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Beneath the Surface of Stability: New and Old Modes of Governance in European Industrial Relations

ABSTRACT ▪ Despite surface stability, there are significant changes in the modes of governance regulating the relationship between law and collective bargaining as a source of labour rights, and between norms defined at EU, national, sectoral and company level. This article focuses on the European integration process as a key source of change, first outlining the weaknesses of informal coordination of wage bargaining within and across countries, then discussing the tensions for trade unions created by Economic and Monetary Union. It concludes by examining the diffusion of 'opening clauses' in sectoral agreements, the displacement of collective by individual rights promoted by EU law and the reduction in statutory standards of welfare and social rights.

Introduction

It is almost a decade since Streeck insisted that European industrial relations, although rapidly internationalizing, were not denationalizing. 'Even as European integration accelerates, national politics and industrial relations will, for better or worse, remain the principal arenas for the social regulation of work and employment' (Streeck, 1998). This was a fairly good prediction. Many distributional and regulatory conflicts and issues in today's industrial relations are deeply influenced by the double process of globalization and European integration, but the actors and institutions of industrial relations (unions, employers' associations, collective bargaining and conflict resolution) are predominantly defined by national traditions, law and power relations. This does not mean that they have not changed: beneath a surface of stability there are significant changes in the 'modes of governance' of industrial relations institutions. I shall argue that the European integration process is a key factor in these changes.

In his description of the objectives of the project coordinated by the European University Institute on New Modes of Governance, Rhodes (2005) usefully warns that innovations in governance are rarely path

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breaking, but nearly always a blending of 'old' and 'new'; that it is not always clear what is 'old' or 'new'; and that the most fascinating puzzles usually lie at the boundaries. Industrial relations in Europe, though reflecting very different national traditions of self-regulation, law and state intervention (Crouch, 1993), is a very good candidate for studying this blending of old and new.

Governance is an overstretched concept, used in many different ways. In the tradition of public administration and state theory, it is often defined as regulation in which the responsibilities of private and public actors are blurred; there is minimal recourse to law and public authority; and policies are defined and implemented through bargaining and networks (Kooiman, 1993; Stoker, 1998; Van Kersbergen and Van Waarden, 2004). 'New' governance is understood as pushing such arrangements further towards delegated self-regulation, through persuasion, informal networks and norms, benchmarking and experimental deliberation (Cohen and Sabel, 1997; EC, 2001; Joerges, 2002; Zeitlin, 2005). While we see some of this in industrial relations, there is perhaps a stronger opposite movement of increased use of individual labour law and the replacement of self-regulation and 'custom' (possibly the 'oldest' mode of governance in industrial relations) by mandatory law. I shall argue that both trends (one away from collective rights and conditions applied in a standardized way, either through law or by collective agreement; the other towards individual rights defined by law at the expense of self-regulation) are related to the particular economic and legal dynamics of the European integration process.

Informal Coordination and Wage Norms Under EMU

The realization of Economic and Monetary Union (EMU) in January 1999 and the enlargement of the European Union in May 2004 were the two key European events of the past decade. It is perhaps too soon to predict the effects of the latter on industrial relations, but about the EMU effect we can be less reticent. There have been two broad responses. One has been attempts at cross-border coordination among trade unions in what can be described as the 'D-mark zone' (Germany, Austria, the Netherlands, Belgium, Luxembourg, France and, although not a member of EMU, Denmark). In these countries, wage setting had already been reorganized in the 1980s or early 1990s to allow wages to rise between a floor defined by past inflation and a ceiling by labour productivity, thus assuring convergence towards the non-inflationary German regime. The institutional means to achieve this varied: pattern bargaining in Austria and Germany, with export industries taking the lead; intra- and inter-associational target-setting to guide increasingly decentralized

bargaining in Denmark and the Netherlands; government imposition of an international wage norm in Belgium; mandatory minimum wages in France (and Luxembourg). With the approach of EMU in 1999, and with wage determination already aligned to hard-currency constraints, trade unions began to worry about the danger of downward wage competition between countries with roughly similar levels of competitiveness, and stepped up their efforts to coordinate wage policies.

The second response to the discipline imposed by the Maastricht Treaty was a series of more or less successful social pacts and agreements in 'catch-up' countries outside the D-mark zone (Portugal, Italy and an attempt in Greece) and those prospective EMU Member States that were confronted with deep structural changes (Ireland and Finland). Since the organizational and institutional preconditions for non-inflationary wage determination were usually lacking, this required major reforms in most countries. In some countries, this was achieved through central agreements with or without government involvement (Italy, less dramatically in Spain and unsuccessfully in Greece). In countries with decentralized, firm-based wage determination (Ireland and Portugal) or with strong rivalries between sectors (Finland), stability was achieved through the negotiation and renewal of tripartite pacts defining a national wage ceiling.

