



# Democratic Re-legitimation and its Limits in European Social Dialogue

## *Functional Representation, Institutional Balance and Regulatory Outsourcing in EU Governance*

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### Abstract

This article examines the European Social Dialogue as a distinctive mechanism in EU governance, institutionalized under Articles 154 and 155 TFEU, which allows social partners to negotiate agreements that may become binding EU law. Challenging traditional views of it as neo-corporatism or a deliberative complement to democracy, the study reconceptualizes it as “managed regulatory outsourcing”, where norm-drafting is delegated to organized interests but remains subject to Commission discretion, Council adoption, and limited parliamentary oversight. Drawing on theoretical frameworks of democratic legitimacy (input, output, throughput), institutional balance, and functional representation, the analysis highlights how this process redistributes authority without resolving the EU’s democratic deficit. Key case law, such as *UEAPME* and *EPSU*, underscores executive gatekeeping and constitutional constraints. Post-*EPSU* developments, including the 2023 Council Recommendation, reflect procedural expansion amid a shift to soft-law instruments, reinforcing hybrid legitimacy but diffusing accountability. The article concludes that while social dialogue innovates participatory governance, it reconfigures rather than eliminates legitimacy tensions, emphasizing the need for stronger accountability in EU multilevel structures.

### Keywords

European Social Dialogue, democratic legitimacy, institutional balance, functional representation, legitimacy, social partners

### 1 Introduction

The European Social Dialogue occupies a distinctive place in EU governance. Institutionalized under Articles 154 and 155 TFEU, it enables social partners, at cross-industry and sectoral levels, to conclude agreements that may become binding EU law through a Council decision. It is thus not merely a policy instrument but a formal law-making channel embedded in the Union’s legislative framework and subject to institutional balance (Dorssemont & Van Malleghem, 2021).

Its emergence marked a shift toward more flexible and non-hierarchical governance, reflecting the limits of traditional decision-making in addressing complex social demands and national diversity (Stephanou, 2006). As part of broader “new modes of governance”, it combines soft law, private actor participation, and multi-level coordination (Gatto, 2006). Since its formalization in 1985 and consolidation through the Treaty of Amsterdam, it has been viewed as an alternative regulatory pathway (Trubek & Trubek, 2007). Linked to Article 28 of the Charter of Fundamental Rights, it has been interpreted either as supranational neo-corporatism (Bisson, 2022) or as contributing to EU democratic legitimacy and deliberative governance (Smismans, 2003; 2007a). However, the post-Lisbon constitutional order, the eurozone crisis, the European Pillar of Social Rights, and increasing politicization have reshaped EU governance and legitimacy debates (Schmidt, 2019; Kelemen, 2020). Contemporary scholarship views EU legitimacy as dynamic and structurally evolving (Bellamy, 2019; Schmidt, 2019), yet less attention has been paid to how Commission discretion affects the legitimacy implications of social partner involvement.

Based on the above, this article inquires how European Social Dialogue reshapes democratic legitimacy within the EU’s constitutional framework, and whether it constitutes a form of democratic re-legitimation or rather a reconfiguration of the Union’s democratic deficit. It argues that European Social Dialogue is best understood as a constitutionally managed form of regulatory outsourcing. While norm-drafting is delegated to organized interests, legislative authority remains contingent on Commission assessment and Council adoption, with limited parliamentary involvement. The system extends regulatory initiative beyond the ordinary legislative procedure without altering the institutional hierarchy, thereby reconfiguring rather than eliminating the EU’s democratic deficit. As such, European Social Dialogue constitutes a mode of democratic re-legitimation with ambivalent effects: it broadens participation by incorporating organized socio-economic actors, yet Commission discretion and weak parliamentary oversight fragment accountability. Legitimacy is thus redistributed across electoral, functional, and executive channels, without necessarily being strengthened.

In terms of its limitations, I must note that this article does not engage in depth with broader debates on constitutional pluralism. While such approaches are relevant for analyzing tensions between EU law and national systems, the present study focuses on the internal institutional structure of European Social Dialogue and its implications for legitimacy within the EU framework. Adopting a doctrinal and conceptual approach, the paper analyses the legal framework governing European Social Dialogue, focusing on Articles 154–155 TFEU and relevant case law. The analysis is complemented by a conceptual examination of legitimacy and representation in EU governance. By combining doctrinal interpretation with theoretical analysis, the article evaluates how social dialogue operates within the EU’s institutional structure and its implications for democratic legitimacy.

