Informal Governance in the European Union

Kleine, Mareike

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Kleine, Mareike.


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Making full use of its procedural powers, the European Commission under the presidency of Jacques Delors in 1990 submitted a proposal for a directive on the Europe-wide regulation of working time for a large variety of sectors. This proposal was well received by trade unions and most member states, which already had equivalent domestic regulations in place. In the United Kingdom, however, where workers worked the longest hours, the proposal immediately generated strong domestic opposition from employers as well as from Euroskeptics in the ruling Conservative Party, who regarded this proposal as only the beginning of a stream of “socialist” interventions. All other member states felt it was necessary to accommodate the British government in this situation to calm the domestic waves. The problem, however, was that the British government was so ambiguous in its complaints that it was difficult for the other member states to assess which, and how many, concessions were, in fact, required.

The case of the Working Time Directive illustrates the need to determine the boundaries between formal rules and informal governance in the event of ambiguous demands for accommodation. Because the norm of discretion is vague and the conditions that give rise to domestic pressure not always perfectly observable for outsiders, governments have an incentive to abuse the norm and demand more concessions than are truly necessary to render domestic pressure manageable again. The member states therefore delegate the authority to adjudicate on ambiguous demands to a government whose judgment they can trust. Specifically, they delegate adjudicatory authority to a government that is biased against the claimant, since the only reason for it to recommend informal governance even though it has nothing to gain from these special concessions.
must be that it seeks to avert damage to the institution. In the context of the European Union, member states invest the Council presidency with a number of procedural prerogatives and thwart attempts to chair negotiations when it has an incentive to collude with the government demanding to change the legislative proposal through informal governance.

Existing empirical studies of the Council presidency and its influence on negotiations partly support the claim that the government in office needs to be biased in order to wield adjudicatory authority in the Council. Many excellent qualitative studies point to the existence of a norm that says that the presidency should be neutral during Council negotiations (Edwards and Wallace 1977, 42; Bunse 2009, 43–48; Dewost 1984). Unfortunately, they usually fail to specify what it means to be neutral—that is, if it implies disinterest, fair-balanced brokering, or the absence of demands to amend the legislative proposal under discussion (Elgström 2003, 38). More recently, a number of quantitative studies have begun to examine the presidency’s influence on Council negotiations. In separate analyses, Robert Thomson and Andreas Warntjen find that holding the presidency during the final stages of negotiations has a positive and statistically significant effect on a government’s influence on the final outcome (Thomson 2008b, 611–12; Warntjen 2008, 332; see also Schalk et al. 2006). Warntjen (2007) also finds evidence for a presidency influence on the Council agenda. These studies, too, are fraught with difficulties, since the influence they identify depends on the counterfactual outcome (i.e., the outcome that would have occurred if no or a different government had not held the office) that the models assume. Furthermore, these studies beg the questions of why the member states would agree to an arrangement that gives one of them a competitive edge in Council negotiations to begin with.

Rather than being concerned with influence on outcomes, this chapter is interested in the presidency’s authority in adjudicating demands for accommodation. Authority, in this sense, is the presidency’s ability to demand deference from other governments, not to assert national interests. It argues that without the office of the Council presidency, the member states would likely adopt the wrong level of informal governance. Since they care about using the right level of informal governance, and consider a biased presidency’s judgment informative in that regard, the member states defer to its judgment in the form of the presidency compromise.

To show that the Council presidency wields adjudicatory authority in the Council, this chapter focuses on the behavior of the member states and the six governments holding the presidency during the negotiation of the Working Time Directive. Liberal Regime Theory expects presidencies that are biased against the United Kingdom to be active adjudicators and render judgments on the use of informal governance to which all other member states defer. Conversely, presidencies that have an incentive to collude with the United Kingdom can
be expected to stall the negotiation or render judgments on the use of informal governance that their cooperating partners pay no deference to. Power-based theories, in contrast, would not expect small states in charge of the presidency to wield authority in decisions over the use of informal governance or, for that matter, for large states to defer to a decision that goes against their interests. Classical regime theory would expect all presidencies to wield authority by virtue of the office, regardless of power asymmetries or their stance on the legislative proposal.