Informal Wage Coordination at European Level

Coordination of wage bargaining in Europe had to be based entirely on voluntary agreement among the trade unions. It had the support of the European Trade Union Confederation (ETUC), some of its most powerful national (Germany and Belgium) and industry (engineering) affiliates, and received tacit backing from DG Employment and Social Affairs within the Commission. European employers' organizations were neither able nor willing to engage in international collective bargaining or joint coordination. The European Central Bank (ECB) and policy-makers in the Commission concerned with macro-economic policy did nothing to encourage coordination across countries, arguing that to keep nominal wage increases consistent with the goal of price stability 'wage imitation effects' should be avoided both within and across Member States (Pichelmann, 2001: 354), ideally through decentralization of wage determination. Trade unions faced a double problem: on the one hand, the fear of 'beggar-thy-neighbour' competition in response to increased international competition; on the other, the need to deter the ECB from establishing its authority through a punitive interest rate policy (following the example of the Bundesbank).

From the early 1990s, with the triple pressure of the internal market, the recession following the collapse of the European Monetary System and the Maastricht convergence criteria, national wage bargaining in

metal-working became increasingly fraught as employers pointed to lower settlements in adjacent countries. In response, the European Metalworkers' Federation (EMF) initiated an international strategy (Schulten, 2002) involving a system of information exchange followed by an exchange of observers and the adoption of common minimum standards on working hours (1996) and vocational training (2001). Since 1998 the EMF has advocated the formula of 'productivity increases plus the inflation rate', and attempts to monitor national practice. Whether this could ever work without some sanction at the European level or joint regulation with employers must be doubted. The conclusion from within the main sponsor, the German IG Metall, is that there is virtually no awareness at national level of the coordination rules — these rules 'rarely affecting or influencing national collective bargaining policies' (Schroeder and Weinert, 2004: 210).

Other European Industry Federations have stepped up their European coordination efforts, but despite some success in political lobbying have achieved little in terms of cross-national coordination of wage bargaining. Hopes for a common wage norm in the old D-mark zone, as expressed in the 'Doorn declaration' of 1998 adopted by unions in Belgium, Luxembourg, the Netherlands, Germany and later France, have been disappointed. According to Andrew Watt, senior economist at the European Trade Union Institute, these coordination efforts rely on similar soft mechanisms (mainly peer pressure) to the open method of coordination in the EU and 'suffer from the same limitations: they are fine in good times, but when under pressure they exert little binding power over trade unions concerned primarily with national priorities and constraints' (Watt, 2005: 15).

Disappointment surely applies to the one and only forum in which trade unions, together with employers, can talk to the ECB, politicians and officials framing European macro-economic policy: the 'macro-economic dialogue', established in 1999 to create 'to the greatest possible extent, a mutually supportive interaction within EMU between wage developments, fiscal policy and monetary policy'. The idea is that if wage bargainers signal their willingness and capacity for moderate wage claims, the ECB might convince itself to lower interest rates. This has some support in theoretical and empirical studies modelling the current European situation. For instance, Hancké and Soskice (2003) show that under EMU, wage bargainers have fewer incentives to contribute to a low inflation rate than when national policy-makers (including trade unions) were trying to qualify for EMU membership, and that coordination among key EMU Member States might contribute to greater price stability. They propose a pattern-setting mechanism, led by German wage increases and settlements in sectors exposed to international competition. Wage coordination based on concerns for competitiveness and

price stability would be a functional equivalent to structural reforms and an alternative to the decentralization of wage determination proposed by the ECB, which they consider neither feasible nor desirable.

Macro-economic dialogue involves a largely informal meeting twice every year. The test came in 2000, after low interest rates at the launch of the euro in 1999 and currency depreciation against the dollar, sterling and yen had sustained robust growth, leading to lower unemployment. Perhaps understandably the ECB began to raise interest rates, but less wisely it continued to do so until mid-2001, almost a year after the international economic downturn had started. During the dialogue of mid-2000 and again later that year, the unions tried to convince the bank that inflationary pressures could be contained without monetary tightening, pointing to the long duration of moderate wage agreements, especially in Germany and Italy (Watt, 2005). They failed: the ECB raised interest rates and continued to do so during the downturn.