## **2 Theoretical Foundations: Representation, Legitimacy, and Institutional Balance**

Understanding European Social Dialogue requires situating it within the EU’s broader framework of democratic representation and legitimacy. Rather than relying on a single model, the EU combines multiple modes of representation that interact within a multilevel system (Benz, 2015). This section does not offer an exhaustive account of legitimacy theories, but focuses on those most relevant to the constitutional and governance dynamics of European Social Dialogue.

## 2.1 The “Legitimacy” Debate

At the European supranational level, Svetlozar (2004) distinguishes four sources of democratic legitimacy: (1) Input Legitimacy: The most direct form, derived from the European Parliament’s elected representatives, citizen participation, and transparent decision-making processes. It forms the basis of the EU’s representative democracy model. (2) Output Legitimacy: Legitimacy based on results, stemming from citizens’ support due to the effectiveness of decision-making and implementation. (3) “Borrowed” Legitimacy: Indirect legitimacy transferred from the democratic institutions of member states to the EU level. The reference to national constitutional traditions is its most fundamental expression (Skandamis, 2006). (4) Constitutional Legitimacy: Legitimacy derived from European and international law and the rule of law principle (Grimm, 2017).

Throughput legitimacy (Schmidt, 2013; 2020) is especially useful for analyzing complex multi-level systems like the EU. It focuses on the quality of governance processes and includes normative criteria such as efficacy, accountability, transparency, inclusiveness, and openness. These ensure fair, responsive, and procedurally sound governance. Unlike input or output legitimacy, throughput legitimacy cannot easily compensate for weaknesses in the other two: strong procedures cannot fully offset low citizen engagement or poor results, and flawed processes can undermine trust in both participation and performance (Stephenson, 2023).

Since the post-Lisbon period, particularly after the eurozone crisis, EU governance has increasingly relied on executive power, policy coordination, and regulatory networks (Schmidt, 2019; Kelemen, 2020). The European Commission plays a central role in these processes by designing and managing participation and consultation, filtering and translating inputs into legislative proposals for the European Parliament and the Council. While this enhances policy coordination, it also concentrates discretion in unelected actors, reinforcing concerns about the EU’s democratic deficit (Stephenson, 2023; Rangone, 2022).

Against this background, the key issue is not simply whether European Social Dialogue complements the ordinary legislative procedure, but how it reshapes authority within the EU’s institutional framework. This can be assessed through its effects on input (participation), output (effectiveness), and throughput (procedural quality and accountability), which together form the analytical framework of this article.

## 2.2 The Institutional Balance Principle

While institutional balance is traditionally understood as ensuring compliance with the Treaty-based allocation of powers, it is analytically relevant for European Social Dialogue because it structures and limits the transformation of social partner agreements into binding EU law, particularly through Commission discretion. The principle requires each EU institution to act within its conferred competences and prohibits encroachment on others’ prerogatives, as established in *Meroni v High Authority*<sup>1</sup> and reaffirmed in *Parliament v Council*<sup>2</sup> and Article 13(2) TEU. It operates both as a safeguard of institutional equilibrium and as a mechanism of adaptive evolution within the EU framework. Koutrakos (2019) further highlights its interaction with the

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<sup>1</sup> *Meroni & Co., Industrie Metallurgiche SpA v High Authority of the European Coal and Steel Community*, Case 9/56, ECLI:EU:C:1958:7 (Court of Justice of the European Communities, 1958).

<sup>2</sup> *European Parliament v Council of the European Communities*, Case C-70/88, ECLI:EU:C:1990:217 (Court of Justice of the European Communities, 1990).

duty of sincere cooperation, whereby the Court enforces procedural fidelity while maintaining balanced inter-institutional dynamics, including in cases such as *Commission v Council*.<sup>3</sup>

In the context of European Social Dialogue, institutional balance preserves social partner autonomy under Article 152 TFEU while maintaining the Commission's monopoly of legislative initiative. Agreements concluded under Article 155 TFEU may be implemented autonomously or through a Council Directive, but legislative transformation remains subject to Commission discretion. This limits the capacity of social dialogue to generate binding EU law and aligns it more closely with structured participation than co-legislation (Carré & Steiert, 2022). More broadly, institutional balance enables executive filtering of participatory inputs, making Commission discretion decisive for whether negotiated outcomes acquire legal force. From a legitimacy perspective, this conditions the impact of functional participation on EU law-making and shapes the relationship between input and throughput legitimacy.

