European Social Policy between National and Supranational Regulation: Posted Workers in the Framework of Liberalized Services Provision

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Abstract

European social policy has two central dimensions: the relation between liberalized market freedoms and social protection, on the one hand, and the distribution of regulatory competencies between the supranational and the national level on the other. The posted workers issue, i.e. the question of which labor law should be applied to workers posted abroad in order to provide services, shows how both dimensions interacted in bringing about a regulatory pattern of national and supranational market-modifying regulation that might be typical for the restricted potential of social regulation in the Single European Market. In several member states, especially France, Austria and Germany, market-modifying measures were introduced according to the pre-established European and international law and the judgments of the European Court of Justice. However, the substance of these diverging regulatory acts depended heavily on many institutional and political factors in each member state. In fact, national regulations preempted the effects of subsequent supranational market modification, making it possible for a European directive on posted workers to be adopted after many years of deadlock in the Council of Ministers. But this directive allows national regulations to remain in place with hardly any changes, and it safeguards national autonomy regarding decisions on the substance of binding labor law to be applied to posted workers. The supranational measure can be described as an "umbrella" that protects national market modification by means of European law without interfering with the institutional arrangements or the political disputes in the member states.

Zusammenfassung

Europäische Sozialpolitik befindet sich heute in einem doppelten Spannungsverhältnis: Auf der einen Seite geht es hierbei um die Beziehung zwischen den Marktfreiheiten des Europäischen Binnenmarktes und dem Prinzip des sozialen Schutzes. Auf der anderen Seite wird die Frage der Verteilung der Regulierungskompetenzen zwischen der europäischen und der nationalen Ebene berührt. Die politische Behandlung der Entsendeproblematik, also der rechtlichen Stellung entsandter Arbeitnehmer im Rahmen der Dienstleistungsfreiheit, zeigt, wie diese beiden Dimensionen Europäischer Sozialpolitik interagierten und ein Regulierungsmuster hervorbrachten, das typisch für die beschränkten sozialpolitischen Regulierungsmöglichkeiten im Binnenmarkt sein könnte: Einerseits schufen mehrere Mitgliedstaaten, unter ihnen Frankreich, Österreich und Deutschland, im Rahmen des vorhandenen europäischen und internationalen Rechts sowie der Rechtsprechung des Europäischen Gerichtshofes nationale Entsendegesetze mit unterschiedlicher Gestalt. Andererseits konnte schließlich vor dem Hintergrund dieser einzelstaatlichen Marktbeschränkungen eine europäische Entsenderichtlinie verabschiedet werden, die bereits seit mehreren Jahren auf supranationaler Ebene behandelt worden, aber lange Zeit aufgrund von Interessengegensätzen blockiert gewesen war. Diese Richtlinie schirmt die nationalen Regelungen ab, welche den rechtlichen und ökonomischen Effekt der supranationalen Regulierung vorweggenommen hatten, und verteidigt sie gegenüber einer Infragestellung rechtlicher oder politischer Art, ohne aber in die institutionelle Struktur arbeitsrechtlicher Vorschriften und die jeweiligen politischen Konstellationen in den Einzelstaaten einzugreifen.

Contents

1 Introduction

The political and scholarly debate on European social policy – which can be broadly defined as market-modifying supranational and national regulations – resurfaced in the wake of the completion of the European Union's Internal Market and has remained one of the most intensely discussed issues in European Integration policy research in recent years. Two main dimensions of European social policy make up the focus of the intellectual efforts to analyze this policy area and its political conflicts: The first is the relation between the four market freedom rights forming the basic principles of the liberalized Internal Market on the one hand and the necessity and possibility of sustainable social protection by means of either national or supranational regulation on the other. The second dimension is the distribution of capacities to act between the European Union and its member states. What role does centralized, supranational regulation play in social policy making compared to subsidiarity or national autonomy?

Both dimensions, however, cannot be conceived as isolated from each other. In fact, they interact in many ways. Today, national social policy is restrained by measures of negative integration embodied in the European Union's primary and secondary law as well as the European Court of Justice's judgments. In addition, national social protection has been exposed to regime competition between EU member states with different levels of wages, taxes and social security contributions. However, the reduced national capacity to act can hardly be compensated for by measures of supranational social policy: their regulatory potential is limited, too, in the face of diverging national economic interests, restricted supranational competencies and institutional diversity of national regimes.

The posted workers issue, i.e. the political efforts to regulate the labor law status of workers posted abroad by their employers in order to provide services, has been one of the most important and controversial cases of European social policy making in recent time. Whereas the legal status quo ante meant that foreign, less demanding labor law especially regarding minimum wages could be applied while the workers were posted abroad, host EU member state governments and

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trade unions fearing cost competition by foreign workers initiated European and unilateral national regulatory initiatives aiming to stipulate that host country labor law be applied to posted workers.

Therefore, this case provides an excellent opportunity to analyze the interaction of both dimensions of European social policy. On the one hand, the issue was highly divisive as it dealt with the question of whether posting workers covered by their home country labor law was an example of legitimate free competition or a case of unfair "social dumping." Could this phenomenon be defended as a central element of the principle of liberalized service provision or should it be restricted in order to safeguard national regimes of social protection? In addition, the posted workers issue was tackled by national as well as by supranational regulatory initiatives: The first draft for a European posted workers directive was published by the European Commission in 1991. However, the directive could only be passed in 1996 after national regulations had been adopted in most of the potential or actual host countries of posted workers. So, whereas national regulations had to take into account the established rules guiding the Internal Market, the European directive itself was influenced by the substance of national regulatory patterns created in the meantime. Thus, the posted workers issue can be described as the main example of a compromise-making attempt not only between free service provision and social protection but also between supranational regulation and national autonomy.

By studying the posted workers case in depth, we might expect to learn more about the potential and the restrictions of European social policy between national and supranational regulation and between liberalization of market access and social protection or "fairness" of competition. We might also improve our knowledge of how multilevel governance in the European Union actually works when it comes to market-modifying regulation.

The paper is structured as follows: In section 2, I discuss how theoretical approaches to policy-making in the European Union in general and to social policy in particular can contribute to a framework for analyzing the creation of market-modifying regulation in the Single European Market. Section 3 will then provide the empirical case study, exploring the phenomenon of posting workers in the European construction industry, and then analyzing the legal status quo as well as potential legal bases for the introduction or maintenance of market modification. The remainder of this section is devoted to the policy-making processes at the supranational and the national level, i.e. the project of the European posted workers directive and the creation of unilateral legislation in several EU member states, of which three cases are selected and analyzed more in depth. Section 4, finally, will summarize the essential empirical findings and present theoretical insights that can be drawn from them.

2 Some Theoretical Reflections: European Social Policy between National and Supranational Regulation

2.1 European Multilevel Governance

Policy-making in the European Union (Caporaso / Keeler 1995; Rhodes / Mazey 1995) is often looked at using the perspectives of either intergovernmentalism (Moravcsik 1993; Garrett 1992; Garrett / Weingast 1993) or neofunctionalism, which is sometimes also called supranational institutionalism (Pierson 1996; Burley / Mattli 1993; Mattli / Slaughter 1995; Tsebelis 1992; Garrett / Tsebelis 1996). The first approach stresses the crucial role of national governments bargaining at the European level and in the national arena ("two-level games," Putnam 1988), while the second emphasizes the autonomous influence of supranational actors, past decisions and economic interactions on advancing supranational regulation.

However, the debate between advocates of both sides has proven to be sterile, since both approaches can be seen as complementary to each other and integrated in a wider theoretical framework modeling the institutional features of the European Union (Schmidt 1996, 1997; Pollack 1996, 1997; Bulmer 1994). An analytical tool frequently used in recent studies is the multilevel governance approach, a perspective that explicitly tries to include intergovernmental and supranational aspects of European decision-making processes as well as transnational interest groups and policy networks. The multilevel perspective also aims to analyze the complex interactions between national and European regulatory patterns. But up to now, this approach has remained a metaphor rather than become a substantial analytical instrument or theory (Marks / Hooghe / Blank 1996; Héritier 1995; Mazey / Richardson 1995; H. Wallace 1996; W. Wallace 1996; Cameron 1992).