Informal Coordination in the National Context

National (peak-level) wage coordination has not disappeared, but takes less and less the form of a formal contract enforceable by law. In a trend pioneered by the Dutch Wassenaar agreement of 1982, a looser type of coordination relying on guidelines or targets and moral suasion substituted for formal centralization of wage bargaining, in circumstances when economic, organizational and cultural trends have pushed firms and unions towards decentralized wage bargaining (Calmfors et al., 2001). The success of this substitution depends on many conditions, among them the governance capacities within associations, the ability of their leaders to gain each other's trust and that of their members, the articulation of a deepening of national or sectoral agendas and norms at the local or firm level, and procedures of democratic legitimacy, for instance, through the use of referendums (Baccaro, 2003; Traxler et al., 2001).

Moments of severe crisis and the need for adjustment have led governments, unions and employers to consider social pacts as a viable institutional solution to their national problems. Accounts of attempts to conclude social pacts remind us of the utmost importance that actors form a shared understanding of the situation (O'Donnell, 2001; Visser and Hemerijck, 1997), otherwise their short-term interests will override the potential longer-term benefits for the economy as a whole. However, not all crises produce such common understanding, and when they do, actors will not always be sufficiently moved towards compromise.

The most notorious case of failure to forge a social pact is Germany — ironically, the country that seemed blessed with a wage-bargaining system until recently the envy of many, but since, subject to increasing stress. Scholars have argued that the unwillingness of the German unions

to make compromises in the negotiations of the *Bündnis für Arbeit* during the first Schröder government (1998–2002) was related to their strong power resources embodied in sectoral corporatist institutions (Siegel, 2005) as well as to social insurance institutions that mitigated the costs of high unemployment (Hassel, 2001). According to Streeck (2003), the recent history of German industrial relations demonstrates the disadvantage of combining a 'weak state' (in the German case, deriving from the 'joint decision traps' of a federal system and the doctrine of *Tarifautonomie* in matters of wage setting) and traditionally strong (or from a different perspective, equally weak) interest organizations that have a lot to lose.

A history of social pacts and the perception that defection may bring the risk of worse outcomes for oneself may produce a norm of cooperation. The organizational and administrative centralization of wage bargaining may be less important in achieving beneficial outcomes in 'hard times' than a cooperative mood and trust among the major players. If actors, motivated by social responsibility, give greater weight to longer-term interests rather than immediate (self-)interests, then even moderately coordinated bargaining may yield socially beneficial outcomes. Such cooperation norms may emerge from a particular history of mutual learning, interaction and reputation building between actors with conflicting interests.

But will such norms survive in times of adversity and help unions to make and defend choices that go against their short-term interests? While a cooperative orientation can produce good results within any bargaining structure, in the face of protracted economic difficulties actors are tempted to revert to less cooperative forms of behaviour in order to protect their interests and to keep or win the consent of core constituencies, which in systems with weak coordination can have serious negative consequences for all. The erosion of the cooperative norm is especially likely when previous interactions are perceived to have generated unequal or unfair outcomes: perceived unfairness will lower the probability that 'non-instrumental motivations will affect the decisions of disfavoured social actors to comply with social norms' (Knight, 2001: 364) and such actors will revert to hard bargaining over short-term gains.

In many situations, the institutionalization of social pacts into a routine policy of inflation-proof and productivity-oriented wage setting does not reflect the 'first' choice of unions or employers, but rather their respective reactions to what is perceived as a credible threat or constraint by the state or an external agent. In a thorough comparative analysis, Hassel (2003) has shown that state intervention in wage determination has hardly declined in recent times, in spite of all talk about deregulation and liberalization. One reason may be the transition to EMU and the political risks of continued high unemployment. Calmfors et al. (2001) speculate that of all the actors, governments have the most to fear from

uncertainty and should be the ones most interested in social pacts. Having lost other policy instruments, such as currency and interest rate adjustments, they should want to avoid the risk of inflationary wage increases occurring 'by accident', because the fiscal and employment consequences are now much more difficult to handle. Wage restraint through coordination with the central organizations of unions and employers is preferable to the longer, less predictable and probably politically less rewarding path of structural reform. But as the German case teaches us, even if social pacts were a government's first choice, it may lack the power to get others on board.

The role of the state, either as external enforcer or participant in the negotiations, has been paramount in all recent cases in which social pacts or national agreements were renewed (Ireland, Finland and the Netherlands). When governments are internally divided or tempted to follow a neo-liberal strategy (Italy and Portugal) or too weak and hesitant (Germany and Greece), attempts at pact building have failed.[1] In short, cooperation may not occur in the absence of an 'external constraint', such as the Maastricht criteria in the case of Italy (Dyson and Featherstone, 1996; Ferrera and Gualmini, 2004), or a convincing 'shadow of hierarchy' (Scharpf, 1993) cast by the state.

