existing or desired, one social policy the social partners can undertake is a renewed attention to equality policies. Despite the fact that women were not one of the distinct constituencies recognized for negotiation (Cameron and Gonäś, 1999), equality issues can become part of the independent agendas agreed by the social partners as the basis for future negotiations. Here, the Commission may have a role to play. To date, it has been necessary for the guiding hand of the Commission to keep gender mainstreaming present in EU activities, and the Commission may now have an opportunity to pressure the social partners to include such a perspective in their future policy agenda.

**Prognosis and future research directions**

The negotiation procedure need not remain limited to social affairs. Similar partnerships could also be developed in the areas of the environment, education (beyond workforce training), research and development, and potentially agriculture. With the exception of agriculture, these “newer” areas of social policy may be able to adapt to partnership arrangements to incrementally develop or expand EU legislative efforts in these policy domains. However, before such expansion to new policy areas, the negotiation procedures used for social policy need to develop greater consistency in their use and in the form of the agreements. Greater coherence in a policy agenda is also needed to move the negotiations from an ad hoc, issue-specific, discrete process to a
systematic, accessible and reliable parallel track in which legislation can be developed. At present, negotiation is more the exception than the rule to social legislation creation and this is not likely to change until the social partners can establish their own shared agenda and agree jointly to initiate policies from it without the Commission’s prompting.

Whether social policy negotiation remains an occasionally used tool or is embraced by the social partners and used more frequently for policy development, several aspects of the process are ripe for further exploration. Especially important for studying the interprofessional negotiation is the need to get greater access to the actual negotiations. All of the social partners, and even the Commission, are reluctant to discuss the specifics of negotiations, and the confidentiality of the process is closely guarded. A true understanding of the relationships among the partners and the crucial decision points necessary to reach consensus, or that could cause a negotiation to fail will not be understood without making records more publicly accessible and without a few researchers being granted observer status at the negotiations. This question of access points to the second research need, which is to link the negotiation process to the larger debate on democratic accountability or the democratic deficit in the European Union. The continuing absence of a formal role for the European Parliament or for the Economic and Social Committee (organizational representatives who serve in an advisory capacity to the Commission), as well as the inability of the national representatives to amend the agreements, raise serious questions about the level of public understanding and acceptance of such a process as well as organizational concerns as the E.U. enlarges to the East and widens the membership bases of the social partners into countries that may be less familiar with this pattern of interest group and government interaction.
Other elements of negotiation warrant further investigation. The first has not yet occurred for study: the failure of the social partners to reach an agreement. To date, all negotiations have successfully concluded agreements that the Council has then passed as directives. Should a negotiation fail, what would become of the issue? Would the Commission take up where the social partners had left off and would they develop more far-reaching proposals? Several of the interviewees noted that the Commission threatens to take up the policies issues under negotiation if it looks like the process is breaking down, but the social partners did not acknowledge this as much of a threat to their work. Nor did Commission officials have a sense of what they would do if a negotiation failed. It is not at all clear from the interviewees that the Commission would immediately take over the legislation-drafting process if a negotiation failed. The lack of clarity on this "failure scenario" will be further complicated by negotiations started by social partner initiative rather than by Commission initiative, where the latter case would place more burden on the Commission to finish what they had started.

Of the negotiated directives, only the first agreement (on parental leave) and the most recent one (on telework) have included provisions calling for reviews of the implemented directives after five years. Many of the interviewees praised this clause in the parental leave directive because it compelled the Commission and the social partners (to varying degrees) to track the progress of transposition and the effects of implementation on various populations of workers. The other working time directives did not include such provisions and there is noticeably less known (by scholars or EU officials) about the implementation consequences of those directives. This presents an excellent opportunity for scholars to explore the various forms these directives have
taken, the consequences for workers as the directives have been implemented by the
member states, and the rate of infringement proceedings in the Court of Justice.