Nevertheless, in general all approaches commonly applied in analyzing policy-making in the EU neglect the role of national diversity and national regulatory efforts embedded both in the European Union's regulatory framework and in the policy-making processes initiated at the European level. Therefore, adding the "horizontal dimension" of comparative political science to the "vertical dimension" of multilevel interactions seems necessary in order to get the whole picture of European social policy which develops at both the supranational and national levels. And national social policies are characterized by institutional and political diversity. Hence, an analytical approach to this policy area will be most effective if it combines research traditions centered on EU analysis and the insights of comparative political research, such as comparative social policy or comparative political economy (Ebbinghaus 1996; Streeck 1995a). This could serve to improve the analysis of dynamic interactions between EU and national regulatory attempts, an area in which theoretical knowledge is not yet sufficiently developed.

Applying this framework may lead to a better understanding of multilevel governance as an analytical tool and an empirical phenomenon.

2.2 National Social Policy under Regime Competition and Legal Restrictions

National regimes of social protection emerged in a period when nation-states still had control of border-crossing economic activities. Thus, national governments could impose taxes and social insurance contributions on all domestic employers without having to contend with intervention from foreign competitors subject to different social standards and labor costs, or with evasion by domestic manufacturers opting to relocate production abroad. The situation changed as European Integration progressed in the direction of a common Internal Market without borders as a result of "negative integration" abolishing restrictions on European-wide trade and factor mobility. In addition, there was some doubt as to whether national social protection regimes conformed with European law (Behrens 1992; Scharpf 1996a, 1997; Leibfried / Pierson 1995; Alte / Meunier-Aitsahalia 1994; Weiler 1981, 1991).

Due to the member states' diverse levels of economic development and social standards, the Internal Market includes jurisdictions with varying levels of labor costs. Now it has become legally possible for national producers to relocate their factories to low-cost countries. This strategy is economically profitable if the productivity of foreign workers is not too low in relation to the level of labor costs. Particularly in labor-intensive sectors like the textile industry relocation has been a frequently adopted way of coping with shrinking competitiveness. An alternative to relocating production is assigning parts of the work to subcontractors based in EU member states with less demanding regimes of social protection. This constellation of increased capital mobility and international competition puts pressure on national regimes with high productivity and high labor costs because firms subject to competition from abroad can now argue in the political arena that production in high-cost countries is too expensive. Thus, either production has to be relocated or the burden of taxes and social security contributions lowered. Otherwise domestic production will lose competitiveness.

One could argue, however, that relocation of production to low-cost countries and penetration by cheap foreign service-providers are different phenomena. It might be easier to create policies that would limit the penetration of foreign firms bringing in posted workers than it is to introduce European-wide harmonizing measures that would reduce incentives for relocation. But the political and economic constellation is the same in both cases: actors exposed to international

market competition can argue that in order to keep a competitive home base social standards and wages have to be lowered and labor market rigidities abolished. In contrast, actors trying to defend established regimes of social protection and collective bargaining will urge regulatory measures stopping regime competition by harmonizing the labor law applicable to domestic and posted workers, i.e. by extending national provisions on all persons active on the national territory. So, assigning work to foreign subcontractors mirrors the phenomenon of relocation of production to low-cost countries in terms of its economic and political consequences.

This example shows how regime competition changes the terms of trade in national politics in favor of capital. Internationally mobile firms and their associations, especially those in export-oriented industries, gain political power at expense of trade unions, less mobile employers and national governments. So, national social policy can be renegotiated between political actors, its content depending on the relative power of actors interested in increased competitiveness by way of lower production costs and actors trying to protect established levels of social protection and market-modification (Falkner 1993; Rhodes 1991, 1995; Streeck 1994, 1995a, 1997; Scharpf 1994a, 1996a).

However, institutional factors might influence the capacity to act in market-modifying issues as well, since the institutional repertoire available to the actors depends on the arrangements in social policy and industrial relations established in the past. And the effective political power of parties and interest groups is conditional on the veto-points that can be activated during the decision-making process (Immergut 1992).

2.3 Supranational Social Policy

National policy-makers' decreasing capacity to modify the market could potentially be compensated for by supranational social policies establishing a minimum level of social protection or harmonizing national arrangements through "positive integration" in order to end regime competition. However, this does not seem to be a practicable strategy because political and economic interests vary too much between high-cost and low-cost EU member states. In addition, there is institutional divergence that virtually prevents harmonizing measures even among countries with approximately identical levels of social protection.

Due to the fact that nation states are not willing to cede their competencies in social policy making to supranational actors, European arrangements in this policy area still tend to follow the logic of intergovernmental bargaining in the Council of Ministers, which requires unanimous decisions or at least qualified majorities.

Apart from areas like occupational health and safety, gender equality, and environmental protection (Streeck 1995; Eichener 1992; Héritier 1995) – where supranational actors such as the European Commission, the European Parliament and scientific advisors influence the policy outcome effectively –, the logic of bargaining between governments in social policy issues usually leads to solutions that do not overtax the very limited potential of supranational regulation (Scharpf 1994b; Streeck 1995a, 1995b; Rhodes 1995).

This means that only measures that do not pose a threat to national competitiveness in low-wage countries and do not interfere with institutional properties of existing national arrangements can be adopted by the Council of Ministers. As a result, supranational social regulation seldom goes beyond "harmless" minimal standards and institutionally neutral measures that can be transposed into national law without modifying established arrangements significantly. At the same time these measures offer many opportunities to adapt European framework policies to national political and institutional circumstances. Therefore, this type of European-wide regulations can be described as "voluntaristic" (Streeck 1995b) or "heedful of national autonomy" (Scharpf 1994b). However, supranational policies of this kind are not suitable for compensating for the loss of national capacity to act because they are not strong enough to bring regime competition to an end (Streeck 1995a, 1995b, 1997; Scharpf 1996a, 1997; Lange 1992; Rhodes 1995; Pierson/Leibfried 1995a, 1995b). They can, however, reduce the legal and political pressure of negative integration on national regimes of market-modifying regulation (Scharpf 1997; Schmidt 1997).

Splits along territorial lines and institutional divergence are also often brought forward as the main reasons why the transnational peak associations of national social partners, i.e. the European federations of capital and labor, are not capable of effectively influencing the outcome of decision-making processes at the European level in the direction of stronger market regulation or harmonization of national regimes. While employers' peak associations like UNICE are generally said to have no positive interest in adding a social dimension to the Single European Market, national trade unions stick to their particular economy and their national power resources, and try to preserve the national arrangements of social policy and collective bargaining set up with their support in the past. A transnational trade union strategy in the framework of the European Trade Union Confederation is hampered by divergent interests of national affiliates according to the relative competitive position of their economies and the institutional regimes. So far, the European Social Dialogue institutionalized by the Maastricht Agreement on Social Policy has not been able to achieve substantial results above the level of intergovernmental compromise in the Council. But while transnational strategies of interest aggregation seem hardly possible, fragmentation along the territorial cleavage can lead parts of the employers' associations to side with trade unions to

form national coalitions interested in defending their labor-cost / productivity regime or in increasing competitiveness (Streeck / Schmitter 1991; Streeck 1994; Falkner 1996, 1997; Ebbinghaus / Visser 1994).