### 2.3 Electoral and Functional Representation

The democratic legitimacy of the EU rests on a dual foundation that combines electoral and functional representation, reflecting its complex multilevel character.

Electoral representation forms the traditional core of democratic legitimacy in the EU. Based on a territorial logic, authority derives from citizens via the European Parliament and from Member States in the Council (Cotter, 2025). This embodies representative democracy at both national and supranational levels. However, the EU's supranational structure has created persistent concerns about a "democratic deficit", including limited accountability, political distance from citizens, insufficient parliamentary empowerment, and weak voter-decision-making links (Svetlozar, 2004; Persson & Lindgren, 2008; Cotter, 2025). In a system of dispersed authority and multilevel governance, electoral representation remains essential but structurally incomplete.

Functional representation complements electoral representation by incorporating organized socio-economic actors into EU decision-making based on the interests and sectors they represent, rather than territorial constituencies (Knodt et al., 2011). The European Social Dialogue is a prime example: its legitimacy derives from organized membership, sectoral expertise, and bargaining capacity. Such mechanisms are often viewed as strengthening input legitimacy by directly involving affected stakeholders (Smismans, 2007a; Obradovic, 2006). However, functional representation faces challenges. The strength and inclusiveness of organized interests vary considerably across Member States due to differences in membership density, internal democracy, and bargaining power (Curtin & Meijer, 2006; Cárdenas Domínguez et al., 2025). It is thus mediated, sectoral, and uneven, lacking the universal accountability of electoral channels. As Piattoni (2011) notes, the EU features a hybrid system in which territorial (electoral) and functional logics coexist and intersect without clear hierarchical dominance. Functional inclusion, therefore, supplements electoral representation without replicating its broad-based accountability, resulting in a distinctive, and sometimes tension-filled, blend of representational forms in EU governance.

European Social Dialogue institutionalizes functional representation, but without replicating the accountability mechanisms of electoral representation, making it a central site for examining legitimacy trade-offs.

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<sup>3</sup> Council of the European Union v. European Commission, Case C-660/13, ECLI:EU:C:2016:616 (Court of Justice of the European Union July 28, 2016).

## 2.4 Hybridization and Accountability Tension

The EU's multi-level governance model represents a hybrid that combines different types of legitimacy and both territorial and functional forms of representation. The European Social Dialogue exemplifies this intersection: it institutionalizes functional representation and appears to strengthen input legitimacy by embedding organized socio-economic actors in norm production. At the same time, it operates under executive coordination by the European Commission and the principle of institutional balance. The Commission retains significant evaluative discretion, especially in transforming negotiated agreements into binding EU law, as confirmed in *European Federation of Public Service Unions (EPSU) v Commission*.<sup>4</sup>

This hybridization creates structural tension. While functional participation expands access to decision-making, the Commission's executive power acts as a filter for turning agreements into legislation. Electoral representation remains limited, as the European Parliament does not exercise full co-legislative authority in this domain (Smismans, 2007a; Obradovic, 2006).

Kröger and Friedrich (2013) note that the EU lacks a clear hierarchy between electoral/territorial and functional channels of representation. When multiple modes coexist, democratic accountability and responsibility become diffused. The core tension is therefore not merely between participation and exclusion, but between participation and accountability. Inclusion of organized interests can enhance deliberative capacity, yet it also raises concerns about transparency and representativeness (Curtin & Meijer, 2006; Bellamy, 2019).

## 2.5 Social Dialogue as Managed Regulatory Outsourcing

Within this hybrid mode of legitimacy and representation, European Social Dialogue can be re-conceptualized as a form of managed regulatory outsourcing under institutional balance constraints.

It is "outsourced" because law-drafting in specific policy areas is delegated to organized interests outside the ordinary legislative procedure. It is "managed" because executive institutions retain decisive authority over legislative transformation. Under Article 155(2) TFEU, the Commission decides whether a negotiated agreement will be submitted for Council implementation. The Court has clarified that this discretion is substantive, not merely procedural (*EPSU v Commission*). The principle of institutional balance anchors institutional prerogatives in Treaty-based allocations (Koutrakos, 2019).