There are two reasons, one methodological and one practical, for taking a closer look at the Working Time Directive in particular. The methodological reason is that because the conflict took a very long time to resolve, the case enables us to apply the different predictions about the presidency’s authority to six successive governments in office that held different preferences on the Commission’s legislative proposal. The practical reason has to do with the availability of data. Because it serves to prevent conflicts, informal governance is rarely newsworthy and, because it is a departure from official procedures, often remains unrecorded. Due to the fact that an overconfident Commission eschewed informal constraints on its agenda-setting power to submit a highly contentious proposal, the Working Time Directive is an unusually well-documented case that is commonly cited to exemplify the Commission’s formal agenda-setting power (Pollack 2003b, chap. 6).

It should be mentioned that it is not always possible to distinguish between adjudication and other negotiation dynamics. Since there are various ways to mitigate domestic pressure through flexibility (Pelc 2011), all of which have different distributional consequences, the presidency is subject to pressure from various governments and other actors as to whether and how to accommodate the claimant. The following study seeks to reduce these uncertainties using primary “behind-the-scenes” data in various languages, and counterfactual reasoning.

**Agenda Setting: Making Full Use of Formal Rules**

Under the premise of implementing the treaty’s provisions on social policy, the Commission in 1990 submitted a proposal for a directive on the Europe-wide regulation of working time. The preparation of the proposal had been highly contentious even within the Commission with a rift running along both national and ideological lines (Brittan 2000, 49; similarly, Economist 1990). The final vote in the college of commissioners was contested, with six out of the seventeen commissioners openly opposing the draft directive (Independent 1990).

The legislative proposal was contentious for several reasons. First, the proposal’s legal base was disputed. It could have been based on Article 100a (2) of
the Single European Act, which covered provisions “relating to the rights and interests of employed persons,” but that would have required unanimity in the Council. Instead, the Directorate General for Employment and Social Affairs under the Greek commissioner, Vasso Papandreou, based the proposal on Article 118a, which covered health and safety provisions, and only required a qualified majority for adoption in the Council.

Second, the Commission, in drafting the proposal, failed to consult the Council’s standing expert group, the Advisory Committee on Safety, Hygiene, and Health Protection at Work. This was considered a breach with custom, because the group, which consists of representatives from the member states, trade unions, and employers’ organizations, had been envisaged to assist the Commission in the preparation and implementation of legislation in this field (Financial Times 1991g).

Third, more contentious than these procedural issues was the content of the proposal. The draft Working Time Directive provided for regulations on minimum daily, weekly, and yearly rest periods as well as on night and shift work, and it also proposed a centralized statutory regulation even though these aspects were in most countries subject to sectoral collective bargains between the social partners (Falkner et al. 2005, 100). Thus, while redundant in many member states with similar or even more stringent collective or statutory regulation in force, this proposal promised to require adjustments in other countries, particularly in the United Kingdom and Ireland, which had no regulations at all (Gray 1998).

Decision Making: Cutting through Ambiguity

Although the proposal was contested on some procedural grounds, the Commission had not violated the treaty, but simply ignored existing customs and made full use of its formal agenda-setting powers: it had independently drafted a legislative proposal, published it without consulting the member states, and tailored it in a way that a majority of the Council could adopt it.

While the agenda-setting stage featured practices of formal governance, the following negotiation stage was rife with practices of informal governance, by which the member states sought to calm the domestic recalcitrance the proposal had caused. Despite the quick emergence of a qualified majority in favor of the proposal, the Council refrained from overruling the British government, referred the negotiations to the Council substructure, stalled it various times, and sought to build a consensus by making a number of unilateral concessions to the British government. Before that, however, the member states had to determine the legitimacy of the British demands for accommodation.
Wait and See (the Luxembourg and Dutch Presidencies)

The most contentious part of the Commission proposal was a cap on weekly working time. Richer countries with strong regulation in place preferred a cap at a low level, because they were concerned about being undercut by poorer states with weak regulations (Europolitique 1991d). France therefore demanded that weekly working time be capped at a maximum of forty-eight hours (Lewis 1998, 371). Poorer member states, such as Greece, Portugal, Spain, and Ireland, had more general reservations about the Commission’s social program (Guardian 1991c; Independent 1991). However, the most fundamental and hostile resistance came from the United Kingdom (Europolitique 1991b, 1991c), which had no statutory regulations on weekly working time. Accordingly, nearly 42 percent of British men worked more than forty-eight hours a week, compared with slightly more than 23 percent of men in the European Union as a whole (Financial Times 1991f). The directive, therefore, promised to cause massive adjustment costs in the United Kingdom.