2.4 European Social Policy between National and European Regulation, Market Freedom and Social Protection

Negative integration in the EU and its Internal Market has exposed national social policies to regime competition because internationally mobile capital now has a credible exit option. This leads to growing political and economic pressures on social standards, making national social policy arrangements renegotiable according to the relative power of political actors interested in defending or retrenching them. However, the loss in national capacity to maintain market-modifying regulations is not offset by supranational social policies. At the EU level, social policy making is hampered by interest heterogeneity in the main decision-making body, the Council of Ministers, stemming from institutional divergence and heterogeneous economic positions. And neither supranational actors nor transnational interest groups are strong enough to overcome the logic of intergovernmental bargaining. Apparently all that can be achieved at the European level is a minimal regulatory approach that does not interfere with national social policy regimes, and thus allows for flexible transposition according to political and institutional circumstances in each member state.

Therefore, "autonomy protection" might be introduced as a third category of supranational regulation, supplementing the concepts of "positive integration," i.e. the harmonization of standards throughout the European Union, and pure "negative integration" rendering national market restrictions unlawful. Autonomy protection appears to be less demanding than harmonization because it only requires EU-level authorization of national action. However, safeguarding national market-restricting arrangements is more ambitious than mere negative integration since the principle of liberalized economic interaction must be weighed against the recognition of other, equally legitimate political aims.

In conclusion, autonomous national capacity to act in market-modifying issues depends on the legal possibility to maintain or introduce measures interfering with the Internal Market. Therefore, the Treaties, the European Court of Justice (ECJ) or the secondary EU legislation have to provide sufficient justification. But national action also depends on the political and institutional feasibility of such measures, i.e. the effective power balance between actors trying to lower labor costs and abolish labor market "rigidities" (such as export-oriented sectors under international competition or liberal parties) and actors interested in maintaining

social protection and reducing the danger of "social dumping" (e.g. trade unions and employers in affected sectors).

3 The Empirical Case Study: Posted Workers in the Framework of Liberalized Services Provision

3.1 Posted Workers in the European Construction Industry

Liberalization of transborder economic activities within the European Internal Market means different things to different industries. Whereas manufacturing plants can now easily be relocated to other member states in order to avoid high taxation or "excessive" wage and non-wage labor costs, production in the construction sector is bound to the site where the building is actually needed. Relocation to countries offering low labor costs is not practicable. Thus, for a long time, it was possible to develop additional sectoral regimes of social protection for construction workers in order to compensate for the specific income risks of workers in this industry which are caused by short periods of employment (bad-weather payments, paid holidays, occupational pensions) and not covered by general social insurance schemes. As long as there was no competition from abroad, the cost of these sectoral regimes could be passed on to clients.

This situation changed fundamentally with the establishment of the freedom to provide services and the accession of less developed countries to the European Union. Now, construction clients, especially manufacturing companies under international competition, can benefit from the use of cheap labor on the building site. How does this work? General construction contractors in high-wage countries subcontract labor-intensive parts of the work to construction firms based in less demanding jurisdictions in terms of wages and social security standards. According to the principle of free provision of services – not to be confused with the free movement of individual workers – foreign subcontractors can now send their construction workers on sites abroad without being subject to the more demanding social standards imposed on domestic construction firms. Workers posted temporarily on a site abroad remain employees of the home country company and are therefore still subject to home country labor law. Foreign subcontractors from low-cost countries can thus undercut production costs in high-cost countries. They render domestic building contractors uncompetitive, especially small and medium-sized firms without easy access to foreign subcontractors or subsidiaries in low-wage countries. Business failures and higher unemployment among nationals can be the result. Thus the social partners in countries with high statutory or collectively agreed wages and high payroll taxes based on general

social insurance or sectoral regimes of social protection are afraid of "unfair competition" from posted workers employed in low-wage countries (for a comparison of national construction industries and patterns of employment see Campagnac 1991; Eisbach / Goldberg 1992; Gross / Syben 1992; Hellste / Heumen 1995; Pellegrini 1990; Rainbird / Syben 1991; Unger / Waarden 1993).

An examination of the degree to which individual EU member states have actually been affected by the posting of workers on their territory shows that France and Germany are obviously the countries where most of the cheap labor has been sent. In France, domestic general contractors started to assign work to foreign subcontractors in the late eighties and thereby paved the way for several hundreds of posted workers – the precise number being unknown. Germany experienced the influx of a much higher number of foreign subcontractors and their staff in the early nineties during the construction boom after German Reunification: about one out of five workers in the building main trades was posted from abroad. However, in addition to being affected by this substantial number of legally posted workers, both countries were also faced with a similar if not larger number of illegal loan workers, bogus self-employed persons that were in fact employed like dependent wage labor, and illegal workers from non-EU countries. In Germany, furthermore, workers from East European countries have been posted since 1990. This kind of temporary employment was based on bilateral agreements on quotas negotiated between the German and several non-EU governments and had nothing to do with the principle of liberalized services provision in the European Internal Market. Nevertheless, access to Polish workers in particular contributed to the emergence of subcontracting structures in the German construction industry. Although it was prescribed that German wages be paid to these East European workers, the quotas for posted workers from non-EU states and the illegal activities accompanying them led the construction sector's social partners to mobilize against subcontracting to East Europeans. After the German government reduced the quotas in 1993, however, domestic general contractors changed over to EU subcontractors and their employees. Other EU member states where the posting of West European workers has occurred – or is at least feared – are Belgium, the Netherlands, Luxembourg, Austria and the Scandinavian countries.

The most important home countries of posted workers were, and still are, Portugal, and, to a significantly smaller degree, Spain, Greece and Italy. From the United Kingdom and, less prominently, Ireland construction workers declaring themselves to be self-employed construction contractors have been sent by illegal Dutch temporary work agencies to building sites in continental European countries, especially Germany. However, until now no official and reliable statistics on posted workers or self-employed persons have been available.

From this part of the analysis we can conclude that the freedom to provide services in the European Union offered divergent opportunity structures to different countries and political actors depending on their competitive position. On the one hand, posting workers could be seen as a means of reducing construction costs, this being the perspective adopted by bigger general construction contractors and their clients, especially those active in export-oriented industries that were, themselves, exposed to fiercer competition on world markets. On the other hand, building employers' associations and trade unions in high-cost countries made posted workers and their employers responsible for unemployment and business failures as a result of "unfair competition" or "social dumping" and therefore had an interest in minimizing the use of cheap labor from abroad (Baumann / Laux / Schnepf 1996; Lubanski / Sörries 1997; Köbele / Cremers 1994; Köbele / Leuschner 1995). For political actors in low-wage countries, trade unions and employers alike, finally, this mechanism was a way to reduce domestic unemployment and overcapacities by sending workers abroad.

3.2 The Legal Status Quo: Liberalized Services Provision and Social Protection

The completion of the Internal Market brought about no changes in the freedom to provide services. The general principle that firms and self-employed persons based in one EU member state were and are allowed to carry out work in another member state without being obliged to establish a subsidiary branch there had become directly effective as an individual right as early as 1970. However, it was not yet clear if employers willing to provide services across borders could send their staff abroad, too. This was only defined on the occasion of several ECJ judgments, most important among them the case Rush Portuguesa of 1990 in which the ECJ ruled that the right to post workers was part of the freedom to provide services and not of the free movement of workers. Hence, the posting of workers can now be subsumed under the principle of unrestricted access to other EU member states for firms providing services (Hailbronner / Nachbaur 1992; Desmazières de Séchelles 1993; Hanau 1995; Hanau / Heyer 1993).

Nowhere did European law define the legal status of workers posted abroad. It did not answer the question of which labor law was to be applied – that of the home country or that of the host country. Therefore, other bodies of international law regarding conflicts between national laws had to be invoked, most prominently the so-called Rome Convention on International Private Law of 1980. The Rome Convention was ratified by all EU member states at that time but agreed upon outside the framework of the European institutions. According to this Convention, posted workers generally remained covered by the labor law of the country of origin, which was the place where the posted worker was usually employed, i.e. his or her home country.

