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ABSTRACT

Transforming Europe's Welfare Regimes – Policy Innovation through European Gender Equality Laws in the United Kingdom and Germany

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The dissertation research examines the evolution of EU social and employment policy in regard to gender equality in the labor market and analyzes how EU guidelines of the European Employment Strategy (EES) and EU directives on social policy have different effects on political processes in the United Kingdom and Germany. This study serves as a window on policy-making at the interface between EU and domestic politics. I argue that the number and distribution of institutional veto points in the domestic polity sets strong incentives or disincentives for domestic political actors to Europeanize their strategies under different modes of governance, thereby explaining the variation in the effects of EU law on domestic policy.

Unlike other studies on the influence of EU law on domestic polity, politics and policies that show that the EU either has or does not have an effect, I find that the EU does not have a "single effect" and seek to explain variation in effect in a systematic way. Looking at different modes of governance, particularly EU directives and guidelines, provides a better understanding of the opportunities and limitations of EU law in influencing and shaping domestic politics. My research findings challenge common assumptions about EU directives (hard law) as being more effective in achieving legislative change than EU guidelines (soft law). Secondly, the Europeanization literature typically starts out with assumptions on how *fits* or *misfits* between EU and national legislation impact domestic policy and foster institutional change. My research

proposes a shift towards institutional veto points and an examination of the conditions under which domestic political actors draw on EU legal resources to overcome resistance to national policy reform. I pay particular attention to the strategies (confrontational versus negotiated) domestic political actors employ in different modes of governance and whether they lead to a shift in the domestic balance of power and alter the domestic policy-making process. The advantage of this approach is that it draws attention to the specific ways in which different modes of governance intersect with the polity and policies of member states.

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For Martha Richardt

TABLE OF CONTENTS

List of Tables

List of Figures

Part I. Transforming Europe's Welfare States

1 Introduction

The European Union[1] (EU) has undergone a significant political transformation since the signing of the Treaty of Rome in 1957. Today the EU encompasses twenty-seven member states and is more than a free trade-and monetary zone. While the creation of "a" European welfare state is highly unlikely (Scharpf 2002, Streeck 1996) the EU has gained competencies in both social and employment policies that affect and constrain national governments and produce secondary effects for domestic politics.[2] Stephan Leibfried and Paul Pierson distinguish between European social policies that exert direct pressure for positive integration, i.e. development of uniform standards, direct pressure for negative integration, i.e. policy reform via market comparability requirements, and indirect pressures aiming at the adaptation of national systems (Leibfried & Pierson 1995, Leibfried & Pierson 2000, Wallace et al 2005). In addition, the European employment strategy coordinates employment policies of member states, thereby encouraging policy change and learning along European employment guidelines.

A growing literature on Europeanization investigates how the EU affects politics and policies of member states (Börzel 2000b, Caporaso & Jupille 1999, Caporaso & Jupille 2001, Lopez-Santana 2006, Randaelli 2003, Schmidt 2005). The subject of the dissertation – Transforming Europe's Welfare Regimes - Policy Innovation through European Gender Equality Laws in the United Kingdom and Germany – seeks to contribute to Europeanization literature

[1] In 1993 the European Community (EC) was renamed European Union. Throughout the dissertation the European Union (EU) will be used.

[2] Gourevitch labels this process "second image reversed" Gourevitch P. 1978. The Second Image Reversed: The International Sources of Domestic Politics. *International Organization* 32: 881-911. Theories of European integration have used domestic political systems as explanatory variable. In Europeanization research Member states polity and politics become the dependent variable.

and provide a window on social and employment policy making at the interface between EU and domestic politics.

1.1 European Gender Equality Law and Welfare State Reform

Since the 1970s, the EU has actively promoted gender equality in its social and employment policies (Ellis 1998, Hoskyns 1996, Mazey 1998, Stratigaki 2004). Social policy legislation has been based on Article 119 of the Treaty of Rome (1957)[3], which entitles men and women to equal pay and provided the legal ground for the first European legislation on equal pay and equal treatment in the 1970s. The Single European Act (1987) and the Social Chapter of the Treaty of Maastricht (1992) expanded the scope of European social policy and set conditions for social partner framework directives that promote labor market flexibility and work-life balance. New social rights were created pertaining to part-time work, working time, maternity and parental leave.

In the Treaty of Amsterdam (1997) the EU received competences to coordinate employment policies of member states. Gender equality became a core element of a European strategy to make Europe "the most competitive and dynamic knowledge based economy in the world capable of sustainable economic growth and more and better jobs and greater social cohesion" (European Council 2000). The strategy encourages member states to address unemployment by promoting employability and an inclusive labor market. The focus on employability, meaning the support of workers to gain initial employment, maintain employment and obtain new jobs (Hillage & Pollard 1998) runs counter to more traditional labor market policies that seek to lower unemployment rates by assisting workers to exit the labor market (i.e. early retirement programs or support for care giving), thereby reducing labor supply. The employment policy is based on the assumption that a higher employment rate of both men and

[3] Article 119 EEC was amended in the Treaty of Amsterdam (ToA) and became Article 141 EC in 1997.

women will lead to lower unemployment, as is the case of Scandinavian member states. This strategy led to the establishment of a new European policy field. The new European employment policy makes women's labor market participation and the redesign of social policies in ways that enable both men and women to be employed core concerns of the EU. Padraig Flynn, European Commissioner for Employment and Social Affairs:

> "Employment growth in the EU, the key to our future prosperity, has become hugely dependent on the increased participation of women in the labor market. With demographic trends now unmistakable, the simple fact is that more women are needed for the workforce. Member states must create the conditions that will enable the European economy and the European workplace to benefit fully from the creativity, talents and skills of women and to enable men and women to have greater balance in their working and family lives" (Rapid 1999).

In 2000 member states agreed on the so-called Lisbon targets which set, for instance, an employment rate target for men of 70% and women of 60% of the working population to be achieved by 2010 (Lisbon Council). In 2002 the Barcelona European Council also adopted childcare targets that require Member states to provide 33% of children 0-3 years of age with a childcare place and childcare places for 90% of children age 3 to mandatory school age. In 2007 Vladimír Špidla, EU Commissioner for Employment, Social Affairs and Equal Opportunities said:

> "Women are driving job growth in Europe and are helping us reach our economic targets, but they still face too many barriers to realising their full potential," said. "Out of 8 million jobs created in the EU since 2000, 6 million were filled by women, and 59% of university graduates are now female. But while women are outperforming men in educational achievement and boosting Europe's overall employment rate, they are still underpaid, earning on average 15% less than men for every hour worked." Press Release IP/07/295

Thus, over the past 30 years European social and employment policy has been strongly committed to furthering gender equality in and access to the labor market, making gender equality laws a test case for the "problem solving ability" of the EU[4] and its ability to influence

[4] The problem-solving capability of the EU has been, for instance, discussed in Scharpf Scharpf FW. 1999. *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press and Grande and Jachtenfuchs

and shape core welfare state policies and structures of Member states. *A core question the dissertation addresses is how different kinds of European law affect policies and policy-making of member states.*

This question is particularly pertinent since member states of the European have a variety of welfare state regimes that affect the way gender relations are constructed. Welfare state (or state social) provisions are "interventions by the state in civil society to alter social and market forces but one cannot a priori judge that all state interventions are aimed at, or actually produce, greater equality among citizens (O'Connor et al 1999, 12). The "character of public social provision affects women's material situations, shapes gender relationships, structures political conflict and participation, and contributes to the formation and mobilization of identities and interests" (Orloff 1993, 303-304). The state can be a source of oppression (Pateman 1988) or a political resource for women and other subordinate groups that establishes social and economic rights that enhance their relative position (Hernes 1987, O'Connor 1998, Orloff 1991, Orloff 1993, Orloff 1996, Piven 1985, Skocpol 1992). Within the EU different types of social provisions can be found.

Gosta Esping-Andersen distinguishes three welfare state regimes, namely liberal, social democratic and conservative or "Bismarckian" (Esping-Andersen 1990, Esping-Andersen 1999). These different regime types have different levels to which they support gender equality in the labor market and defamilialization, meaning "the degree to which households' welfare and caring responsibilities are relaxed – either via welfare state provision or via market provision" (Esping-Andersen 1999). Liberal regimes, such as the United Kingdom (UK), reinforce dependence on the market, provide limited government support to enhance women's labor market participation and have a strong reliance on the market for the provision of care. Social

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Grande E, Jachtenfuchs M. 2000. *Wie problemlösungsfähig ist die EU? Regieren im europäischen Mehrebenensystem*. Baden-Baden: Nomos.

democratic welfare regimes, such as Sweden, provide a high degree of de-commodification or protection from market and other risks, the state actively seeks to increase women's labor market participation and defamilialization is supported through publicly financed and publicly provided child care. Conservative welfare state regimes, such as Germany, provide generous protection but maintain status differences; the state actively supports a traditional male breadwinner-female homemaker division of labor and is most resistant to defamilialization (Esping-Andersen 1999, Mahon 2002).

Further research on welfare states regimes adds two additional welfare state regimes. Southern European welfare states are distinctly different from Conservative welfare state regimes and form their own regime type (Ferrera 1996, Leibfried 1993). Southern European welfare states support a traditional male breadwinner-female homemaker division of labor by strongly relying on the family for care giving. Since 2004 Central Eastern European (CEE) states are full members of the EU and form another welfare state regime type (Ferge 2001). CEE states have undergone a transition from a communist command economy that defamilialized care to a capitalist market economy where the defamilialization of care is no longer seen as a state task. In addition, feminist research has pointed to variation in the state-market family relation and "gender logics" across regime types and variation in policy provisions over time (Michel & Mahon 2002, O'Connor et al 1999). This makes a further differentiation within regime types necessary when discussing the gender aspects of policies and institutions within particular member states.

Thus, on the one hand European social and employment policies promote equality and equity in the labor market and the transition towards a dual income model, meaning that both men and women are employed and have equal opportunities in the labor market, and on the other hand member states have their distinct political institutions and policy legacies that structure state-market-family relations. *The dissertation explores how this plays out in the EU.*

How European law affects member states is not only important from the perspective of the EU, particularly its ability to foster European integration but even more so for understanding how the EU can assist member states in addressing current challenges to their social protection systems and employment policies to respond to external and internal challenges. In the 21st century advanced industrialized economies face increased competition in a global information and knowledge-based economy. They are also faced with domestic challenges of a demographic transformation through an aging population coupled with declining fertility rates and insufficient employment rates coupled with high unemployment (Esping-Andersen 2002). To remain competitive European member states need to address these challenges and reform their social protection systems and restructure their employment policies. Each member state, due to different institutional and policy legacies, faces slightly different challenges and there is no one solution that can be applied to aid all member states. Thus, can the EU assist member states in their reforms? More specifically, can sub-state actors, such as women's activists, unions and employers associations, use European gender equality law to influence and shape the restructuring of welfare states and establish social and employment policies that promote a dual income welfare state with equal opportunities in the labor market?

The dissertation seeks to address these theoretically and empirically complex issues by examining three questions in particular. Firstly, how are policy input (EU law) and policy output (national legislation) linked differently in the United Kingdom and Germany? Secondly, under what conditions can domestic actors use European legal resources to overcome welfare state resistance to reform? Thirdly, how have EU legal resources altered the "rules of the game" of policy-making within member states?

The focus of the dissertation is on understanding the process of policy change and how the rules of the game of policy-making have altered in the multi-tiered context of the EU. The analysis of the legislative process centers on the political system, interest based strategies of

actors and the particular ways in which actors draw on European law to influence the policy making process in their particular country. Thus, the dependent variable of this study is the process of policy change. Policies can change through different processes and these processes affect the time and quality of policy change. Understanding the process of policy changes in different modes of governance in different member states is the central goal of this dissertation.

The remainder of the chapter is structured as follows: I will first provide some background on the two particular European modes of governance I am looking at – European hard and soft law. Then, I will discuss the analytical puzzle that has been guiding the research. Afterwards, I outline the theoretical argument and methodological approach for the case studies. I conclude with the structure of the dissertation.

1.2 European Hard and Soft Law

To understand the process of policy change within member states the dissertation focuses on actor strategies within two different modes of governance[5] of the EU – hard and soft law. In the context of the dissertation European hard law refers to EU directives and soft law refers to EU guidelines.

European directives are a core component of the European policy-making and the EU as a regulatory model. Directives are established though joint decisions among member states and must be transposed into their national legal system by whatever the national arrangements are within a member state. Time and quality of implementation varies across countries and from

[5] In a Weberian sense of the state, the state has to successfully claim "the monopoly of the legitimate use of physical force within a given territory" Gerth HH, Mills W. 1946. *From Max Weber: Essays in Sociology*. New York: Oxford University Press and authority is found in a system of command and control. In a system of governance authority no longer rests entirely on a system of government but also on multiple authorities that are not necessarily public and sharing. Thus governance involves the "[f]ormulation and implementation of collectively binding decisions through the participation of state and non-state actors in public/private networks" Mayntz R. 2002. Common Goods and Governance. In *Common Goods, Reinventing European and International Governane*, ed. A Heritier, pp. 15-27. Langham, MD: Rowman & Little. The EU has different modes of governance available, two of which will be examined in the dissertation.

case to case. Directives are legally binding and compliance can be enforced through the European Court of Justice (ECJ). Cases can be referred to the ECJ through infringement procedures initiated by the European Commission based on Article 226 EC (ex. 169 EEC) or by member states based on Article 227 (ex. 170). Private litigants can also directly invoke European law before national courts. National courts or Courts of First Instance (CFIs) can refer the case for preliminary hearings to the ECJ based on Article 234 EC (ex. 177 EEC)[6]. The process, broadly defined, begins with a national court having to decide on a matter that involves EC law and which the national court cannot decide without guidance from the ECJ. Once the question is raised at the ECJ the court ruling interprets primary law and interprets and determines the validity of secondary law. Afterwards, the ECJ sends the case back to the national court. The national court then continues with its proceedings and comes to its own ruling. New case law opens a window of opportunity for domestic actors to demand policy change that brings in line domestic legislation with the case law. Achieving policy change through European hard law can also be referred to *traditional mode of governance*.

European soft law refers to EU guidelines, particularly those established within the European Employment Strategy (EES). These guidelines are not legally binding and are established within and enforced through the Open Method of Coordination (OMC).[7] Fritz Scharpf summarizes four key characteristics of the OMC

> "(1) Policy choices remain at the national level and European legislation is explicitly excluded.
> (2) At the same time, however, national policy choices are defined as matters of common concern, and efforts concentrate on reaching agreement on common objectives and common indicators of achievement.

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[6] The ECJ does not actually decide a case but answers a set of questions posed by the national court. The ECJ response is used by the national court to resolve an issue of EC law, which arose before it.

[7] The OMC was first introduced in Article 98-104 EC of the Treaty of Maastricht (1992) to co-ordinate national economic policies through "broad economic guidelines and recommendations of the Council. The OMC was extended to the area of employment in Articles 125-128 EC of the Treaty of Amsterdam (1997). The Lisbon Summit (2000) further extended the OMC to other areas, such as education, social inclusion. This extension is not based on EC primary law.

> (3) Moreover, governments are willing to present their plans for comparative discussion and to expose their performance to peer review.
> (4) Nevertheless, co-ordination depends on voluntary co-ordination, and there are no formal sanctions against Member Sates whose performance does not match agreed standards" (Scharpf 2002)

The OMC is -- generally speaking -- perceived as "an experimental approach to EU governance based on iterative benchmarking of national progress towards common European objectives and organized mutual learning" (Zeitlin 2005 (forthcoming)). The iterative process relies on horizontal coordination among member states and the sharing of information on national policies. Member states cannot be forced to comply with the guidelines through legal means and the ECJ cannot be invoked to enforce policy change. Member states are however held accountable to guidelines, by for instance, peer review, benchmarking, and recommendations. European guidelines and their respective targets are also referred to as *new mode of governance* (Kilpatrick 2005, Scharpf 2002, Trubek & Trubek 2005). The EES is the most developed example of this *new community method*. EU gender equality legislation has been developed in both hard and soft law.

1.3 Hard versus Soft Law

A significant question for international legal scholars and within the Europeanization literature is whether legally binding hard law is more effective than soft law in achieving policy change. Conventional wisdom assumes that the harder the law -- the higher the degree of obligation, delegation and precision -- the more effective the law will be in achieving actual policy change (Abbott et al 2000, Kahler 2000)[8]. In the particular case of soft law developed

[8] Obligation refers to the level by which states or other actors are bound by a rule or commitment or by a set of rules or commitment (legal binding). The level of precision refers to how unambiguously the rules define the conduct they require, authorize or proscribe. Delegation refers to the degree to which a third party has been granted authority to implement, interpret, apply rules, resolve disputes, possible to make further rules. Abbot and Snidal's conception of hard and soft law is grounded in neoliberal institutionalism or "rational functionalism" which assumes that states establish international law and institutions to further their mutual interests. This perspective has been critiqued by constructivists arguing that law is "a broad phenomenon deeply embedded in the practices, beliefs, and traditions of

within the OMC, Andrew Moravcisk recently argued that it has not yet led to policy change (Moravcsik 2005). Martin Rhodes is also highly skeptical of whether the EES is an effective mode of governance leading to actual policy change (Rhodes 2005). Stijn Smismans points out that the OMC in practice is less "open" in the "sense of assumed increased participation of stakeholders and public scrutiny but merely open ended in its outcomes" (Smismans 2004, 2). Beyond the empirical question of whether or not soft law is capable of achieving policy change a theoretical debate on its desirability has emerged.

For feminists having long seen the EU as a key force in promoting gender equality, the increasing use of soft law is seen as critical because it may foreclose opportunities to pass new hard laws. Soft law is seen as providing less of a reliable framework of action and is perceived as being too weak to forestall a race to the bottom in social policy, especially since market integration is pursued mainly through hard law (Chalmers & Lodge 2003, Joerges & Roedl 2004, Klabbers 1998). Other concerns regarding the increasing use of soft law pertain to its effects on the development of an international legal system since it may "destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose" (Weiler 1998). Overall, hard law is perceived as more capable of achieving policy change, thereby implying that 'one size' fits all or hard law is a better means to achieve policy change across member states.

Proponents of soft law critique hard law as being exclusive, incapable of addressing societal complexity, static and unable to adapt well to changing circumstances and variety of welfare states, and limited in their production of knowledge needed to solve problems advanced industrialized democracies are facing in the 21st century (Zeitlin & Trubek 2003). Soft law

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societies, and shaped by interaction among societies" Finnemore M, Toope SJ. 2001. Alternatives to "Legalization": Richer Views of Law and Politics. *International Organization* 55: 743-58. This makes it important to pay more close attention to the process through which law is created and how obligation is generated. (See also Sikkink, Ellickson and Posner for a constructivist perspective that perceives international law as soft law or social norms).

produced within the context of the OMC has the potential of creating a higher quality of change since the OMC encourages learning among member states and educates actors what reasons are behind certain legislation, thereby promoting normative change (Visser 2005). Despite its controversial character, soft law has increasingly been used in policy issues ranging from fiscal policy to the fight of poverty making it important to obtain empirically grounded understanding of what effects hard and soft laws actually have on policy-making processes within member states.

Since soft law is – generally speaking – weaker than hard law in terms of obligation, precision and delegation the commonly held assumption is that it is less capable of achieving policy change. Given this broad skepticism I anticipated that I would find only significant policy change through hard but not soft law in my empirical research. However, when I studied the process of policy change through European hard and soft law in the UK and Germany I came across the following puzzle.

1.4 Analytical Puzzle

Based on Article 141 EC (ex. 119 EEC) the EU passed an Equal Pay Directive (1975) and an Equal Treatment Directive (1976). The British government perceived its national legislation to be in compliance with European law. The European Commission challenged the governments' response and initiated infringement procedures. Subsequently, the ECJ pointed out areas of non-compliance between EU and national law. The Conservative Thatcher government amended its national law in the 1980s. The way the legislation was amended, however, left national law predominantly intact. Sub-state actors, particularly the Equal Opportunities Commission (EOC) and the Trade Union Congress (TUC), challenged the government's response as being insufficient to fully comply with European law. These actors developed a European litigation strategy, followed through on legal victories achieved at the

ECJ with political campaigns and copy-cat law suits to create domestic pressure for further policy change. The Conservative Thatcher government conceded to these legal and political pressures and further amended national legislation. In the 1990s, new equality legislation was adopted at the EU and domestic actors again used European litigation strategies. In the case of the Parental Leave Directive (1996) TUC litigated and even before the case could reach the ECJ the Labour government under Prime Minster Tony Blair amended the legislation. Over the past 30 years domestic political actors have successfully used European litigation strategies to improve compliance.

When the EU adopted the EES in 1997/1998 activists did not mobilize around the new guidelines on, for instance, equal pay and public childcare. The Labour government's New Deal Program and National Childcare Strategy are, for instance, carried out without reference to the EES and domestic political actors have not used the EES to influence the reform agenda. This finding is in line with commonly held assumptions about hard and soft law. However, in the German case the opposite holds.

The German government also perceived its national laws to be in compliance with the European Equal Pay and Equal Treatment Directives. The European Commission found areas of non-compliance between European and national law and initiated an infringement procedure at the ECJ. As a result of ECJ case law the Christian-Democratic Kohl government amended legislation in the 1980s but – as the Thatcher government – left national law predominantly intact. Private litigants also developed a European litigation strategy. In fact, Germany has the highest litigation rates on workers protection and equal treatment in the EU - followed by the UK (see Chapter 2). However, the nature of the litigation cases and the policy change following from them is distinctly different in the two cases.

Unlike in the UK private litigants actions, by and large, were not backed up by interest groups, such as unions and women's organizations in Germany. In some cases, such as the

Kalanke case, European law was invoked by individuals to strike down legislation that granted preferential treatment in hiring and promotion for women and was seen as a key achievement of German women's activists emphasizing "equality of difference" and positive discrimination on behalf of women.[9] In other cases, such as the Kreil case European law was invoked to open up the German military for women. In 1996 Tanja Kreil applied to the army and was not admitted because of her gender. The Administrative Court of Hanover referred the case to the ECJ that ruled that women could not be excluded from the military.[10] Subsequently, the German government amended the national legislation and admitted women to the military. While this was a clear success for women's interests the litigation was not motivated by or backed by feminist activism. Overall, there was no decisive European litigation from women's associations and unions like in the UK.

The scope of the cases brought before the ECJ is significantly different in the UK and Germany. British cases are broad and touch upon a variety of issues ranging from equal pay, equal treatment, social security, pension, pregnancy, and homosexuals' rights while 80 percent of German cases pertain to indirect discrimination against women and address very specific question of German labor law, such as part-time work, pensions and affirmative action (Tesoka 1999, 2). In addition, achieving broad policy change based on ECJ ruling proved difficult in Germany. Organized opposition to policy change particularly was significant, especially when the state-market relationship and collective bargaining autonomy was affected. In these cases employers and unions mobilized opposition to legislative reform and thought to delay and minimize the effects of policy reforms. In other words, while national legislation was brought into compliance with EU law in both countries, the process has been fragmented and taken

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[9] Kalanke vs. Freie Hansestadt Bremen, C-450/93. The ECJ decided that women cannot be given priority in hiring and promotion. Shortly after the ECJ decided in Marshall vs. Land Nordrhein-Westfalen, C-409/97 that positive discrimination was permissible as long as men were protected against unfair discrimination.

[10] Kreil vs. Bundesrepublik, C-285/98.

significantly longer in Germany than in the UK and, most importantly, has not gone hand-in-hand with an empowerment of women's activists like in the UK. Thus, the UK and German case – while sharing high litigation rates – are distinctly different in terms of what cases are referred to the ECJ, level of interest group support of litigants, and the process through which ECJ rulings are translated into national legislation.

In the area of soft law the government and interest groups both drew on EES guidelines in core labor market reforms, particularly the Job-Aqtiv Act and the so-called Hartz reforms. Guidelines were used by the government to emphasize the need for reforms. Feminist activists within parties and interest groups were able to link the reforms of the unemployment assistance system to a federal commitment to expanding federal funding on childcare. Employer's organizations supported the expansion of a federal commitment to childcare and more broadly to a dual income earner model. Thus, unlike in the case of hard law German women's activists were able to use soft law to shape the way the welfare state was restructured. In addition, employers and unions were willing to engage in the process of drawing up National Action Plans on Employment and use EES guidelines and targets in their lobbying activities around labor market reforms.

The successful use of European hard law leading to policy innovation in the UK and the successful use of European soft law in Germany leads to a twofold puzzle: Why have interest groups in the UK been able to shift the domestic balance of power and achieve significant policy change through mobilizing around hard law whereas the opposite holds in Germany? Why is hard law not always more successful than soft law in achieving policy innovation?

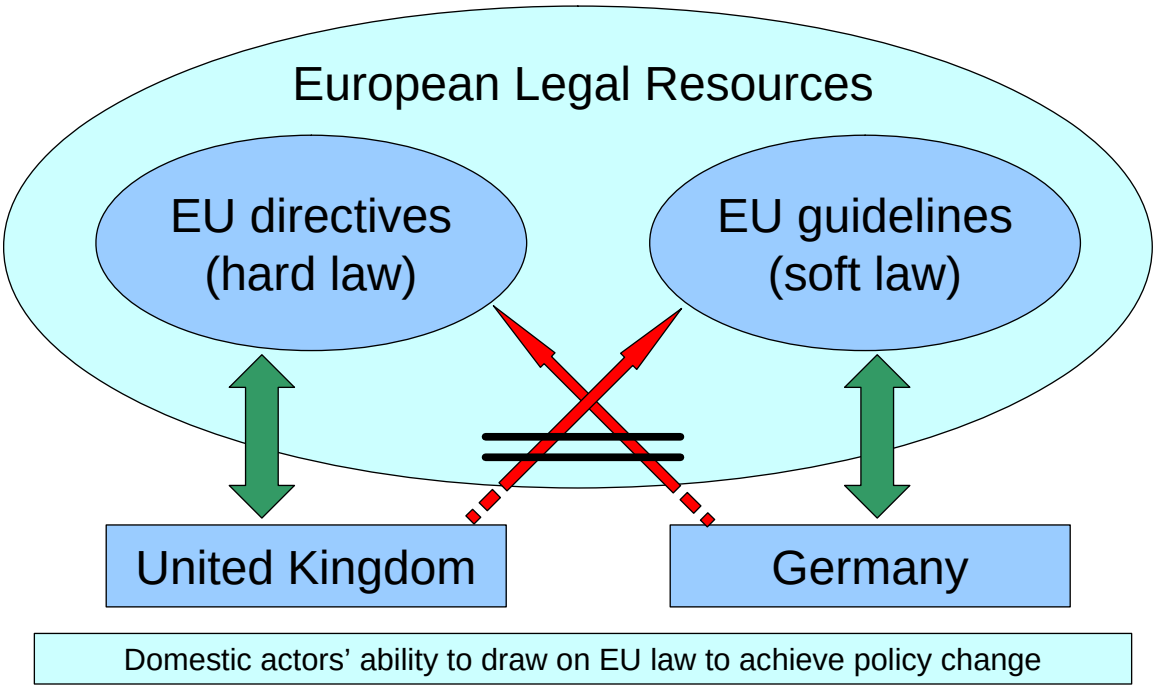

Figure 1: *Interaction between European legal resources, actor strategies and policy change*

1.5 Theories on Europeanization and Domestic Policy Change

To explain the analytical puzzle I examined alternative explanations within the Europeanization literature that seeks to explain variation in implementation and compliance among member states. These core alternative explanations are the following:

1.5.1 Institutional and policy legacies – Goodness of Fit

The Europeanization debate has been strongly influenced by the institutional and policy legacy approach. This approach emphasizes state autonomy and underscores the ability of states to decide the extent to which states comply with European law. National institutions and policy legacies structure the way European law is implemented. Ilona Ostner and Jane Lewis claim that national welfare state regimes and gender orders serve as a "needle's eye" that structure the implementation of EU law.

> "National social policies rest on underlying assumptions about who is the primary and who is the secondary breadwinner or care giver. These assumptions are crystallized in the various institutions that constitute a member state's welfare regime. In the multi-tiered process of EU policy-making, a member state's gender order serves as a filter for both the incorporation of directives into national law and the transformation of the reformed laws into everyday practice" (Ostner & Lewis 1995, 183).

Similarly, scholars of "Varieties of Capitalism" claim that business and governments seek to preserve the competitive advantages of their specific production regime when negotiating European policies (Fioretos 2001). The flip-side of this argument is that member states will only enact EU laws swiftly and comprehensively which coincide with their competitive advantage and resist compliance with others.

Based on these overall considerations of the effects of institutional and policy complementarities the Europeanization literature seeks to further explain variation in compliance and implementation by theorizing the effects of "fit" and "misfit" between European and national institutions and policies. Two different kinds of "goodness of fit" approaches can be found in the Europeanization literature – one focusing on complementarities of European law and national regulation and practices and the other the effects of polity complementarities.

One group of scholars claim that a "goodness of fit" or a complementarity between European law and national regulation and practices leads to faster and more comprehensive implementation while a "misfit" between them causes national resistance to change. Knill and Lenschow (Knill & Lenschow 1998), for instance, argue that when European law "fits" with domestic administrative structures and administrative routines national institutions will be more open to policy change and this creates better conditions for effective implementation. The underlying premise is that European law is confronted with national administrative and policy legacies. If the domestic rules, policy legacy and interest group organization run counter to those of European law resistance to change will occur (Dunia 1999, Dunia & Blithe 1999, Knill & Lenschow 1998). Tanja Börzel states it clearly.

> "It is assumed that implementation problems only occur if there is pressure for adaptation. If an EU policy fits the problem solving approach, policy instruments and policy standards adopted at the national level, there is no reason why the public administration should resist implementation. The EU legislation can be easily absorbed into the existing legal and administrative system. Only if the implementation of an EU policy requires considerable legal and administrative changes imposing economic and political costs on the public administration, implementation failure should be expected" (Börzel 2000a, 225).

Within the parameters of the institutional core of a member state implementation can be improved through, for instance, mobilization of domestic actors "pushing" for reforms (Börzel 2000a, Börzel 2000c) or if the political system has limited veto points, thereby limiting the ability of interest groups to block reforms (Knill & Lenschow 2001). Important is, however, that "misfit" between European law and domestic policies is seen as creating obstacles for compliance and implementation.

Another group of scholars focuses more strongly on "adaptation pressures" for change. If adaptation pressures are high and there is a "goodness of fit" between the opportunities offered by European law and the interest of sub-state actors they have high incentives to Europeanize their strategies and pursue a European litigation strategy. If sub-state actors Europeanize their strategies a shift in the domestic balance of power can occur which in turn can lead to significant institutional and policy changes. The successful use of European legal resources is, however, conditioned on domestic factors such as mediating institutions, access to the courts, political and organizational culture (Caporaso & Jupille 2001).

The "goodness of fit" approach points to the importance of political legacies and institutions for the way European law is implemented within member states, thereby providing a key explanation for variation. The approach has been critiqued from three different perspectives. Firstly, "goodness of fit" is difficult to measure and is not always correlated with level of resistance. In some cases a small misfit may cause large domestic resistance to change (Falkner et al 2002). In other cases a large misfit can increase incentives for sub-state actors to

Europeanize their strategies (Caporaso & Jupille 2001). Secondly, the "goodness of fit" approaches do not sufficiently examine when sub-state actors invoke European law. Lisa Conant (Conant 2002) points out only when sub-state actors anticipate significant payoffs they are willing to dedicate resources and develop a European litigation strategy. Thus, adaptation pressures and a "goodness of fit" between opportunities offered by European law and interests of sub-state actors alone may not be sufficient. Finally, member states' vary in their political institutions and in the political capacity of the political executive to carry out reforms. Markus Haverland, for instance, found in his study of the implementation of the Packaging and Packaging Waste Directive in the UK, Germany and the Netherlands that German legislation required fewer changes than the British legislation but the transposition of the directive took longer in Germany than in the UK. Haverland explains this difference through the higher number of veto points of the German legislative system that allowed those opposing policy change to slow down the transposition. Thus, not the "goodness of fit" per se but the political capacity to carry out legislative reform affects the transposition of European law (Haverland 1999, Haverland 2000)[11] Haverlands study shows that "goodness of fit" – if one can calculate it – cannot predict a specific trajectory in the implementation of the directive alone, making it important to examine the process of implementation and the specific dynamics surrounding it.

The second kind of "goodness of fit" approach draws on the compatibility between the policies of member states' and that of the EU. Vivien Schmidt argues that the policies of a member state affect the ability of a state to influence European integration (bottom-up) and Europeanization (top-down). Schmidt distinguishes between "simple policies" (high

[11]Ian Baily conducted a follow-up study of the implementation of the Packaging and Packaging Waste Directive in the UK and Germany. Baily found that while institutional veto points were important during the transposition phase the fit between national and European procedures and practices mattered in the legal and practical implementation phase Bailey I. 2003. National Adaptation to European Integration: Institutional Vetoes and Goodness-of-Fit. *Journal of European Public Policy* 9: 791-811. In other words, while the transposition of the directive was faster in the UK than in Germany we cannot conclude that fast transposition leads to comprehensive implementation. This finding points to the complexity of policy change that does not necessarily end with the change of national law.

concentration of power and authority in unitary institutional structures and restricted interest group participation) and “compound policies” (diffused power and authority through federal or regionalized institutionalized structures and corporatism) (Schmidt 2005, 763).

> “For simple polities the Europeanization of national governing practices has diffused their traditional concentration of power in the executive through the EU’s quasi-federal levels and centers of governance. It has opened up their traditionally limited interest access in policy formulation through semi-pluralist EU level processes. It has diminished their flexibility in policy implementation through EU demands for regulatory uniformity. And it has subordinated their polarized, majoritarian politics to the EU’s consensus-oriented, interest-based politics. For more compound polities, by contrast, Europeanization has mainly added to their traditional diffusion of power, further opened up interest access while allowing corporatist implementation to stand, reinforce consensus-oriented (albeit partisan) politics” (Schmidt 2005, 763)

In terms of implementation of policies it means that a simple polity – like the UK – has a low institutional fit with the EU which makes it harder to adapt practices to the EU but has advantages in terms of influencing European integration and makes it easier to comply with the EU. A compound polity – like Germany – has a high institutional fit with the EU which makes it easier to adapt its practices to the EU but makes it harder both in terms of projecting nation preferences in negations over European policies and in terms of complying with European policies (Schmidt 2005, 767). Thus, both compound and simple polities have their specific challenges in how to adapt to EU process.

Because the argument is made on a macro-level it is not clear how these institutional differences play out in a concrete case and how variation across cases within a policy area or across policy areas can be explained. In addition, while this observation holds for European hard law in the cases I studied it does not account for a reverse effect in regard to European soft law. In the case of soft law the compound polity – Germany - opens up significantly more to the EU than the simple polity – UK. Looking at the polity without paying sufficient attention to the political process of policy change runs the risk of being overtly deterministic.

1.5.2 Interest group mobilization

In “Contained Justice” Lisa Conant examines the politics of legal enforcement of European primary and secondary law through ECJ rulings. Justice is contained because of the ability of national administrations to obey individual ECJ judgments and simultaneously ignore the implications that unwelcome ECJ interpretation has for the universe of parallel situation. To achieve broader policy change litigation and political mobilization on the local and national level is important. Based on Mancur Olson’s classical work “Logic of Collective Action”, Conant explains variation in policy responses as a function of variation in aggregation of interests and institutional support, which determine patterns of legal and political mobilization (Conant 2002, 33). Conant argues that the implementation of European case law runs most smoothly when the benefits are distributed narrowly (generating high support from groups benefiting from its implementation) and the costs are distributed most widely (avoiding a counter mobilization). The interest group approach points to a key problem of the above discussed “goodness of fit” approach which does not pay sufficient attention to when sub-state actors actually develop a European litigation strategy. Only when litigants anticipate big payoffs they will actually dedicate the resources to do so. Thus, a fit between opportunities offered by the European legal system and sub-state actors’ interest alone is not sufficient.

In an earlier work, Conant argues that variation in political structures inspire different aggregate levels of interest organization, which in turn determine the responsiveness of domestic actors to Europeanization law in each country (Conant 2001). Conant argues that

> “German courts will face the greatest bottom-up societal pressure to participate in the European legal system. Conversely, British and French political structure should both be more resistant to Europeanization, which demands a politicized form of legal activism that is not well established in either country. … German courts should participate the most frequently in the European legal system, while French and British courts should participate less often” (Conant 2001, 105).

However, in the case of gender equality litigation, litigation shows that British courts referred a similarly high number of cases to the ECJ like German courts and only French courts did not (see, for instance, (Caporaso & Jupille 2001, Tesoka 1999)).

While I agree with Conant that interest mobilization is important for explaining variation in the implementation of European law the approach has several limitations. Firstly, Conant perceives political mobilization as a function of distribution and magnitude of costs and benefits associated with a broader application of ECJ case law. Conant ignores normative reasons for activists to mobilize to achieve even small changes that have symbolic relevance for them. Secondly, Conant does not fully take into consideration how political structures impact decisions and strategies of actors. While it is correct, for instance, that Germany and the EU share institutional features – since both have federal institutional characteristics – and German courts are relatively more inclined to referring cases to the ECJ than other domestic courts, litigants are faced with a decentralized political system that makes the follow-through on legal victories challenging. Since this research project is concerned with the process of policy change at the domestic level it is important to not only examine how the political system affects litigation strategies but also how it affects the follow-through on them. Finally, looking at interest group characteristics and their power potential alone cannot explain why interest groups are not able to Europeanize their strategies equally well across different kinds of European law. In the case of the UK, for instance, women's activists were able to pursue successful litigation strategies around European directives (hard law) and use ECJ case to overcome resistance by the political executive to fully comply with European law. They were not able to integrate European soft law equally well into their strategies. Thus, while the characteristics of the interest groups remain the same their ability to draw on European legal resource can vary significantly depending on the kind of enforcement mechanisms the law relies on. In other words, the

potential payoffs and follow-through costs vary across different political systems and across types of law.

1.5.3 Different legal systems

Differences in legal cultures can be used to explain differences in the opportunities of interest groups to Europeanize their strategies, particularly in the case of legally binding EU law (de Witte 1998, Mattli & Slaughter 1998). The UK follows common law Germany a civil law tradition. In the UK courts have been relatively independent from the national executive and the precedent-setting approach of the EU matches that of the British common law approach. This makes it on the one hand easier for the political executive to accept ECJ case law but it makes it more difficult for litigants to find courts willing to refer cases to the ECJ since this infringes on the competencies of domestic courts. In Germany, courts – particularly the Constitutional Court (Bundesverfassungsgericht) – are even more independent than British courts. While there are constitutional issues relating to the precedence of European law over German law litigants can more easily find judges willing to refer cases to the ECJ than in the UK. The European legal system adds only another layer to the German legal system, which increases the willingness of judges to refer cases to the ECJ. Germany has the overall highest referral rates to the ECJ in the EU (Stone Sweet 2000).

The legal culture argument does not map neatly onto the litigation rates and references to the ECJ in regard to gender equality issues. While the overall referral rates of the UK are significantly lower than those of Germany, this is not the case in regard to gender equality. From 1961 to 1999 the UK had 31 preliminary ruling cases on gender equality and Germany 37 (Tesoka 1999). In the UK women's groups did not immediately find judges receptive to their cases and only by filing cases at newly established Industrial Tribunals they were able to get cases referred to the ECJ (Alter & Vargas 2000). In addition, Germany had a higher number of

litigation cases than the UK (Stone Sweet & Brunell 1998, Tesoka 1999) but these cases were in a fairly narrow area and much less geared towards achieving broad policy changes.

Thus, legal culture shapes the overall opportunities for litigation but it does not determine actual litigation strategies in a particular policy area. Referral rates are only one part of the larger process of policy change and say little about whether or not a litigation strategy actually leads to policy change. Since European soft law cannot be enforced legally this approach cannot be applied to this specific research question that involves both hard and soft law.

1.5.4 Party preferences

Advocates of the party preference hypothesis explain variations in implementation in terms of government position on a particular European law (Treib 2004). On a more general level the party preference hypothesis claims that a left wing or pro-European government is more likely to comply with EU. While it is certainly the case that a political executive in favor of a particular European law is conducive for a timely and comprehensive implementation it does not sufficiently take into consideration how constitutional rules and electoral results shape the ability of governments to translate their policy preferences into actual policies. In addition, if the governing party does not take sufficient steps to comply with European law sub-state actors can challenge the governments' decision. In the German case, for instance, the Christian-Democratic Liberal government (1982-1998) opposed a comprehensive implementation of European gender equality legislation. The German Equal Rights Act 1980s was gradually overturned by ECJ case law and German courts started applying this case law in national labor disputes rather than following the German anti-discrimination law. In 1994 the government amended the law to bring it into compliance with European law. These dynamics cannot be observed if the analysis mainly focuses on the preferences of parties and does not take into consideration how the domestic balance of power can be shifted through new European legal

resources. Finally, in the UK case private litigants used European litigation strategies independent of what party (Labour or Conservative) was in power and used ECJ case law to achieve policy reforms that went above and beyond the government's initial policy reforms. Thus, party preference can serve as a proxy for how much resistance can be anticipated in the implementation of European law but it does not determine the final policy outcome.

1.5.5 Political Culture of Compliance

Gerda Falkner and co-authors claim that the overall political culture of law or rule obedience shapes implementation patterns. Falkner distinguishes between "three worlds of compliance", the world of law observance (i.e. Sweden), the world of neglect (i.e. France) and the world of domestic politics (i.e. UK, Germany) (Falkner et al 2005). Since both the UK and Germany fall into the "world of domestic politics" the approach is too broad to explain the mechanisms leading to policy change across cases and countries and variation in compliance in specific areas.

What is missing?

While each individual approach provides insights into the causes of variation neither can explain variation in the use of hard and soft law by domestic actors in the UK and Germany. In addition, *these approaches focus on interests rather than processes*. Looking at the legislative process and how European law features in this process is important for understanding the effects of Europeanization. What is needed is a better understanding of the specific ways in which policy input (EU directive or EU guideline) and a specific policy output (national legislation) are linked differently in different political systems – i.e. the policy process that leads to policy change.

1.6 Theoretical Argument

New institutionalism has provided a rich theoretical analysis of why national policy trajectories remain distinctive over time in the midst of pressures to change or even converge (Hall 1986, Shonfield 1969, Zysman 1983). New historical institutionalist research has thought to explain these distinctive paths by focusing on critical junctures (mostly about institutional innovation) and feedback effects (mostly about institutional reproduction) (Pierson 1993, Pierson 2004). When studying institutional evolution it is striking how little and how much institutions have changed over time (Thelen 2000, 211). Kathleen Thelen and Wolfgang Streeck are calling for a study of institutional reproduction pays attention to institutional transformation through displacement, layering, conversion, drift or exhaustion and that cannot be acquitted with critical junctures or feedback effects (Streeck & Thelen 2005, Thelen 2003). This new line of research overcomes the commonly drawn distinction between the analysis of institutional creation and institutional reproduction and opens new ways to think about institutional change. Thus far, this research examines institutional evolution in comparative case studies without taking the supranational and international realm into consideration. Since European law intersects with the political and legal systems of member states its influence must be taken more strongly into consideration when examining how institutions and policies of member states evolve.

1.6.1 Veto Points and Actor Strategies

To get a better understanding of how policies and institutions of welfare states evolve in the context a multi-tiered European Union it is important to understand differences in the capacity of governments to promote policy change and control policy outcomes and how this changes in the context of the EU.

Traditional institutionalism explains differences in the political capacity of governments by linking a given set of political institutions to a particular policy result. New institutionalist research has shown that policy outcomes cannot be simply read off from political institutions.[12] New historical institutionalist research breaks with "correlational thinking" that links a given set of political institutions to a particular policy outcome and acknowledges that "institutions constrain and refract politics but they are never the sole "cause" of outcomes" (Thelen & Steinmo 1992, 3). This makes it important to examine actor strategies within a specific political configuration. New institutionalism is thoroughly grounded within comparative research and observes the relationship between institutions, actor strategies and policy outcomes within and across states. Since European social and employment policy intersects with domestic policy-making the theoretical framework must be opened up to incorporate the new opportunities and constraints of the multi-tiered system of the EU. In other words, we need to look at the dynamic relationship between European law, domestic legislative processes and actor strategies to understand how European law is incorporated into national policies.

Of central importance for understanding the process of policy change are institutional veto points and actor strategies evolving around them. Institutional veto points are points of strategic uncertainty that are produced by constitutional rules and electoral results and represent areas of institutional vulnerability where a mobilization of opposition can thwart a policy reform (Immergut 1992b).[13]

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[12] Whereas "old" institutionalism presumed that functions follow form (Lowi) and neglected political actors, new institutionalism draws the attention to processes over time and takes into consideration political actors. An overview over different types of institutionalisms can be found in, for instance, Hall P, Taylor R. 1996. Political Science and the Three New Institutionalisms. *Political Studies* 44: 936-57, Immergut EM. 1998. The Theoretical Core of the New Institutionalism. *Politics and Society* 26: 5-34, Koelble T. 1995. The New Institutionalism in Political Science and Sociology. *Comparative Politics* 27: 231-43, Thelen K. 1999. Historical Institutionalism and Comparative Politics. *Annual Review of Political Science* 2: 369-404, Thelen K, Steinmo S. 1992. Historical Institutionalism in Comparative Politics. In *Structuring Politics*, ed. S Steinmo, K Thelen, F Longstreth, pp. 1-32. Cambridge: Cambridge University Press.

[13] For Immergut veto points "are not physical entities but points of strategic uncertainty where decisions may be overturned; even a small shift in electoral results or constitutional provisions may change the location and strategic

> "Constitutional rules and electoral results set distinct limits on the ability of executive governments to introduce reforms. These barriers, in turn, served as useful tools for groups that wished to block legislation or are willing to threaten to stop the process unless their demands were met" (Immergut 1992b, 83).

While institutional veto points are fairly stable in the political configuration, they, nevertheless, are not permanent fixtures and it is important to locate veto points by examining the institutional configuration and the action and strategies around them. Electoral outcomes can, for instance, remove veto point in a bicameral system or the government can reach out to the opposition party to negotiate a reform compromise across party lines to overcome a veto point. Because constitutional rules vary across states some states have a higher number of potential veto points than others.

Immergut makes an important distinction between actors' preferences and institutional conditions. "The actors assessed their goals, interests, and desires independently of the institutions; the institutions affect only the strategic opportunities for achieving these objectives" (Immergut 1992a, 231). Consequently, it is necessary to examine interest group influence in the context of a particular political system and within a particular political decision making process.

> "Institutional configurations … give different interests differential chances of attaining favorable policy outcomes. Because interest groups can anticipate these results, however, the institutional effects are important not just for the final policy outcome, but for interest group behavior during the entire process. The willingness of interest groups to make concessions early on or to stand their ground depends upon their assessment of the veto opportunities. If there is no chance of veto, they may as well cooperate. On the other hand, if they can veto – or uncertainties in the process make a veto likely – they may as well insist that their demands be met, and they may in fact escalate their demands" (Immergut 1992a, 29).

Immergut points to the strategic aspects of interest group negotiations. Interest groups do not hold one single demand throughout the bargaining over a policy outcome but rather adjust their

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importance of such veto points" Immergut EM. 1998. The Theoretical Core of the New Institutionalism. *Politics and Society* 26: 5-34.

strategies and demands in the legislative process and in the context of a particular institutional configuration.

Immergut's veto point approach is significantly different from that of George Tsebelis veto player approach. Tsebelis defines veto players as "individuals or collective actors whose agreement is necessary for a change of the status quo" (Tsebelis 2002). A veto player can be an individual (such as the US President) or a collective veto player (such as a bicameral system). The power resource of a veto player can stem from an institution (such as a Constitutional Court) or from the political game (such as a coalition government). "Policy stability increases in general with the number of veto players and with their distance" (Tsebelis 2002, 37). In contrast to Immergut who locates veto points inductively and examines the dynamic interaction between constitutional rules, electoral outcomes and actor strategies (process) Tsebelis determines veto players deductively by looking at the formal institutions of states and focuses on policy stability/change (outcome).

This study uses Immergut's veto point approach to explain patterns of welfare state reform in the multi-tiered context of the EU. Using Immergut's veto point approach allows me to focus on the legislative process rather than policy stability or change. Immergut's veto point approach has been previously used to explain patterns of welfare state expansion (Huber et al 1993, Immergut 1992b) and welfare state retrenchment (Bonoli 2000, Bonoli 2001). Europeanization research has well documented that a polity with a high number of veto points, such as Germany tends to take more incremental reforms and take longer to comply with European law than a polity with few veto points (Haverland 1999, Haverland 2000, Schmidt 2005). However, what is less well understood is the process of policy change given new European legal resources and opportunities. In other words, how does the political system influence not only how much change is possible and what time it takes but also the strategies of actors' vis-à-vis European legal resources?

1.6.2 The Argument in Brief

The political system of member states and the interest group representation within them is important for how European hard and soft law is initially implemented and how European legal resources can be used to exert further pressure on governments to amend legislation. Veto points of the political system do not only influence how much change is possible (and the time required) but also influences the strategies and actions interest groups deem feasible in different modes of governments.

Following Immergut's use of veto points I argue *that veto points of member states influence actor's strategies and shape the decision-making process of when and how to integrate different kinds of European legal resources. Veto points set incentives or disincentives for interest groups to draw on EU resources – developing either formal strategies around EU hard law involving litigation or informal strategies around European soft law involving OMC tools.*

In a *polity with few veto points*, power is highly centralized and interest groups have limited access and leverage in the policy-making process. European hard law with its opportunity to litigate can prove a valuable tool for previously marginalized sub-state actors to enhance their influence on policy-making. European soft law does not allow litigation and interest groups cannot force a strong political executive to grant them more access to the policy-making process. Thus, sub-state actors have less incentive to mobilize around soft law than hard law.[14] *A litigation based strategy leading to enforced policy change is the preferred strategy*.

In a polity with *many veto points*, power is decentralized and interest groups have more opportunities to influence policy-making. The access and leverage to policy-making can even be

[14] (The exception would be if the government voluntarily decided to open up the domestic OMC process to interest groups and integrate their deliberations into account in its policy-making).

enhanced when institutions of democratic corporatism are present. European hard law with its opportunity to litigate can put new issues onto the policy-making agenda. In a polity with a weak political executive and a large number of veto points achieving policy change based on ECJ case law can be challenging, particularly when opposition to a particular policy reform mobilizes around veto points. European soft law promotes negotiated policy change without legal enforcement mechanism. In a polity with many veto points negotiation based strategies are often used by the political executive to forge a policy consensus across party lines and across various levels of government. Here, soft law can be more easily integrated in *consensus driven policy reform* processes and used as a tool by sub-state actors to affect the shape of policy outcome.

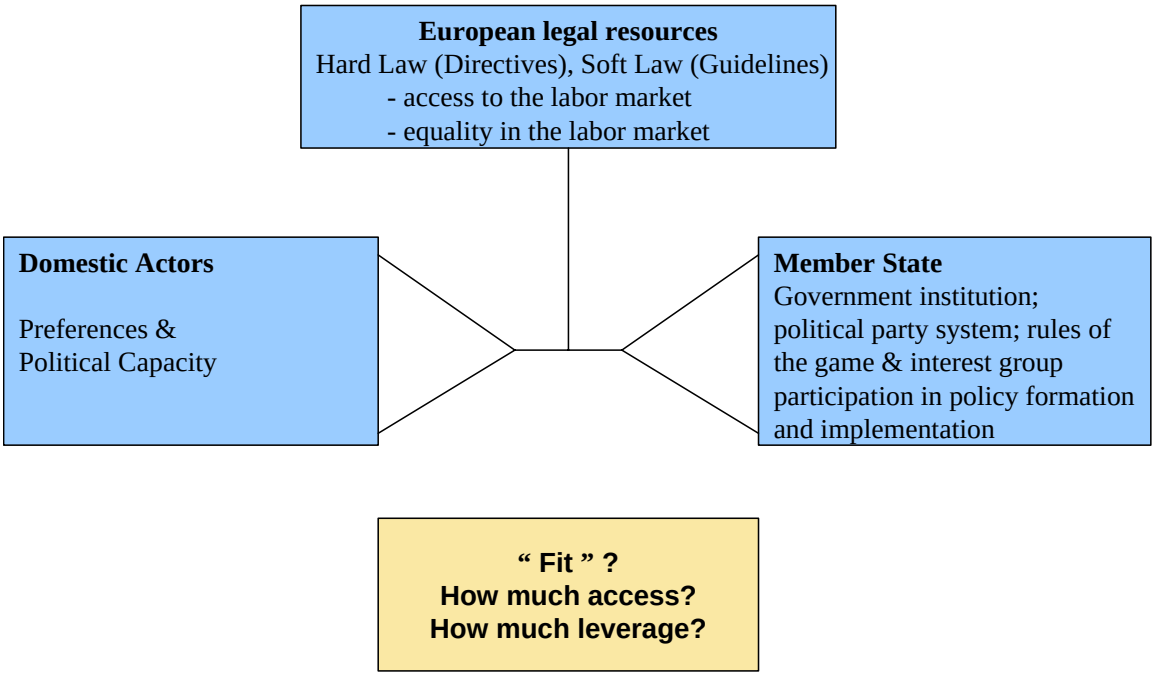

Figure 2: *Integration of European legal resources in member states*

The decision of sub-state actors to incorporate European law is not solely determined by how “hard” the law is and its ability to achieve policy change in theory. In other words, for sub-

state actors to successfully draw on European legal resources it is less important how "hard" the European law is or the "goodness of fit" between European and domestic regulation and practices, but instead on the "fit" between the European mode of governance, domestic institutions and the interest group preferences and resources.

Hard law promotes a *confrontation strategy*, meaning that sub-state actors can use legal means to support their claims and enhance their access to policy formulation while soft law promotes a *negotiated and consensus driven strategy*, meaning that sub-state actors can only draw on guidelines, targets and recommendations in negotiations with state actors to support their claims. In polities with few veto points sub-state actors, particularly marginalized actors, can draw on hard law to increase their access to the policy formulation and implementation process. In policies with many veto points and especially those that have institutions of democratic corporatism, consensus driven strategies can be more easily integrated in negotiations with the government over the direction of policy reforms and used in guiding the implementation of these policies.

1.6.3 The role of veto points in the UK and Germany

In the United Kingdom the political executive counts on decisions being routinely confirmed by the parliament because of a secure parliamentary majority. In a polity with a low number of veto points and a high capacity of the political executive to pass reforms, interest groups find hard law a useful tool to extend their access and leverage in the legislative process. Key sub-state actors, particularly the EOC and TUC can align their preferences with European law. These sub-state actors can develop a European litigation strategy. When ECJ case law is established, interest groups can organize follow-through campaigns and place copy-cat law suits to pressurize the government into amending legislation. Once the political executive concedes to the pressure there is by and large no veto point in the legislative process where an

opponent to the reform can thwart it. Through the use of European hard law, women's activists have been able to introduce a fusion of judicial and political style policy-making in the UK, shift the domestic balance of power and achieve policy innovation through a confrontational strategy. Interest groups have used European litigation strategies across directives and independent of the party in power. Interest groups have not been able to integrate EES guidelines into their strategies because they could not develop a confrontational strategy around non-legally binding soft law. The government itself also has low incentives to draw on the EES in policy reforms since it operates in a polity with a high power concentration and the political executive also has a high reform capacity.

In the German case the political executive routinely has to seek compromises with opposition parties and federal states to pass legislation. In the case of European directives these veto points in the legislative process present opportunities for opposition to thwart a policy reform and to minimize the effect of ECJ case law. In addition, through institutions of democratic corporatism that allows particularly employers associations and unions' access to the legislative process they can influence policy making without having to engage in a costly and potentially risky European litigation strategy. In other words, while the British TUC uses a European litigation strategy to influence policy reform the German DGB does not. Nevertheless, German courts refer cases frequently to the ECJ to evaluate specific issues private litigants raise. The follow through on these legal victories can however be challenging. The default line for opposition against significant policy change based on ECJ case law is by and large a question of whether or not the state-market relationship and collective bargaining autonomy is affected. In the Kreil case, for instance, the ECJ decided that women could not be excluded from the German military. Here, the government responded relatively quickly with an amendment of the German law and permitted women to join the military. In the case of equal treatment, however, employers and unions have mobilized against comprehensive policy change and full compliance

with European law took 21 years. One reason why this process took very long and still left many issues unresolved is that opposition against a particular policy reform can develop strategies around veto points within the legislative process to block reforms.

In a polity with several veto points and democratic corporatism features soft law can be a useful tool for the government to forge a political consensus and for interest groups to influence the content and direction of the policy reform. Through the integration of soft law the political executive can enhance its reform capacity since it can use soft law to overcome a veto point in the legislative process. This creates a window of opportunity for interest groups to also draw on soft law to influence the policy reform and to add new elements to the reform package.

1.7 Research Design

I develop a three-step causal analytical approach to examine the policy-making process in member states within the context of two different kinds of EU law. In the first step I describe the evolution of European social and employment legislation that member states need to incorporate. In the second step I turn to the case studies. Here, we need to first analyze the institutional framework in which action takes place. The aim is to identify the rules and regulations set up by the Constitution and informal practices guiding policy-making. In addition, institutions pertaining to the labor market are taken into consideration since they are directly affected by European social and employment law. In a third step the actions and strategies of actors within the rules laid out by the political system are examined within the decision making process. Since I am examining the implementation of two different kinds of European law it is essential to analyze how actor strategies vary across modes of governance. I will discuss these steps in more detail below:

Step 1: Europeanization

Through European integration the EU has required rights in the area of social and employment policy. Europeanization is a process by which member states have to adjust their domestic norms, rules and procedures to be in compliance with European ones. To study this process we need to first understand the evolution of European laws. This project does not seek to explain why European integration has occurred, why certain laws have been passed and other failed to pass or why a specific issue has been regulated within hard or soft law or both. However, the evolution of gender equality law within European social and employment law needs to be understood before their implementation can be examined. Comparative research has shown that state and social structures are not stable over time.

> "For states and social structures are themselves transformed over time. And so are the goals and capacities of politically active groups, in part because of ongoing transformations of political and social structures, and in part because of the effects of earlier state policies on subsequent political struggles and debates" (Weir, Orloff and Skocpol 1988, 17).

The EU presents dynamic policy-making environment, which has continuously advanced its competencies on social and employment policy making in regard to equal opportunities. Once the key developments on the European level are understood the use of European legal resources by sub-state actors can be analyzed. Chapter 2 provides this background information on social policy (1957-2007) and Chapter 3 discusses the evolution of employment policy (1992-2007).

Step 2: Political institutions and practices governing policy-making

Once European laws are established they need to be implemented which means that one set of institutions – European rules, regulations, norms – has to interact with varying sets of institutions of member states. National policy outcome is a result of two factors, preferences of actors and the prevailing institutions governing the legislative process. While preferences can vary, institutions are more stable. In the second step, I describe the political system and locate where veto points can emerge through either constitutional rules (institutional veto points) or as

a result of electoral outcomes (temporal veto points). Once potential veto points are located I turn to the specific policy-making process.[15]

Step 3: Policy-Making Process

The policy making process varies across countries and cases. In each individual case, I examine (1) the initial national legislation (2) the initial government response and whether or not it was challenged by interest groups and (3) in cases where interest groups have mobilized, if they have followed through and achieved further legislative change.

Phase 1: Initial National Legislation

European hard and soft laws follow different modes of governance and initiate different patterns in government response. European hard law, i.e. directives, requires governments to bring their national law in compliance with European law. In the case of European hard law I will outline how a member state transposes the directive into national law and when and how compliance with European law is achieved. European soft law, i.e. EES guidelines, requires governments to participate in horizontal coordination mechanisms among member states and amend their national policies in line with European guidelines. In the case of European soft law I will describe how the government draws up National Action Plans (NAPs) on employment and when and how EES guidelines are integrated into labor market reforms. In both hard and soft law sub-state actors can draw on European legal resources to influence and shape the initial government response.

Phase 2: Challenge Phase

Member states' legislative response is not necessarily the final policy response to European law. In the case of European directives the European Commission can initiate an

[15] While the "goodness of fit" literature seeks to establish the degree of adaptation pressure – i.e. how compatible are European and national institutions – this project is not concerned about how much change is necessary or how high the adaptation pressure is but rather in the process by which state and sub-state actors are adapting domestic legislation and institutions to the European laws, regulations and norms.

infringement procedure, thereby increasing pressure from above to adapt. Sub-state actors can also develop a European litigation strategy, thereby increasing pressure from below to adapt. To develop an European litigation strategy sub-state actors must know of a European law or a favorable ECJ interpretation of the law that they can draw on, refer to it in national court cases and find a national court that is receptive to their ideas and willing to either refer the case to the ECJ or use a ECJ legal interpretation instead of the national policy. This, by itself, can be a challenging endeavor (Alter & Vargas 2000).

European soft law on employment cannot be enforced legally. However, member states may face “horizontal pressures” from other member states in the form of “recommendations” that are made public in annual Joint Employment Reports. Recommendations create peer pressure and use naming and shaming techniques to promote policy change across member states. Sub-state actors may also draw on soft law guidelines, recommendations and knowledge produced in the OMC process to put pressure on governments to pursue reforms and to influence the outcome of policy reforms.

Thus in both cases, the initial government response to European law can potentially be reexamined and challenged. This is, however, not necessarily the case and it has to be closely examined when sub-state actors decide to Europeanize their strategies, what their motivation for doing so is and how the political system effects their decision. In the case of hard law the ECJ can serve as a focal point of action and case law can be used to achieve broad policy change. In the regard to non-legally binding soft law, the OMC process and the iterative process of reviewing national employment policies can serve as a focal point for action to achieve broad policy change. Basically, sub-state actors can use guidelines, targets and recommendations as a catalyst for putting the issue on the national policy making agenda and demanding policy change in line with European guidelines.

Phase 3: Follow-Through

If sub-state actors challenge national legislation they need to follow through on their initiative to actually achieve broader policy change. In the case of hard law they need to follow through on legal victories. To put it differently, having achieved a legal victory does not necessary lead to broad policy change. Sub-state actors may have to file copy-cat cases to increase the pressure on governments to amend national legislation in line with case law or organize political campaigns to make the case law known to the general public and put it onto the policy making agenda. In regard to soft law they may have to reiterate specific points made within the OMC process to achieve further policy change. European targets and recommendations examples may be used to reiterate the importance of reforms and comparisons maybe drawn with other member states how they have gone about meeting European guidelines. Thus, in the case of soft law follow through is not an attempt to achieve full compliance – like in the case of hard law – but a process by which a specific issue is kept on the policy agenda and structural reforms in line with European guidelines is promoted.

The diagram below illustrates the Europeanization process I am examining.

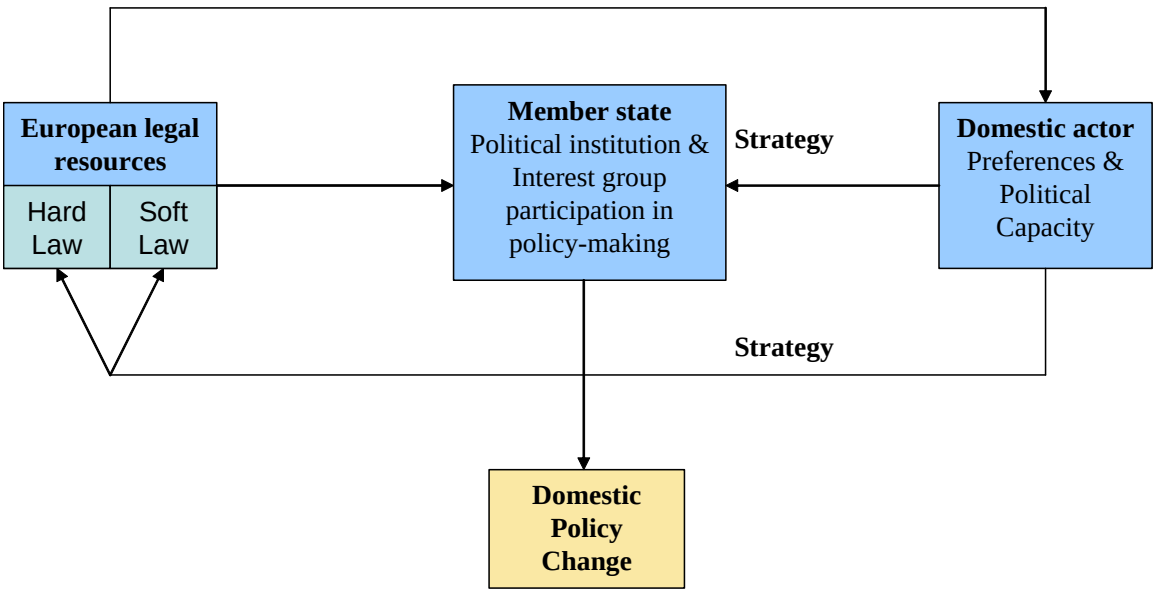

Figure 3: *Domestic actor strategies for policy change*

1.8 Case selection

The case studies focus on the implementation of European law in the UK and Germany from 1975 to 2005. I selected the UK and Germany because they constitute "most different" cases on a number three important dimensions: political systems, welfare states, organization of women's interests.

First, the UK and Germany represent most different cases in terms of the political system and interest group participation in the formulation and implementation of policies. The UK has a high concentration of power and authority in a unitary institutional structure. Within this political system interest groups have limited access to policy making. The political executive has a monopoly on policy formulation and frequently integrates interest groups in the implementation of its policies. In Germany power and authority is diffused through federal and regionalized institutional structures. Interest groups, particularly labor and employers are given preferential access to policy formulation and implementation through institutions of democratic corporatism (Lehmbruch 1977, Schmitter 1974). The UK and Germany also differ significantly in terms of electoral systems. The UK has a majoritarian representation system, which tends to polarize voting through its First-Past the Post System with two major parties, the Conservative Party and the Labour Party. Germany has a proportional representation system, which promotes coalition governments and a strong Upper House (Bundesrat) where regional interests are represented.[16] Looking at these two cases allows me to examine how the rules laid

[16] Looking purely at the political structure the UK could be grouped with countries such as France and Greece while Germany could be grouped with countries such as Italy and Belgium. Intermediary cases would be the Netherlands and Sweden.

out by the political system have influenced the strategies of the interest groups and the process of policy change based on European law.

Secondly, the UK and Germany have very different welfare states. The UK has a liberal welfare state and Germany a conservative welfare state. Within these different welfare state trajectories a relatively strong male breadwinner-female homemaker divide has been sustained until the 1990s. A male breadwinner-female homemaker in an ideal type of welfare state is one where "married women (are) excluded from the labour market, firmly subordinated to their husbands for the purposes of social security entitlements and tax, and expected to undertake the work of caring (for children and other dependents) at home without public support (Lewis 1992, 162). While social-democratic welfare state regimes, such as Sweden and Denmark, made a transition to a dual income model in the 1970s, the political executive in both Germany and the UK has only begun to dismantle the male breadwinner welfare state legacy more actively in the 1990s (Bleses & Seleib-Kaiser 2004, Gottschall & Bird 2003, Lewis 1997, Lewis 2002, Lewis 2006), Independently from more recent developments, the UK and Germany remain laggards in achieving gender equality in the labor market, particularly when compared with Nordic states. In 2000, for instance, the UK and Germany had the highest gender pay gap in the EU with 21 percent difference.[17] The public provision of childcare for children under the age of three is also low with 10.8 percent of children in the UK and 7 percent of children in Germany having a childcare place. Thus, in both member states women's activists have incentives to draw on European law to achieve policy change.