The final area of negotiation that may offer the most promise for understanding
negotiations is the sectoral negotiation process. Increasingly, it is the sectoral social
partners (e.g., transport sector, telecommunications sector, fisheries, aviation) that have
concluded agreements that are specific to their sector and more substantial than the
broader interprofessional negotiations. For example, the aviation sector has concluded an
agreement on working time that is more generous for workers than what is provided by
the overarching working time directives concluded by ETUC, CEEP, and UNICE. There
are over 30 sectoral social partners recognized by the Commission and the number is
expected to increase both from enlargement and as the sectors take advantage of the
opportunity to tailor legislation to fit the need of their employers and employees. Like
the interprofessional negotiations, these processes too are not open to the public, but the
greater level of activity and larger number of agreements which are easier to track during
implementation within a specific sector should make for viable research opportunities.

Ten years after the opportunity to create social policies through social partner
negotiation it is clear that building the relationships that lead to successful policy
agreements is a slow and technical process. Five agreements have been reached, and
while no new negotiations are currently proposed, the successes of the social dialogue
and the negotiation process have moved the social partners to begin to set their own
agenda and take the initiative in further policy negotiations. It appears that for social
affairs there will be two tracks to take on the path to establishing a truly Social Europe.
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APPENDIX A

Framework Agreement on Parental Leave

(14 December 1995)

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Commission of the European Union
Preamble
The enclosed framework agreement represents an undertaking by UNICE, CEEP and ETUC to set out minimum requirements on parental leave, as an important means of reconciling professional and family responsibilities and promoting equal opportunities and treatment between men and women.

ETUC, UNICE and CEEP request the Commission to submit this framework agreement to the Council for a Council decision making these requirements binding in the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland.

I — General considerations

1. Having regard to the Agreement on social policy annexed to the Protocol on social policy attached to the Treaty establishing the European Community, and in particular Articles 3(4) and 4(2) thereof,

2. Whereas Article 4(2) of the Agreement on social policy provides that agreements concluded at Community level shall be implemented, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission,

3. Whereas the Commission has announced its intention to propose a Community measure on the reconciliation of work and family life,

4. Whereas the Community Charter of Fundamental Social Rights stipulates at point 17 dealing with equal treatment for men and women, that measures should be developed to enable men and women to reconcile their occupational and family obligations,

5. Whereas the resolution of the Council of 6 December 1994 recognizes that an effective policy of equal opportunities presupposes an integrated, overall strategy allowing for better organization of working hours and greater flexibility, and for an easier return to working life, and notes the important role of the social partners in this area and in offering both men and women an opportunity to reconcile their work responsibilities with family obligations,

6. Whereas measures to reconcile work and family life should encourage the introduction of new flexible ways of organizing work and time which are better suited to the changing needs of society and which should take the needs of both the enterprises and the workers into account,

7. Whereas family policy should be looked at in the context of demographic changes, the effects of the ageing population, closing generation gap and promoting women's participation in the labour force,

8. Whereas men should be encouraged to assume an equal share of family responsibilities, for example they should be encouraged to take parental leave by means such as awareness programmes,

9. Whereas the present agreement is a framework agreement setting out minimum requirements and provisions for parental leave, distinct from maternity leave, and for time-off from work on grounds of force majeure, and refers back to Member States and social partners for the establishment of the conditions for access and modalities of application in order to take account of the situation in each Member State,

10. Whereas Member States should provide for the maintenance of entitlements
to benefits in kind under sickness insurance during the minimum period of parental leave,

11. Whereas Member States should also, where appropriate under national conditions and taking into account the budgetary situation, consider the maintenance of entitlements to relevant social security benefits as they stand during the minimum period of parental leave,

12. Whereas this agreement takes into consideration the need to improve social policy requirements, to enhance the competitiveness of the Community economy and to avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings,

13. Whereas the social partners are best placed to find solutions that correspond to the needs of both employers and workers and shall therefore be conferred a special role in the implementation and application of the present agreement,

II — Content

Clause 1: Purpose and scope

1. This agreement lays down minimum requirements designed to facilitate the reconciliation of parental and professional responsibilities for working parents.