However, the host country could impose its "internationally enforceable norms" of "public order" on all foreigners temporarily working on its territory. Thus, the meaning of the notion "internationally enforceable norms" became crucial for the legal treatment of posted persons. Until the re-regulation of this issue, it was up to the national labor courts to decide, so that the legal situation was somewhat ambiguous. While statutory rules on health and safety at the workplace and on working time were undisputedly regarded as parts of the national public order, other central aspects were not unequivocally covered, for example statutory minimum wages and collectively agreed arrangements on wages or working time. While statutory wages and collective agreements that had been declared generally binding on all domestic employers, i.e. had taken effect "erga omnes," were sometimes considered to be internationally enforceable, this was probably not the case for normal collective agreements without universally binding character.

General social insurance is addressed in European regulation 1408/71 on the social security of migrant workers. Adopted in 1971, this regulation, which does not mention sectoral social protection, rules that posted workers are covered by home country social insurance for up to one year of work abroad. This principle was never questioned later on.

As we look at the body of established rules concerning the status of posted workers in terms of labor and social insurance law, we can see that there was no clear definition of host country labor law standards that were applicable to foreign workers, especially where statutory and collectively agreed wages were concerned. Since employers from countries with less elaborated wage and social security standards could exploit the ambiguity of the Rome Convention and the European coordination rules on social insurance, it became possible to legally undercut labor cost levels of more demanding national regimes.

3.3 Legal Bases for National and Supranational Regulation

Having described the legal status quo concerning the labor law status of posted workers, we now must turn to the treaty bases which could have been used in order to re-regulate the border-crossing provision of services by sending workers abroad. Therefore, we need to ask how the issue could be dealt with: how could the content of internationally enforceable norms applicable to posted workers be defined, clarified and extended? In other words: how could the sphere of free provision of services be restricted?

On the one hand, European action setting up a common catalogue of host country minimum standards to be applied to posted workers and their employers might have been based on several articles of the "Treaty on the Foundation of the Euro-

pean Communities" (TEC). Of potential relevance were Art. 57 together with Art. 66 establishing a European competence for regulating the trade in services, Art. 100 and 100a governing the creation of the Single European Market, Art. 118a on the improvement of the work environment and the subsidiary Art. 235. In 1993, when the Maastricht "Treaty on European Union" (TEU) came into force, the "Agreement on Social Policy" signed by eleven member states could have been used as an additional legal base. However, it was argued by some legal scholars and political actors that none of these treaty bases was an appropriate basis for a European regulation aimed at obstructing the functioning of the Internal Market by reducing the cost advantage of low-wage countries.

On the other hand, national capacities to act depended on ECJ jurisdiction. As far as the range of internationally enforceable norms was concerned, the ECJ had ruled on some occasions (e.g. Judgments Seco of 3 February 1982 and Rush Portuguesa of 27 March 1990) that member states were not prohibited from extending their national labor law (including statutory minimum wages and collective agreements) to cover workers posted on their territory for a certain period of time. However, only non-discriminatory provisions that were also generally binding on domestic employers ("erga omnes") and were justified by the general public interest of the host country could be extended if the public interest was not guaranteed by the provisions in force in the home country (Judgments van Binsbergen of 3 December 1974, Webb of 17 December 1981, Saeger Dennemeyer of 25 July 1991). Nevertheless, the justification of national regulations restricting the provision of services by imposing host country working conditions could become a much disputed issue in the legal profession and, later on, in the political arena.

In conclusion, it should be noted that at the end of the eighties the distribution of competencies between the European and the national level seemed to be unclear. European and national actors' capacities to act became the object of doubts regarding the justification of imposing restrictions on the free provision of services. The ambiguous and vague relationship between national and supranational re-regulation and between the market freedom and the social protection of posted workers – and domestic employers as well – could thus become the background of political conflict between actors interested in unrestricted access to cheap service providers and actors trying to avoid the erosion of wage levels and social protection regimes and to protect their nation-state's public order.

3.4 The European Regulatory Effort: Supranational Political Entrepreneurship and the Logic of Intergovernmentalism

Under the legal status quo governing the labor law applicable to posted workers, domestic workers paid according to national statutory or collectively agreed wages could find themselves working side by side with posted workers covered by their home country labor law – apart from certain statutory provisions. The "European Federation of Building and Wood Workers" (EFBWW), the federation of European construction trade unions, perceived this legal "loophole" as a potential threat to wage levels and regimes of social protection in major European countries and pressed for a binding "social clause" in the European directive on the liberalization of public procurement, which was adopted by a qualified majority in the Council of Ministers in 1989 (OJ L 210/1 of 21 July 1989). This measure was supposed to lead to intensified transborder construction activities. EFBWW's supranational initiative for the social clause was supported by national building trade unions from most member states. Initial opposition from some low-wage member states was never strong enough to dilute EFBWW's commitment to this social clause. However, the application of host country provisions was made optional by the Council and thus dependent on the decision of the public customer. The German and the British governments, in particular, were against a compulsory social clause because it would have led, in their eyes, to illegitimate restrictions of the Internal Market.

Since this regulation did not suffice to prevent "social dumping" in EFBWW's view, the trade union federation urged the Commission to present an additional draft directive specifying a compulsory hard core of national social standards applicable to posted workers no matter what type of procurement – public or private – was concerned. The Commission reacted by including a corresponding project among the forty-seven measures listed in the "Social Action Program Implementing the Community Charter of Basic Social Rights of Workers" to be adopted before the Single European Market was to come into force. To prepare the legislation, the Commission consulted the member states' governments and the European social partners. The transnational employers' associations were all opposed to the planned measure except for those representing the construction industry. In 1991, the Commission then presented a first draft directive (OJ C 225/6 of 30 August 1991) based on Art. 57 and 66 TEC, which allowed for qualified majority adoption by the Council.

The purpose of the draft was to "balance" the freedom to provide services and the social protection of posted workers in order to avoid "social dumping" and "unfair competition" as well as "exploitation" of workers. To do this, it stipulated that a common hard core of host country standards be extended on posted workers in all industries. The list was exhaustive. However, the Commission proposed

a threshold period of three months in order to avoid "rigid" interference with the principle of free service provision, thus exempting most of the work on building sites from the application of host country minimum wages and paid holidays. The Commission wanted to extend only two kinds of national labor law provisions to cover posted workers: statutory labor regulations (regarding minimum wage, working time, health and safety, etc.) and universally applicable collective agreements (erga omnes). It did not want to include two other kinds of labor standards – collective agreements that were not generally binding, and "usually applied" wages and working conditions – because they covered just a majority of domestic workers, but not all of them. By this strategy the Commission wanted to avoid discrimination against foreign firms, which could not be expected to adhere to higher labor standards than those generally required of domestic firms. If foreign firms were forced to comply with stricter labor standards than domestic ones, this would have constituted an unfair restriction of transborder trade in services. By using this approach to national social standards, the Commission's draft refrained from interfering with the mechanisms used in the member states to regulate labor law. Creating a European minimum wage or harmonizing national labor law institutions was not even broached since this would have encroached on national autonomy (EIRR 199: 12 ff, 213: 20 ff).

After its publication the draft was transferred to the Economic and Social Committee for consultation and to the European Parliament for its First Reading (OJ C 72/78 of 15 March 1993). Both actors proposed strengthening amendments, especially concerning a shorter threshold period. In addition, the Parliament suggested that "usually applied" wages and working conditions also be included, thus enabling host countries without erga omnes arrangements to impose this kind of formally non-binding labor law on posted workers. The Commission's second draft of 1993 (OJ C 187/5 of 9 March 1993) took these amendment proposals into account and was stronger in its content. A threshold period of one month, for example, would allow host countries to apply their standards sooner than originally drafted. The Commission accepted the clause on usually applied conditions only in a modified manner, stressing that only wages and working conditions applied by the overwhelming majority of employers should be extended to cover posted workers; otherwise foreign firms would be at a disadvantage (EIRR 236: 22 f).