The national strategy based on social pacts may have become less valuable in the post-EMU context, since the motivation and incentive structure for unions to endorse painful reforms has altered. However, if lower levels of unionization and decentralizing tendencies in wage bargaining increase the coordination costs for unions, state support will become more important for them. But once wage determination is under control and unions act 'under the shadow of markets' and the hierarchy of a central bank, they may have little to offer, other than a threat to obstruct reforms. Hancké and Rhodes (2005), referring to what they regard as the EMU-related pacts of the 1990s, argue that if these succeed in adjusting the macro and micro foundations for wage bargaining, then the external political and problem-driven motivation for negotiating further pacts will diminish.[2] Fiorito (2003) calls this the 'paradox of corporatism': its very success undermines its attraction to governments and employers.

Social pacting may remain a valuable strategy for the new Member States, especially if they seek membership in the EMU. They are soon expected to join the second phase of the Exchange Rate Mechanism, which makes exchange rate policies a matter of common concern (with procedures for surveillance and coordination) and brings the Maastricht convergence criteria into play. Although institutional tripartism is a feature in most new Member States, these structures are extremely fragile (except in Slovenia, which in this respect resembles Austria) and the chances of meaningful social pacts of the type concluded in Ireland and Italy during the 1990s are rather bleak.

The Stresses of Low Inflation and Slow Productivity Growth

To compensate for history and lack of mutual trust, the authors of the Maastricht Treaty tried to shore up the credibility of the new currency and the ECB by developing a set of very strict rules. The independent governors of the ECB were charged with maintaining price stability, which in March 2003 was specified as 'close to but below 2 percent', a norm criticized by some economists as dangerously close to the unknown territory of deflation. The weak business and employment performance of the eurozone gives advocates of this position some ammunition, although the European growth problem may be more the outcome of tight fiscal policies, especially in economic downturns, stupidly encouraged by the Stability and Growth Pact. As explained above, the unions have been unable to deter the ECB's governors from a 'conservative' monetary stance.

It is hard to see how high inflation can be a solution, but very low or zero inflation may be a problem. Some inflation helps 'to grease the wheels of the labour market' (Akerlof et al., 1996). Holden (2004) explains how that might work, starting from the old problem, discussed at length by Keynes, that workers will resist money wage reductions even in the presence of very high rates of unemployment. Keynes had no real explanation for this, referring to 'social and historical forces' (Skidelsky, 2003: 420); but in a unionized labour market in which most employees have secure contracts, employment protection and wages set by collective agreement, there are obvious institutional reasons. In the eurozone, 70 percent of all employees are covered by collective bargaining, a rather stable figure (EC, 2004); seven out of eight are on a standard open-ended contract, even though the use of temporary contracts increased in the 1990s. If employers want to change wage rates, they must wait until the next negotiations; if there is no agreement, in most countries the old wages and most other previously agreed terms of employment continue to apply, by force of law or custom (Blanpain, 1994). The existing nominal wage is, therefore, the 'fall-back' option of the unions, the 'pay-off' with which they walk away in case negotiations break down. Under conditions of zero inflation and an appreciating currency, this unchanged nominal wage may result in a decline in competitiveness, especially when productivity growth is very low, as is the case in many European countries. Some European Commission economists make exactly this point, observing that nominal wage growth since 2001 has been very low and that 'actors in the wage bargaining process appear, in general, to have taken on board the price stability objective set by the ECB'. Yet nominal wage growth has been 'rather invariant to the cyclical situation' and 'the slowdown in labour productivity translated into greater increase of

nominal unit labour costs in 2001, 2002, and 2003' (Pichelmann et al., 2004: 2).

Some inflation makes employment contracts, which are usually written for one to three years, more flexible in real terms, because the real value of wages erodes over time (unless there is automatic and full indexation to price increases, but such clauses have become rare). It may therefore be assumed that reducing inflation to zero will make open-ended and union-regulated contracts less attractive to employers. For some, it may be a reason to shift new jobs to fixed-term or temporary contracts, allowing them unilaterally to cut nominal wages by not renewing the contract and hiring cheaper replacements (within the limits set by statutory minimum wages). It may be expected that enduring low inflation and slow productivity growth will fuel employer demands for contractual flexibility, lower levels of employment protection, lower replacement rates and lower minimum wages.

There are other means of adjustment, but they are not very attractive to trade unions either. Reducing basic pay and introducing more flexible components tied to individual or company performance does make nominal earnings more flexible; and variable pay serves other purposes, unrelated to inflation, and appears to have advanced in many industries alongside company bargaining. Although variable pay currently applies to many manual as well as white-collar workers, it usually covers only a small proportion (less than 5–10 percent) of their total earnings. But if the scope for nominal wage increases is extremely limited, unions will not want a large part of a very small increase to be at management's discretion. They will fear that there will be nothing left to negotiate at sectoral level, and that sectoral bargaining will lose its function when its wage-regulation role is undermined. This fear will be greater if the workplace institutions representing employees are fragile, beyond the control of the union.