2. This agreement applies to all workers, men and women, who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.

Clause 2: Parental leave

1. This agreement entitles, subject to clause 2.2, men and women workers to an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to eight years to be defined by Member States and/or social partners.

2. To promote equal opportunities and equal treatment between men and women, the parties to this agreement consider that the right to parental leave provided for under clause 2.1 should, in principle, be granted on a non-transferable basis.

3. The conditions for access and modalities of application of parental leave shall be defined by law and/or collective agreement in the Member States, as long as the minimum requirements of this agreement are respected. Member States and/or social partners may, in particular:

   (a) decide whether parental leave is granted on a full-time or part-time basis, in a fragmented way or in the form of a time-credit system,

   (b) make entitlement to parental leave subject to a period of work qualification and/or a length of service qualification which shall not exceed one year,

   (c) adjust conditions for access and modalities of application of parental leave to the special circumstances of adoption,

   (d) establish notice periods to be given by the worker to the employer when exer-
cising the right to parental leave specifying the beginning and the end of the period of leave,

(e) define the circumstances in which an employer, following consultation in accordance with national law, collective agreements and practices, is allowed to postpone the granting of parental leave for justifiable reasons related to the operation of the undertaking (e.g. where work is of a seasonal nature, where a replacement cannot be found within the notice period, where a significant proportion of the workforce applies for parental leave at the same time, where a specific function is of strategic importance). Any problem arising from the application of this provision should be dealt with in accordance with national law, collective agreements and practices,

(f) in addition to (e) above, authorize special arrangements to meet the operational and organizational requirements of small undertakings.

4. In order to ensure that workers can exercise their right to parental leave, Member States and/or social partners shall take the necessary measures to protect workers against dismissal on the grounds of an application for, or the taking of, parental leave in accordance with national law, collective agreements or practice.

5. At the end of parental leave, workers shall have the rights to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

6. Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply.

7. Member States and/or social partners shall define the status of the employment contract or employment relationship for the period of parental leave.

8. All matters relating to social security in relation to this agreement are for consideration and determination by Member States according to national law, taking into account the importance of the continuity of the entitlements to social security cover under the different schemes, in particular health care.

Clause 2: Time off from work on grounds of force majeure.

1. Member States and/or social partners shall take the necessary measures to entitle workers to time off from work, in accordance with national legislation, collective agreements and/or practice, on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate...
presence of the worker indispensable.

2. Member States and/or social partners may specify the conditions for access and modalities of application of clause 3.1 and limit this entitlement to a certain amount of time per year and/or per case.

Clause 4: Final provisions

1. Member States can maintain or introduce more favourable provisions than set out in this agreement.

2. Implementation of the provisions of this agreement shall not constitute valid grounds for reducing the general level of protection afforded to workers in the field of this agreement. This does not prejudice the right of Member States and/or social partners to develop different legislative, regulatory or contractual provisions, in the light of changing circumstances (including the introduction of non-transferability), as long as the minimum requirements provided for in the present agreement are complied with.

3. The present agreement does not prejudice the right of the social partners to conclude, at the appropriate level including European level, agreements adapting and/or complementing the provisions of this agreement in order to take into account particular circumstances.

4. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with the Council decision within a period of two years from its adoption or shall ensure that the social partners establish the necessary measures by way of agreement by the end of this period.

Member States may, if necessary to take account of particular difficulties or implementation by collective agreement, have up to a maximum of one additional year to comply with this decision.

5. The prevention and settlement of disputes and grievances arising from the application of this agreement shall be dealt with in accordance with national law, collective agreements and practices.

6. Without prejudice to the respective role of the Commission, national courts and the Court of Justice, any matter relating to the interpretation of this agreement at European level should, in the first instance, be referred by the Commission to the signatory parties who shall give an opinion.

7. The signatory parties will review the application of this agreement, five years after the date of the Council decision, if requested by one of the parties to this agreement.