As soon as the Council of Ministers began to discuss the draft directive, a deep cleavage between different groups of member state governments impeded progress in the direction of a passage of the dossier. On the one hand, actual or potential host countries of posted workers, i.e. high labor cost member states like France, the Netherlands, Belgium or Denmark, were in favor of a directive covering the whole labor market without any threshold period. On the other hand, important home countries like Portugal and the United Kingdom were fiercely opposed to the directive in principle as well as to many details like the treaty

base, the shortened threshold period or the complete sectoral coverage. If these proposals became law, these countries stood to lose their competitive advantages in services provision in the construction sector. A third group of national governments from Italy, Spain, Greece and Ireland was not as unyielding as the second one because they benefited less from the posting of workers. However, they were also unwilling to accept the strong version of the directive favored by the first group. Germany as the country most affected by the posting phenomenon after 1993 remained hesitant since the Liberal Party (FDP), a coalition partner in government, and the peak association of German employers (BDA), dominated by export-oriented sectoral affiliates, were opposed to the principle of "protectionist" restrictions on the Single European Market. In contrast, the Christian Democratic Minister of Labor and Social Affairs, the German trade unions and the employers' associations of the construction sector backed the draft directive.

In 1994, during Germany's EU presidency, the German Minister of Labor presented a diluted draft reducing the compulsory sectoral coverage to the construction industry and including a variable threshold period. But it was not accepted. By proposing this draft, the German government had tried to tackle the deteriorating situation in the German building sector and respond to intense lobbying by the building trade union and employers' associations. The building employers had even succeeded in convincing the BDA to give up its principled opposition to the directive. The Germans had formulated the proposal to be less binding partly as a concession to Italy and Spain in the hope that these countries would side with the advocates of the directive. Nevertheless, the persistent stalemate at the European level could not be overcome (EIRR 210: 12 ff, 252: 2).

Delegating the dossier to the social partners which had gained new regulatory competencies as a result of the Maastricht Treaty was occasionally considered by the Commission as a way of circumventing the blockade in the Council of Ministers. However, no concrete negotiations that might have led to an agreement between UNICE, CEEP and the European Trade Union Confederation were initiated. Many observers expected no positive results since UNICE, i.e. the majority of national employers' peak associations, was not willing to discuss the directive because it favored national decisions on the range of "internationally enforceable norms" without harmonizing intervention from the European level. In addition, the institutional mechanisms of European collective bargaining were not sufficiently developed because the actors had no experience with negotiating transnational collective agreements. Nevertheless, EFBWW and FIEC as the sectoral social partners of the construction industry were able to issue a Common Position in autumn 1993 urging the adoption of the directive and thereby trying to exert some influence on the Council of Ministers. However, due to internal conflicts among FIEC affiliates, the commitment to the directive had to be worded vaguely (Sörries 1997; Baumann / Laux / Schnepf 1996; EIRR 239: 4).

The European decision-making process initiated by supranational political entrepreneurs remained blocked in the Council for many years as a result of intergovernmental deadlock. Political actors interested in the directive thought that it would probably not be adopted for a long time to come.

3.5 National Regulations as a Means of Overcoming European Deadlock

Deadlock at the European level meant that the legal status of posted workers remained ambiguous. However, as the European Court of Justice had allowed member states in a more or less explicit manner to extend their national labor law to cover all persons temporarily working on their territory, they could unilaterally introduce national posted workers regulations. So a shift of the regulatory process to the national level occurred in all potential or actual host countries of posted workers, i.e. Belgium, the Netherlands, Luxembourg, Denmark, Sweden, Austria, France and Germany. In order to find out more about the logic of national regulations governing the border-crossing provision of services, this chapter compares the legislation in France, Austria and Germany.

France was particularly affected by the posting of Portuguese workers sent by subcontractors set up in Portugal by French building firms in the late eighties. At that time it was not yet clear if Portuguese posted workers benefited from the freedom to provide services or the free movement of workers – the latter being postponed until the end of the transitory period after the accession of Portugal to the EU in 1992. So French authorities demanded work permits from posted workers, whom they treated like migrant workers. This led to the Rush Portuguesa proceedings, named after a Portuguese subcontractor filing a suit against the French authorities, in which the ECJ ruled that posting workers was part of the provision of services and therefore not subject to a transitory period.

Since the French authorities feared a steep increase in posting as a consequence of this judgment, they initiated a preliminary regulation in May 1991: a circular drawn up by the Ministry of Labor imposing the statutory minimum wage SMIC on foreign building contractors (Législation Sociale No. 6524, 21 May 1991). As this administrative text was not a binding regulation, it was replaced by Art. 36 of the Five-Year Law on Employment ("Loi Quinquennale") adopted by both chambers of French Parliament in November 1993 that created a new Art. L 341–5 of the "Code du Travail" and was implemented by a decree issued in July 1994 and a new circular in December 1994 (French "Journal Officiel" of 12 July 1994, pp. 10041 ff, Législation Sociale No. 7097, 25 August 1994 and No. 7197, 30 January 1995). By means of this regulation, foreign employers were forced to pay the French statutory minimum wage SMIC (about DM 12) or a universally applicable,

collectively agreed sectoral wage. For example, in the construction industry there was a minimum wage for manual workers not much above the statutory minimum wage. In addition, laws and agreements on working time and sectoral social protection of construction workers were extended to apply to posted foreigners. The regulation had no grace period and protected the whole labor market. Since then, the posting of workers has not become a major problem for the French labor market. Illegal employment of non-EU nationals and moonlighting, however, continue to be significant phenomena in the French construction industry (Robin 1994; Moreau 1995; Hennion-Moreau 1994; EIRR 243: 21 f, 247: 6).

What is most intriguing about the French case is that it was not politically controversial at all. Art. 36 was supported by all political parties and by all interest groups, the trade unions, both employers' associations of the construction sector, and the peak association of French employers (CNPF). No trade association was opposed to the extension of the existing minimum wages on posted workers. All political actors perceived a national restriction of the freedom to provide services as a legitimate measure to avoid "unfair competition" caused by foreign firms not covered by French labor law. Even the clients of the construction industry did not oppose the application of the SMIC or the collectively agreed minimum wages since the relatively low level of these standards did not harm their interests.

Like France, Austria introduced a regulation on posted workers (Art. 7 of the "Arbeitsvertragsrechts-Änderungsgesetz," Austrian "Bundesgesetzblatt" 172 of 9 July 1993, pp. 277 ff**)** in 1993 – before it became a member of the European Economic Area and the EU. Just like the regulation in France, it covered the entire labor market. The law applied statutory labor law provisions and all collective agreements to foreign employers and their workers provided that a threshold period of one month elapsed. This wide range of labor law – beyond pure minimum wage provisions (with the lowest pay bracket at about DM 14) – could become internationally enforceable because Austrian collective agreements were already binding on all domestic firms due to their compulsory membership in the Chambers of Business. The creation of a posted workers law extending Austria labor law was seen as a necessary preventive measure in order to avoid "social dumping" which was expected by domestic construction workers and their employers as a probable effect of Austria's entry into the Single European Market. This perception was shared by all political actors, including the trade unions as well as the employers' associations and the political parties. Together, they gave priority to closing the legal "loophole" which might have led to a competition between divergent labor law regimes on the Austrian territory. Nevertheless, safeguarding social provisions was also part of an informal agreement between the employers' associations interested in joining the EU and the trade unions whose help was considered necessary for rallying public support for the decisive referendum in 1994 (Eder 1997).