Finally, the UK and Germany vary significantly in the way women's interests are organized, what preferences and political capacities they have. The UK's women's movement

[17] Gender pay gap is defined as difference between men's and women's average cross hourly earnings as a percentage of men's cross hour earnings (for paid employees working at least 15 hours per week). http://europa.eu.int/employment_soical/news/2004/jan/jer2004_en.pdf

has been historically strong and concerned with social rights and labor market issues but found it difficult to penetrate the policy making process and create broad coalitions (Gelb 1987, Koven & Michel 1993, Lovenduski 1995). The Women's Liberalisation Movement (WLM) - the core women's organization composed of autonomous grass-roots organizations – focused on equality in the labor market in the 1970s (Lovenduski 1986). The movement has not been able to successfully challenge the male breadwinner-female homemaker legacy. The German women's movement had limited access to policy making as well. The feminist women's movement focused particularly on body rights, particularly abortion rights, domestic violence and perceived the state as a source of oppression rather than an institution that can help to curb the imbalances of the market and create conditions that further gender equality (Marx Ferree 1987). Only very few feminists were interested in labor market issues and their demands were not necessarily for equality and equity in work but mixed with maternalist demands, such as pay-for-housework. The main umbrella organization, the Deutsche Frauenrat had a conservative approach that did not fundamentally challenge the male breadwinner-female homemaker welfare state and has been at odds with grass-roots radical feminist organizations and socialist feminists in trade unions until the 1990s. Thus, in both the UK and in Germany women's organizations – for different reasons – have faced a closed political opportunity structure in the 1970s and 1980s.[18] This makes it interesting to observe if, how and what kind of European resources could be used to open up the political opportunity structure and how this has changed the rules of the game of policy-making in both countries.

In future research intermediary cases will be added to the study such as the Netherlands, which has a relatively high political power concentration with a conservative welfare state and corporatist features; Sweden, which has a relatively high political power

[18] For a definition of political opportunity structure see Tarrow S. 1994. *Power in Movement: Social Movements, Collective Action and Politics*. Cambridge: Cambridge University Press.

concentration with corporatist features. The Netherlands and Sweden are intermediary cases in terms of power concentration and fall in between the unitary structure of the UK and the federalist structure of Germany. Sweden and the Netherlands vary from the German and British cases in terms of an earlier dismantling of the male breadwinner legacy towards a 1 ½ worker model in the Netherlands and a dual income model in Sweden. Looking at these cases will be interesting and will allow me to examine if activists still draw on European resources to further advance women's equality/equity and access to the labor market by drawing on European legal resources.

1.9 Empirical Evidence

European social and employment policy has evolved significantly over the past 30 years. After a careful analysis of how gender equality legislation has evolved in social and employment policy I selected 6 directives and 2 sets of European Employment Strategy (EES) guidelines to study how they have been implemented in the UK and Germany. The laws can be broadly divided into those furthering equality and equity in employment and those furthering access to work.

Legislation that focuses on equality and equity in employment was the first legislation passed. The legislation seeks to promote formal equality of opportunity and equity for women already in the labor market. It did not take into consideration differences in care taking responsibilities that may prevent women from being employed. Only in the 1990 legislation was being passed that went beyond achieving formal equality of opportunity in the labor market and that takes the division of labor within (traditional) families into consideration. Thus, while equality and equity focuses on, for instance, equal pay and equal treatment that benefit women who are employed legislation on access to labor market, such as parental leave and working time, help women and men to remain employed and/or access the labor market. I selected hard

and soft law that takes into consideration these two important dimensions of furthering equal opportunities through social and employment policies.

Equality and Equity in Employment	
Hard Law	**Soft Law**
Equal Pay Directive 1975/117/EEC Burden of Proof Directive 1997/80/EEC Equal Treatment Directive 2002/73/EC (ex. 1976/207/EEC	Equal Pay Guideline – Indicator 28
Access to Employment	
Hard Law	**Soft Law and Targets for 2010**
Maternity Leave Directive 1992/85/EEC Parental Leave Directive 1996/34/EC Part-Time Work Directive 1997/81/EC Working Time Directive 2002/15/EC (ex. 93/104/EC)	Employment rate – Indicator 2 70% for men and 60% for women Childcare – Indicators 29 & 30 90% for children 3 to mandatory school age and 33% for children 0-3

Table 1: *Social and employment legislation overview*

Area of Directive	Directive	Treaty Basis	Date of Proposal	Date of Adoption	Transposition Deadline	Official Journal (OJ)	Social Partner Part.	Decision Rule	Rights established
Equality/ Equity	Equal Pay (75/117/EEC)	100 EEC (94 EC)	21.1.1974	10.2.1975	12.2.1976	L45, 19	No	Unanimity	Equal pay for work of equivalent value. Sex segregation in the labor market and grading of jobs is not included
Equality/ Equity	Equal Treatment (76/207/EEC) Amended 2002/73/EC	308 EEC?? (or 235 (35 EC) 141 (3) EC	21.1.1974 7.6.2000	09.02.1976 23.9.2002	09.08.1978 5.1.2004	L39, 40-42 14.02. 76 L269, 15 5.10.2002	No No	Unanimity	Access to employment, vocational training, promotion, working conditions. Amended Directive includes occupational social security schemes, covers self-employed activities. Does not include survivor and family benefits and omits issues, such as part-time work, unpaid work
Access	Pregnant Workers (92/85/EEC)	118a EEC (137 EC)	11.09.1990	19.19.1994	19.10.1994	L 348, 1 28.11.92	No	Qualified Majority	Paid maternity leave, protection against dismissal Does not include temporary and irregular work contracts; Regulated within 'health and safety'
Access	Working Time (93/104/EC) Amended (2000/34/EC)	118a EEC (137 EC)	20.09.1990	23.11.1993	23.11.1996	L 307, 18 13.12.93 L195, 41 01.08.2000	No	Qualified Majority	Minimum periods of daily, weekly rest and annual leave, maximum of weekly working time, night work, shift work, patterns of work. Exclusion of categories of workers, qualification period, differentiation between regular work and overtime.
Access	Parental Leave (96/34/EC)	4 (2) Social Protocol	24.11.1983	03.06.1996	03.06.1998 (UK 15.12.1999)	L 145, 4-9 19.06.96	Yes	Qualified Majority	14 weeks of leave that can be taken by both parents; right to return to same or equivalent job No right to paid leave Based on Social Partner Framework Agreement
Access	Part-time Work (97/81/EC)	4 (2) Social Protocol	22.12.1981	15.12.1997	20.01.2000 (UK 07.04.2000)	L 14,9 20.01.98	Yes	Qualified Majority	Equal treatment of part-time and full-time workers. Temporary and irregular contracts are excluded; No right to part-time work Based on Social Partner Framework Agreement

Table 2: *Legislative Overview*

The empirical material of the dissertation is based on a variety of material, particularly a wide range of interviews with administrative officials, social partners, women's activists and academics in the United Kingdom, in Germany and at EU institutions in Brussels, and primary data on litigation strategies and legislative reforms in the UK and Germany. This data allowed me to identify the opportunities and constraints that actors face in integrating EU resources with domestic political strategies and the conditions under which EU resources can be successfully used to overcome bottlenecks of domestic policy reform.

1.10 Outline of the Dissertation

The dissertation is structured in two parts. The first part contains a chapter on European hard law and a chapter on European soft law that provide an overview of the historical evolution of gender equality policies within European social and employment policies. The second part of the dissertation contains the empirical case studies, particularly from the United Kingdom and Germany.

Chapter 2 focuses on the way gender equality policy has been furthered through hard law in the context of a European social policy. The first part of the chapter traces the evolution of EU directives or hard law from the Treaty of Rome (1957) until 2007. The second part of the chapter analyzes European integration and social policy by looking at the key driving forces that led to an expansion of gender equality policy despite a tenuous treaty basis. Litigation and transnational advocacy, as two key mechanisms, for expanding gender equality legislation are examined in particular. These mechanisms have been employed by marginal actors, such as women's groups, to promote and re-shape European social policy. Understanding these mechanisms is valuable for understanding processes of policy change due to European law within member states in the empirical part of the dissertation.

Chapter 3 examines the role of soft law in the making of a European employment policy and outlines the evolution of gender equality policies within this relatively new European policy field. The first section of this chapter describes the evolution of the European Employment Strategy (EES) that took concrete form at the Luxembourg Jobs Summit in 1997. The historical overview provides insights into why the EU acquired competencies on employment policy, how gender equality became a core component of the strategy and how it has evolved over time. Looking at the evolution of EES guidelines, targets, monitoring procedures and recommendations over time deepen the understanding of how the strategy has changed since it was created ten years ago. The chapter then outlines some of the driving forces and mechanisms of change within this new mode of governance. The final part of the chapter compares hard and soft law from a theoretical perspective and examine if the two forms of law are competitive or complementary. The discussion concludes that neither hard nor soft law is a superior mode of governance and each mode of governance has its pros and cons. In the context of EU, gender equality is addressed mainly through hard law in social policy while gender equality within employment policy is pursued through soft law.

The second part of the dissertation contains the empirical case studies. In the introduction to the second part the institutional and policy framework of the United Kingdom and Germany are described. For each country their political system, relations to Europe and the employment-gender nexus is discussed. Later the empirical cases of hard and soft law in the two countries are discussed.

Chapter 4 is on European hard law. The chapter focuses on two sets of hard laws. In the first part of the chapter I discuss the way hard laws on equality and equity in employment (i.e. equal pay and equal treatment) have been implemented in the UK and Germany. These hard laws were passed in the 1970s. Studying the response to them within member states provides insights into what kind of strategic actions have evolved around them within member states. In

the UK a successful European litigation strategy emerged while this was not the case in Germany. Afterwards, I examine hard laws on access to the labor market (i.e. maternity leave, parental leave, part-time work, working time). These hard laws were passed in the 1990s and represent a second set of gender equality laws. Looking at them and how they were implemented introduces a temporal dimension to the research. The analysis of the empirical case points to questions such as the following: Can British actors still pursue a confrontational strategy around EU hard law? Does it matter what party holds power for actors to Europeanize their strategies and employ a European litigation strategy? What variation can we observe across these six EU directives?

Chapter 5 is on soft law, particularly childcare guidelines and targets within the European Employment Strategy. The first part of the chapter provides a historical overview of how childcare has been addressed at the EU and how and why it has become a prominent element of the EES. In essence, childcare is at the nexus of the debate on employability, fertility rate, gender equality and raising the availability of childcare places is seen as key for achieving a number of macroeconomic goals of the European unions such as increasing the employment rate, fighting poverty and creating a more inclusive society. Focusing on childcare provides a window into how the EU is gaining competencies on a new policy issue and the way EU soft law alters national policy-making processes. The second part of the chapter examines the domestic response to EES childcare guidelines and targets in the UK and Germany. In both cases I first outline the historical evolution of childcare policies and examine what role the EES has played in recent childcare reforms. In the UK the Labour government under Prime Minister Tony Blair established a National Childcare Strategy and a Sure Start Program shortly after taking office. This strategy was not amended due to the EES and sub-state actors have not integrated the soft law into their strategies to influence the evolution of these programs. In Germany the Social Democratic-Green government did not establish a national childcare strategy nor agreed to set

national targets on childcare. Nevertheless, childcare and education featured prominently in labor market reforms and sub-state actors incorporated soft law into cooperative problem solving at various roadblocks in the legislative process. European level agreements again matter in the latest set of reforms pertaining to parental leave and childcare conducted under the Grand Coalition of Christian Democrats and Social Democrats. The empirical case study points to questions as the following: Why have British actors – after having been able to successfully develop a European litigation strategy – not incorporated soft law into their strategies? Why have German actors – after having failed to develop a European litigation strategy – been drawing on soft law in various reforms of the German welfare state? What role do veto points play in the ability of sub-state actors to integrate different kinds of European law into their strategies?

The concluding chapter addresses some of the key theoretical aspects addressed in the dissertation. Firstly, since the EU uses different kinds of modes of governance a key question is if one mode of governance might be superior to another. In other words, is hard law superior to soft law? Secondly, the dissertation seeks to contribute to the veto point literature by examining how veto points work in the context of Europeanization. Do veto points only affect the magnitude of policy change or also actor strategies in different modes of governance? What kind of strategies (confrontational or cooperative) do actors develop around European legal resources? Thirdly, looking at the way European law is implemented in member states makes it clear that Europeanization is occurring and the EU influences and shapes the evolution of welfare states. However we still know relatively little about the nature of that change. Understanding the process of policy change provides insights of how welfare states evolve under the influence of a growing body of European social and employment laws.

2 European Social Policy – Furthering Gender Equality through "Hard Law"

The EU has a long-standing commitment to furthering gender equality that reaches back to the Treaty of Rome (1957). Gerda Falkner once described the EU as a 'moving target' resembling a 'rolling mystery train' with constant and rapid changes in the nature of the European integration (Falkner 1996, 233). This chapter seeks to provide an overview of the institutionalization of gender equality legislation within the wider context of European social policy and labor law. Understanding the past struggles over social policy is important for understanding not only contemporary politics but also how sub-state actors have incorporated European legal resources into their strategies over time.

The first part of the chapter traces the evolution of EC directives or hard law. The evolution of hard law can broadly be divided into four phases. (1) The initial development phase from the Treaty of Rome (1957) to the passage of the first EC social policy directives in the 1970s, (2) advancing social policy despite resistance of some Member states in the 1980s, (3) social policy within the context of internal market building, and (4) the reformulating of equality principles and approaches since the mid 1990s. During each phase the passage of hard law required policy makers to overcome different kinds of obstacles. Looking at these challenges provides a better understanding of the fragmented nature of European social policy.

The second part of the chapter analyzes European integration and social policy by looking at the key driving forces and mechanism of evolution of gender equality policy. Two important driving forces that led to an expansion of gender equality policy despite a tenuous treaty basis – litigation and transnational advocacy network lobbying – will be examined in particular. Understanding these mechanisms of developing social policy at the European level is important for understanding how marginal actors, such as women's groups, have been able to promote and shape the evolution of European social policy.

2.1 Institutionalization of Gender Equality Policy

2.1.1 From the Treaty of Rome to the passage of EC Gender Equality Directives (1957-1980)

Six European states – Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands – founded the European Community (EC) after World War II. The EC was based on three founding treaties or primary laws. These were the European Coal and Steel Community (ECSC) Treaty concluded in 1951, the European Economic Community (EEC) Treaty and the European Atomic Energy Community (Euratom) Treaty both concluded in 1957.

The EEC treaty's main focus was on economic integration but it also had a social policy component. Social policy was mainly addressed in Title VIII "Social Policy, Education, Vocational Training and Youth" (articles 117-128).[19] Article 117 sets the original agenda on social policy in the 1950s.

> "Member states agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained. They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action."[20]

Based on France's demands two articles on social policy were specifically included in Title VIII – Article 119[21] (equal pay) and Article 120[22] (paid vacation). Article 119 says "Each member state shall during the first stage (of market integration) ensure and subsequently maintain the

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[19] Social Policy was not only addressed under Social Policy (Articles 117-128) but also under in Part II (Foundation of the Community"), which contains the free movement of goods, persons, services, and labor in Articles 48-51 EEC.
[20] Article 136 (ex. Article 117) was amended significantly in the Treaty of Amsterdam.
[21] [Article 141]. At the time the International Labour Organization (ILO) had already demanded actions to be taken to ensure equal pay. While Article 119 said "equal pay for equal work" the ILO Convention went further saying "work of equal value" (ILO 1956). The ECJ and subsequently in the Treaty of Amsterdam (1997) this definition of equal pay was adopted by the EU.
[22] Article 120 (now Article 142 EC).

principle that men and women should receive equal pay for equal work." Article 120 emphasizes that the Member states will "endevour to maintain the existing equivalence between paid holiday schemes".

France had actively lobbied for the inclusion of these social provisions to avoid distortion of the rules of competition. The French government argued that its social provisions were higher than that of the other states putting enhanced pressure on its businesses in a common market. France, for instance, had a 40 hour work week since 1936, a higher number of vacation days than other Member states and equal pay legislation (Falkner 1994, 81, Hoskyns 1996, 45, Sullerot 1975, Warner 1984). The French government claimed that social costs were comparable to, for instance, taxes and demanded that the EC should take action to level these costs across Member states. This position was opposed by other member states, such as Germany, that wanted to restrict government interference in the area of wages and prices. The German government claimed that social costs are only one factor of production costs among others. A harmonization of indirect or social costs would inevitably evolve through the creation of a common market and the EC should not interfere in the market to achieve this harmonization (Beutler et al 1987, 437, Falkner 1994, 79).

A compromise between the two positions was negotiated in which Article 119 and 120 were included in the Treaty of Rome in the section on social policy (not competition as originally intended) and it was left open how Member states should implement these provisions (Hoskyns 1996, 45). This was particularly problematic because Article 119[23] did not directly grant

[23] The Treaty of Amsterdam (1997) added a new paragraph to Article 141 that gives lawmaking capacity to EU institutions. Paragraph (3) says: "The Council, acting in accordance with the procedure referred to in Article 251 (ex. 189b), and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."

lawmaking capacity to European institutions to develop secondary law based on Article 189[24]. Member states were asked to take actions on equal pay until the end of the first phase of market integration without the specific guidance of secondary law. Overall, social policy was not a core area of the Treaty of Rome. The EC was not given a strong regulatory and distributive capacity on social policy and a harmonization of social policy was seen as a mere by-product of market integration (Banard 2000, Leibfried & Pierson 1995).

In the early 1960s it became apparent that member states had not taken concrete action on equal pay (Motte 1961) despite Article 119 having clearly stated that equal pay had to be addressed by Member states prior to entering the second step of market integration.[25] On 12 May 1960 the European Council decided to move to the second phase of market integration as soon as 31 December 1961 (ABl. No. 58, 12 September 1960), which made it important to clarify what member states had to accomplish in terms of equal pay.

After the European Council meeting the European Commission began reviewing equal pay. On 12 July 1961 the European Commission established an ad-hoc working group composed of national level bureaucrats, lawyers, trade union representatives to discuss equal pay. While Article 119 EEC referred to equal for pay for 'equal value' the ILO Convention 100

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[24] [Article 249] Article 189 grants the European Parliament, the Council and the Commission power to develop secondary legalization or to develop EC directives 'in order to carry out their task' as long as it is 'in accordance with the provisions of the Treaty'.
The European Commission combines legislative and executive powers. The Commission possesses the exclusive authority to draft and propose legislation. The Commission frequently consults with interest groups before proposing legislation to the EC's legislative organs. The Commission also monitors compliance with EC law and can initiate infringement procedures at the ECJ. The Council is composed of ministers of member state governments. Until the mid-1980s it was by and large the Community's legislature. Members of the Council have weighted votes, roughly determined by the size of the country they represented. In addition, the European Council and Intergovernmental Conferences are taking place where heads of state and government represent national interests and the overall direction of the EC and EU are determined. The European Parliament has directly elected members since 1979. The power of the EP has increased over time but, generally speaking varies with the subject area. The Parliament meets in Strasbourg and Brussels. Currently 626 members are elected for a five year term.

[25] The only exception were initiatives to promote free movement of labor, requiring Member states to allow for free entry, employment and residence and improving the social security rights of migrant workers. These directives and regulations were, however, not aimed at harmonizing social provisions or establishing a European social model but rather to coordinate between different kinds of national legal systems while maintaining their separate forms of provisions and rights.

defined equal pay as pay for work of 'equivalent value'. The question was whether Article 119 could be interpreted beyond the meaning of the text or not (Falkner 1994, 86-90, Heynig 1965, 195ff., Hoskyns 1996, Knapp 1968). The deliberations of the ad hoc working group did not lead to any concrete actions and their work was critiqued by lawyers arguing that this group could not legitimately interpret Article 119 and by statisticians arguing over how gender pay gap could be calculated (Hoskyns 1996, 62). On 28 July 1960 the European Commission issued a recommendation which did not clarify the meaning of pay (Bulletin 6-7, 1960, 45) but urged member states to agree on a common interpretation of equal pay and to take concrete actions prior to entering the second stage of market integration.

On 30 December 1961 member states decided that they could move to the second stage of market integration without having previously taken concrete action on equal pay. Member states were given until 31 December 1964 to address equal pay (Falkner 1994, 90-95, Heynig 1965, 196ff). Thus, while gender equality was part of the Treaty of Rome and the primary law demanded concrete action to be taken prior to further economic integration it was not at all certain that member states do so.

At that time, the European Commission had only limited abilities to promote social policy. Article 118[26] allows the Commission to promote co-operation between the member states on matters relating to social security such as working conditions, social security, occupational health and safety, the right of association and collective bargaining. Article 122[27] requires the Commission to formulate annual reports on social policy to the European Parliament. Because of these limitations it was up to individual member states, such as France, to keep equal pay on the political agenda and demand concrete actions. Since France had agreed to further market

[26] Article 140 EC (ex. 118).
[27] Article EC 145 (ex. 122)

integration without member states haven taken concrete actions on equal pay it no longer seemed likely that the EU would develop a strong equal pay policy.

At the end of the 1960s the debate on a European social policy was renewed through widespread social unrest and economic recession. It was demanded that Europe be given a more human face and the EC be more than just a device for business to exploit the common market (Banard 2000, 6). “Second wave” feminist activists also demanded stronger gender equality legislation across Europe. While these demands influenced the overall political climate of the time their ‘direct input’ into policy making at the EC level was relatively small (Hoskyns 1996, 308).

At the Hague Summit on 1 and 2 December 1969 member states debated the enlargement of the EC and the role of economic and social integration. High hopes were associated with this meeting because Georges Pompidou had replaced Charles de Gaulle as French President and Willy Brandt had replaced Kurt George Kiesinger as German Chancellor in 1969. De Gaulle had vetoed a membership of the UK twice but the new French President Pompidou no longer objected to a British membership. Pompidou made several proposals on the completion, deepening and enlargement of the European Economic Community at the Hague Summit.[28] In addition, Willy Brandt, the first Social Democratic Chancellor of Germany, supported the enlargement of the EC and supported the French initiatives on social policy. With the change of government in two core member states an enlargement of the EC was approved and Denmark, the UK and Ireland could become members in 1971.

Based on The Hague Summit a renewed debate on the future of Europe and social policy emerged. In accordance with the Summit conclusions and a decision of the Council of Ministers of 6 March 1970, the European Commission asked a group, presided over by Mr.

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[28] "Statement by Georges Pompidou (The Hague, 1 December 1969)", *Bulletin of the European Communities*. February 1970, n° 2, 33-35.

Pierre Werner (the Prime Minister and Minister of Finance of Luxembourg), to write a report on the economic and monetary union. Evelyn Sullerot, a French sociologist, was asked to write a report on women's employment. The so-called "Werner Report" was presented at the Council of Ministers on 20 May 1970 and emphasized the complementary nature of economic and social issues (Werner 1970, 12-14). The report also emphasized the role of social partners in the formulation and implementation of Community policy (Werner 1970, 11-12). The "Sullerot Report"[29] (Sullerot 1970a, Sullerot 1970b) argues that since the EC seeks to establish coherent economic and social policies it has to access the complex problems raised by women's employment (Sullerot 1970a, 47). Sullerot pointed to the "structural nature of women's disadvantage, the need for society as a whole to take more responsibility for reproduction and childcare, and the importance of breaking the pattern of job segregation which corralled women in low-pay, low-status jobs" (Hoskyns 1996, 84). Sullerot makes a case for government policies that create conditions allowing both men and women to combine work and family life by emphasizing the importance of women's intellectual capital. Sullerot writes:

> "A society always suffers if one of its major groups lags behind. The active, intellectual, cultural, human and creative potential of the women of the Community is considerable. By utilizing this potential and giving it better opportunities, the Community can give the work a qualitative model, which does not yet exist, of a civilization which is advancing and in which women are harmoniously integrated" (Sullerot 1970a, 50).

The Werner and Sullerot reports contributed to a new awareness of the importance of linkage between economic and social policy and emphasized the positive effects for the economy and society if women can balance work and family life better.[30] Both reports, while

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[29] In 1975 Sullerot wrote another report on behalf of the French government on the employment of women and the problems it raises in the Member states of the European Community (Sullerot 1975).

[30] Economiquent, c'est une bonne chose. Le travail des femmes est source de richesses. La prevue en est le tableau des disparités régionales considérables des taux d'activité feminine: le niveau de l'emploi feminine: l'emploi feminine, un indicateur de development. On constate qu'une region où peu de femmes travaillent est une region don't la santé économique est préoccupante. …. Socialement, ce peut être mieux qu'une bonne chose: la condition d'un development different, d'une civilization où se révèleraient de nouvelles formes d'aides interpersonnelles et de

addressing different aspects of European integration, argue that social policy should not be seen as a mere by-product of economic integration and competition itself demanded greater social coordination. The report did not, however, lead to concrete actions.

In the absence a concrete European initiative to pass legislation on equal pay and equal treatment Belgium feminist activists, particularly the labor lawyer Elaine Vogel-Polsky, explored the possibility of using European primary law in national courts to challenge the Belgium equal pay law. The case brought before the Belgium court was the Defrenne case. In the early 1970s Defrenne versus the Belgium State case reached the ECJ.[31] The case dealt with the following issues: On 13 March 1968 Gabrielle Defrenne, an air hostess who had worked with the Belgium airline Sabena since 1951, was forced to retire at age 40. Defrenne directly claimed applicability of Article 119 at a national labor court (Tribunal du travail) (Hoskyns 1996, 68-75). Three Defrenne judgments followed in the subsequent years that addressed issues of pension entitlements (Defrenne 1), gender pay gap (Defrenne 2), and retirement ages and working conditions (Defrenne 3). The most important decision of this complex court case was that Article 119 had "direct effect" in member states, meaning that national courts can apply Article 119 irrespective of national legislation (Defrenne 2 judgment).[32] Thus, private litigants can directly invoke European law in national courts and that national legislation in conflict with European law is automatically rendered inapplicable (Cichowski 2001, 118-126, Ellis 1998, Landau 1985). Because the ECJ deemed certain directives to be capable of taking direct effect in national law

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nouvequx besoins de vie collective" Sullerot E. 1970b. *L'emploi des femmes et ses problemes dans les etatas membres de la CE*, CEC, Brussels.

[31] Case 80/70 Defrenne vs. Sabena (no.1). [1971]; Case 43/75 Defrenne vs. Sabena (No. 2) [1976]; and Case 149/77 Defrenne vs. Sabena (No. 3).Gourevitch P. 1978. The Second Image Reversed: The International Sources of Domestic Politics. *International Organization* 32: 881-911

[32] Van Gend en Loos (Case 26/62 [1963] ECR 1. Here, the ECJ defined that the right of individual legal persons to have certain of its provisions enforced in the national courts of the Member states. For details on 'direct effect' see Wyatt, 'Prospective Effect of a Holding of Direct Applicability' (1975-6) 1 ELR 399, 'Article 119 EEC: Direct Applicability' (1975-6) 1 ELR 418, 'Article 119 and Fundamental Principle of Non-discrimination on Grounds of Sex' (1978) 3 ELR 483, 'Article 119 EEC: Equal Pay for Female Successor to Male Worker' (1980) 5 ELR 374, 'The Direct Effect of Community Social Law – Not Forgetting Directives' (1983) 8 ELR 241, and Dashwood "European Community Law, in Sweet and Maxwell, London, 3rd ed. 1993.

without the approval of national legislature it made clear that member states needed to pay close attention to the content of Community law. The case law also came at a time when France began another initiative to establish a stronger European social policy.

In October 1972 the French President Pompidou called a summit for a *Relaunching of Europe.* The heads of state or government reaffirmed that "economic expansion is not an end in itself but should result in an improvement of the quality of life as well as of the standard of living" (Bulletin EC 10/1972, OJ (European Council) C13, 12.02.1974, *1–4).* Aside from the French President George Pompidou, the German Chancellor Willy Brandt and the British Prime Minister Edward Heath supported the new emphasis on social policy and issued a communiqué saying:

> "[…] vigorous action in the social sphere is to them just as important as achieving Economic and Monetary Union. They consider it absolutely necessary to secure an increasing share by both sides of industry in the Community's economy and social decisions"(Bulletin EC 10/1972, paragraph 6.19, and OJ [1974] C13, 12.02.1974, *1 –4*).

With France, Germany and the UK government's all supporting concrete actions on social policy the European Commission was instructed to produce an action program in the social field "providing practical measures and the means for them" before 1 January 1974 (European Commission 1972).[33] The European Commission developed a "Social Action Programme" in 1973 (24 Oct. 1973, COM (73) 1600) that was formally approved by the Council on 21 January 1974 (OJ [1974] C13, 12.02.1974 p. *1–4).* The Social Action Programme, which proposed actions from 1974 to 1976, had three parts:

> *"*full and better employment at Community, national and regional levels, which is an essential condition for an effective social policy; improvement of living and working conditions so as to make possible their harmonization while the improvement is being maintained; increased involvement of management and labour in the economic and

[33] In addition, the Commission began to also pursue its own strategy to enforce Article 119 by preparing an infringement procedure at the ECJ. This was, however, not taken further and secondary law was prepared. The Commission took first steps towards an infringement procedure against Luxembourg and the Netherlands which both did not reach the ECJ because Luxembourg passed a law on 10 July 1974 and the Netherlands on 20 March 1975. (see Falkner G. 1994. *Supranationalitaet trotz Einstimmingkeit*. Bonn: Europa Union Verlag and 7. Gesamtbericht über die Tätigkeit der Europäischen Gemeinschaften, 1973, 222, Agence Europe 23.11.1973)

> social decisions of the Community, and of workers in the life of undertakings; (OJ [1974] C13, 12/02/1974 p. 0001-0004).

In its objectives gender equality matters as far as it committed the European Community

> "to undertake action for the purpose of achieving equality between men and women as regards access to employment and vocational training and advancement and as regards working conditions, including pay, taking into account the important role of management and labour in this field;
> to ensure that the family responsibilities of all concerned may be reconciled with their job aspirations" (OJ [1974] C13, 12/02/1974 p. *0001 – 0004).*

Within the Social Action Program draft directives on equal pay, equal treatment as well as equal treatment and social security were prepared. The French Commission official in the Directorate/General V (DGV) Jacqueline Nonon and the French sociologist Evelyne Sullerot were in charge of developing these directives together with an ad hoc working group composed of independent women instead of delegated civil servants from member states (Mazey 1998, 140). Nonon's strategy was to take equal pay as a starting point but to "stretch the elastic as far as it would go" (Hoskyns 1996, 102). While the approach originally taken was fairly broad and emphasized the need to "ensure that family responsibilities of all concerned may be reconciled with their job aspiration" (Euorpean Council 1974), relevant measures on childcare were not taken. A Commission proposal for part-time work failed (COM (81) 775, 22 December 1981). The focus of the group narrowed to equality in the labor market, particularly equal pay and equal treatment. By focusing on equality in the labor market the expansion of European legislation could fit into the liberal agenda of market making rather than market correcting (Streeck 1995, 400). Member states passed unanimously three directives on gender equality:

- Directive 75/117/EEC of 10 February 1975, OJ 1975, L45/19

  Equal Pay Directive – Based on Article 119 EEC (now Article 141 EC)

- Directive 76/207/EEC[34] of 9 February 1976,

  Equal Treatment Directive – Based on Article 119 EEC (now Article 141 EC)

- Directive 79/7/EEC of 19 December 1978, OJ 1976 L 39/40

  Equal Treatment and Social Security Directive – Based on Article 119 EEC (now Article 141 EC)

Since the directives had to be passed unanimously by member states they provided general rather than specific policy prescriptions. This left open the very meaning of equal pay and equal treatment. In the case of equal pay it was still not clear, for instance, if European law granted equal pay for work of equal value or equivalent value and in the case of equal treatment it was not clear if it referred to discrimination on ground of sex or various kinds of discrimination. Because of these ambiguities within the directives it left ample opportunity for litigants and the ECJ to define and expand the scope of the directives (Cichowski 2001, 121, Ellis 1998).

2.1.2 Advancing Social Policy in Hard Times

With the achievements of the 1970s the question became how European social policy could be broadened and deepened. In the early 1980s the French government once again took the initiative to expand the social dimension of the European Community. This initiative met harsh resistance from several member states. Despite these challenging conditions social policy was further advanced in the 1980s.

In the 1981 the French government introduced the concept of a "l'espace social européen" ("European Social Sphere") in a memorandum on the future development of the

[34] The Directive was extended by the Directive 86/613 on equal treatment of the self-employed (OJ [1986] L 359/56), Directive 86/378/EEC on occupational schemes (OJ [1986] L225/40). The Directive was amended in light of the Barber case (Case 262/88, Barber vs. Royal Exchange, 1990, ECR- J- 1889). Further expansion of the Directives occurred through the adoption of the Directive 97/80/EC on the burden of proof in case of discrimination based on sex. Finally, the Directive was amended in 2002 through the Directive 2002/73/EC (OJ [2002] L269/15).

European Community (Bulletin 11/81, Part III, Chapter 5). The concept refers to the area of employment, social security and social dialogue (Jonckheer & Pochet 1990, 5). The Council discussed the memorandum but no concrete actions followed.

The European Commission drafted a set of social policy directives that addressed new forms of work organization, voluntary part-time work (1981 and 1983), temporary work (1982), and parental leave (1983). Since these directives had to have unanimous support from member states, the British government under Prime Minister Margaret Thatcher could veto them. The Conservative British government advocated a neo-liberal economic model with limited government interference in the economy and maximum flexibility of the workforce in the UK and opposed an expansion of social policy at the European level. The European social policies were rejected as putting an additional burden of regulation on business what would undermine their ability to effectively compete in the global market economy (see (Great Britain 1985, Cmnd 9474, Hervey 1998, 7). The failure to pass these directives symbolized the malaise of the EC at the time and is often referred to as “Eurosclerosis”.

Since new European hard law was difficult to establish under the institutional rules requiring European social policy directives to be passed unanimously women’s activists shifted their efforts towards building new institutions and expansion of rights of existing institutions that support gender equality. Examples of key institutions are the following:

- The Women’s Bureau was set up in 1976. It was renamed Equal Opportunities Unit in 1994. The Unit is situated within the Employment and Social Affairs Directorate of the Commission. The unit was put in charge of developing Action Programs (1982-1985, 1986-1990, 1991-1995, 1996-2000, 2001-2005, 2006-2010). The first action program (1982-1985) focused on the consolidation of the impact of the new equality directives and to improve rights of individual women workers by preparing additional legislation. Later programs not only focused on the implementation of directives but also on creating resources for equality

activists on the national level by creating programs funded through the European Social Fund and the European Regional Development Fund.

- The Women's Information Service was set up in 1976. This organization became the European Women's Lobby (EWL) in 1990. The EWL is an umbrella organization consisting of national level women's organizations. The EWL is a core institution to promote gender equality at the EC level and to inform and mobilize domestic political actors when EC laws are negotiated.
- The Commission also set up the Advisory Committee on Equal Opportunities for Women and Men in 1981. The Committee is composed of two representatives from Member states and – since 1995 – also includes representatives of European level social partners and the European Women's Lobby as observers (Commission Decision 82/43/EEC, Commission Decision 95/420/EC).
- The Commission established transnational networks such as the Expert Legal Group to oversee the implementation of EC law in Member states in 1982, the Expert Group on the Situation of Women in the Labour Market in 1983 or the European Commission's Childcare Network in 1986. All networks aside from the Expert Legal Group and the Labor Market group were discontinued in the 1990s.
- In addition, the European Parliament established a formal standing committee on Women in 1981.

Parallel to the institution building activities at the European level feminist activists began to explore the ambiguities of European law in national courts. In the 1980s an increasing number of court cases were referred to the ECJ for preliminary hearing to clarify specific questions national courts deemed necessary for their ruling. Examples of these questions were, for instance, the following: Can women be excluded from work involving night shifts or military service? Can a worker not be hired on the basis of being pregnant? Does pension 'pay' fall

within Article 119? Can a directive extend the scope of Article 119 or does it merely flesh out the bare bones of Article 119, enabling Member states to harmonize their laws more easily? Based on these inquires the ECJ was able to expand the scope and meaning of equal pay and equal treatment. This can be shown by looking at, for instance, the case of equal pay in the context of pensions and the meaning of equal treatment in the case of pregnancy.

The meaning of 'equal pay' in regard to pensions was first brought up in the above discussed Defrenne case in the 1970s. The ECJ had ruled that pension constitutes deferred pay and falls under the scope of Article 119 as long as the employers pay pensions directly or indirectly in return for employment. Social security payments were considered outside of the scope of Article 119. The question of equal pay in regard to pension was brought before the ECJ again in the 1980s.[35] In case 69/80 Worringham v. Lloyds Bank Ltd. (1981, ECR 767) the court was asked to determine if 'contracted out' pension and social security of earnings related elements of the state pension scheme constitute pay. The court addressed this question again in Burton v. British Railways (Case 19/81 [1982] ECR 555) and Razzouk and Beydoun v. Commission (Case 7 and 117/82 [84] ECR 1509). An important case in the matter was also the Bilka-Kaufhaus GmbH v. Weber von Hartz (Case 170/84 [1986] ECR 1607) where the court ruled that part-time workers – mainly women - could not be excluded from occupational pension schemes provided by companies on a voluntary basis to 'top up' government's statutory pension schemes. The decision was important because it extended equal pay to part-time workers, thereby recognizing the principle of indirect discrimination. Through the case law the meaning of equal pay got redefined and broadened.

Through the ECJ case law member states faced increased pressure to bring their legislation in line with European law to avoid further (costly) litigation for employers. Member

[35] It is not possible to review all case law on pensions in this section. For a comprehensive review of case law on pensions see Ellis 1998.

states agreed to amend the Equal Treatment and Social Security Directive 79/7/EEC (OJ [1979] L 6/24) to provide guidance to member states on how to amend their legislation. This was done with the Occupational Social Security Directive 86/378 that addressed the question of equal treatment in occupational pensions (OJ [1986] L 225/40). [36]

The issue of equal pay within pension was still not fully resolved with the passage of the Occupational Social Security Directive. The Barber case (C 262/88, Barber vs. Royal Exchange, 1990 [ECR] I – 1889) brought to the attention of the court questions on equality within pension schemes and whether or not secondary law, i.e. an EC directive, can expend the scope of primary law, i.e. Article 119. In the specific case of EC Directive 86/378 the directive permitted member states to set different retirement ages for men and women. In the Barber case the ECJ made clear that equality with respect to occupational pension age required the same retirement ages for men and women and the EC directive cannot expand the scope of Article 119 but can only flesh out the bare bones of Article 119 (see (Ellis 1998, 148-149). In other words, substantive rights to equality flow from the primary rather than EC directives. In this particular case the directive had operated under a false premise and was overwritten by Article 119. In the light of the Barber case the Directive 86/378 was amended by Directive 96/97 (OJ [1997] L 46/20). Member states were required to harmonize their pension ages for men and women. Thus, through ECJ case law the meaning and scope of equality was redefined and member states had to amend their legislation.

The ECJ played a similarly important role in defining the meaning and extent of equal treatment, particularly in the case of maternity and pregnancy rights. In 1990 the ECJ was asked to evaluate the matter by a Dutch court in the case of Dekker v. Stichting

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36 At the same time the EC Directive on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity, including Agriculture, in a Self-employed Capacity, on the Protection of Self-employed Women during Pregnancy and Motherhood' (EC 86/613, OJ [1996] L 359, 56).

Vormingscentrum voor Jonge Volwassen Plus (Case C-177/88, [1990] ECR I-2941). The Dekker case concerns Ms Dekker who applied for a job with a Dutch company, VJV. The hiring committee found her most qualified for the job and recommended her for the job while fully aware that Ms. Dekker was three month pregnant. The management of VJV decided not to hire her because she was pregnant. The Dutch court referred the case to the ECJ to determine if the decision not to hire Ms Decker violated Article 119 EEC and EC Directive 76/207/EC. The Court found that discrimination in employment opportunities on the ground of pregnancy can constitute direct sex discrimination. The ruling refer to Article 119 and is contrary to Directive 76/207/EEC, establishing once again that secondary law can only flesh out primary law but not go beyond it. The decision also made clear that equal treatment refers to equal treatment of men and women but also serves as a protection from being disadvantaged (see (Cichowski 2001, 124). Cichowski, after a careful analysis of a whole series of ECJ case law on parental law, concludes that “the Court does not hesitate to shift the control over maternity and pregnancy away from national competence even when a decision is costly to Member state governments” (Cichowski 2001, 129).

With the increasing amount of case law emerging, the Commission became active to develop a Pregnant Worker Directive in 1990. This directive – unlike amendments of the Equal Treatment Directive in regard to pensions – met strong opposition from Member states, particularly from the UK. A pregnant worker directive was nevertheless passed through QMV in 1992 (see below).

The example of equal pay in regard to pension and equal treatment in regard to pregnant workers shows that case law provides strong incentives to member states to pass an EC directive to assist member states in their national response to EC legislation. The passage of new social policy directive was challenging during the 1980s because EC social policy legislation required unanimous support from Member states and several member states,

particularly the UK, were opposed to having a strong EC social policy. However, the increase in case law gave new impetus to creating institutional conditions that would make the passage of new social policy directives more feasible.

While case law was clearly important in the further development of EC directives it has had limitations. The ECJ has been critiqued for predominantly focusing on the labor market and divides between work and market rather than social exclusion (Shaw 2001, 91). The ECJ has also been critiqued for applying a formal equality model and does not seek to achieve substantive equality or a socio-economic transformation. By focusing on the public realm or 'market law' and ECJ law does not address the still predominant division of labor within the family in terms of 'care'. Structural disadvantages within the household are not addressed. (Shaw 2001).

2.1.3 The Internal Market and 'L'Espace Sociale Européene

With the further enlargement of the Community with the membership of Greece in 1981 and scheduled membership of Spain and Portugal in 1986 the inability to pass the above directives created demands for an institutional reform of the EC. A debate emerged on the introduction of qualified majority voting (QMV) in some areas of social policy to make it possible to pass secondary law in an enlarged EC. These demands gained additional support through the ECJ ruling in Cassis de Dijon[37]. Here, the ECJ ruled that national standards should be mutually recognized. This ruling accelerated not only the process of common market completion (Cameron 1992, 52-54, Endo 1999, 132) but also brought to attention the need to develop ways to pass social policy to go along with economic integration to make it easier for member states to recognize national standards across member states.

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[37] Case 120/78 ('Cassis de' Dijon') Rewe-Zentral AG v. Bundesmonopolverwaltung fuer Brantwein [1979] ECR 649

To overcome the inability to pass secondary law the European Commission began to take on a more entrepreneurial role. The new Commission President Jacques Delors (1985-1995), supported by the French Socialist President Francois Mitterrand, released a White Paper *Completing the Internal Market* which proposed to take action to achieve a single market by 1992 (Com (85) 310 final). The White Paper drew upon a consensus among member states that economic integration was needed. The White Paper also emphasized that in order to strengthen economic cohesion social policy was needed. While some have considered the White Paper to have a slant towards negative integration – which is tantamount to "deregulation" (Pelkmans 1988, 364) – it also consisted of a list of approximately 300 social measures to help to prevent social dumping in the process of building an internal market and to promote the creation of a European social sphere. Issues mentioned were, for instance, gender equality, freedom of movement, education and training and social security.

These components met harsh resistance from some member states, particularly the UK**.** Because of the resistance to the social policy components they were removed from the final document (see (Falkner 1994, 189, Knigge 1989, 18, Köpke 1988, 48, Salisch 1989, 10)). This document was the guiding document for the Single European Act (SEA). On 28 February 1986 Heads of Government and State adopted the Single European Act (OJ [1987] L 169/1) that came into force in 1987.

The SEA is combining a liberalization of trade (deregulation and single market building) with new grounds for social policy (regulation) and procedural reforms, making market integration the core of the reform project.[38] Article 8a EEC (now Article 14EC) set the deadline

[38] For a detailed analysis of the genesis of the SEA see Moravcsik (1991), Sandholtz and Zysman (1989), Cameron (1992), Dehouse and Majone (1994), Endo (1999), for an overview of different interpretations see Anderson 1995 and Wallace and Young 2000. The genesis of the SEA is interpreted quite differently in the literature. While Moravcisk presents an intergovernmentalist account Cameron presents an intergovermentalist and neo-functionalist synthesis. Dehouse and Majone emphasize the entrepreneurship of the Commission under Delors leadership, Endo the timing and mediation of Delors while Sandholtz and Zysman present a technology based explanation.

for the completion of the internal market program for 31 December 1992. The SEA also extended European competencies in a few areas beyond immediate market creation. The European Commission committed itself to strengthening economic and social cohesion in Article 130a EEC (now 158 EC) which aims at reducing disparities between levels of development of regions. “In various so-called ‘flanking’ policy areas, notably environment and research policy, EEC competencies was formally extended (see Articles 130r-t and 130f-q, EECT). Not so for social policy: The delegation was not willing to give the EEC a much greater role in this field” (Falkner 1998, 58-59). Exceptions to this were linked largely to two Article provisions, Articles 100a (single market, now Article 95 (2)) and Article 118a (health and safety, now Article 137). These measures became subject to QMV and thus, allowed the Council to overcome ‘a joint decision trap’ (Scharpf 1988) where a single member state could block policy reforms. Matters “relating to the rights and interests of employed persons” (Article 100a (2)) still required unanimous agreement in the Council. Furthermore, the idea of social dialogue (Article 118b, now Article 139), as initiated in the Val Duchesse talks of social partners was introduced. Despite these changes the SEA did not contain guaranteed social rights and thus, did not provide a basis for establishing a social dialogue but did establish a foundation on which a European social cohesion strategy could be build.

On 11 May 1987 the Belgium government released a document “Flexibilité-Adaptabilité” that encouraged an initiative to promote economic flexibility without deregulating the economy in ways that would promote social dumping (see (Falkner 1994, 199, Jonckheer & Pochet 1990, 6 ff.); Agence Europe 27.5.1987, 6). The Belgium government proposed the passage of new social policies to support economic restructuring within member states.

The British Conservative government under Prime Minister Thatcher criticized the move towards positive integration aiming at a harmonization of social and employment standards and urged member states to only advance negative integration of market deregulation. Prime

Minister Thatcher captures the Zeitgeist in her Bruges speech: "We have not successfully rolled back the frontiers of the state in Britain, only to see them re-imposed at a European level, with a European superstate exercising a new dominance from Brussels".[39] The European Community was seen as proposing a high number of community laws without enough consideration to the quality of the law. The government opposed further Europeanization. This made it much more difficult to develop new European social policy in general and gender equality in particular.

The SEA granted relatively limited additional competencies on social policy to the Community but it introduced qualified majority voting (QMV) in Articles 100a (single market) and 118a (health and safety). Since the Articles 100a and 118a allowed for decision-making on the basis of QMV the opposition of the UK government to an expansion of European social policy could be circumvented. Martin Rhodes described describes Delors' Commission as playing a "treaty-based game" to circumvent British veto on social policy and use the option of QMV to pass new social policies (Rhodes 1995). Directives based on the SEA were, for instance:

- Directive 91/533/EEC of 14 October 1991, OJ 1991/L288/32

  Work Contract Directive – Based on Article 100 EEC (now Article 94 EC)
- Directive 92/85/EEC of 19 October 1992, OJ 1992/L 348/1

  Pregnant Workers Directive – Based on Article 118a EEC (now Article 137 EC)
- Directive 93/104/EEC of 23 November 1993, OJ 93/L307/18

  Working Time Directive – Based on Article 118a EEC (now Article 137 EC)[40]

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[39] Speech delivered by Prime Minister Thatcher in Burges, 20 September 1988 "Britain and Europe"

[40] Important information on the working time directive include: (1) Commission proposal for a Council Directive concerning certain aspects of the organisation of working time. Com (1990) 317 final, (2) of 3 August 1990, (2) Re-examined proposal for a Council Directive concerning certain aspects of the organisation of working time. Com (1993) 578 final of 16 November 1993.

- Directive 94/33/EEC of 22 June 1994, OJ 94/L216

  Young Workers Directive – Based on Article 118a EEC (now Article 137 EC)

None of these directives were passed with the sole purpose of enhancing gender equality but several of them have a clear gender equality component. The Pregnant Worker Directive, for instance, was based on Article 118a EEC (health and safety).The passage of the directive was highly contested. The European Commission had proposed sixteen weeks of paid maternity leave in its original draft but had shortened it to fourteen weeks with remuneration at the level of statutory sick pay (Mazey 1995, 603). Despite these concessions the UK and Italy opposed the directive. To pass the directive despite the opposition of some member states the directive was based on Article 118a EEC (health and safety) and passed with QMV. Since the UK could not veto the passage of the directive the government challenged its treaty basis. The ECJ upheld the directive by arguing that Article 118a was to be interpreted broadly (Case C-84/94, UK v. Council, ECR I-5755).

Overall, the introduction of QMV in the SEA permitted the passage of new social policy legislation. Unlike in the 1970s gender equality was no longer a core focus of the policies or an end itself. The directives were justified within the context of strengthening flexibility and adaptability of the economy rather than furthering equal opportunities. A dialogue on the creation of social rights and a European Social Model did not follow these directives. The SEA

The directive was amended through the Directive 2000/34/EC of the European Parliament and the Council of 22 June 2000 (OJ [2000] 195/41). Important documents concerning the amended directive include: (1) Communication from the Commission to the Council , the European Parliament, the Economic and Social Committee and the Committee of the Regions on the organisation of Working Time in the sectors and activities excluded from Directive 93/104/EC of 23 November 1993. Com (1998) 662 final of 18.11.1998, (2) Proposal for a Council Directive amending Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time to cover sectors and activities excluded from that Directive, OJ [1999] C 41/1 of 17.2.1999 (3) Proposal for a Directive of the European Parliament and of the Council concerning certain aspects of the organisation of working time (Codified Version)COM (2002) 336 final of 24.6.2002

Currently another amendment to the directive is debated. For further information see: Amended proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/88/EC concerning certain aspects of the organisation of working time COM (2005)246 final of 31.05.2005.

largely focused on the economic demands of a single market and global competition and not on the building of a European social model.

The French President Mitterand and the Commission President Jacques Delors encouraged a revival of a 'Social Europe' by connecting the debate on social policy even more strongly to employment relations. Wolfgang Streeck notes:

> "It is not implausible – indeed it is likely – that political strategists like Francois Mitterrand and Jacques Delors understood two basic points by the mid 1980s: First, if they wanted to restart Europe, they had to "bring business back in"; second, provided proper assurances were given and policy changes made, there was a realistic possibility for a coalition with business that would add fresh support to a renewed European project (Streeck 1995, 392).

The basic idea was to find a way to bridge the gap between British voluntarism on the one hand and continental industrial relations on the other. A stronger integration of social partners – employers and union organizations – was perceived as a key strategy for doing so. Delors initiated a dialogue between social partners at Val Duchesse, Belgium, and meetings took place from 1986-1988 and again in 1989. The overarching goal of these meetings was to get the support of business for the passage of a social rights and new social policy directives.[41]

When the member states began to discuss an overall treaty revision – later to known as the Treaty of Maastricht (1992) – the Commission proposed a "Community Charter of Social Rights" (COM (89)248final) to the Council on 30 May 1989.[42] The draft met harsh criticism from governments favoring voluntarism, particularly by the British government. The Social Charta

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[41] Social Partners were meeting regularly at Val Duchesse, Belgium. While UNICE only agreed to non-binding *joint-opinions* from the Val Duchesse meetings the social dialogue was important for revisions of the primary law and developing new social policy directives. For a detailed analysis on social pacts at the EU level see Falkner G. 1998. *EU Social Policy in the 1990s. Towards a corporatist policy community*. London: Routledge, Rhodes M. 1995. A Regulatory Conundrum: Industrial Relations and the Social Dimension. In *European Social Policy: Between Fragmentation and Integration*, ed. S Leibfried, P Pierson, pp. 78-122. Washington, D.C.: The Brookings Institution, Streeck W. 1995. From Market Making to State Building? Reflections on the Political Eocnomy of European Social Policy. In *European Social Policy. Between Fragmentation and Integration*, ed. S Leibfried, P Pierson. Washington, D.C.: The Brookings Institution.

[42] See Rhodes M. 1995. A Regulatory Conundrum: Industrial Relations and the Social Dimension. In *European Social Policy: Between Fragmentation and Integration*, ed. S Leibfried, P Pierson, pp. 78-122. Washington, D.C.: The Brookings Institution for details.

was revised to meet some of these concerns and restricted charter rights to workers and not all citizens. The revised Social Charta was released on 2 October 1989 (COM (89) 471 final). This document still met harsh criticism from the Conservative British Thatcher government, which argued social policy was a national and not a European concern. Since it seemed unlikely that all twelve member states would ratify a treaty that included a Social Charta the French Minister for European Affairs, Edith Cresson, proposed to have a separate ratification process for the Social Charta (see (Falkner 1994, 209), Conclusions of the Presidency, Agence Europe, 12 December 1989, 5).

The Treaty of Maastricht (1992) established a single market with a common European Monetary Union (EMU) that was first proposed at the Hague Summit in 1969. The Treaty of Maastricht also had the Community Chapter on the Fundamental Rights of Workers annexed to the primary law. This allowed member states to individually ratify the Treaty of Maastricht and the Social Protocol.[43] Eleven of the twelve member states, with the exception of the UK, ratified the Social Protocol.

> "The Agreement on Social Policy had three main purposes: to confirm and clarify the legal competencies of the Community in regard to social policy; to extend qualified majority voting in the social area; and to give greater institutional priority to the social dialogue between management and labour at transnational level" (Deakin & Morris 2001, 106).

Important elements of the Social Protocol are:

- Article 1 of the Agreement on Social Policy (ex. 117 EEC). Article 1 no longer contains a reference to the harmonization of social systems that would follow from further integration of the common market. Instead, Article 1 identifies specific objectives for

[43] On the specific negotiations see Falkner G. 2002. How intergovernmental are Intergovernmental Conferences? An example from the Maastricht Treaty reform. *Journal of European Public Policy* 9: 98-119, Lange P. 1993. Maastricht and the Social Protocol: why did they do it? *Politics and SOciety* 21: 5-36.

community action to achieve such a harmonization, specifically “promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labor, the development of human resources with a view to lasting high quality employment and the combating of exclusion”. Thus, social policy harmonization is no longer seen as a spill-over effect from market harmonization but is more actively pursued.

- Article 2 assigns the Community a complementary role in the areas of health and safety at work, working conditions and consultation of workers, equality between men and women, integration of persons excluded from the labor market. This new entitlement creates new leverage for the development of new social policy directives.
- Article 2, 3 and 4 gives social partners a greater role in the drafting of EC directives and allows them to draw up collective bargaining agreements that can be used as a foundation for an EC directive. This encourages more close cooperation between the Commission and the social partners on social policy issues.

Overall, the Treaty limits on the one hand the ‘entrepreneurship of the Commission’ by introducing the principles of subsidiarity – meaning that the EU needs to demonstrate that an issue can be regulated more effectively at the EU level than at the national level – and proportionality and, on the other, grants the Commission a monitoring role over the social situation in Member states (Article 118) and encourages the Commission to work closely with social partners to develop new social policy (see Article 2, 3, 4).

Based on the Social Protocol the Belgium Council Presidency launched a new attempt to “give social Europe back its wings” in 1993 (Danish Social Minister Smet quoted in Europe, 25 November 1993, 9, cited in (Falkner 1998, 115). When negotiations on new social policy directives began British veto stalled the negotiations once again. The Commission began to explore the options to prepare directives with the social partner on the basis of the Social

Agreement. Using the Social Agreement had the advantage by bypassing the British veto but the disadvantage of whatever agreement was reached and directive was passed it would not be legally-binding in the UK.

Building on the Val Duchesse dialogue of social partners and the new Social Charta that allowed the establishment of Social Partner Agreements, the Commission initiated consultations between EU level social partners, namely the European Trade Union Association (ETUC), the Union of Industries of the European Communities (UNICE) and the Center for Public Enterprises (CEEP) in the areas of works councils, parental leave, part-time work and a-typical work. These policy issues had previously been addressed in the Community Action Programs and draft directives developed based on the programs had failed. Through the involvement of the social partners it seemed more likely to convince member states to adopt new social policy legislation. This let to the passage of four new directives:

- Directive 94/45/EC of 22 September 1994, OJ 94/L245

  Works Council Directive
- Directive 96/34 EC of 3 June 1996, OJ 96/L145

  Parental Leave Directive
- Directive 97/81/EC of 15 December 1997, OJ 98/L14

  Part-Time Work Directive
- Directive 99/70/EC of 28 June 1999, OJ 99/L175

  Fixed-Term Employment Directive

The first test case for negotiations under the social agreement was on Works Council. The Commission started these procedures on 1 November 1993. Here, the social partners could not reach an agreement largely due to British opposition from CBI and TUC. The Commission did not, however, retract from passing a directive without the social partner

agreement. The Works Council Directive (94/ 45/EC, OJ [1994], L 245/1) was passed based on a QMV.[44]

After the failure of a social partner agreement the Commission chose an area of social policy where approval by social partners seemed more likely.[45] The Commission proposed a social partner agreement on parental leave which was seen significantly less controversial than a works council directive because of the low costs anticipated by business. Parental leave negotiations were initiated on 22 February 1995. These negotiations were successfully completed on 6 November 1995 and signed by the social partners on 14 December 1995. Based on the social partner agreement the Commission proposed a Parental Leave Directive 96/34 EC (OJ [1996] L 145/1-4) which was adopted on 3 June 1996.[46]

The Commission also initiated consultations on "flexibility in working time and security for employees" to discuss part-time work on 27 September 1995. These negotiations were more difficult than those on parental leave because of anticipated costs from the directive for employers. Only after intense negotiations lasting until 1997 an agreement on part-time work could be reached that was formally singed by the social partners on 6 June 1997. On 23 July the Commission proposed a Part-Time Work Directive 97/81/EC (OJ [1998], L 14/9) that was adopted on 15 December 1997.[47]

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[45] The Council Directive on Works Councils was extended to the UK through Council Directive 97/74/EC (OJ [1998] L 10/22, 16.1.1998).

[46] The directive was first proposed in 1983 (COM (82) 686 final) but was not adopted by the Council.

[47] The Directive was extended to the UK through Council Directive 98/23/EC of 7 April 1998 (OJ [1998] L 131/10). Preparatory documents concerning Part-Time Work include the following:
(1) Proposal of the Council Directive 97/81/EC, COM (97) 392 final of 23 July 1997; (2) Proposal of the Council Directive 98/23/EC, COM (1998) 84 final – 98/0065 (CNS) of 3 March 1998; (3) European Commission, 1995, Flexibility in working time and security for workers, Background paper for the first-stage of consultation with social partners, SEC (95) 1540/3 of 26 September 1995, (3) European Commission, 1996, Deuxième phase ce consultation des partenaires sociaux sur la flexibilité du temps de travail et la securité des travailleurs, SEC (96) 658 of 9 April 1996. For details on the negotiations on the parental leave directive see also Falkner 1998, 114-128

Finally, a Framework Agreement on Fixed-Term Work was agreed on in March 1999 and the Commission proposed a directive (COM (1999) 203 final) that was adopted as a Council Directive on 28 June 1999 (Directive 1999/70/EC (OJ [1999] L 175/43)).[48]

Throughout the negotiations women's activists had relatively little influence in the scope of the directives. From the 1980s women's interests were largely contained in the Community Action Programs and these directives were negotiated by the social partners. The way the directives were finally proposed differed significantly from earlier draft directives that were developed by women's activists in the Community Action Programs in the early 1980s. The shift in emphasis becomes apparent when one compares the original draft directive on parental leave developed by the Community Action Program (COM (83) 686 final, 24 November 1983) with the final Social Partner Framework Directive. The original draft directive stressed equal treatment for women and men and seeks to promote an egalitarian model of care while the final directive perceives parental leave as a strategy to enhance labor market flexibility, thereby avoiding references to pay and social security benefits or to the distribution of care work in the family. A similar assessment can be made for the Part-Time Work Directive which also does not strive to establish a new egalitarian model of care. The Community Action Program in conjunction with the European Childcare Network had proposed a directive on childcare to the social partners which did not support the initiative. To pacify strong criticism from the EWL and women's activists a Council Recommendation on Childcare was passed (OJ [1991] C 129) European Council 1992/241/EEC of 31 March 1992). A supplementary recommendation on childcare followed that outlined objectives and principles of childcare and national groups in 1997 (European Commission DGV, 1997: INT). The Council also issued a Council

[48] Important documents on the Fixed-Term Employment Directive are: (1) Proposal Commission; COM (99) 203 final of 28 April 1999, (2) Flexibilité du Temps de Travail et sécurities des travailleurs Première phase de consultation avec les partenaires sociaux conformement à l'article 3 de l'accord social annexe au Traité, SEC (95) 154013 of 26 Sepember 1995, (3) Deuxième phase ce consultation des partenaires sociaux sur la flexibilité du temps de travail et la securité des travailleurs, SEC (96) 9 April 658 of 9 April 1996.

Recommendation on the protection and dignity of men and women at work (OJ [1992] L 49/1) that included measures on sexual harassment and a Code of Practice on the Implementation of Equal Pay for work of Equal Value for Women and Men (COM (96) 336 final). Unlike directives these recommendations and codes of practice were of merely political nature, not legally binding soft laws and no further steps were taken to achieve their premises.

Is the Glass Half Full or Half Empty?

The SEA and the Treaty of Maastricht's Social Protocol opened new ways of developing European social policy. Firstly, the SEA allowed the passage of directives based on QMV the Commission could engage in a treaty based game. The Commission, for instance, defined pregnancy as a health and safety concern which allowed the Commission to promote a Pregnant Worker Directive based on Article 118a (safety at work). European directives based on this treaty provision can be passed with QMV and apply to all member states (independently of the ratification of the Social Protocol). Through this strategy the Pregnant Worker Directive (EU Directive 92/85/EEC) on "safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding" was passed in 1992 (Mazey 1995, 603, Rhodes 1995). The Social Charta was only binding for those Member states having signed the Charta. This opt-out option also helped to reduced the "joint decision trap" (Scharpf 1988) and to move forward on social policy.

Secondly, European social policy has expanded significantly since the 1960s. In the 1960s and 1970s social policy was still seen as a primary national responsibility. In the 1980s and 1990s the Community has established its competences on social policy in the absence of "a" European social model. Towards the end of the 1990s it was no longer a question if the European Union should have a social policy but rather what kind of policies should be passed and through what mode of governance European social policy should be developed.

The SEA and the Treaty of Maastricht significantly advanced social policy. After the 1970s the SEA and the Social Charta of the Treaty of Maastricht were the first major treaties that allowed Europe to move forward on social policy and complementary market integration. Nevertheless, the Treaty of Maastricht left several issues open for future negations. Article N paragraph 2 of the Treaty of Maastricht called for an Intergovernmental Conference (ICG) to address issues that were postponed by the ICG 1991-2. Core challenges of the European Union were the following:

Firstly, institutional problems were not resolved, particularly those caused by European enlargement. With an enlarged EU it became increasingly more difficult to pass new European social policy directives and to revise existing directives. Directives mainly set minimum standards without concrete mechanisms of raising these standards over time. While several of the newly established directives addressed equal opportunities in the labor market, such as parental leave or part-time work, the debate over these issues was not framed in terms of the benefits of gender equality in employment for society and the economy – as Sullerot argued in the 1970s – but in terms of economic needs for increased flexibility and adaptability. Because of the challenges to pass new legislation the framing of directives and what they ought to achieve was much less ambitious than the early equal pay and equal treatment directives. The revision of directives has also been challenging. The Equal Pay Directive 1975 has to this date not been revised and the Equal Treatment Directive 1976 has been revised after 26 years in 2002.

Secondly, the Treaty of Maastricht did not limit the “opt-out” option to the Social Charta but also permitted member states to ratify the EMU separately. The UK did not ratify either one. Denmark experienced difficulties ratifying the Treaty of Maastricht with the Social Charta and the EMU. After the first referendum on the treaty failed the government decided to opt-out of the EMU. In Germany a dispute over the constitutionality of the Treaty of Maastricht emerged and the French referendum on the treaty only passed with a light majority. These ratification

difficulties brought to the attention of policy-makers the pertinent issue of the democracy deficit and lack of transparency of European decision making structures and the struggle over competencies between states and the EU (Griller et al 2000, 2).

Thirdly, the treaty revisions did not promote a new mode of governance that would address the above challenges. Developing a European social policy through directives is a technocratic process with limited involvement of the demos in the deliberation of the legislation. Since the 1990s social partners have increasingly participated in the negotiations but non-governmental organizations (NGOs) have had limited influence on the legislative process. Because of these limitations EC directives, or the traditional mode in which governance works promotes a “top-down” or a “one-dimensional” process of Europeanization rather than a dynamic one between European Union, member states and citizens.

2.1.4 Re-envisioning a European Social Model

In 1992 the Commission President Jacques Delors published a White Paper on *Growth, Competitiveness, and Employment* (COM (93) 551 final, 17 November 1993) and a Green Paper on European Social Policy leading to a White Paper on Social Policy (COM (94) 333 final, 27 July 1994). These documents strongly focus on the relation between employment and social policy. They shift the debate on labor market reform from a focus on unemployment rates to employment rates, job creation and social inclusion. In this section I will specifically focus on the developments in the area of hard law. Chapter 3 takes the White Paper as the starting point for the development of a European Employment Strategy (EES).

On 29 March 1996, the Italian Presidency of the European Council launched a new Intergovernmental Conference (IGC) preceding the Treaty of Amsterdam (1997) in Turin, Italy. Employment and social policy was debated early on during the IGC. Since the British Tory government under Prime Minister John Major strictly opposed the adoption of any further social

policy or to reconsider its opt-out from the Social Charta of the Treaty of Maastricht, the IGC decided to postpone any further debate on social policy until the general election in the UK in 1997.

In May 1997, the British Labour Party won the general election and the newly elected Prime Minister Tony Blair immediately decided to end the UK opt-out of the social protocol. The Minister for Europe, Doug Henderson, announced "that the Social Agreement in its current form represents a sensible balance between social responsibility and economic efficiency" (Agence Europe, 5. 5.1997, no.2). This changed the dynamics of the IGC considerably and accelerated the process because an integration of the Social Charta in the Treaty of Amsterdam seemed feasible.

The European Women's Lobby (EWL) acknowledged the importance of the IGC and the window of opportunity it would create for an overall reform of the way the European Union approached equality. Thus, unlike in the treaty revisions on the SEA and the Treaty of Maastricht the EWL initiated a full scale campaign around the IGC. This considered of the following elements: (1) A comprehensive position on the IGC; (2) Consultation of member organizations at the national level; (3) Information awareness campaign on IGC; (4) lobbying at both EU and national level (Helfferich & Kolb 2001, Mazey & Richardson 1997). Through the organization of a transnational advocacy coalition gender equality was forcefully promoted during the IGC.