The low inflation and low productivity trap also motivates employers to extend working hours or reorganize them to avoid higher pay for overtime or unsocial hours. The main employers' organizations in countries with the highest labour costs and low inflation rates (Austria, Belgium, France, Germany and the Netherlands) are now demanding a return to the 40-hour week, which would reduce hourly wages without changing weekly or monthly rates. It is not clear whether there is as much resistance to a longer week or fewer holidays as to lower wages. There are, however, several examples across Europe of workers and their local representatives conceding longer or more flexible working hours in order to avoid job losses: many so-called 'local pacts' and 'company agreements' in Germany do exactly this, weakening the union-negotiated industry norm of shorter hours.

Lengthening the working week or year without additional pay is the

obverse of the union campaign which began more than 25 years ago for the reduction of working hours without loss of pay. That was the first European union campaign orchestrated by the ETUC and had the support of most governments at the time as a response to rising unemployment; it may now be dead, not because unemployment is lower, but because the real wage increases and overtime earnings needed to convince workers to buy more leisure are no longer there. Consequently, unions now have a hard time mustering support for what was often presented as an altruistic strategy. Shorter working hours may not have fulfilled the job redistribution promise that unions expected; yet, it is understandable that reversing the process in a time of high unemployment, even if motivated by direct appeals to keep jobs from moving to cheaper places, is not a very appealing strategy for them.

Renewal or Erosion? Collective Bargaining Between EU Law, Welfare State Retrenchment and 'Opening' Clauses

At first sight, national collective bargaining systems in Europe have remained relatively stable since 1990 (EC, 2004; Schulten, 2005). The three major changes were the move from intersectoral to sectoral bargaining in Sweden in the early 1990s, the regulation of a two-tier bargaining structure in Italy in 1993 and the establishment of collective bargaining of any kind in the transition economies in central and eastern Europe. Other countries have more or less muddled through with the basic structures of their national bargaining systems. But beyond the relative stability of the formal bargaining institutions, there has been a gradual transformation. In all countries where intersectoral or sectoral bargaining still predominates, such as Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Spain and Sweden, the higher-level agreements have widened the scope for additional bargaining at company level and have introduced 'opening' clauses that allow firms to diverge from collectively agreed standards under certain conditions.

A second change, perhaps even more fundamental, emanates directly from the EU: a considerable expansion of individual labour law, mostly in the form of regulations and directives which must be incorporated in national law. In many countries, such as Ireland, the UK, Denmark and Sweden, this has led to a shift away from collective agreements as the dominant source of regulation, and from voluntary self-regulation to formal rights enforced through the courts. What formerly took place within the domain of interest-based bargaining between unions and employers now takes place within the realm of individual rights-based legislation (Sciarra, 2004).

Outside Scandinavia, this process of institutional shrinkage of the collective agreement as a source of regulation also reflects the decline in the representativeness of trade unions. Where there are no unions, workers cannot press their grievances as issues of rights based on equity and fairness to be achieved through collective action and bargaining. Instead, they must rely upon individual rights, including a right to representation, upheld by the courts. However, this may further undermine 'voluntary association': the Danish unions, for instance, fear that EU law undermines the scope to provide collective goods, thus destroying incentives for union membership. Collective agreements in Denmark have no *erga omnes* effect, cannot be extended and only bind those organizations and their members that have voluntarily signed them. This conflicts with EU law and has created a problem with the implementation of EU directives, in some cases resolved by special 'incorporation agreements' with mandatory normative effects (for instance, in the case of the employee information and consultation directive) extending to non-organized employers. EU law also pushes towards formalization and juridification of agreements. Informal or tacit agreements, defining customary practices in a particular industry or firm, are difficult to interpret by third parties (courts) and individual workers may not be fully aware of them.

A third development, seemingly in the opposite direction and related to domestic pressures of welfare retrenchment, is the packaging of collective agreements with more qualitative and social issues. Whereas welfare state reforms tend to tighten eligibility and lower the value or benefits related to classical worker risks such as sickness, invalidity and unemployment (Korpi and Palme, 2003), there is a compensating tendency in collective bargaining to guarantee provisions above the legal minima to workers in large and medium-sized firms (for early retirement, see Ebbinghaus, 2002). This development has been documented for the Netherlands (Trampusch, 2004), but is common in many other countries, linked to 'social plans' providing job placement and 'super-legal' early retirement and unemployment benefits in case of company restructuring. There has been a rise in sectoral agreements setting up collective funds to finance such social plans in Belgium, Germany, the Netherlands, Denmark, Sweden and Finland. The growth of individual labour law in matters of gender equality, leave and childcare rights has also fuelled a spate of special agreements or clauses in collective agreements.