Two years later, however, the posted workers subject became a contentious issue in Austrian politics. Though the posted workers had not caused much of a problem, the announcement by the leading Austrian construction firm that they would assign more work to Portuguese subcontractors provoked fierce opposition from the trade unions in the summer of 1995. Therefore, they urged the government to abolish the threshold period and to strengthen the enforcement mechanisms of the national posted workers law. This time, however, the Social Democratic Minister of Labor (from the SPÖ) was not able to reach compromise with the Christian Democratic coalition partner (ÖVP) on major aspects of the bill. Nor were the social partners able to come to an agreement. Christian Democrats and employers' associations rejected a stricter draft as being excessive and "protectionist." Under normal circumstances, consultations among the social partners and the political parties would have resulted in a diluted version of the law being passed. But then the coalition of Social Democrats and Christian Democrats collapsed because of disagreement on the budget. This paved the way for an unscheduled session of Parliament ("Nationalrat") in November 1995 in the run-up to the new election. On this occasion, without consulting the other parties first, the Social Democrats managed to push through the original, stricter version of the bill ("Antimißbrauchsgesetz," Austrian "Bundesgesetzblatt" 299 of 29 December 1995, pp. 534 ff) with the support of the opposition parties – the Green party and the right-wing FPÖ – against the continued resistance of the Christian Democrats and the employers organized in the Federation of Austrian Industrialists and the Chambers of Business. The latter finally submitted a complaint to the European Commission arguing that some provisions of the new law (such as the collective responsibility of domestic employer and foreign subcontractor in case of infringements) discriminated against foreign firms. Since then, no significant amount of posting has occurred in Austria, but the Austrian construction sector, like the French, has been affected by illegal employment of non-EU nationals, especially from the Eastern neighboring countries (Eder 1997; Pflegerl 1996; Ziniel 1996).

In contrast to the French and Austrian national consensus on the principle of avoiding "social dumping," the German case shows highly controversial political debates and difficult bargaining processes (EIRR 253: 8). Germany was the host country of most of the posted workers from Western Europe after 1993, which led to high unemployment among nationals in the following years. Nevertheless, the political actors in favor of the creation of a posting regulation similar to the French or Austrian one (the trade unions, the construction employers, and the Ministry of Labor and Social Affairs) were not able to get their proposals passed completely.

On the one hand, a "protectionist" attempt at restricting the freedom to provide services was opposed by legal scholars who argued that there was no justification for national steps aiming to reduce foreign access to the German construction

sector (for the juridical debate see, among others, Däubler 1995, 1997; Hanau 1993, 1995, 1996; Koenigs 1997; Löwisch 1994). In addition, many economists (such as Eekhoff 1996 and Gerken/Löwisch/Rieble 1996) argued that applying German labor law to posted workers would lead to higher construction costs, thereby hampering economic growth in Germany and further diminishing the attractiveness of Germany as a location for production ("Wirtschaftsstandort").

On the other hand, similar arguments were reflected in the political bargaining process. As soon as the Ministry of Labor started preparing a national posted workers bill with the support of the trade unions and the two building employers' associations, the liberal FDP and the employers' peak association BDA announced their resistance. Both actors were interested in liberalized service provision as a means of overcoming the high level of labor costs in Germany in general and in the construction sector in particular. In addition, both had the opportunity to effectively veto the proposal, the Liberals as part of the governing majority in the Bundestag (the first chamber of Parliament), the BDA and their sectoral affiliates outside construction as one party in the bipartite committee responsible for recommending the extension of collective agreements. Since there was no statutory or universally applicable wage agreement in the German construction industry, such an extension became a necessary part of a regulation in accordance with European law. Usually-applied wages were not a viable alternative because a large number of German employers were not organized in employers' associations and therefore not bound by simple collective agreements. However, generally binding collective agreements on wages were a very unusual phenomenon in the German regime of autonomous wage setting by sectoral social partner associations ("Tarifautonomie"). There were only some generally binding agreements on wages in the retail and restaurant trades. In the construction sector, only the arrangements on sectoral social security were universally applicable, but not the wage agreements. Even some trade unions were reluctant to admit the necessity of legally binding minimum wages.

The conflict between the Christian Democratic Minister of Labor, who was in favor of the bill, and the Liberal Minister of Economic Affairs could only be resolved by way of a much diluted compromise: the posted workers law should only cover the core of the main building trades, have a threshold period and expire after two years. However, as a result of parliamentary debate and compromise between the Bundestag, with its coalition majority made up of Christian Democrats and Liberals, and the Bundesrat (the second chamber), with its Social Democratic majority, a stricter version could finally be adopted in February 1996: the "Arbeitnehmer-Entsendegesetz" (German "Bundesgesetzblatt" I, 1996, pp. 227 ff, of 29 February 1996) now covered the whole construction sector (main trades and auxiliary trades), lasted for three and a half years and had no threshold period. Last but not

least, the universally applicable agreement on paid vacation in the construction sector was applied to foreign employers as well (Arbeitnehmer-Entsendegesetz 1996; Kretz 1996; Koberski / Sahl / Hold 1997; Hanau 1996).

However, the crucial part of the regulation was still missing: a generally binding minimum wage for the construction sector equally applicable to German and foreign employers and their employees. While it would have been possible to make the already existing lowest pay bracket in the sector universally applicable (DM 20.24 for Western Germany), this was not politically feasible. The BDA and East German building employers were opposed to it because it would have led to relatively high binding minimum wages which were expected to push up wages in other sectors and to put demands on East German building firms that they would be unable to meet. However, West German construction firms were interested in a relatively high minimum wage as this would have reduced the comparative advantage of Portuguese firms more effectively. The construction trade union and the employers' associations entered into negotiations which led to a first agreement in April 1996. The minimum wage was to be introduced in gradual increases leading up to DM 18.60 in the western and to DM 17.11 in the eastern part of the country (EIRR 267: 7, 268: 14 f).

Now the bipartite committee had to decide whether or not to recommend that the agreement on the minimum wage become universally applicable. Contrary to a joint request filed by the social partners of the construction industry, the minimum wages agreed to were rejected by BDA and the export-oriented members (metal manufacturing, chemical industry, wholesale and foreign trade), the most outspoken clients of the construction industry, as being too high (EIRR 269: 6 f). And it became clear that circumventing the BDA's veto by way of statutory wage regulation was politically unfeasible. A second round of negotiations ensued, leading to reduced wages of DM 17.00 for the west and DM 15.64 for the east (EIRR 273: 5). This arrangement was declared generally binding by the Minister of Labor in November 1996 with the consent of the BDA, however only for eight months until August 1997 (EIRR 275: 5). In order to extend the agreement from September 1997 onwards, the minimum wages had to be reduced once more to DM 16.00 and DM 15.14 (EIRR 283: 7). The advocates of the national regulation claim that the number of legal posted workers has dropped somewhat since the introduction of the minimum wage. However, effective enforcement of German labor law standards on the building sites remains a problematic issue as several categories of illegal workers can still be found there.

We can see from these three cases how divergent national regulations on posted workers emerged as results of different political constellations and institutional diversity. National legislation protecting the whole labor market by means of extending the statutory minimum wage or already existing binding sectoral agreements was easy to pass in France and Austria; it was not an object of controversial

political debate. In Germany, in contrast, the posted workers arrangement was based on a special minimum wage declared to be generally binding; it could only be agreed upon after protracted, contentious negotiations.

The reasons for this divergence are threefold: On the one hand, the institutional repertoire available in France and Austria could be easily employed to prevent "social dumping" because binding minimum wages already existed. No fundamental discussions were necessary. In Germany, where collective wage agreements were binding only on employers who were members of trade associations, the introduction of a universally applicable minimum wage for the construction sector was perceived as necessary to create a regulation complying to European law. But this was a break with the tradition of autonomous wage agreements and caused an immense political dispute.