Unsurprisingly, the Commission proposal immediately took on a very visible profile in British politics when it was published. While the trade unions and the Labour Party welcomed the proposal, British employers universally lined up against the Working Time Directive, arguing that they would face adjustment costs in the billions (Financial Times 1990). In addition, Euroskeptic backbenchers within the Conservative Party suspected that the directive constituted precedent for Europe-wide social regulation on a massive scale (Forster 1998, 352). The domestic pressure on the British government to defy any such regulation grew ever stronger and threatened to become truly unmanageable. However, the cacophony of voices against the directive made it difficult to ascertain the real dimensions of the domestic conflict.

Against this backdrop, Luxembourg was the first country to preside over the negotiation of the Commission proposal. The country was in favor of the Working Time Directive and had committed itself to adopting it by the end of its time in office (Agence Europe 1991). After Jean-Claude Juncker, the president of the Council of Ministers, announced that he was prepared to call a vote to adopt the directive even against the fierce British opposition (Europolitique 1991a), British employment secretary Michael Howard signaled a more conciliatory approach (Forster 1999, 85). The British government promised it would accept help from the Council in evaluating the actual costs of the Working Time Directive for British business (Financial Times Business Information 1991; Financial Times 1991e). In this light, the Luxembourg presidency referred the Commission proposal for a closer assessment to the working groups and committees of government experts in the Council’s informal substructure.
The domestic pressure in the United Kingdom against the Working Time Directive mounted when Germany, under pressure from its own churches and trade unions, demanded the inclusion of a clause to make Sunday a compulsory day off. Although the Dutch presidency, which was largely in favor of the Commission proposal, was quick to dilute this amendment (Financial Times 1991a; Economist 1991b), it prompted fierce reactions, particularly from the British tabloid press quoted at the beginning of this chapter (Economist 1991a; Guardian 1991b; Times 1991d; Financial Times 1991d). The domestic pressure on the British government intensified even further in October and November 1991, when plans were made to include the Social Charter (a Europe-wide agreement between the social partners) as a chapter in the Treaty of Maastricht, which was then under negotiation in an intergovernmental conference (Forster 1998, 352). This prompted Howard to renounce his earlier conciliatory position and, adding fuel to the fire, to issue a report that underscored the massive scale of domestic adjustment costs, claiming that the Working Time Directive in its present form was going to cost £5 billion a year and ruin much of British business (Financial Times 1991a, 1991d).

Although the Dutch delegation had initially committed to concluding negotiations by the end of its term in December 1991 (Financial Times 1991c; NRC Handelsblad 1991; Van Beuge 1993, 26), it decided to refrain from bringing the proposal to a vote and overruling the British delegation when the pressure within the United Kingdom against the directive escalated (Guardian 1991d; Financial Times 1991b; Sunday Times 1991b). Since the Dutch presidency was to be followed by Portuguese and British presidencies—which were, respectively, skeptical of and entirely opposed to the directive—the Commission proposal was considered shelved for at least a year. After this year, it was thought, the conditions for the adoption of the Commission proposal in its present form would be more favorable: the controversial Commissioner Papandreou would have bowed out of office, the British Parliament would have ratified the Maastricht Treaty, and the British people could potentially have elected a more pro-European Labour party that was less susceptible to pressure by British business (Times 1991b, 1991c).

Ambiguous Adjudication (the Portuguese and British Presidencies)
To everyone’s surprise, the Portuguese presidency continued with the negotiations even though it had been expected to shelve the proposal during its term. But it was furious that the United Kingdom, which had spearheaded the opposition against including the Social Charter in the treaty, had unilaterally secured
an opt-out from the Social Charter at the intergovernmental conference on the Maastricht Treaty instead of helping Portugal to water it down. Portuguese officials thought out loud about bringing the Working Time Directive to a Council vote in order to have it imposed on the United Kingdom in revenge (Guardian 1991a). British officials, however, thought that the Portuguese presidency, which, in fact, had opposed the proposal in its original form, would instead use its time in office to dilute the Working Time Directive considerably (Sunday Times 1991a; Times 1991a). In other words, Portugal’s motivation, and whether it was going to advance the proposal or collude with the British government to dilute it, remained unclear. Consequently, its authority was widely questioned by other delegations.