The packaging of sectoral collective agreements with qualitative issues reinforces the tendency to redesign these agreements as a menu rather than a norm, and favours the use of opening clauses. At the same time, it is the source of conflicts between politics and self-regulation. Thus in the Netherlands, the government has tried to prohibit super-legal benefits in response to austerity measures, with little effect. In Germany, a similar conflict over sickness benefits in 1995 ended in defeat for the government

and rapid concessions from especially the larger employers. These conflicts will not go away, but may lead to institutional responses safeguarding what is left of the autonomy of collective self-regulation, especially in countries where unions are strong enough to convince employers to remain one step ahead of politicians and the law. In Denmark, for instance, in the most recent central agreement setting the 'qualitative agenda' for sectoral negotiations for 2004–06, the two key issues were the introduction of a central fund to finance parental leave above the statutory level and pay compensation in the event of unlawful strikes. The most discussed aspect in the subsequent sectoral agreements was the introduction of a 'mousetrap' clause, which allows the parties to reopen negotiations if parliament adopts legislation that would change the basis of the agreements. This escape was seen as necessary to secure these agreements' relatively long duration of three years and was clearly intended as a warning to political actors. A similar approach is followed in Sweden, where the new sectoral agreements for 2004–07 could be reached only after the central organizations of employers and unions signed a so-called 'adjustment agreement' guaranteeing financial benefits and support for workers who lose their jobs — their first central agreement in more than a decade. However, if the Swedish government decides to introduce new sickness insurance rules or amend existing working-time legislation, the signatories may declare the agreements null and void.

Opening clauses tend to upset the hierarchy between law and collective bargaining, between collective and individual rights, and between unions and other types of employee representation. Collective agreements in most European countries are binding contracts, a source of 'hard' law (the exceptions are Ireland and the UK, where they create reciprocal, but voluntary commitments or 'soft' law). A collective contract has mandatory normative effect, preventing any detrimental derogation in individual contracts; it therefore serves as a parallel or alternative source of protective employment legislation. The main exception is that departure to the employee's disadvantage may be specifically authorized in a collective agreement between the union(s) and the employer(s). It is not enough for a works council to consent, and agreements between management and works council do not usually have direct legal effect, unless workers explicitly agree that their individual contracts be changed.

This has not prevented legislators (for instance, in the Netherlands) from delegating aspects of working-time regulation to works councils when no unions are present. In Germany, although limited to a narrowly prescribed range of issues and situations, works council agreements do have direct legal effect and replace individual contracts. However, if such agreements worsen contractually determined conditions, for instance by exchanging lower wages for job guarantees, this is interpreted as an

infringement of the principle of 'most favourable treatment' by the Federal Labour Court.

EU Directives (on information and consultation, parental leave, part-time employment, working time and atypical employment) may be another source of such conflicts, especially when they provide for lower standards than defined in national law. Employers sometimes invoke the more lenient European standards in order to press for downward revisions at home, as in recent conflicts over the revised EU working-time directive in Austria and the Netherlands. By not enforcing the principle of 'most favourable treatment' (or what in Italian legal practice is called the *clausola di non regresso*), a general tendency towards more flexibility may be promoted through European law (Sciarra, 2004).

Opening clauses go under a variety of names and are essentially of two types. The first is the classical 'hardship' or 'inability to pay' clause, providing for temporary derogation *in peius* from terms and working conditions laid down in the collective agreement, when a plant or company is in economic difficulties. Such departure to the employee's disadvantage is meant to be exceptional, and unions or works councils typically demand some form of audit[3] or codetermination right. It is in the interest of negotiators to keep the use of such clauses narrowly circumscribed, since frequent use worsens the quality of future agreements. In the words of an Irish Labour Court judge, commenting on the decline of voluntary agreements in his country: 'if people were stuck with agreements, they would take more care over constructing them' (Dobbins, 2005). The conflicts over opening clauses which erupted in Germany and France in the summer of 2004, involving international firms such as Siemens, DaimlerChrysler and Bosch, were remarkable because these were highly profitable firms. They wanted to rewrite the contract with the unions in order to gain further concessions on working hours, threatening relocation of investment and job losses if no deal was reached. According to data from the Max Planck Institute, around half of all large firms now have local pacts negotiated with works councils, though not all of these can be classified as concession bargaining.