The second reason lies in the actor constellations. In France, none of the actors involved were afraid of higher construction costs as a result of national "protectionism." However this might not only be a result of less liberal economic doctrine but also of the regulation itself being based on the relatively low statutory minimum wage and on the fact that the sectoral minimum is not much higher. French employers could continue employing foreigners directly for quite low wages.

The actor constellation in Austria was quite similar to the French one. Therefore, the first preventive law of 1993 covering the whole labor market and applying all collective agreements to posting employers could be introduced without political conflict. However, the revision of the posted workers legislation in 1995 was intensely debated. The issue became the object of heated party competition in the run-up to the elections. Nevertheless, compared to the German case, there was no basic disagreement on the principle of extending national labor law provisions to cover foreign subcontractors in Austria.

In Germany, opposition from political actors like the Liberal Party and export-oriented employers' associations was much stronger and could only be surmounted by, first, the reduction of the sectoral coverage and the time limit of the law and, second, by the creation of a special minimum wage below the established wage scale of the construction sector. Hence, protection of German construction workers and domestic building contractors could only be achieved by introducing a low-pay bracket for nationals, thereby partially eroding the established high-wage regime. However, the German minimum wage for construction workers, binding for the first time for all foreign and domestic employers in east and west, is still higher than in France or Austria and higher than some of the lowest wages in other German sectors. Thus, it interferes with the principle of free provision of services and the interests of construction clients more than the French or Austrian posted workers law.

Finally, veto points that could be activated by political actors interested in unlimited transborder services provision made a difference: In France the political actors did not activate any of the very few veto-points in the policy-making system, such as the right of the second chamber of Parliament, the Senate, to block bills adopted by the first chamber, the National Assembly. In Austria, however, political actors interested in passing the stricter, modified version of the posted workers law in 1995, i.e. the trade unions and the Social Democrats, were able to override the veto points of social partner consultation and coalition compromise by way of voting in Parliament with the support of opposition parties – without further deliberations with the potential veto actors, the Christian Democrats and the employers' associations. In contrast, the German posted workers law and the minimum wage in the construction sector were heavily affected by veto actors. On the one hand, the Liberal Party in government – and the interest groups consulted – could ensure a diluted content of the bill. On the other hand, the employers' peak association, the BDA, was able to veto minimum wage levels that were considered to be too high.

From this comparison we can see that Germany experienced a cumulation of factors impeding the introduction of a comprehensive posted workers regulation: the combination of political interests, veto points and the institutional repertoire made market modification more difficult than in France or Austria.

3.6 The European Directive: Protecting Divergent National Labor Law Regimes

After many years of blockade at the European level caused by the inability to reach a compromise acceptable to a qualified majority of EU member-state governments, the incoming Italian presidency presented a new proposal for a posted workers directive with a less binding character. Since a qualified majority of votes in the Council seemed only to be within reach if the countries with national posted worker regulations and some of the hesitating member states of the intermediate group were willing to accept it, the new draft of February 1996 had to take into account the preferences of these two clusters of national interests. The Italian presidency came up with a directive allowing, on the one hand, for an almost unchanged maintenance of unilaterally introduced regimes and, on the other hand, diluting some of the provisions rejected until then by the wavering governments, among them Italy itself, but also Greece, Ireland and Spain.

Therefore, it came out as no surprise that the Italian government based its draft on some of the flexible provisions already agreed upon under the French presidency of 1995, such as the open, non-exhaustive hard-core list of minimum standards

(which now included sectoral social security schemes) and the optional coverage by universally applicable collective agreements in industries other than the construction sector. Countries without erga omnes arrangements were to be allowed to extend agreements signed by the most representative associations and arrangements that were generally valid for all employers in the sector – provided that foreign firms were not discriminated against. Access for non-EU firms to EU markets was to remain under the control of bilateral agreements negotiated between EU and non-EU governments (EIRR 253: 19 f, 255: 2, 259: 2, 262: 2, 265: 2, 266: 2).

However, the most significant aspect of the Italian compromise proposal was the idea of a complex clause dealing with the threshold period. As a general principle, the threshold period was to be abolished. The member states and the national social partners were to be free to introduce a grace period of up to one month for the application of minimum wages, however. A mandatory threshold period of eight days for minimum wages and paid vacation was established for initial assembly and installation work, thereby accommodating Italian, Irish and other governments' interests in flexible rules for firms active in this market (Biagi 1996; Eder 1997).

The main reason why political bargaining regained momentum was that the benefit of further resistance by low-wage countries against the supranational solution had already been significantly reduced by the introduction of national regulations tackling the posted workers problem in virtually all host countries. This development had pre-empted the economic effect of uniform European legislation. So re-nationalizing the issue by way of unilateral market modification in the member states had paved the way for a supranational measure complementing what had been established in the meantime.

Since this proposal no longer constituted a threat to national interests, it became possible to reach a qualified majority at an informal Council meeting in March 1996, thereby removing all obstacles for the adoption of a Common Position in June (OJ C 220/1 of 29 July 1996) and the formal passing of the Directive in September 1996, with all governments except the British and the Portuguese voting in favor of it (EIRR 268: 2 f, 270: 2, 271: 2, 274: 3, 14 f). The European Commission, and the European Parliament in its Second Reading (OJ C 320/73 of 28 October 1996), did not propose any amendments because they considered the political constellation of the qualified majority to be too fragile to survive further discussions. A unanimous Council decision, which would have been necessary if the Parliament had proposed any changes, was unattainable. Hence, the supranational actors had to accept the result of intergovernmental bargaining even if they would have preferred to amend the directive. In order not to endanger the unstable bargaining outcome in the Council of Ministers, the Commission and the Par-

liament refrained from proposing modifications. Because of a conflict about Parliament's access to the Council minutes, which had to be resolved in bilateral negotiations, the directive could not be formally passed by the Parliament and the Council until December 1996.

The legislation that was finally adopted, the European "Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services" (OJ L 18/1 of 21 January 1997, Davies 1997), can be described as an "umbrella" which protects national labor law standards and unilateral posted workers legislation in different countries. It provides a shield against legal action of the Commission or the ECJ that might be initiated by employers from low-wage countries that feel discriminated against by the obligation to pay host country wages. Political actors explicitly expected that a European directive that precisely defined the consequences of ECJ jurisdiction and partly clarified or corrected it would not be overruled by the ECJ.

A second benefit of the directive, compared with national legislation on posted workers, lies in the opportunity for improved enforceability, for example by intensified international cooperation of labor market authorities and a modification of the international agreement on the competence of national labor courts.

How will the directive be translated into national labor law? This process must be completed by December 1999. No major changes in national arrangements are to be expected since the directive offers so many options that national actors can actually decide which sectors other than the construction industry are to be covered by collective agreements, which additional labor law provisions are to be included in the "common hard core," and which threshold period is to be established.

But the most important aspect lies in the fact that member states will not have to change the institutional structure of their industrial relations regimes: if there are neither statutory minimum wages, nor minimum standards that have been collectively agreed upon and are universally binding, nor similar rules also applicable to domestic employers, these provisions will not be imposed on foreign employers and their employees. And the nation-state will not be forced to introduce such rules in order to transpose the directive appropriately. This means that member states must extend statutory minimum wages and working conditions and generally binding collective agreements if they already exist. If they do not, posted workers will not be able to claim host country minimum wages and other working conditions. Thus, domestic construction firms might not be protected against competition from abroad by the creation of a level playing field on their national territory. The substance of a national posted workers regulation and the level of the minimum wage will continue to depend on the outcome of political bargaining between actors interested in liberal access to foreign contractors and those trying to defend or stabilize the national wage regimes.

The difference between the status quo before the adoption of the directive and the present situation lies in the fact that until the directive came into force, nation-states could decide whether they wanted to extend public order provisions, particularly in terms of minimum wages, or not. Under the new regulatory framework they are obliged to expand their binding labor law to include posted workers – but they do not have to create binding provisions for this purpose. Because decisions on the substance of binding labor law to be extended to cover foreign employers remain a national domain, the European directive will not end regime competition. Therefore, political and institutional capacities to create market-modifying regulation continue to be of crucial importance.