Although the British general elections in April 1992 did not bring about the change in government that the proponents of the Working Time Directive had hoped for, they nevertheless seemed to turn the tide in favor of a swifter adoption. A reshuffling of the British cabinet brought Gillian Shephard into the position of employment secretary; she had a reputation for being more liberal and conciliatory than her Thatcherite predecessor (Financial Times 1992b). In that situation, Germany insisted that the Portuguese presidency rethink its plans to have the British government overruled in the Council in order to ascertain the possibilities for consensus (Financial Times 1992e; Press Association 1992). Instead of softening its stance, however, the British government became even more opposed to the Working Time Directive and considerably upset its cooperating partners.

This new opposition was triggered when in June 1992 the initial rejection of the Maastricht Treaty in a Danish referendum fueled Euroskeptic opposition by a handful of backbenchers in the House of Commons (Lamont 1999, 199). The Portuguese presidency subsequently announced its willingness to make significant concessions to the British delegation. It suggested making the forty-eight-hour limit optional, including derogations for several industries, and providing the British with a ten-year grace period for the implementation of this directive (Financial Times 1992a, 1992c; Times 1992; European Report 1992b; Financial Times 1992f; Reuters 1992a). Upset by the failure of its conciliatory effort, the German government declared it was now prepared to vote for the Portuguese proposal in the Council even against the opposition of the United Kingdom (Independent 1992). France, however, found that the Portuguese presidency’s compromise went too far in its effort to accommodate the British delegation. By raising a technical disagreement with Germany (Guardian 1992; Financial Times 1992d; Europolitique 1992), France managed to put off further negotiations in the Council and send the dossier back to the Council substructure.
As expected, the British government, which took over the presidency after Portugal, shelved the working directive during its term. The issue was only raised once over a working lunch, but simply to note that no progress was possible under the British presidency (European Report 1992a; Reuters 1992b). One might argue that the United Kingdom ignored the proposal not because other governments would not have trusted its judgment, but merely in order to stall the inevitable adoption of an unwanted legal act. However, as discussed below, the legislative text was not yet set in stone.

**Accommodation (the Danish Presidency)**

Denmark, which was in favor of the Portuguese compromise, immediately announced it was going to revive negotiations on the directive during its presidency (Europolitique 1993a). At an informal exchange of views in April 1993, ministers agreed that Denmark would begin to organize bilateral contacts with concerned delegations in order to be prepared to adopt the proposal after the ratification of the Maastricht Treaty (Europolitique 1993b). Immediately thereafter, the directive was indeed scheduled for adoption in June.

Shortly before this meeting, Euroskeptics within the Conservative Party demanded that the British government defy the directive outright if it was adopted (Guardian 1993b; Independent 1993a). In response, the Danish presidency decided that the Council’s patience had been tested long enough and threatened to call a vote (International Herald Tribune 1993; Sunday Times 1993). The British government seemed satisfied with the concessions it had received and announced its willingness to enable a unanimous vote in the Council by abstaining from the decision (Financial Times 1993a). The Danish presidency subsequently proposed a compromise that, by and large, resembled the text previously proposed by the Portuguese presidency (Guardian 1993d). This time, however, all governments including France accepted the presidency compromise and adopted it as a common position with the United Kingdom abstaining. All that remained to be done for the directive to become EU law was for the European Parliament to voice its opinion and for the Council to adopt a final position.

Despite its abstention in the Council, the British government publicly announced its complete opposition to the proposal (Daily Mail 1993; European Report 1993a; Financial Times 1993c; Guardian 1993a). Prime Minister John Major openly accused the Commission of “muddle-headed meddling” (Economist 1993) and singled out the Working Time Directive as a prime example (Times 1993a; Guardian 1993c). Other member states considered Major’s behavior a “misuse of goodwill” (Lewis 1998, 364) and tried to convince the British government to stop its inflammation of public anger, arguing that the United Kingdom had received adequate concessions (Times 1993b). They argued that
Britain would have ten years to implement the voluntary forty-eight-hour working week, and that many sectors—such as transport workers, those at sea, and junior doctors—remained exempt (Independent 1993b).

**Sticking Together (the Belgian Presidency)**

The European Parliament, dominated by a large socialist majority, was furious about the ample derogations in the directive and proposed a number of amendments to scrap them (Herald 1993a). The Commission agreed with the Parliament and endorsed most of the amendments changing the directive back to its original form. A qualified majority in the Council would have sufficed to adopt this new text, while the member states needed unanimity to reinstate the concessions to the British delegation against the will of the Commission (Herald 1993b; Scotsman 1993). In other words, a single member state would have sufficed to block a renewed accommodation of the United Kingdom.