On 16 and 17 June 1997 Heads of State and Government agreed on a draft Treaty at the Amsterdam Summit with scheduled signing of the draft for October 1997 (Bulletin 6/1997, I.2 and I.3). The Amsterdam Summit (1997) brought significant changes to the European primary law and gender equality in particular and can be seen as the most significant amendments to the framework of rights, principles and legislation competencies since the Treaty of Rome in 1957. The Treaty of Amsterdam integrated respect for human rights and fundamental freedom

into the formal structure of the EU. In terms of gender equality the EU extended its commitment to further gender equality beyond the workplace to include gender mainstreaming of all activities (Pollack & Hafner-Burton 2000). The EU also moved away from a passive strategy of eliminating inequality to one that advocates equality between men and women actively. Important innovations are:

- Articles 136-145: The Community Charter of Fundamental Social Rights of Workers was formally integrated in the treaty. This was possible because the newly elected British Labour government under Tony Blair adopted the Social Protocol of the Treaty of Maastricht.
- Four new gender related articles were included:
  - Article 2 makes equality between men and women a community task
  - Article 3 (2) establishes gender mainstreaming as the key measure to "eliminate inequalities, and to promote equality, between men and women" in all activities of the EU
  - Article 13 broadens the definition of anti-discrimination to include discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation
  - Article 6a requires the council to pass sex discrimination measures unanimously and consultation with the European Parliament
- Article 141 (ex. 119) was revised. Core differences between the original Article 119 of the Treaty of Rome (1957) and the Treaty of Amsterdam (1997) are as follows.
  - Article 141 (1) clarifies that "equal pay" is for work of equivalent value. The EU formally acknowledges case law produced by the ECJ on the matter and transfers it into its primary aw.

- Article 141 (2) defines the meaning of "pay" as "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer."[49]
- Article 141(3) EGV is a new paragraph which endows the Council with the authority to act to ensure the application of measures on equal opportunities, treatment and pay. Article 141 (3) became the basis for a revision of Equal Treatment Directive 76/207/EEC.
- Declaration 28, appended to Article 141 EC, provides that 'when adopting [positive action] measures, member states should, in the first instance, aim at improving the situation of women in working life'. The declaration off-sets the gender neutrality chosen in Article 141 (4) EC and allows for positive action.[50]

❖ Article 139 (ex. Article 118b) obligates the Commission to consult with social partners before submitting a social policy proposal and social partners can draft their own social partner framework directives. Through this procedural change the practice of social partner involvement in the creation of new policies – developed as part of the Social Protocol of the Treaty of Maastricht – was further institutionalized.

❖ The EU receives a new employment title in Articles 125-130 (ex. 109n-109s). The Employment Title allows the Community to coordinate employment policies while

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[49] For a detailed analysis of the meaning of pay and relevant case law see Ellis (Ellis 1998, 64-146).

[50] After the ECJ ruling on Kalanke v. Land Bremen (Case C-450/93, [1995] ECR I-3051) the ability of Member states for positive action was called into question since it may violate equality enshrined in the equal treatment directive. While this was partially altered in the Barber ruling (OJ [1997] L 56/20, Case 262/80, Barber v. Guardian Royal Exchange, [1990] ECR I-889) Article 141 (4) chose the formulation "the principle of equal treatment shall not prevent any Member state from maintaining or adopting *measures providing for specific advantages* in order to make it easier for the *under-represented sex* to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers" (italics added).

leaving the responsibility for employment policy with the member states. (See Chapter 3).

The Treaty of Amsterdam set the conditions for a revision, deepening and broadening of European social policy in regard to gender equality. Since the treaty incorporated gender mainstreaming as a horizontal task all community policies as well as national policies are evaluated in regard to their gendered impact (Pollack & Hafner-Burton 2000). Through the amendment of Article 141 (ex. 119) and Article 13 EC new equality legislation could be developed. These include the following directives:

- Directive 2000/43/EC of 29 June 2000, OJ 2000/ L180/22

  Equal Treatment of Persons Irrespective of Racial or Ethnic Origin Directive
- Directive 2000/78/EC of 27 November 2000, OJ 2000/ L303/17

  Equal Treatment in Employment and Occupation Directive
- Directive 2002/73/EC of 23 September 2002, OJ 2002/ L 260/15 (amended the Equal Treatment Directive 76/207/EEC)

  Equal Treatment Directive

The revised Equal Treatment Directive 2002/73/EC is of particular importance because it revised the way European social policy seeks to promote equality and equity in employment. Article 1 of the directive clarifies the principle of equal treatment saying that there shall be no direct or indirect discrimination on the grounds of sex in the public or private sectors, including public bodies, in relation to “conditions for access to employment, vocational guidance and training, employment and working conditions, including dismissal and membership in organizations of workers or employers”. Article 1 is a response to the ECJ ruling in Commission v. United Kingdom (Case 165/82, [1983] ECR 3431) in which the court held that European member states could not exclude certain small businesses from application of the equal treatment principle. Article 2 of the directive introduces the concepts of harassment related to

sex and sexual harassment and states that they are forms of discrimination in violation of the equal treatment principle.

The overall legislative framework for gender equality improved considerably with the adoption of the Directive 2006/54/EC which simplifies and updates existing Community legislation on equal treatment of women and men as regards employment and has to be implemented in member states by August 2008.

- Directive 2006/54/EC of 29 June 2000, OJ 2000/ L180/22

  Equal Treatment of Persons Irrespective of Racial or Ethnic Origin Directive

These directives have provided a platform for a new initiative on gender equality. In 2004, for instance, the European Commission published a Green Paper on “Equality and Non-Discrimination for All” in an enlarged EU of 27 member states. Based on the Green Paper the European Commission has designated the year 2007 to be the “European Year of Equal Opportunities for All” as part of a concerted effort to promote equality and non-discrimination in the EU. European Employment, Social Affairs and Equal Opportunities Commissioner, Vladimír Špidla, said:

> "Europe must work towards real equality in practice. The European Year of Equal Opportunities for All and the framework strategy will provide a new drive towards ensuring the full application of EU anti-discrimination legislation, which has encountered too many obstacles and delays. Fundamental rights, non-discrimination and equal opportunities will remain key priorities for the European Commission." (Brussels, IP 05/647, 01.06.2005).

The European Year is the centerpiece of a framework strategy designed to ensure that discrimination is effectively tackled, diversity is celebrated and equal opportunities for all are promoted (Brussels, IP 05/647, 1 June 2005). The strategy – with a budget of 13.6 million Euros – is designed to facilitate the effective implementation of the directives and to achieve equality in practice. Stakeholders, including local authorities, will be invited to participate in this initiative with projects along four themes (1) Raise awareness of the right to equality and non-

discrimination; (2) Stimulate a debate on ways to increase the participation of under-represented groups in society; (3) Celebrate diversity; (4) Promote respect and tolerance.

In 2006 the Commission also adopted a “Roadmap for equality between women and men for the period 2006-2010” (COM (2006) 92 final). In the roadmap the Commission defined its priorities and its framework of action for promoting equality until 2010. In addition, the European Council adopted a “European Pact for Gender Equality” (Conclusion of the Presidency, 77775/1/06/Rev 1). This pact is tied with the soft-law strategy on employment discussed in the next chapter and reiterates the commitment of member states to implement policies aimed at promoting the employment of women and guaranteeing a better work-life balance by particularly promoting childcare services to meet democratic challenges. Furthermore, a Regulation creating a European Institute for Gender Equality was adopted in December 2006 (Regulation (ECV No 1922/2006). The institute is going to provide technical support for the development of policies on gender equality.

In terms of treaty revisions on social policy there have been no significant innovations undertaken since the Treaty of Amsterdam (1997). The Treaty of Nice (2001) did not bring many innovations for social policy (OJ [2001] C 80/1, 10.3.2001). Noteworthy is an amendment to Article 137 (2) EC that extended QMV in areas of where employment contracts are terminated, the representation and collective defense of collective interests, and the employment of third-county nationals. All in all, the Treaty of Amsterdam brought significant changes and the Treaty of Nice extended some of the competencies the EU had received earlier.

The Treaty establishing a European Constitution has not yet been formally ratified by member states (OJ [2002] C 324/33, 24.12.2002). The Constitutional Treaty has to be ratified by all 25 member states to take effect. The ratification process already experienced difficulties with a failure to pass a referendum on the treaty in France and the Netherlands it 2005. Thus, while the treaty is not in effect yet the following parts are of specific interest for gender equality law.

Part II of the Constitutional Treaty contains a Charta of Fundamental Rights (CIG 87/2/04, 29.10.2004). Title III of Part II contains detailed articles on equality, looking beyond gender equality and including equality in regard to race, ethnicity, children, old age, and disability. Title IV of Part III contains detailed articles on solidarity, which address, for instance, collective bargaining autonomy, health care, social security and social assistance.

2.2 European integration and social policy

European legislation has increased significantly since the 1950s. While this is a reasonable indicator for positive integration and a transfer of national regulation to the EU it is difficult to obtain reliable data. Looking at the overall evolution of European legal acts it becomes clear that they have steadily increased.

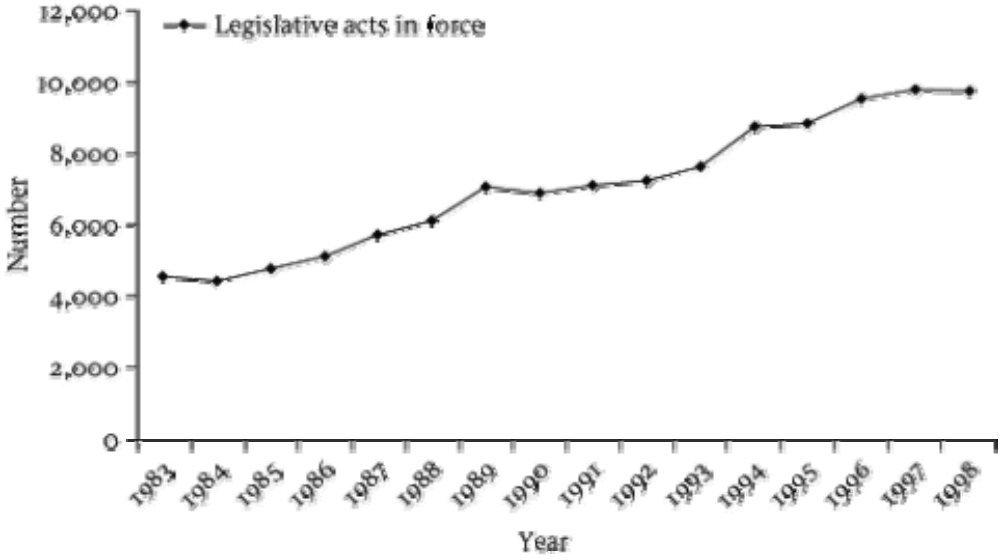

Figure 4: *Annual Number of EC Legislative Acts in Force ((Stone Sweet 2004, 59), referring to (Maurer 2003).*

Furthermore, the passage of new legislation has occurred in phases. Legislation picked up fairly slowly in 1959 and only began to increase significantly in the 1970s. From 1979 to 1985 legislation dropped as a result of circumstances described above, such as UK veto on social

policies. Legislative activities increased again after the passage of the SEA introducing QMV to new areas making legislation easier. Legislative activities slowed down again in the 1990s.

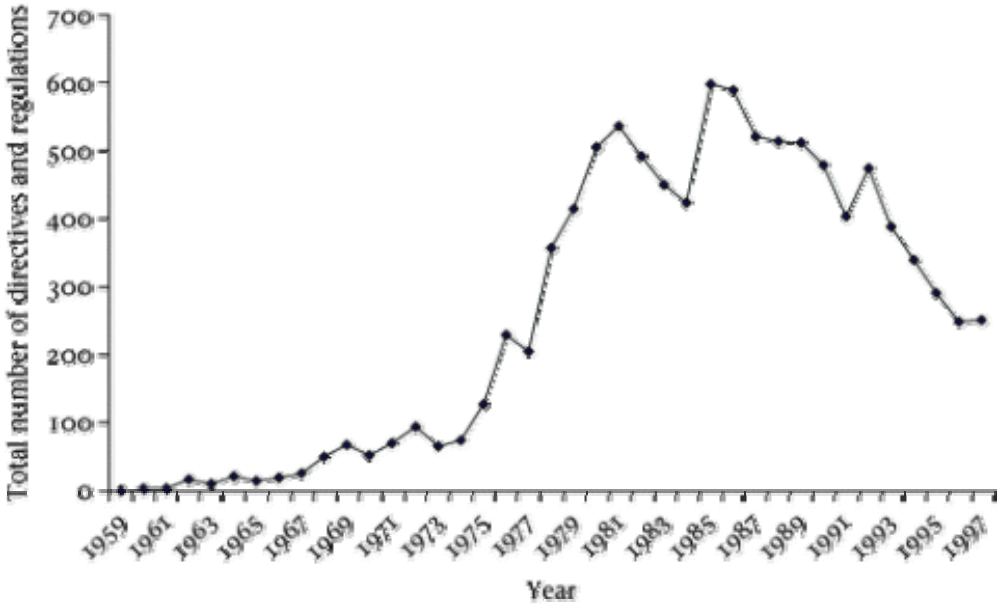

Figure 5: *Annual Number of Council Directives and Regulations Adopted (Stone Sweet and Brunell 2004**,** 59, referring to Christine Mahoney and Alec Stone Sweet from EU Directory of Legislation in Force (2003))*

A similar pattern of new legislation being passed can be found on social policy. Gerda Falkner et al. (2005) focus specifically on the evolution of EC social policy.

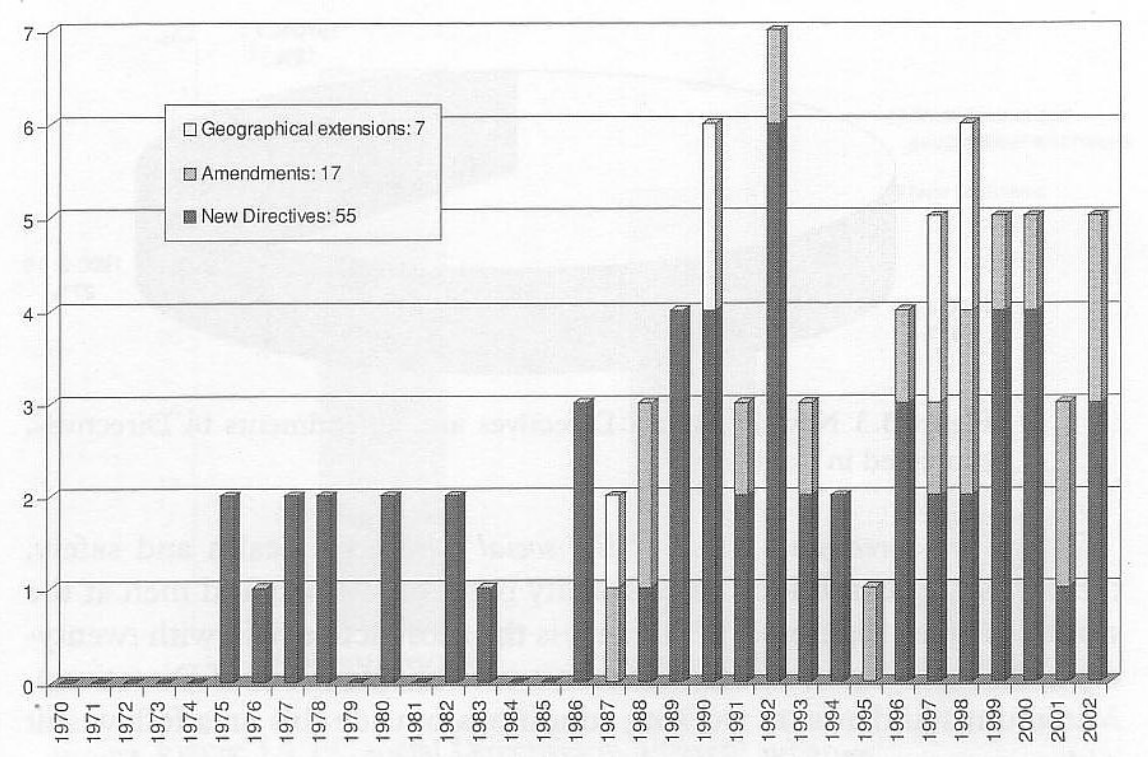

Figure 6: *EC social policy directives over time (Falkner et al 2005, 47)*

The data shows that the first laws were passed in the 1970s only. New legislations were particularly passed after European competencies were extended in the SEA and the Treaty of Maastricht (1992). Gender equality legislation followed a pattern similar to the overall passage of social policy legislation.

2.2.1 Driving forces of integration

As the above review of gender equality legislation has shown, gender equality legislation is not an isolated area of EU legislation and part of a wider debate on the role of the EU, the European internal market and social model. In the original EEC treaty social policy – particularly in regard to gender – received limited attention. Member states did not anticipate that gender equality would become a core area of European social policy and labor law when they agreed to integrate Article 141 (ex. 119) in the Treaty of Rome in 1957. Despite the tenuous treaty basis

for European equality policy, the EC/EU competencies have gradually expanded and a relatively minor provision in the original EEC treaty has had far reaching consequences.

The development of gender equality policies challenges inter-governmentalist scholars that find collective national government and business power to be in control over the process of European integration (Hoffmann 1966, Milward 1992, Moravscik 1993, Moravscik 1998) Taylor 1991, 1997). Inter-governmentalists assume that states – as represented by their national governments – are the primary actors in European policy-making. Nation states are willing to support European integration when they "improve the efficiency of bargaining between states" (Moravscik 1993, 507) and when it "strengthens the state against society" ((Moravscik 1998), see also (Milward 1992). Historical institutionalist scholars have used gender equality policy to demonstrate that these theories overestimate the ability of the principal (nation-state) to control the agent (EU) and unintended consequence of European integration can occur (Pierson 1996). Europeanists have used gender equality to show that inter-governmentalists underestimate the ability of Europeanization to influence national preference formation (Risse et al 2001).

Feminist activists both at the national and European level have promoted the expansion of gender equality policies through different means. Looking at these mechanisms is important to gain a better understanding of how feminist activists have contributed to an institutionalization of gender equality law making the EU a key proponent of anti-discrimination policies.

2.2.2 Mechanisms of evolution

European integration has been driven through different mechansims, specifically transnational economic activity, legislating, litigating, and lobbying (Stone Sweet 2004, 52-55). Firstly, transnational economic activity has increased significantly through the removal of trade and investment barriers since the founding of the EC. Market creation or negative integration can lead to "spill-over" effects and positive integration in other areas, such as foreign and

security policy or gender equality (Moravscik 1993, Scharpf 1996). The underlying premise of this mechanism of European integartion are national actors that seek to further private interests by turning to the EU. Secondly, reforms of the polity or legislative procedures that increased the capacity of the EU to pass new legislation. The SEA introduced QMV in a number of new policy areas making it easier to pass new legislation (Jupille 2004, Moravscik 1998, Tsebelis 2001). Thirdly, the EU has a preliminary ruling mechanism that allows private actors to access the ECJ via national courts. This feature has promoted a development of the EC from an international regime to a quasi-federal polity. Legal scholars have shown how ECJ turned peliminary ruling system of the EU from a mechanism to allow individuals to challenge European law in national courts into a mechanism to allow individuals to challenge national law in national courts, thereby reinforcing the supremacy of European law over national law (Alter 2001, Burley & Mattli 1993, Weiler 1994, Weiler 1991). Finally, interest group lobbying as been important for, particularly, bringing certain issues to the attention of the European Commission and the European Parliament. Lobbying at the Commission, European Parliament and Council is key for putting new issues on the European agenda and influencing the shape of new legislative proposals (Marks & McAdams 1996, Mazey & Richardson 1993, Mazey & Richardson 1997, Pollack 1998)]. Looking at the influence of sub-state actors and how they use the opportunities and constraints of the EU shows that domestic actors and social movements are not equally well able to exploit these new opportunities.

Women's activists have particularly influenced the mechanism for developing further EU legislation, particulalry litigation and lobbying. These mechanisms are important because they are driven by national level activists as well as European level activists. When we study legislative reforms at the national level in subsequent chapters these activists become important for the way European law has been implemented.

Lobbying

As the previous discussion on the evolution of EC law has shown, women's activist's influence on gender equality law only gradually expanded over time and has had varying success in influencing treaty revisions and secondary laws. When the Treaty of Rome (1957) was established it was largely due to the French government that Article 119 was integrated in the primary law. The influence of women's activists on the passage of equality directives was limited in the 1970s and new equality directives proposed by women's activists were not adopted in the 1980s. Despite these setbacks a range of institutions to support gender equality were established at the EC level in the 1980s. An important institution is the European Women's Lobby (EWL), created with the support of the European Commission. These organizations had marginal influence on the passage of new social policy directives in the early 1990s that were based on the SEA and the Social Charta of the Treaty of Maastricht. Social partners were given access to the decision making process, particularly in the process of drawing up framework agreements for new social policy directives, while non-governmental organizations were not given the same access to the decision making process. In the mid 1990s the EWL and other equal opportunity organizations became active on the IGC of the Treaty of Amsterdam. The Treaty of Amsterdam was breakthrough for women's activists.

The EWL built a transnational advocacy coalition around the IGC that demanded a revision of equality legislation both through lobbying at the European level and at member state governments (Helfferich & Kolb 2001). A transnational advocacy coalition brings together actors who have a vested and shared interest on a common issue. Unlike a social movement that is composed of non-governmental actors (NGOs) a transnational advocacy coalition also has governmental and intergovernmental actors.

The success of the campaign can be attributed to the effective lobbying of the coalition and through the relative openness of the political opportunity structure (Imig & Tarrow 1997, Marks & McAdams 1996) at the time of the ICG. At the European level the EWL, Equal

Opportunity Unit of the DG Employment, Women's Standing Group at the European Parliament among others and national level women's organizations as well as women's activists within national parties and bureaucracies lobbied around the same issues. Thus, the success of campaign was not due to the emergence of a European women's movement or European lobbying effort alone but rather a multilevel campaign that focused on the European Commission, Council of Ministers (Council) and European Parliament (EP) on the European level and national governments at the national level.

These lobbying efforts met a relatively open political opportunity structure that was created by, for instance, Northern enlargement, increased powers of the European Parliament through the Treaty of Maastricht and the victory of the Labour party in the UK that removed a crucial opponent to an expansion of European social policy. In addition, a crisis of the European project with rejection of the Euro in Denmark in 1992 and low support of the EU by women in opinion polls led member states to search for ways to enhance public support for further European integration. (For more information on this see (Hoskyns 1996, Liebert 2002, Mazey 1998)).

Since the Treaty of Amsterdam European and national level organizations have not been able to use further treaty revisions to expand gender equality policies further. However, they have used their strategies to influence and shape the revision of directives, promoting gender mainstreaming and overall to strengthen the gender dimension of European policies within the framework of the Treaty of Amsterdam.

Litigation

Litigation has been an important mechanism for feminist activists to enhance the pressure on national governments to establish new European social policies. Through litigation new questions in regard to the meaning of primary law can be raised, such as does equal pay extend to equal pay for work of equal value, does pregnancy fall under the equal treatment? In

the process of drafting primary and secondary law the role of women's activists has been limited. While social partners have been increasingly integrated in the decision making process, particularly in the Social Partner Framework Agreement of the 1990s, this was much more challenging for women's activists or non-governmental organizations in general. Litigation allowed women's activists on the national level either as individuals (as in the Kreil case) or backed by women's organizations such as the EOC in the UK to raise questions on the way the EC law should be interpreted. This opened up the possibility of exploiting the ambiguity of primary and secondary law and demand further clarification of the law through the ECJ. In other words, by posing new questions to EC law it leads to unanticipated consequences for member state governments that originally passed the legislation.

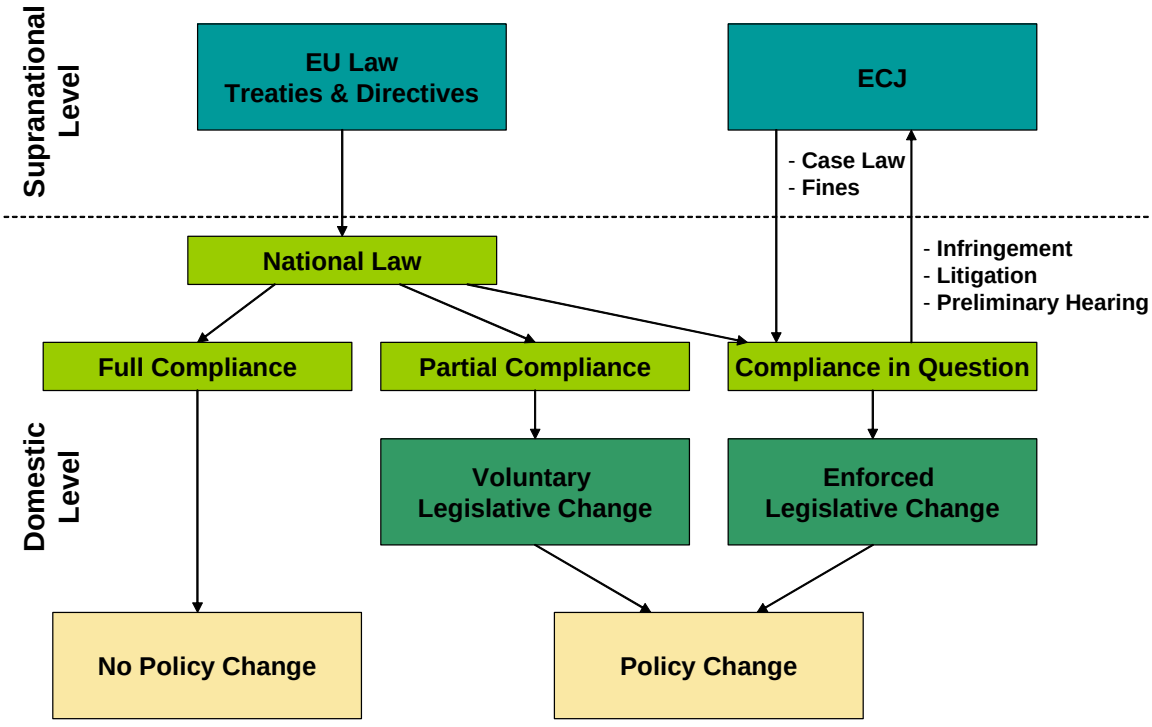

Figure 7: *EU hard law and domestic policy change*

Leibfried (2005) collected data on the distribution of ECJ judgements on social policy from 1954 to 2003 (Leibfried 2005). Based on their data the figure below was compiled.

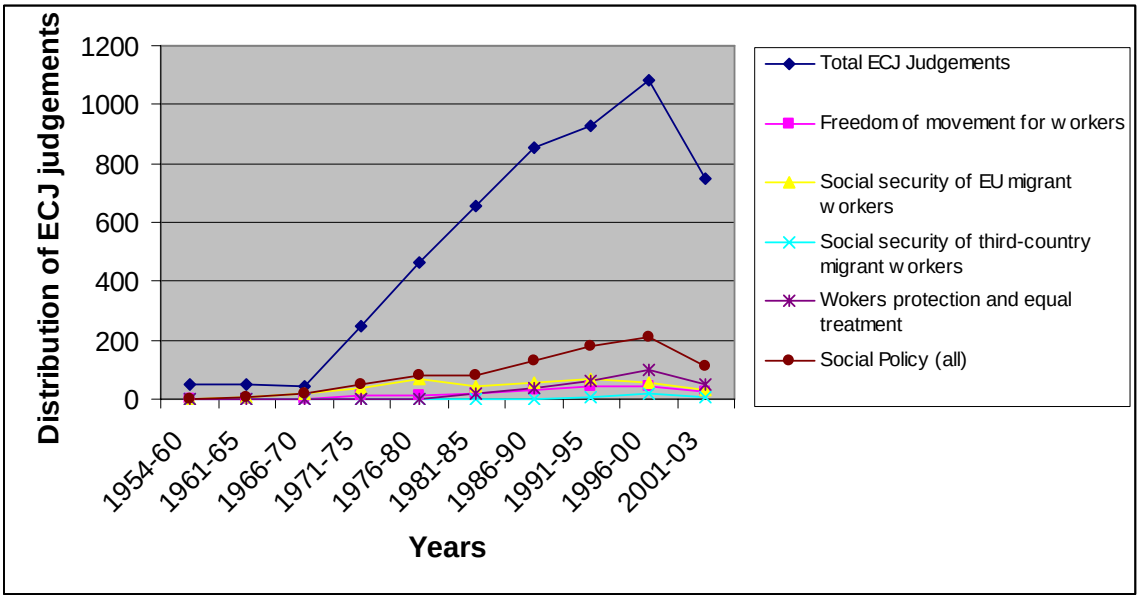

Figure 8: *Distribution of ECJ judgments on social policy by functional categories*

(Data Source: (Leibfried 2005, table 10.3)

The data shows that when the ECJ processed an increasing number of cases, social policy cases did not increase in the same way. From 1966 to 1970 46.6% of ECJ judgments were in regard to social policy and in 2001-3 only 14.9%. Workers protection and equal treatment is again only a small fraction of ECJ cases. It is not only important how many cases reached the ECJ but also how they reached the ECJ. Here, it is important to distinguish between referrals to the ECJ by the European Commission – initiating an infringment procedure – and preliminary hearings by national courts – based on private actor litigations. Leibfried (2005) collected data on ECJ rulings on social policy by functional subcategory and EU member state, 1954-2003.

	Countries	AU	BE	DK	FI	FR	DE	GR	IE	IT	LX	NL	PT	ES	SW	UK	All
	Freedom of movement for workers																
1	Referral by European Commission		12			6	2	5		11	6	1		5			48
2	Preliminary rulings	5	17			16	32	2	1	15	5	18	1	2		18	132
3	All	5	**29**			22	**34**	7	1	26	11	19	1	7	—	18	180
	Social security of EU migrant workers																
4	Referral by European Commission		5			5	1	1			1	2				1	16
5	Preliminary rulings	6	121	1	2	40	93	2		9	5	67		7	2	20	375
6	All	8	**126**	1	2	45	**94**	3		9	6	**69**		7	2	21	391
	Social security of third-country migrant workers																
7	Preliminary rulings	2	4			1	18					5					30
	Workers' protection and equal treatment																
8	Referral under Article 230 (ex 173)																2
9	Referral by European Commission	4	6	1	1	8	4	3	2	15	6	1	1			4	56
10	Preliminary rulings	6	15	18	2	9	54	1	5	12		30		7	4	52	215
11	All	10	21	19	3	17	**58**	4	7	27	6	31	1	7	4	**56**	273
	Social policy—all																
12	Referral under Article 230 (ex 173)																2
13	Referral by European Commission	4	23	1	1	19	7	9	2	26	13	4	1	5	0	5	120
14	Preliminary rulings	19	157	19	4	66	197	5	6	36	10	120	1	16	6	90	752
15	All cases	23	180	20	5	85	204	14	8	62	23	124	2	21	6	95	874
16	Union member since	1994	1957	1972	1994	1957	1957	1980	1972	1957	1957	1957	1985	1985	1994	1972	—
17	Years: 2003 minus (line 16 or 1961)	10	43	22	10	43	43	24	32	43	43	43	19	19	10	22	426
18	Cases/year membership (115/117)	2,3	**4,2**	0,9	0,5	2	**4,7**	0,6	2,5	1,4	0,5	2,9	0,1	1,1	0,6	**4,3**	2,1

Table 3: *ECJ rulings on social policy by functional subcategories and EU member states*

(Source: (Leibfried 2005, table 10.4).

It is important to note that preliminary rulings outnumber referrerals by the Commission. In the case of workers' protection and equal treatment Germany, for instance, has 4 cases of referral by the commission but 54 preliminary rulings and the UK 4 referrals by the Commission but 52 preliminary rulings. This data does not mean that the Commission has not initiated more infringement procedures but only very few cases actually go all the way to the ECJ.

2.3 Summary

This chapter described the evolution of EU gender equality legislation which occurred in four phases – initial development of EC social policy directives in the 1970s, advancing social policy in hard times in the 1980s, social policy expansion within the context of internal market building in the 1990s and currently, the reformulation of equality principles and approaches. Looking at the evolution of social policy over the past 50 years makes clear that gender equality policy has been intertwined with the overall development of social policy.

Gender equality policy was a significant part of the Treaty of Rome in 1957 but rather a "passive" component of the treaty that had to be "activated". Feminist activism both at the national and European level played a major role in this development. In the 1980s and 1990s feminists mainly used litigation and lobbying to integrate gender equality policies in social policy and expand the body of gender equality law and redefine the overall approach to gender equality by, for instance, promoting gender mainstreaming. Looking at the evolution of EC directives over times makes clear that gender equality policies have not developed in a clear and predictable fashion. The process has been rather a stop-and-go with activists finding new and creative ways to further gender equality once it came to a halt. The non-linear development makes has let to a patch-work of gender equality policies that make it difficult to predict how European gender equality will develop further.

What is clear, however, is that the EU has a strong and continuing commitment to gender equality policy and the body of law has been continuously expanded. Even when the process has come to a temporary halt and social policy has come under harsh criticism, like in the 1980s, gender equality policies have not been revoked. Thus, over time, gender equality policies has been broadened and revised, it has emerged from an "unintended consequence" of Article 119 of the Treaty of Rome to an integral part of EU policy and the Commission and Council have time and again reiterated their commitment to equal opportunities and equality

between women and men. This being said, passing EC directives in a EU of 27 member states is challenging and the limitations of hard law to further gender equality within member states have become apparent. To further advance gender equality policies, particularly within the new European employment policy, a new soft law approach has become necessary. The next chapter will address this new mode of governance.

3 A “European Employment Model” in the Making – The Role of ‘Soft Law’

This chapter examines the evolution of the European employment policy which took concrete form with the introduction of an Employment Title at the Treaty of Amsterdam and the Luxembourg Jobs Summit in 1997. The Employment Title marks a “shift in emphasis from the enactment of employment law (the body of rules directly concerned with the employment relationship) to the creation of employment policy (measures directly concerned with the creation and maintenance of employment, including measures concerned with training)” (Barnard & Deakin 1998, 134). Gender equality plays an important role in this new policy area.

European employment policy has as its focal point the European Employment Strategy (EES). The EES contains a set of non-binding guidelines designed to govern labor market reforms, policies and institutions of member states and established a complex system of reporting, indicators, multilateral surveillance, exchange of best practices and mechanisms to evaluate the employment performance of member states through benchmarking and peer review. The EES is the classic form of a new mode of governance within the EU called the Open Method of Coordination (OMC).

The first section of this chapter describes the evolution of the EES. The second part focuses on explaining European integration and employment policy in more detail by looking at the driving forces and mechanisms of evolution. The chapter concludes by looking at how “soft” gender equality laws in employment policy have complemented “hard” gender equality laws in social policy.

3.1 Development of the European Employment Strategy

3.1.1 Why Europe needs a European employment strategy

The establishment of a European employment policy was highly contested in the 1990s. Two interrelated factors supported the development of this new policy field. Firstly, most European member states experienced high unemployment rates and low job growth rates, particularly compared to the United States. This raised questions on the overall competitiveness of the EU economies within the global market economy and underscored the necessity to restructure employment policies. Secondly, member states had to adapt to the effects of the Economic and Monetary Union (EMU) that transferred monetary and exchange rate policy from member states to the European Central Bank. In addition, since not all member states agreed to transfer these responsibilities to the EU it indicated a lack of popular support to the EU and pointed to a legitimacy crisis of the EU. It also raised new questions about the relationship between macroeconomic and monetary policies vis-à-vis employment policies. I will look at these issues in more detail below.

Employment gap and global competitiveness

A key issue for the development of the EES was the employment gap between Europe and other advanced in industrialized economies. In the 1990s unemployment rose to 18 million in the EU (Bertozzi & Bonoli 2002, 2) and the "15 existing or prospective EU member states lost 6 million jobs (60 percent of the total created between 1985 and 1990)" (Goetschy 1999, 121). The employment performance was increasingly seen as being not sufficient. Fritz Scharpf notes:

> "Present political discussion in Europe emphasizes the superior performance of the United States where the rate of unemployment is now lower than it is, on average, in Europe, and where the rate of job creation has been much higher over the last tow decades or so. In fact, between 1971 and 1994, civilian employment increased by 55 per cent in the United States, and only by 11 per cent in the present member states of the European Union (OECD 1997c) … What is most worrying, however, is the structural component of the European employment gap. It is reflected in the high level of long-term unemployment. In 1995, for instance, only 9.7 per cent of the unemployed in the United States had been out

> of work for twelve month or longer. Among the member states of the European Union, this ratio varied between 17 per cent in Austria and more than 60 per cent in Belgium and Italy, with most countries having shares of long-term unemployment between 30 and 50 per cent" (Scharpf 1999, 123-4).

The long-term deterioration in employment in Europe becomes particularly visible when comparing unemployment, growth and job creation rates between the US, EU and Japan over time.

	1961-1970	1971-1980	1981-1990	1991-1999
EU	0.3	0.4	0.5	0.0
US	1.9	2.0	1.8	1.5
Japan	1.4	0.7	0.9	0.4

Job Creation in the EU, US and Japan, 1961-1999
Source: (Commission 1998, 67)

	1961-1970	1971-1980	1981-1990	1991-1999
EU	2.2	4.0	9.0	10.1
US	4.7	6.4	7.1	5.8
Japan	1.2	1.8	2.5	3.1

Average annual percent of civilian labor force, unemployed
Source: (Commission 1998, 69)

	1961-1970	1971-1980	1981-1990	1991-1999
EU	4.8	3.0	2.4	1.9
US	4.2	3.2	2.9	2.5
Japan	10.5	4.5	4.0	1.1

Average annual percent change, GDP in constant prices
Source: (Commission 1998, 83)

Table 4: *Economic performance of the EU in comparison with the US and Japan*

Between 1960 and 1999 the US continuously performed best in terms of job creation rate. In regard to unemployment the US experienced higher unemployment rates than the EU and Japan in the 1960s and 1970s but reversed the trend in the 1990s. The EU has experienced a decline of job growth and an increase in unemployment. The EU had lower job growth and higher unemployment rates than Japan since the 1960s. In terms of GDP growth the

EU fared better than Japan but worse than the US. Overall, the EU figures gave rise to concerns about the competitiveness of the EU. [51]

Within Europe member states had different levels of unemployment and job creation. Denmark, Spain, Ireland, the Netherlands, Portugal and the UK have lower than the average number of unemployed. Germany, France and Italy have a long gradual upward trend in unemployment (Cameron 1999, 9). In terms of job creation Ireland, Luxembourg and the Netherlands created jobs while Finland, Sweden, Germany and Italy lost jobs and Britain, France and Belgium had relative stagnation in job creation (Cameron 1999, 11, Kasten & Soskice 2000).

OECD studies examined the causes of this variation and point in a number of studies to rigidities in the labor market as a key cause for lack of job creation and high unemployment. The Grubb and Wells' OECD study of employment regulation and patterns of work showed that the more regulated a country's labor market is the slower is private sector employment growth and the lower is its level of aggregate earnings/ income ((Grubb D. & Wells 1993) see also (OECD 1986). The OECD Jobs Study 1994 (OECD 1994a) emphasizes that the employment gap in Europe is largely caused by institutional rigidities, union power, and high costs of welfare state programs in conjunction with a large public sectors. These labor market rigidities and costs decrease the global competitiveness of European firms on the one hand but also decrease incentives for workers to seek employment and take on lower wage jobs. These studies made apparent that traditional policy instruments, such as employment protection and labor supply reduction could not contain the rise of unemployment nor create new jobs and employment growth. This became particularly apparent in the case of Germany.

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[51] For an analysis of the enduring problem of high unemployment in Europe and variation among EU member states see, for instance, Cameron DR. 1999. Unemployment in the New Europe: The Contours of the Problem. *EUI Working Papers* 99. The above tables are from Cameron DR. 1999. Unemployment in the New Europe: The Contours of the Problem. *EUI Working Papers* 99. For a detailed analysis of the employment situation see Bundesbank D. 1999. Der Arbeitsmarkt der Europäischen Währungsunion. *Deutsche Bundesbank Monatsbericht* 51: 47-59.

The underlying issue guiding the debate on employment policy has been the search for a European agenda on global competitiveness. During the early 1990s the EU was increasingly compared with the US and Japan. Particularly through the establishment of the EMU the EU as a whole – rather than individual member states – were compared with the Japan and the US. OECD studies emphasized that ad hoc state interventions to reduce unemployment would not be able to solve the structural problems European economies were facing in a global market economy. Looking at the EU as one economic area with diverse challenges across member states opened up the opportunity to think about employment beyond the narrow approach taken at the Social Charta of the Treaty of Maastricht (1992).

Economic and Monetary Union

In the 1990s the popular support for further economic and market integration declined sharply. In the Treaty of Maastricht (1992) Heads of State and Government decided to create the European Monetary Union (EMU) which transferred national competences on currency and fiscal policy to the EU. Member states had to ratify the EMU and referenda failed in the UK, Sweden and Denmark referenda failed. In France, President Mitterrand only won the referendum with a slight majority. In Germany the EMU was passed by the parliament but litigants challenged the decision in Constitutional Court which subsequently declared adoption of the EMU constitutional. The challenges of adopting the EMU pointed to a legitimacy crisis of the neo-liberal integration project of the EU.

The post-Maastricht legitimacy crisis was used by proponent of a European social model, particularly Sweden and Austria, to argue that the EU would only gain more popular support if its economic integration was accompanied by a strong and coherent social and employment component. It was further argued that member states could no longer compete based on their monetary policy and this in turn would enhance the pressure on labor markets. To avoid a spiraling down of employment and social standards in a common market social democratic

governments and unions argued for the development of a European employment strategy to set minimum standards and common objectives. A transferal of competences on employment policy was opposed by conservative governments, such as the British and German governments, that stressed differences between member states employment policies and perceived competition as useful to remain competitive in a global economy. These different positions had to be reconciled to move forward on employment. Thus, the core question was if employment policy be also decided at the EU level or remains at the national level given that macro-economic and monetary policy was going to be decided at the EU level.

3.1.2 Establishing the European Employment Policy

The EU had very limited competences on employment. The Treaty of Rome (1957) addresses employment in Article 104 EEC (high levels of employment as part of the common economic policy) and Article 118 EEC (employment as part of social policy). The Treaty of Maastricht (1992) entitled a European Social Charter but did not grant the EU an Employment Title. To develop a European employment policy a stronger mandate from member states was necessary. This section outlines the key events leading up to the European employment policy, particularly the White Paper (1993), Essen Summit (1994), Intergovernmental Conference (1996/1997), Amsterdam Summit (1997) and the Luxembourg Summit (1997). Through these steps a European employment policy was created which complemented the increased competences the EU received on monetary policy.

White Paper - Growth, Competitiveness and Employment (1993)

The Commission President Jacques Delors initiated a dialogue on employment policy through a White Paper on *Growth, Competitiveness, and Employment* that he presented at the Edinburgh Summit in December 1992 (European Commission 1993). The White Paper was

formally adopted by European Council on 5 December 1993 (COM (93) 700 final). The preamble of the White Paper says:

> "This White Paper sets out to foster debate and to assist decision-making – at decentralized, national or Community level – so as to lay the foundations for sustainable developments of the European economies, thereby enabling them to withstand international competition while creating the millions of jobs that are needed" (COM (93) 700 final).

The overarching goal of the strategy was to reduce unemployment by fifty percent by 2000. This goal should be met through three interlinked strategies.

Firstly, the criteria for monetary stability set out by the Treaty of Maastricht (1992) and the Stability and Growth Pact (1992) should be kept. Secondly, a European social pact should be established that requires wage restrain of workers and would transfer productivity gains into economic sectors having most job growth perspectives. An infrastructure project should be launched that would create a European energy, transport and telecommunication system. The European Investment Bank (EIB) would provide 5 Billion ECU[52] for this infrastructure project. Thirdly, the EU should develop an employment strategy. This section of the White Paper was largely drawn up based on a comparison of the US and European labor markets. The European labor market was seen as having high non-wage labor costs and high inflexibility. Three measures were suggested to remedy this situation - education and training of employees to enhance their competitiveness, increase in flexibility of labor market and reduction of non-wage labor costs, especially for low qualified workers. Since this would reduce tax revenues the White Paper suggests that governments increase or establish an environmental tax.

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[52] The European Currency Unit (ECU) was a basket of the currencies of the European Community member states. The ECU was conceived on 13 March 1979 and was replaced by the Euro on 1 January 1999.

The White Paper did not have immediate consequences because member states objected to costly measures proposed by Delors. The White Paper was, however, widely debated within European institutions and member states. Member states disagreement on how to address current employment and economic challenges.

> "John Major, UK Conservative Prime Minister, as well as Felipe González, Spanish Socialist Premier, attached the overregulated nature of EC's job market as the principal cause of massive unemployment. Others, notably the French and Danish socialist leaders, feared the dismantling of the European welfare states" (Endo 1999, 196).

The White Paper sought to negotiate through these different positions. The White Paper entitles elements of a neo-Keynesian demand and a neo-liberal supply side approach to the growth and job related problems of the EU.

The largest contribution of the White Paper has been a shift in the debate on employment on a number of issues. Firstly, it moved the debate away from short-term questions of economic growth to more long-term and structural problems of the Community in regard to employment and structural reforms of the labor market. Secondly, it shifted the debate on employment from focusing on unemployment to one on how employment rates could be raised (European Commission 1993, 136, Ferrera et al 2000, 77-78). An increase in employment rate was envisioned through job growth and an increase in employment opportunities for skilled workers.

Women's activists, particularly those active in the Expert Group on Gender and Employment (EGGE) headed by the British academic Jill Rubery, perceived the overall focus on employability as positive for women's employment but critiqued the White Paper for its negligence of the structural constraints that exclude particularly women from the labor market and the treatment of women as "a target group requiring social help and not as a group shaping the future pattern of employment in Europe" (Rubery & Fagan 1998, 99, Rubery & Maier 1995). The expert group emphasized that the White Paper did not specifically address the interests of

women and did not correctly interpreted the changes taking place in the European labor market at the time.

> "For example, the White Paper presented the tendency for most new jobs to be taken by the inactive rather than the unemployed as a puzzle and not as a consequence of gendered nature of labour demand in a context of declining manufacturing and the rise of part-time and service sector jobs" (Rubery 2005, 393).

Overall, the White Paper put employment policy thoroughly on the European agenda. In the coming years the debate was no longer on whether or not to have a strategy but rather on how all member states could be convinced to establish a European employment strategy and its direction and content.

Essen Summit (1994)

The foundation of what is now known as the EES was laid down at the Essen Summit in December 1994 – the last attended by Jacques Delors as Commission President. In this summit a procedure for employment monitoring was established. This procedure resembles that of the economic monitoring procedure introduced in the Treaty of Maastricht (Article 99 EC) to oversee the EMU but does not have the backing of the Stability and Growth Pact (1992) and does not permit the EU to apply sanctions. The Council recommended member states to take action on five areas of employment:

(1) Improving employment opportunities by investment in vocational training and life-long learning;

(2) Increasing employment intensity of growth through more flexible organization of work and working time, wage restraint, job creation in local environmental and social services

(3) Reduction of non-wage labor costs to promote the growth of a low-skill labor market segment

(4) Active labor market policies by reforming employment services, encouraging occupational and geographical labor mobility and developing incentives for the unemployed to return to work

(5) Targeted measures to help groups particularly affected by long-term unemployment.

The Council also passed a resolution in support of equal participation by women in an employment-intensive economic growth strategy (European Council 1994b).

The Essen Strategy contained elements of neo-liberal and neo-Keynesian approaches to employment. Some elements were deregulatory in character by, for instance, emphasized the need to reduce indirect labor costs and increase the flexibility of the labor market to increase effective utilization of labor while other parts reinforced the role of the state in training and support the integration of specific target groups into the labor market like young people, long-term unemployed and women. The Essen Council also urged member states to translate the recommendations into national policies and submit annual progress reports. The Commission, in conjunction with ECOFIN and the Labor and Social Affairs Council were asked to draw up an annual report and evaluate the individual reports. To do so, the Essen summit introduced monitoring and benchmarking into the reporting process to increase the transparency of what actions member states on employment. While the monitoring procedure was fairly weak it can be seen as a first attempt to coordinate policies of member states in the area of employment and get governments to commit to joint European objectives on employment.

At the Essen Summit women's activist challenged the perception of women as a target group and demanded that the strategy addresses equality more holistically by making direct references to equal opportunities, gender monitoring or auditing, recognition of gender implication of employment, indirect policies to support women's employment. This was not adopted by member states. Essen Council recommended that member states should take action in areas of improving employment opportunities by investing in vocational training,

improvising intensity of growth, reduction of non-wage Labor costs, active labor market policies, and targeted measures to help groups particularly affected by long-term unemployment. Thus, women were still perceived as a target group that required help to succeed in the labor market and not as a group shaping the future pattern of employment.

Following the Essen European Council meeting details of a European employment policy were negotiated. In December 1995 the Madrid European Council decided "… that job creation is the principal social, economic and political objective of the European Union and its Member states, and declares its firm resolves to continue to make every effort to reduce unemployment." [53] At the June 1996 European Council meeting in Florence the new Commission President Jacques Santer proposed an *Action for Employment in Europe: A Confidence Pact* that called for an integrated approach to promote job creation and growth. The confidence pact supported and reinforced the EMU and argued that the EMU would reduce unemployment in the medium term; it emphasized the positive benefits of further market integration, called for structural reform in employment policies in line with the Essen summit and supported the introduction of pilot projects on territorial and local employment pacts. At the Dublin European Council meeting in December 1996 the emphasis on employment was reiterated in the *Dublin Declaration on employment*, underlining the need to pursue a macroeconomic policy favorable to growth and employment. The Commission emphasized the need to support European employment recommendations with structural funds in a communication on *Community Structural Assistance and Employment* (COM (96)109). Particularly the European Social Fund (ESF) was seen as useful to further the employment objectives of the Essen council.

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[53] http://www.europarl.eu.int/summits/mad1_en.htm,SN400/95

While employment policy was thoroughly established on the EU agenda by this time women were still seen as a target group like young people, long-term unemployment. In other words, equal opportunities and employment were still seen as separate issues and gender equality was still approached with a target group strategy.

Inter-Governmental Conference (1996-1997)

In early 1996, in the European Council of Turin, an Inter-Governmental Conference (IGC) commenced to discuss the reform of the Treaty of the European Union (For details on the proceedings of the IGC see (Griller et al 2000, Helfferich & Kolb 2001, Mazey & Richardson 1997, Moravcsik & Nicolaidis 1999)). This conference leading up to the Treaty of Amsterdam (1997) consolidated the process started with Delors' White Paper and the Essen Summit. At the opening of the IGC, the European Council of Turin on March 29 1996 formally added employment to the reform agenda by saying that

> "supplementary coordination action is necessary. Therefore in order to fulfill the objective of a high level of employment while ensuring social protection, the IGC should examine how the Union could provide the basis for better cooperation and coordination in order to strengthen national policies. The IGC should moreover examine whether and how the efforts of our governments as well as of the social partners could be made more effective and better coordinated by the Treaty" (SN 100/96, pt. I).

The negotiations leading up to the final compromise on employment were highly controversial. In Turin a European employment policy was particularly supported by Austria, Belgium, Denmark, Greek, Italy, and Sweden. Member states less supportive of a European employment policy were Finland, Ireland, Luxemburg, Netherlands, Portugal, and Spain. Key member states were opposing an extension of EC competencies, namely, France, Germany and the United Kingdom (Tidow 1998, 31-46). The German Christian-Democratic Chancellor Helmut Kohl and the British Conservative Prime Minister John Major had the most restrictive stance on a European employment strategy. The French Conservative Prime Minister Alain Júppes was not

strictly opposing an employment policy but did not favor a transferal of responsibilities (see (Griller et al 1996, 122ff, Griller et al 2000, 530ff, Sperlich 1998, 23-27)). [54]

Throughout the negotiations the development of an employment policy was still held back by key member states opposing a European employment title. Chancellor Kohl maintained its restrictive position on employment despite the Bundesrat demanding that the government should approve of an employment policy (8. November 1996) and the Social Democratic Party (SPD) – in opposition at the time – argued that it would not ratify a treaty if it did not include an employment title (Aust 1997, 761). Prime Minister Major also strongly opposed an expansion of social policy and even demanded to reverse some of the achievements of the SEA, such as revoking qualified majority voting on health and safety (Article 118sa EC) back to unanimity voting and to overall reduce workers rights (Aust 1997, 761). At this point the Major government had also called upon the ECJ to evaluate the working time directive (see Chapter 2).

The negotiations on a European employment policy only speeded up in 1997. Firstly, the New Labour government under Prime Minister Tony Blair was elected in the UK on 1 May 1997. Already on 4 May 1997 the Robin Cook declared that the government would sign the Social Charter of the Treaty of Maastricht (1992), opening the way to incorporate the Social Charta into the future treaty. On 5 May 1997 Doug Henderson, Minister for Europe attended the IGC and said

> "We believe that the Social Agreement in its current form represents a sensible balance between social responsibility and economic efficiently. I hope that its transition into the treaty will be straight forward. It is also right that the European Union should play its part in tackling unemployment. … We will therefore support an Employment Chapter in the Treaty" (cited in (Aust 1997, 762)).

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[54] During the IGC the European Parliament, Commission and social partners sought to influence the negotiation process. The European Parliament strongly supported a European employment policy and demanded far-reaching competencies on employment that went beyond the proposal by the Commission Tidow S. 1998. Europäische Beschäftigungspolitik. Die Entstehung eines neuen Politikfeldes: Ursachen, Hintergründe und Verlauf eines politischen Prozesses. In *University of Marburg*. ETUC was more supportive of an expansion of EU competences on employment than UNICE Tidow S. 1998. Europäische Beschäftigungspolitik. Die Entstehung eines neuen Politikfeldes: Ursachen, Hintergründe und Verlauf eines politischen Prozesses. In *University of Marburg*.

The government insisted, however, that no concrete targets or goals were explicitly written into EU primary law. Secondly, the French President Chirac called for early election in June 1997. The French Conservative government under Prime Minister Alain Júppes lost the election and was replaced by a Socialist government under Prime Minister Lionel Jospin. The newly elected French socialist government was in favor of a European employment policy but also demanded to renegotiate the Stability and Growth Pact (1992).

In the final phase of negations the only government opposing a European employment strategy was the German Christian-Democratic government of Helmut Kohl.[55] Chancellor Kohl got under enhanced pressure to commit to a European employment policy from the French and British governments when he once again objected to the establishment of a European employment policy on 16 and 17 June. At the end, Chancellor Kohl agreed to a European employment title as long as no concrete targets and goals were explicitly written in the treaty itself (Frankfurter 1997). The final compromise was that member states remained in charge of employment policy but the EU was given competencies to develop a European strategy entitling non-legally binding guidelines on employment. This agreement allowed the EU to become active on employment policy and complement its activities in monetary and fiscal policies.[56]

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[55] The German Christian Democratic government has opposed transferring responsibilities on employment to the EU Barth B. 1996. Beschäftigungspolitik in der EU. In eigener Verantwortung. *Bundesarbeitsblatt* 7-8: 8-14. However, the government has recognized that reforms are needed and promoted the Essen strategy (1994) but did not want to extent EU competencies beyond it.

[56] Employers and unions had different positions towards an European employment policy. ETUC strongly in favor of a European Employment Title while UNICE opposed. ETUC (European Trade Union Confederation). 1996. *Building an Employment Union*, Brussels, ETUC (European Trade Union Confederation). 1997b. ETUC meets Luxembourg Prime Minister. *ETUC press report* 3, ETUC (European Trade Union Confederation). 1997c. *ETUC Resolution on the Amsterdam EU-summit*, Brussels, ETUC (European Trade Union Confederation). 1997d. Memorandum from the European Trade Union Confederation to the Dutch Presidency. *ETUC press report* 3: Brussels, UNICE (Union des Confédérations de l'Industrie et des Employeurs. 1997. *UNICE opinion on conclusion of the Intergovernmental Conference*, Brussels, UNICE (Union des Confédérations de l'Industrie et des Employeurs). 1996a. *UNICE contribution to the Intergovernmental Conference*, Brussels, UNICE (Union des Confédérations de l'Industrie et des Employeurs). 1996b. *UNICE: Euorpean Business wants competitivenss as major objective of EU Treaty, and criticizes delay in structural reforms*, Brussels, UNICE (Union des Confédérations de l'Industrie et des Employeurs). 1997a. *UNICE message to the Amsterdam Summit (16-17 June 1997)*, Brussels. In the process of the negotiations UNICE kept its resistance to an employment policy. Once it became apparent that the EU would receive

Treaty of Amsterdam (1997)

In June 1997 the Treaty of Amsterdam consolidated the process started with Delor's White Paper. Article 2 EC commits the EU to high employment levels and the EU is explicitly engaged in the promotion of the co-ordination of employment policies of member states with a view to the reinforcement of their effectiveness through the development of a coordinated employment strategy (Article 3 EC). The Essen Strategy was integrated as Title VIII (Art. 109n-s EEC or 125-130 EC after the renumbering). Through the Employment Title the EU can coordinate employment policy of member states with objectives and guidelines that are non-legally binding for member states and cannot be enforced through ECJ jurisprudence or fiscal sanction imposed by the Commission as done in the European Stability and Growth Pact (1992) in monetary policy. The Employment Title regulates the European employment policy procedure as follows.

- Article 125 EC specifies how the "member states and the Community shall … work towards developing a coordinated strategy for employment and particularly for promoting skilled, trained and adaptable workforce and labour market responsive to economic change." Thus, member states remain in charge of employment policy but they are committed to co-ordinate their policies with a view to enhancing their effectiveness.
- Article 126 (2) EC acknowledges that "promoting employment" is a "common concern" and member states shall coordinate their actions in the Council in accordance with procedures set out in Article 128.
- The Council decides on the guidelines of the employment policy with qualified majority (Article 128 EC). Consequently, individual member states do not have veto power.

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competences on employment UNICE began to demand that the policies would further competition Sperlich J. 1998. *Die Beschäftigungskapitel im Amsterdamer Vertrag: Möglichkeiten und Grenzen einer europäischen Arbeitsmarktpolitik*. Diplomarbeit thesis. University of Konstanz, Konstanz.

Article 99 (2) clarifies that the employment guidelines have to be in line with the broad economic guidelines and economic policies of the member states.

- Article 128 EC spells out the annual procedure of the EES. The Commission drafts Employment Guidelines that are decided on by the Council through a qualified majority vote. Member states are asked to draw up National Action Plans on Employment (NAPs) on how they have incorporated the guidelines into their policies. These reports are submitted to the Commission for cross-national comparison and evaluation. Benchmarks are used to compare policy making and progress towards meeting the guidelines and targets. In addition, a peer review of these reports takes place across member states. Based on recommendations of the Commission the Council can give recommendations to the individual countries and can point out best practice examples to encourage learning between member states.

The below graph illustrates the EES process and actors involved. Key to the process is an internal and external review process of the process member states have made towards meeting European objectives. At the European level it involves European institutions, such as the Commission, Council and Committees and on the member state level different levels of government, social partners and non-governmental actors. The following diagram illustrates the EES process and points to two important feedback mechanisms – one at the national level and one at the supranational/European level:

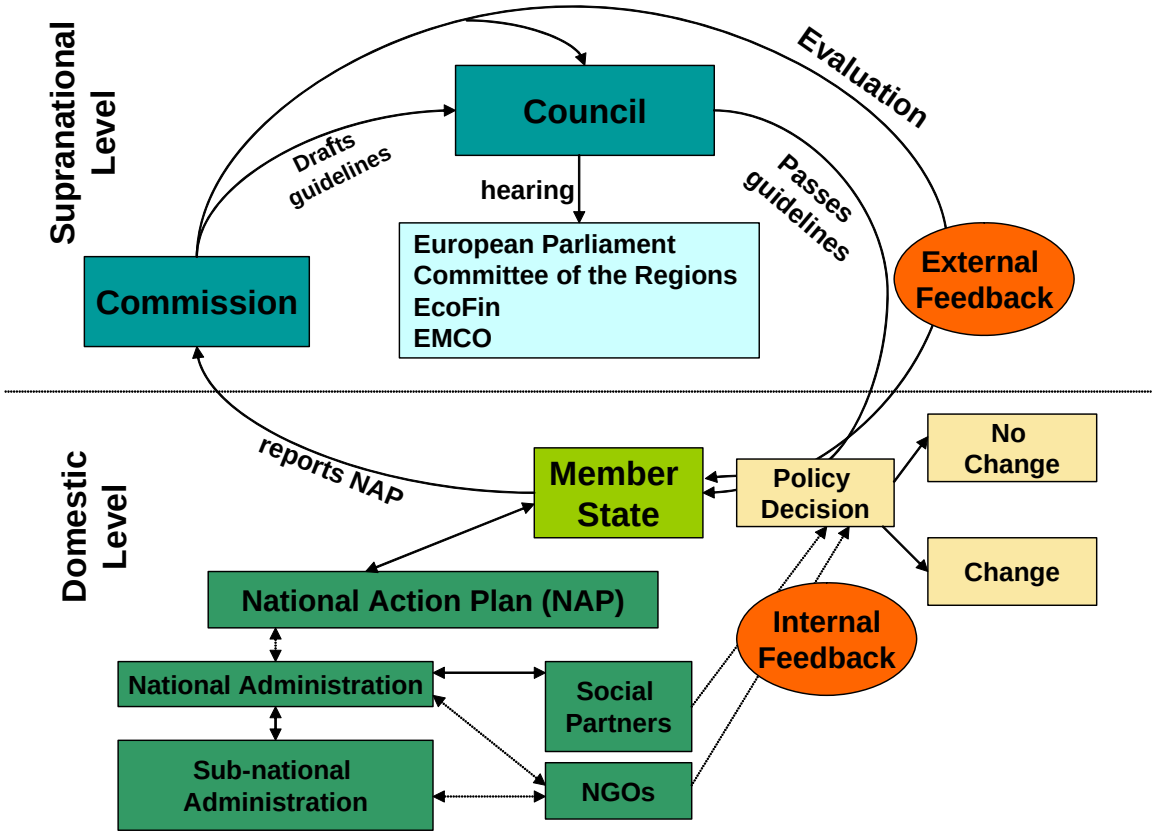

Figure 9: *EU soft law and domestic policy change*

The internal and external feedback loops are important for the EES process. The external feedback process is initiated by the Commission which evaluates NAPs of member states and works with different committees and expert groups to analyze them. The Commission drafts recommendations and point out best practice examples that have to be passed by the Council. These recommendations and best practice examples provide external feedback to member states on specific policies. Recommendations encourage member states to amend their policies to bring them closer to EES guidelines and help them achieve commonly agreed targets on time. Best practice examples point out policies where a specific country is a policy-leader and other countries can learn from the way the country has addressed a specific policy issue. The internal

policy process is equally important within the EES process. Member states are asked to write a NAP. In the process of writing the NAP the national administration, social partners and NGOs can be involved. The way this is done depends by and large on the member state itself. Member states can also voluntarily decide to discuss the NAP in the national parliament prior to submitting it. The internal drawing up of the NAP with various consultative options encourages an internal feedback on a particular policy or legislative reform in the making. Here, domestic political actors can use EES guidelines as well as parts of the external feedback provided by the EU to influence and shape domestic policy reform. Thus, the internal and the external policy feedback process – in an ideal scenario – can mutually reinforce each other and promote domestic policy change in line with EES goals. The empirical part of the study examines closely the extend to which the EES plays a role in domestic policy change and if it has altered the way in which the policy making process is done.

3.2 Evolution of the Strategy

The Treaty of Amsterdam regulated the overall competences and procedures guiding the European employment policy. The content of the strategy, its objectives, guidelines, and targets still had to be negotiated. In this section I will outline the various phases the EES has undergone. The content of the strategy was finalized at the Luxembourg Jobs in 1997. Afterwards the strategy has been continuously modified. In 2002 a five year review of the strategy took place which led to a streamlining and overall revision of the strategy. Gender equality policy has been a focus of the strategy throughout this process but the way gender equality is approached has altered.

Luxembourg Jobs Summit 1997

Shortly after the Treaty of Amsterdam a special Job Summit was held in Luxembourg on November 20-21, 1997. Even before the summit started Jacques Santer, Commission president,

presenting a draft of the guidelines to the European Parliament to put pressure on member states to pass the employment strategy (Santer 1997a, Santer 1997b). At the Luxembourg Summit different positions of member states on employment policy had to be mediated. The French socialist government saw the EES as a way to balance the EMU – focusing on monetary stability – with a second strategy focusing on employment and employee rights. The socialist government was supportive of "old" tools to render unemployment by initiating an employment initiative. Strong supporters of the strategy were Sweden, Austria and Belgium. The British Labour government wanted that the EES promotes a deregulation of labor markets rather than active labor market policies in the sense of creating a "secondary labor market". The German Christian democratic government under Helmut Kohl perceived employment policy as a national policy and wanted to limit European competences on employment and was against establishing concrete targets [, 1997 #1; Zeitung, 1997 #4; Zeitung, 1997 #2]. The skepticism was shared by the Spanish and Finish governments which also suffered from high unemployment rates. The main cause of resistance was the fear that the government would have to expand the secondary labor market and finance programs for the unemployed (Berger 1997).

Social partners intensified their efforts to influence the policy. ETUC wanted that member states agree on concrete targets and that social partners are granted institutionalized access to the drawing up of the employment guidelines and evaluation of national policies (ETUC (European Trade Union Confederation) 1997d). To strengthen their demands ETUC organized a demonstration attended by 30000 union members in Luxembourg (ETUC (European Trade Union Confederation) 1997a). UNICE opposed the passage of concrete targets (UNICE (Union des Confédérations de l'Industrie et des Employeurs) 1997b).

The Christian Democratic Prime Minister of Luxembourg and Council President Jean-Claude Juncker navigated through the different positions of member states and social partners during the summit. Juncker insisted that the EES is neither a tool for deregulation (UK position)

nor a fund for employment initiatives (French position) but rather a tool to encourage learning among member states to improve their individual employment policies. A compromise was achieved through setting targets, especially for long-term and youth unemployment. Member states agreed to address these issues within the next five years. Juncker also emphasized that a target on employment rate was important since this would make job creation and investment in human capital the core focus of the strategy (Tageszeitung 1997, Welt 1997a, Welt 1997b). Member states approved of this target. The Commission also proposed a target to reduce unemployment to seven percent of the working population. This was, however, rejected by member states and did not become part of the final strategy. Member states agreed to quantitative targets on active labor market measures and to gradually increase active labor market measures to 20%.[57] Member states also agreed on granting social partners institutionalized access to the strategy and thus, gave higher preference to social partners than other non-governmental organizations. The strategy and its guidelines were organized along four pillars.

Four Employment Pillars: Employability, Entrepreneurship, Adaptability, Equal Opportunities

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[57] Guidelines 1 asks member states to take action on youth and long-term unemployment within the next five years. Member states should ensure that "every unemployed young person is offered a new start before reaching six month of unemployment, in the form of training, retraining, work practice, a job or other employability measure; unemployed adults are also offered a fresh start before reaching twelve month of unemployment by one of the aforementioned means or, more generally, by accompanying individual vocational guidance" (Council document no 13200/97).