A second type of 'opening clause' has become more popular and provides leeway for firms that cannot afford to meet the general standard, especially small and medium-sized enterprises. These tend to favour sectoral agreements, which save transaction costs and help avoid direct confrontation with the unions, but often they cannot meet the sectoral standard that large firms are willing to concede, particularly given the packaging of collective agreements and the narrow scope for wage growth discussed earlier. This may cause the breakup or erosion of sectoral agreements, as smaller firms leave their associations or join rivals that do not negotiate a multi-employer agreement. These tensions became particularly virulent in post-unification Germany and have led to

a lower rate of organization and coverage in various sectors.[4] The exponential growth of opening clauses in recent years has been interpreted as a form of re-institutionalization, preventing further disintegration of sectoral agreements by admitting and re-regulating practices that were formerly extralegal and beyond the control of sectoral organizations (Streeck and Rehder, 2003). The number of German employees covered by agreements with opening clauses increased to 6.6 million in 1999 and affects currently 40 percent of the firms under the jurisdiction of IG Metall.[5] In the negotiations for 2004, German engineering employers wanted a general 'opening clause' authorizing local managements and works councils to deviate from sectoral norms, but IG Metall finally gained the concession that they and the employers' federation would need to be informed and give their prior consent.

Such developments are not unique to Germany. An innovation in the 2004–06 sectoral agreements in Denmark is that local negotiators may conclude agreements that deviate either above or below the standards defined in the sectoral agreement; they must, however, inform the signatories. This means more flexibility for firms, but local union representatives may also have gained something, since deviations are allowed only in enterprises which have union-elected employee representatives and only by agreement. In the Netherlands, many agreements since 2000 contain à la carte provisions, allowing individual workers a choice between hours and pay or between different working-hours arrangements. A similar provision with regard to working hours is offered through 'delegation clauses' in sectoral agreements in Austria and Belgium. In successive steps, beginning in 1982, French governments have allowed 'derogation' from the law, thus seeking more space for company bargaining, especially over working hours. In the pluralistic union landscape of France, this creates many problems, since any union may sign a contract which binds all employees, including members of rival unions. The absence of a peace clause in such contracts and the legal definition of strike action as an individual right (unlike the definition of strikes as collectively exercised rights in Scandinavia, Germany, Austria and the Benelux countries) is a further complication, removing all hierarchy between contracts at different levels. The new law on collective bargaining of May 2004 did not change this and retains the principle that any of the five recognized national unions may sign a binding agreement, even if it represents a very small minority. But the law institutionalizes a right of opposition to such agreements by unions that have a majority in the latest works council elections: a provision intended to encourage coalition formation among unions, for or against the agreement, and thus giving them greater legitimacy, especially when they derogate from the law (Moreau, 2005).

The same conflicts apply to laws allowing the extension of collective

agreements to unorganized employers. The issues are everywhere the same: the introduction of a general dispensation or opening clause in collective agreements as a precondition for public recognition and extension, and the assignment of negotiation rights to non-union bodies. In the Netherlands, the law remains unchanged, but under pressure from the government, most collective agreements that qualify for extension contain clauses which exempt new firms. In France, where extension plays a very large role, especially in the setting of minimum wages and conditions, employers have proposed new rules to allow more flexibility. In the negotiation over the *Agenda 2010* labour market reforms in Germany, employers and the opposition parties demanded that sectoral agreements should be legally required to contain 'opening clauses', but this was successfully opposed by the unions. The Polish parliament, however, gave in to employer pressure and adopted a revised Labour Code with a statutory 'hardship clause'. Accordingly, the signatories can agree to suspend a collective agreement for up to three years if a company faces financial problems. Hungary went in the opposite direction in 2002, revoking a provision mandating non-union bodies to negotiate in the absence of unions.

A decade ago, the OECD (1994) argued that extension stifles competition in product and labour markets, and called upon governments to discontinue this practice; but governments have ignored this advice. In 1997, the European Court of Justice (ECJ) defended extension on the grounds that it was a linchpin of the European social model, as defined in Treaty articles 2 and 3.[6] The competition rules of the internal market do not in the opinion of the EJC overrule this principle. Empirical research in the Netherlands has found no evidence that extension exerts upward pressure on wages (Freeman et al., 1994; Rojer, 2002); by supporting sectoral bargaining, it may reduce both distributional conflict and labour turnover. By assigning rights to outside organizations, sectoral agreements may not only improve the incentive structure for long-term investment (training and productivity), they may also promote flexibility and risk-taking in the workplace. By defining some hard collective and individual rights and placing these rights beyond the reach of local actors, they help create the security and stability of expectation that serve as the bedrock for trust and flexible adjustment at the local level.