The European directive is valid indefinitely. In order for it to be transposed into German law, the time limit now included in Germany's posted-workers legislation will have to be removed so that it, too, can become valid indefinitely. However, the government will not be obliged to introduce a statutory minimum wage if the BDA vetoes the continuation of the generally binding character of the construction sector's minimum wage. And the UK government's intention to establish a statutory minimum wage in 1998 or 1999 – which will also be applicable to workers sent to Great Britain – is not related to the directive at all. This change in the British labor law tradition is a direct result of the shift in political power in May 1997 brought about by the parliamentary elections (EIRR 228: 23 f, 281: 11, 282: 12).

4 Conclusion

4.1 The Regulatory Pattern in the Posted Workers Case

The regulatory pattern that developed as a result of the bargaining processes at the European as well as at the national level in different EU member states can be summarized as follows:

1. Both the European directive and the national regulations are based on the established body of international private law regarding conflicts between national laws in transnational contracts, on the freedom of services provision and on the ECJ judgments defining the range of unilateral action restricting market freedoms. Supranational and national re-regulations were built upon this body of competition and labor law in order to close loopholes and clarify crucial concepts, such as internationally enforceable norms of public order, that had not yet been precisely defined.

2. National regulations dealing with the posting of foreign workers are the result of interactions between political factors such as the balance of power between liberal, export-oriented political actors and their defensive, locally oriented

counterparts, the institutional repertoire available to these political actors and the veto-points accessible to them. While national action was embedded into the framework of European law and the regulatory attempt of the European directive on posted workers, it followed its own path in each member state and prepared the political background against which supranational regulation became possible.

3. The European posted workers directive came into being after a long period of intergovernmental deadlock in the Council of Ministers, as soon as unilateral action taken by the nation states had pre-empted the legal and economic effects of European-wide re-regulation. Because the legal base of national measures was not without ambiguity, some member states' governments succeeded in passing the directive as a strategic device to defend their national arrangements against potential legal action by the Court or the Commission. Since the logic of intergovernmental bargaining prevailed almost exclusively, neither the Commission nor the European Parliament could influence the final outcome. They had to adapt their strategies to the situation in the Council. In addition, the directive increases the potential for successful implementation and enforcement of national labor law. As a result, the directive refrains from interfering with the mechanisms of creating binding labor law developed in each member state. It only requires member states to extend certain types of binding provisions to posted workers (if such provisions actually exist in the country under consideration) and offers options flexible enough to maintain national arrangements regarding the sectoral coverage, the list of labor law provisions to be applied or the threshold period. Hence, it can be classified as an "umbrella" regulation which will safeguard national autonomy, but will not put an end to regime competition in the Single European Market.

4.2 The Potential for Social Regulation in the Single European Market

The case study on the posted workers directive and the corresponding national legislation has shown that the potential for market-modifying regulation in the Single European Market by means of supranational regulation is restricted if economically or politically salient issues are at stake. The reason for this lies in the divergence of national arrangements as well as in the difficulties of reaching intergovernmental compromise between member state governments with contradictory preferences. This regulatory deficit at the European level cannot be compensated for by autonomous action by supranational actors or the European Social Dialogue.

However, what can be concluded as the essence of the case is that if there are national options to act, i.e. if the European Court of Justice does not rule them out, member states can pre-empt European-wide re-regulation by adopting unilateral measures. Their character is far from uniform because different institutional arrangements and different results of political bargaining lead to divergent solutions for the same problem. Only in the face of this national background does supranational regulation become feasible – not as "harmonization" of national diversity but as an "umbrella" protecting and reinforcing the national arrangements. Therefore, without European-wide harmonization of social policies, member states' solutions can be renegotiated when shifts in political power occur as a result of increased regime competition. Although one could argue that the extension of domestic labor law to cover all firms active on the national territory effectively ends regime competition, this does not take into account that applying wages and social provision to foreigners can still become an object of political debate. The decision on the introduction of binding labor law provisions and the level of these standards is still a national one. Therefore, regime competition continues as long as political actors interested in access to cheap subcontractors and lower labor costs are able to ask for renegotiation of social standards or abolition of market restrictions.

As we have seen in this case, supranational regulation can serve to protect national autonomy and unilateral market-modifying arrangements from intervention by the ECJ or Commission aimed at promoting market integration. This pattern can be found in other cases as well. The European Works Councils Directive of 1994 and the results of the European Social Dialogue (the directives on parental leave and part-time employment) correspond to this regulatory pattern up to now in that they protect the institutional properties of national social policy regimes and call for decentralized negotiations aimed at implementing the directives' provisions (Streeck 1997). Furthermore, the Council added a Protocol to the Maastricht Treaty and modified the directive on gender equality in occupational social protection in order to interpret and thereby restrict the implications of the ECJ judgment "Barber" which could have resulted in severe fiscal imbalances in company-based pension schemes. However, the pattern of autonomy protection is not necessarily confined to the domain of social policy. Regarding EU competition policy in electricity and postal services, for example, Schmidt (1997) shows that when the Council of Ministers adopted European measures which only partially liberalized these former state monopolies, it was trying to achieve "the lesser evil" compared to more radical deregulation that might have been enforced sooner or later by the Commission with the help of the Court of Justice. Finally, Scharpf (1997) provides evidence for the limitation of negative integration in the new Amsterdam Treaty and its Annexes as far as public services, public broadcasting and public credit institutions are concerned. By means of these clauses,

the Council of Ministers signaled to the Commission and the Court that the principle of market integration should be constrained at a time when the Commission and the Court increasingly refused to intervene against distortions of competition caused by national market restrictions.

Further research is needed to explore, in a systematic way, the conditions under which the protection of national autonomy becomes the main priority of EU policy making as opposed to negative integration or harmonization. Autonomy protection might perhaps embody an emerging regulatory pattern balancing supranational regulatory capacities with national ones, and balancing liberalization of European-wide competition with patterns of social protection. This might represent a pragmatic compromise between the principles of market liberalization and market modification, on the one hand, and between supranationalism and subsidiarity on the other. Negative integration could thus be restricted in the absence of positive integration.

4.3 Some Final Remarks

What about the political implications of the posted workers case? The most important aspect seems to be that re-regulation (i.e. restriction of liberalized services provision in order to stabilize national social policy regimes) depended on ECJ jurisdiction more or less explicitly allowing nation-states to extend their labor law to workers posted from abroad. The fact that unilateral action was not explicitly forbidden was a helpful precondition for national policies to be introduced and the European regulatory initiative to ultimately succeed. However, the European "umbrella" directive had to take into account the diversity of national arrangements that had been introduced in the meantime.

We can turn this into a normative principle. Since substantial market modification seems to be possible only at the national level (if political actors interested in constraining the effects of market integration are in fact able to get what they want), supranational regulation and ECJ jurisdiction should refrain from precluding national action. The most that the EU can offer is supranational regulation and jurisdiction that opens up a variety of national options for market-modifying regimes to be introduced and maintained. Supranational social regulation has to avoid "excessive" negative integration and protect member states' autonomy – and national measures have to take the principles of European law into account. However, European legislation of this kind will leave national social rights exposed to regime competition because their substance remains renegotiable in the national political arena.

Seen from the point of view of a methodologist, this study documents the need for combining theoretical approaches and empirical data collection which focuses on the development at the European level with theories and methods of comparative political analysis. However, since the theoretical knowledge about the horizontal and vertical interactions in the European system of multilevel governance is still far from complete, further research should be conducted in order to explore how national and supranational regulatory regimes interact, thereby inhibiting or promoting, modifying or reinforcing each other.

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