Guideline 3 demands a shift from passive to active labor market measures. "Benefit and training systems - where that proves necessary - must be reviewed and adapted to ensure that they actively support employability and provide real incentives for the unemployed to seek and take up work or training opportunities. Each member state will endeavour to increase significantly the number of persons benefiting from active measures to improve their employability. In order to increase the numbers of unemployed who are offered training or any similar measure, it will in particular fix a target, in the light of its starting situation, of gradually achieving the average of the three most successful Member States, and at least 20%."

During the summit Heads of State and Government adopted – in amended format – employment guidelines by the European Commission (COM (97) 497 final, 1 October 1997). The 1998 Employment Guidelines consisted of 19 guidelines that were organized along four pillars.

(1) *Employability* which contained guidelines on active labor market measures, in particular youth and long-term unemployment, tax and transfer system and continuing learning.

(2) *Entrepreneurship* focused on better conditions for the establishment of new companies.

(3) *Adaptability* aimed at a modernization of work organization and training through labor market deregulation and reduction of taxes and a non-wage labor costs. Here, social partner involvement was most strongly encouraged.

(4) *Equal Opportunities* that call for a reduction of gender gaps in the labor market, improving the work-life balance and improving options to return to the labor market after care work.

Having a pillar dedicated to furthering equal opportunities was generally perceived as positive by women's activists. The strategy was – however – critiqued for addressing employability of young people and long-term unemployed within the first pillar and women's employability within the fourth pillar. In addition, women were seen as a target group and furthering their employability has the function of promoting equal opportunities (European Council 1997). Women's activists at the EU level demanded that gender equality is perceived as horizontal task.[58]

Revision of the strategy within four pillar structure (1998-2002)

[58] Community Action Programs (1982-1985; 1986-1990; 1991-1995; 1996-2000) have addressed equal opportunities in the labor market before. However, these programs did not directly affect policies of member states.

Over the next five years the EES was gradually developed further within the four pillar structure. The member state having the presidency of the EU had considerable agenda setting power for the development of the strategy since it was amended on an annual basis during this time. I will briefly outline the key developments during the first five years.

1998

At June 1998 Cardiff European Council meeting the British presidency demand that the EES supports more strongly labor market deregulation, flexibility and entrepreneurship. The government argued that sustained and durable growth could only be achieved through structural reforms that focused on job creation. From a gender perspective the Cardiff council was important because it strengthened equal opportunities.

In 1998 Austria took over the European presidency. The Austrian ministers for women and for labour were both female at the time and used the opportunity to establish an informal joint council of ministers for labor and gender equality that commissioned a report *Equal Opportunities and Employment in the European Union (Rubery & Fagan 1998).* The report critiqued that unemployment was dealt with in the employment policy while equal opportunities were addressed in the action programs. As a result of this division “gender equality only emerges explicitly under the topic of targeted groups, with women identified as a group requiring special help and not as a group shaping the future pattern of employment in Europe” (Rubery & Fagan 1998, 99). The report emphasized the need to broaden the scope and acknowledge the influence of the organization of care work in the different national circumstances to promote a higher employment rate. This demand was supported through the OECD study *Women and Structural Change* (OECD 1994b) which demanded a new gender contract to reflect the changing realities in the organization of gender relations inside and outside of work. The report was crucial in creating a momentum for a stronger commitment to gender equality within the EES at the December summit.

Firstly, gender mainstreaming was introduced as an overall tool that should to be applied to all areas of the EES and specific measures to further equal opportunities in pillar IV[59]. Article 3 Paragraph 2 EC demands that all actions of the EC shall be gender mainstreamed. The principle of gender mainstreaming was explicitly integrated as a horizontal task in the EES. Herewith, a merging of the equal opportunities agenda and employment was initiated. This was a major success for feminist activists that had been lobbying for this since the EU had first debated employment policy in the early 1990s. Secondly, pillar IV was also broadened to include a stronger focus on gender gaps, reconciliation of work and family life, facilitating return to work, promoting the integration of people with disabilities into working life. Within reconciliation of work and family one guideline focuses on adequate provision of good quality care for children.[60]

> "In order to strengthen equal opportunities, Member states and the social partners will … design, implement and promote family-friendly policies, including affordable, accessible and high quality care services for children and other dependents, as well as parental and other leave schemes" (European Council 1999).

Thus, for the first time the EU moved beyond its recommendation on childcare and addressed childcare within a concrete framework of action where member states policies could be evaluated and monitored. In addition, EU committees developed a comparative index which compared men and women's employment rate and examined the effect of the presence of children on the employment of men and women. The data shows that while men's employment rates increases when children are present women's employment rate decreases (Council of the European Union 1999, 80-81).

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[59] For a discussion on how feminist activists influenced the Treaty revision and how gender mainstreaming became enshrined in the Treaty and subsequently in the EES see Helfferich and Kolb 2001, Mazey 2001, Pollack and Hafner-Burton 2000. The Treaty of Amsterdam is perceived as a victory for feminist activists due to the integration of gender equality and gender mainstreaming in the treaty.

[60] The EES focuses exclusively on the supply side of childcare (quantity, quality, affordability). The demand side of childcare (wages and training of childcare workers) is only not addressed. (For an analysis on public childcare, parental leave and women's employment see Meyers et al. 1999)

1999

Events within the EU institutions and member states changed the dynamics of negotiations on the future direction of the EES. On January 1st the Euro was formally launched and the fiscal policy was transferred fully to the European level and European Central Bank. The European Commission had to step down due to a corruption scandal that was discovered by the European parliament. This weakened the ability of the Commission to influence the EES at the time.

In June 1999 the European Council met in Cologne, Germany. The German Christian Democratic government had been replaced by a Social Democratic-Green government headed by Chancellor Gerhard Schröder in 1998. Prior to the Cologne summit different propositions on the future of the EES were debated. On the one hand the German Social Democratic-Green government – under the influence of SPD party leader and finance minister Oskar Lafontaine – and supported by the French, Italian, Austrian and Swedish governments wanted to use the EES to launch a "Euro-Keynesian" economic policy. On the other hand, the British Labour government and Spanish Conservative government under Aznar demanded further structural reforms of the labour, product and capital markets to maintain competitiveness (Council 8906/99 – June 2, 1999)[61]. While the EES had been focused on employability and supply side economic reforms at the Luxembourg and Cardiff Summits the German Presidency of the Council thought to introduce a stronger focus on demand side economic reform and shift the focus to the quantity of employment. This was particularly supported by the German trade union organization (DGB) (Putzhammer 1999). European social democrats had expressed the need for stronger macro-economic demand side economics in the so-called Larson report (1993) and

[61] The original proposals were developed by the French and Italian governments (pro-Euro-Keynesian policy) and countered by a proposal by the British and Spanish governments (deregulation, employability focus (Council 8906/99).

the Guterres report (1999) (SPE 1993, SPE 1999). The Guterres report – drafted by Prime Minister of Portugal Antonio Guterres - came out shortly before the Cologne Summit.

At the Council meeting Heads of State and Government decided to establish an European Employment Pact, known as “Cologne process” that encourages dialogue between all parties involved in macroeconomic policy formation– particularly the Council, the Commission (EU level decision makers), national governments (Fiscal Policy), the social partners (Wage policy) and the European Central Bank (Monetary policy). The pact has three pillars.

(1) Financial policy, which must respect the principles of the stability pact and the same time channel public funds towards investment and competitive jobs;

(2) Controlled pay increase in line with productivity gains;

(3) Monetary policy oriented towards price stability.

The overall policy objectives include ‘sustainable and non-inflationary growth’ and ‘a high level of employment’ without pre-justice to the objective of price. The Cologne Process further deepens economic policy by adding macro-economic dialogue as a new dimension.

The Cologne Summit had a number of concrete changes for the EES itself. Firstly, social partners were asked to participate more strongly in the drafting and implementation of the EES. In addition, the European Social Funds (ESF) and the EES became linked. ESF redefined its objectives in accordance with the EES.[62] The EQUAL fund was established. This fund is organized along the four pillar structure of the EES and supports the concrete guidelines and targets of the EES by providing funds for local, regional and intra-regional projects.

2000

[62] Regulation (EC) 1262/1999 of the European Parliament and of the Council (21 June 1999), especially section 5, Regulation (EC) 1260/199 of the Council (21 June 1999) with the general guidelines on the structural funds L 161/1 (26 June 1999).

The process started in Luxembourg in 1997 reached its climax at the Lisbon European Council in March 2000. European Council member states agreed on a new agenda to achieve "the most competitive and dynamic knowledge economy in the world, capable of durable economic growth, of high employment levels and jobs of a better quality and of improved social cohesion" (European Council 2000). The Lisbon council went beyond the Cardiff and Cologne process by going beyond the already established linkage of employment and economic policy and the involvement of a larger number of actors in policy formation. The Lisbon Council emphasized the importance of "modernising the European social model, investing in people and combating social exclusion". Social policy is seen as key to increasing productivity and generating durable and sustainable growth. The Lisbon Council let to the establishment of the Social Inclusion strategy.

The Lisbon Council also formally adopted a new mode of governance, namely the open method of co-ordination (OMC) that was already used in economic policy (based on Article 99 EC) and employment (based on Article 128 EC) and broadened the approach to other areas, such as social inclusion, pension reform, immigration policy, innovation policy.[63]

The new governance approach – initiated at the Edinburgh Council in 1992 – gained new impetus through the Lisbon Council and culminated in the adoption of a White Paper on *European Governance* that focused on ways to increase the effectiveness, legitimacy and transparency of Community action (COM (2001) 428 final). While the traditional Community method – EC Directives adopted by the Council and the European Parliament based upon a proposal of the Commission – is still seen as the main community method new ways to enhance governance shall be explored. The Commission specifically points to the role of benchmarking,

[63] In 2001 the European Commission released a White Paper on Governance that clarified the principles, their transposition and role of the Commission in the decision-making process (CEC 2001).

peer pressure, networks and the open method of coordination as complementary tools of legislation.

Within the EES the so-called *Agenda 2010* was adopted with concrete quantitative targets to achieve the objectives of the strategy. Targets for 2010 were 70% employment rate for men and 60% employment rate for women. To improve the monitoring process of the EES a new spring meeting with the European Council was introduced to access the process of reform. This way the EES was evaluated twice a year – once in the spring and once during the December Council meeting.

The Lisbon strategy altered the EES in two concrete ways. Firstly, for the first time the EES was not torn between governments wanting to use the EES to form a social union with uniform wages and harmonized social standards and others that perceived the EES as a tool to establish a deregulated labor and product market. In 2000 the EES had a clear focus on higher investment in human resources, higher productivity and higher skills, backed by an active welfare state (Diamantopoulou 2000). Second, women's employment became increasingly more important. The Portuguese presidency drew comparisons between the EU and US economies finding that significantly more women are employed in the US than in Europe. "…the Lisbon summit underlined the need to give women equal access to the labour market, especially to jobs in the new economy" (Rapid 2000).

In terms of institutional structure, the Lisbon Summit established the Employment Committee (EMCO) which replaced the informal expert group working on indicators and monitoring since 1997. Each member state and the Commission can appoint two members to EMCO. The committee has a key role in monitoring employment policies of member states, refine and develop indicators on which to measure performances, draw up opinions and assist the Council in its work. This group was established to increasing the transparency of national

statistics and establishing ways to compare and evaluate national developments as well as providing a forum to discuss the future development of guidelines and benchmarks.

2001

In 2001 the Stockholm Summit extended the target approach and set limits to the Commission strategy to propose perspective measures on how individual member states should approach problem. The European Council agreed on targets of 50% employment rate for older workers aged 55 to 64 years were set for 2010 older workers (European Council 2001). The Summit also emphasized that not only the quantity of jobs matters but also the quality of jobs and emphasized that the EES should also further skills, health and safety, working conditions and strive for a balance between flexibility and security. While women's employment became increasingly more important within the strategy the EES only encouraged member states to set individual targets and benchmarks for childcare but did not adopt overall targets.[64]

2002

The Barcelona Council in March 2002 confirmed that that full employment was the overarching goal of the EES and strengthened its importance for an enlarged EU of 25 member states in 2004. At the Barcelona Summit 2002 childcare targets were finally adopted by the Council of Ministers. Herewith, childcare became part of the priority areas. The targets aim for at childcare for at least 90% of children between 3 years and the mandatory school age and at least 33% of children under 3 years by 2010 (European Council 2002, 13) . The same year the Joint Employment Reports notes that

> "Even though a growing number of member states have introduced new measures, quantitative targets and deadlines to improve childcare facilities, good and affordable

[64] "Although Belgium, the United Kingdom, France, Greece, Portugal and Ireland have set targets for increasing the provision of care services, for the most part childcare services are not sufficient to deal with the scale of demand. Countries with low levels of childcare services, especially for 0-3 year olds, have not set quantitative targets and have taken only limited action to improve the situation (Italy, Spain, Austria, Germany and the Netherlands) European Commission. 2001. *Joint Employment Report*, http://europa.eu.int/comm/employment_social/employment_strategy/employ_en.htm.

> services are still not sufficient to meet the demand or to reach the new Barcelona targets. … In addition, it is difficult to assess the effect of the initiatives because of the lack of appropriate and/or comparable data. The issue of improving care for other dependents has, as last year, received very little attention" (European Commission 2002, 54).[65]

By 2002 member states had reiterated their commitment to increasing women's employability by adopting childcare targets. It was generally accepted that women's employment rate could only be increased if member states supported families in their care responsibilities. This was seen as not only positive for increasing women's employment rate but also for creating better conditions to reconcile work and family life and create better conditions for couples to have more children. Thus, childcare was – to some extent – seen as a means to increase employment rate and thereby social security contribution and at the same time encourage a higher birth rate to counteract an aging population with low fertility rates. The Scandinavian member states with their extensive childcare system were seen as key examples of both high employment rates and high birth rates and as a best practice example for other member states. Through the adoption of targets it became possible to examine closely the policy responses of member states in this policy field.

Member states did not adopt targets to further equality in the labor market, such as targets on gender gaps (i.e. gender pay gap, unemployment gap, occupation or vertical segregation gap) or adopted a strong commitment to increase the quality of work of women through, for instance, adopting measures to encourage women to be employed in full-time jobs rather than part-time jobs. Overall, while the adoption of childcare targets was clearly an important step towards furthering a higher employment rate in it is only a moderate step towards increasing gender equality in employment.

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[65] Member states are also not required to report their national childcare targets in terms of percentages of children covered for age groups defined in the EES. This allows countries to report their investments in childcare in terms of government funds and places created. Furthermore, the statistical data on childcare provisions and employment impact of children for men and women has improved but is still not complete to provide comparable data on childcare.

Five-Year-Review and Reform of the EES

At the Lisbon European Council (2000) a reform debate of the EES was initiated with the so-called mid-term review that took place in 2002. The first five years of the EES reflected on the Luxembourg Process when social democratic governments were in office in the majority of member states. The redesign of the EES was pursued when conservative parties were in power in the majority of member states. The central goal of the restructuring of the EES was a streamlining of the strategy and a stronger coordination between the economic, employment and social inclusion processes.[66]

In preparation of a new structure of the EES a five year review process was initiated which comprised of a series of impact evaluations and reviews (European Commission 2002). The impact evaluations were country analysis done by independent research institutes as well as synthesis reports specific topics, such as equal entrepreneurship, life long learning, inclusive labor markets. The report on equal opportunities was drawn up Expert Group on Gender and Employment (EGGE) that is composed of national experts from each member state and headed by the British academic Jill Rubery (EMCO 29/060602/EN_REV1). The Commission added a macroeconomic analysis and an overall analysis of national reports, summarized in a synthesis report based on technical background papers. The results of the Commission assessment have been laid down in a Communication adopted on the 17 July 2002 (COM (2002) 416 final). The Commission notes on equal opportunities

> "Over the period 1997-2001, women benefited from the majority of the new jobs created and their employment rate increased from 50.6 % to 54.9 %. The gender gap in employment rate has been reduced from 20 % to 18 % since 1997 whereas the gap in unemployment declined from 12 % to 9 %. However, gender gaps (including pay gaps of 16 % on average) are still considerable and need to be tackled in order to meet the Lisbon and Stockholm objectives. … The reduction of gender gaps requires the active

[66] The harmonization of the different strategies was first brought onto the EU agenda at the Stockholm Summit in March 2001. The EES is based on Article 125-129 TEC that were introduced in the Treaty of Amsterdam. The EES was initiated with the Luxembourg process in 1997. The BEPG and council recommendations are based on Article 98-104 TEC of the Treaty of Maastricht. The BEPG was initiated through the Cardiff process in 1998.

> involvement of social partners, particularly in the area of pay and parental leave. Childcare provision, which involves the direct responsibility of public authorities emerges as a priority area for direct government action, and new targets were set by the Barcelona Summit for 2010" (COM (2002) 416 final).

Based on these reports the Commission proposed a streamlining of the annual economic and employment policy co-ordination cycles to enhance efficiency of policy coordination, improve coherence and complementarities between the various processes and instruments, increase access to the strategy and make the strategy more publicly visible (COM (2002) 487 final of 3 September 2002).

EES structure 2003-2004

In January 2003 the Commission proposed a restructuring of the strategy around three overarching objectives (COM (2003) 6 final):

1. Achieving full employment by increasing the employment rate,
2. Raising the quality and productivity at work,
3. Promoting cohesion and inclusive labor markets.

In addition, 10 priority areas or guidelines were defined of which one was gender equality.

1. Active and preventive measures for the unemployed and inactive;
2. Job creation and entrepreneurship;
3. Address change and promote adaptability and mobility in the labour market;
4. Promote development of human capital and lifelong learning;
5. Increase labor market supply and promote active aging;
6. Gender equality;
7. Promote the integration of and combat the discrimination against people at a disadvantaged in the labor market;
8. Make work pay through incentives to enhance work attractiveness;
9. Transform undeclared work into regular employment;

10. Address regional employment disparities

Gender mainstreaming – previously a horizontal task – was only a sub-point of gender equality.[67] Based on protest from feminist activists gender mainstreaming was integrated as a horizontal task in the final document (COM (2003) 6final).

The reformed strategy has not only altered the focus of the EES but has also broadened the issue areas addressed by the strategy. The EES had previously focused on employability and job creation – particularly weak in Continental and Southern welfare states – while ignoring issues of productivity and quality of jobs – particularly a concern of liberal welfare states.

The economic and employment processes were harmonized in terms of setting guidelines and national reporting. Through this streamlining and coordination of the EES and BEPGs the OMC's governance is improved but it also exposes the EES much more strongly to the neo-liberal economic policy of the BEPS. The Social Inclusion Strategy is not linked with the EES and BEPS. The revision of the strategy also affects the committee structure. The EcoFin and EMCO are working more closely together. In addition, the EcoFin founded a sub-group on employment in March 2003. This indirectly challenges the sole competences of the EMCO group on employment policy. Through this reform a hierarchy between the different strategies is formally established that shows once more that "a social model for the EU is realized in the shadow of an economic and monetary model that constitutes the idée-force of European integration" (de la Porte & Pochet 2002, 292).

[67] The 10 new guidelines cover active labour market policy, job creation and entrepreneurship, adaptability and mobility in the labour market, human capital and lifelong learning, labour supply and active ageing, gender equality, discrimination against people at a disadvantage, make work pay, transformation of undeclared work and regional employment disparities.

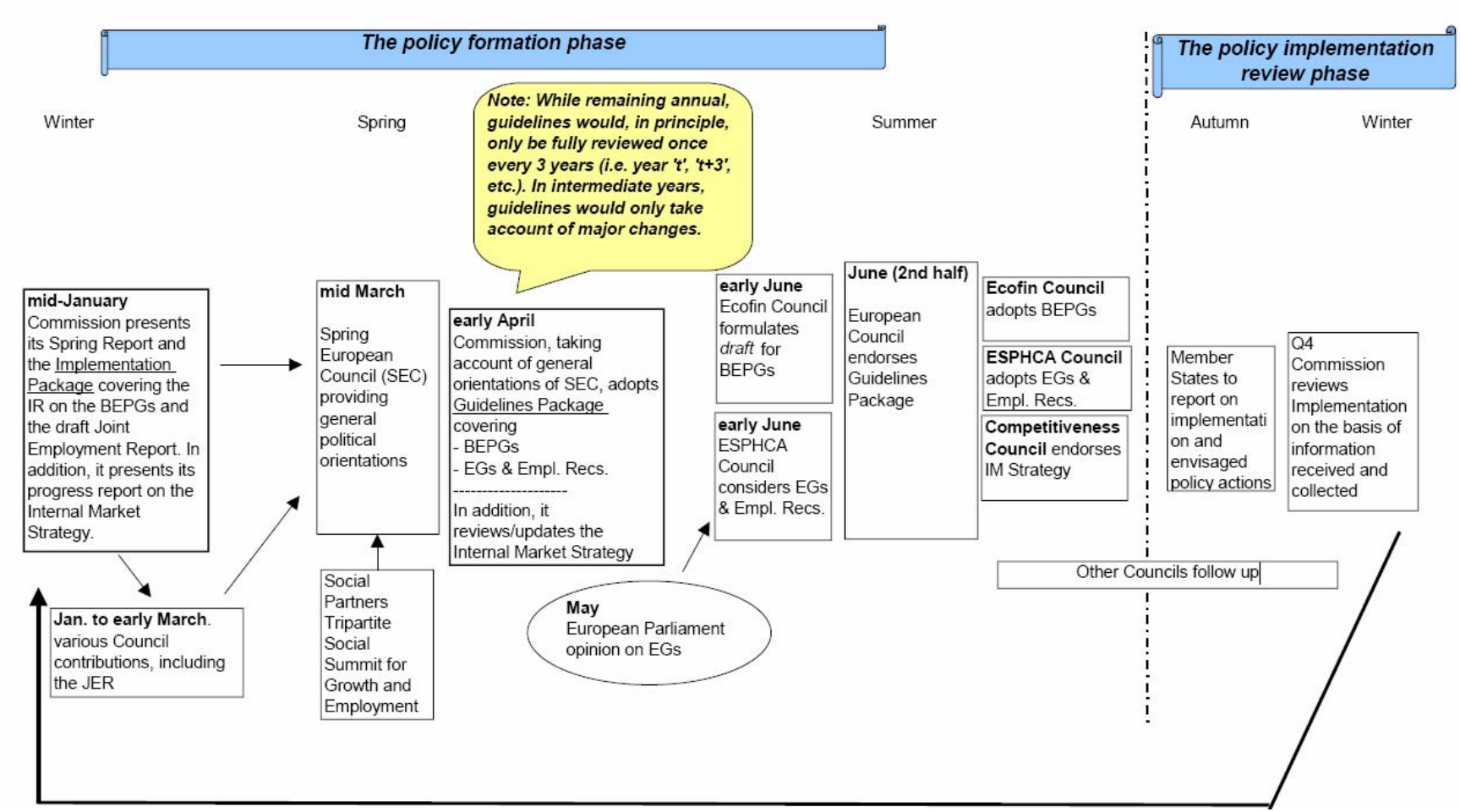

Figure 10: *Flow chart of the streamlined policy co-ordination cycle*

(Source: COM (2002) 487 final of 2 September 2002)

The revised EES has received mixed responses on reforms that concerned equal opportunities by, for instance, the Expert Group on Gender and Employment, EWL, European Parliament. On the hand equal opportunity lost visibility with the abandoning of the four pillar structure, one of which was dedicated solely to equal opportunities. Gender equality still remained one of the 10 priority areas and gender mainstreaming applies to the strategy as a whole. In addition, member states did not agree on passing new targets on gender gaps, for instance, and only agreed to a commitment to a substantial reduction in gender gaps. On the other hand, the three new overarching objectives of full employment, job quality and social inclusion are positive in terms of pointing to the importance of job quality and social inclusion/access to resources, thereby broadening the perspective on employment. Gender mainstreaming applies to the EES as a whole and through the stronger links between the BEPG and the EES gender mainstreaming could spill over to the BEPG. However, as discussed above the BEPG fosters macroeconomic issues rather than social inclusion and equality (Rubery et al 2004) and this casts doubts on whether this is feasible.

Kok report (2003)

With the revision of the strategy the debate on the direction of the EES did not end. The British and Portuguese governments proposed the establishment of a European Employment Taskforce to evaluate EU employment policies that was launched by the Commission in March 2003. The task force, headed by Wim Kok (ex-Prime Minister of the Netherlands), presented its report in Berlin on December 8, 2003 in Berlin. The Kok report focuses on four priority areas:

1. Increase adaptability of workers and enterprises;
2. Attracting more people to enter and remain on the labor market;
3. Investing more and more effectively in human capital and lifelong learning;
4. Ensuring effective implementation of reforms through better governance.

The Employment Taskforce pushed “employment policy more to a “full employment with flexibility” approach and away from concerns with job quality. The Commission incorporated the findings of the report and used it to justify a rightward shift in the EES (Pochet 2005, 62).

From a gender perspective the Kok report was perceived critically. While the Kok report emphasized the integration of women into employment it did not promote a closing of the gender gap.

> “The report explicitly recognized that increased women’s employment is a means of achieving a higher employment rate, through attracting more workers into the labour market, but contradictions between a quantitative, flexibility approach and the twin objectives of more effective investment in human capital an further pursuit of gender equality were not identified”(Rubery et al 2004, 617).

In order to increase the employment rate the report encourages member states to implement reforms that increase part-time work, facilitate the use of fixed terms contracts and reduce employment protection. In its recommendations it advises member states to extend their low-wage labor market segment. These recommendations are seen critical from the perspective of women’s employment. Increasing low skill and part-time employment does not sufficiently create conditions were workers can gain sufficient resources to establish and/or maintain an independent households. It also facilitates the splitting up of jobs into several part-time or mini jobs with limited prospects of promotion and advancement than the creation of new high quality/high paying jobs.

Enlargement (2004)

On May 1st, 2004 the EU obtained 10 new member states. The new member states had to submit their first National Action Plan on Employment in 2004. The Commission had interacted with new member states to ensure that they would follow employment policy priorities in their national employment policies and in the way they use European Social Funds since 1999. All candidate countries had to submit “Joint Assessment Papers” (“JAPs”) analyzing key challenges for their employment policies. These documents were signed by the Commissioner

for Employment and by the Ministers of Labour. The first JAPs were signed with the Czech Republic, Slovenia, Poland and Estonia in 2000 and early 2001, followed by Malta, Hungary, Slovakia, Cyprus and Lithuania in late 2001/early 2002 and by Romania, Bulgaria and Latvia in autumn 2002. The candidate countries and the Commission agreed to monitor the implementation of the JAP commitments. In late spring 2002, candidate countries sent progress reports on the implementation of the JAP commitments. The Commission and representatives of candidate countries reviewed these reports in a second set of technical seminars. A more in-depth review took place in 2003. In 2004 new member states submitted – for the first time – their NAPs with the other member states and all 25 member states are integrated in the EES process. On January 1, 2007 Bulgaria and Romania joined the EU and EU encompasses 27 member states today. These member states are also required to submit an NAPs.

Current EES structure (2005-2008)

In 2005 the European Commission proposed a further streamlining of the Lisbon strategy to focus on delivering stronger, lasting growth and more and better jobs. The EES shall be presented in conjunction with the macroeconomic and microeconomic guidelines of the economic coordination process and for a period of three years. The new process has been in practice from July 2005, with the approval by the European Council of the Integrated Guidelines for Growth and Jobs (Council Decision, 2005/600/EC of 12 July 2005). The guidelines remain the same from 2005 to 2008. They are organized along three priority areas:

1. Attract and retain more people in employment and increase labor supply and modernize social protection systems;
2. Improve adaptability of workers and enterprises;
3. Increase investment in human capital through better education and skills.

Eight guidelines are adopted:

1. Improve employment policies aiming at achieving full employment, improving quality and productivity at work, strengthening social cohesion
2. promote life cycle approach to work
3. Inclusive labor markets
4. improve matching of labor market needs
5. promote flexibility combined with employment security and reduced labor market segregation
6. employment friendly labor cost development and wage setting mechanisms
7. expand and improve investments in human capital
8. adapt educational and training systems in response to new competence requirements

From a gender perspective the new strategy has to be seen critically. Gender mainstreaming is still part of the strategy and should be taken into consideration across all guidelines. There is, however, no single guidelines focusing on gender equality anymore. Gender equality, by and large, is tied to increasing women's employment. Within the framework of a "lifecycle approach to work" member states are encouraged to increase female participation and reduce gender gaps in employment, unemployment and pay, better reconciliation of work and private life and the provision of accessible and affordable childcare facilities and care for other dependants. While this is clearly a limitation of the strategy and the visibility of gender equality has been reduced it is still remarkable that work-life balance and childcare has remained part of the strategy to this point.

In the Commissions' annual progress report on growth and jobs the Commission President José Manuel Barroso notes

> "We need more people in work to finance pensions and health care as the populations get older. Young people need help to start their working lives. Parents need affordable

> childcare and a decent work-life balance. And we cannot have people drop out of the labor market when they are in their fifties" (European Communities 2006, 2).

The Commission has paid considerable attention to the ageing of the population, combined with declining birth rates. On 12 October 2006 the Commission released a Communication on the demographic future of Europe (COM (2006) 571 final). In the Communication policies on gender equality feature prominently. Furthering gender equality is seen as on the one hand, promoting women's employment and thereby helping to compensate for a declining working population and on the other, supporting individual choices to have children, thereby supporting men and women to increase the number of children they whish to have. The Commission released another Communication on "Promoting solidarity between the generations" on May 10th 2007 (COM (2007) 244 final). The Communication also emphasizes the linkage between a better work-life balance and childcare support and increasing the number of children families have. As Vladimír Špidla, Commissioner for Employment, Social Affairs and Equal Opportunities said:

> "Far too many men and particularly women in Europe still have to make difficult choices between family life and a successful career. We must create the conditions for people to have both." He added, "women continue to bear the lion's share of care responsibilities, so unless we put a stronger emphasis on gender equality and equal opportunities, low birth-rates will persist, Europe will not meet its employment targets and we will not achieve our goal for a more prosperous and inclusive Europe". (IP/07/643)

On May 15th the Ministers for gender equality and families had an informal meeting in Bad Prymont (Germany). Here, Vladimír Špidla argued along the same lines:

> "If Europe is to meet its economic, social and demographic challenges, equality between women and men has to be the starting point. Recent success in the EU's labour market performance is largely thanks to more women joining the workforce. We are seeing that, in countries where women participate actively in all aspects of economic, social and political life, well established work-home reconciliation policies are the norm - these are also the countries where women and men have, on average, more children".[68]

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[68] http://ec.europa.eu/employment_social/emplweb/news/news_en.cfm?id=242

The recent focus on demographics makes clear that women's employment and childcare – as a supporting or enabling component – are part of an overall policy package to increase employability rather than furthering gender equality per se or creating greater gender equality within European families. In other words, the reasoning behind promoting gender equality are mainly macroeconomic and demographic concerns and promoting gender equality is a vehicle for achieving these larger socio-economic goals. While this can be seen as a setback for women's activists trying to use the EES to further gender equality it entitles the possibility of promoting a core issue of feminist demands within a stronger framework of the EES and even has the potential of integrating childcare and women's employability into the economic strategy of the EU and its member states.

3.3 Evolution of Employment Guidelines, Targets, Monitoring and Recommendations (1998-2008)

3.3.1 Guidelines

From 1998 to 2002 the EES was developed further on an annual basis within the four pillar structured agreed at the Luxembourg Jobs Summit in 1997. The 2002 impact evaluation pointed out that the guidelines were difficult for member states to address since they only had limited amount of time to respond to them, the number of individual guidelines grew over time and the guidelines were subject to change annually. To increase the effectiveness of the strategy and to give member states the opportunity to not only list policies within the framework of the EES but to actually use them in policy development a streamlining of the strategy was initiated. In the streamlined strategy the four pillar structure was abandoned and member states agreed upon overarching and key areas and were given more time to integrate those into their national policies. Member states have to report on the process in annual national action reports.

In addition, the reporting of the employment and economic strategy has been harmonized to allow member states to allow both policy areas to work together.

The following table illustrates the evolution of guidelines. What is important to note is that from 1998 to 2002 a four pillar structure was in place which dedicated an entire pillar to equal opportunities. The content of the pillar remained fairly stable over these initial five year. An important addition to the pillar was the incorporation of gender mainstreaming in 1999 which gained in importance over time and became a tool to gender mainstream the other three pillars. From 2003 onwards gender mainstreaming became a “horizontal task” alongside, for instance, good governance. Several of the gender equality guidelines from the 4th pillar were not, however, taken over into the new layout of the EES. Gender equality was mentioned as one specific objective only. In the current structure – being in place from 2005-2008 – gender equality receives even less specific mentioning. Nevertheless, gender equality has remained an important component of the strategy largely due to its importance for the achievement of the three core overarching objectives of the EES: full employment, quality and productivity at work and social cohesion and inclusion. In order to achieve full employment women’s employment rate has to be increased; to promote quality and productivity jobs gender segregation in the labor market has to be addressed and to achieve grater social cohesion and inclusion women’s employment yet again features prominently. The overarching shortcoming is that relations within the family and greater gender equality in the private sphere are not addressed and furthering gender equality is by and large a tool to means to achieve other (economic) objectives rather than an end in itself.

***Table 5**: EES structural evolution*

	EMPLOYABILITY	ENTREPRENEURSHIP	ADAPTABILITY	EQUAL OPPORTUNITIES
1998	- Tackling youth and long-term employment - Transition from active to passive measures - Encouraging a partnership approach (with social partners) - Easing the transition from school to work	- Making it easier to easier to start up and run businesses - Exploiting the opportunities of job creation in social service economy, labor intensive sectors - Making the taxation system more employment friendly	- Modernizing work organization - Support of adaptability within companies (i.e. encourage training within companies)	- Tackling gender gaps Reconciliation of work and family life - Facilitate return to work - Promoting people with disabilities into working life
1999	- Tackling youth unemployment an preventing long-term unemployment - Transition from passive measures to active measures - Encouraging a partnership approach (with social partners) - Easing the transition from school to work - Promoting a labour market open to all	- Making it easier to start up and run businesses - Exploiting new opportunities for job creation - Making the taxation system more employment friendly	- Modernising work organization - Support adaptability in enterprises	- Gender Mainstreaming - Tackling gender gaps - Reconciling work and family life - Facilitating reintegration into the labour market
2000	- tackling youth and preventing long-term unemployment - Transition from passive measures to active measures - Easing the transition from school to work - Promoting a labour market open to all	- Making it easier to start up and run businesses - Exploiting new opportunities for job creation - Making taxation more employment friendly	- Modernizing work organization - Support adaptability in enterprises	- Gender mainstreaming approach - Tackling gender gaps - Reconciling work and family life
2001	- Tackling youth and preventing long-term unemployment - Adopting an employment friendly approach to benefits,	- Making it easier to start up an run businesses - Exploiting new opportunities for job creation	- Modernizing work organization - Supporting adaptability in enterprises	- Adopting a gender mainstreaming approach - Tackling gender gaps in employment, unemployment and pay

	taxes and training - Developing policies for active aging - Developing skills for the new labor market in the context of lifelong leaning - Enhancing active policies to improve job matching - Promoting a labor market open to all	- Developing actions at the local and regional level - Making the taxation system more employment and training friendly		- Reconciling work and family life
2002	- Tackling youth unemployment and preventing long-term unemployment - Adopting an employment friendly approach to benefits, taxes and training - Developing policies for active aging - Developing skills for the new labor market in the context of lifelong leaning - Enhancing active policies to improve job matching - Promoting a labor market open to all	- Making it easier to start up an run businesses - New opportunities in the knowledge-based society and in services - Developing actions at the local and regional level - Making the taxation system more employment and training friendly	- Modernizing work organization - Supporting adaptability in enterprises	- Adopting a gender mainstreaming approach - Tackling gender gaps in employment, unemployment and pay - Reconciling work and family life

	OVERARCHING OBJECTIVES	**SPECIFIC OBJECTIVES**	**HORIZONTAL TASK**
2003-2004	- Full employment - Quality and productivity at work - Social cohesion and inclusion	- Active and preventive measures for the unemployed and inactive - Job creation and entrepreneurship - Address change and promote adaptability and mobility in the labour market - Promote development of human capital and lifelong learning	- Good governance and partnership in the implementation - Gender mainstreaming and the promotion of gender equality

		- Increase labour supply and promote active aging - Gender equality - Promote the integration of and combat the discrimination against people at a disadvantage in the labour market - Make work pay through incentives to enhance work attractiveness - Transform undeclared work into regular employment - Address regional employment disparities	
2005-2008	- Full employment - Quality and productivity at work - Social cohesion and territorial	- Implement employment policies at achieving full employment, improving quality and productivity at work, and strengthening social and territorial cohesion - Promote a lifecycle approach to work - Ensure inclusive labour markets, enhance work attractivess, and make work pay for job-seekers, including disadvantaged people, and the inactive - Promote flexibility combined with employment security and reduce labour market segmentation, having due regard to the role of the social partners - Ensure employment-friendly labour cost developments and wage-setting mechanisms - Expand and improve investment in human capital - Adapt education and training in response to new competence requirements	- Gender mainstreaming and promotion of gender equality - Good governance and partnership in implementation

3.3.2 Targets

Targets and guidelines are two interlinked important elements of the EES. Guidelines define the direction of the EES while targets identify key issue areas member state's performance is measured. While guidelines have been amended over time targets – once adopted – have remained intact. Since 2003 the EES has as is overall European targets the following three:

- An overall employment rate of 67% in 2005 and 70% in 2010
- An employment rate for women of 57% in 2005 and 60% in 2010
- An employment rate of 50% for older workers (55-64) in 2010.

In addition 8 targets and benchmarking areas have been defined that member states should meet by 2010 (European Council 2005):

- Every unemployment person is offered a new start before reaching 6 month in the case of young people and 12 month in the case of adults in the form of training, retraining, work practice, a job or other employment measures, combined with an ongoing – if appropriate – job search assistance
- 25% of unemployed should participate in active measures
- Jobseekers should be able to consult job vacancies advertised at employment agencies across member states
- An increase, at EU level, of 5 years of the exit rate from the labor market by 2010. In 2001 the average retirement age was 59.9
- Childcare facilities should be provided for 33% of children 0-3 years of age and 90% for children 3 to mandatory school age
- School leaver's quota should be reduced to 10 percent on EU average.
- 85 percent of the 22 year olds should have completed 12 years of school

- ❖ EU average of 12.5% of adults of working age in life-long learning program

Various interest groups wanted additional quantifiable targets, such as gender pay, and equality gap targets. These were not passed by member states. (A monitoring is still taking place through gathering statistical data on them and by having a close look at them in the monitoring process of the EES). In 2003, for instance, member only agreed to "a substantial reduction in the gender pay gap by each Member State by 2010" without concrete targets. Nevertheless, the EES is closely monitoring the gender pay gap within the EES and the European Commission is gathering additional data on the matter to keep pressure on member states to act on the matter.[69] EES guidelines and targets have been in force for all EU member states since May 2004.

3.3.3 Monitoring

The EES monitors the progress of member states to achieve the above guidelines and targets through extensive benchmarking and monitoring. While in some areas the monitoring has been relatively easy to establish it has been rather challenging in others. This can be demonstrated by looking at employment rates and childcare.

The Commission report on gender equality pulls together some important statistics on where countries stand in terms of meeting the Lisbon targets on employment and even on specific data on gender gaps such as unemployment gender gap and gender pay gap (Commission of the European Communities 2007).

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[69] The European Commission issued a report on gender pay gaps of 30 European countries in June 2006 Plantenga J, Remery C. 2006. *The gender pay gap — Origins and policy responses. A comparative review of 30 European countries Group of experts on Gender, Social Inclusion and Employment*, European Commission, Luxembourg.

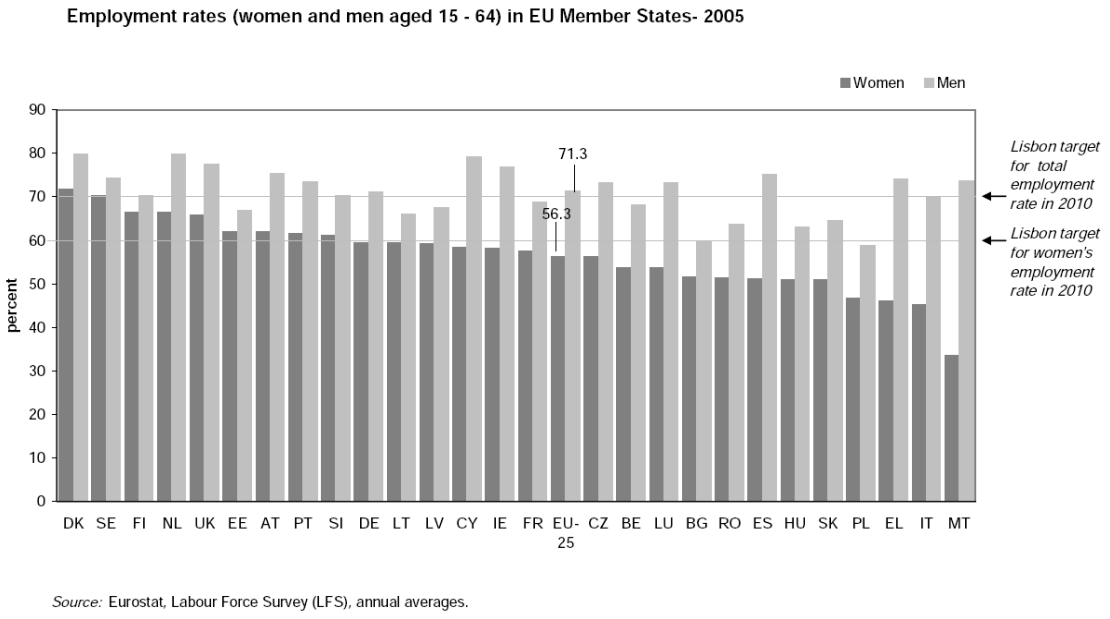

Figure 11: *Employment rates (women and men aged 15-64) in EU member states 2005 (Source: (Commission of the European Communities 2007,12)).*

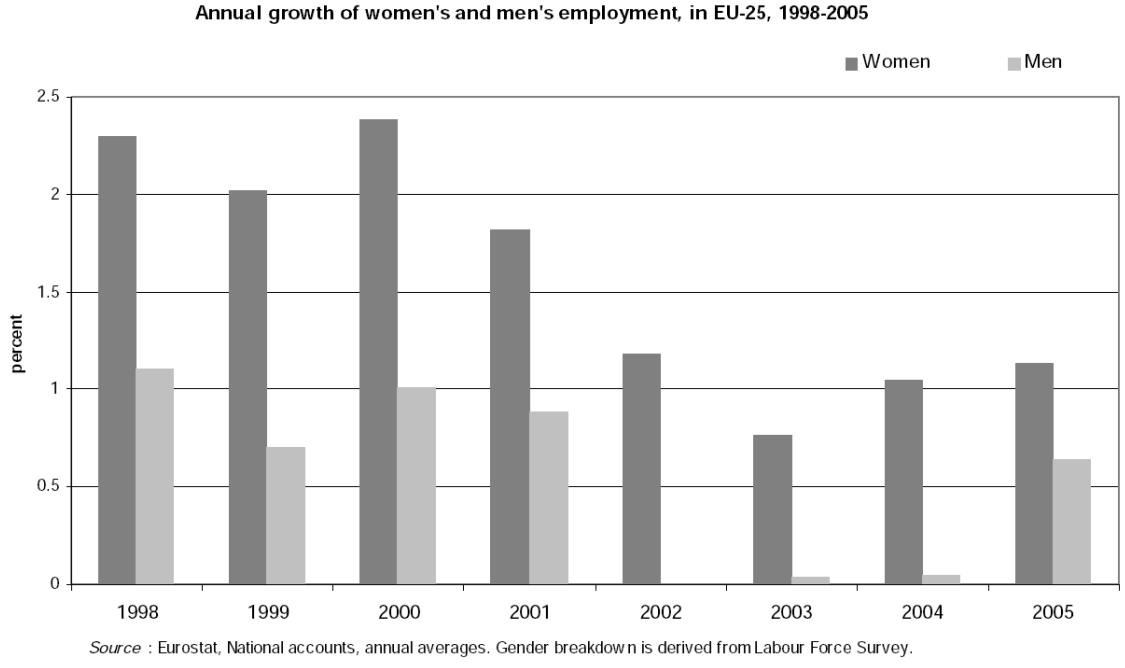

Figure 12: *Annual growth of women's and men's employment*

(Source: (Commission of the European Communities 2007,13)).

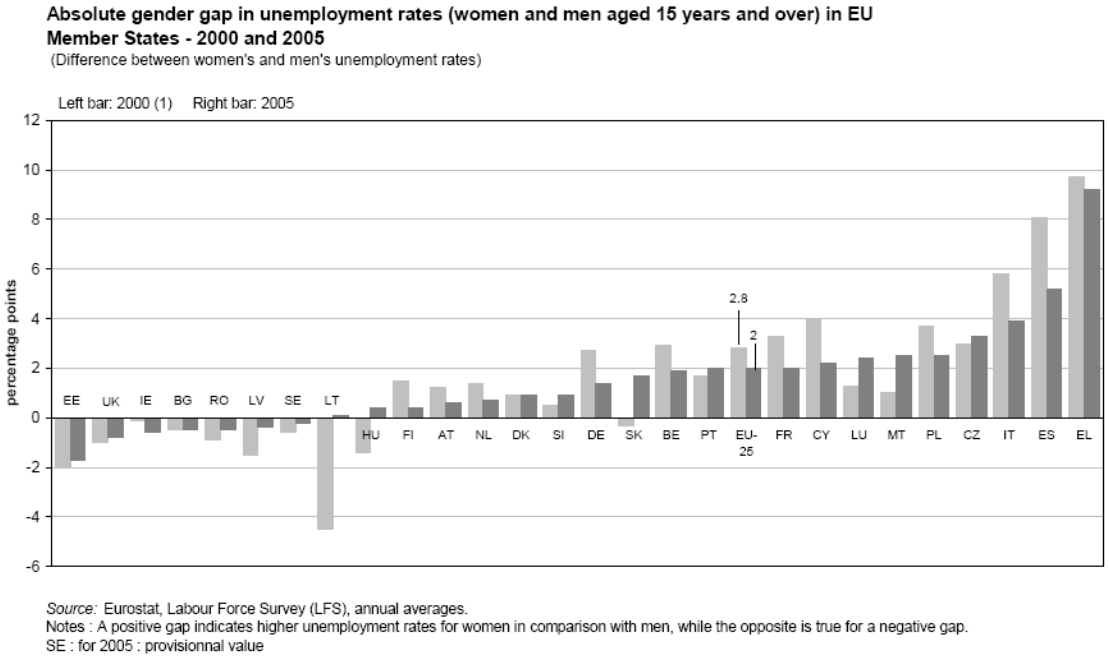

Figure 13: *Absolute gender gap in unemployment*

(Source: (Commission of the European Communities 2007, 14)).

It is important to not that by only considering the overall level of employment it is not taken into consideration how many hours a person works. The UK, for instance, meets the targets on women's employment – and has done so even back in 1997 (Council of the European Union 2004, 116). However, the vast majority of women work in jobs with few hours and the labor market is characterized by strong occupational segregation.

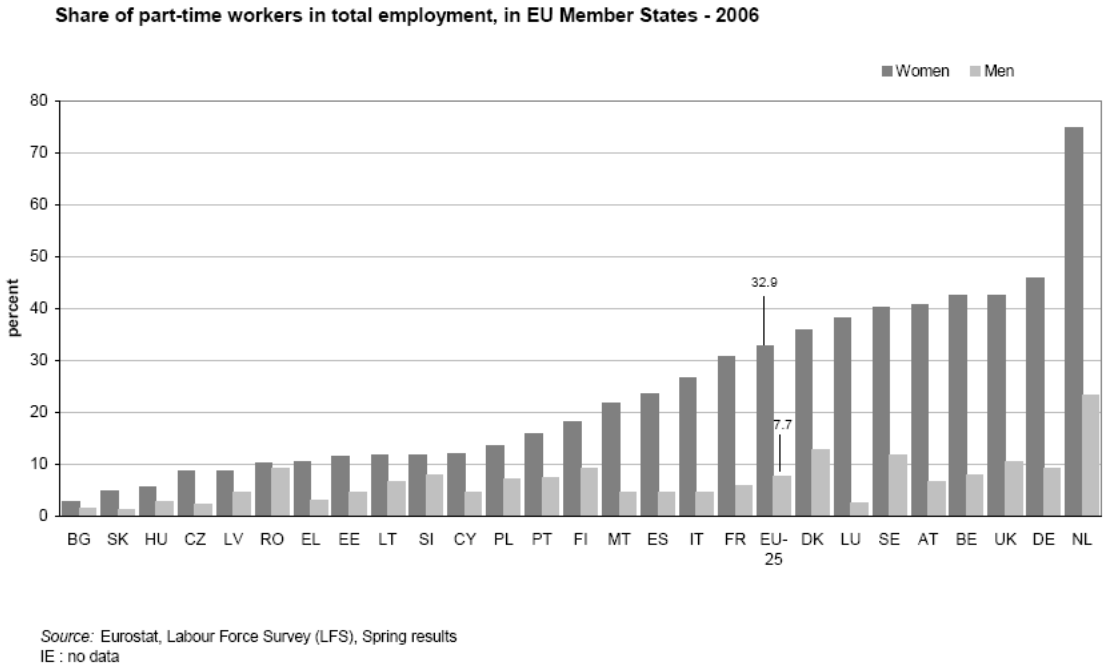

Figure 14: *Share of part-time workers in total employment, in EU member states – 2006 (Source: (Commission of the European Communities 2007, 14)).*

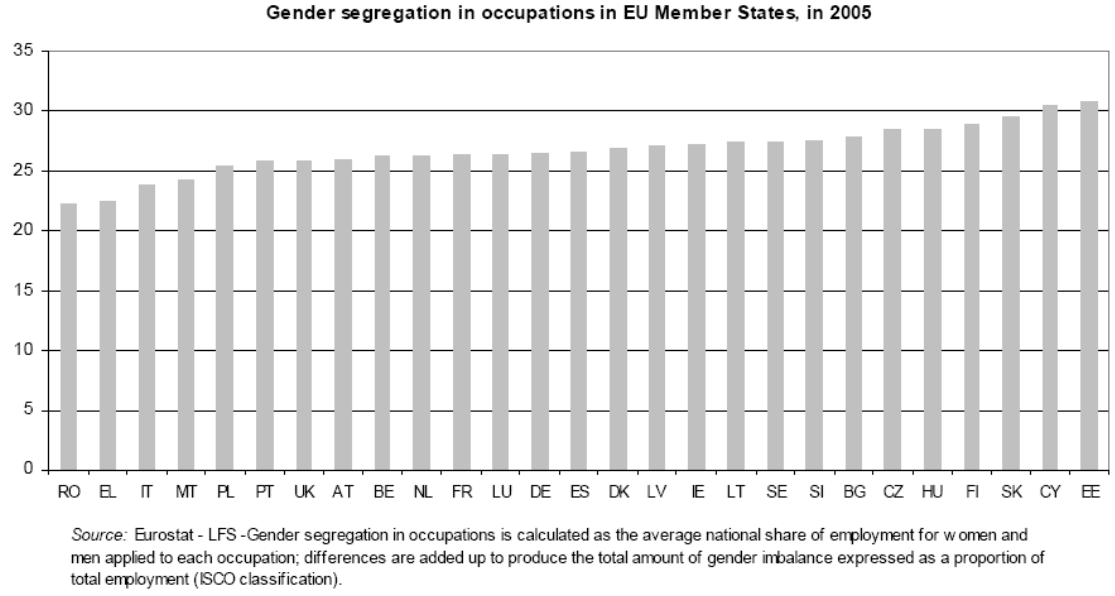

Figure 15: *Gender segregation in occupations in EU member states in 2005*

Source: (Commission of the European Communities 2007.18)

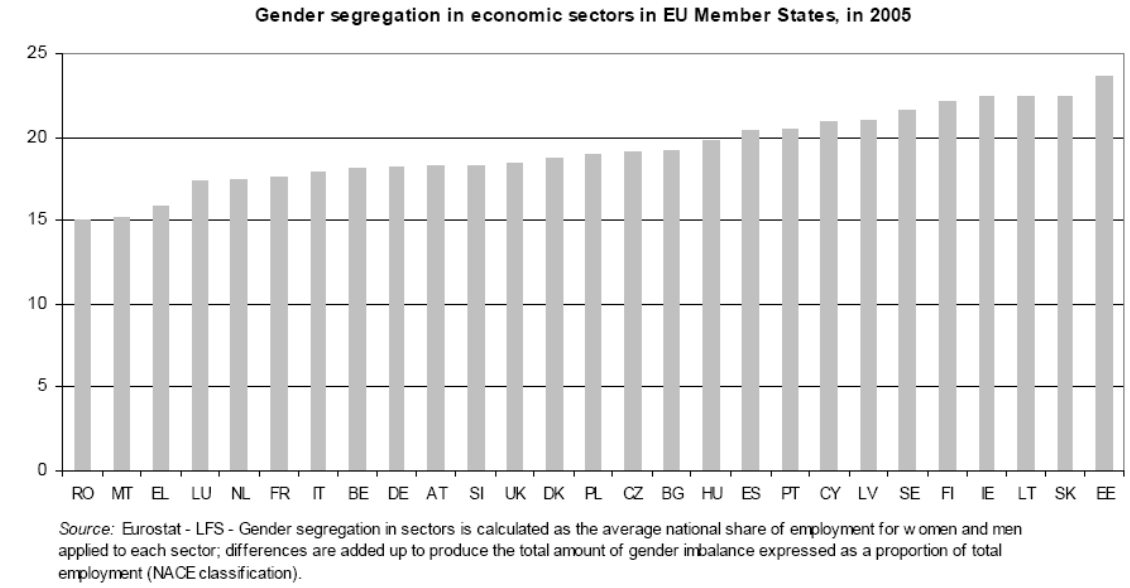

Figure 16: *Gender segregation in economic sectors in EU member states in 2005*

(Source: (Commission of the European Communities 2007, 18)).

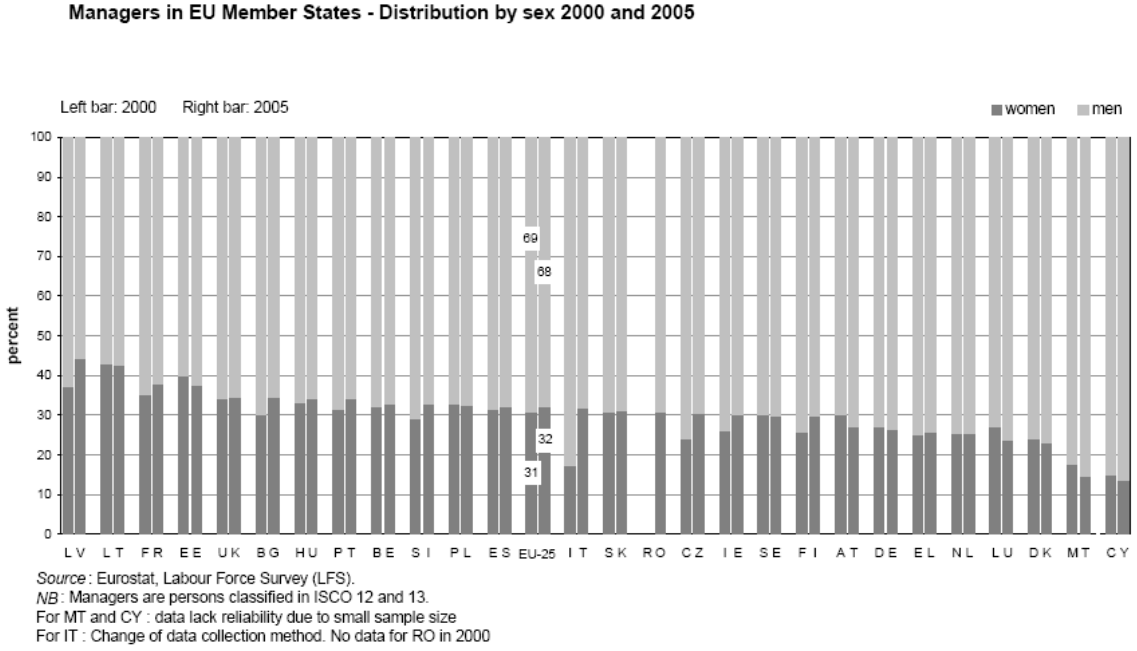

Figure 17: *Managers in EU member states*

(Source: (Commission of the European Communities 2007, 16)).

Through the intervention of especially British interest groups the EES has adopted a stronger focus on quality of jobs and these aspects of the labor market are increasingly taken into consideration – also quantitative indicator are still underdeveloped to account for quality of jobs.

The EES also has available data on gender gaps, such as unemployment gap and gender gap. While the EES does not have concrete targets to close gender gaps it nevertheless has a commitment to substantially reduce them and collects data on member states progress.

Data on unemployment and gender pay gaps are also readily available.

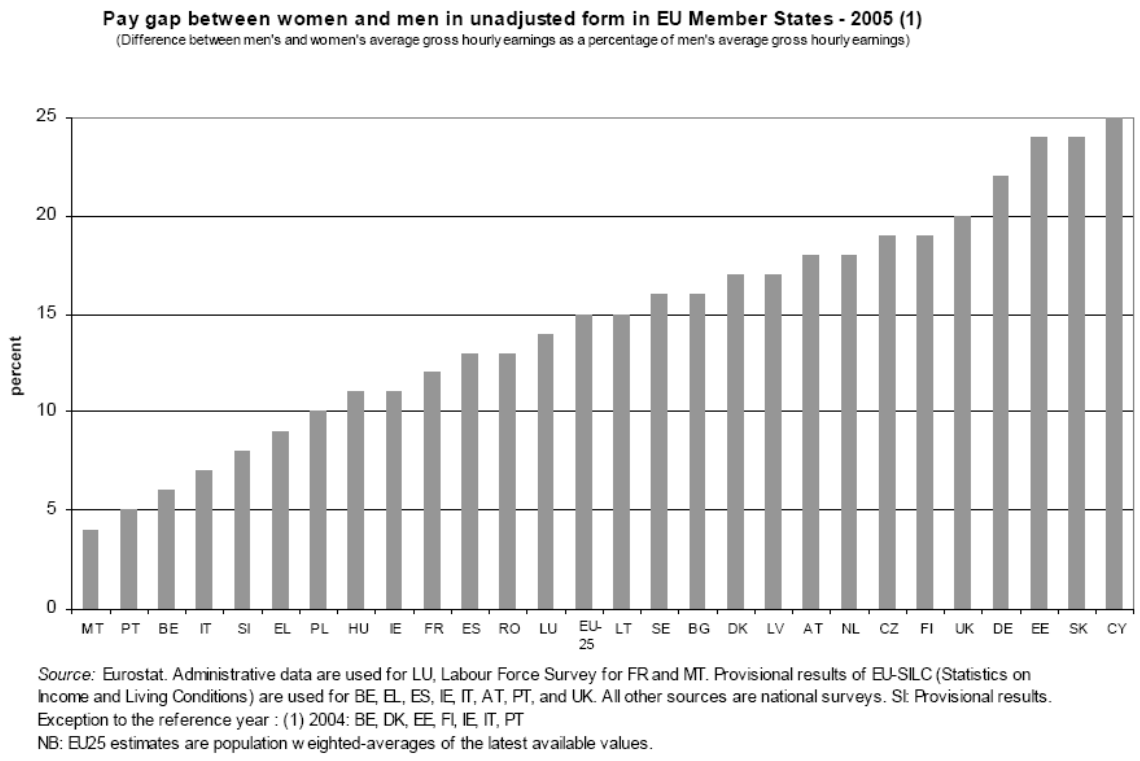

Figure 18: *Pay gap between women and men in unadjusted form in EU member states*

(Source: (Commission of the European Communities 2007, 14)).

When member states decided to adopt childcare targets in 2002 it became apparent that most member states do not keep national statistics on childcare and even if they were available the way public childcare is measured varies significantly. The Joint Employment Report 2002 notes "… it is difficult to access the effect of the initiatives (of Member States on childcare) because of the lack of appropriate and/or comparable data" (European Commission 2002, 54). Given the increased focus of the EES on targets and indicators and the emphasis on a 'results-oriented approach' (COM (2003) 6, 7) this lack of comparable data is problematic. Childcare is a key example to demonstrate the challenges monitoring and benchmarking faces.

The EES traces the developments on childcare through indicator 30. This indicator relies heavily on childcare data reported in the NAPs of member states. As the following table shows this information is quite rudimentary.

	0-3 years						3 years to compulsory school age					
	1998	**1999**	**2000**	**2001**	**2002**	**2003**	**1998**	**1999**	**2000**	**2001**	**2002**	**2003**
AT					8.8	11.0					81.6	85.2
BE					28.3	29.2					100.0	100.0
DE	7.0				8.5		89.5				89.8	
DK					68.0						94.0	
ES					12.1						99.0	
FI				26.1	28.6					61.3	62.1	
FR					32.0	29.4					100.0	100.0
GR												
IE												
IT					7.0						98.0	
LU					10.0	10.9						
NL				22.5	25.0	29.0				82.5		89.0
PT			20.4	21.5	21.5	21.5			65.3	66.3	70.6	
SE					73.0	73.7					76.7	95.8
UK					10.8						29.4	
CY						12.0						82.0
CZ												
EE												
HU		10.3			10.1			87.8		86.4	87.8	
LV			15.2	16.3	15.8				63.5	65.6	77.7	
LT				14.9	16.5	17.8				55.9	58.5	62.1
PL												
SK					18.8						45.3	
SL												
MT												

Table 6: *European Employment Strategy Indicator 30 on Childcare*[70]
(Source: National Action Plan Data 2004 and Indicator Group)

The Commission, EMCO, the Indicator Group have been working in conjunction with Eurostat to improve the data availed on childcare. In 2004 Eurostat published its final report on the "Development of a Methodology for the Collection of Harmonised Statistics on Childcare" (European Communities 2004). Until now the quantitative data available on childcare is not complete.[71] From 2004 onwards the "EU-SILC" (Statistics on Income and Living Conditions) will collect data on childcare. The data collected will provide comparable childcare data for children up to 12 years of age and contain information on the type of childcare used, for example day-care centre, pre-school, childminder, au-pair, grandparents and how many hours per week care is used for each child. The first results will be available only in 2007. In addition, from 2005 onwards the Community Labour Force Survey will ask people why they are not searching for a job and one of the reply options will be "lack of suitable care services for children" which will allow for the quantification of the aspects of availability, access and affordability. The first results will be available in 2006.[72]

Since quantitative data on childcare is limited the Commission works with several expert groups to evaluate the EES and to receive additional information on national policies outside of the NAPs. In regard to equal opportunities the Commission's Expert Group on Gender and Employment (EGGE), formerly the Expert Group on the Situation of Women in the Labour

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[70] EU 15:
AT = Austria; BE = Belgium; DE = Germany; DK = Denmark; ES = Spain; FI = Finland; FR = France; GR = Greece; IE = Ireland; IT = Italy; LU = Luxembourg; NL = Netherlands; PT = Portugal; SE = Sweden; UK = United Kingdom
EU 10 NME: CY = Cyprus; CZ =Czech Republic; EE = Estonia; HU = Hungary; LV = Lithuania; LT = Latvia; PL = Poland; SK = Slovakia; SL =; Slovenia; MT= Malta
http://europa.eu.int/comm/employment_social/employment_strategy/indic/compendium_jer2004_en.pdf

[71] In the appendix is a summary of the data currently available on childcare is attached. The document also contains information on primary school hours and leave arrangements of Member States.

[72] I would like to thank Sophia Eriksson, European Commission, DG Employment and Social Affairs, Employment Strategy Unit, for providing this information.

Market, plays an important role in the evaluation of employment policies as well as the Advisory Committee on Equal Opportunities. Because of gender mainstreaming as a horizontal objective, the EGGE can examine all guidelines and policies from a gender perspective and plays an important role in the guidelines pertaining to equal opportunities. Through the EGGE the Commission is able to make recommendations that focus on the particular problems of childcare provisions within each Member State. The influence of the EGGE is, however, much less institutionalized than that of, for instance, the EMCO. There is also no standardized way of how the qualitative data provided by experts groups is integrated in the work of EMCO or the Indicator Group.

The qualitative and quantitative data available on childcare and member states progress towards the commonly established targets is rather fragmented. This makes it difficult to evaluate child care policies over time in all 25 Member States. The lack of comparable data limits the ability of Commission to put pressure on member states either through issuing recommendations or monitoring their progress and also limits the ability of actors within Member States to integrate the EES into their domestic strategies in a forceful way. Furthermore, the EES defines ECEC for children 0 to 12 years of age but quantitative targets focus on 0 to mandatory school age. The strong focus on (incomplete) quantitative data makes it more difficult to draw attention to quality, affordability and access to care that are mentioned in the guidelines. Finally, neither the guidelines nor the quantitative data take into consideration how care work is distributed within the family.

In the absence of good comparative data on childcare data has been gathered to compare employment levels of women and men with and without children.