This argument of 'beneficial constraints' set by external and legal limits (Streeck, 1992) has never convinced those employers who are there for a quick profit. This is well reflected in a recent Dutch survey of employer opinion regarding the principle and practice of extension, which found that a majority of employers appreciate that extension supports equal contributions to joint funds for training and pensions, and guarantees labour peace (Heijnen and Van Rij, 2003). However, a minority sees advantage in a shift towards company-level bargaining or, better still, no

collective bargaining. This group, mainly operating in low-cost sectors (retail, restaurants, petrol stations, cleaning, work agencies and transport), is large enough to generate persistent conflict over extension procedures, and in recent years, many of them have 'escaped' from the obligations arising from extended sectoral agreements by negotiating separate agreements with minority unions, in some cases created for the purpose.

Paradoxically, employer-promoted innovations to sectoral agreements are most easily achieved where unions have access to a fairly stable and widespread system of workplace representation. The Danish case shows that there may be a trade-off, with both sides winning something; though even here, with high union membership, this puts much pressure on the national unions since they must provide adequate services to local representatives and redirect resources and staff from the centre. Where union workplace representation is fragile, does not cover many smaller firms, is not under the full control of national unions or has fallen victim to competition between them, 'the marriage of opposites' (Tarantelli, 1986) between centrally coordinated and locally decided wage policies threatens to end in divorce.

In that case, trade unions will be reluctant to join the sirens of decentralization. The predicament of the Italian unions is a case in point: according to data from the Bank of Italy and the employers, many small firms and most workers in the South are de facto excluded from a second round of bargaining, as prescribed under the model inaugurated by the Ciampi pact of 1993 (Rossi and Sestito, 2003). Annual wage drift in the southern regions was estimated at 2.5 percent below the national average between 1995 and 2001 (Casadio, 2002). Given that *average* real-wage gains in these and subsequent years were very small, this means that they have lost out in real terms. This is irrespective of the general opening clauses offered with the *contratti d'aria* and *patti territoriali*, allowing lower wages in exchange for subsidies and job incentives in disadvantaged areas, again mostly in the South.

In Spain, to take another example, most collective agreements have a so-called 'drop-out' clause for situations in which companies may disregard the so-called 'wage guarantee clause', a kind of non-automatic price indexation. The clause is the main reason why Spanish workers have been able to maintain purchasing power in spite of very low negotiated wage growth. Spanish employers, like the Italians, worried about low productivity growth and the decline of their competitiveness in the eurozone, advocate the overhaul of the two-tiered bargaining system. But for Spanish unions, given their absence in small and medium-sized firms, decentralization is no option. For the time being, 'drop-out' clauses which allow firms not to pay the (full) difference between price increases and the government's (lower) target inflation rate may be a half way out of this conflict.

Conclusion

This article has shown that changes in industrial relations institutions are not captured by organizational and structural data: we need to study change in the modes of governance of these institutions. A distinction between 'old' and 'new' modes is clearly insufficient as there has been a blending of individual and collective rights, hard and soft law, self-regulation and state action and concertation, creating a very complex and hybrid form of regulation. Much of what has been described in this article speaks for the vitality of collective bargaining as an institution, its capacity for flexible solutions and adaptation to very different economic pressures and legal models. The sectoral collective agreement is still the linchpin in the continental European model of industrial relations, crucial for employer and union organization, the provision of collective funds and goods, and improving the stability and incentives for long-term investment and flexibility in the workplace. However, this linchpin is now assailed from different sides and its survival may depend on partial self-denial through the use of opening clauses, thus losing some of the qualities of hard law and collective rights provided through self-regulation.

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NOTES

1. I am not sure where to place Belgium. After the failure of pact building in the mid-1990s, there were five biennial central agreements within the boundaries of a state-imposed international norm. In January 2005, when the socialist unions rejected the draft agreement for 2005–06, the government imposed the entire draft by law.
2. To explain the Irish case, with six successive tripartite central agreements, they argue that the country lacks the micro foundations for company skill policies and inflation-proof wage determination.
3. For instance, the Irish central agreement for 2003–05 ('Sustaining Progress') allows payment above and below the general norm, but also provides for a monitoring procedure which informs central actors of the reasons for such deviations.
4. According to the Institute for Employment Research (IAB) in Nuremberg, between 1995 and 2001 the proportion of employees covered by sectoral agreements decreased from 73 to 63 percent in (former) West Germany and from 56 to 44 percent in (former) East Germany. Single-employer agreements cover 8 percent, while 17 percent of all employees work in firms which voluntarily follow the sectoral agreement (IdW, 2004: 108).

5 For recent figures on local and company agreements, see http://www.boeckler.de/wsi/tarifarchiv
6 EJC-C-219/97 *Mij. Drijvende Bokken* v. *Stichting Pensoenfonds voor Vervoer- en Havenbedrijven*.

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