And yet, the Council decided to stick to the concessions it had made. At the meeting of the Social Affairs Council in November, the Belgian presidency—which had favored the initial Commission initiative—proposed a compromise that scrapped most of the Parliament’s contentious amendments and largely resembled the proposal that Portugal had presented a year and a half previously (European Report 1993c; Financial Times 1993b). Although some member states silently believed that Belgium was wasting an opportunity to get back at the United Kingdom for their ingratitude, they nonetheless deferred to the presidency’s decision uncomplainingly (European Report 1993b). Thus, after three years of arduous negotiations, the Council definitively and unanimously adopted the Working Time Directive with the United Kingdom abstaining (Council of the EU 1993).³

The Working Time Directive was again brought back into the limelight after the European Court of Justice ruled in the so-called SIMAP case that on-call duty counted toward total working time (European Court of Justice 2000). Three years later, in its Jaeger judgment, the court ruled further that on-call duty in a hospital counted as working time even when the worker was allowed to rest when the services were not needed (European Court of Justice 2003). Meanwhile, the Working Time Directive was amended several times to extend its provisions to sectors that had been previously excluded.⁴ Clearly, the Working Time Directive had some dramatic consequences that the member states did not foresee when they adopted it in 1993. Yet this need not concern us here.

Important for our purpose is that the case of the Working Time Directive illustrates how the informal norm of discretion operates in practice and how the member states determine the boundary between formal rules and informal
governance. The situation arose not because the Commission transgressed its mandate, but because it made full use of its formal power. In fact, it did precisely what standard agenda-setting models expect it to do: capitalize on conflicts among governments, and publish proposals that a majority in the Council could easily adopt.

However, the implementation of treaty objectives according to the book can quickly, as in this case, stir up unmanageable domestic recalcitrance that prompts a government to defy an imminent law. In the case of the Working Time Directive, the publication of the legislative proposal immediately generated strong resistance, in particular within the United Kingdom. British employers’ associations feared excessive adjustment costs from the directive. The influential British Euroskeptics suspected that the Working Time Directive was only the beginning of a series of social regulations that would be imposed on the United Kingdom.

All member states agreed that it was necessary to accommodate the British government without any explicit quid pro quo in order to avert disruptions to the EU’s smooth operation. This is, among other things, exemplified by the fact that the Council unanimously scrapped a number of amendments even though they were angered by the British government’s actions and could have blamed the Parliament for the withdrawal of concessions. The final outcome thus included several derogations that were tailored to quell the British employers’ recalcitrance.

In light of the cacophony of recalcitrant voices in the United Kingdom, however, the principal difficulty for the Council was to assess the type and severity of pressure on the British government. Hence, it was up to the six successive Council presidencies to determine the actual need for informal governance.

Contrary to the tenets of classical regime theory, the presidencies did not enjoy authority by virtue of their control of procedural prerogatives. Instead, and in line with our expectations, governments in charge of the presidency wielded authority only when they had nothing to gain from making concessions to the British government so that the judgment of the presidency could consequently be trusted. For example, instead of using its procedural power to manipulate the negotiations in its favor, as classical regime theory would have expected, the British government decided to shelve the dossier for the duration of its presidency. Critics might argue that the British government stalled negotiations simply to delay the adoption of an unwanted legal act. Though this might make sense toward the end of Council negotiations, it cannot explain why Britain ignored the proposal during its term even though there was still some room to negotiate changes to the proposal. The only plausible explanation seems to be that the British government expected other governments to thwart any attempt to use the presidential prerogatives to manipulate the negotiations in its favor. Similarly, the Portuguese presidency,
whose stance on the directive was ambiguous throughout its term, was unable to impose its authority. Instead, Germany did not go along with a proposed vote, while France refused to accept Portugal’s presidency compromise.

Contrary to power-based institutionalism, the presidencies’ authority did not depend on power asymmetries. Thus, two large and powerful states, Germany and France, accepted small Belgium’s recommendation to reinstate the concessions to the United Kingdom. They consequently refrained from blocking the consensus that was necessary to reinstate these concessions despite the fact that they had previously rejected a similar compromise proposal from the less credible Portuguese presidency.