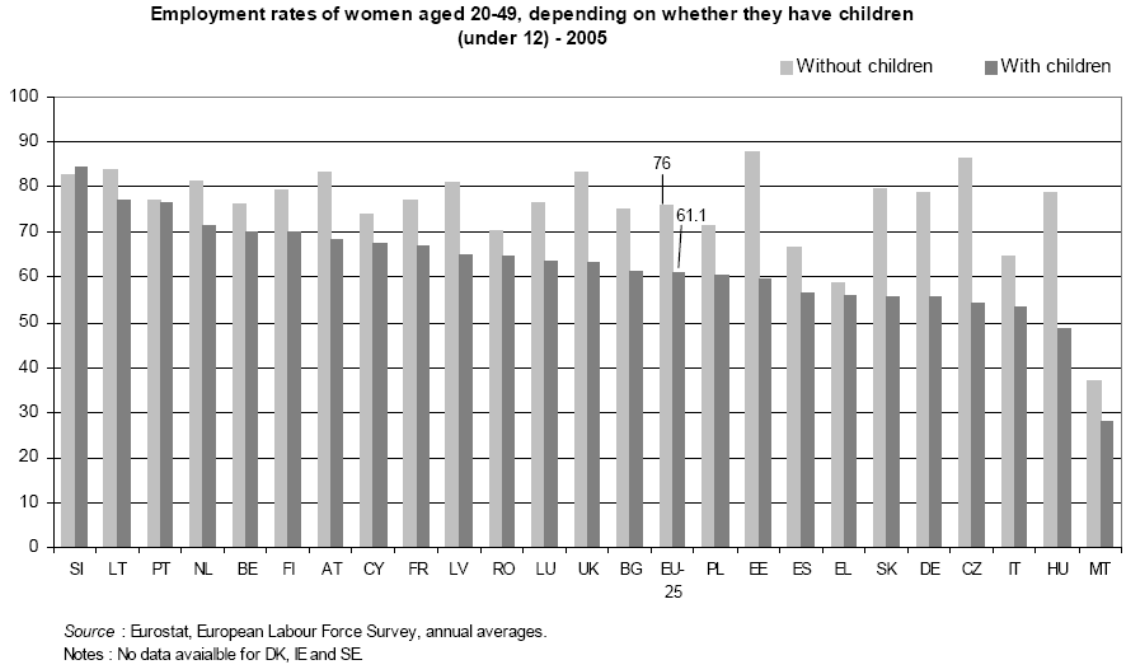


Figure 19: *Employment rates of women aged 20-49, depending on whether they have children (under 12)*

Source: (Commission of the European Communities 2007, 19)

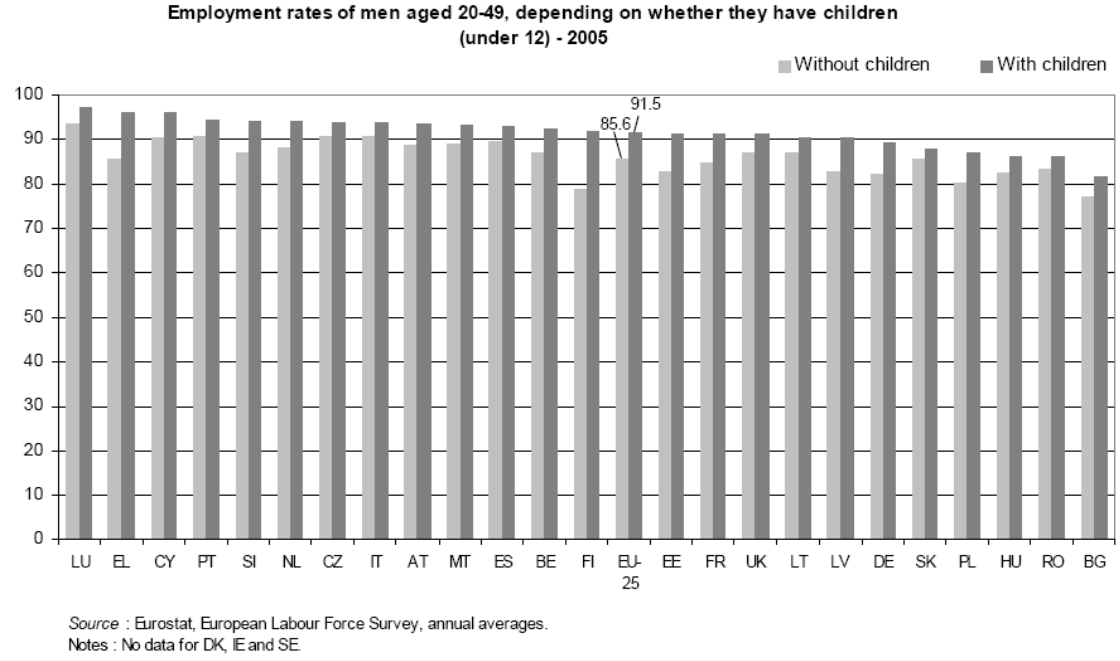
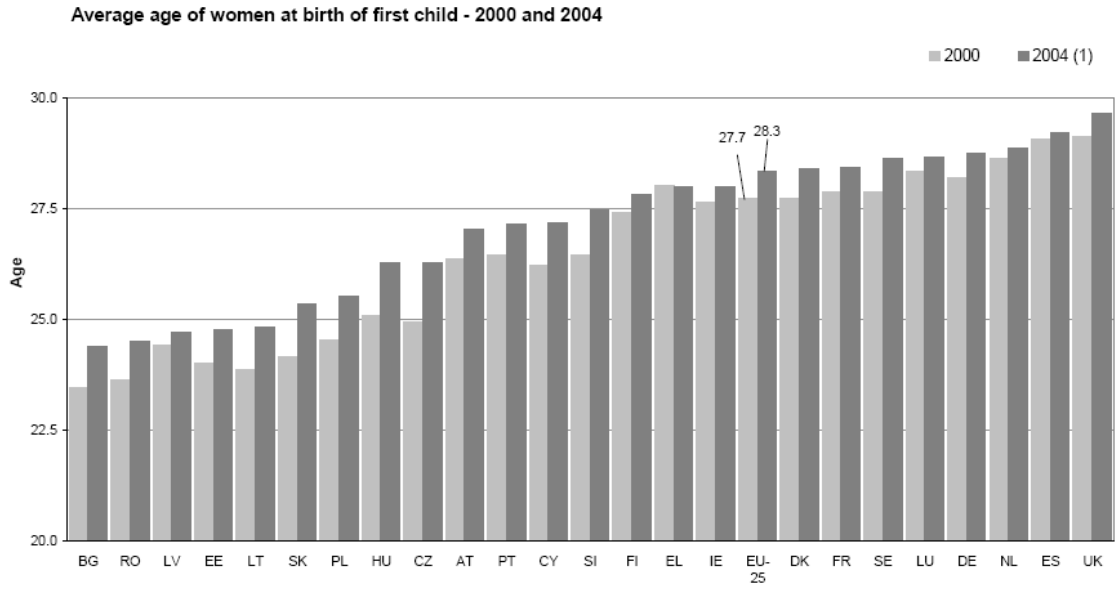


Figure 20: *Employment rates of men aged 20-49, depending on whether they have children (under 12) – 2005*

Source: (Commission of the European Communities 2007, 19)

In addition, data is provided on when women have their first child.



Source: Eurostat, Demography statistics.
NB: No data available for BE, IT and MT for both years. UK :Scotland and Northern Ireland not included
For DE, LU, UK and BG : birth order of current marriage : the comparability with other countries is limited.
Exceptions to the reference years:
(1) DE, EE, EL and ES : 2003.

Figure 21: *Average age of women at birth of first child – 2000 and 2004*

Source: (Commission of the European Communities 2007, 20)

This data can serve as a proxy for evaluating the overall conditions for having children in a particular country. In both Germany and UK the data shows that women have their first child above the EU average. In the UK it was 29.7 years and in Germany 28.8 years. Employment rates of women and men between the ages of 25 and 49 show that employment rates of men with children are higher than without and for women the opposite. This data can be used by feminist activists both at the national and EU level to demand an overall improvement on the conditions under which individuals and couples decide to have children.

3.3.4 Recommendations

Within the Joint Employment Report member states can receive recommendations. These recommendations are passed by QMV in the Council and thus, no individual member state can block a recommendation. They are important indicators of what areas need improvement. In the recent Joint employment Reports the process of member states made in response to the recommendations is evaluated. If a country does not receive a recommendation it does not mean that it does not have any problems in that particular area. It is important to keep in mind that recommendations are not necessarily based on a careful analysis of the performance of countries and a study of the indicators and statistics gathered within the EES. A recommendation only indicates that a specific area was brought to the attention of the Commission by an interest group or a member state. Once a recommendation is issued it is likely that this area will receive continuous monitoring of the following years.

In this section I will specifically address recommendations given to member states in regard to gender mainstreaming and equal opportunities. The core areas Germany and the UK have received recommendations are as follows. Germany received recommendations particularly in regard to its taxation system that supports a male breadwinner-female homemaker division of labor, gender pay gap being one of the largest in the EU and lack of public childcare facilities particularly in the West and for children under the age of three. The UK received recommendations in regard to gender gaps in unemployment/employment and part-time work, especially because of the high percentage of women working in part-time jobs, occupational and sectoral segregation, gender pay gap and lack of public childcare facilities.

Gender Mainstreaming

	AT	BE	DK	DE	GR	SP	FR	FI	IT	IR	LU	NL	PT	SW	UK
Strengthening gender mainstreaming in general			2000 2001	2001	2000 2001 2002	2000 2001 2002		2000 2001 2003	2000 2001 2002		2001			2000 2001	
Impact of tax and benefit system on women's employment		2000		 2001 2002 2003 2004	2000					2000 2001 2002 2003	2000 2001	2000			

Tackling Gender Gaps

	AT	BE	DK	DE	GR	SP	FR	FI	IT	IR	LU	NL	PT	SW	UK
Reducing gender gaps in unemployment and/or employment rates/part-and full time work gaps	2000 2001 2002 2003 2004	 2003			2000 2001 2002 2004	2000 2002 2003 2004			2000 2001 2002 2004	2000 2001	2000 2001 2002	 2004			2000 2004
Reducing occupational and/or sectoral gender segregation		2001	2000 2001					2000 2002 2003					 2001 2002	2000 2002	 2002 2003
Reducing gender pay gap	 2001 2003 2004			 2001 2002 2003 2004	 2003			 2002 2003		 2001 2002 2003 2004	 2002 2003 2004	 2003 2004	 2003 2004		2000 2003 2004

Reconciliation of work and family life

	AT	BE	DK	DE	GR	SP	FR	FI	IT	IR	LU	NL	PT	SW	UK
Reconciliation of work and family life (general)	2000 2001 2002			2001						2000	2000 2002 2003 2004		2001 2002		
Improving care facilities for children and/or other dependants	 2002 2003 2004			2001 2002 2003 2004	 2002 2003 2004	 2003 2004			 2004	2000 2001 2002 2003 2004	2001	 2004	2001 2002 2003 2004		2000 2001 2002 2003 2004
Fixing targets care facilities						2002			2002						
Facilitating reintegaration in the labour market											2002 2003 2004				

Table 7: *Overview of recommendations given to member states on gender equality issues*
Source: 2000/164/EC: Council Recommendation of 14 February 2000 on the implementation of Member States' employment policies (OJ L 052, 25/02/2000 P. 0032 – 0040), Council Recommendation of 19 January 2001 on the implementation of Member States' employment policies (OJ L 022 , 24/01/2001 P. 0027 – 0037), Council Recommendation of 18 February 2002 on the implementation of Member States' employment policies (OJ L 060 , 01/03/2002 P. 0070 – 0080), Council Recommendation of 22 July 2003 on the implementation of Member States' employment policies (OJ L 197, 05/08/2003, P. 0022-0030), Council Recommendation of 14 October 2004 on the implementation of Member States' employment policies (OJ L 326, 29/10/2004, P. 00 47-0063).

The 2006 Council Recommendations on the 2007 up-date of the broad guidelines for the economic policies of the member states and the community and on the implementation of member states' employment policy only mention gender on the margins (Commission of the European Communities 2006). [73] Recommendations in regard to women's labor market participation were given to Greece, Malta and the Netherlands. Gender pay gap was mentioned in the recommendations to the Czech Republic and Slovakia and gender segregation in the section on Austria. Childcare features more prominently in the report. 10 countries received recommendations on childcare, particularly Germany, Spain, Ireland, Italy, Latvia, Lithuania, Luxembourg, Austria, Slovakia and the UK.

3.4 Driving forces of the EES

Employment legislation, like social policy legislation, is not an isolated area and legislation on employment is strongly affected by the overall European market integration and developments in social policy. The evolution of European employment policy shows that gender equality was not a core area of the strategy from the very beginning. The early debates on European employment policy perceived women as a target group and saw a distinct difference between employment policy and equal opportunities policy. Through the adoption of gender mainstreaming as a horizontal task, employment targets for both men and women were adopted as well as childcare targets and equal opportunities and employment policy agendas have merged. While this is clearly an achievement there are several setbacks.

Firstly, the focus is on women's contribution to society as workers, mothers and contributors to social security systems rather than gender equality per se. In other words, gender equality appears to be a means rather than an ends. Secondly, the Luxembourg Jobs Summit created a four pillar structure of which one was dedicated to equal opportunities. This

[73] There were no recommendations in 2005 due to the chance in the structure of the EES.

structure was abandoned in the streamlining process. In the current guidelines (2005-2008) gender equality is still mentioned as a horizontal talk but no single guideline is dedicated to equal opportunities anymore. In fact, some of the key guidelines are grouped under “a lifecycle approach to work”. Thirdly, the EES become linked to economic policy coordination process. Since economic coordination is supported by the Stability and Growth Pact and allows the EU to issues fines for noncompliance the EES is increasingly under the influence of this “harder” form of coordination. Since the Social Inclusion Process is not linked with the economic process questions of poverty and making work pay are getting less attention in the new strategy. Thus, even more than in the streamlined process in 2003-4 the current strategy provides limited room for a strong equal opportunities and gender equality strategy. To understand the ups and down, achievements and setbacks of the evolution of the EES from a gender perspective it is important to look at the mechanisms of evolution.

3.4.1 Mechanisms of Evolution

Firstly, economic integration has been a key structural driving force of the EES. With the adoption of a European currency and the establishment of the Stability and Growth Pact (1992) economic integration advanced considerably in the 1990s. Some member states, particularly the UK and Sweden, did not adopt the Euro an their decision raised questions about further economic integration. To move the project of European integration forward and enhance Europe’s competitiveness on the global market a European employment strategy was seen as essential.

Secondly, the traditional community method relies strongly on legislative initiatives of the European Commission; regulations and directives adopted have to be approved by the Council and judicial enforcement of laws can be achieved via the ECJ. The policy making process is highly technocratic and the involvement of the European citizens – the ‘demos’ is limited. In an

enlarged EU with currently 25 member states the passage of hard laws has become increasingly more difficult, particularly given the structural differences of member states. Member states have also been hesitant to transfer new responsibilities to the EU since certain policy areas, such as social policy, have developed their own individual dynamics and member states lost partial control over the way these policy areas have evolved. Thus, granting the EU responsibilities on employment within the traditional community method was not feasible. A new mode of governance had to be developed that on the one hand allowed the EU to become active on employment policy and complement its initiatives on social policy and on the other hand create a mode of governance that is more 'open' and 'inclusive' with options for the 'demos' to participate in the formulation of European laws. Thus, a legislative initiative – and rule change - was promoted that would make it easier to pass new legislation.

Thirdly, from the perspective non-state actors the EES opens new avenues for lobbying. The EES – unlike the traditional mode of governance – undergoes a rapid transformation with frequent iterations and changes. The EES has only been in place for ten years but it has undergone a major reform and annual updates. These rapid changes create multiple access points to influence the direction and content of the strategy but also make policy gains less permanent. Women's activist, for instance, strongly lobbied for the integration of a equal opportunities pillars in the original strategy. The high visibility of equal opportunities could not be sustained in the reforms. In the 2003-2004 guidelines one of eight priority areas focused on gender equality and in the 2005-2008 there is no gender equality guideline at all anymore. While some issues, such as childcare, are still included they are grouped under the guideline on life-cycle approach to work. Only through permanent lobbying initiatives gender mainstreaming could be preserved within the strategy. Thus, while lobbying in the case of EU hard laws is able to lock in certain achievement this is not the case in soft law. It has to be seen if marginal actors, such as women's groups, will have the resources to keep lobbying on these issues. This is

particularly questionable since social partners have been given preferential access to the EES and women's activists have to seek strategic alliances with European and state level actors to influence the evolution of the strategy.

3.4.2 Hard and Soft Law – Two Complementary Forms of Law?

In international relations different concepts of law prevail. While some scholars, such as Martha Finnemore and Stephen Toppe (Finnemore & Toope 2001) adhere to a limited concept of law, equating sources of law to those that have been attributed legally binding force in some way, other, others, such as Francis Synder (Snyder 1994) adopt a broader view of law, considering all rules, norms and principles that can be invoked in court as standards for review, either as independent standards or as standards of interpretation. In other words, while the former group sees 'soft law' as a contradiction in terminus the latter group sees soft law as "rules of conduct which, in principle have no legally binding force but which nevertheless may have partial effects" (Snyder 1994, 198). Linda Senden, building on Synder's work, defines soft law as "Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects (Senden 2004, 112). Here, soft law has a pre-, post and paralegal function. Pre-law function refers to preparatory and informal instruments such as a Green or White Paper or an Action Program. Post-law function refers to interpretative and decisional instruments like a communication, notice or guideline. Paralegal function refers to an alternative to legislation such as a recommendation, resolution, a code of practice or conduct.

Important to note is that guidelines and targets established within the OMC do not fit this definition of soft law. Soft law produced within the OMC presents a new kind of soft law. Borrás

and Jacobsson distinguish between ‘old’ and ‘new’ soft law. New soft law is characterized as follows:

> “1) the inter-governmental approach of the OMC as opposed to the EU’s supranational soft law approach; 2) the political nature of the co-operation in the OMC; 3) the OMC’s greater mutual commitment and peer pressure mechanisms; 4) the strategic use of the OMC for horizontal linkage of policy areas; 5) the strategic use of the OMC for vertical co-ordination and interpretation; 6) the mobilization of a wide range of actors in the policy-making and implementation process; and 7) the use of the OMC for knowledge sharing and learning” (Borrás & Jacobsson 2004, Jacboson 2004, 85-86)

In addition, while traditional soft law can benefit from the judicial system through its pre-, post-, and paralegal function the OMC has an alternative enforcement mechanism that does not rely on the legal system at all. In other words, hard law can be enforced through the judicial system and ‘old’ soft law has the potential of also being enforced thought he same mechanisms. ‘New’ soft law relies on the OMC and thus, has an entirely different and novel enforcement mechanism and approach to achieving domestic policy change. David Trubek and Luise Trubek explain that soft law produced within the OMC relies on shaming, diffusion through mimesis or discourse, deliberation, and experimentation in conjunction with policy networks (Trubek & Trubek 2005). Given the specific nature of soft law developed within the OMC its risks and benefits need to be examined – particularly in comparison with hard law – to gain a full understanding of what has contributed to the rapid expansion of the use of this new mode of governance.

In the area of employment discrimination the EU has developed a rich set of EU directives and regulations (see Chapter 2). Soft law produced within the EES and other forms of OMC add to this body of law in three concrete ways. Firstly, if an EU directive exists, such as on gender pay, an EES guideline on gender pay can complement the hard law. Secondly, if an EU directive failed to passed, such as in the case of childcare, the EES guideline and target can present an alternative venue to address this policy issue. Thirdly, in some policy areas a directive would be too specific and a policy instrument aimed at structural changes is needed

such as in the area of adaptability or active labor market measures. Thus, soft law can be a useful tool in different settings.

Some scholars such as Claire Kilpartrick, David Trubeck and Luise Trubeck emphasize the emergence of hybrid laws, meaning areas of law where both hard and soft laws target the same policy issue [Kilpatrick, 2003 #175; Kilpatrick, 2005 (forthcoming) #279; Trubek, 2005 #370; Trubek, 2005 #161]. Kilpatrick points out that even in area with well established hard law such as employment discrimination a purely rights- and litigation-based approach cannot alone achieve the equality goals. Thus, soft law can play an important role in achieve actual gender equality.

The debate over hard and soft law often centers on the question of the effect of legal choices for the constitutionality of international legal system or what kind of European social model can be established. In these debates it gets often forgotten that hard and new soft law are two very different types of law with vastly different modes of governance. Hard law “locks-in” a specific policy result. This makes it difficult to upgrade or modify the law as seen in the equal pay and equal treatment directives but it also protects a law at times from a retrenchment when political majorities have shifted. It also can be enforced in court and further interpreted through ECJ rulings. Among the key disadvantages of hard law is the technocratic process of passes new directives and the overall challenges of passing new directives in a growing EU with diverse economies and social security system.

Soft law produced within the OMC undergoes rapid iterations and is fairly easy to change. Thus, policy compromises are often not locked-in like in hard law. As discussed above the equal opportunity pillar was hard fought of by feminist activists and could not be sustained in the streamlining of the process. Gender mainstreaming has survived these reforms but one should not forget that gender mainstreaming is supported through Article 3 (2) of the Treaty of Amsterdam that says “In all the activities referred to in this Article, the Community shall aim to

eliminate inequalities and to promote equality, between women and men". In addition, only in areas where targets are established the process gains significant stability.

The temporality element of hard and soft law is often not taken into consideration when comparing hard and soft law. The different speed of iterations is, however, crucial for lobbying activities at the EU and national level. The proposal of a hard law until it is actually implemented is a multi-year process is set in motion. In addition, the judicial system can be used to further explore the meaning of a directive and for enforcement purposes. Soft law has constantly been in flux. Currently, a three year revision pattern has been established to have more stability because it was inherently difficult for policy-makers and interest groups to respond to annual changes. The most stable parts of soft law are those areas where targets have been established. An increase in stability allows for higher accountability, allow a naming and shaming strategy and provide interest groups to engage better in policy networks and derive a policy strategy vis-à-vis soft law.

Thus, neither hard nor soft law is a superior mode of governance. Each mode of governance has its pros and cons. Targeting gender equality through different modes of governance is, generally speaking, advantageous. For the further development of hard and soft law the different modes of governance need to be seriously taken into consideration when examining not only how European law evolves at the EU level but also what impact it has domestically. In the empirical chapter I will further explore when and how hard and soft law is a useful tool to influence policy making at the national level.

3.5 Summary

The European Employment Strategy has become the centerpiece of a new European policy field that complements not only the EU's extended competencies in macro-economic policy but also its commitment to social policy discussed in the previous chapter. Unlike social

policy that has historically strongly relied on hard law to influence and shape policies of member states this new policy field uses soft law and draws on a new mode of governance to influence the policy-making process within member states. Like in the area of social policy gender equality policies were not originally a core part of the policy initiative. Feminist activists played a central role in integrating gender equality into this new strategy. The key difference between feminist achievement in establishing gender equality policies in hard law and soft law is, however, that the gains made within soft law is harder to preserve. In the initial strategy, for instance, gender equality was addressed in one out of four pillars of the employment strategy. In the course of revising the strategy the pillar strategy was removed and gender equality became less visible and more narrowly focused on factors furthering women's employment rate. Only through intense lobbying gender mainstreaming could be preserved as a horizontal task within the strategy. Once the strategy was feminist activists once again took the initiative to promote a broadening of the employment strategy to focus more strongly on quality of work. By looking at quality of work the strategy could, on the one hand address concerns of productivity within member states and on the other address the kind of work are doing and bring into the ongoing debate once again issues of gender pay gap and gender segregation in the labor market. Thus, while gains made within hard law, such as establishing a new directive are fairly stable political achievements gains within soft law are much less secure and require constant lobbying and networking to have them remain within the strategy.

Gains made within soft law become more reliable and a constant factor, however, when they are supported through commonly agreed targets, such as the employment and childcare targets set for 2010. In these cases benchmarking and monitoring can take place and it become difficult for member states to go back on targets once they are established. Looking at what targets are established shows, however, also the limitations of feminist lobbying initiatives within the EES. A core focus of feminist activism has been the gender pay gap. Here, member states

have agreed to monitor the gender pay gap and to mention the importance of closing the gender pay gap within the strategy but member states have vetoed all initiatives to establish actual targets.

Overall, the EES is currently strongly influenced by the BEPG and achieving higher employment rates of both men and women is the overarching goal of the strategy. As long as furthering equal opportunities is conducive to achieving this goal it has been furthered through the strategy as seen in the adoption of employment rate targets and childcare targets. Establishing a better work-life balance is only taken into consideration in terms of its effects for the employability of women. Gender relations within the family and the role of fathers in the provision of care are not addressed by the strategy. Thus, while the EES has a strong gender component over the past 10 years the strategy is limited in its scope and the achievements made are not as secure as those made within hard law.

Part II. European Law and Policy Change in the United Kingdom and Germany

After having explained the evolution of hard and soft law on gender equality policy at the intersection of social and employment policy over the past 50 years the empirical part of the dissertation turns to the implementation of some of those laws within member states. Here, I particularly focus on two member states – the United Kingdom (UK) and Germany. To uncover the process of policy change due to EU laws within member states the case studies use a two step causal-analytical approach. I will first outline the institutional framework as well as the equal opportunities framework of the UK and Germany. I will then turn to implementation of hard and soft law in these countries. Here, I pay particular attention to the way domestic actors developed strategies around the different kinds of European law and what institutional and actor specific factors contributed to a successful use of European laws to shape welfare state and labor market redesign. Looking first at the institutional framework in which different kinds of EU law are implemented is important for understanding why British actors were able to integrate European hard law into a confrontational strategy while German actors were able to integrate European soft law into negotiation strategy leading to a significant transformation of the welfare state.

Institutional and Policy Frameworks of the United Kingdom and Germany

The UK and Germany are significantly different in terms of their political system and the welfare state and labor market institutions that structure gender equality in the labor market. Understanding these different systems is crucial for examining the context in which European law is implemented in the two member states and domestic actor strategies evolving around different forms of European law.

United Kingdom – Political System

The British political system is the Westminster model that is based on a majority voting system, a fusion of powers, and a strong executive government (Lijphart 1984, Lijphart 1999, 9-21). The strong executive is largely based on the strong position of the Prime Minister who is usually also the party leader and has the right to nominate cabinet members as well as a large number of high ranking administrative officials (King 1994, 155-156). The UK constitution is an area of uncodified law, consisting both of written and unwritten law. The UK does not have a formal written constitution and relies on the concept of parliamentary sovereignty. The parliamentary system slightly deviates from the Westminster model in the sense that it has two Houses of Parliament – the House of Commons (Lower House) and the House of Lords (Upper House) (Lijphart 1999). The House of Commons is significantly more influential in the legislative process than the House of Lords.

The level of power concentration is furthered through stable electoral dynamics in a majority voting system with two main parties (Labour and Tories being the two main parties, the Liberal Democrats as a third party and several small parties). Despite the existence of more than two parties the electoral system with its "First-Past-The-Post" system for general and local election leads to a shift in power between the Labour and Tory parties in most instances.

Parliamentary sovereignty has recently been reduced through the Constitutional Reform Act 2005 and devolution. The Constitutional Reform Act 2005[74] incorporated the European Convention of Human Rights into UK law (Woodhouse 2007). Citizens received specific negative rights and the judiciary can strike down acts of parliament that are "declared incompatible" with the convention. In addition, the Law Lords from the House of Lords will be

[74] For details on the Constitutional Reform Act 2005 (Commencement No. 9) Order 2007 see http://www.opsi.gov.uk/si/si2007/20071252.htm

removed and a new "Supreme Court" will be established by 2008[75]. Historically, the UK had a strong separation of judicial and political style policy making. The reform has the potential to weaken this separation. Furthermore, the power concentration has recently been reduced through the devolution of responsibilities on employment and education to the regions (England, Wales, Scotland, and Northern Ireland). While historically the UK can be described as a centralized and unitary state, recent reforms have allowed the establishment of governments and legal systems in the regions, making the UK a “quasi-federal” state (Hazell & Rawlings 2005, Jeffery & Wincott 2006, Wincott 2006).

George Tsebelis described the UK – prior to devolution - as a political system with a low number of institutional veto points and the political executive having a high reform capacity (Tsebelis 1995). Despite the recent constitutional changes the number of formal veto points remains relatively low in the political system because certain competencies have been devolved to the regions, such as certain issues within employment and education policies, but the legislative process governing the overall legislation has remained fairly stable.

The relationship between state and interest groups is also important for understanding the legislative process. The UK is a pluralist system of interest mediation (Lijphart 1999, 177). Social partnership between employer’s and union’s associations has historically been weak. In terms of collective bargaining agreements, industry-wide bargaining crumbled and company based bargaining has become the norm in the private sector since the 1980s. Through devolution of responsibilities to the different regions (England, Wales, Scotland and Northern Ireland) public sector bargaining has become regionalized in the 1990s. The key employer’s association is the Confederation of British Industry (CBI) and the key union association is the Trade Union Congress (TUC). These organizations have had varied access to the legislative

[75] For details see Constitutional Reform Act (CRA) 2005, c.4, § 23

process. While in the 1960s and 1970s the government actively thought to integrate social partners in the policy making process this changed under the conservative Margaret Thatcher government in the 1980s (Hall 1986, 69-90). Thatcher reduced the influence of both TUC and CBI in policy making and cut back on tripartite institutions. Thatcher had a principal objective against granting trade unions access to both industrial and political arenas (Hall 1986, 108-109). Under the Labour government of Tony Blair trade unions have not been strengthened and thus, the influence of social partners in the legislative process can be described as weak. Nevertheless, the current administration is more open to dialogue with the social partners then prior Conservative governments (Hall 1999).

United Kingdom – Relation to Europe

The UK government is well organized and efficient both in regard to influencing negotiation at the EU level and in terms of implementing EU law. Armstrong and Bulmer compared the system with a well functioning "Rolls Royce machinery" (Armstrong & Bulmer 2003, 392). Key reasons for this are the strong position of the political executive and the relative weak position of the Parliament in influencing the policy-making process involving the EU. Both Houses of Parliament have extensive rights to be informed and review policies vis-à-vis the EU and both have EU Committees (at the Lower House the European Scrutiny Committee and at the Upper House the Select Committee on the European Union). Neither House of Parliament can, however, determine the policy of the government and its representatives in negotiations with the EU (Maurer & Wessels 2001b). This allows the political executive to define its position within internal negotiations and instructs its administrative representative at the EU level accordingly.[76] The Cabinet Office European Secretariat plays an important role in coordinating

[76] For details on the internal negations and offices, such as the Cabinet Office European Secretariat, see Armstrong K, Bulmer S. 1996. United Kingdom. In *The European Union and Member STates. Towards Institutional Fusion?*, ed. D Rometsch, W Wessels, pp. 353-290. Manchester: Manchester University Press, Armstrong K, Bulmer S. 2003. The United Kingdom: Between Political Controversy and Administrative Efficiency. In *Fifteen into One: The European*

the internal position vis-à-vis the EU. At the national level ministries are consulted on the potential effects of the legislation and social partners are also contacted.

The high level of coordination is the case for negotiations within both hard and soft law. For hard law the Cabinet Office of European Secretariat plays an important role and Regulatory Impact Assessment through different ministries allows the UK to respond to draft directives swiftly and to negotiate the UK's position with a single voice. In the area of soft law the UK also adopted a centralized structure to negotiate how the EES should evolve and in terms of coordinating the drawing up of the NAPs. The Department for Work and Pension (DWP) is responsible for active labor market measures and also for the drawing up of the NAP. Within the DWP a small unit, called Joint International Unit (JIU), deals with all issues related to the EU and is in charge of both negotiating policies on the EES at the EU level and to coordinate the drawing up of the NAP. At the EU level the JIU works closely with the EMCO group at early stages of revising and evaluating the EES and holds informal relations with the Directorate General in charge of employment. At the national level the JIU is coordinating the process of drawing up the NAP. The JIU will coordinate with ministries, particularly the Department of Trade and Industry (DTI) and the Department for Education and Skills (DfEs), the devolved administrations of Scotland, Wales, and Northern Ireland. The DTI in conjunction with the JIU plays a key role in initiating a dialogue with social partners.

Key to understanding the relationship between the UK and Europe in both hard and soft law is that the UK has adopted a centralized way of negotiating at the EU level and in term of implementation which is in line with its overall institutional structure. The strong political executive and relatively weak role of the parliament and social partners in negotiations allows

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Union and its Member States, ed. W Wessels, A Maurer, M Juergen, pp. 388-410. Manchester: Manchester University Press, Kassim H. 2000. The United Kingdom. In *The National Co-Ordinatio nof Eu Policy: The Domestic Level*, ed. H Kassim, GB Peters, V Wright. Oxford: Oxford University Press.

the executive to have a highly coordinated response in the drawing up of new laws at the EU level and to respond to the implementation needs of both hard and soft law swiftly. Because of this specific approach vis-à-vis the EU no additional formal or informal veto points are created and the political executive faces limited constraints in the way EU law is implemented domestically.

United Kingdom – Employment Relation and Gender Issue

Gender equality in the labor market is entrenched in a liberal welfare state (Esping-Andersen 1990)(Esping-Andersen 1990). In the course of restructuring the labor market from an industrial to a service and technology based economy, unemployment rose to historic heights in the 1980s (Wood 2001, 394). Unlike the German government – initiating policies to reduce the labor supply – the British Conservative Thatcher government pursued a neo-liberal deregulatory labor market reform strategy. This strategy led to job creation in the service sector economy and integrated increasing number of women in (part-time) employment. While this strategy led to job growth it has done so at the expense of productivity, growing wage inequality, and social problems of poverty and exclusion. Women's employment has increased predominantly in the low pay; part-time labor segment making quality of jobs a core issue for women's employment. Measures to improve the reconciliation of work and family life, such as curbing the long-hour work culture or increasing the number of high quality, affordable and accessible childcare places have largely not been adopted in the 1980s. These issues were only tackled by the Labour government under Prime Minister Tony Blair in the 1990s. [77]

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[77] For a detailed discussion of the British employment and gender relations see, for instance, Daly M. 2000. *The Gender Division of Welfare. The Impact of The British and German Welfare States*. Cambridge: Cambridge University Press, Lewis J. 1992. Gender and the Development of Welfare Regimes. *Journal of European Social Policy* 3: 159-73, Lewis J. 1997. Gender and Welfare Regimes: further thoughts. *Social Politics*: 160-77, Lewis J. 2002. Gender and Welfare State Change. *European Societies* 4: 331-57, Lovenduski J, Randall V. 1993. *Contemporary Feminist Politics: Women and Power in Britain*. Oxford: Oxford University Press, O'Connor JS, Orloff AS, Shaver S. 1999. *States, Markets, Families*. Cambridge: Cambridge University Press, Pfau-Effinger B. 2000. *Kultur und Frauenerwerbstaeitgkeit in Europa*. Opladen: Leske + Budrich, Rubery J, Smith M, Fagan C. 1999. *Women's*

Germany

The German institutional system is characterized by a high degree of horizontal and vertical fragmentation, a fusion of political and judicial style policy-making through an independent Constitutional Court (Bundesverfassungsgericht BVerfG) and collective bargaining autonomy. In the 1980s Peter Katzenstein labeled the Federal Republic of Germany (FRG) a semi-sovereign state because of a strong social partnership at home and security partnership abroad (Katzenstein 1987). Domestic policy-making is constrained by three institutional nodes limiting the federal government's freedom of action: coalition government, intergovernmental relations and parapublic institutions (Katzenstein 1987, 350, 371). These institutional nodes influence the strategies of parties, subordinate levels of government, and interest groups. In addition, legal norms have a strong effect on "the formulation and implementation of policy and possibly on public attitudes more generally" (Katzenstein 1987, 385). This is largely due to the strong and independent role of the German constitutional court that gets called upon in political disputes to evaluate the constitutionality of a specific legislation. The political executive has to routinely seek compromises with opposition parties and federal states to pass reforms because of the fragmented political system. These institutional characteristics remained stable even after the reunification between the German Democratic Republic (GDR) – East Germany - and the Federal Republic of Germany (FRG) – West Germany on October 3rd 1990.

Because of the fragmented political system the political executive is faced with a large number of institutional veto points that limit the ability of a government to control the policy-making process and its outcomes.[78] Electoral dynamics may create a veto point or remove it. If

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Employment in Europe: trends and prospects. London: Routledge, Ruggie M. 1984. *The State and Working Women: A Comparison of Britain and Sweden*. Princeton: Princeton University Press

[78] Katzenstein referred to Germany as a country with a centralized society and a decentralized state Katzenstein P. 1987. *Policy and Politics in West Germany, Policy and Politics in Industrial States*. Philadelphia: Temple University Press and Shonfield described Germany as having divided authority Shonfield A. 1969. *Modern Capitalism: The Changing Balance of Public and Private Power*. London: Oxford University Press. Fritz Scharpf and Manfred G.

a government holds the majority in both Houses of Parliament a crucial veto point in the legislative process is removed. Since this is rarely the case the government has to include external interests to enhance its capabilities (Lehmbruch 1993, Schmidt 1996a). The political executive has to routinely seek compromises with opposition parties and federal states to pass reforms. These institutional constraints limit the capacity of the political executive to pass radical reforms. German style policy-making is often characterized by incremental and negotiated reforms. In 2006 the Bundestag passed a reform act on federalism and amended the German Basic law.[79] Through this legislation the number of legal acts that have to pass both Houses of Parliament has been reduced from approximately 60 percent to 35-40 percent. This reduced the potential veto power of the Bundesrat. Nevertheless, the German legislative system provides many opportunities for blocking reforms and/or reducing the speed of reforms. The recent federalism reform does not specifically affect the laws examined in the thesis because they were passed prior to the reform. Most employment and social policy reform acts did not have to be passed by both Houses of Parliament even prior to this reform. Even those that did have to pass both Houses of Parliament still need to be passed by both Houses of Parliament after the Federalism Reform Act of 2006.

Social partnership between employer's and union's associations is important in Germany. The German industrial relations system is composed of a multi-layered bargaining system with industry-wide and regional components and works councils at the firm level. In the 1990s the bargaining system underwent changes that introduced opt-out clauses to allow for company

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Schmidt have widely written on the influence of the Bundesrat as a potential veto player in the legislative process Scharpf FW. 1989. Der Bundesrat und die Kooperation auf der "dritten Ebene". In *Vierzig Jarhe Bundesrat*, ed. Bundesrat, pp. 121-62. Baden-Baden: Nomos, Schmidt M. 1996b. Germany: The Grand Coaliton State. In *Political Institutions in Europe*, ed. JM Colomer, pp. 62-98. London: Routledge.

[79] On 30 June 2006 the Bundestag amended the German Basic Law (BGBl. 2006 Part I, p. 2034) and passed the "Föderalismusreform-Begleitgesetzetz*"(* BGBl. 2006 Part I. p. 2098). For a discussion on the federalism reform see, for instance, FÜLLER C. 2006. Interview mit Scharpf, Fritz W.: "Die Kleinen haben Angst vor Konkurrenz". In *TAZ*. Berlin, Herzog R. 2006. Kooperation und Wettbewerb. *Aus Politik und Zeitgeschichte* 50: 3-5, Ruetter W. 2006. Regieren nach der Foederalismusreform. *Aus Politik und Zeitgeschichte* 50: 12-7, Scharpf FW. 2006. Foederalismus: Warum wurde so wenig erreicht? *Aus Politik und Zeitgeschichte* 50: 6-11.

based pay determination and opt-outs of employers from the bargaining system. Nevertheless, the industrial relations system still has a high degree of interest mediation. Social partners have historically been involved in the operation of various labor market institutions through a tripartite board structure and have formed strategic alliances with the government to promote, for instance, increasing jobs and apprenticeship places. Social partners have limited formalized and institutionalized access to the legislative process. The so-called “Konzertierte Aktion” failed in the 1970s and so did the “Bündnis für Arbeit” organized by the Social Democratic-Green government in 1998 (Streeck 2003). Social partners gain influence mainly through discussions with ministries and being asked to provide opinion papers during the legislative process. Social partners are also involved in the organization of labor market policy at the federal state level. Depending on the organization of the individual federal state’s labor market, social partners play a decisive role in the committee of structural funds (Begleitausschuss), which decides on the distribution of European Social Fund resources. Thus, the level of interest mediation between the state and social partners at various levels of labor market organization is fairly high. Through the stronger involvement of social partners informal veto points can be created.

Germany – Relation to Europe

The German government has adopted a decentralized approach within the political executive both in regard to influencing negotiation at the EU level and in terms of implementing EU law. The key reason for this is horizontal fragmentation within the political executive which gives different ministries relative autonomy in negotiations with the EU and requires coordination across ministries to come to a common position vis-à-vis the EU. In the area of social and employment policy a number of ministries are involved: the Foreign Ministry and the Finance Ministry (until 1998 the Economics and Employment Ministry) had the key role in European policy negotiations as well as the ministry affected by a particular issue is involved.

While one ministry is given the leading role in negotiations in Brussels final commitments often require last minute negotiations across ministries, i.e. the Finance Ministry has to get involved to agree to the fiscal effects of a decision. This can lead to quite different positions being brought into the negotiations by the German government (Maurer & Wessels 2001a, 114-127)

The process of negotiations and implementation is dominated by the political executive. However, the parliament has become more involved after the signing of the Treaty of Maastricht (1992). The parliament has the right to be informed and can demand that its position on a specific issue becomes the basis for negotiations of the government in Brussels. Since the political executive can rely on a majority in the Bundestag it rarely happens that the Bundestag forces a contrary position onto the government (Maurer 2003). Nevertheless, the debate in parliament can rise public awareness on a specific directive or draw attention to the NAPs and pressure can be exerted on the executive this way.

Thus, while the UK has a highly centralized system of negotiations Germany has a decentralized approach. This is reflected in the way both hard and soft law are negotiated and implemented. In the area of hard law it is often the case that the same civil servants leading the negotiations on a specific directive develop a strategy for implementation (Maurer 2003, 136). However, there is a split in responsibilities among ministries that give rise to inconsistencies. The EU section of the Finance Ministry (until 1998 the Ministry of Economics) is communicating with the Commission on transpositions of EU directives. The Ministry of Economics (since 2002 the Ministry for Economics and Labor) is domestically in charge of transposing the directives. Unlike in the UK where the government can often simply pass a regulation for transposition of EU law – and bypass the parliament – a formal legislative process is necessary in most cases in Germany. This process is not only longer but also involves the parliament and opens up multiple opportunities – i.e. veto points - to amend the draft legislation. Because of horizontal

fragmentation and legislative requirements involving more actors the process of transposing EU law into national law is often prolonged.

In the case of EU soft law a decentralized approach was chosen. In the case of the EES the ministry of Finance and the Ministry of Labor are leading the process. The Ministry of Finance has the overall coordinating responsibility while the Ministry of Economics and Labor is in charge of key issues of the EES. In addition, since 2003 all ministries affected by a particular section of the EES are involved and federal states are given the opportunity to draw up their own NAP in respect to the achievements of their particular federal state. Also, social partners – the Confederation of German Employers' Associations (BDA), the German Federation of Trade Unions (DGB), and partly the United Services' Trade Union (ver.di) are regularly consulted in the drawing up of the NAP. The NAP is also presented and discussed in parliament. Thus, a large number of actors are involved both in negotiations at the EU level as well as in the drawing up of the NAP domestically. The German EES process is decentralized and contains a corporatist consultation process that involves a relatively large number of state actors at both the federal and federal state level as well as non-state actors, i.e. social partners.

Key to understanding the relationship between Germany and Europe in both hard and soft law is that Germany has adopted a decentralized way of negotiating at the EU level and in the implementation, which is in line with its overall institutional structure. The political executive has to also involve the parliament more than its British counterparts and social partners are given privileged access in the legislative process. Thus, the German political executive has to engage in significant coordination between different ministries at the federal level (horizontal fragmentation) and, particularly in the case of soft law, incorporate different levels of government (vertical fragmentation). The decentralized approach chosen does not only increase the need for coordination but also increases the number of veto points by adding informal veto points that enable interest groups to shape the legislative process.

Germany – Employment Relation and Gender

Gender equality in the labor market and employment policy more generally is entrenched in a Conservative welfare state regime (Esping-Andersen 1990). The West German gender equality policy has been strongly tied to the reconstruction of social and political order after WW II. In the 1950s the Christian Democratic Parties (CDU/CSU) institutionalized a social Catholic notion of family with different – yet equal – roles for the man as breadwinner and woman as homemaker and gave special protection to the family in the German basic law. The division of labor was institutionally supported through a tax and benefit system, i.e. married couple tax splitting, child allowance, social security system that has the option of family based claims. The fiscal support for the family was coupled with low investments in public childcare provisions and the maintenance of a half-day school system.[80]

In 1969 the Social Democratic-Liberal government (SPD and F.D.P.) took office the civil and labor code was partially amended to open new avenues for women's employment. While the government demanded more equal distribution of care work social provisions and tax laws supporting a male breadwinner model were not reformed. Childcare did not feature prominently on the agenda of political parties or movements, such as the student movement and the feminist movement. Social movements at the time focused on a reform of the education system to make it less authoritarian and to strengthen parenthood involvement in childcare. "Kinderläden" (children's shops) were proposed that furthered interaction of children, early childhood education but did not focus on childcare as daycare to allow both parents to work or to promote a dual income model (Neumann 2003, 3).

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[80] For a discussion of the German male breadwinner model see, for instance, Birgit Pfau-Effinger Pfau-Effinger B. 2000. *Kultur und Frauenerwerbstaeitgkeit in Europa*. Opladen: Leske + Budrich and Mary Daly Daly M. 2000. *The Gender Division of Welfare. The Impact of The British and German Welfare States*. Cambridge: Cambridge University Press.

When the Christian Democratic-Liberal government (CDU/CSU and F.D.P) came into office in 1982 the male breadwinner-female homemaker model was partially reformed and replaced by a "Three-Phase-Model" of women's employment (Kirner & Schulz 1992). A "typical work biography" for women consists of full-time work until the first child is born, a relatively long parental leave and return to (part-time) work thereafter. The government supported this model through a policy mix that consisted of parental leave (Erziehungsurlaub), parental assistance (Erziehungsgeld) as well as a dual system of child tax credits (Kinderfreibetrag) and child allowance (Kindergeld). Since pre-school care was not significantly expanded and schools are half-day a return to full-time work after a longer period of childrearing is challenging.

Restructuring of the family policy occurred at a time when labor market underwent a transition from an industrial to a service and technology based economy in the 1980s. During this time, unemployment rose to historic heights. The Christian-Democratic Kohl government (1982-1998) responded to this challenge by introducing policies to reduce the labor supply through, for instance, early retirement policies (Wood 2001). Through these policies unemployment rates could be reduced and a high level of social protection for labor market insiders, mainly male industrial workers, could be maintained. These policies did not deregulate the labor market, initiate an expansion of service sector or include decisive measures to produce inclusive labor markets. The policies did not aim at increasing women's employment rate. They did include some active labor market measures to assist women to reenter the labor market but increasing labor supply ran counter to the overall policy to tackle unemployment. At the same time a new maternalist debate emerged ("Neue Mütterlichkeit") which thought to increase the status of mothers, their social recognition as well as seek financial support and improve the infrastructure for women with children. Women's activists demanded, for instance, wages for housework (Opielka 2003, 23) but not measures that would increase the employment rate of mothers such as more childcare places (Neumann 2003).

The East German family policy was significantly different from the West German policy. East Germany promoted an adult worker model with childcare facilities for children of all age groups. After reunification the West German tax and benefit system, family policy, social security and administrative structure in regard to childcare was transferred to East Germany. In other words, the West German gender regime was not merged with the East German but rather expanded to new federal states in the East. This had significant effects for women's employment since they were faced by disproportionate lay-offs in the economic restructuring and through a sharp decline in public childcare places.

Through reunification the gender consciousness has increased and demands were made to establish a dual-income model. While previously West German women's activists had demanded a stronger social recognition and financial support for homemakers through, for instance, wages for housework to reflect the equal value of work in the labor market and care work in the family, women's activists increasingly demanded better childcare facilities to allow parents to combine work and family life. In addition, a steep decline in fertility rates caused doubt on a model that supported a division of labor theoretically but de facto leading to a struggle for parents to combine work and family. The Social Democratic-Green government (1998-2005) supported gender equality in terms of not only increasing women's employment rates but also closing gender gaps.

The Grand Coalition of Christian Democrats and Social Democrats – in office since 2005 – has continued its support for women's employment. The minister for family affairs, Ursula von der Leyen (CDU) has been a keen promoter of increasing women's employment rates and shifting to a dual income model. Three important reforms have been initiated in 2007. Firstly, von der Leyen, for instance, initiated a reform of the parental leave and payment scheme

(Elterngeld- und Elternzeitgesetz).[81] The parental leave time is reduced and at the same time the payment is shifted from a small flat rate to a percentage of the income. In addition so-called fathers' months are introduced that are available to couples when the father takes two month of parental leave. The new parental leave payment is available for only 12 months – or 14 months if fathers take two months – and encourages a quicker return to work. German legislation had previously encouraged a parental leave of up to three years which had made it difficult for a parent to return to work despite having an equivalent workplace guaranteed by law. In addition, a tax deduction was introduced that parents can claim up to 4,000 Euros tax deduction for childcare. In April 2007 von der Leyen has made another initiative to increase childcare places for less than three year olds so that parents who return to work after one year of parental leave have daycare options.[82]

These recent legislative changes undermine core pillars of social provisions that have until now supported a male breadwinner welfare state. It represents turn away from a male breadwinner model towards a dual income model with a stronger participation of fathers in the care for children. It is important to note that the position of German political parties on the kind of gender equality and family policy they envisioned has changed over time. In the 1950s the Christian Democratic Parties (CDU and CSU) were supportive of a male breadwinner-female homemaker model and emphasized that women and men had different – yet equal roles. The SPD and - even more so - the Green party favored a move away from this model and a stronger integration of women in the labor market. Through the recent reform proposed and carried out by the Grand Coalition under the leadership of van der Leyen the family policy of the CDU has changed. Thus, currently all political parties are in favor of a redesign of the welfare state to encourage labor market participation of both parents.

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[81] Elterngeld- und Elternzeitgesetz (BEEG). 5 December 2006, BGBl. I p. 2748
[82] http://www.bmfsfj.de/Politikbereiche/Familie/kinderbetreuung.html

	United Kingdom	Germany
Political System	❖ Unitary state ❖ Fusion of executive and legislature ❖ FPTP electoral system typically delivers stable working majority ❖ Strong position of the Prime Minister	❖ Federal state ❖ Separation of powers ❖ Proportional representation system with 5% hurdle ❖ Moderately strong position of Chancellor
Veto points and state-society relations	❖ Low number of veto points (low horizontal and vertical fragmentation) ❖ Supremacy of the parliament ❖ Pluralist system of interest mediation ❖ Social partnership weak ❖ Low level of interest mediation	❖ Large number of (horizontal and vertical) veto points ❖ Fusion of political and judicial style policy-making (veto power of German Constitutional Court) ❖ Democratic corporatism ❖ Social partnership given deliberate access to policy-making ❖ High level of interest mediation
Relations with the EU	❖ Centralized approach	❖ Decentralized approach
Employment and Gender	❖ Liberal market economy with male breadwinner legacy	❖ Coordinated market economy with male breadwinner legacy
Implications	❖ Low number of veto points lead to high reform capacity	❖ High number of veto point encourage consensus driven reform

Table 8: *Institutional and Policy Frameworks in the UK and Germany*

4 Hard Law

This chapter focuses on two sets of hard laws that are important pillars of the European gender equality strategy. Firstly, I will discuss hard laws on equality and equity in the labor market, specifically equal pay and equal treatment which are the first equality laws passed in the 1970s. Examining the implementation of these laws allows me to identify if and what kind of strategy domestic political actors have developed around new European legal resources. Secondly, I examine hard laws on access to the labor market, such as parental leave and part-time work. These laws were passed in the 1990s and represent a second set of gender equality laws. Looking at them and how they were implemented allows me to examine how strategies of domestic actors have evolved, what strategies have proven successful and what patterns of interaction between non-governmental, state, and EU level actors have emerged over time.

A central finding of this chapter is that the overall approach to hard laws by domestic actors is significantly different in the UK and Germany and that the way actors draw on EU law has remained fairly stable over time. British domestic actors developed a confrontational strategy around EU hard law that has on the one hand led to an empowerment of women's activists and on the other introduced a fusion of judicial and political style policy-making in the UK. Marginal actors at the time, such as trade unions and equality bodies, have used a European litigation strategy to shift the domestic balance of power and increase their access and leverage in policy-making. Through this strategy previously weak and marginal actors have been able to become able to influence the way policies were designed and legislation was amended. Interest groups have used a European litigation strategy across directives and independent of the party in power. German domestic actors have not developed a confrontational strategy around EU hard law. European hard law has not led to an empowerment of women's activists and the domestic balance of power has not been altered.

Multiple veto points of the domestic legislative process have limited the ability to achieve policy innovation through a confrontational strategy in most instances. Opposition to reform has been most vivid when the state-market relationships, i.e. collective bargaining agreements, were affected and reforms have proven easier when it only affected the public sector.

4.1 Equality and Equity in Employment

In this section I will look at two directives – the Equal Pay Directive (75/117/EEC) and the Equal Treatment Directive (76/207/EEC) that was amended by (2002/73/EC) in 2002. I will first outline the content of the directives and then discuss the way they have been implemented into national legislation in the UK and Germany. I will discuss these directives together since the implementation and litigation process evolving around them is intertwined in the UK and Germany.

The Equal Pay Directive (75/117/EEC) is based on Article 141 EC and was adopted on 10 February 1975. The Equal Pay directive states that "The principle of equal pay for men and women outlined in Article 141 of the Treaty ... means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration". Amongst other things the Equal Pay Directive requires that:

- a job classification system used for determining pay must be based on the same criteria for both men and women and drawn up so as to exclude any discrimination on the grounds of sex *(Article 1)*
- there must be no provisions which are contrary to the principle of equal pay in legislation, administrative rules, collective agreements, wage scales or individual contracts of employment *(Articles 3 and 4)*
- employees must be protected against victimisation for taking steps aimed at enforcing compliance with the principle of equal pay *(Article 5)*

It is important to note that pay is not limited to contractual pay and also applies to non-contractual benefits and a claimant can make comparisons to not only current employees but also with a successor or a predecessor (although not a hypothetical comparator).

The Equal Treatment Directive (76/207/EEC) was adopted on 9 February 1976. The directive covers all aspects of employment (access to employment, promotion, vocational guidance and training, working conditions and dismissal). It requires that there shall be "no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status". In 2002 the Equal Treatment Directive was amended by Directive 2002/73/EC. A revision of the Equal Treatment Directive became possible through the adoption of Article 13 (anti-discrimination) of the Treaty of Amsterdam (1997). The table below highlights some important changes. The revised directive addresses vocational training and sexual harassment for the first time. The new directive also requires the establishment of an equality body in all member states.

Directive 76/207/EEC	**Directive 2002/73/EC**
Article 2	**Article 2**
2. This Directive shall be without prejudice to the right of member states to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature and of the context in which they are carried out, the sex of the worker constitutes a determining factor	6. Member states may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate
3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.	7. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity. A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would be entitled during her absence. Less favourable treatment of a woman related to

	pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive. This Directive shall also be without prejudice to the provisions of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (*) and of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC) (**). It is also without prejudice to the right of member states to recognise distinct rights to paternity and / or adoption leave. Those member states which recognize such rights shall take the necessary measures to protect working men and women against dismissal due to exercising those rights and ensure that, at the end of such leave, they shall be entitled to return to their jobs or to equivalent posts on terms and conditions which are no less favourable to them, and to benefit from any improvement in working conditions to which they would have been entitled during their absence.
4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).	8. Member states may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women Article 141 (4) With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any member state from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Table 9: *Comparison of Equal Treatment Directive (1976 v/s 2002)*

4.1.1 Equal Pay and Equal Treatment - Implementation in the United Kingdom

In the UK equal pay and equal treatment legislation had not been passed until the 1970s. In 1946 the Report of the Royal Commission on Equal Pay declared that “equal pay was not a

matter for government intervention but for individual negotiation" (Soldon 1978, 151). The Women's Conference of the TUC strongly lobbied for the passage of a law on equal pay but was not successful even within TUC itself. The Women's Charter produced a manifesto for women's employment rights in the trade-union movement in 1964 but TUC dropped its support of national legislation for equal pay in 1965 (Soldon 1978). The issue remained on the political agenda and was fostered by a highly publicized equal pay strike by women workers at the Ford's Dagenham factory (Lovenduski & Randall 1993, 180).

The Labour government under Prime Minister Wilson appointed Barbara Castle as Minister for Labour. Ms. Castle was a strong proponent of equal pay legislation and demanded the passage of a law in advance to the UK membership in the EU in 1973. Under these favorable conditions two key laws on gender equality were passed.

In 1970 the government passed the Equal Pay Act 1970 (EqPA). The pressure on the government to pass further legislation was kept up in the 1970s. The WLM, National Council of Civil Liberties, Women in the Media, the National Joint Council of Working Women's Organisation among others organized a broad political campaign for equal treatment legislation in 1974 (Lovenduski & Randall 1993, 181). The government passed the Sex Discrimination Act 1975 (SDA) and established the Equal Opportunities Commission (EOC) to oversee the implementation of the law. The EOC distanced itself from involvement with feminist and other non-governmental organizations and there was a clear distinction between the EOC from feminist activists organized within the WLM in the 1970s (Lovenduski & Randall 1993, 183).[83] Through this early legislative reform the division between state and market was redrawn

[83] The SDA and the EqPA were complemented by the Race Relations Act 1976 (RRA) and the Disability Discrimination Act 1995. Both acts are important parts of the overall equality of opportunity approach but are outside the scope of this work.

allowing the government to pass uniform legislation applicable for the public and private sector. It also meant a clear departure from the previous equal opportunities legislation in the UK.

Initial legislation – Further legislation not considered necessary

When the Equal Pay Directive 75/117/EEC and the Equal Treatment Directive 76/207/EEC were passed the government perceived its national legislation to be sufficient to comply with the EU law since it had the 1970 Equal Pay Act, 1975 Equal Treatment Act and the 1976 Race Relations Act in place. Thus, no further actions were taken.

Challenging the government's response – The emergence of a European litigation strategy

Initially, no domestic actors were challenging the government's response to the EU Directives. The EOC at the time was not ready to take up the issue:

> "… the first three or four years of the EOC's operation were disappointing. The commission was widely criticized for outcomes which were the result of weaknesses in the founding legislation and for failure of administration and imagination. It failed to achieve an effective decision-making strategy, it failed to make use of its law-enforcement powers, and it failed to establish itself as a presenter of equal opportunity" (Lovenduski & Randall 1993, 187).

Thus, the legislation was initially not domestically challenged. In 1979 the European Commission examined the implementation of the equal pay and equal treatment directives in all member states. The British Equal Pay Act was considered deficient on three grounds. [84](1) Section 6 of the Act excluded provision made in connection with death or retirement. (2) The definition of equal pay was defined too narrowly as equal pay for work of value to that of a male counterpart. This regulation required a (female) plaintiff to find a male counterpart to be compared to and the existence of a job evaluation scheme as the basis for this comparison.

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[84] Commission of the European Communities vs. United Kingdom of Great Britain and Northern Ireland, Case C-61/81, ECR 1982, 2601

Through significant gender segregation in the British labor market and employer consent to rank two jobs the conditions for a comparison were not given in most instances. (3) The legislation did not address sex segregation in the labor market.

The European Commission also initiated an infringement procedure to achieve an amendment of the Sex Discrimination Act. [85] The main reason for the infringement procedure was that the Sex Discrimination Act included direct, indirect discrimination and victimization but not positive discrimination, meaning action to overcome the effects of past discrimination.

Both infringement procedures led to ECJ rulings that required an amendment of the national legislation. The ECJ rulings were not received favorably by the Conservative Thatcher government that had taken office in 1979. Expanding social policy was running counter to the overall deregulation efforts of the government. While the government had to address the ECJ case law it was still up to the government to interpret the ruling, even if this interpretation ran against the spirit of the decision. The government decided to amend legislation to a minimal degree.

In the case of the Equal Pay Directive the Department of Employment was asked to prepare an amendment of the legislation. This proposal was met with significant resistance from women's groups, the EOC and the House of Lords, particularly in regard to a proposed delay of the regulation to take effect. The Equal Pay legislation was amended through the 1983 Equal Value (Amendment) Regulation that took affect on 1 January 1983 (Clark 1983, Clark 1984). The new Section 1 (2) introduced "equal pay for work of equal value" and allowed independent experts, not employers themselves, to evaluate the worth of a job. Nevertheless, the regulation 1 (3) still allows employers to justify pay disparities between jobs on a basis of attributes specific to the workers under comparison and not just on the basis of the tasks themselves (Hoskyns

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[85] Commission of the European Communities vs. United Kingdom, Case C 165/82

1996, 310). Overall, the government amended the Equal Pay Act in a way that left the domestic legislation mainly intact and did not reflect the spirit of the ECJ ruling (Alter & Vargas 2000, 457). The Equal Treatment Act was amended through the Sex Discrimination Act 1986. The amended law also left the national legislation largely intact. Thus, while the UK government responded to the pressure of the European Commission and amended the national legislation to bring it into line with EU law the changes were not far-reaching and, by and large, maintained the status-quo.

At this point the UK law came under intensive criticism domestically. A key driving force was the EOC. In 1988 Janna Foster was appointed to the EOC and, for the first time, someone with a background in women's rights at work took office. In addition, Valerie Amos, a black feminist with employment experience through her women's right work for the London local authority, was appointed chief executive (Lovenduski & Randall 1993). Under the leadership of Foster and Amos the EOC moved towards a law-enforcement strategy. In addition, the Women's Unit at the TUC took up the issue. Thus, two equal opportunities activists – EOC and TUC – began to challenge the governments' response to EU directives and ECJ case law.

It is important to note that when the EOC and TUC developed a law-enforcement strategy the political environment had drastically changed from the early 1970s. When the Equal Pay and Equal Treatment Acts were passed the Labour government under Prime Minister Wilson was in office. The Labour government had been receptive to the demands of women's activists and maintained close ties with the unions. When the Conservative government under Prime Minister Margaret Thatcher took office women's activists and trade unions had very limited access to the policy-making process. In this situation activists turned towards EU and developed a European litigation strategy.

Through the division of judicial and political style policy making in the UK these activists had to first find courts willing to refer cases to the ECJ and to indirectly undermine the

supremacy of the parliament. The judicial support came from newly established Industrial Tribunals (Alter & Vargas 2000). Important equal pay cases were Worringham vs. Loyds Bank Ltd. (Case C-69/80, 81, ECR 767), Pickstone vs. Freeman ([1988] 2 All ER 803, [1988] 3 WLR 265, [1989] A.C. 66 House of Lords) and J. P. Jenkins vs. Kingsgate (Clothing Production) Ltd. (Case C-96/80, 1981, ECR 911). Equal Treatment has also given rise to a number of judgments, such as Marguerite Johnson vs. Royal Ulster Constable of the Royal Ulster Constabulary (Case C-222/84, 1986, ECR 1651; Helen Harshall vs. Southampton and South-West Hampshire Area Health Authority (Case C-271/91, 1993, ECR I-4267).

In other words, private litigants brought cases in front of national courts, primarily the Industrial Tribunal, which was deemed to be sympathetic to referring a case to the ECJ for preliminary ruling. Within the domestic legal system cases can be heard at the Industrial Tribunal, Employment Appeals Tribunal (EAT) and House of Lords as highest national appeals court. At any point in the appeals process a case can be referred to the ECJ for preliminary ruling. The domestic court can ask specific questions to the ECJ that need to be clarified to rule on an issue. The ECJ can only answer those questions. The national court has to interpret the ECJ ruling and decide the specific case in line with the ECJ ruling. In the cases mentioned above the ECJ clarified EU law in such a way that it opened up the possibility for the national court to establish new individual rights and to call the national legislation into question.

Follow-Through on Legal Victories

Through legal activism in conjunction with judicial support the way the British government had complied with the EU directives could be called into question. The achievement of legal victories alone would not have led to a broad application of ECJ case law and eventual legislative change. The Women's Liberation Movement (WLM), EOC and TUC lobbied for legislative change to broaden the application of the court decisions and to achieve more encompassing standards of gender equality in national legislation. The EOC in particular played

a crucial role following through on legal victories and in demanding broader legislative changes to reflect the case law. Pressure was put on the government to amend legislation, for instance, by organizing broad lobbying campaigns raising public awareness of the ECJ rulings and by filing copy-cat cases to enhance pressure on industry to demand clarification of the legal situation to avoid costly future litigation. Thus, a previously weak sub-state actor increased its access and leverage in the policy-making process through a European litigation strategy.

The Conservative Thatcher government gave into the pressure and amended both the equal pay and equal treatment legislation. In the case of equal pay the government passed the 1983 Equal Pay (Amendment) Regulation. In the case of equal treatment the government passed the 1986 Sex Discrimination Act, which was amended through the Sex Discrimination (Amendment) Order 1988, Employment Act 1989, Equal Treatment (Gender Reassignment) Amendment Regulation 1999. These further legal changes occurred in response to ECJ rulings and domestic follow through campaigns. The Equal Treatment (Gender Reassignment) Amendment Act 1999 was, for instance, a direct result of P v.S and Cornwall County Council (Case 13/94, ECR I-2143) where an applicant was dismissed after she began to undergo male-to-female gender reassignment. The tribunal referred the case to the ECJ which ruled that such a dismissal could not be tolerated because it failed to respect the dignity and freedom of a person.[86] The continuous legislative change points to the high political capacity of the political executive to pass reforms and respond to case law and, most importantly, to the willingness and ability of women's activists to use the European litigation strategy independently of the party in power.

Revised Equal Treatment Directive

[86] Of importance in the case of sexual orientation are also the European Convention on Human Rights (ECHR) that was incorporated into UK law through the Human Rights Act 1998.

While European equal pay legislation has not been amended since the 1970s the Equal Treatment Directive was amended in 2002 (2002/73/EEC). The government had until October 5, 2005 to transpose the directive. The government took action to implement the directive on time. In the revision process the Department of Trade and Industry (DTI) and the Women and Equality Unite (WEU) were consulted. The Employment Equality (Sex Discrimination) Regulations 2005 came into force on 1 October 2005 (SI 2005/2467).[87] The main changes are:

- a new definition of indirect sex discrimination in employment matters and vocational training
- new provisions prohibiting harassment of a sexual nature or on the grounds of sex
- a provision specifically stating that less favorable treatment of women on grounds of pregnancy or maternity leave is unlawful sex discrimination
- the extension of SDA protection to people who work overseas for a British employer
- clarification of the responsibilities of those who provide vocational training and extension of the protection to cover vocational guidance and unpaid practical work experience
- introduction of an 8 week response time by the employer to a statutory questionnaire
- a change to the current exception in the SDA that allowed an employer to refuse to offer a particular job to someone planning or undergoing gender reassignment.

The new Equal Treatment Directive calls for the establishment of an equality body in all member states. While the UK has an equality body in place – the EOC – the government decided to alter the structure of body. Thus far, each region of the UK (England, Scotland, Wales and Northern Ireland) has an EOC as well as a Disability Rights Commission and a Commission for Racial Equality. The Equality Act 2006 puts in place a new structure. Starting in October 2007 these commissions will be replaced by a new Commission for Equality and Human Rights (CEHR) to reflect the new emphasis on anti-discrimination established by Article 13 of the Treaty of Amsterdam (1997). One CEHR will operate in England, Scotland and Wales

[87] The consultation document as well as an overview document on changes to the Sex Discrimination Act is available through the web page of the WEU.
http://www.womenandequalityunit.gov.uk/legislation/archive.htm

and another CEHR will be established for Northern Ireland.[88] Since the new CEHR has not even begun operating it is too early to say what new litigation cases will be brought to the court and how this changed structure will affect the ability of activists to pursue litigation and organize follow through campaigns.

What can we learn from the British case?

It is quite striking how strongly women's activists challenged the governments limited implementation of the EU directives and thought legal means to explores uncertainties in the national (and European) legal interpretation of these laws. It is also important to note that while British public opinion is, generally speaking, highly Euro-skeptical gender equality legislation and ECJ judgments were interpreted positively and activists did not hesitate to draw on European legal resources to further their political goals.

Important factors that contributed to women's activists drawing on EU law were the political institutional structure of a unitary state with a strong political executive unwilling to grant marginal actors, like women's groups, voluntary access to the decision making process and limited opportunities of those groups to challenge the governments approach domestically. During Prime Minister Thatcher's time in office the access and leverage of women's activists was particularly limited. Given the strong position of the political executive in the British political system marginal, such as the EOC and TUC, had to find innovative ways to exert pressure on the government. This was only possible through going beyond the opportunities offered by the British political system and seeking support from international/European (legal) resources. Secondly, British women's activists have a long tradition of pursuing gender equality on the basis of a strategy of equality of sameness (as opposed to equality of difference pursued by a

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[88] For details on the CEHR see http://www.cehr.org.uk/content/purpose.rhtm or http://www.cehr.org.uk/content/scotland.rhtm

majority of German feminists at the time).[89] The ECJ shared a similar approach in its ruling which produced positive synergies between women's activists trying to get cases referred to the ECJ and the way the ECJ interpreted the law.