5 Within the meaning of Article 2(4) of the Social Policy Agreement of the Treaty on European Union.
APPENDIX B

Interview Questions

Human Subjects Exemption
Approved February 26, 2001
Protocol Number: 01E0083

Project Description
I am interested in social policy negotiation procedures involving the social partners and the Commission. Specifically I am interested in the development, implementation, and review of the Parental Leave Directive, and secondarily, the development of the part-time workers directive. Finally, I am interested in the distinctions between negotiation and the traditional legislative process.

Question Area 1: Negotiation Process (please use the parental leave directive as a guide to your answers?) Let’s begin by talking about the decision-making processes lead to the adoption of a directive.

1. Could you describe how social policies are proposed and adopted under the negotiation strategy? Use the Parental Leave example if that’s helpful.
   A. Who initiates a policy and which groups support it?
   • Social partners?
   • Groups within the social partners?
   • The Commission?
   • The parliament?
   • Parliamentary review committees?
   • Government representatives?
   • Political parties?

2. Now that I have some sense of who was involved, can we talk about the process itself?
   A. Do you need to have total consensus?
      How much disagreement is acceptable?
      What would have stopped the process (an insurmountable obstacle)?
   B. What surprised you about negotiating a policy?
   C. Do you think the substance of Parental Leave would have been different if it had gone through regular legislation?
Question Area 2: The traditional legislative process
I want to change direction a little a focus on how policies are proposed and adopted when they are pursued through the traditional law-making process.

1. Can you tell me what the most significant differences are between negotiation and passing a directive through traditional channels?
   A. Would the initiators be different and where would support come from?
      • Social partners?
      • Groups within the social partners?
      • The Commission?
      • The parliament?
      • Parliamentary review committees?
      • Government representatives?
      • Political parties?

2. In terms of your involvement, how would you be involved under this scenario?

3. How would the parental leave directive been different if it had not been negotiated?

Question Area 3: The choice of negotiation

It seems that you now have two choices when it comes to social policy directives: negotiate a policy or pursue it through the traditional legislative process.

1. Can you tell me when it is advantageous to use negotiations?
   For example, is it . . .
   • Substantive policy area?
   • Who supports the idea?
   • Who opposes the idea?
   • The role of the Commission?
   • Working with national governments?
   • Avoiding national governments?
   • Serving your membership?

2. What are the disadvantages of this choice?
   Repeat choices from above

3. What would be the advantages of using the normal legislative process?
   Repeat choices from above

4. What are the disadvantages?
   Repeat choices from above

5. What are the most important factors that would influence your choice of process?
Repeat choices from above

Question Area 4: Policy Implementation and Review

Now that Parental Leave has been implemented and is under review, I am really interested in your impressions about the policy, its effectiveness, and how well the negotiation worked in this case.

1. Do you think a parental leave policy would be in place now if it had not be negotiated?
   A. If yes, how would it have been different under the traditional legislative process?
   B. If no, why not?

2. Is your group participating in the review?
   A. Has your organization’s position on the directive changed in the last five years? How has it changed?
      What caused the change?
      Are new people influencing this?
   B. Will you be recommending changes to the directive and why?
   C. How has your relationship with the other social partners and the Commission changed since the original negotiation?
   D. Will you recommend the continuation of this law?

3. How would you compare the process that created the part-time workers directive to the parental leave process?
   A. What, if anything, was different about your strategy in the second negotiation?
   B. Were the relations between the social partners more cohesive during this second process?

4. Knowing what you know now (from PL and Part time workers directive) . . .
   • Are you more or less willing to use the negotiation process for other legislation?
   • Why?
   • What do you anticipate will be the next area of policy taken up under negotiation?

Conclusion:
1. What other observations or comments would you like to make about the topics we have discussed?
2. Do you have any questions for me about my project?
3. May I follow up with you by email if I have a few brief questions later?
4. Please recommend two other people that you think I should talk to about this issue?