4.1.2 Equal Pay and Equal Treatment - Implementation in Germany

The German Basic Law ensures that "men and women have equal rights" (Article 3 GG). In addition, Article 9 GG guarantees the freedom of contract in the economy, meaning that social partners have special responsibilities and competencies to ensure equal rights in the labor market. No specific equality legislation was in place prior to the passing of the EU directives.

Initial Legislation

The German government perceived the Basic Law to be in compliance with European directives on pay and equal treatment and did not take any steps to pass an equal treatment or an equal pay act. This position was supported by employers' organizations, the Department of Labor and Social Policy, labor law experts and judments by both the German Constitutional Court and the Federal Labor Court (Hoskyns 1988, 41). The women's section of the SPD – the ASF – demanded a general anti-discrimination law similarly to the British Sex Discrimination Act (Hoskyns 1988, 41). The German trade union association (DGB) and the majority of the SPD favored an amendment of the existing legislation without a specific legislation. While those groups demanded concrete legislation they did not take concrete steps, either politically or in court, to challenge the government's position not to initiate an equal treatment and equal pay act.

Challenging phase or the failure to establish a confrontational strategy

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[89] For a discussion of the notion of "Equality of Sameness" and "Equality of Difference" see Ostner I, Lewis J. 1995. Gender and the Evolution of European Social Policies. In *European Social Policy*, ed. S Leibfried, P Pierson, pp. 159-93. Washington, D.C.: The Brookings Institution.

In 1979 the European Commission initiated a study on the implementation of the Equal Pay and Equal Treatment Directives in all member states. The report found that Germany's basic law could not be substitute for an active implementation of the directives. The Commission initiated infringement proceedings at the ECJ (Elpers 1980).[90] Even before the ECJ judgment the Social Democratic-Liberal (SPD, F.D.P.) government decided to comply with the demands of the Commission and drafted the First Equal Rights Act in 1979.[91] The draft proposed an amendment of the Civil Code to include provisions on equal treatment (paragraph 611 a, b) and equal pay (paragraph 612 (3)). The Civil Code would only apply to individual employees but would not cover collective bargaining agreements. The latter remained subject to Article 3 GG.

The women's group within the SPD, called ASF, was in favor of a broader anti-discrimination law and the Liberal Democratic Party (F.D.P.) supported a broader anti-discrimination as long as employers' rights were not limited through the law. The Social Democratic Party (SPD), having strong ties with trade unions, and the Christian Democratic Party, being in the opposition at the time, having strong ties to employers' organizations, were not in favor of a far-reaching legislation because of its effects on collective bargaining autonomy. Union and employer associations – forming a cross-class coalition – were strongly against a general application of the gender equality legislation that would also cover collective bargaining agreements. The key concern of social partners was that a broad application of the gender equality laws would compromise collective bargaining autonomy that is constitutionally guaranteed in Article 9 GG. While the Christian Democratic Party was in opposition in the Lower

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[90] On the discussion of the Commission inquiry in the German parliament see Bundestag Plenarprotokoll 08/201, 13 February 1980: 161079ff.

[91] "Entwurf eines Gesetzes über die Gleichbehandlung von Männern und Frauen am Arbeitsplatz und über die Erhaltung von Ansprüchen bei Betriebsübergang (Arbeitsrechtliches EG-Anpassungsgesetz), Bundesrat Drucksache (BR Drs.) 353/79, 17 August 1979. The legislation was passed with light modifications in 1980.

House it had the majority in the Upper House, Bundesrat, and could use its veto power to block a more comprehensive legislation from moving forward (Pfarr & Bertelsmann 1989, 55).

Women's activists outside of political parties played a minor role in the negotiations. When the Equal Rights Act 1979 was debated in parliament the Deutscher Frauenrat – an umbrella organization of German women's associations – demanded that the legislation should include indirect discrimination, the reversal of burden of proof, and jobs should be advertised in a gender neutral way (Informationen für die Frau 3/1980, 16). However, there was limited support of this initiative by women's organizations and the political parties did not take these recommendations into consideration seriously.

Since there was broad opposition to a comprehensive implementation of European equality directives and only marginal actors demanded a more comprehensive implementation the government passed the First Equal Rights Act 1980 as it was proposed (First Equal Rights Act 1980, BGBI 1980 I, 1308). The law prohibits an agreement between an employer and an employee to lower pay for work of equal or equivalent value on grounds of the employee's sex. The existence of protective legislation on grounds of an employee's sex also does not justify lower pay. It also requires that job advertisements must be gender neutral. Furthermore, the employer has the burden of proof in a court case.

The law had significant shortcomings because it only applied to individual employees and not collective bargaining agreements (relevant for pay) and does not address the exclusion of women from many occupations (relevant for equal treatment) (Ostner & Lewis 1995, 188). Thus, instead of bringing national law into full compliance with EU law the German political executive decided to engage in an entangled legal battle.

In 1982 the Social-Democratic Liberal government (SPD, F.D.P) under Chancellor Helmut Schmidt was replaced by the Christian-Democratic Liberal coalition government (CDU/CSU and F.D.P) headed by Chancellor Helmut Kohl (1982-1998). The Christian-

Democratic party with its close ties to the Catholic Church promoted more conservative family values than the predecessor government. The government, however, did not propose any further amendment to the legislation.

The Commission initiated an infringement procedure challenging the way the German government had implemented the Equal Pay and the Equal Treatment Directive in the First Equal Rights Act 1980.[92] In the case of equal treatment the ECJ ruled in 1985 that Germany had to provide a list of exception cases with conclusive reasons why women cannot be employed in certain professions. In 1987 the government presented this list of exceptions. Thereafter, the Commission declared the German law to be in compliance with the EU directive and did not take any further action (Ostner & Lewis 1995, 188).

The compromise between the Commission and the Christian-Democratic government meant that each exception case had to be individually challenged in court. Since the list of exceptions was fairly comprehensive this meant an entangled legal battle that is still going on today. In the case of equal pay the law only applied to individual contracts and not collective bargaining agreements and thus, this aspect had to be disputed in court as well.

Similar to the UK case the controversy over the implementation of Equal Pay and Equal Treatment Directives moved to the national courts. German lower courts were much more inclined than their British counterparts to refer cases to the ECJ for preliminary rulings. A large number of German lower courts began to refer cases to the ECJ rather than the German Constitutional Court and to base their rulings on European case law rather than the national Equal Rights Act. This was done following the ECJ's supremacy doctrine, meaning that legal victories based on European law negate conflicting national policy (Costa vs. ENEL, 1964). I will look at a selected case law on Equal Pay and Equal Treatment cases.

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[92] Commission vs. Federal Republic of Germany, Case 248/83, ECR 1474 (1985)

One of the most contested issues was whether the equal pay regulation could be limited to employment contracts between employees and employers or also address collective bargaining agreements that were concluded between a trade union and an employers' association and works agreements (Betriebsvereinbarungen) between the works council and employers on specific matters of a firm. [93] The matter was brought before the ECJ.

The first time the ECJ addressed equal pay was in the Defrenne II (Case 43/75, ECR 1976). The ECJ ruled that Article 141 EC (previously 119 EEC) prohibits direct open discrimination in pay in individual as well as collective agreements. This ruling ran counter to the way Germany had implemented the directive and excluded collective bargaining and work agreements. In the case Kowalska vs. Freie und Hansestadt Hamburg (Case 33/89, ECR 2591, 1990) the ECJ ruled once more that equal pay applies to work of equal and equivalent value to both individual contracts and collective bargaining agreements. The court also held that transition funds given to employees at the termination of a contract cannot be restricted to full-time employees. A central issue is the criteria according to which pay levels are assigned. In 1986 the ECJ decided in Gisela Rummler vs. Dato-Druck (Case 237/85, ECR 2101, 1986) that the amount of "muscle power" and "degree of physical strength" required for a task cannot be used to determine payment levels. Part-time workers cannot be excluded from company specific retirement benefits (Bilka vs. Weber von Hartz, Case 170/84, ECR 1607,1986 and Ingrid Rinner-Kohn vs. FWW Spezialgebäudereinigung GmbH, Case 171/88, ECR 2743, 1989).

The equal treatment part of the law was also challenged in court. Two issues were particularly prominent. Firstly, the First Equal Rights Act 1980 did not contain sanctions in case of discrimination on the grounds of sex. In 1984 the ECJ ruled that in case of an infringement of

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[93] The transposition of the directive does not require a specific implementation of the directive in the field of works councils because Article 75 of the Works Council Act prohibits discrimination on grounds of sex. It is also not necessary to provide a specific implementation of the directive in regard to pay for civil servants whose pay is regulated in the Act of Parliament and not governed by the Civil Code. Here, Article 3 (2) of the German Basic Law is sufficient (Commission vs. Federal Republic of Germany, Case 248/83/, ECR 1474 (1985).

the equal rights imperative compensation could not be only symbolic but should act as a deterrent (Case 14/83, Saline von Colson and Elisabeth Kamann vs. Land NRW, Case 14/83, ECR I 1801, 1984)[94]. Secondly, the First Equal Rights Act 1980 contained restrictions relating to working hours of female employees. In 1991 the ECJ ruled against a ban on women working night shifts (Ministere Public vs. Alfred Stoeckel Case C345/89, ECR, 1991, I-4047). In 1992 the German Constitutional Court reaffirmed the ECJ judgement and also ruled that a ban on night shifts was discriminatory (28.1.1992, BVerfGE 85, 191ff). The German Constitutional Court asked legislators to re-regulate night work. Two years later the ECJ once more ruled that a ban on women's night work is against the Equal Treatment Directive and the ban on night work had to be lifted (Habermann-Beltermann vs AWO, Case C- 14/83, ECR, 1994, ECR 1994, I-1657).[95]

Follow-Through Phase or the lack thereof

Having a high referral rate to the ECJ and legal victories alone does not automatically lead to an amendment of the national legislation. In the German case litigants, by and large, were individuals without the support of an equality body or trade union and the litigation was not part of an organized effort to challenge the gender equality legislation at large. This has affected the ability to build on legal victories and to organize political campaigns to put pressure on the political executive to amend legislation.

In the case of equal pay no specific legislation was put in place to establish a job evaluation procedure to look into claims on equal pay for work of equal value. While collective bargaining agreements have been amended in ways that they do not directly discriminate on the base of sex indirect discrimination remains a problem. A key role in indirect discrimination have

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[94] For further cases on the concept of equal treatment that year see also Case 79/83, Dorit Harz vs. Deutsche Tradax GMbH, 1984, ECR I 1921, C-184/83 Ulrich Hofmann vs. Barmer Ersatzkasse, 1983, ECR 3047.

[95] The case concerns the dismissal of a pregnant woman who had been employed on an indefinite contract to work at night, despite the national law that forbids night work by pregnant workers. The national law affects only a limited contract, in contrast to the unlimited contract in question. Therefore, the dismissal is contrary to the Equal Treatment Directive.

been played by grading policies of income levels for different tasks, i.e. tasks that are predominantly performed by women are graded lower than those predominantly performed by men. Because no federal law was passed collective bargaining agreements need to tackle this task on an individual basis and each individual payment scheme has to be examined to see if discrimination occurs. This is a long-term process with varying success across collective bargaining agreements and over time. In some countries, such as Sweden or in Wales, companies with a certain number of employees have to evaluate their payment schemes. This is not the case in Germany.

In the case of equal treatment individual legal cases have clearly had an impact but it has been fragmented. Because the government and the Commission had negotiated a list of exception clauses for occupations and tasks women cannot perform each individual exception has to be challenged in court and has to be individually removed.

The Equal Rights Act was brought in compliance with EU law only in 1994. The decision to amend the legislation was however not due to litigation and political pressure following from legal victories but rather a by-product of German unification. In 1994 the 2nd Equal Rights Act and the Working-Time Act were passed. The Unification Treaty of 1990 stipulated in Paragraph 31 that new federal legislation was obligated to "further develop" equal rights between men and women. During the legislative process the female MPs of the Green party and the SPD as well as women within trade unions used the opportunity to discuss ways in which women could be promoted within the labor market and politics. These groups demanded quota regulations and the setting of concrete targets.[96] The Christian-Democratic Liberal government opposed these measures, especially quota regulations, and emphasized the freedom of choice between paid

[96] For a debate on this issue see BT-DR 11/3728 and BT-Drs. 11/3266 as well as BT PIPr. 11/128, 23. February 1989. For a detailed discussion on quota regulations see Kodre P, Mueller U. 2003. EU Equal Treatment Norms and Domestic Discourses in Germany. ed. U Liebert, pp. 83-116.

employment and work within the family and an increase in labor market flexibility to integrate women in (part-time) work. The way both sides argued their position was without references to the European equality legislation and discussed within a domestic framework (Kodre & Mueller 2003, 104). It is also striking that East German women's organizations or MPs did not make an attempt to use the revision of the equal rights legislation to transfer East German institutions of gender equality to the new German legal and social order (Kodre & Mueller 2003, 113). The 2nd Equal Rights Act did not adopt quota regulations and only amended legislation to fully comply with the Equal Treatment Directive.[97]

The overall process of bringing national law in full compliance with the Equal Treatment Directive 1976 took 18 years. The process of achieving the reform cannot be seen as a victory for women's activists because they were not pursuing a decisive follow-through strategy on the legal victories and they also did not manage to significantly influence the legislative process from within political parties.

Even with the national legislation being in compliance with the EU directive the legal battle over equal treatment did not end. The entangled legal battle over equal treatment continued both at the federal level and within federal states. At the federal state level a well-known case challenged one of the key exemption clauses of the equal treatment legislation, specifically the ban on women in the military. In Tanja Kreil vs. Bundesrepublik case (Case 285/98 Tanja Kreil vs. Bundesrepublik, 2000, ECR 0069) Tanja Kreil demanded access to the military. The case was referred to the ECJ which struck down the general ban on women in the military services. The court decision was in line with a previous decision brought to the ECJ by a British court in Sirdar vs. The Army Board & Secretary of State for Defense (Case 273/97 Sirdar vs. The Army Board & Secretary of State for Defense, 1999, ECR I-7403).

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[97] See BT-Drs. 11/6946

While this case required the government to amend the German legislation and to open the military to women the case highlights two important points: Firstly, Ms Kreil acted as an individual litigant without the support of any women's organization, trade union or an equality body. While the ECJ case law and subsequent amendment of German law has clearly expanded women's individual rights and granted women limited access to the military services it was not linked to or supported a women's organizations' overall influence on the legislative process. In other words, there was no shift in the domestic balance of power with long-term effects for future negotiations over gender equality issues. Secondly, the legislative amendment was limited to the military and other restrictions and exception clauses stayed intact. The legislative changes did not affect labor relations on a broader scale. Thirdly, the case also points to the ongoing struggle to remove restrictions on women's employment that were negotiated between the German government and the European Commission in 1987.

The entangled legal battle over equal treatment also occurred on the federal state level. A few social democratic governments in federal states had passed legislation that decisively aimed at promoting women in employment and by doing so went beyond the national legislation. The federal state of Bremen had passed the Equal Treatment Act for Men and Women in Public Service (Landesgleichstellungsgesetz) that called for giving women a preference over equally qualified men in public employment in areas where women were underrepresented in terms of hiring and promotion. In 1991 Eckhard Kalanke challenged the law at the local labor court after a woman was chosen for a position he had applied for. When the case reached the Federal Labor Court it was referred to the ECJ and not the German Constitutional Court (Kalanke vs. Freie Hansestadt Bremen, C-450/93, 1995, ECR I- 3051). The German Constitutional Court has been known for its conservative rulings on family values and women's role in the labor market and the decision to refer the case to the ECJ was widely seen as way to enhance the chances

of having the Equal Treatment Act of Bremen reaffirmed. The ECJ, however, did not uphold the Equal Treatment Act of Bremen because it entailed positive action.

The ECJ decision made clear that the ECJ is not deciding in favor of either gender but rather defends the principle of equal opportunity for men and women. The ECJ ruling called into question the use of quota regulations and other positive action measures in other German federal state legislations. This was seen as a major setback for women's activists who had tried to expand gender equality legislation at the federal state level beyond national legislation and perceived the ECJ as an ally in furthering gender equality. When Helmut Marshall challenged the Equal Treatment Act of North Rhine-Westphalia (Helmut Marshall vs. Land Nordrhein-Westfalen, Case 409/95, 1997, ECR 6363) the ECJ partially reversed its ruling in the Kalanke case and permitted soft quotas, meaning that preferential treatment of women is permissible unless reasons specific to the alternative (male) candidate for the position tilts the balance in his favor. This ruling was welcomed particularly by women's activists within the SPD and Green party that had vividly promoted quota regulations as a means of promoting women in employment and politics. Nevertheless, the ECJ judgments on quota regulations pointed out that the ECJ furthers gender equality by promoting an understanding of gender equality of sameness rather than equality of difference and that woman's activists could not count on the ECJ to support all kinds of equality legislation and initiatives by national activists to further gender equality.

Revised Equal Treatment Directive

The implementation of the Equal Treatment Directive 1976 took 18 years and the legal battle over equality legislation continued even after the compliance with EU law was finally achieved. In 2002 a revised Equal Treatment Directive 2002/73/EEC was passed that opened up the possibility of a national debate on equal treatment. In anticipation of the revised Equal Treatment Directive the government amended the 1994 Equal Treatment Act through the 2001

Gleichstellungsdurchsetungsgesetz (2. GleiBG 2001). The key shortcoming of the new legislation is that it only applies to the public sector. To preserve collective bargaining autonomy the private sector is exempt from the legislation. Employers associations' (BDA, BDI, DIHT, ZDH) negotiated a voluntary agreement as a substitute for a law on July 2nd 2001 [Bundesvereinigung Deutscher Arbeitgeberverbände (BDA), 2001 #485; Bundesvereinigung Deutscher Arbeitgeberverbände (BDA), 2004 #486; [Institut für Arbeitsmarkt- und Berufsforschung der Bundesagentur für Arbeit (IAB), 2006 #487].

Over time, and independent of social democratic or conservative government in power, preserving collective bargaining autonomy has been a structuring feature of the way Germany has implemented EU gender equality law pertaining to equality and equity in the labor market. The recent amendment also further strengthens a division between public and private sector. In the evaluation of the voluntary agreement it is remarkable that references to the European directive are absent but the 2006 report on the agreement makes references to the European Employment Strategy and targets agreed upon in Lisbon (Institut für Arbeitsmarkt- und Berufsforschung der Bundesagentur für Arbeit (IAB) 2006).

What can we learn from the German case?

Firstly, bringing national legislation into compliance with EU law was challenging, both in regard to equal pay and equal treatment directives. In the case of equal treatment it took 18 years to bring national legislation and 21 years to bring the legislation of federal states in compliance with EU law. The 2001 Equal Treatment Act still does not treat public and private sector employment as equal. In the area of equal pay no equal pay act was passed to avoid an interference with collective bargaining autonomy. Since equal pay legislation affects social partners the mobilization of these groups was strong throughout. The high number of veto points and existence of equality legislation both at the federal level and within federal states prolonged the process of bringing national legislation in compliance with EU law. Secondly,

despite a high litigation rate and several important legal victories broad legislative changes have not resulted – except in cases pertaining to the public sector such as the opening of the military to women. Unlike in the UK where litigation was part of a decisive strategy to achieve legislative change by women activists, German litigation lacks support from interest groups and no equality body like the British EOC is in place to support litigants or launch test and copy-cat legal cases to challenge national legislation. In some cases individuals, such as Mr. Kalancke or Ms. Kreil, used European law to either retract or expand German law but their efforts were not part of an overall strategy of women's activists. Thus, German activists by and large failed to develop a confrontational strategy around EU hard law. Without a successful European litigation strategy in place, marginal actors could not increases their access and leverage in the legislative process due to EU hard law.

There are several reasons for a lack of women's activists. Important factors is the focus of (West) German women's movements on issues of body rights rather than employment issues in the 1970s and 1980s and the strong focus of women's activists within parties on positive action and quota regulations as a means to promote women in employment and politics. The latter aspect contributes to the development of an independent equal opportunities strategy from that of the EU and an ambivalent position vis-à-vis the ECJ as seen in the Kalanke case. Thirdly, the follow-through on ECJ case law has been challenging because of the political system with many veto points and a constitutional guarantee of collective bargaining autonomy. Even when women's activists within and outside of political parties lobby for a comprehensive legislation these efforts can be derailed at various veto points of the legislative process. The case of the Equal Rights Act 2001 is a case in point: women's activism was both strong within political parties and outside and still it was not possible to forge a political compromise to have the law apply to both public and private sector. In the years to come it needs to be seen if this political compromise can be challenged through litigation cases.

4.1.3 UK and Germany compared on Equal Pay and Equal Treatment

Equal Pay and Equal Treatment Directives were important for setting a precedent of how domestic activists can use European law to further their policy goals. In the UK the government had adopted the 1970 Equal Pay Act and the 1975 Equal Treatment Act in anticipation of the UK joining the EU in 1973. Once European directives were established feminist activists developed a decisive European litigation strategy to improve compliance with European law. This strategy entailed a well-organized follow-through campaign on legal victories, putting high pressure on the government to further amend legislation and institute new individual rights. Through the European litigation strategy previously marginal actors could increase their access and leverage in policy-making process. Since the only real veto point to legislative reform was the political executive significant legislative change could be achieved once the government conceded to the pressure of sub-state actors in conjunction with ECJ case law. In Germany the government did not pass legislation in response to European law and argued instead that Article 3 of the German Basic Law guaranteed that women and men are equal and this was sufficient to comply with European gender equality legislation. Interest groups did not develop a decisive European litigation strategy and an entangled legal battle through individual litigants emerged. These litigation efforts were able to create new individual rights, such as a removal of the ban on night shift work for women but – at the same time - challenged some of the achievements of women's movements, i.e. the removal of hard quota regulations that granted preferential treatment to women in the public sector. Legislative veto points and the federal system with several key issues being regulated at the federal state level allowed opponents of reform to block or minimize the extent of policy change. Social partners – i.e. employers and unions – also lobbied at veto points in the legislative process to avoid far reaching legislation that would affect collective bargaining – as in the case of equal pay – and limit equal treatment legislation to the public sector only and avoid a federal equal pay law.

Looking at the way these first equality directives were implemented in the UK and Germany points to some shortcomings in the Europeanization literature. Firstly, the legal culture argument emphasizes that the legal system determines how difficult it is to get a case referred to the ECJ and that the legal culture affects European litigation strategies. In Germany the legal system has made it easier for private litigants to get cases referred to the ECJ than in the UK (see Chapter 2 on litigation rates). However, British interest groups were supporting private litigants in their efforts to litigate and overcame these challenges of the legal system in the case of gender equality laws leading to similarly high referral rates on gender equality in the UK as in Germany. In other words, British activists had to "create" a window of opportunity by finding a court that was more likely to refer a case to the ECJ. Because Industrial Tribunals were willing to refer cases the litigation rates on gender equality laws are significantly higher than on other issues and the rates are comparable to those of Germany. Because litigation was already a coordinated effort in the UK the follow-through campaign on legal victories was the natural next step for activists to pursue. In Germany lower courts were willing to refer cases but it was much more challenging to broaden legal victories to achieve significant legislative change. As argued in this chapter the reason for this was not only the way women's interests are organized but also the institutional political framework in which the legislative process takes place.

Secondly, successful follow-through campaigns were not dependent on what party was in government or the level of (mis-)fit between the directive and the domestic legislation. For a successful European litigation strategy the "fit" between actors – there preferences and organization – and the political institutions governing policy making was the key. In the German case, women's activists were weakly organized and/or had an independent strategy of achieving gender equality form the ECJ, such as quota regulations. The German federal state with legislation having to pass both Houses of Parliament, each federal state having its own legislation on equal treatment and a constitutional guarantee of collective bargaining autonomy

made the follow-through on legal victories challenging. Collective bargaining autonomy is constitutionally guaranteed and affects and limits what alliances are possible for women's activists within parties and trade unions and what policy change becomes feasible. The high number of veto points in the legislative process allowed interest groups to form strategic alliances with parties to derail, delay or reduce the level of legislative change. In the UK women's organizations were much stronger, had preferences aligned with those of the ECJ and had an equal opportunity body to support their initiatives. The British unitary state made it easier for interest groups to focus their efforts on the political executive once a ECJ judgment was reached to achieve actual policy change. Once the political executive conceded to the pressure from the European case law and interest groups' follow-through campaign those broad legislative changes had no legislative veto points to concentrate on to stop or water down the reform efforts. Thus, while Gerda Falkner (2005) rightly argues that the UK and Germany fall into "world of compliance" where domestic politics determine the extent to which directives are implemented the approach is too simplistic. Falkner neglects the different political processes through which reforms are amended in the two countries. Institutions of the political system structure the controversy quite differently and the domestic controversy over equal pay and equal treatment has played out quite differently in the two countries.

Finally, how the first equality directives were implemented and what kind of strategies political actors developed around them affects the way more recent directives have been incorporated into national law. It is important to integrate a temporal dimension to the analysis. When examining equality directives that further access to employment it is important to note that British activists developed a successful European litigation strategy and German actors did not. This sets the stage for later controversies surrounding directives that further access to employment.

	United Kingdom	Germany
Initial legislation	❖ 1970 Equal Pay Act ❖ 1975 Equal Treatment Act Labour government under PM Wilson	❖ Article 3 Basic Law – "men and women are equal" ❖ No further legislation passed
Challenging phase	❖ European Commission infringement procedure ❖ Private litigation through EOC and TUC	❖ European Commission infringement procedure ❖ Private litigation without the backing of interest groups
Follow through phase	❖ Interest group organize political campaign and copy-cat cases	❖ Entangled legal battle at both federal and state level
Policy output	❖ Repeated amendments of legislation under Conservative governments	❖ Clarification of the law through litigation without broader legislative change ❖ 1994 Equal Rights Act passed as a result of reunification not European litigation
Implications	❖ Origin of the European litigation strategy (confrontational strategy) ❖ Fusion of judicial and political style policy making introduced ❖ Shift in balance of power empowering marginal actors	❖ No decisive European litigation strategy ❖ Federalism and collective bargaining power influence speed and breadth of reform ❖ Minimal empowerment of women's activists

Table 10: *Equal Pay and Equal Treatment – Implementation in the United Kingdom and Germany*

4.2 Access to Employment

In this section we will discuss four directives – the maternity leave, parental leave, part-time work and working time. These directives all contribute – directly or indirectly – to enhancing women's labor market participation rates. These directives were passed over 15 years after the equal pay and equal treatment directives. Looking at these directives I specifically examine if domestic actors develop similarly successful litigation strategies in the UK and if German actors are able to exploit these new opportunities better than before. In other words, did British actors continue to rely on a European litigation strategy and a confrontational approach to achieve

domestic policy reform and do German actors fail to do so? What kind of variation can be observed over time and across a larger number of EU directives.

4.2.1 Pregnant Worker Directive – Maternity Leave

The Pregnant Worker Directive 1992/85/EEC was adopted on 19 October 1992. The directive was based on Article 118a EEC (health and safety). The overall aim of the directive is to "encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding" (Article 1). The directive contains fourteen compulsory minimum standards as well as several non-binding provisions. Important elements of the directive are the following:

- All female employees, regardless of length of service and regardless of whether they work full or part-time, must be allowed a minimum of 14 weeks' unpaid maternity leave of which two weeks is compulsory
- There shall be no derogation from any existing rights
- Member states must ensure that employed pregnant women and new mothers are guaranteed income during at least the 14 week minimum maternity leave period at least equivalent to that to which they would be entitled when being absent from work because of an illness

Member states had until 19 October 1994 to transpose the directive.

4.2.1.1 United Kingdom

The British Conservative Major government had opposed the passage of the directive at the European level. A core objection for the government was the original proposal for the directive contained a right to paid parental leave and the government threatened to veto the directive (COM (1990) 406). The Commission did not concede to the pressure of the British government and proposed the passage of the directive based on Article 118a EEC (health and safety) which could be passed with QMV. Since the directive could not be formally vetoed the government increased its efforts to dilute the directive. The government argued that the costs for fully paid leave were too high (European Industrial Relations Review - EIRR 210: 13).

The Dutch presidency reached a compromise among member states that incorporated some of the UK's objections. The revised proposal of the directive set pay during maternity leave at the level of sickness benefits and not full pay. Since sickness pay levels vary considerably among member states and are particularly low in the UK the costs of implementation were reduced. In addition, eligibility criteria were raised from nine month to one year which again would reduce implementation costs (European Industrial Relations Review – EIRR 217: 14-15). When the UK took over the presidency in 1992, the government urged the passage of the directive on the basis of this compromise and opposed any attempts by the European Commission and European Parliament to increase the benefit levels (European Industrial Review –EIRR 225: 2-3). The UK still abstained from the vote on the directive but it was passed with QMV (European Industrial Relations Review – EIRR 266: 16-18).

Initial Legislation

While the government had not supported the legislation it still had to implement it by 1994. The government did not, however, take active steps to implement the directive and only implemented the directive shortly after the 1994 deadline. The Management of Health and Safety at Work (Amendment) Regulation 1994 (Statutory Instrument 1994 No. 2865) came into force on December 1, 1994. Despite this delay the UK was the second member state after Denmark to comply with the law. The new law expanded the British legislation significantly.

All pregnant employees are entitled to at least 14 weeks statutory maternity leave during which all contractual benefits except wages continue. These rights apply regardless of length of service. Beforehand, only women who had been working with the same employer full-time continuously for two years were entitled to maternity leave. Part-time workers working less than 8 hours a week were fully excluded from the maternity leave entitlements. In the new legislation all employees are entitled to maternity leave and employees with two years' continuous employment are entitled to an additional period of maternity absence lasting from the end of

their maternity leave up to the end of the twenty-eighth week after the week the baby is born. This has critically extended the right to maternity leave in the UK which previously excluded 40% of pregnant workers from these benefits (Collins 1994, 10).

In terms of maternity leave benefits the government distinguishes between two sets of benefits. Firstly, statutory maternity pay (SMP), which if an employee is entitled the employee receives up to eighteen weeks of SMP which is usually 90 percent of the employees salary for six weeks and a specific flat rat for twelve weeks. To off-set some of the costs for employers the government set up a fund that grants employers a rebate. If a women does not qualify for SMP but she meets criteria of the National Insurance contribution she can still receive compensation through a maternity allowance (MA) for eighteen weeks from the Benefits Agency. This again reduces some of the costs for employers (Maternity (Compulsory Leave) Regulations 1994 (S.I. 1994/2479). The regulation was later amended when the parental leave directive was adopted and had to be implemented in UK law (see below).

Challenging and Follow Through Phase

In the case of maternity leave the struggle over the directive took place at the European level. The UK had to concede to the directive at the EU level and only delayed its implementation. Since national law was brought into compliance with the EU law with minor delays the Commission did not become active on the issue and did not initiate an infringement procedure.

Litigation cases on the directive occurred not necessarily to amend the national legislation but rather to clarify issues that were not spelled out fully. The first case brought before the ECJ on the directive came from the UK and was indirectly supported by the Equal Opportunities Commission. In Boyle vs. Equal Opportunities Commission, (Case 411/96, 1998, ECR, 27 October 1998) the questions of employment rights under contract rather than under statute were investigated. The core issue was if a woman can take sick leave during the 14

weeks of maternity leave. The ECJ held that a woman could not take sick leave during this period unless she returned to work and terminated her maternity leave beforehand. Through the litigation the national maternity leave policy was clarified but no legislative changes were necessary. Consequently, there was no follow through campaign or political lobbying necessary.

What can we learn from this?

Firstly, despite the high costs of establishing a right to maternity leave for industry the government complied in a timely fashion. The government response challenges assumptions of the misfit-thesis that would predict the government avoiding or delaying compliance in cases of high transposition costs. The UK had considerable costs emerging from the implementation of the directive but still complied. Because of limited veto points in the political system the government had the political capacity to implement the maternity leave legislation. Secondly, the implementation also calls into question the party thesis. The government vividly opposed the law but it still complied with it to avoid a legal battle. Thirdly, the implementation of the directive supports the political capacity thesis proposed here. Once the government – as the key veto player – concedes to the pressure to adapt national legislation compliance is swift since no veto point in the political system could be used by those wanting to delay compliance. Since the government fully complied with the directive litigation was not necessary or feasible.

4.2.1.2 Germany

Germany had the first maternity protection as early as 1878. At that time it was prohibited to employ women workers three weeks after they given birth. The Federal Republic of Germany introduced the first maternity leave through the Maternity Protection Act 1952 (Mutterschutzgesetz). Women were entitled to six weeks of maternity prior and post childbirth. The Maternity Protection Act 1968 expanded the previous law and contained five important elements: protection against dismissal for four months after childbirth, prohibition of work for 6

weeks prior to birth, although the woman can request to work during that period, prohibition of work for 8 weeks after childbirth without exception, after these 8 weeks women (excluding self-employed) have the right to an additional 16 weeks of maternity leave that can be taken until the child is 6 years old, maternity benefits for 6 month after the child is born. The benefit level was calculated based on the 13 weeks of employment prior to the delivery of the child. Starting in 1986 the benefits provisions for parental leave – starting after the second month of protective period – were gradually extended. (Details are discussed in the subsequent section on parental leave).

Because of the benefit levels German law already guaranteed the government – unlike its UK counterpart – was not concerned about compensation levels and eligibility criteria for maternity leave when the Pregnant Worker Directive was debated at the EU level. For the German government the key issue was finding a balance between the principle of protection and employability. Germany – like France – had a wide ranging system of employment protection in place while other member states – such as Netherlands and Ireland – focused on risk assessments and individual medical requirements to avoid unnecessary obstacles for women in employment (Falkner et al 2005, 77). The dispute over this issue was not fully resolved and the text of the Pregnant Worker Directive is ambiguous leaving room for national debate.

Initial Legislation

The German government had to conduct only minimal changes to comply with the directive because of already well established maternity rights. The key change necessary was to remove a number of work restrictions for pregnant workers. Despite the low misfit between EU and national legislation compliance was problematic. Germany did not take legal actions to comply with the directive on time. In 1994 the government proposed a new Maternity Protection Act. However, due to the end of the legislative period in 1994 the legislative process was not

concluded and postponed to the time when the new parliament had resumed work. Thus, Germany missed the implementation deadline of October 19, 1994.

Challenging Phase

In 1995 the European Commission initiated a review of the way member states had implemented the directive. In 1995 the Commission initiated infringement procedures against seven member states (Portugal, Italy, France, Germany, Belgium, Greece, Luxembourg) for non-compliance for non-communication of national implementation measures. [98] In the case of Germany the new parliament took up the issue of maternity leave in 1996 and passed the Maternity Protection (Amendment Act) 1997. [99]

It is important to note that the parliamentary debate on the issue did not focus on the ban on night work or specific issues that had to be amended to comply with the law, such as an explicit risk evaluation of a work place or an extension of the risky substances. The parliamentary debate focused on whether or not domestic workers could be exempt from maternity leave rights (so-called Dienstmädchenprivileg) (BT Dr 13-2763, 12). Maternity protection was expanded to them. Thus, the implementation of the directive was not used to rethink maternity rights in the context of the European directive.

The Commission asked member states to present a report on how they had implemented the directive into national law. The Commission published a report on these national responses in 1999 (COM (1999) 100 final). The report pointed out that Germany had not fully complied with Article 7 of the directive and left a number of work restrictions for pregnant workers intact. Germany, for instance, had a general ban on night work for pregnant

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[98] All cases aside from the Luxembourg one were resolved and did not go to the ECJ (Luxembourg (C-409/97)). The case against Luxembourg was referred to the ECJ in December 1997. It was discontinued because Luxembourg amended its maternity rights law from 1975 the following year (COM (1999) 100 final).

[99] (Gesetz zur Änderung des Mutterschutzrechts vom 20/12/1996, BGBl I, 30.1.1996, 2110, Verordnung zur ergänzenden Umsetzung der EG-Mutterschutz-Richtlinie (Mutterschutzrichtlinienverordnung - MuSchRiV), 15.4.1997, BGBl I, 18.4.1997, 784).

and breastfeeding mothers in place with the exception of work within specific categories such as hotel and restaurant workers, those in the entertainment business and dairy workers, who were allowed to continue work during the first 4 months of pregnancy or while they were breastfeeding (Article 8 of the Mutterschutgesetz). This system of a general ban with exceptions related to certain occupations rather than the risk to the woman's health and safety which might be posed by a particular job is not in accordance with Article 7 and the Commission was considering commencing infringement proceedings against Germany (COM (1999) 100 final, 10). However, the Commission did not pursue a formal infringement proceeding leading up to the ECJ.

In addition, private litigants demanded a clarification of the law in regard to the length of leave in cases of premature birth. In those cases women were getting potentially less than the 14 weeks guaranteed maternity leave – composed of 6 weeks of protected period prior and 8 weeks post delivery. (Falkner 2004, 82, Treib 2003, 129). Workers, respectively civil servants had gone to court and referred to the directive to get this point clarified (BT Drs. 14/8424, p. 8). The cases, however, never reached the ECJ and there was no complete European litigation strategy in place.

Follow-Through

The German parliament debated a legislative change in 2002 (BT Plenarprotokoll 14/234, 26 April 2002) and decided to amend the legislation (New Gesetz zum Schutz der Berufstätigen Mutter (MuSchG vom 20/06/2002, BGBl. S. 2318). This change of the legislation was, however, unrelated to the concerns raised by the Commission regarding Article 7.

Litigation cases had made it necessary to clarify the duration of maternity leave (BT-Drs. 14/8525). Since Article 8 of the directive guarantees at least 14 weeks of maternity leave a woman who is not able to take the full six weeks prior to delivery due to premature birth has still the right to the full 14 weeks of maternity leave. The law did not incorporate any changes to the

ban on night work. A reform had only been supported by the Green party and a reform was proposed but never followed up by the BMFSFJ (BT Plenarprotokoll 14/234, 23366-23369). The ban on night work was seen as protecting women and taking the ban away was seen as reducing rather than expanding the level of benefits. Thus, the 2002 amendment only took those concerns brought up at the EU level that expanded maternity rights rather than – at least in the national perception – would reduce them.

What we can learn from this?

The German maternity rights were fairly well developed and the government had supported the establishment of the directive. Nevertheless, a relatively small misfit led to late compliance with the law. When the law was finally discussed in parliament two years after the implementation deadline the debate focused on domestic issues, such as coverage of maternity rights for domestic workers (BT-DR. 13/2763), and not on ways in which the law could be revised in light of concerns mentioned by the Commission or in litigation cases.

Litigation played a minor role in the implementation of the law. The litigation pointed to practical problems of women actually receiving the 14 weeks of maternity leave. The change necessary to amend the law was seen not as a political or controversial issue but rather as a matter of clarifying the law. Litigation cases on larger issues of potential discrepancy between European and national law in the area of a ban on night work were not tackled in litigation cases. Overall, there was no considerable action of interest groups – women's groups or social partners - to either promote or block the implementation of the directive.

This case shows that neither the party nor the misfit hypothesis can fully explain the implementation process. It was not party resistance to the directive that prolonged the implementation but rather procedural reasons, i.e. the end of the legislative period. The misfit hypothesis would have predicted fast compliance with the directive since adjustments to the national law were minor. However, compliance was not achieved because the government

decided not to tackle the issue before the upcoming election. Because of the high coverage level domestic political actors – both women's activists and social partners – did not lobby around the legislative change since the anticipated changes were not perceived to be costly and changes beyond the ones promoted by the government were not perceived as desirable.

	United Kingdom	Germany
Initial legislation	❖ 1994 Management of Health and Safety at Work (Amendment) Regulation ❖ Conservative government under PM Major opposes directive at EU level but 1994 legislation achieves full compliance	❖ Maternity Protection Act 1968 ❖ Legislation was not amended ❖ Open non-compliance with directive
Challenging phase	❖ Private litigation clarifies law	❖ Commission decided not to go forward with infringement procedure ❖ Private litigation inquires about length of leave in case of premature birth
Follow through phase	❖ N/A	❖ N/A
Policy output	❖ Unchanged	❖ 2002 law to clarify legislation in regard to premature birth ❖ Open non-compliance with directive in other areas remains
Implications	❖ Government had opposed directive at EU level because of high costs for industry. Once directive was declared to conform with EU law government complied ❖ UK government accepts supremacy of EU law	❖ Government only amends legislation where seen as "clarification" of law and extension of benefits not where compliance is perceived as reducing benefits ❖ Partial non-compliance with directive remained ❖ Actors do not develop European litigation strategy

Table 11: *Pregnant Worker Directive – Implementation in the United Kingdom and Germany*

4.2.2 Parental Leave Directive

The European Commission first proposed a Parental Leave Directive in 1983 (COM (83) 686 final). This was not adopted because of opposition from some member states, particularly

the UK. In 1993 the Belgium Council presidency proposed a Parental Leave Directive once again. This proposal again met resistance from the UK and was not adopted. Based on the Social Charta of the Treaty of Maastricht (1992), which was not adopted by the UK, a Parental Leave Directive was once again proposed by the Commission in 1995. In this case the Commission started negotiations with European employers and union organizations (UNICE, CEEP and ETUC) to pass a framework agreement. These negotiations were concluded on 6 November 1995 (Agence Europe, 8 November 1995, 15 and Agence Europe 11 November 1995: 12). Member states approved of the framework agreement and the Parental Leave Directive 94/34/EC was formally adopted on 3 June 1996 (OJ (1996) L 145/409).

The overall aim of the directive is to "set out minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women". The directive calls for the following minimum standards:

- Workers have a right to at least 3 month parental leave on grounds of a birth of a child or adoption of a child and the leave can be taken within an 8 year time frame (Clause 2.1)
- Parental leave regulation can be defined by law and/ or collective bargaining agreement (Clause 2.3)
- Workers must be protected for dismissal on grounds of exercising their right to parental leave (Clause 2.4).
- At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship (Clause 2.5).
- Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements or practice, shall apply (Clause 2.6).
- Time off on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable (Clause 3)
- The directive has relatively few compulsory conditions but a series of non-binding provisions (see Clause 2.3).

The directive had to be incorporated into national law by 3 June 1998. In case of special difficulties an additional 1 year for implementation by a collective bargaining agreement was

given (Article 2). The transposition deadline for the UK was 15 December 1999 because the government only opted-in to the Social Charta of the Treaty of Maastricht – on which the directive was based – in 1997.

4.2.2.1 United Kingdom

The UK did not have legislation in place when the Parental Leave Directive was adopted. Since the UK had not signed the Treaty of Maastricht's Social Charta it was also not required to implement the directive. When the Labour government under Prime Minister Tony Blair took office in 1997 the government signed the Social Charta of the Treaty of Maastricht (1992). This made it necessary to implement the Parental Leave Directive.

Initial Legislation

The Employment Rights Act 1996 (see ERA 1996 s.71 to ERA 1996 s.75) only addressed maternity leave but did not grant a right to parental leave. To implement the directive a new parental leave act had to be passed. In 1999 the government passed the Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312) which came into effect on 15th December 1999. The government decided to implement the directive in form of a regulation – rather than an Act of Parliament – which further speeded up the passage of the law and the UK was able to comply with the directive within the original time frame.

The new legislation implemented the mandatory sections of the Parental Leave Directive but did not implement many of the voluntary parts of directive. Employer's organizations lobbied strongly for a minimal implementation of the directive to avoid high costs for companies. The government responded to these demands by only granting 13 weeks of non-paid leave and introducing a cut-off date which excluded parents whose children were born prior to the date the legislation came into effect (see Regulation 13 of the Maternity and Parental Leave Regulation etc. 1999).

Challenging Step

In the case of the Parental Leave Directive the European Commission did not introduce infringement procedures. This was not necessary because private litigants took up the issue of "cut-off" dates of December 15th 1999 shortly after the law came into effect. The TUC lawyer, Cherie Booth, filed a case at the High Court in London in May 2000. The High Court referred the case to the ECJ for preliminary ruling and the Court of Appeal endorsed its decision in July. TUC General Secretary John Monks said:

> It gives us no pleasure to be taking the government to court, but half a million of Britain's working parents have been denied the right to take time off. We do not understand why the government is dragging out this case - every expert expects them to lose. You would think ministers would see this as an ideal opportunity to demonstrate their child friendly credentials before the election. Instead they risk exposure as the only European government failing to implement these modest rights to unpaid time off for parents. They should not be so frightened of the business campaign to label even modest family friendly measures as red tape (Trade Union Congress (TUC) 2001).

The case was due for a hearing at the ECJ on May 3rd 2001. Shortly beforehand the government negotiated with TUC to drop the case. TUC agreed to do so [(TUC), 2001 #491; EIRO, 2001 #495]. The climb down of the government was partially affected by an infringement procedure by the European Commission against Ireland which also had a cut-off date in place (EIRO 2000a, EIRO 2000d). At the time when the government conceded to removing the cut-off date it was fairly evident that the ECJ would demand the ruling.

Follow-Through

The government passed the Maternity and Parental Leave (Amendment) Regulations 2002 (SI 2002/2789) on 11th November 2002. The regulation came into effect on 24 November 2002 and has fully been in effect since 6th April 2003. Under current British rules, female employees are entitled to a minimum of 26 weeks ordinary maternity leave of which at least two weeks must be compulsory maternity leave and all employees (fathers and mothers with children born with ages below 5 at 15th December 1999 are entitled to parental leave).

In 2003 a new regulation came into effect which extended the right to paternity leave and made changes to the maternity leave regulation, too. According to the new regulation maternity leave can be taken up to 52 weeks of which 26 are paid. Paternity leave is introduced which grants the father a right to 2 weeks of paternity leave within the first 8 weeks after the child is born at a pay of 100 pounds per week. The regulation did not change the parental leave rights and it remains at a maximum of 13 weeks without pay which can be taken in a piecemeal way of at least 1 week and a maximum of 4 weeks per year.

What we can learn from it

The implementation of the Parental Leave Directive challenges the misfit approach. Despite the need to pass a new law and high costs for companies the government implemented the directive on time. Opposition to reform, such as the employer's organization CBI, could not form a strategic alliance with an opposition party to block the passage of the reform. This case shows once more the potentially high reform capacity of the government due to the limited number of veto points.

The implementation of the directive seems to at first confirm the party hypothesis as proposed by Oliver Treib (Treib 2003). While it is undeniably the case that the Labour government was more inclined to implement the directive than the previous Conservative government the change in government alone cannot explain the process through which the directive was fully implemented into national law. Litigation played a crucial role in this process. Litigation and political mobilization were important to achieve full compliance with the law.

Domestic actors had a well-developed European litigation strategy and the government was aware of this strategy from previous experiences in litigation cases on equal pay and equal treatment. Since the UK political system has largely only one veto point – the political executive – ones the government gives into the pressure from interest groups in conjunction with ECJ case law those opposing the reform have limited options to block a reform. The Labour

government conceded to the demands of TUC knowing of the credibility of a European litigation strategy and the ability of the domestic actors to organize and pursue a follow-through campaign on a legal victory.

4.2.2.2 Germany

Germany had fairly good provisions in place prior to the law. The Parental Leave Act 1994 (Bundeserziehungsgesetz, BGBL I 1994, 180) granted up to 36 months of parental leave and provided the right to a (relatively low) flat-rate benefit for a maximum of 2 years. The Parental Leave Act did not comply with the directive on one account only. Single income couples were excluded from the right to parental leave, meaning that in case of one partner working and the other being a full-time homemaker they did not have the right to parental leave. Since the directive granted an individual right to parental leave for all workers parental leave should be available independently of the occupational status of a spouse or partner.

While the necessary modification was minor the Christian-Democratic-Liberal government opposed the change. The establishment of an individual right to parental leave ran counter to the male-breadwinner female homemaker family model favored by the government. If the mother was a full-time homemaker the government did not see the necessity to grant parental leave to the father (Falkner et al 2002, 11-12). Employers and unions were not particularly involved in the debate since they did not anticipate by simply granting an individual right to parental leave many (male) workers would take it up. The reason was simply that the parental leave payment was a flat rate not sufficient to replace a family income. [100]

Challenging Step

[100] Germany has a high disparity among leave takers with only very few men taking the parental leave. For an analysis (see Bruning G, Plantenga J. 1999. Parental Leave and Equal Opportunities: Experiences in Eight European Countries. *Journal of European Social Policy* 9: 195-209).

In 1998 the European Commission issued a Letter of Formal Notice to the German government (Bulletin EU 7/8: section 1.8.1). German officials engaged in negotiations with Commission to avoid having to amend national law. The European Commission did not pursue further steps in an infringement procedure (Falkner et al 2002, 12). Private litigants did not take up the issue either. By 1998 it appeared as if Germany would not have to amend its parental leave legislation and reform its male-breadwinner oriented policy.

In the absence of either an infringement or litigation case the German Parental Leave Act, nevertheless, got amended in 2000. In 1998 the Christian-Democratic Liberal government lost the federal election and a Social-Democratic-Green government took office. The government passed a new Parental Leave Act 2000 (BGBl I, 2000, 1645). The government used the opportunity to implement the Parental Leave Directive to initiate an overall revision of the parental leave legislation and to dismantle elements of the law that supported a male breadwinner-female homemaker division of labor. The new parental leave act did not only contain an individual right to parental leave but also the right to part-time work during parental leave for both parents simultaneously (as long as they worked for a company with more than 30 employees). In addition, a right to a piecemeal use of parental leave over the course of 8 years from the time the baby was born was introduced. Through this change of legislation the government hoped to make it more attractive for men to take part of the parental leave and to encourage a better work-life balance for both parents. The Department for Family Affairs (BMFSFJ) also initiated a campaign to make parental leave more attractive and acceptable for male workers and their employers.

What we can learn from this

In Germany – unlike the UK – full compliance with the law was not achieved through infringement or litigation. The German parental leave act was only brought into compliance with the directive when the government changed and a new domestic policy compromise was

negotiated. Similarly to the UK case the way the government implemented the directive challenges the misfit hypothesis because the legislative change necessary was only marginal and did not entail high cost for the government or companies. Since legislative change only occurred with the change of government and the election of a Social-Democratic Green government the party hypothesis seems to be confirmed. However, only looking at the change of government does not fully explain the process through which the law was amended.

When the law was passed the Social Democratic-Green government had the majority in both Lower and Upper House of Parliament. Thus, the Christian-Democratic party could not block legislation in the Upper House. Since employers did not anticipate high costs through the amendment they did not engage in significant lobbying activities either. Thus, in the absence of a veto point in the Upper House of Parliament and with the legislative change not affecting collective bargaining autonomy or leading to high costs for companies the government could pass the new legislation swiftly. The conditions for passing the law were very favorable.

The party hypothesis is further weakened when looking at recent legislative changes. On December 5, 2006 the Federal Parental Leave and Payment Act (Bundeselterngeld- und Elternzeitgesetz) was passed (BGBl. I, 2748). The new law increases parental leave pay for the first year and gives fiscal incentives for parents to return to work after that year. The leave grants 12 months of parental leave pay plus two additional months if the other spouse is taking them. The payment is between 300 Euros and 1,800 Euros depending on the income of person taking the leave. The payment provides 67 percent of the person's income after taxes. The reform was carried out under the leadership of the Minister for Family Affairs, Ursula van der Leyen, a member of the Christian Democratic Party. The Christian Democratic Party has historically supported a traditional division of labor within the family and promoted a gradual extension of parental leave to 3 years. The recent reform marks a sharp departure from the previous emphasis on a male breadwinner model or a 1 ½ earner model by emphasizing the

importance of parents to return to work sooner and to make the transition back into employment easier. It also entails the so-called “fathers months” – or the two months additional leave – which encourages both partners to actively participate in childcare. The reform was done independently from EU hard law and evolved out of a domestic discussion and debate on women, employment and fertility strongly that is tied into and promoted by the European Employment Strategy (EES) and EU soft law (see next chapter).

	United Kingdom	Germany
Initial legislation	❖ 1994 Maternity and Parental Leave etc. Regulation ❖ No legislative change due to directive	❖ 1994 Parental Leave Act ❖ No legislative change due to directive
Challenging phase	❖ Private litigation through TUC ❖ Before case reaches ECJ government amends legislation	❖ Commission considers infringement procedure but does not go forward ❖ No private litigation cases take up issue
Follow through phase	❖ N/A	❖ N/A
Policy output	❖ 2002 Maternity and Parental Leave (Amendment) Legislation	❖ 2000 Parental Leave Act brings law into compliance ❖ Background: Government changed Christian Democratic Liberal to Social Democratic Green government. Left wing government initiated legislative change as part of its party agenda
Implications	❖ European litigation strategy is well developed ❖ Government responds even to anticipated case law ❖ Shift in the domestic balance of power	❖ Legislative change due to change in government – removal of partisan veto point ❖ Note: Decline in support of male breadwinner model across party lines since 1998 ❖ No shift in balance of power

Table 12: *Parental Leave Directive – Implementation in the United Kingdom and Germany*

4.2.3 Part-time Work Directive

A Part-time Work Directive was first proposed by the European Commission in 1981 (COM (1981) 775 final). This directive was not approved by the Council at that time. In the 1990s the Commission tried to pass a part-time work directive on the basis of the 1989 Social Charter but this attempt also failed due to the British veto (Rhodes 1995, 99). The Commission changed its strategy once the Social Charta of the Treaty of Maastricht (1992) was passed and began negotiating a framework agreement with social partners. It took until 14 May 1997 for the European social partners (UNICE, ETUC and CEEP) to finalize a "draft European framework agreement on part-time work" (Agence Europe 6974, 15 May 1997: 29). The social partners signed the final agreement on 6 June 1997 and the Council – based on a commission proposal – passed the Part-Time Work Directive 97/81/EC of 15 December 1997 (OJ L 14 of 20.01.1998).

- The aim of the directive is "to provide for the removal of discrimination against part-time workers and to improve the quality of part-time work. It also aims to facilitate the development of part-time work on a voluntary basis and to contribute to the flexible organization of working time in a manner which takes into account the needs of employers and workers" (Clause 1).
- The directive defines a part-time worker as "an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker" (clause 3). A part-time worker is compared with a full-time worker as follows: "a full-time worker in the same establishment having the same type of employment contract or relationship, who is engaged in the same or a similar work/ occupation" (clause 3).
- "In respect of employment conditions, part-time workers shall not be treated in a less favorable manner than comparable full-time workers solely because they work part-time, unless different treatment is justified on objective grounds" (Clause 4). The directive excludes from the principle of non-discrimination part-time workers that work on a casual basis (Clause 2.2) and allows further derogation from the principle of non-discrimination based on, for instance, period of service, working time, level of compensation (Clause 4.4.).
- The directive on the one hand protects workers from having to switch from full-time to part-time work or vice versa (Clause 7) while, at the same time, trying to create conditions that encourage more easy voluntary transition from full-time to part-time work and vice versa (Clause 8) and entails conditions that allow the exclusion of certain kinds of workers from the principle of non-discrimination (Clause 2.2. and 4.4.).

Deadline for implementation is 20 January 2000. The implementation deadline for the UK is according to the amended EC 98/23/EC 7 April 2000 (OJ L 131 of 05.05.1998).

4.2.3.1 United Kingdom

The UK had no statutory provisions that guaranteed non-discrimination against part-time work when the directive was passed. The UK was initially not required to implement the directive since it had not signed the Social Charta of the Treaty of Maastricht. When the Labour government under Prime Minister Tony Blair came into office in 1997 and signed the Social Charta the directive had to be implemented into British law.

Initial implementation

To comply with the Part-Time Work Directive the Labour government passed the Employment Relations Act 1999 which gives the trade and industry secretary the power to pass Regulations to prevent discrimination against part-time workers. Herewith, it became possible to implement the directive into British law via a Regulation – that would not have to be passed by the House of Commons – and allow a swift implementation of the directive. While implementing the directive was procedurally straight forward the content of the Regulations was heavily disputed because of its potentially high costs for British industry.

The On 17 January 2000, the trade and industry secretary, Stephen Byers, published a draft Regulations for consultation (Department of Trade and Industry (DTI) 2000). The draft limited the level of comparison between full- and part-time workers to individual employers. Since the UK has a highly decentralized industrial relations system this meant that de facto it would be very difficult for a part-time worker to find a suitable comparator. Since the Equal Treatment Directive was already implemented in the UK and highly enforced through various litigation cases (see above) the anticipated effect was rather limited.

Given the particular way the government proposed the implementation of the directive it was not surprising that the employer's organization (CBI) was pleased by the restricted definition of a comparator and the exclusion of casual workers from the regulation. The trade

union organization (TUC) criticized the governments' minimalist approach, lack of a code of practice and exclusion of casual workers from the regulation (EIRO 2000b).

In the subsequent negotiations on the regulation the government maintained its restricted definition of a comparator. The government met TUC's demands partially by extending the scope of coverage from only applying to "employees" to "workers" which meant that it also included "quasi" employees with a-typical work contracts.

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000 No. 1551) was passed on 8 June 2000 and came into force on 1st July 2000. The implementation was approximately six month after the set time limit for implementation. Because of this compromise negotiated between government, employers and unions the directive was "under-implemented" (in relation to the definition of a comparator) leaving room for future litigation and "over-implemented" (since it referred to workers) at the same time.

Challenging Phase

The way the government implemented the Part-time Work Directive could, in principle, have been challenged in court because of its narrow definition of a comparator. The European Commission did not initiate an infringement procedure and TUC also did not decide to litigate. Potential reasons for this decision could be that the practical relevance of a legislative change would be marginal. Another reason could be that the government had met some of TUC's demands in the negotiation phase, such as extending the scope of the regulation from "employees" to "workers" (Falkner et al 2005, 168). Thus, while the directive was somewhat "under-implemented" in terms of a restricted use of a comparator it was also 'over-implemented' in terms of its scope. The domestically negotiated implementation of the directive was not challenged by TUC in court.

Nevertheless, the Part-Time Work Regulation 2000 had to be amended two years later in the process of implementing the Fixed-Term Work Directive and due to a court ruling in

regard to equal pay that affected the part-time work regulation. The amendment to the Regulations came into force on 1 October 2002 (The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (Amendment) Regulations 2002, SI 2002 No. 2035). The changes cover the issue of "comparators" (Regulation 2) and "access to occupational pension scheme" (Regulation 8(8)).

The original regulation had a very limited definition of a comparator which meant that part-time workers had to compare themselves to full-timers under the same type of contract. When the government had to implement the Fixed Term Work Directive (1999/70/EC) this definition was challenged. In the context of a part-time worker on a fixed term contract it would have meant that the worker had to compare him or herself with a full-timer on a fixed term contract and not with a full-time worker on a permanent contract. This would have amounted to a less favorable treatment of part-timers on the grounds that they are fixed term. Thus, in the process of implementing the Fixed-Term Work Directive the Part-Time Work Regulation was amended.

The Part-Time Workers Regulation had to be amended to ensure compliance with the judgment of the House of Lords in Preston and others v. Wolverhampton Healthcare NHS Trust on 8 February 2001 (UKHL 5)[101]. The case addressed two questions. Firstly, can part timers claim retrospective membership of an occupational pension scheme at least as far back as 8 April 1976? The ECJ confirmed this. Secondly, the UK law entails a six month time limit from the

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[101] In 1997 Preston and others v. Wolverhampton Healthcare NHS Trust was filed. In 1998 the House of Lords transferred the case to the ECJ. The ECJ gave its decision on 16 May 2000 and ruled that time limits had to be removed within national legislation. The Court explained that a six-month time limit for lodging a tribunal application is permissible, running from the date the employment to which the claim relates ceases. The Court also explained that if a claim for pension rights is successful, it is possible to claim back as far as April 1976. For a discussion of the case see, for instance, Busby N. 2001. Only a Matter of Time. *.Modern Law Review* 64: 489-99, Faro AL. 2002. Judicial Enforcement of EC Labour Law: Time limits, burden of proof, ex officio application of EC law. *Working Paper C.S.D.L.E. "Massimo D' Antona"*: 2002, Singh R. 1999. European Community Employment Law: Key Recent Cases and Their Implications for the UK. *Industrial Relations Journal* 30: 373-86. See also http://www.thompsons.law.co.uk/ltext/111-part-time-pensions.htm and http://www.eurofound.europa.eu/eiro/2000/05/feature/eu0005251f.html

end of employment to make claims. The ECJ did not answer this point and left it up to the British court to decide.

The background to this case is that some workers had been denied access to membership of occupational pension schemes because of the hours they worked. It came into question how far back retroactive claims could be made from those having been denied access to the pension schemes. 60.000 public and private sector workers filed claims arguing that they were unlawfully excluded from the pension schemes based on Article 119 and sought retroactive membership. A series of 22 test cases were selected to explore the issue. In 1995 the case was brought before the Birmingham Employment Tribunal. On 4 December 1995 the tribunal ruled that the time limit for this claim specified in the Equal Pay Act 1979 S 2 (4) and the two year time limitation on the right to recover appears in S 2 (5) applied to their claims. This led to a dismissal of their claims. On 24 June 1996 the Appeals Tribunal and on 13 February 1997 the Court of Appeals upheld the two year time limitation for claims. The claimants appealed to the House of Lords that referred the case to the ECJ for preliminary ruling. On 16 May 2000 the ECJ judgment said that UK rules limiting the right of part-time workers to retroactive membership of an occupational pension scheme are contrary to Community law. The ECJ judgment points to the necessity of a removal of the two year time limitation for equal pay claims retroactive membership in occupational pension schemes. In the future, claims may go as far back as 1976 – the date of the Defrenne II judgment.

On 6 February 2001 their Lordships ruled that the two-year time limit on backdating contravened European law on the equal treatment of men and women could no longer be maintained. As a consequence, the Part-Time Workers Regulations have been amended to remove the two-year time limit (Department of Trade and Industry (DTI) 2002). The decision also led to an amendment of the Equal Pay Act 1970 through the Equal Pay (Amendment) Regulations 2003 on 19 July 2003. In Preston case a follow-through campaign was not

necessary because of the sheer number of cases initially brought forward the industrial tribunals already putting significant pressure on the government to implement the House of Lords judgment swiftly.

What can we learn from this?

The British government had passed the Employment Relations Act 1999 which allows the secretary of trade and industry to pass Regulations that do not have to be passed via the regular legislative process in parliament. Using Regulations to implement EU directives allows a swift implementation of the law because it limits on the one hand formal veto points of the legislative process and on the other hand allows the government to negotiate with social partners a compromise on the details of the legislation. In the case of the Part-Time Worker Directive this compromise could have been challenged in court but TUC did not opt for a confrontational strategy since Labour government had involved TUC in the original compromise on how the directive should be transposed. In other words, in this particular case the sub-state actor did not have to increase access and leverage to the legislative process via a European litigation strategy and decided not to opt for a confrontation with the government to achieve full compliance. The amendment of the regulation was necessary because of interrelated effects of other equality directives and the indirect effects of litigation pursued on equal pay. What is important to note is that the government responded to case law in a quick and comprehensive manner and thereby fully accepted the veto power of the ECJ.

4.2.3.2 Germany

The German Improvement of Employment Opportunities Act 1985 (Beschäftigungsförderungsgesetz) (BGBl I 1985, 710) introduced the right to non-discrimination for part-time workers (Paragraph 2). Employers are required to inform employees of jobs available that would suit their desired working patterns. The Improvement of Employment Act

1985 also made it easier to conclude fixed-term contracts since employers could hire a worker on a fixed-term contract of up to 18 months without having to give special reasons. The act was amended in 1996 (Arbeitsrechtliches Gesetz zur Förderung von Wachstum und Beschäftigung, BGBl. I 1996, p. 1476-1479) and the duration of fixed term contracts was extended to 24 months. This made it possible to renew a fixed-term contract three times. Employees over the age of 60 could be employed without a restriction on a fixed term contract.

The law did not comply with the Part-Time Work Directive in terms of how a comparator was defined. In the directive a part-time worker could first compare herself or himself to a comparator in the same company and if that is not possible to a worker with a similar work or occupation (clause 3.2). Being able to find a comparator outside of a specific company allows employees in areas where workers mainly work part-time to find a suitable comparator. Thus, Germany had only very marginal changes to carry out to comply with the directive.

Initial legislation

When the directive had to be implemented the Social Democratic-Green government was in the process of increasing the labor market flexibility as part of its strategy to reduce unemployment. Increasing the number of part-time workers was seen as a valid strategy to cut down unemployment. The government decided to not only comply with the mandatory parts of the directive but also implement voluntary aspects of the directive, such as the right to work part-time for all workers within companies of at least 15 employees. The government also decided to implement the Part-Time Work Directive and the Fixed Term Work Directive 99/70/EC jointly. To put this change into place, the Beschäftigungsförderungsgesetz 1996 had to be replaced. On 27 September 2000 the government presented a draft for the Part-Time and Fixed Term Work Laws (Gesetz über Teilzeitarbeit und befristete Arbeitsverträge) (Bundestags-Drs. 14/4374).

Similarly to the UK case, social partners became quite active and thought to influence the way the directive was transposed. The BDA strongly critiqued the Part-Time and Fixed Term Work proposal. The BDA called into question that the right to part-time work would create more jobs. According to the BDA the legislation would increase labor market regulation rather than deregulate the market. The BDA also challenged the assumption that the right to part-time work would support women's employment. Employers may avoid hiring workers that may use the right to part-time work and this would have negative effects on women's employment. Overall, the BDA did not see the necessity for a comprehensive implementation of the directive including its voluntary elements. The BDA preferred that employers could individually address working time issues on a voluntary basis. The BDA also critiqued the way the government wanted to implement the Fixed Term Work Directive (99/70/EC) because it did not extent the length of time an employee could be on a fixed term contract to four or five years as demanded by industry but only to two years.

The BDA supported the drafts of both the CDU/CSU and F.D.P. that did not propose an implementation of the voluntary section of the directive and wanted to give a longer time frame in which fixed-term work contracts could be issued (Bundesvereinigung Deutscher Arbeitgeberverbände (BDA) 2001). The employers' organization was, however, aware that the Social-Democratic-Green government had the majority in both Houses of Parliament at the time and a law could not be vetoed. Furthermore, a strong opposition to the law was not possible because the employers organization had a keen interest in getting the section of the law addressing fixed term work passed. The reason behind this was that the Improvement of Employment Opportunities Act 1996 granted the option of fixed term contracts but this law was going to expire at the end of 2000. Thus, if a new legislation was not in place employers could not issue new fixed term contracts. Because of the issue linkage the employers' associations had a strong interest in getting the law passed in a timely manner.

The DGB supported the legislation because of its positive effect on employment. Ursula Engelen-Kefer, vice president of the DGB stated that the law "needed to be improved, especially the provision that employers can refuse a request for part-time work for "compelling internal reasons". She argued that the expression "internal reasons" might allow employers to refuse a request for part-time work if it is considered to be inconvenient. Moreover, she critiqued the exclusion of employees in companies with less than 15 employees (EIRO 2000c).

While there was considerable debate over the way the directive had to be transposed and opposition to the government proposal from both opposition parties and employers' association was strong the government was able to swiftly pass the Part-Time and Fixed Term Employment Act 2001. The law was passed on 21 December 2000 (BGBl. I 2000, 1966) and came into effect on 1st January 2001. It has replaced the Beschäftigungsförderungsgesetz. Three reasons contributed to the swift passage of the act.

Firstly, the government held the majority in both Houses of Parliament. While the law did not require the formal passage of the law in the Bundesrat the solid majority of the government in both Houses of Parliament reduced the options to form an opposition. The government also pursued a strategy of issue-linkage by implementing the Part-Time work Directive and Fixed-Term Work Directive jointly. Since the employers' organizations were supportive of a swift transposition of the Fixed-Term Work Directive – since it extended the opportunities to conclude fixed term work contracts – and unions were supportive of the right to part-time work due to its presumably positive effects on job creation and meeting some of the demands of women workers for more part-time work both interest groups had some stake in the passage of the law. Thus, on the one hand there was no veto point in the legislative process that groups opposing some parts of the law could latch onto and on the other hand the government pursued a strategy of issue linkage to avoid the unions or employers opposition to the reform as a whole. This facilitated the negotiations on the law in the Bundestag. Finally, since the Improvement of

Employment Opportunities Act 1996 clause on fixed term contracts was going to expire at the end of 2000 the opposition parties and employers' organizations had a strong interest in getting a new legislation in place and due to the time constraints were willing to negotiate and not engage in delay tactics (EIRO 2000c).

Challenging Phase

The DGB emphasized the positive effects of the law. The former DGB leader, Dieter Schulte, estimated that the law would create 250,000 new jobs (Viethen & Scheddler 2002, 6). However, employers' organization strongly criticized the law. Employers' organizations had previously argued that the law would alter the way companies make decisions who to hire and would try to avoid hiring workers who are likely to take up the right to part-time work. A study by the institute for labor market and employment research (IAB) of the federal employment agency found out that this was highly unlikely. Employers' organizations had also anticipated a wave of litigation cases which did not occur. By 2002 there were only 17 rulings by labor courts. On the one hand, the number of disputed cases was much lower than expected because less than 10 percent of the companies actually denied workers the right to part-time work for internal company reasons. On the other hand, these reasons could be examined in labor court and the employer had to provide proof for its internal reasons to deny the right to part-time work (Viethen & Scheddler 2002). The litigation cases concerned the way the law was interpreted domestically and did not have the purpose of amending the German law. Nevertheless, the Part-Time Work and Fixed-Term Work Act has been amended three times since 2001.

On 23 December 2002 Article 7 of the so-called Hartz I Act amended Article 14 (3) of the Part-Time and Fixed Term Work Act 2000 (BGBl. I 2002, 4607, 4619). The amended law reduced the age limit for unlimited fixed term employment for older employees from 58 years to 52 years. The BDA welcomed the amendment but demanded an even lower age cap and also an increase of the duration an employee could be employed on a fixed term basis from two

years to five years (Bundesvereinigung Deutscher Arbeitgeberverbände (BDA) 2002). The DGB strongly critiqued the limitation of the age cap for fixed term contracts. In the original draft the government proposed an age cap was 50 years which would mean that employees 48 years and older could be employed on this basis more easily. The DGB challenged the presumption that this would make it easier for employers to hire an older employee. The DGB also argued that it runs counter to the Fixed Term Work Directive 99/70/EC that protects workers against "unreasonable" contracts and the anti-discrimination directive 2000/78/EC (Deutscher Gewerkschaftsbund (DGB) 2002).

It is important to note that the law was amended in line with the demands of employers and that the DGB did not pursue a European litigation strategy to enhance its bargaining position. The debate strongly focused on older employees and not on gender equality.

On 24 December 2003 Article 2 of the so-called Agenda 2010 Act amended the Part-Time and Fixed Term Work Act further (BGBl. I 2003, 3002, 3003). This amendment met further demands of employers. Key changes were: (1) Paragraph 8 limits the right to part-time work to specific groups of employees and introduces a five year time limit. (2) Paragraph 13a introduces a pro-rata-temporis rule which implies that workers working more than 20 hours per week will be compensated at 0.5 rate and employees working more than 30 hours per week at 0.75 percent of what full-time employees are paid. Paragraph 14.2 also increased the option of fixed term contracts without having to give a cause. (3) Finally, Paragraph 14.3 lowers the age limit for fixed term contracts for older employees to 50 years. These changes are by and large in line with the demands of employers' organizations and the opposition parties (CDU/CSU and F.D.P.) and address many of the concerns brought up in the initial negotiations over the Part-Time and Fixed Term Work Act (Bundesvereinigung Deutscher Arbeitgeberverbände (BDA) 2003).

Thus, overall the law was amended but not due to a European litigation strategy and not because of gender equality concerns. In the amendment responded to many of the issues

raised by opposition parties and employers organizations. The change in the law can partially be explained through the loss of the majority in the Bundesrat by the Social Democratic-Green coalition. To pass the Hartz reforms and Agenda 2010 the government needed to compromise with both the opposition parties. To achieve a compromise on the Hartz reforms the government had to open up to demands by opposition parties and interest groups that wanted greater labor market flexibility and deregulation.

While the first two amendments of the law were not the result of ECJ case law the third amendment of the law was. A labor court in Munich referred the case of Werner Mangold vs. Rüdiger Helm (Case C-144/04 Werner Mangold v. Rüdiger Helm [2005] ECR I-9981) to the ECJ.[102] On 22 November 2005 the ECJ held in its judgment that § 14 (3) of the Part-Time and Fixed Term Work Act runs counter to EC Directive 2000/78/EG. The act allows employers to employ older employees – 52 years and older - without a reason on a fixed term contract. This contains a discrimination based on age since younger employees cannot be employed on a fixed term contract for an unlimited time and/or without reason (see ECJ press release no. 99/05). In April 2006 the Federal Labor Court of Germany (Bundesarbeitsgericht) followed the decision of the ECJ (BAG, Urteil vom 26. April 2006 - 7 AZR 500/04)

Through the rulings by both the ECJ and national labor court an amendment of the Part-Time and Fixed-Term Work Act became necessary. In response to a written question from a Member of Parliament Kornelia Möller a high ranking government official - Franz Tönnes - responded that the government will amend the legislation in line with the ECJ ruling and is

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[102] For a discussion of the Mangold case see: Jans JH. 2007. The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community
Law. *Legal Issues of Economic Integration* 34: 53-66, Muir E. 2004. Enhancing the effects of EC law on national labour markets, the Mangold case. *European Legal Studies/Etudes Européennes Juridiques* , Schmidt M. 2007. The Principle of Non-discrimination in Respect of Age:
Dimensions of the ECJ's Mangold Judgment. *German Law Journal* 7: 505-24, Taylor P. 2006. *Employment initiatives for an ageing workforce*. Dublin: Ireland: European Foundation for the Improvement of Living and Working Conditions

preparing an amendment on 22 February 2006. Instead of removing the age restriction the grand coalition government made fixed-term employment contracts dependent on conditions of long-term unemployment and set a time limit for these contracts (Bundestags-Drs. 16/522, Question 21, Bundestags-Plenarprotokoll 16/15).

The Part-Time and Fixed Term Work Act 2000 (BGBl. I, 1966) was amended on 19 April 2007 (BGBl. I, 538). It is important to note that the litigation case Mangold was not initiated or supported by trade unions. Unions have welcomed the ruling while employers' organizations have critiqued it but neither group was involved in the filing of the law suit or pursuing a decisive follow-through campaign. Also, no litigation cases were filed by women's activists to amend the law.

What can we learn from this?

The German government passed Part-Time and Fixed Term Employment Act 2001 shortly after the official transposition deadline for the directive had passed. The directive was, nevertheless, implemented relatively smoothly because the Social Democratic-Green government held the majority in both Houses of Parliament and linked part-time and fixed term in one legislative act. Because of issue-linkage it was not possible for employers' organizations or opposition parties close to employers to fully oppose the legislation. This allowed the government to overcome societal opposition to the legislation. The initial legislation met many demands of unions in regard to part-time work. In the challenging phase employers' organizations did not pursue a European litigation strategy. Key changes to the law were made because of national level bargaining and to meet concerns of employers. A European litigation strategy led to further changes in the law. The litigation was not, however, conducted to increase gender equality but focused on age discrimination and older workers. In other words, the litigation case concerned primarily the core – male – workforce and did not intend to promote a better work-life balance. Furthermore, the litigation case did not lead to a shift in the

domestic balance of power. i.e. an empowerment of non-governmental actors. While the Mangold case was initiated by lawyers to challenge the German legislation it was not initiated by the trade unions and part of a broader strategy of unions to challenge the reduction of age cap for unlimited fixed term contracts. In contrast to the UK case where litigation was conducted for gender equality concerns age discrimination was the key driving force of the German litigation.

	United Kingdom	Germany
Initial legislation	❖ 1999 Employment Relations Act and 2000 Part-Time Workers Regulation	❖ 2000 Part-Time and Fixed Term Work Act ❖ Implementation of the mandatory and large section of voluntary parts of the directive
Challenging phase	❖ Commission does not initiate infringement procedure ❖ Legislative change necessary due to Fixed-Term Work Directive ❖ Private litigation (Preston) entitled 60,000 individual claims by women	❖ Amendment of the law in subsequent labor market reform legislations based on altered domestic consensus on the issue ❖ Private litigation (Mangold)
Follow through phase	❖ High number of people involved in the filing of Preston case made follow-through unnecessary	❖ Trade unions did not launch Mangold case and did not organize follow through
Policy output	❖ Legislative change of both the Part-Time Workers Regulation and the Equal Pay Act	❖ Legislative change in response to Mangold judgment
Implications	❖ European litigation strategy well established ❖ Government swiftly responds to case law ❖ Large number of women activists participating in Preston case shows capacity of women's movement to put pressure on government	❖ Private litigation played a role in legislative change, however, case was on age discrimination and not gender equality ❖ Unions welcomed case law and government's amendment of legislation but did not actively pursue European litigation strategy to achieve this change ❖ Legislative changes reflect differences in the government's position over time and is not a direct result of a European litigation strategy

Table 13: *Part Time Work Directive – Implementation in the United Kingdom and Germany*

4.2.4 Working Time

The Working Time Directive 93/104/EC of 23 November 1993 (OJ (1993) L 307/18-24) was seen as a major step forward by trade unions. The Directive is based on a wide interpretation of occupational health and safety (Article 118a EEC, now Article 137 EC). Working time is considered an issue of health and safety because long working hours are seen as harmful to worker's health. Key elements of the working time directive are the limiting of the maximum length of a working week to 48 hours in 7 days, and a minimum rest period of 11 hours in each 24 hours. From a gender perspective – not being part of the initial reasoning behind the directive – working time matters because long working hours make it difficult to combine work and family life. The directive contains twelve compulsory minimum standards. Its main provisions cover:

- Maximum weekly working time of 48 hours on average, including overtime
- At least four weeks' paid annual leave
- A minimum rest period of 11 hours in each 24, and one day in each week
- A rest break if the working day is longer than six hours
- A maximum of eight hours' night work, on average, in each 24.

The scope of the directive excluded workers in air, road and rail transport, fishing and activities at sea, and doctors in training. It allowed for the average working week to be calculated over a longer "reference period" of up to four months, or up to 12 months by collective agreement, and gave member states some leeway to define terms such as "rest period" and "night work" through national legislation. The directive had to be transposed in member states by 23 November 1996.

The directive was amended by the Directive 2000/34/EC of the European Parliament and of the Council of 22 June 2000. The amendment extended the law to a wider range of

workers that were previously excluded. Member states had until August 2003 to apply the amendment and until August 2004 to also grant working time restrictions to doctors in training.[103]

4.2.4.1 United Kingdom

The Working Time Directive was strongly opposed by the British government in the 1990s. The UK did not have any statutory regulation in place, such as annual leave entitlement or legal provisions on working time limits or rest periods. Collective bargaining agreements also did not cover these aspects. When the Commission first proposed the directive (COM (1990) 317 final) the British government strongly opposed it. The working time regulation did not only represent high adaptation costs for the British industry but also ran counter to the deregulatory policies promoted by the previous Prime Minister Margaret Thatcher and a culture of long-working hours. Prime Minister John Major strongly opposed the directive and perceived it as an "unnecessary interference with working practices" (Financial Times, 29 April 1992, p. 14).

The Commission based the directive on the health and safety provision of Article 118a EEC, now Article 137 EC. This treaty basis allowed the passage of the directive based on QMV. Since the British government could not veto the legislation it pursued a strategy of limiting the scope of it as much as possible. Because of British intervention sectors and activities such as doctors in training and activities at sea were excluded (Financial Times, 29 May 1993, 2 June 1993, p. 1) and a loophole was created that allowed individuals to voluntarily work more than 48 hours (Financial Times, 25 June 1992). Despite these concessions the UK voted against the directive in June 1993 (EIRR 239).

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[103] For an overview of the way working time has been reevaluated see Adnett N, Hardy S. 2001. Reviewing the Working Time Directive: Rationale, Implementation and Case Law. *Industrial Relations Journal* 32: 114-25, Kenner J. 2004. Re-evaluating the concept of working time: an analysis of recent case law. *Industrial Relations Journal* 35: 588-602.

Once the Working Time Directive was passed with QMV Prime Minister John Major continued his resistance to the directive. The UK challenged the treaty basis of the directive (Article 118a) in court (Case C-84/94, United Kingdom v Council of the European Union [1996] E.C.R. 1-5755). The government argued that the directive should be based on Articles 100 or 235 of the treaty, both of which required unanimous approval by the member states. On 12 November 1996 the ECJ decided that there was reliable evidence that linked “working time” and “health and safety” and thus, the directive had a valid treaty basis. The court upheld almost all parts of the directives, except a voluntary provision on Sunday work.

After all legal options had been exhausted the government planned to uphold its resistance at the upcoming Intergovernmental Conference (IGC) to draft the Treaty of Amsterdam (1997) (Hansard, HC, 12 November 1996, cols 152 ff). At the end, this never became an issue at the IGC because of a change in government in the UK.

Initial implementation

In 1997 the Labour government under Prime Minister Tony Blair took office and immediately took steps to implement the Working Time Directive. The UK did not have any regulations on working time in place, i.e. no working hour limits, rest period requirements, annual leave entitlement.

The Working Time Regulations 1998 (1998 No. 1833) was passed. The implementation was surrounded by a political controversy on the scope of the law. The law guarantees a working week of 48 hours, an average eight hour working week, four weeks annual leave, 20 minute rest period after six consecutive hours of work and a rest period of 11 hours in a day and 35 hours per week. Employers associations strongly demanded a minimal implementation to limit the already high costs. The key to achieving a minimum implementation was the use of the “opt out” option that allowed individual employees to voluntarily work more than 48 hours per week.

Challenging phase

Britain's broadcasting, entertainment, cinematographic and theatre workers' union (BECTU) challenged the British national regulations. BETUC challenged the British regulation which required a worker to have worked for thirteen consecutive weeks with the same employer to qualify for the entitlement. Article 7 of the Community Directive provides that every worker is entitled to paid annual leave of at least four weeks (subject to an optional let-out which allowed Member States to grant only three weeks' paid leave for a transitional period running up to 23 November 1999) "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice". While the British government claimed that the condition imposed by its regulations falls within the Directive's permitted flexibility by reference back to national rules BECTU argued that the conditions imposed by the British regulations could in fact render the Directive's paid leave provisions ineffective for many workers who will never fulfill the condition of an unbroken period of thirteen weeks working for the same employer - something not uncommon in the entertainment industry.

The case was subsequently referred to the ECJ for preliminary ruling. In its judgment the court held – not only based on the Directive but also on Article 31.2 of the Nice Charter and Article 141 TEC - that such an eligibility requirement was contrary to the Directive because it completely excluded certain fixed-term workers from the universal right to annual leave[104]. Thus, the ruling clarifies that paid annual leave is a fundamental right.

The ECJ judgment was released in late June and already on 25 October 2001 the government amended the regulation and took out the thirteen-week threshold (Working Time

[104] Judgment of the Court of 26 June 2001, case C-173/99, BECTU v Secretary of State for Trade and Industry [2001] ECR I-4881. For a discussion of the BETUC case see Bernard C, Deakin S, Hobbs R. 2001. Capabilities and Rights: An Emerging Agenda for Social Policy. *Industiral Relations Journal* 31: 331-45, Guiubboni S. 2003. Fundamental Social Rights in the European Union: Problems of Protection and Enforcement. *Italian Labor Law eJournal* 5

(Amendment) Regulations 2001). The government responded so swiftly to the ECJ ruling that no actual follow-through campaign was necessary.

Amicus, a British trade union representing manufacturing workers launched a complaint with the Commission (BBC News, 29 April 2002). The areas of concern were: (1) Employers do not force workers to take holidays and breaks they are entitled to, so that staff could still in theory work 24 hours a day 365 days a year. (2) Employees can volunteer to work more than 48 hours a week, and so can work unlimited hours. (3) Overtime hours for UK workers on night shifts are excluded from the overall 48-hour week count. The Commission initiated an infringement procedure focusing on the counting of overtime hours by issuing a Letter of Formal Notice in March 2002 (see Financial Times, 29 April 2002, p. 2). The government responded to the Letter of Formal Notice through a Working Time (Amendment) Regulation 2002 (SI 2002 No. 3128). No actual follow-through campaign was necessary in both cases because the government responded swiftly to European pressure to amend the national legislation.[105]

Current legislation on working time

The Working Time Regulation had to be amended once more in 2003. The reason was a litigation case outside of the UK regarding the hours doctors in training were working. Two important cases were the so-called SiMAP case[106] that defined all time when the worker was required to be present on site as actual working hours, for the purposes of work and rest calculations and the Jaeger case[107] that confirmed that this was the case even if the worker was allowed to sleep when their services were not required. The rulings have a large impact on workers who have traditionally been required to be resident on site when on call, particularly

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[105] Information on the case can be found at the Amicus webpage. Amicus had aligned with TUC and was ready to launch a campaign to support the infringement procedure. See http://www.amicustheunion.org/Default.aspx?page=477 and http://www.amicustheunion.org/Default.aspx?page=2148.
[106] Judgment of 3 October 2000: Case C-303/98 Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana. [2000] ECR I-7963
[107] Landeshauptstadt Kiel v Norbert Jaeger [2003] ECR I-8389

junior doctors and care home workers. Many of these employees are now required to work rotating shifts instead of on call. The government responded to the ECJ judgment through the Working Time (Amendment) Regulations 2003 (2003 No. 1684). From 1 August 2004, doctors in training will be subject to weekly working time limits in the UK.

What can we learn from this?

The working time case shows that British unions are using EU hard law effectively to influence legislative outcomes. While unions had relatively little influence over the content of the initial Regulation on working time they could increase their influence either directly via a European litigation strategy or by launching a formal complaint with the Commission leading to infringement procedure. Since the British political system has few veto points the European litigation strategy can put considerable pressure on the government to amend its position and to initiate legislative change. Due to the high reform capacity given to the political executive the reform could then the carried out swiftly. While litigation has led to domestic policy change the litigants were not women's activists and the primary focus was not on reconciliation of work and family life. The effects of the legislative change, however, indirectly benefit women workers since the judgments challenge the culture of long working hours in the UK.

4.2.4.2 Germany

Germany had a regulation on working time since 1938 (Working Time Regulation 1938). [108] The Federal Republic of Germany had the 1969 Working Time Act (Arbeitszeitgesetz)[109] and the Federal Vacation Act 1963[110] in place when the directive was negotiated. The German working time act allowed a maximum working time of 48 hours and

[108] Arbeitszeitverordnung, 30 April 1938, Reichsgesetzblatt I 1938, 447
[109] Arbeitszeitgesetz, BGBl, I 1969, 461
[110] Mindesturlaubsgesetz für Arbeitsnehmer (Bundesurblaubsgesetz), BGBl I 1963, p. 2

granted the option of going beyond this time limit as long it was kept within a two week time period.

In 1992 German Christian-Democratic government was in the midst of promoting a more flexible labor market. Two key issues were promoted. Firstly, the government wanted to remove the prohibition to work on Sundays (BT-Drs. 12/6990: 41-42). Secondly, it wanted to pass a new working time legislation that would allow workers to work more than 48 hours per week as long as this time limit was met on average over a period of six months. Through this law companies could respond better to an increase in workload at one time and have workers work fewer hours when in a slower phase. Having this flexibility was considered important to be able to respond more effectively to production demands without having to hire short-term workers for peaks in production (Treib 2003, 134-135).

In European level negotiations different concept of working time had to be negotiated. The British government strongly lobbied for an “opt-out” clause that would allow employees to voluntarily work more than 48 hours per week. The French government had passed a law that limited the working week to 35 hours and consequently wanted more strict limitations on working time. The German position was in-between the British and French position. It was important for the German government to have flexibility within the 48 hour limitation that would introduce “time accounts” allowing workers to work more than 48 hours per week. During the negotiations of the directive the government had lobbied for a “time period” of twelve months – while the French government promoted a two month time frame. The German government could not convince member states to adopt a longer reference period. At the end the directive contains a four month period to average out working time (see Financial Times 26, 10, 1991, p. 5).

The most contested part of the new Working Time Act was the length of the reference period. In spite of having a four month reference period in the EU directive the draft of the

German directive contained a six month reference period. In addition, the working time act had to be extended to previously excluded workers in the agricultural sector. This was not controversial since the directive had the option of granting exceptions to reduce the actual effects on agricultural workers. Finally, the Federal Vacation Act had to be amended since it only guaranteed three weeks leave and the EU directive entitled workers to four weeks of leave. This amendment was, however, not contested since many collective bargaining agreements had more favorable leave guarantees in place (BT-Drs 12/6990: 45 and BT-Drs. 507/93).

Initial legislation

Since the German government was in the process of passing a Working Time Act it could incorporate the Working Time Directive into the process of drafting the law. The 1994 Working Time Act[111] established an eight hour regular daily working rule. German employees may work up to ten hours a day as long as the average daily working day averages out to the eight hour rule within six calendar months, Derogations from the eight hour working day rule may be agreed collectively between individual social partners or on a sectoral basis. The six month reference period was in clear opposition to the four month reference period demanded by the Working Time Directive. Since collective bargaining agreements covered annual leave this aspect was also not addressed by the legislators. Because the Working Time Act could be passed in the Bundestag alone and did not require the passage in both Houses of Parliament the opposition parties and trade unions had limited options to influence the legislative process.

Challenging Phase

Only in 2000 the Commission critiqued the way Germany had transposed the Working Time Directive but did not take further actions (COM (2000) 787: 18). The implementation of the directive was challenged by private litigants but not for gender equality concerns. Women's

[111] Arbeitszeitgesetz, 6 June 1994 (BGBl. I p. 1170, 1171

activists did not take issue with the fact that longer reference periods could allow employers to demand from workers to work more than 48 hours a week for a prolonged period of time. This can be particularly challenging for parents and raises a number of work-life balance issues. The litigation case was brought forward by junior doctors without having gender equality issues in mind.

Following the Spanish litigation case SiMAP (Sindicato de Médicos de Asistencia Pública v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana, 2000) that defined all time when the worker was required to be present on site as actual working hours, for the purposes of work and rest calculations the "Jaeger" case emerged in Germany (Landeshaupstadt Kiel v Norbert Jaeger, 2003). The Jaeger judgment confirmed that this was the case even if the worker was allowed to sleep when their services were not required. These judgments affect workers that are required to be on site when on call, such as junior doctors working in hospitals and care home workers. Because the working time limit of 48 hours a week also applies to them their work organization had to be changed. [112]

Follow through

Because of the Jaeger judgment the Working Time Act was amended. When a person is on call it is considered working time. The amendment is in force since the beginning of 2004 (see Amendment of the Working Time Act of 2nd June 2003 (BGBl. I, p. 744). The law leads to a reorganization of the way the work of junior doctors is structured and introduces rotating shifts in hospitals to comply with working time limitations.

What can we learn from it?

The Jaeger case led to an important change in the German working time legislation. The legislative change was, however, not achieved by women's activists seeking to improve overall

[112] A brief discussion of the case can be found in Darabi K, Hull MJ. 2005. Work-hours regulations in the European Union and their impact on the physician workforce. *SWISS MED WKLY* 135: 91.

working conditions. The effects of the judgment benefit largely doctors in training and have not been broadened to all workers. While the ECJ judgment has empowered junior doctor's vis-à-vis more senior doctors and hospital administration the overall effects of the legislative change has limited effects on gender equality issues pertaining to working time in Germany.

	United Kingdom	Germany
Initial legislation	❖ 1998 Working Time Regulation	❖ 1994 Working Time Act ❖ Intentional non-compliance with directive
Challenging phase	❖ BECTU, British union, litigates ❖ AMICUS, British union, launches complained with the Commission who initiates infringement procedure	❖ Commission does not initiate infringement procedure ❖ Jaeger, a junior doctor, litigates
Follow through phase	❖ N/A	❖ Junior doctors mobilize
Policy output	❖ 2001 Working Time (Amendment) Regulation as a result of BECTU judgment ❖ 2002 Working Time (Amendment) Regulation as a result of AMICUS ❖ 2003 Working Time (Amendment) Legislation based on Jaeger case	❖ 2003 Working Time (Amendment) Act in response to Jaeger judgment ❖ Law still in non-compliance with directive on reference period
Implications	❖ European litigation strategy well established ❖ Follow-through campaign becomes less important over time since (a) government recognizes potential of a campaign and (b) government responds swiftly to ECJ case law ❖ High political capacity to pass reform and respond to ECJ	❖ Confrontational strategy was used by junior doctors but not by women's activists ❖ European litigation strategy possible within German context, however, not to further gender equality ❖ Unions did not use European litigation strategy to enforce shorter reference period

Table 14: *Working Time Regulation – Implementation in the United Kingdom and Germany*

4.2.5 Access to Employment – UK and Germany Compared

Looking at maternity leave, parental leave, part-time work and working time in the UK and Germany shows that the first equality directives on equal pay and equal treatment have set the stage for the domestic actors using European litigation strategies to further their bargaining position in domestic policy disputes and their ability to develop a successful European litigation

strategy. The implementation of the directives seeking to further access to employment has been highly complex. In this section I will provide a brief summary on the four directives.

As seen in the implementation of the first EU directives on equality litigation and a follow-through campaign by domestic actors can be a key driving force for policy change. In the UK domestic political actors have been able to develop a successful European litigation strategy while German actors have not. In the case of the newer equality directives pertaining to access to employment a similar outcome can be found.

In regard to the Pregnant Worker Directive British litigants, particularly the EOC, have used litigation to clarify the law and achieve legislative change. In Germany litigation has also let to a clarification of the pregnant worker act, particularly on the issue of guaranteeing 14 weeks of leave to workers who deliver their babies early. Larger gender equality issues, such as a removal of a ban on night work, were not tackled in litigation cases.

The Parental Leave Directive provided grounds for a European litigation strategy in the UK. In this case TUC litigated and the government responded before even an ECJ judgment was reached. In Germany the government amended the national legislation by and large because of a change in government after a federal legislation. Thus, we find policy change but without a European litigation.

In the case of the Part-Time Work Directive litigation played a role in legislative change in both the UK and Germany. In the UK the Preston case had a clear gender component and was tied to issues of equal pay. Since 60.000 complaints were filed before test cases were selected the government responded to the ECJ judgment swiftly without requiring non-governmental actors to initiate a follow-through campaign. In Germany the Mangold case let to an amendment of the legislation. This case dealt, however, with age discrimination and did not have a gender component and was staged by two lawyers without the support of an organization.

Finally, the Working Time Directive and subsequent litigation cases let to a change in domestic legislation in both the UK and Germany. In the UK, however, the cases were initiated by trade unions and supported by the European Commission. A full-fledged litigation strategy was not necessary to achieve policy change. The cases challenged the culture of long-working hours in the UK but gender equality was not the key concern here. In Germany the Jaeger case, brought forth by junior doctors, let to legislative change that includes on call time as working time. This judgment and legislative change did not have overall affects on gender equality or the reconciliation of work and family life.

Looking at these four directives one can conclude that litigation was a key driving force for policy change in the UK. A European litigation strategy has played a prominent role in furthering gender equality. The EOC and trade unions have successfully used this strategy to put pressure on the political executive. Given the low number of veto points in the political system legislative change was fairly easy once the political executive conceded to the ECJ judgment and interest group pressure surrounding it. Since the British government could implement EU directives mainly via Regulations that did not have to be passed by the House of Commons. In a number of cases a full-fledged litigation strategy was not necessary to achieve legislative change since the government responded to the initial stages of the strategy.

In Germany litigation was not a key driving force for policy change. There were a number of cases where litigation let to policy change but by and large the effects of litigation were minor and gender equality concerns played a minimal role in those cases. In addition, Germany does not have an equality body like the EOC and trade unions did not adopt a European litigation strategy as a core strategy to increase their access and leverage in domestic policy-making. Overall, litigation was not the key or primary strategy actors used to achieve policy change.

4.3 Summary – Furthering Gender Equality through Hard Law

Based on our discussion of the European litigation strategy adopted by British actors such as the EOC, it can be concluded that successful use of European Hard law allowed marginal non-governmental actors to increase their influence in domestic policy-making. This pattern of litigation was established when they challenged the way in which the British government had implemented the equal pay and equal treatment directives. The litigation strategy could be successfully used thereafter – even a threat of using this strategy was at times sufficient to lead to the amendment of national legislation. The success of the strategy was independent of the party in government or the costs for industry that the amendment entailed.

The key reason for the success of the litigation strategy was the mix of actor characteristics and preferences and the polity in which they operated. The combination of strong non-governmental actors that pursue a notion of equality of sameness, such as the EOC and women's activists within trade unions, and a unitary state with few veto points are conducive to developing a confrontational strategy around European Hard law.

Thus, in the UK, European Hard law has led to:

- an empowerment of women's activists (shift in balance of power)
- the introduction of a fusion of judicial and political styles of policy-making
- a confrontational strategy that leads to policy innovation

This case study leads us to a few interesting conclusions on some of the alternative explanations discussed earlier. Firstly, interest groups use European litigation strategy across directives and independent of the party in power. Second, costs of adjustment influence the level of governmental and industrial resistance but they do not determine actual policy outcome. Finally, the legal culture and/or the overall litigation rate are not relevant because interests groups have found courts that are willing to refer to the ECJ and have thereby overcome the

challenges of the British legal system. One can even argue that overcoming these systemic difficulties has empowered litigants.

In contrast, the attempts by German actors at incorporating European Hard law into domestic strategies have led to mixed results. In spite of high referral rates for preliminary rulings to the ECJ by German courts there has not been swift and comprehensive policy reform. Instead, they have resulted in a mix of entangled legal battles, some rudimentary policy change and in a few cases – where the state-market relationship was not affected – significant policy change.

Again, the key reason behind the lack of success was the mix of actor characteristics and preferences and the polity under which they operated. In Germany, women's activists supported the notion of equality of difference, which was not always aligned with the ECJ's interpretation of the equality directives. Moreover, the political executive in Germany is weakened by the necessity of reform having to go through parliament (unlike in the UK, the executive cannot pass Regulations that bypass legislative approval), federalism and collective bargaining autonomy. The increase in the number of veto points makes the government slower to respond to pressure and reduces the opportunities for non-governmental actors to successfully develop a confrontational strategy around hard law.

Thus, in Germany, European Hard law has led to:

- ❖ minimal empowerment of women's activists (balance of power remains intact)
- ❖ a minimization of the effect of ECJ case law because opposition to reform can mobilize around veto points
- ❖ multiple veto points that limit the ability to achieve policy innovation through a confrontational strategy

This case study also leads us to a few interesting conclusions on some of the alternative explanations discussed earlier. Firstly, the opposition to reform is most vivid when the state-

market relationship is affected. The level of misfit or the cost of reform is not the primary factors in determining the level of opposition. An example of this is the ease of change with the Kreil case that opened up the army to women. This case, however, only affected the public sector and did not require the consent of the federal states. In contrast, a notoriously difficult case for policy change is equal pay since it infringes on the collective bargaining autonomy of employers and unions and any legislation would redraw the line between the state and the market.

5 Soft Law

This chapter focuses on European soft law, particularly the way the European Employment Strategy (EES) has incorporated childcare and how childcare guidelines and targets have been used in domestic policy-making in the UK and Germany. The chapter focuses on childcare for a number of reasons. Firstly, childcare has been part of the EES from the beginning and has increased in importance over time. In 2002 member states adopted childcare targets for 2010 and follow the progress of member states in achieving those targets through benchmarking. Secondly, meeting the childcare targets is seen as crucial for achieving overarching goals of the EES, particularly the increase in women's employment rates and the establishment of a dual-income welfare state model across Europe. Thirdly, pointing mainly to the experience of Scandinavian countries, the EES emphasizes that in countries with a high employment rates of women and high social provisions supporting a dual income model the fertility rates are higher than in countries with a traditional division of labor. Providing childcare places is seen as key for achieving a number of macroeconomic goals such as raising women's employment rates, increasing the fertility rate and developing to counter an aging population that puts enormous strains on maintaining a high level of social provisions. Finally, because the EES gives a lot of weight to childcare, reaching its goals can serve as a test case not only for how well the EES supports equal opportunities in the labor market but also for the success of the EES as a whole. Unlike in the case of equal pay, where member states have not committed to concrete targets, increasing childcare places is uncontested at the EU level at this point. Looking at the way member states respond to the EES and childcare guidelines provides a window to examine how member states respond to the EES and under what conditions sub-state actors incorporate EU soft law into their strategies.

The chapter is structured as follows: I will first provide a background on the way childcare has been addressed at the European level. The European Commission first tried to pass a European childcare directive. This attempt failed since members states were unwilling to transfer competencies to the EU in the realm of social policy and hard law. Childcare became part of the EES since it was considered crucial for achieving overarching goals of the strategy, in particular the increase in women's employment rates. Second, I examine the way sub-state actors have used EES childcare guidelines and targets in domestic policy-making processes. For both the UK and Germany I describe the policy evolution on childcare first and then explain what role the EES has played in recent labor market reforms and in particular on childcare policies. In the case of the UK I analyze why sub-state actors have found it difficult to integrate the EES into their strategies. This is particularly striking since British actors have successfully developed a European litigation or confrontational strategy around EU hard law. In the case of Germany I examine how soft law has played an important role in recent labor market reforms and childcare initiatives by the federal government. This is surprising since German actors have not developed a successful European litigation strategy around hard law and childcare policy does not even fall into the competencies of the federal government. I argue that institutional veto points of the political system not only affect the magnitude of legislative change but also actor's strategies. In a polity with few veto points and a high reform capacity of the government – like in the UK – the incentives for state actors to incorporate soft law are lower than in a polity with many veto points, making it harder for political executive to pass reforms. In a context of a polity with many veto points and consensus driven policy reforms sub-state actors increase their access and leverage in the policy-making process by drawing on soft law.

5.1 Childcare directive – A failed attempt

The EU has a strong commitment to furthering gender equality in the labor market as seen in the previous chapter on hard law. Based on Article 119 of the Treaty of Rome, the EU passed secondary legislation on equal pay and equal treatment in the 1970s. [113] This legislation was broadened and deepened through case law that extended civil rights. The reconciliation of work and family life was, however, mainly left to national regulation since the Community only emphasized the need to "ensure that family responsibilities of all concerned may be reconciled with their job aspirations" (Euorpean Council 1974, 2). A Commission proposal on a childcare directive failed in 1981 (COM (81) 775, 22 December 1981). Member states blocked the directive since childcare was seen primarily as a national and local responsibility.

In the 1980s the European Commission expanded its role to new areas and policy instruments [Stratigaki, 2000 #311, 31 and launched Community Action Programmes on Equal Opportunities for Women to establish new networks and resources to further equal opportunities. The First Action Programme (1982-1985) wanted to broaden and deepen the directives on gender equality of the 1970s and emphasized the sharing of care responsibilities within the family. The Second Action Programme (1986-1989) focused on the sharing of both paid and unpaid work or the sharing of "family and occupational responsibilities". In this context the program actively promoted a reorganization of working time, parental leave and the establishment of a supportive infrastructure, including childcare, to create better conditions to combine work and family life. Strategaki compared the first and second Action Programmes and concluded

> "the EU gender equality potential had already narrowed as the implicit objective shifted from improving the quality of life and sharing of all social life (decision making posts included) more equally between women and men to combining work and family life and

[113] The EC passed an Equal Pay Directive 75/117/EEC (OJ 1975, L 45/19), Equal Treatment Directive 76/207/EEC (OJ 1976, L 39/40-42) and an Equal Treatment and Social Security Directive 79/7/EEC (OJ 1979, L 6/24-25)

> sharing child care by increasing parental leaves, relevant infrastructure, and flexible working time for working mothers" [Stratigaki, 2004 #145, 41].

Through the Action Programmes and with the support of the European Commission and domestic organizations such as the British Equal Opportunity Commission (EOC) a European Commission Childcare Network[114] was established in 1986 (see (European Commission 1986, Stratigaki 2000, 32). The network consisted of representatives from all member states and was headed by the British academic Peter Moss. The Network conducted research on the importance of high quality and quantity of care services, organized seminars and prepared legislation on childcare. On 8 August 1989 the Commission issued a Communication on family policy which identified the common theme of "the impact of other Community policies on the family, notably on child protection' and envisaged the 'production of regular information on demography and measures concerning families..." (COM (89) 363 final). On 29 September 1989 the family ministers issued a Conclusion on family policy. Given the increased interest in children and children's rights the European childcare network began to draft a legally binding childcare directive. The draft directive envisioned a public provision of care for children 0-3 years of 5-10%, 3 to school age 60-70%, and full day care services for 5-10% of children age 3 to 10 years of age (Cohen & Fraser 1991, 52, Randall 2000, 355). The draft directive emphasized an egalitarian vision of childcare following the Social Democratic welfare state provision of care. Member states did not pass a legally binding directive and the Council of Ministers issued a non-legally binding Recommendation on Childcare instead (European Council 92/241/EEC of March 31, 1992, OJ 1992, L 123/16-18). In the overall restructuring of networks to support the work of the Commission the childcare network was dismantled in 1996 and only the Expert Legal Group (since 1982) and the Expert Group on the Situation of Women

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[114] In 1991 the Childcare Network was renamed European Commission Network on Childare and Other Measures to Reconcile Employment and Family Responsilbities.

in the Labor Market (since 1983) remained. The Framework Programmes replaced the Action Programmes and no longer made childcare a priority.

While the childcare directive failed, other provisions to further the reconciliation of work and family were passed in the 1990s. In an effort to increase the “flexibility and adaptability” of European economies and to ensure a qualified and diversified workforce women’s employment has gained increasing importance. Through the Single European Act (1998) directives could be passed with qualified majority voting based on Articles 100a EEC (single market) and 118a EEC (health and safety). This allowed the passage of, for instance, the Pregnant Worker Directive 92/85/EEC (OJ 1992/L 348/1) and Working Time Directive 93/104/EEC (OJ 1993/L307/18) based on Article 118a EEC. Based on the Social Charta of the Treaty of Maastricht (1992) Social Partner Framework Agreements were negotiations leading to the passage of a Parental Leave Directive 96/34/EC (OJ 1996/L 145/1) and a Part-Time Work Directive 97/81/EC (OJ 1998/L14/9).

After the Treaty of Maastricht (1992) the reconciliation of work and family life was slowly removed from the realm of Community Action Programs and transformed into social partner negations and concerns on the restructuring of labor market and welfare states. While earlier draft directives developed in Community Action Programmes on, for instance, parental leave (COM (83) 686 final, 24 November 1983) had defined parental leave broadly and integrated issues of pay and social security benefits as well as the distribution of care work in the family, this was no longer the case in the context of social partner framework directives. Here, parental leave was part of the establishment of “Social Rights of Workers” and part of a broader strategy to enhance labor market flexibility and adaptability rather than alter the organization and provision of care work.

A Childcare directive was significantly more difficult to pass at the EC level for a number of reasons. Firstly, member states were reluctant to broaden the scope of Article 119 (equal pay)

of the Treaty of Rome to integrate childcare (Mazey 1998, 139). Especially under the criteria of subsidiarity, introduced in the Treaty of Maastricht (1992), childcare was seen as a policy issue where national and regional governments, local authorities, social partners and other relevant groups could determine how and to what extent employed parents should be supported. Secondly, to overcome a veto by the British Conservative governments of Prime Minister Thatcher or Prime Minister Major that were both opposed to an expansion of European social policy in the 1980 and 1990s, a childcare directive would have to be passed through QMV or based on a social partner framework agreement. Since childcare does not fall either under the creation of a single market (Article 100a) or health and safety (Article 118a) a childcare directive could only be passed with unanimity. It was clear that some member states, particularly the UK, would veto a childcare directive and the only option for was a Social Partner Framework Agreement. Since childcare is not part of the work contract and a proposal for childcare from social partners would have most likely given rise to questions of coverage and cost sharing between the state-market-family, social partners did not propose a framework directive. Finally, childcare fell into the responsibility of two Directorate Generals (DGs), namely the DG XXII (Education, Training and Youth) as it looks at schooling and DG V (Employment and Social Affairs) in regard to parental employment. Childcare encompasses different kinds of childcare needs from pre-primary schooling to after school provisions, issues of quality, quantity and access to childcare and different kinds of providers of childcare and issues pertaining to pay, working conditions and training of childcare workers. The complexity of care provisions makes it more difficult to establish EC law. In 1992 the passage of a childcare directive was prepared within the context of an EC family policy and through DG XXII and thus, had a strong focus on children's rights and less on the effects of parenthood on employment.

With the failure to pass a directive and the dismantling of the Childcare Network in 1996 it seemed unlikely that member states would pass a legally binding legislation. In 1997 the

Commission published a supplementary recommendation on childcare where objectives and principles of childcare and responsibilities of national groups were discussed (European Commission DGV, 1997: INT). The Commission did not initiate any further steps and the prospects of a European Childcare Strategy were rather limited.

5.2 European Employment Strategy and Childcare

5.2.1 Integrating childcare in the EES

The Treaty of Amsterdam (1997) became the turning point for the promotion of childcare at the EU level. At the Treaty of Amsterdam the EU received an Employment Title (Articles 109n-s ECT or 125-130 EC). The Employment Title consolidated a process started with Delors' White Paper on Growth, Competitiveness and Employment (European Commission 1993) and the so-called "Essen Strategy" and gave the EU coordinating responsibilities on employment policy. Shortly after the Treaty of Amsterdam the Luxembourg Job Summit developed the European Employment Strategy (EES) which was adopted by the European Council in December 1997. In the context of furthering "employability" the EES developed guidelines and targets on the public provision of childcare (Euorpean Council 1997). Herewith, the EU takes on questions of how care work is organized and/ or provided between families, states and markets within member states. In the following section I will briefly describe the process leading up to the European commitment to promoting childcare.

In the 1990s the EU experienced high unemployment levels of 18 Million (Bertozzi & Bonoli 2002, 2) and a loss of five million jobs. At the same time the European Monetary Union (EMU) suffered ratification difficulties in the UK, Sweden and Denmark. A strategy of economic integration without a coherent social and employment policy was questioned. Social Democratic Parties – in government in a majority of the member states – indicated their support for a stronger European social policy and a European initiative to combat unemployment. This was

used by Jacques Delors, Commission President from 1985 to 1995, to present a White Paper on Growth, Competitiveness and Employment (European Commission 1993). The White Paper shifted the debate on employment from a focus on unemployment to one on employability and structural reforms of the labor market (European Commission 1993, 136, Ferrera et al 2000, 77-78).

The focus on employability brought attention to women's employment rate lagging behind that of men's employment rate in most member states. The White Paper did not, however, mention gender at all which was heavily criticized by the Expert Group on the Situation of Women in the Labor Market (Rubery & Fagan 1998, 99, Rubery & Maier 1995). Due to this criticism the Commission set up a Task Force to evaluate the equal opportunities issues of the new employment strategy. The Task Force clearly stated again that in the employment policy "gender equality only emerges explicitly under the topic of targeted groups, with women identified as a group requiring special help and not as a group shaping the future pattern of employment in Europe" (Rubery & Fagan 1998, 99). In addition, the Task Force criticized that issues of women's unemployment were addressed in the context of employment policy while equal opportunities were addressed only in the Action Programmes. The group demanded a stronger focus on equal opportunities throughout the employment policy. Furthermore, the Task Force emphasized the need to broaden the EES in scope and acknowledge the influence of the organization and provision of care work in the different national welfare states to promote a higher employment rate of both men and women (Rubery & Fagan 1998). This demand was supported through a high level expert group of the OECD that published an influential study on "Women and Structural Change" (OECD 1994b). The study called for a new gender contract to move away from the old 'male breadwinner female homemaker model' towards a new model that better reflected the changing realities in the organization of gender relations inside and outside work. The fourth World Conference on Women in Beijing in 1995 adopted gender

mainstreaming to "promote an active and visible policy of mainstreaming a gender perspective in all policies and programmes, so that, before decisions are taken, an analysis is made of the effects on women and men, respectively."

In the development of an employment strategy the demands of the Task Force were partially taken into consideration. The 1994 Essen Council passed a resolution in support of equal participation by women in an employment-intensive economic growth strategy (European Council 1994a) but still treated employment and equal opportunities as separate issues. A Commission Communication on gender mainstreaming committed to "mobilising all general policies and measures specifically for the purpose of achieving equality by actively and openly taking into account at the planning stage their possible effects on the respective situations of men and women (the gender perspective)" (COM (96) 67, 21.2.1996). Gender mainstreaming was, however, not yet integrated in the European employment policy.

The Treaty of Amsterdam (1997) shifted the debate on gender equality beyond equal pay, equal treatment and positive action towards gender mainstreaming and equal opportunities for men and women in employment. Article 3 (2) integrates gender mainstreaming as a task to "eliminate inequalities, and to promote equality between men and women" in all activities of the community.[115] In addition, a range of positive action measures was adopted to benefit the disadvantaged sex in the field of employment. Furthermore, the definition of discrimination was broadened to include discrimination based on sex, racial or ethnic origin, religion or belief,

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[115] Gender mainstreaming seeks to equalizing opportunities for men and women. It is a holistic and long-term strategy for achieving gender equality by 'engendering' the policy-making process (see Mazey S. 2001. *Gender Mainstreaming in the EU: Principles and Practice*. London: Kogan, Ostner I. 2000. From Equal Pay to Equal Employability: Four Decades of European Gender Policies. In *Gender Policies in the European Union*, ed. M Rosilli, LA Tilly, pp. 25-42. New York: Peter Lang. The Council of Europe defined gender mainstreaming as "(re)organization, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and stages, by the actors normally involved in policy-making" (Council of Europe, 1998, 13). At the EU level gender mainstreaming involves the creation of specific organizational units, such as an Equal Opportunities Unit at the European Commission, and specific programs that seek to systematically incorporate gender mainstreaming throughout all government institutions and policies (see Mazey S. 2001. *Gender Mainstreaming in the EU: Principles and Practice*. London: Kogan, Pollack MA, Hafner-Burton E. 2000. Mainstreaming Gender in the European Union. *Journal of European Public Policy* 7: 432-56.

disability, age or sexual orientation (Article 13). The constitutional embedding of gender equality is a large victory for European feminists and has introduced a new phase of EU gender equality policy (Helfferich & Kolb 2001, Mazey 2001).

The EU also received an Employment title at the Treaty of Amsterdam. This allows the EU to coordinate employment policies of member states. The main objective of the Employment Title is set out in Article 125. “Member States and the Community shall, according to this Title, work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour market responsive to economic change…” At the 1997 Luxembourg Job Summit the structure of the EES was negotiated. Here, a four pillar structure was adopted, namely employability, entrepreneurship, adaptability, and equal opportunities. While equal opportunities was included in the strategy as a core pillar the employability and equal opportunities agenda were still treated as separate issues.

Through the adoption of gender mainstreaming in the Treaty of Amsterdam the EES became an important test case for the use of this new strategy to bring gender mainstreaming into new areas of EC social policy. In 1998 the Austrian Presidency introduced gender mainstreaming as a horizontal objective in the EES and thereby, establishing a dual strategy of gender mainstreaming of all pillars and objectives of the EES and specific measures to further gender equality in the equal opportunities pillar. Gender mainstreaming seeks to improve the productivity and effectiveness of the EES and integrate a gender perspective in the overall design, implementation and evaluation of the employment strategy and its policies. In addition, childcare – being part of the equal opportunities pillar – was no longer seen as an exclusive responsibility of the member states but also that of social partners and integrated in a broader “family-friendly policy, including affordable, accessible and high quality care services for children and other dependents, as well as parental and other leave schemes” (European Council 1999b). Furthermore, the Commission was asked to establish a comparative index to generate data on

the effects of parenthood on employment rate of men and women within member states. This data links the first pillar on employability with the fourth pillar on equal opportunities (European Council 1999a, 80-81). The linkage between childcare and employability was supported by the European Women's Lobby EWL which issued a position paper on the matter. The paper demanded not only a greater societal responsibility for care but also measures to increase men's care responsibilities (European Women's Lobby 1998). The latter aspect was not adopted in the employment strategy.

In 2000 the Lisbon European Council agreed on a new agenda to achieve "the most competitive and dynamic knowledge based economy in the world, capable of durable economic growth, of high employment levels and jobs of a better quality and of improved social cohesion" (European Council 2000). To achieve this goal the Lisbon Council adopted a new mode of governance, namely the open method of coordination (OMC) and applied it to employment and economic policy as well as social inclusion. In addition, the so-called Agenda 2010 was adopted with concrete quantitative targets to be achieved by 2010. An important target was the employment rate of 70% for men and 60% for women. In 2001 an additional employment rate target of 50% for older workers aged 55-64 was adopted (European Council 2001). Already at this point childcare targets were debated in the Council and the Joint Employment Report 2001 encouraged member states to individually set quantitative targets on childcare. The report notes

> "Although Belgium, the United Kingdom, France, Greece, Portugal and Ireland have set targets for increasing the provision of care services, for the most part childcare services are not sufficient to deal with the scale of demand. Countries with low levels of childcare services, especially for 0-3 year olds, have not set quantitative targets and have taken only limited action to improve the situation (Italy, Spain, Austria, Germany and the Netherlands)" (European Council 2001, 39).

At the Barcelona Summit in 2002, childcare targets were adopted. The targets for childcare were at least 90% of children between 3 years and the mandatory school age and at least 33% of children 0-3 years by 2010 (European Council 2002, 13). While the establishment

of concrete targets was immediately perceived as a success integrating a European family policy within the context of employment, childcare targets were not adopted to alter the distribution of paid and unpaid work within the family or gender relations within the family. Instead, childcare targets were adopted in the context of increasing the employment rate and thus, were part of the economic strategy. The European Women's Lobby, while supporting the introduction of the targets, notes

> "the EWL does not accept the different targets for child care provision depending on the age of the child. The differentiation in targets represents a way of cementing the current unequal sharing of family responsibilities until the age of 3 years, and does not recognise that provision of childcare and care of dependent persons is a societal responsibility, regardless of age." (European Women's Lobby 2002)

In 2002 the Barcelona European Council also initiated a reform debate on the EES with an impact evaluation of the strategy and a streamlining of the strategy to improve its mode of governance in 2003 (COM (2003) 16, 3 and COM (2002) 487). The amendment of the strategy brought important changes for gender mainstreaming and equal opportunities but did not lead to a change in the EES's commitment to childcare.

In 2003 the Commission proposed a restructuring of the strategy around three overarching objectives, namely (1) achieving full employment by increasing the employment rate; (2) raising quality and productivity at work; (3) promoting cohesion and inclusive labour markets. In addition, priority areas were defined of which only one focused on gender equality and gender mainstreaming no longer had the status of a horizontal objective (COM (2003) 6 final). Only through lobbying from the Expert Group on Gender and Employment, the European Women's Lobby and the European Parliament, gender mainstreaming was reintroduced as a horizontal objective (European Council 2003). While childcare targets were not called into question throughout the revision process, attempts to introduce new targets, such as targets to reduce the gender pay gap, failed.

In March 2003 the European Council followed a joint proposal of the UK and Portugal to create an Expert Group to support the work of the Economic Policy Committee to critically evaluate how the Lisbon targets could be reached by 2010. This Employment Task Force, headed by Wim Kok, presented its report in Berlin in November 2003 (Kock 2003). Childcare was featured in this report as a tool to achieve inclusive labor markets and enhancing the employability of women. This report does not give preference to one particular form of childcare (public or private) as long as quality and affordability are satisfied (Kock 2003, 37-38).[116] The role of men in the provision of care or the distribution of care responsibilities within the family is not addressed.

After the revision of the EES is completed, guidelines are set for 3 years while member states still need to submit National Employment Reports annually. The Employment Guidelines for 2005-2008 (adopted 12/07/2005) address childcare in guideline No. 18, "Promote a lifecycle approach to work". Childcare is seen as important for a "better reconciliation of work and private life and the provision of accessible and affordable childcare facilities and care for other dependents". The childcare targets are reinforced in the final version of the guidelines (COM (2005) 141final).

5.2.2 Development of strategic objectives and their limitations

In the 1980s the EU had furthered equal opportunities mainly through Community Action Programmes. Through the adoption of gender mainstreaming as a community strategy in 1996 and decisive lobbying efforts of feminist activists gender mainstreaming became an integral part of the EES. Through gender mainstreaming it has been possible to link different pillars of the EES and connect the availability of childcare to employability. The integration of childcare into

[116] For a general evaluation of the report from a gender perspective see Rubery J. 2003. More (and better?) jobs for women?: the Employment Task-froce report and gender mainstreaming. .

the debate on how employability can be increased has significantly altered the way childcare is approached at the EU level. The Action Programmes had a more holistic perspective of family policy and childcare was part of a broader strategy to revise the gender contract. The EES links macroeconomic investments in childcare to an increase in women's labor market participation and does not address issues of how care-work is distributed within the family.

Furthermore, the EES does not clearly spell out how a more gender equal society would look like. In other words, the Employment Title only provides the EU with competencies to coordinate the employment policies within member states and sets targets that member states can achieve by whatever means and ways they chose to. The EES does not define what kind of gender equality, welfare state regime or social Europe is envisioned. It is up to the individual member states to define gender equality and the EES leaves room for member states to further women's employment while still perceiving women's role as the primary care giver. This is especially possible since employment rate targets do not distinguish between full, part-time and minimal employment. Similarly, the childcare targets do not distinguish between part-time and full-time care facilities leaving room for member states to meet targets with care places that do not permit parents to work full-time. In addition, the strategy does not address issues of division of care responsibilities within the family or the behaviour of men or that of employers, where many of the obstacles to gender equality may be encountered.

Finally, the EES prioritizes access to employment over equality in employment. This can be seen when looking at the targets adopted. The EES has explicit targets on employment rate for both men and women and childcare but no targets on closing the gender pay gap or decreasing labor market segregation. A recent adoption of job quality targets – important especially for women working disproportionately in non standard and flexible jobs (O'Reilly & Fagan 1998, Rubery et al 1999) – may lead to a more holistic approach but it is too early to see the effects of the quality targets yet.

Given the specific approach on gender equality taken by the EES childcare is the strongest area in which equal opportunities are promoted. Childcare has featured prominently in the strategy and received increased attention over time after childcare targets were adopted in 2002. This makes childcare a test case for how seriously the EES seeks to promote gender equality and an inclusive society and also for the overall ability of the strategy to promote policy change within member states.

5.3 National initiative on childcare without the EES – The case of the United Kingdom

5.3.1 Policy Evolution

Until the 1990s the United Kingdom did relatively little to provide public childcare. Childcare has historically been seen as a private matter between parents and private or voluntary resources. Public provision of childcare was stigmatized as being for those mothers who have to work or cannot take care of their children. Childcare work has been seen as low skilled work that could be performed by women through extending their mothering role. While there had been some attempts to enhance childcare since the 1960s this did not lead to a significant expansion of childcare and were put on hold when the Conservative Thatcher government came into power (Randall 2000, Randall 2002). The neo-conservative Thatcher government disapproved of an expansion of the public budget to provide for social services for all. Providing universal care was perceived as supporting welfare state dependency and running against proclaimed “strong family values”. Instead of extending public provision of care (for all) the government used tax credits to encourage low income parents to work. In 1988 the Family Income Supplement (FIS), established in 1971, became the Family Credit (FC) with more generous benefits to make low paid work more attractive. At the same time benefits for single parents were cut and absent fathers’ fiscal responsibilities for their previous families were

increased through the establishment of the Child Support Agency in 1990 (Kiernan et al 1998, 95).

In the mid-1990s the government partially altered its strategy due to the rising number of lone parent families and rising levels of child poverty. Prime Minister John Major committed to universal nursery education for 3-4 year olds in 1993. The Ministry of Education introduced a Nursery Education Voucher system to make nursery school education more affordable for low income families, to encourage “choice” among different childcare options and create conditions for parents to seek employment. The system was however costly, difficult to administer and did not succeed (Kiernan et al 1998, 273, Randall 2000, 93-95). In 1994 the government also increased the FC further.

In 1997 the Labour Government under Tony Blair came into office. The government signed the Social Charta of the Treaty of Maastricht and agreed to implement key directives to further equal opportunities, such as Working Time Act 1998, Parental Leave Act 1999, and Part-Time Working Act 2000. The administration altered the tax and benefit reform started during the conservative governments of Thatcher and Major. The Blair government aimed at a further reduction of welfare dependency through a dual strategy of “welfare to work” and “making work pay”. To make this strategy inclusive for low income families and lone parents in particular the government complemented it with an expansion of welfare state services on childcare. Since tax and benefit form, New Deal for Lone Parents (NDLP) and the National Childcare Strategy are interrelated I will explain briefly the tax and benefit reforms and active labor market strategy before turning more in-depth to childcare.

The government transformed the FC into the Working Family Tax Credit (WFTC) in 1999. The government estimated that nearly twice as many families will be in receipt of WFTC as compared to those that received FC. The WFTC increases the in-work support relative to the FC system in four ways: a credit for children, increase in the threshold, reduction in the taper

and a childcare credit of 70 per cent of actual childcare costs up to £ 150 per week (Dilnot & McCrae 2000, 72, Treasury 1998a, Paragraph 1.30). From April 2003, WFTC and Disabled Person's Tax Credit (DPTC) are replaced by two new tax credits, Working Tax Credit (WTC) and Child Tax Credit (CTC). In order to receive the WTC a person must work at least 16 hours per week with premiums given for work over 30 hours per week. The CTC is a universal benefit which provides £ 26.50 per week to families earning less than £50,000 a year and £54.25 a week for the first child to families with an income less than £13,000. In addition, the National Minimum Wage Act 1998 set a wage floor to make work in the highly deregulated low wage sector more attractive. The WTC provides benefits independently from the family type and therefore ignores the challenges lone parents face to combine work and family. Since childcare is costly and most public childcare places have limited opening hours the WTC demand of at 30% private coverage of the costs and work of at least 16 hours per week make it especially difficult for lone parents to take full advantage of new deal incentive structure to seek employment.

A second important strategy of the Blair government has been the New Deal for specific target groups and is designed to move people from claiming unemployment benefits to work[117]. The New Deal focuses on target groups, such as New Deal for Young People (NDYP), Long Term Unemployment (NDLTU), Lone Parents (NDLP) and Partners of Unemployed (NDUP). The NDLP seeks to increase the employability of lone parents. In 1997 more than 20 percent of families with children were headed by a lone parent. Unlike in other liberal welfare states the employment rate among those parents was relatively low with 41 percent (unlike 82 percent in

[117]Rake points out that the two New Deals with a high level of male participation (NDYP and NDLTU) offer, in combination with an element of compulsion, the most extensive range of options. Whereas the NDYP and NDLTU channel 40 percent of participants into training this is only the case with 9 percent of the participants in the NDLP and the NDUP. “The combination of eligibility requirement, the number of participants and quality of provisions means that the New Deals command very different levels of government expenditure Rake K. 2000a. Gender and New Labour's Social Policies. *Journal of Social Policy* 30: 209-31. “

the US) (Department of Social Security 1997, 7). In 2000 Chancellor Gordon Brown said that he expected that through the investments in childcare and the NDLP an employment rate of 70% for lone parents could be achieved by 2010. By increasing the employment rate of lone parents the government also seeks to eliminate child poverty by 2020. Through the introduction of ONE (single work-focused gateway) lone parents with children age 5 years are automatically invited to speak to benefit officials about taking part in NDLP scheme. If they do not attend they face partial loss of benefit. In 2002 the measures were extended to all parents[118]. The Minister of Employment, Ms Margaret Hodge, insists that while these requirements are there "We are not forcing anybody to go out to work. What we are doing is to encourage choice" (BBC 2000).

The NDPU is available to partners of the unemployed where there has been a Job Seekers Allowance (JSA) claim for the couple for more than six months. While the New Deal gives advice and support to individuals the access to the program is dependent on the partners' unemployment status. Here, the family unit is important and the household has to declare the main breadwinner. Women whose partners are employed but are out of paid employment are excluded from the NDPU. "Lack of provision for these women reflects the conditioning of New Deal support on familial, rather than individual, 'work poverty'" (Rake 2000a, 214).

The underlying gender bias of this new vision can be seen in the way the NDUP uses the family unit as the criteria for access to the New Deal and different levels to which the new deal encourages skill acquisitions and full-time employment. The NDYP and the NDLTU give

[118] From October 1998 to September 2003 NDLP had a caseload of 540630, presenting 83% of initial interviews. The number of leavers from NDLP reached 441,870 by the end of September and 98,790 lone parents were still participating at this point. The statistics on leavers from the program are as follows: 52% left for employment, 1 percent transferred to other benefits, 32% withdrew for other reasons but remained on Income Support and 1 % were no longer eligible and 13% left for unknown destinations (http://www.dwp.gov.uk/asd/asd1/ndlp/ndlp_dec03/SFR_dec03.pdf).

much higher preference to skill acquisition and full-time employment than the NDLP and the NDPU where women are the key participants[119].

These reforms have led to a shift from needs-tested benefit provision towards work-conditional benefits. Indirectly, these reforms also enhanced the labor supply for the deregulated low-wage (part-time) labor market segment. The ideological justification for making mothers work and to move to an activation strategy including mothers is to expand the "working citizen" concept to all persons of working age and to indirectly reduce child poverty. However, the structure of the tax and benefit system as well as the active labor market measures of the new deal indicate that the concept of working citizen does not fully incorporate married mothers and is targeted towards lone parents and persons whose partners are unemployed. Since a lack of childcare is a key stumbling block for the integration of these target groups childcare has become a key element of the activation strategy of New Labour.

The day after the 1997 election (May 2, 1997), the Secretary of State of Education abolished the Nursery Education Voucher scheme (targeted strategy) and set out the new early years' policy (universal scheme). In July 1997, Chancellor of the Exchequer Gordon Brown declared in his budget speech that henceforth childcare would be "an integral part of our economic policy"[120]. Following its election platform of the Labour Party a Green Paper entitled "Meeting the Childcare Challenge[121]" was published in May 1998. The Green Paper laid the foundation for the way the government addressed childcare. The UK childcare strategy consists

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[119] As Katherine Rake has pointed out the government wanted to enhance "employment and equal opportunities for all" but women are disproportionately in the NDLP (95%) and NDYP (27%) and the Women's Budget Group revealed that only 8% of the funds goes to NDLP whereas 57% go to the NDYP Rake K. 2000b. Men first. Women are missing out on the New Deal programme for the unemployed. Most spending is going to predominantly male groups. In *The Guardian*.

[120] See http://archive.treasury.gov.uk

[121] Childcare (Meeting the Childcare Challenge). Cm 3959 (19.5.98), Childcare (Scotland) Meeting the Childcare Challenge – A childcare Strategy for Scotland. Cm 3958. TSO (19.5.98), Childcare (Wales) The National Childcare strategy in Wales. Cm 3974. TSO (22.6.98).

of the National Childcare Strategy, the Sure Start Program and the above described Child Tax Credit. Baroness Ashton describes the vision of the National Childcare Strategy as follows:

> "The ambition is that every family that wishes could find childcare for their children appropriate to the age of the children, because a family's desire to have different childcare is often based around the age of the child or their own personal preferences, and that is for them to decide. We would want to make sure that any family would be able to find adequate childcare. That does not mean we would pay for it as a Government; it means it is a mixture of Government money, through tax credits and through family income, to support those children" (HC 1184).

The National Childcare Strategy has adopted a universal approach to childcare aiming at "accessible, affordable and quality childcare for children aged 0 to 14 (and to 16 for those with special educational needs or disabilities) in every neighbourhood." A dual strategy is set up where the National Childcare Strategy aims at universal childcare provisions for 3 and 4 year olds and the Sure Start Program is a targeted approach which addresses poor areas and wants to eliminate child poverty. While the National Childcare Strategy is aimed at helping 1,007,000 children, the Sure Start program is set up to help 400,000 children living in disadvantaged areas by 2004 (DfES 6.11.2002 Press Release). The strategy does not set minimum opening hours and thus, children can be cared for as little as 12.5 hours per week. Since the WTC requires at least 16 hours per week to be eligible for the credit this can be seen as a major weakness of the strategy.

The Ministry of Education and Employment (DfEE), now the Department for Education and Skills (DfES) has historically been responsible for pre-school education. (The Ministry of Health and Social Security has historically been responsible for ensuring standards of care in local authority day nurseries). The DfEE in cooperation with Local Education Authorities formed Early Years Development Childcare Partnerships (EYDCPs). Here, the strategy is led and coordinated nationally by the DfEE but locally run where 150 partnerships have been

established so far[122]. In addition, a Children's Information Services was established to provide local information for parents and the Childcare Link to provide more general information on the national level. The EYDCPs also promote the implementation of the Sure Start Program which tackles child poverty and social exclusion. Through the mix of a national strategy design and local involvement in setting up EYDCPs a large number of actors interested in advancing childcare provisions are participating in the strategies design and implementation. Daycare Trust – a leading charity working on childcare – was strongly involved in the design of the strategy and the director of Daycare Trust, Colette Kellerher, became advisor to the EYDCP in 2000. On the local level the Childcare Strategy is open to the participation of non-governmental actors. However, the local partnership character also opens the strategy up for a large degree of variation.

In October 2001 the "Inter-Departmental Childcare Review: Delivering for Children and Families" was announced as part of the 2002 Spending Review. It was led by Baroness Ashton (Minister for Sure Start, Early Years and Childcare) and also included Baroness Hollis (DWP), Dawn Parimarolo MP (HM Treasury) and Barbara Roche MP (Minister for Women). The Department of Trade and Industry, the Children and Young People's Unit, Department of Health, and the No 10 Policy Directorate were also involved. The goal of the report was to assess the future demand and need for childcare, assess the effectiveness of the different types and qualities of care and to develop a 10 year vision and strategy. In its conclusions the report links childcare spending to enabling parents to go out to work and lift their families out of poverty. The review identified areas of market failure to produce access to affordable, good quality childcare for all (Cabinet Office 2002).

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[122] The DfEE pushed a guideline for EYDCPs "Good Practice for EYDC partnerships developing and supporting high quality, sustainable childcare" DfEE, 1999.

In 2003 the DWP published its fifth report focusing on “Childcare for Working Parents” (HC564). The DWP committee collected written and oral evidence from key actors working on childcare in the UK. Here, criticism was voiced on several dimensions, mainly regarding the normative vision of care, access to care and affordability.

The British academic Peter Moss, formerly head of the European Childcare Network, outlined an alternative vision of childcare to the one proposed by the government. “In his view, childcare is a public good which is the right of all children, regardless of whether their parents work or not. Professor Moss criticized the Childcare Review for failing to look at the bigger picture. … The Review should have questioned existing initiatives, such as tax credits, and moved childcare provision away from being a private commodity towards a universal, free service” (HC 1184). While Professor Moss made references to childcare provisions in other European countries he did not refer to the EES (see also (Daycare Trust 2001)).

The National Childcare Strategy was also criticized for not delivering a working childcare market and rather patchy provisions. The EOC remarks “even with this Government’s commitment to childcare and the substantial amount of money already spent, and due to be spent, there are still not enough good, affordable childcare places for everyone who wants one. The high cost, the lack of flexibility in drop off and pick up times, as well as chronic shortage of supply, compound the stress for parents trying to juggle work and children” (Equal Opportunities Commission 2003, 4). The EOC concludes that “As it stands, childcare remain largely a private benefit for high-income families and a social benefit for some poorer families” (Equal Opportunities Commission 2003, 5).

The Daycare Trust also points to the affordability question. Only 13 per cent of parents with dependent children use formal childcare services all the time due to the high costs involved. The shortage in places also contributes to rising childcare costs (Daycare Trust 2001). The costs for childcare are sought to be buffered through the reform in the tax and benefit system.

The Children's Tax Credit was however only taken up by 2.3 percent of all families with children up to the age of 16 in England (Equal Opportunities Commission 2003, 8). One of the main reasons why the Child Tax Credit has not been taken up is that it only covers 70% of the actual costs of childcare. This is a particular problem for lone parents who are more likely to work limited hours at national minimum wage. If the employment is at the national minimum wage for 16 hours a week the net income is £ 34 a week. Since the WTC requires parents to cover 30% of the childcare costs themselves they might be worse off when moving into work than before. Another problem is that tax credits can only be claimed if registered childcare is used. This argument is supported by a survey by the Chartered Institute of Personnel and Development (CIPD), which shows that

> "22% of new parents who earn less than £20,000 have stopped work completely, compared with 10% of those who earn more than £20,000. It is arguably due to the alarming lack of childcare provision in the UK, where only 4% of parents get their crèches provided for by the Government or their organization. Given that British parents face the highest childcare bills in Europe, more and more parents, particularly women, have little choice but to drop out of the labour mark" (Chartered Institute of Personnel and Development (CIPD) 2003, 9).

At the annual Daycare Trust conference Daycare Trust Director Stephen Burk said that "Access to childcare still depends on where families live, how much they earn and whether they are in work. According to a Daycare Trust survey families living outside of the 20% most disadvantaged areas are not reached sufficiently by the strategy" (BBC 2003).

Overall, various governmental and non-governmental actors are given access to government negotiations on the National Childcare Strategy on the national and local level; semi- and non-governmental actors generally recognize declared childcare to be a priority and welcomed the shift towards a more universal provision of childcare; the review process of the strategy allows groups to point to areas where the strategy has not been sufficient to deliver available, affordable and quality care for all. In the national debate on childcare we find some references to childcare provisions in other European countries but we do not find references to

the EES. In the following section we will explore the implementation of the EES in the UK, the involvement of national actors in the strategy and explore why actors have not Europeanized their strategies in the context of the EES.

5.3.2 Why is the EES missing in UK's childcare policy evolution?

The UK has adopted a centralized structure for the drafting of the NAP Employment with the Department of Work and Pension (DWP), in charge of active labor market policies, coordinating the process. Within the DWP the Joint International Unit (JIU)[123] is coordinating with other ministries, regions and semi-governmental actors as well as coordinating relations with the EU. On the national level the JIU coordinates with HM Treasury, the Department of Trade and Industry (DTI), the Department of Education and Skills (DfES) and the Prime Minister's Office. The regions of Scotland, Wales and Northern Ireland are consulted for their specific policies on employment and education. The DTI is in charge of coordinating with social partners on specific guidelines. At the final stages of process the draft of the employment report is send to the EOC, the Disability Rights Commission and the Commission for Racial Equality. The JIU is also in charge of bilateral coordination with the European Commission and is a member of the EMCO committee. The centralized administrative structure lays the conditions under which key actors actively interested in furthering equal opportunities can influence the drawing of the NAP. The key actors are the Women and Equality Unit (WEU), the EOC and the social partners (TUC, CBI) and -- in the case of childcare – the Daycare Trust.

The WEU was set up as a "gender mainstreaming unit" within the cabinet office in 1997 and has been moved to the DTI in 2001. The main focus of the unit has been to advance women in the workforce (especially equal treatment, antidiscrimination, equal pay). While the WEU was initiated as a gender mainstreaming unit it has not applied gender mainstreaming

[123] The JIU serves the DWP and the DfES as a joint unit.

forcefully to the NAP. While the NAP uses a gender neutral language it tends to limit gender mainstreaming to equal treatment and equal opportunities (Walby 2000). The WEU has neither made the EES nor the National Childcare Policy a priority and has not mobilized around either of them[124].

The EOC has been reviewing the NAP more critically. The EOC -- like the Disabilities Rights Commission and the Commission for Racial Equality -- receives the NAP when the full draft has been written. This limits the ability of EOC to mobilize around the NAP and gives the EOC a correcting rather than influencing role in the drafting process. In addition, the low public visibility of the EES would require a significant allocation of resources without the opportunity to mobilize around potential (legal and fiscal) sanctions. Since the EOC has limited resources lobbying around the EES is much less attractive than mobilizing around hard law which has higher public visibility – since the government has to implement the directives into national law – and litigation strategies are available. In addition, New Labour has made childcare a priority and elicits EOC's opinion in the policy making process. Thus, while there is a clear misfit between the national level of childcare provision and European childcare targets the EOC has not incorporated them into its national strategies thus far.

The DTI involves the social partners at an earlier stage and more actively than the EOC. The DTI consults the Confederation of British Employers (CBI) and the Trade Union Congress (TUC) and, to a lesser degree, the Centre for Enterprises with Public Participation and Services of General Economic Interests (CEEP). The social partners have participated minimally in the drawing of the NAP. From TUC's perspective the UK lacks national institutions facilitating a comprehensive social partnership and CBI is not willing to develop those institutions. TUC and

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[124] The WEU has been engaged in projects such as "Advancing Women in the Workplace" or "Equal Pay" and thus, focuses more on issues of equal treatment, equal anti-discrimination which are areas targeted by the EC directives. With the financial support of the EU projects and cooperation with industry are furthered.

CBI involvement occurs in some areas such as the “UK productivity challenge” and “Work and Parents Taskforce”. However, this is following an ad hoc approach of coordination rather than a comprehensive partnership approach the EU envisions. CBI perceives itself as a junior partner or consultant in the drawing up of the action plan and avoids concrete commitments resulting from its involvement or the institutionalization of a “social dialogue”. TUC is more supportive of a social partnership but skeptical as to whether it is possible. The NAP is seen as a government statement of “best practice” examples and giving the UK government the opportunity to outline what Europe can learn from the UK rather than vice versa. TUC would like to use the NAP in principle to introduce a “European perspective” into the national debate but the EES framework is not suitable for doing so in the UK. The lack of a comprehensive partnership, low public visibility of the strategy and the lack of sanction mechanism are seen as central problems for mobilizing around the EES. On the whole social partnership involvement is minimal in the area of the EES and neither TUC nor CBI dedicates significant resources to mobilizing around the drawing of the NAP[125].

Social partners (CBI and TUC in particular) have not integrated the EES into their strategies to influence the National Childcare Strategy. From an employers’ perspective the incentive of doing so are very low. Firstly, the National Childcare Strategy is tax financed and the government did not propose to have firms share some of the costs for the macroeconomic invests. Because of the low degree of interest mediation between employers, trade unions and the state the establishment of social pacts or other measures to make employers accountable for childcare is highly unlikely. Secondly, through the New Deal and tax and benefit reforms the labor supply for the deregulated low-wage sector is already promoted. Thus, firms have little incentives to become involved in the provision of childcare for low income families.

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[125] This is based on interviews with DWP, WEU,CBI, TUC, EOC, WEU

Overall, the low public visibility of the EES combined with a weak social partnership relationship and exclusion of other actors from the drawing of the NAP leave the government relatively unconstrained in drawing of the NAP. The government is able to use the NAP as a report rather than an action plan and can portray its reforms in the "most positive" light. Shortcomings of the National Childcare Strategy are not voiced in the NAP.

Domestic actors can, theoretically, put direct pressure on the government when the NAPs are drawn up and exert indirect pressure through various tools of the EES, such as targets, recommendations and funds (via the ESF). British actors are well connected to the European level through the EOC being a member of the Advisory Committee on Equal Opportunities for Men and Women, the academic Jill Rubery being the coordinator of the EU Commission's Expert Group on Gender and Employment, as well as strong ties with the European Women's Lobby. Through these strong ties national issues can be brought onto the European agenda and via the "boomerang effect" spiraled back to the national level (Keck & Sikking 1998). Within the EES the question is how successful this strategy is and if it allows actors to mobilize leading to a boomerang effect. I will briefly discuss different options for actors to mobilize around the EES and explain why this has not been the case.

Firstly, a domestic actor mobilization could evolve around the Barcelona childcare targets. The UK having a diverse childcare system with day nurseries, child minders, nursery schools, reception classes and playgroups and childcare statistics compiled separately for England, Wales, Scotland and Northern Ireland make it difficult for actors to compare the EES targets with national statistics. Thus, the question is what level of care and kind of provision of care can be counted towards these targets. National childcare statistics are also not fully comparable to the age structure set within the EES. In addition, the National Childcare Strategy is not structured around percentage targets but focuses on additional childcare places and public funds provided. Accessibility and affordability of childcare are key concerns in the

national debate but no European targets have been established and these issues are only mentioned in the guidelines and joint employment report. These restrictions limit the ability to mobilize around specific EES targets. Furthermore, the EES has not developed a specific vision of childcare which limits the ability of national actors to refer to the EES on a normative level.

Secondly, the EU gives regular recommendations to the UK to improve its childcare provisions. The Joint Employment Report 2002 [126] however also acknowledges the governments' commitment to childcare and perceives the overall development on childcare in the UK in line with the EES. Through these mixed messages from the EU national actors have no real leverage when referring to the EES.

Thirdly, the European Social Fund (ESF) EQUAL provides funds to find innovative solutions to childcare. A central aim of EQUAL is to support bottom-up innovative processes through setting up developmental partnerships along the guidelines of the EES. In the UK EQUAL is important for the recruitment and training of childcare workers. The UK has historically perceived childcare work as low skilled work and the area has suffered from a shortage in labor supply. Within the National Childcare Strategy more child minders are needed. "At present rates of growth, more than 150,000 new childcare workers are required to meet the target of one million new childcare places by 2004" (Daycare Trust 2001, 1). In July 2000 the government launched a campaign to increase child minders and playgroup staff. The DWP channels funds from EQUAL directly towards training and skill acquisition for child minders[127]. Participants of the NDLP are especially encouraged to acquire these skills. Thus, the idea of EQUAL to promote innovative solutions from below is circumvented to meet the demands for

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[126] http://europa.eu.int/comm/employment_social/employment_strategy/report_2002/jer2002_final_en.pdf

[127] Looking at the spending of EQUAL (2000-2006) the UK spends 40% on employability, 20% on entrepreneurship, 25% on adaptability, 5% on equal opportunities as well as 5% on asylum seekers and 5% on technical assistance. In the EU spending guidance to member states 10% of the funds should be going to equal opportunities. However, Theme G (Reconciliation of work and family life) is not offered and the money is given to Theme E (work-life balance which focuses on return to employment) and Theme A (re-integration to the labor market).

more childcare workers. While the usage of EQUAL runs against the original idea of the funds it assists the government in meeting the demands for childcare workers.

Overall, the UK has a high misfit between EU targets and national level of childcare provision. However, the EU hardly exerts any pressure on the national government due to the existence of a national childcare strategy and the integration of childcare in the overall employment strategy. The low public visibility of the strategy and the lack of (legal or fiscal) sanction mechanisms sets strong disincentives for actors to mobilize around the EES since they cannot rely on high levels of interest mediation to compensate for these shortcomings. In the national debate actors make more references to other European care regimes, such as Sweden and France, than to the EES. The government itself treats the NAP as a report rather than an action plan and restricts access to the drawing up of the NAP reports. Since the government has a high reform capacity due to the fusion of power within the political system and few veto points in the legislative process the political executive does not need to incorporate soft law to achieve a policy reform. Thus,

5.4 EES as a catalyst for labor market reform and promoter of a new approach to childcare – The case of Germany

5.4.1 Policy Evolution

Through the reunification of West and East Germany two different “care” regimes coincided on October 3rd, 1990. While East Germany provided universal childcare for all age groups and experienced similarly high employment rates of men and women the West German welfare state actively supported a Three-Phase-Model of Women’s employment (Kirner & Schulz 1992). Historically, West Germany had supported a male breadwinner welfare reform through its tax and benefit system, i.e. married couple tax splitting and child allowance, family

policy (i.e. long term paid maternity leave) and a social security system (i.e. family based insurance claims). The fiscal support is coupled with low investments in public childcare provisions and a half-day school system.

In West Germany family policy was strongly tied to the reconstruction of social and political order after WWII. The Christian Democratic Parties (CDU/CSU) institutionalized a social Catholic notion of family with men and women having complementary roles (different but equal) and gave special protection to the family in the German Basic Law (Grundgesetz). The Ministry for Family was established in 1953. The Ministry for Family was headed by the Catholic Franz-Josef Würmeling from 1953 until 1962. The Ministry for Family supported a male breadwinner female homemaker arrangement and did not support an extension of childcare. In 1969 the Social Democratic-Liberal government took office and partially altered the civil and labor code opening new avenues for women's employment. While the government demanded more equal distribution of care work within the family, measures to support this change, such an amendment of the tax and benefit system and expansion of public childcare, were not taken. At that time the women's movement and student protests gave marginal attention to childcare. If childcare was on their agenda then as part of the demand to make the education system less authoritarian, Kinderläden (children's shops) were set up that reflected these ideas. However, these children's shops relied on parental involvement and were not designed to take care of children to allow mothers to combine work and family more easily (see (Neumann 2003, 13).

A new maternalist debate emerged on "new motherliness" (Neue Mütterlichkeit) in the 1980s. The needs of mothers – independently from their marital status – were formulated to elevate the social recognition, financial support and improve the infrastructure for women with children. Part of this debate was the demand for "wage for housework" to reflect the equal value of paid work and care work in the family (Opielka 2003, 23). These demands were not tied to childcare or active labor market participation of women (Neumann 2003, 15). The Christian

Democratic-Liberal government (CDU/CSU and F.D.P.), in office from 1982 to 1998, did not meet these demands and supported a Three-Phase-Model of female employment. Here, a "typical work biography" consists of (full-time) work until childbirth, a relatively long parental leave and return to (part-time) work hereafter. The transition from a male breadwinner female homemaker model has been supported through a policy mix of parental leave (Erziehungsurlaub) and parental assistance (Erziehungsgeld). Shortly after the election in 1982 the government re-introduced the dual system of child tax credits (Kinderfreibeträge) and child allowance (Kindergeld). Since childcare facilities and schools are largely part-time most women "prefer" part-time work. This gives firms an instrument to select who will return and in which conditions (Pfau-Effinger 2000, 132). Unlike in the UK, the welfare state and the labor market policies have not specifically targeted lone parents.

After the German reunification the West German tax and benefit system, family policy, social security and administrative structure on childcare was transferred to East Germany. Local authorities became in charge of childcare provisions. In the process of political and economic restructuring local authorities in the East Germany faced severe fiscal constraints. A retrenchment of women's employment was paralleled by a retrenchment of public childcare provisions to cut public spending.

In 1989 Professor Ursula Lehr, Minister for Family from 1989-1991, demanded for the first time an expansion of childcare for under three year olds. The proposal met fierce resistance from the Christian Democratic Party and the states. The initiative was uniformly opposed by all of the Länder unless the federal government provided significant financial assistance to the Länder. The only way the federal government could become active on childcare was through a legislative initiative. In 1991 the government amended the Children and Youth Act (Kinder und Jugendhilfegesetz) (KJHG) and introduced the term "bedarfgerechtes Versorgungsangebot" (supply based on demand) for all age groups. This was, however, not seen as sufficient to

promote an extension of childcare places in West Germany and prevent a cut back of existing ones in East Germany.

In 1992 negotiations on a new German abortion act began. The West German Paragraph 218 of the Criminal Code was modified and applied to East Germany eventually in 1995. In the course of the abortion acts' amendment childcare played an important role. Since abortion would no longer be easily accessible in East Germany the right to a kindergarten place was seen as necessary compensation. In 1992 the right to a kindergarten place for all three to six year olds was adopted and the act came into force in 1996 (Paragraph 24 KJHG). Local authorities were given time to make the necessary infrastructural investments until 1999. The law does not address opening hours and holiday arrangements which both represent major obstacles for parents to work part- or full-time. For children under the age of 3 years the SGB VIII only recognizes a need based provision (bedarfgerechtes Angebot) leading to a large degree of variation on childcare among the different states and between rural and urban areas.

The federal government had envisioned that local authorities would make infrastructural investments and the government would not have to participate in the costs for these macroeconomic investments. Many local authorities decided however to shift funds rather than allocate additional funds to childcare. Especially in East Germany local authorities could cut back on childcare provisions for children under age 3 (Kindergrippen) and after school care for older children (Kinderhorte). In East Germany, for instance, 56.4% of children under 3 years of age had childcare places in 1989 the number dropped to 14.4% in 2000 (Dingeldey 2003, 103). In West Germany the new legislation has promoted an extension of childcare places within the age segment of 3-6 year olds but limited investments in after school care but still makes full-time employment of parents difficult. Germany remains one of the few European countries with a half-day school system relying on parental support for homework and a three tier school system where decisions on which school to attend are made when children are aged 10. Through the

combination of limited childcare and a school system relying on parental involvement strong disincentives is set for a dual breadwinner model. In the 1990s the insufficient infrastructure in conjunction with an economic downturn led to a further drop of fertility rates (Kreyenfeld 2002, Sleebos 2003).

In 1998 the Social Democratic-Green government took office. In the first term (1998-2002) the government amended, for instance, the parental leave law (Bundeserziehungsgeldgesetz) and complied with the EU directive. According to the new regulation parents of children born after 1.1.2001 can take parental leave independently of the family type and each parent can also work up to 30 hours. Though budgeting options integrated – allowing choice between different durations of parental leave with higher payments for shorter leave periods – the law has given incentives to return to work earlier and not use the full three years of parental leave. The new law also partially breaks with traditional gender divisions by allowing both parents independent of the employment status of the partner to take the leave.

While the Social Democratic-Green government swiftly implemented EU Directives to further equal opportunities the government did not take steps to reform the tax and benefit system. The marital tax splitting and the option model allowing parents to choose either child allowance (Kindergeld) or child tax credit (Kinderfreibetrag) were maintained. Both measures benefit particularly higher income families. The government also followed the policy legacy of increasing the child allowance to compensate parents for the upbringing of their children. Minister for Family, Senior Citizen, Women and Youth Ingrid Bergmann, 1998-2002, increased the child allowance by nearly 50 percent to 154 Euros per child for the first three children and introduced an education credit of 21640 Euros. At the same time, the household credit (Haushaltsfreibetrag) that gives support to lone parents who cannot benefit from the marital tax splitting has been gradually reduced from 2,916 Euros (2001) to 0 (2004). Furthermore, the government discontinued the care tax credit for lone parents (Betreuungskostenfreibetrag,

approximately 2000 Euros until 1999). Starting in 2000 all households can only claim the child tax credit (Kinderfreibetrag). In households with (both) parents working and childcare costs exceeding 1,548 Euros further tax reductions can be claimed (see (Schratzenstaller 2002, 129). Through these reforms fiscal incentives are given for high income parents to remain employed and to hire private help in the household while at the same time the fiscal support for employed lone parents has been reduced. The government reintroduced the tax credit for lone parents who live without a partner. "True" lone parents can receive 1,300 Euros as tax credit starting in January 2004.

In regard to childcare the government did not take specific actions within the first term in office. However, childcare and education came forcefully onto the political agenda when the OECD PISA study was released in 2000[128]. According to this study educational achievements of German students were below OECD average on reading, math and sciences. The results put educational concerns onto the political agenda and enabled women's activists within the government to demand decisive action on education. Within the emerging political debate on the PISA results long-standing demands for whole day schools to improve students' performance reemergered. These debates translated into a program "Education and Care" (Bildung und Betreuung) and the governments' commitment to transfer 4 billion Euros from the federal government to the Länder to set up whole day schools once re-elected.

In the second term in office (2002 to present) the Social Democratic-Green government continued with and expanded its labor market reform and became active on childcare. During the first term in office the government passed the Job-AQTIV Act 2001 that reformed the

[128] See http://www.pisa.oecd.org/ for the overall PISA strategy and http://www.mpib-berlin.mpg.de/pisa/PISA-2000_Overview.pdf for specific information in relation to Germany.

SGBIII.[129] The reform has been carried out in reference to the EES. Its key emphasise is on skill acquisition and strengthened preventive labor market measures to avoid long-term unemployment through early intervention by the employment agency. From a gender perspective the new law is important in two ways. Firstly, gender mainstreaming was integrated in paragraph 1 of the Job-AQTIV Act 2001. The introduction of this element of the law was made with specific reference to the EES (BT-Drucksache 14/6944, 26). Secondly, through the Job-AQTIV Act equal opportunities in access to active labor market measures has been promoted. For parents in training and skill acquisition programs the agency should assist in childcare provisions. While the DGB welcomed the reforms the BDA was critical of them and thought that they are not going far enough to restructure the labor market.

In February 2002 the Federal Audit Office (Bundesrechnungshof) reported severe mismanagement of the Federal Employment Agency in reporting of placements and assisting job seekers. Through this scandal the activation strategy of the agency was called into question and consequently, the agency as a whole. The government decided to set up a Commission led by Peter Hartz, manager at Volkswagen, to develop an overall labor market strategy. Shortly before the federal election in fall 2002 the Hartz Commission published a set of labor market reforms which translated into Modern Services of the Labor Market Act (Gesetze für moderne Dienstleistungen am Arbeitsmarkt in 2002 and 2003).

The first two sets of Reforms (Hartz I and II) came into force in January 2003[130]. Hartz I reorganized the Federal Agency and its work to assist job seekers has been altered. The

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[129] In 1997 the Labor Promotion Act of 1969 (Arbeitsfoerderungsgesetz, AFG) was transformed into the Sozialgesetzbuch III (SGBIII). Job-Aqtiv Gestetz: Gesetz zur Reform der arbetismarktpolitischen Instrumente. Bundesregierung – Gesetz vom 10.12.2001 – Bundesgesetzblatt Teil I 2001 Nr. 62 4.12.2001, 3443

[130] Hartz I: Bundesregierung – Gesetz vom 23.12.2002 – Bundesgesetzblatt Teil I 2002 Nr. 8730.12.2002, 4607
Hartz II: Bundesregierung – Gesetz vom 23.1.2002 – Bundesgesetzblatt Teil I 2002 Nr. 8730.12.2002, 4621
Hartz III: Bundesregierung – Gesetz vom 23.12.2003 – Bundesgesetzblatt Teil I 2003 Nr. 6527.12.2003, 2848
Hartz IV: Bunesregierung – Gesetz vom 24.12.2004 – Bundesgesetzblatt Teil I 2003 Nr. 6629.12.2003, 2954

tripartite structure of the agency involving employers, trade unions and the government was transformed to a supervisory board. In addition, job-centers were opened to assist job seekers to find a new position. Hartz II introduced tax subsidized Ich-AG giving unemployed incentives to start up their own business (entrepreneurship) as well as Minijobs which provide tax subsidies for low income jobs, especially sought to reduce the black market in domestic work.

Parallel to the implementation of Hartz I and II the Chancellor's office formulated a strategy paper on "A way to more growth, employment and social justice" (Auf dem Weg zu mehr Wachstum, Beschäftigung und Gerechtigkeit). Here, explicit references are made to the Lisbon strategy and emphasized its commitments to the 2010 goals (Kanzleramt 2002, 3). The paper also reinforces the governments' commitment to macroeconomic investments in the areas of education and families. In line with the coalition treaty between Social Democrats and Green Party, the paper calls for macro-economic investments in care and education. The federal government will provide 4 billion Euros to assist the Länder in setting up whole day schools and 1.5 billion Euros per year from 2003-6 to assist local authorities in expanding childcare for under three year olds. The paper also argues that the federal division of responsibilities should not prevent these investments (Kanzleramt 2002, 7-8). A revision of the tax code in support of the male breadwinner model is not included in the tax and benefit reform package. In regard to the labor market the strategy paper envisions a reform of labor market policy according to the Hartz reforms. The key concepts of Hartz III and IV are reinforced, namely a combination of unemployment assistance (Arbeitslosengeld) and social assistance (Sozialhilfe) to cut spending on labor market policy; limited options to deny a job offered; deregulation of the labor market to accommodate fixed term and other forms of employment; new organization of the low wage labor market segment (Kanzleramt 2002, 16).

For an overview of the key legal changes see: http://www.labournet.de/diskussion/arbeit/realpolitik/modelle/hartz/uebersicht.pdf

On March 14 2003 Chancellor Schröder announced his Agenda 2010 in parliament. Following the strategy paper the Chancellor supported the Hartz reforms. In June 2003 the Social Democratic Party a posteriori approved of the Hartz agenda as part of the document "Courage to Change" (Mut zur Veränderung) (SPD 2003, 13-16). Again, references are made to the creation of a European Social Model that does not regulate society via market rules. The reform agenda 2010 is seen as a way to restructure welfare states to allow for growth and tied to the Lisbon strategy (SPD 2003, 7). A dual strategy to increase employability is proposed in the key chapters of the agenda 2010 on education, training and innovation and modernization of the labor market. On the one hand, the opportunities for young people (below 25) should be enhanced to get them into employment and childcare provisions should be extended provide better conditions to reconcile work and family life. On the other hand, the pressure on older employees to remain employed is enhanced through a termination of early retirement policy, combination of social assistance and unemployment assistance and reduced options to decline a job. The reform agenda met with high levels of resistance within the Social Democratic Party and trade unions. The Hartz III and IV were passed – with minor alterations – by both Houses of Parliament after long negotiations between federal and state governments and intensive lobbying on behalf of the social partners at the end of 2003.

From a gender perspective the Hartz reforms are quite problematic. A positive aspect of the reform is that childcare has become a priority of the government and the government is willing to use fiscal gains through the Hartz reforms for these macroeconomic investments.[131] Through this policy innovation the government has not diverted from the policy legacy of compensating parents for raising children through fiscal transfers to families but has rather

[131] The redistribution component of agenda 2010, namely the transferal of public spending away from labor market measures to macroeconomic investment, is however put into question since new the fiscal gains from the Arbeitslosengeld II might be much lower than anticipated Käppner J. 2004. In der Zaungast-Rolle. Die deutschen Städte fühlen sich bei der Föderalismusreform übergangen und fordern als Konsequenz eine Verfassungsänderung. In *Süddeutsche Zeitung*. München.

added a new element to the strategy. The labor market reforms themselves are seen critically. Gender mainstreaming has not been applied to the Hartz III and IV reform package to reduce or eliminate a strong gender bias of the reforms.[132] Firstly, the Arbeitslosengeld II takes the family income as the basis for determining whether or not a person will receive these benefits. At the same time it has become more difficult to decline a job. For a person with an employed partner this enhances the pressure to either take on the job offered or to withdraw from the active labor market after one year of being unemployed. For low skilled (female) workers employment in "minijobs" is indirectly encouraged by making it harder to decline a job offer (Zumutbarkeitskriterien). For (lone) parents the criteria for having to accept a job are less strict since they are conditioned on the availability of childcare. The new regulation perceives lone parents as being able to seek employment once their children are three years old and thus, breaks with the welfare state legacy of given special protection to mothers to withdraw from the labor market. Through these new regulations an increase in child poverty is anticipated and there has not been a conclusive strategy developed to reduce child poverty[133].

Overall, the Agenda 2010 introduces a significant restructuring of the labor market which implicitly furthers the employment of (skilled female) workers planned investments in childcare and school systems and tax incentives to hire domestic help (Minijobs) and create (low skilled female) jobs; increases the pressure on married women with an employed partner to find employment, take on a job or withdraw from the active labor market; enhances the pressure on single parents to seek paid work by treating them as being employable aside from few

[132] Due to massive protests from feminist actors within the DGB, Deutsche Justinnenbund, Berufliche Perspektiven fuer Frauen E.V. and the equal opportunities unit within the federal employment agency a sentence on gender mainstreaming has been added on the first respectively the last page of the legislative drafts. Feminist activism had relatively little impact during the legislative process. Childcare was also not a key concern of these protests.

[133] Associations, such as the Kinderschutzbund (Association Protection Children) organized large scale protest against the Arbeitslosengeld II since a massive increase in recipients of social assistance is expected bringing 1,5 million children into social assistance. The BMFSFJ proposed a credit of 140 Euros for low income working parents. The ministries estimate that those 150,000 children and their families will be removed from the Arbeitslosengeld II. Arbeitslosengeld II pays 345 Euros in West Germany and 331 Euros in East Germany (see BMFSFJ 2003). Housing costs and other related costs are covered by local authorities.

exceptions. Childcare is not an integral part of the labor market reform and only plays a role in terms of financing investments for under three year olds. A radical shift towards universal childcare cannot be achieved with the funds allocated and neither with the ones allocated for the building of whole day schools. Despite these shortcomings we can nevertheless determine a process of institutional layering (Thelen 1999, Thelen 2003) in the sense that a new dimension is added to the policy legacy on child support. In other words, while the Christian Democratic governments have provided families with fiscal support to help parents bear the expense of children the Social Democratic-Green government continues with this strategy but adds a new component to it, namely infrastructural investments. Herewith, the government supports "choice" between homemaking and paid work.

The Grand Coalition government between Christian Democrats and Social Democrats continues with the transformation of the welfare state. In 2006 and 2007 three key legal changes were carried out that significantly alter social provisions and promote the establishment of a dual income welfare state and a stronger role of fathers in the provision of care. The legal changes are:

- Parental leave and payment scheme
- Increase in tax deduction for childcare. Euros 4,000 per child
- Increase in the number of childcare places for under three year olds proposed

The new Parental Leave and Payment Act (Bundeselterngeld- und Elternzeitgesetz – BEEG) was passed on Octover 13, 2006 and came into force on January 1st 2007. The new law replaces the "Elterngeld" (parental pay) through the "Bundeserziehungsgeld" (Federal Education Pay) for all birth after January 1st, 2007. The new payment scheme shifts away from a flat rate and pays 67% of the last income after taxes. The amount can vary between a minimum payment of 300 Euros and a maximum payment of 1,800 Euros. If one of the parents was not employment at the time of birth the minimum amount will be paid. The payment can be received

for a maximum of 12 months for married couples if only one person takes parental leave. If both partner take part of the parental leave the payment can be extended by two months. These month are referred to as "fathers' month" since it is still assumed that women are by and large going to take the longer period of leave and the additional two month would be taken by fathers. Thus, the payment is for a maximum of 14 months and parents can decide how they want to split the time.

The new parental payment scheme encourages an earlier return to work since the payment scheme is limited to one year. While the parental leave legislation still guarantees a job for a maximum of three years the fiscal incentives provided by the new law encourage an earlier return to work. In addition, costs for having children are covered more fully by the government which is sought to encourage parents to have more children. The introduction of the fathers' month was highly contested, particularly within the Christian Democratic Party. The law was proposed by the Minister for Family Affairs van der Leyen (CDU) and van der Leyen and Chancellor Merkel – among others – were strongly in favor of introducing them (Financial Times, April 27, 2006). The SPD was strongly in favor of the "father months". The passage of the law can be seen as adding a new layer to the way parental leave is organized. The new legislation keeps the existing legislation intact but through this addition a departure from the male breadwinner to a dual income model with a stronger involvement of fathers is promoted.[134]

Secondly, the government passed the Act for Fiscal Promotion of Growth and Employment 2006 (Gesetz zur steuerlichen Förderung von Wachstum und Beschäftigung of April 26, 2006). Starting January 1st, 2006 childcare costs amounting to two-thirds of expenditures up to a maximum of 4,000 Euros per child can be claimed as special expenditures

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[134] For a discussion of the recent reform see, for instance, Spiess CK, Wrohlich K. 2006. The Parental Leave Benefit Reform in Germany: Costs and Labour Market Outcomes of Moving Towards the Scandinavian Model. *IZA Discussion Paper* . See also a summary of the reform by the Bertelsmann foundation: http://www.reformmonitor.org/httpd-cache/doc_reports_2-3197.html

incurred for production of income. The tax deduction can only be claimed if both parents are working or by single parents. In other words, couples where one partner is a full-time homemaker cannot claim this deduction.

Thirdly, Minister van der Leyen has initiated a childcare initiative for under three year olds. On April 2nd, 2007 the federal government, federal states and local governments agreed to increase the childcare places for children under the age of 3. Until 2013 the agreement says that 750,000 new places will be created. This requires an investment of 3 billion Euros. It is, however, still unclear how this will be financed and a fierce controversy between different levels of government is happening. If the reforms go through it will mean that approximately 2/3 of the children will have a place available (which is in line with the EES childcare targets for children 0-3 years). Currently, there are only 285,000 places available.[135] In 2005 only 13.7% of children under the age of 3 had a place. While this was up by 25% since 2002 it is still rather low.[136] More places are available in former Eastern Germany than in former Western Germany. With these reforms the number of childcare places for under three year olds will triple.[137]

Minister van der Leyen, a physician and mother of seven children, has made employment and motherhood more acceptable within the Christian Democratic Party. While the Christian Democratic Party has strongly supported a division of labor after WW II the party has taken on a position previously only taken by the Green Party and women within the Social Democratic Party. Thus, all political parties are supportive of the new legislation and a turn away from the male breadwinner model.

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[135] http://www.bmfsfj.de/Politikbereiche/Familie/kinderbetreuung.html
[136] http://www.bmfsfj.de/Politikbereiche/kinder-und-jugend,did=81130.html
[137] For recent news coverage see: http://www.expatica.com/actual/article.asp?subchannel_id=26&story_id=39819; http://www.dw-world.de/dw/article/0,2144,2376742,00.html; http://www.dw-world.de/dw/article/0,2144,2367896,00.html; http://www.dw-world.de/dw/article/0,2144,2367896,00.html; http://www.ftd.de/politik/deutschland/:Pl%E4ne%20Kita%20Gutscheine%20Bund%20L%E4nder/206093.html; http://www.ftd.de/politik/deutschland/:Bund%20Kita%20Ausbau/191224.html.

These recent changes and proposed changes will significantly alter the social provisions. The legislative change shift the focus away from direct fiscal support for families with children to fiscal support for workers and investment in infrastructure that allow parents to better reconcile work and family life.

The reforms could be passed because the Grand Coalition holds the majority in both Houses of Parliament. The initiative is supported by social partners and – after initial criticism – from the main churches. Moving towards a “Scandinavian model” or a dual income model with a well-developed infrastructure to support families is seen as key to bringing more women into the labor market, helping to increase the birth rate and last but not least, to improve the performance of German students in international tests such as the PISA studies.

5.4.2 EES and Childcare

In Germany the drawing of the NAP is done in a decentralized fashion reflecting the high degree of vertical and horizontal fragmentation of the state. Prior to the 1998 election the Ministry for Economics and Technology (Bundesministerium für Wirtschaft und Technologie) was responsible for the drawing of the NAP. After the Social-Democratic Green government took office in fall 1998, the responsibilities shifted twice in the cause of an overall restructuring of the ministries. The Ministry of Finance (Bundesministerium für Finanzen, BMF) had the coordinating responsibilities from 1999-2003. The Ministry of Economics and Labour (Bundesministerium für Wirtschaft und Arbeit, BMWA, formally the Bundesministerium für Arbeit und Sozialordnung, BMA) has been in charge of key issues of the NAP concerning labor market reforms. Since the fall 2003 the BMWA has been leading the drawing of the NAP. The ministry coordinating the drawing of the NAP consults with other ministries, such as the Ministry for Health and Social Security, the Federal Ministry of Education and Research or the Federal

Ministry for Family, Senior Citizens, Women and Youth (BMFSFJ). The different states and local authorities are contacted and each state is drawing up a statement that is added to the NAP[138].

While different ministries have been coordinating the process the staff working on the drawing of the NAP has largely remained the same. The BMWA is the central actor in bilateral negotiations with the European Commission and the Employment Committee (EMCO) as well as consulting with the Länder, central associations of the local authorities and the social partners. The BMWA is also the key actor in preparing labor market reforms and the reform of the Federal Employment Agency (Bundesagentur für Arbeit, formally Bundesanstalt für Arbeit). Since the Federal Employment Agency has been a "semi-sovereign administration" (Selbstverwaltung) the social partners are involved in the administration of the agency alongside the government on the federal, state and local level.

In respect to childcare and education the drawing of the NAP involves two ministries. The Federal Ministry of Education and Research (Bundesministerium für Bildung und Wissenschaft) is responsible for coordinating with the Ministries of Education on the state level since key responsibilities in this area fall into the jurisdiction of the states. The Ministry of Education and Research can coordinate the education policy through the Conference for the Arts and Culture (Kultusministerkonferenz). The federal ministry is not entitled to set standards in terms of opening hours of schools and curriculum. The co- financing of the whole day school project required a formal agreement between the federal and state level (Bund-Länder-Abkommen).

The BMFSFJ is coordinating with the states, the local authorities as well as social partners' on childcare provisions. The BMFSFJ is only responsible for drawing of sections on

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[138] Interviews have been conducted with the BMWA, BMFSFJ, BDA, DGB, Deutsche Frauenrat.

equal opportunities and is given limited ability to apply gender mainstreaming to the NAP as a whole. An external monitoring unit such as the EOC in the UK does not exist in Germany. Important NGOs such as the Deutsche Frauenrat (German Women's Federation) or the Deutsche Juristinnenbund (German Female Lawyers Association) are not consulted by the ministry. The BMFSFJ sees the NAP as a report of what the government has done and not as an action plan.

While the number of government actors involved in the drawing of the NAP is significantly larger in Germany than in the UK the process is similarly closed. Germany is fundamentally distinctive from UK in that Germany does not have a national childcare strategy and German federal government refuses to set national target. This makes the government more "vulnerable" to external pressure exercised via the OMC. In this particular national conditions European targets and recommendations play a different role than in the UK[139].

Firstly, the EES targets on childcare represent a significant challenge to the government since Germany is one of the few European countries with low childcare provisions – especially for under three year olds – and without a national childcare strategy to meet the targets. The government is repeatedly quoting the prospective investments in childcare but these are not tied to national targets. One of the reasons for the resistance to national targets is the political experience of not meeting targets set to reduce unemployment of 3.5 million by the end of the first term in office in 2002. The opposition parties interpreted not meeting the target as an overall failure of the government's labor market strategy. Despite supporting European wide targets on childcare, the government is inviting external pressure by refusing to set national targets. The government seeks to compensate for the lack of specific national targets and

[139] Finally, EQUAL funds are not directly channeled to a particular purpose, i.e. training of child minders. The projects funded through the fund are running until 2006 and it is too early to determine evaluate if innovative solutions are produced.

strategy by making detailed reports on the advancements on childcare on the Länder level in its NAP 2003. Secondly, Germany receives regularly recommendations to improve its childcare provisions. Since the government is not setting up national targets and only reiterates the increased funds given to local authorities further frictions between the EES strategy and the national response are created. While the lack of a national strategy and targets makes the government vulnerable to external pressure it strengthens its position vis-à-vis the Länder and conservative forces wanting to preserve the male breadwinner female homemaker division of labor. In Germany childcare and education fall into the responsibility of the Länder and local authorities. These actors have exercised their veto power to prevent the federal government from becoming active on childcare and education since this perceived this as weakening the division of power within the federalism. With the EES targets on childcare coming into play the governments' demands for macroeconomic investment on childcare are strengthened.

While the government is open for external pressure through the OMC this would have limited consequences without domestic pressure. Germany does not have a strong childcare lobby and childcare initiatives are mainly locally organized without the organizational capacity to influence federal policy making. Since NGOs are not consulted in the drawing of the NAP and given the low public visibility of the EES we can exclusively focus on the social partners positioning towards childcare. Here, the question is if social partners, and especially employers, are using the resources the EES provides to achieve their own goals. This will help us to understand why the "boomerang effect" works in the case of Germany.

In the drawing of the NAP we find a medium level involvement of social partners. Federal bodies of the social partners are the Deutsche Gewerkschaftsbund (DGB), Bund Deutscher Arbeitgeber (BDA), Bund Deutscher Industrie (BDI), Deutsche Industrie und Handelskammer (DIHK) and the Zentralverband des Deutschen Handwerks (ZDH). In the drawing of the NAP the BMWA consults mainly with the BDA and DGB since these

organizations are concerned with labor market policy. The key difference between the implementation of the NAP in the UK and Germany lay is the level of interest mediation and the role the social partners play in the broader labor market and childcare reform process. The role of the social partners cannot be restricted to their role in the drawing of the NAP. It is necessary to also investigate the strategies evolving around the NAP and the general involvement of social partners in labor market and policy reforms.

Since 1998 the EES guidelines asks member states and social partners to seek ways to enhance childcare provisions. The German government has perceived this to be a state task and has sought to promote and fund these macroeconomic investments. The BDA supports the government's initiative by saying

> "It is predominantly a governmental task to create high quality childcare and to expand existing once – especially since Germany is one of the countries with the worst provision in Europe. Equal opportunities between men and women and the reconciliation of work and family life can only be achieved through a better childcare provisions" (Bundesvereinigung Deutscher Arbeitgeber (BDA) 2001, 6).

The following year the BDA argues in its position paper on the five year revision of the EES "The Commission's approach is correct arguing that it is the responsibility of the government to create childcare facilities. It is a public task to set up area wide childcare facilities according to demand" (Bundesvereinigung Deutscher Arbeitgeberverbände (BDA) 2002, 6). In 2003 the BDA supported the European Commission's recommendations on childcare arguing that this harms women's labor market participation (Bundesvereinigung Deutscher Arbeitgeberverbände (BDA) 2003). Thus, while it is not clear that the Commission really leaves social partners out of the responsibility to enhance childcare the employers association prefers this interpretation. For the BDA the government has agreed to the EES targets and consequently, it is the government's task to meet the demands. The regular reference to the EES in regard to childcare leaves us

with the question of why employers use the resources the EES provides on this specific issue.[140]

Firstly, firms operate in a CME high-skill, high-wage equilibrium in Germany. With rising numbers of women being employed firms invest significant resources into education and training to provide their employees with firm specific skills. If highly trained women take pro-longed parental leave, return to work part-time or exit the labor market the firm specific investments in training and skill acquisition are lost. During the first term of the Social Democratic Government (1998-2002) a skill shortage in the IT sector let, for instance, to employers' support of women in the IT sectors[141]. In addition, skilled labor shortages are particularly strongly felt in (Catholic) states with low childcare provisions, such as Baden-Württemberg and Bavaria. In addition, labor market predictions predict a skill shortage (despite high unemployment rates) in the future. Thus, having highly qualified women exiting the labor market creates severe problems for firms and this provides incentives for the employers' association to support the federal government's initiative on childcare.

A second point of concern is the involvement of firms in the provision of childcare. German firms – unlike their British counterparts – have to anticipate that the government may require them to participate in the financing and organization of childcare. In 2003 the government has initiated Local Pacts for Families (Lokale Bündnisse für Familien) to enhance social partners' involvement in the reconciliation of work and family life. The strategy entitles elements of flexible working time and work organization, firm based infrastructure for childcare

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[140] The DGB is participating in the drawing of joint statements on particular guidelines but is not actively using the strategy to promote childcare. The DGB is active on equal opportunities within the labor market and childcare plays a secondary role.

[141] On the European level the Commission organized a strategy to increase the level of employment in the IT sector (COM (2000) 48endg). The Federal Employment Agency also initiated a program on gender mainstreaming and IT sector employment. These programs became abandoned with the end of the IT boom. Nevertheless, a shortage on highly qualified workers is anticipated given the low fertility rate and lack of elite training facilities. It is doubtful that Germany will alter its immigration policy to such an extent that it will fill this demand through immigration. Current initiatives, such as the Green Card, will not be sufficient.

and human resource planning taking parental leave into consideration. From 2003-6 these pacts should encourage voluntary arrangements between different actors on the local level, such as welfare associations, firms, trade unions and local authorities to promote the reconciliation of work and family life. From an employer's perspective these pacts are preferable to legislation demanding specific actions from firms or fiscal support. The Alliance for Families (Allianz für Familien) has a similar status as the Voluntary Agreement between the state and leading employers' organization (BDA, BDI, DIHT, ZDH) on equal treatment. The Equal Treatment Act (2.GleiBG 2001) only applies to the public sector and the private sector encourages equal treatment on the basis of a voluntary agreement. Firms prefer a similar arrangement in regard to reconciliation of work and family life.[142] In this specific situation the BDA uses its involvement in the EES to reemphasize that the state rather than firms should facilitate macroeconomic investments on childcare (and education). Thus, for the BDA the EES is a tool to reinforce the value of voluntary arrangements or soft measures. Indirectly, this strategy leads to domestic pressure on the government to find innovative solutions to meet the targets set at the EU level.

Overall, in the specific national context of Germany the EES is an important tool to overcome national resistance to reforms of the labor market and childcare strategies. When the Social-Democratic Green Government took office in 1998 only marginal reforms were carried out in the labor market (i.e. Job-Aqtiv law) and childcare and whole day school initiatives were proposed but not carried out. During the second term in office the government has continuously made references to the Lisbon strategy to promote further reforms of the labor market and reallocate resources from labor market to macroeconomic investments in childcare. Social

[142] If these voluntary arrangements do not produce satisfying results the government can threaten with legal regulations such as done just recently in the case of the education and training. On March 3rd, 2004 the government decided to pass a law requiring firms to pay a fee if they do not provide sufficient vocational training (Ausbildungsabgabegesetz). This law will end a voluntary pact of main employers to deliver sufficient vocational training.

partners, especially employers, are using the EES to put the government between a 'rock and a hard place' to make macroeconomic investments and to fund these needed investments. In this specific context the low public visibility of the EES and lack of (legal and fiscal) sanction mechanisms are compensated by actors' ability to use the high degree of interest mediation to exert pressure on the government. To sum up, the EES has contributed by adding a new component to the family policy, namely federal government spending on infrastructure for childcare (and whole day schools). This is an institutional layering over and above the fiscal strategies of support for families with children.

The Grand Coalition government has continued with the support for childcare. While the new government has still not adopted a childcare strategy and set concrete targets it has taken on the childcare issue seriously. Minister for Family Affairs, Ursula van der Leyen, wants to triple the number of childcare places for children under the age of three by 2013. Through this initiative Germany would meet the EES childcare targets of 33% for children ages 0-3 years three years behind the actual deadline. Van der Leyen justifies the involvement of the federal government in an issue that pertains traditionally to the federal states and local communities in reference to the low birth rate, positive effects for women's employment rates and to bring Germany in line with European standards. [143]

5.5 EES and Childcare - Germany and the UK compared

Childcare has been on the European agenda since the 1980s. Based on the work of the European Commission Network on Childcare a directive on childcare was drafted in 1992. The draft directive set specific targets for childcare for under three year olds and children of three to school age and emphasized an egalitarian vision of childcare following the Scandinavian

[143] Deutsche Welle. 2007. German Parents to Get More Daycare Options. In *Deutsche Welle*

example. The draft directive was however not adopted. In the late 1990s childcare became part of the European Employment Strategy (EES). While the European Union integrated childcare within a concrete implementation framework of the EES it only became a priority of the strategy at the Barcelona Council of Ministers in 2002 and in the 2003 guidelines. The EES has narrowly incorporated childcare and focuses on aspects of quantity, quality and affordability – with most attention being given to quantity of childcare. The strategy lacks a normative vision of childcare. The distribution of care work within the family has not been addressed and neither has the issues evolving around childcare workers been included in the strategy. The narrow focus of the EES on targets is part of the EES strategy to honor national diversity and the principle of subsidiarity but limits the building of a Social Europe on a normative level. For national actors the specific incorporation of childcare limits and structures the ability to use the EES.

Comparing the implementation of the EES in the UK and Germany I found that only under certain institutional conditions, namely a high number of veto points in the legislative process – encouraging consensus driven reform strategies by the government – in combination with a high degree of interest mediation let to the incorporation of the EES in national policy-making processes. In the UK New Labour took office in 1997. The government immediately made childcare a priority and integrated childcare in its economic policy. Because of the low number of institional veto points the government was able to carry out its policy reforms swiftly. While the government had the political capacity to pursue the reform without consulting NGOs it voluntarily granted them access to both the development and the revision of the National Childcare Strategy. This has been – to some extent – less the case for Sure Start. In the context of the EES the government refers to the National Childcare Strategy to minimize external pressure. While the government could insulate itself from the soft pressures of the OMC, national actors, such as the EOC or TUC could theoretically use the EES to question the set

pattern of response to external recommendations and to demand further action of the government, particularly for children care for children under the age of three. While these actors are vocal about the shortcomings of the National Childcare Strategy, in the revision of the strategy they are not incorporating the EES into their arguments in the national debates and they also do not mobilize around the EES. The EES also does not play a role in negations vis-à-vis Sure Start.

The key reasons for actors choosing not to use the EES are the lack of legal and fiscal sanction mechanism and low public visibility of the strategy. In other words, while the EES provides a carrot for member states to comply with its guidelines there is no stick that can punish member states for not doing enough to meet commonly agreed guidelines and targets of the EES.

These inherent shortcomings of the soft law approach could be overcome if the social partners would mobilize around the strategy and use their preferential involvement in the drawing up of the NAP. Social partners however do not dedicate significant resources to the NAP and do not mobilize around it. The underlying reason for the indifference of social partners to the EES is the low level of interest mediation between the state, employers and unions in the UK. In the Liberal Market Economy (LME) (Hall & Soskice 2001) context firms have relatively little incentive to support universal provision of childcare and they do not anticipate that the government could draw them into social pacts to provide for this infrastructure. In this specific national context the EES neither exerts significant external pressure nor is it made relevant on the national level through national actor mobilization on childcare using the EES to achieve their goals. Thus, in a polity with few veto points and subsequently a high reform capacity of the political executive it is difficult for sub-state actors to incorporate soft law into strategies. Those challenging could be overcome if interest mediation was high – such as in the case of Sweden –

where interest group could hold the government accountable to non-legally binding laws through well established channels of interest mediation.

In Germany the Social Democratic Party and the Green Party supported an extension of public childcare prior to the 1998 election. Once in office no actual strategy was derived. Through the vertical division of power between the federal government and the states childcare – like education – falls into the responsibility of the states. The establishment of childcare targets on the European level strengthens the federal governments demand for more macroeconomic investments and the position of the federal government vis-à-vis the states.

The external pressure exercised through the OMC was complemented by internal pressure from the social partners, especially employers. Germany is a Coordinated Market Economy (CME) with high skill-high wage labor market equilibrium and firm and industry specific skill investments (Hall & Soskice 2001). In this context employers have an interest in keeping skilled female workers in the labor market since a growing number of qualified women are employed and a skilled labor shortage is anticipated in the near future. Childcare is seen as one of the key preconditions to facilitate the reconciliation of work and family life and to keep these workers tied to the labor market. The EES is important because it allows employers' associations to point to the responsibility of the government to carry out the macroeconomic investment in childcare and education and training. Secondly, through the high level of interest mediation employers are more concerned about being drawn into the actual childcare provisions than their British counterparts. The federal government proposed using cuts in social spending on unemployment assistance and social assistance to finance the expansion of childcare. In contrast to the UK where the expansion of childcare is tax financed and employers do not play a significant role in the strategy's delivery German employers cannot be certain they are not required to share part of the costs. Through the higher degree of interest mediation the government has however already initiated local pacts for families where employers are drawn

into social policy. From an employers' perspective voluntary cooperation is preferred to legislative regulations or formal "taxes" on companies or wages to finance childcare. The EES is used to reiterate this point and make the government accountable for the commitments it has made on the European level. The combination of a high number of institutional veto points – encouraging consensus or negotiated reform strategies – and a high degree of interest mediation create favorable conditions for the incorporation of soft law into national policy-making processes.

	EES childcare target for 2010 ❖ **33% for 0-3 years** ❖ **90% for 3 to compulsory school age**	
	United Kingdom	**Germany**
Childcare coverage in 2002[144] ❖ **0-3 years** ❖ **3 to compulsory school age**	❖ 10.8 % ❖ 29.4 % ❖ Misfit for both age groups	❖ 8.5 % ❖ 89.5 % ❖ Misfit for 0-3 years
Structural approach to implementing EES	❖ Centralized ❖ Very limited access to sub-state actors	❖ Decentralized ❖ Incorporation of sub-state actors, particularly social partners
Initial legislation on childcare	❖ Labour government passed legislation prior to EES 1. National Childcare Strategy 2. Sure Start	❖ SPD-Green government did <u>not</u> adopt 1. formal childcare strategy 2. national targets
Challenging Phase	❖ Key sub-state actors, such as TUC, EOC, Daycare Trust, Sure Start activists do not draw on EES	❖ EES used in negotiations on labor market reform by key sub-state actors, such as BDA, DGB, childcare lobby ❖ Issue linkage of employability and childcare
Policy Change	❖ Policies on childcare were not amended due to EES	❖ No formal childcare strategy but increase in funds ❖ Grand coalition continues expansion of childcare places

[144] National Action Plan Data 2004 and Indicator Group http://europa.eu.int/comm/employment_social/employment_strategy/indic/compendium_jer2004_en.pdf

Implications	❖ Despite a well established European litigation strategy no confrontational strategy around EES	❖ EES important for finding political consensus between different levels of government and across party lines ❖ Soft law used by sub-state actors to increase leverage in policy-making process ❖ Findings challenge misfit and party hypotheses

Table 15: *EES childcare guidelines – Implementation in the United Kingdom and Germany*

5.6 Summary – Furthering Gender Equality Through Soft Law

In contrast to the case of European hard law British actors such as the TUC and EOC have not successfully incorporated European soft law into their strategies. The key reasons for the failure to develop a confrontational strategy around EES soft law was the mix of actor characteristics and preferences and the polity in which they operated.

In the UK the political executive has a high reform capacity and Labour government under Prime Minister Tony Blair did not voluntarily integrate soft law into its core labor market reforms, such as the New Deal Program and the (universal) National Childcare Strategy and the (targeted) Sure Start program. These key pillars of New Labour's labor market reform and childcare strategy were passed swiftly after Labour came into power without references to European law.

Interest groups were not able to develop a confrontational strategy around soft law since soft law does not permit the involvement of the ECJ. Furthermore, mobilization around soft law was made difficult in a polity with a high concentration of power, limited veto points and a centralized approach to implementing the EES that gave limited access to interest groups. In addition, a weak social partnership of CBI and TUC has made it difficult to engage in a critical debate with the government when the National Action Plans was drawn up. Thus, a combination

of limited institutional veto points and societal veto points made it difficult for actors to successfully develop a strategy involving European soft law. This resulted in limited policy innovation through soft law in the UK.

Overall, we find that in the case of soft law in the UK there was

- No empowerment of women's activists
- No confrontational strategy
- Limited policy innovation

The interest group hypothesis, discussed earlier as an alternative explanation, assumes that interest groups will mobilize when benefits of a specific legislative change are distributed narrowly and costs are distributed most widely. This case challenges this assumption – interest groups that are able to use one form of EU law successfully cannot necessarily use another kind of EU law equally well. It points to the importance of the institutional and political environment an interest group is operating in and the kind of resources a particular European law makes available to them. Only when there is a fit between interest group preferences, the institutional environment they operate in and the kind of EU law available to them are they able to integrate it successfully into their strategies and increase their access and leverage in the policy making process. Second, under the party hypothesis, having a Labour government in power that in general supported gender equality in the labor market should have made the drawing up of the National Actions Plans a fairly open and inclusive process for societal actors to participate in. This was, however, not the case.

In contrast, German actors have successfully incorporated European soft law into negotiated policy reforms. Due to a large number of veto points in the political system the political executive has to routinely find a compromise with the opposition and federal states to pass reforms. While the large number of veto points provides disincentives to sub-state actors to Europeanize their strategies in the case of hard law, the large number of institutional veto

points in combination with institutions of democratic corporatism has a positive or empowering effect in the case of soft law. When legislation hits a potential roadblock in the legislative process soft law can be used by state and sub-state actors to increase their access and leverage to the policy-making process. Because soft law provides more flexibility than hard law in the way actors can incorporate it in domestic negotiations it has played an important role in cooperative problem solving between different levels of government, across party lines and between state and societal actors than hard law. Through the use of soft law sub-state actors could increase their access and leverage in the policy-making process and shift the domestic balance of power on a particular policy issue. Recent labor market reforms, such as the Hartz Reforms and reforms on childcare that extended federal competencies on childcare and education and increased the number of childcare places, required the cooperation between the federal government and federal states. The political executive and interest groups integrated soft law into their strategies in negotiations at veto points. This increased the reform capacity of the political executive and helped to partially redraw the competencies on the matter between the federal government, federal states and local communities. It also increased the ability of feminist activists, mainly within political parties, and social partners to influence the policy making process.

Thus, in the German case soft law has enhanced the reform capacity of the political executive in a polity with many veto points. Soft law has been integrated in a consensus driven reform process by both the government and interest groups. Because soft law is integrated in cooperative problem solving it has been essential for achieving policy innovation. Soft law has helped to promote a move away from the German male breadwinner welfare state towards one that supports women's labor market participation, encouraging fathers to play a larger role in care and a better work-life balance through infrastructural investments in care and education.

Thus, in the German case soft law:

- Increased influence of women's activists in legislative process
- Is part of cooperative problem solving and negotiated reform process
- Resulted in policy innovation transforming the German welfare state

This case study also leads to a few interesting conclusions on some of the alternative explanations discussed earlier. The misfit hypothesis would suggest that European law is filtered through domestic institutional arrangements and underestimates the ability of European law to lead to institutional change. The case of childcare points to the ability of European law to encourage policy change that significantly alters the way the welfare state is set up. These reforms have initiated a move away from the male breadwinner welfare state towards a dual income model. The recent policy innovations point to institutional layering (Streeck & Thelen 2005). Thus, while in the German case European hard law has had mixed results in achieving policy reform European soft law has been a useful tool for domestic actors to achieve policy change a highly contested area which has previously been hard to modernize.

6 Enforcement and consensus politics – Different ways of drawing on EU law

The conclusions of this dissertation can be organized along the following three main points:

- ❖ Hard law is not always the stronger and/or preferred mode of governance. For domestic actors to use either mode of governance successfully the institutional environment is of utmost importance.
- ❖ Veto points influence not only the magnitude of policy change but also the behavior of interest groups.
- ❖ Through the implementation of EU law welfare states have evolved. There is, however, no conversion of welfare state systems – instead, there is a layering effect.

6.1 A comparison of the efficacy of hard law and soft law

International legal scholars and scholars within the Europeanization literature have posed the question of whether legally binding hard law is more effective than soft law in achieving policy change. The conventional wisdom is that the harder the law is – the higher the degree of obligation, delegation and precision – the more effective the law will be in achieving actual policy change (Abbott & Snidal 2000, Kahler 2000). *The dissertation research has show that hard law is however not a superior mode of governance.*

The UK case seems to confirm this common wisdom. Private litigants, especially the EOC and TUC, mobilized around hard law. They found national judges receptive to referring legal cases to the ECJ for preliminary hearings. Once a favorable ECJ judgment was received they organized political campaigns to publicize the case law and filed copy-cat cases to make

the cost of non-compliance for industry apparent. This put the political executive under pressure to amend legislation. The same actors, however, did not integrate EES guidelines into their domestic strategies. This suggests that hard law is a more powerful mode of governance and is better utilized by domestic actors to bring about policy change. In the German case, however, the opposite scenario holds. Private litigants developed European litigation strategies but their efforts were not backed up by interest groups (unions, women's organizations). The follow-through on legal victories was by and large absent. Opposition to reform, mainly employer's organizations and unions, mobilized to avoid broad legal changes. In contrast, both the government and sub-state actors incorporated soft law into cooperative problem solving strategies to negotiate a policy compromise at various veto points in the legislative process. In other words, soft law was used to achieve a policy compromise across party lines and different levels of government. This made possible the passage of key labor market reforms and has promoted macroeconomic investments in education and childcare as part of the overall economic policy. Thus the German case belies the conventional wisdom about the relative strengths of hard and soft law.

Because actors have developed different kinds of strategies around different kinds of European law it draws attention to the distinct legal and political opportunities different modes of governance offer to sub-state actors within member states. The empirical case studies show that neither mode of governance is superior. While equality laws in each mode of governance may seek to achieve the same ends it is important to treat European gender equality laws not as "hybrid laws" but to differentiate clearly between hard and soft law. Only by looking at the different modes of governance and the differing opportunity sets they create for sub-state actors can the process of Europeanization be fully understood.

6.2 European law, veto points and policy change in member states

The number of veto points clearly affects the reform capacity of the political executive. In a polity with many veto points change is more likely to occur in an incremental fashion since reforms can be blocked or delayed at various veto points whereas a polity with a low number of veto points is conducive to faster reform with a broader impact. In the case of the UK, the political executive has a high reform capacity due to a limited number of veto points in political system. In relation to the EU, it is is even possible for the government to pass reforms mainly through Regulations that do not even require the approval of the parliament. This makes reforms swift if the government decides to go forward with them. In contrast, in the case of Germany, the large number of veto points makes reforms happen slowly and incrementally. In regard to the EU, the government has to implement legislation through legal acts that require parliamentary approval. In the area of education and care different levels of government are involved (federal, state, local government) which can further complicate finding a political consensus on reforms.

The decision of domestic actors to incorporate European law is not solely determined by how “hard” the law is. Political actors strategize around veto points and take them into consideration when deciding if and how to Europeanize their strategies. In other words, veto points of member states set distinct incentives or disincentives for political actors to draw on different kinds of EU legal resources. In the UK – a polity with by and large only one veto point – litigation based strategies that can be developed around EU hard law are more effective. This leads to enforced policy change. In Germany – a polity with many veto points – negotiation based strategies around EU soft law have proved more effective. This leads mediated policy change. This shows us that policy outcomes cannot be simply read off from domestic policy institutions and we need to closely look at the dynamic relationship between European law, legislative processes within member states and actor strategies evolving around a particular

kind of European law. There has to be a "fit" between the European mode of governance, domestic institutions and the interest group preference and resources. In other words, the "fit" discussed here is not a "fit/misfit" in terms of institutional or policy fit between EU law and domestic law/institutions nor how high the costs of adjustment are but rather a fit between institutions of the member state, actors and the kind of strategies a particular European law promotes, as discussed below.

Hard law promotes a confrontational strategy, meaning that domestic actors can use legal means to support their claims and enhance their access to the policy formation and legislative process. In a polity with a strong political executive and a fusion of power, such as in the UK, domestic actors can draw on hard law to increase their access and leverage in the legislative process. Since the political executive represents the key veto point once the government concedes to the pressure of ECJ case law and there is a domestic follow-through campaign, those opposing a particular policy reform have no other veto points to mobilize around to block or delay the reform. Thus, a confrontational strategy enables marginal actors to increase their access and leverage in the legislative process and shift the domestic balance of power.

In a polity with a larger number of veto points and institutions of democratic corporatism, interest groups are given deliberate access to the legislative process. Developing a confrontational strategy in this context can jeopardize the relationship with the government and may not yield more influence and leverage. In addition, even if an actor decided to pursue a confrontational strategy and the government conceded to the demands of the interest group a reform could still be blocked at veto points in the legislative process. Thus, multiple veto points make it difficult for actors to organize a follow-through campaign. The ECJ becomes an additional veto player in the political system. Opposition to reform can still mobilize around veto points to block or minimize the effect of legislative reforms and avoid broad legislative changes

because of ECJ case law. In the case of Germany, opposition to policy reforms in the labor market is strongest when state-market relationship is affected, i.e. equal pay, equal treatment. Opposition is hardly present in cases of symbolic changes or when collective bargaining autonomy is not affected, i.e. minimal amendment of parental leave, opening professions to women (such as the military), etc. This also explains the variation in the magnitude of policy change.

Soft law promotes a negotiated and consensus driven strategy, meaning that sub-state actors can only draw on guidelines, targets and recommendations in negotiations with state actors to support their claims. In a polity with a strong political executive there are limited incentives to incorporate soft law into domestic actor strategies because it already has a high reform capacity. Since soft law does not enable interest groups to litigate or put formal pressure on the government it is difficult for them to develop a confrontational strategy. In a polity with many veto points the political executive routinely has to seek compromise with opposition parties and federal states to pass reforms. Here, soft law can be a useful tool to forge a political consensus and enhance the reform capacity of the government. In addition, soft law can be used by interest groups at key points in the legislative process to influence the content and direction of reform proposals.

Thus, veto points influence not only the magnitude of policy change but also the behavior of interest groups.

6.3 Policy innovation through hard and soft law

Welfare states are faced with large external and internal challenges in the 21st century. EU social and economic policy is seeking to assist member states in this transformation. Looking at the way the UK and Germany have implemented different kinds of EU law has made it clear that the UK is still a liberal welfare state and Germany a conservative welfare state. EU

law has produced policy innovation in both member states rather than a conversion of welfare state regimes. In both cases policy changes have altered the way the welfare states approach equality in the labor market and access to the labor market.

In the case of hard law in the UK, for instance, legislation has added minimum levels of social provisions in the area of maternity and parental leave. These provisions are still far below those granted by Scandinavian welfare states and achievements have to seen in the context of a liberal welfare state. Nevertheless, these new provisions have added a new layer to social provisions and the way gender equality is promoted in the UK. Soft law has contributed to a transformation of the male breadwinner welfare state in Germany. Recent legislations on both labor market issues and education and care have drawn on EU soft law to achieve a new policy compromise. Through these reforms core pillars of social provisions that supported the breadwinner-female homemaker division of labor have been undermined. Labor market reforms increasingly treat both partners as workers. In addition, the government shifts governmental support from fiscal support for families to reimbursing families for childcare expenditures (tax incentives) and adds macroeconomic investments in care to create better conditions for both parents to work (i.e. whole day schools and childcare places). Various kinds of reforms have led to policy innovation through layering, meaning that new policies have been added to existing institutions. According to Streek and Thelen layering has the ability to set in motion path-altering dynamics through a mechanism of differential growth (Streeck & Thelen 2005, 23). Thus, while existing institutions may prevail new ones are added and through differential growth processes become important enough to alter the overall institutional framework. An example of this would be, for instance, in the German case the maintenance of the family tax splitting that supports the male breadwinner division of labor and the adding of tax deduction for childcare expenditure for dual income couples that make it economically more feasible for both partners to work. Overall,

European law has let to a large number of policy innovations within member states that have transformed welfare states rather than let to a conversion of welfare states.

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