This model goes beyond traditional corporatism, which implies a redistribution of regulatory authority between the state and organized interests (Sargent, 1985). Instead, the Social Dialogue is embedded in the EU framework, where the European Commission holds ultimate executive power. It operates as a hierarchical yet multi-level system with institutionally centralized authority.

The result is a legitimacy model distributed across electoral, functional, and procedural channels. Social dialogue enhances input participation and may improve output effectiveness (Cattaneo, 2018), but it functions within executive-coordinated structures that limit its regulatory capacity. Democratic re-legitimation thus unfolds under constitutional constraints defined by institutional balance.

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<sup>4</sup> European Federation of Public Service Unions (EPSU) v European Commission, Case C-928/19 P, ECLI:EU:C:2021:656 (Court of Justice of the European Union, 2021).

Taken together, these elements frame the European Social Dialogue not as a simple extension of democratic participation, but as a structured interaction between functional representation and executive control, where legitimacy gains come with accountability trade-offs. The central claim is that the Social Dialogue neither replaces electoral representation nor creates corporatist co-decision. It institutionalizes a hybrid form of regulatory production in which participatory inclusion and executive control coexist. Consequently, the EU's democratic deficit is not eliminated but re-configured through the redistribution of authority across overlapping governance modes.

### 3. The “Constitutional” Dynamics of the European Social Dialogue

European Social Dialogue is a Treaty-based procedure under Articles 154 and 155 TFEU. These provisions define the scope and limits of social partner involvement in EU law- and policy-making, reflecting a balanced allocation of roles among the Commission, the Council, and indirectly the European Parliament. This framework highlights the tension between participatory democracy and institutional hierarchy, with the Dialogue operating within the limits of EU social policy competence. Article 153 TFEU allows the Union to support and complement Member States' actions in specific areas, while excluding key domains such as pay and the right to strike. These constraints explain the reliance on social partners to negotiate norms where direct EU legislation is restricted, while reinforcing the Commission's and Council's role in ensuring agreements remain within Union competences (Obradovic, 2006).

At the European level, cross-sectoral social dialogue is conducted by organizations representing broad interests across the economy, labor market, and social policy. Owing to their general scope, these actors occupy a central position in EU governance and attract sustained attention from the EU institutions and academic scholarship. Representation is structured through cross-sectoral “umbrella” organizations, which aggregate numerous national and sectoral associations. The principal actors include the European Trade Union Confederation (ETUC), BusinessEurope (formerly UNICE), SMEunited (formerly UEAPME), and SGI Europe (formerly CEEP), alongside sectoral social partner organizations operating in specific industries (Gaitenidis, 2025).

#### 3.1 Articles 154–155 TFEU : Structured Participation Under Limits

Article 154 TFEU imposes on the Commission the duty to promote consultation of social partners at the EU level and to facilitate dialogue between them. Before submitting proposals in the field of social policy, the Commission must consult social partners regarding both the possible direction and the content of contemplated action. Social partners may then express opinions or recommendations, and they may also inform the Commission of their wish to initiate negotiations under Article 155 TFEU (Bisson, 2022).

Article 155 TFEU provides that agreements concluded at the Union level may be implemented either: (1) In accordance with the procedures and practices of the social partners and Member States (autonomous implementation), or (2) In matters covered by Article 153 TFEU, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. This dual pathway grants social partners a distinctive role in norm production. They may negotiate contractual relations and agreements, and these may acquire binding EU law status. Yet this “legislative” potential is limited to the Commission's right of initiative and the Council's decision-making authority (Bisson, 2022).

Therefore, according to the Treaty, social partners may initiate negotiations, but institutional power ultimately returns to the “formal” EU institutions if no agreement is reached or if implementation through Council Decision is pursued. The autonomy of social partners is thus constitutionally limited.

The representativeness of social partners at the EU level cannot be taken for granted. Although cross-sectoral organizations aggregate national and sectoral actors, their membership density, internal governance, and bargaining capacity vary significantly across Member States, leading to uneven participation and influence. Sectoral imbalances further reinforce these disparities, as some industries are well organized while others remain fragmented or weakly represented (Gaitenidis, 2025; Kerckhofs et al., 2021; Larsson et al., 2025). These asymmetries are reflected in broader tensions within EU social policy, illustrated by *Viking*<sup>5</sup> and *Laval*,<sup>6</sup> as well as debates on the Minimum Wage Directive,<sup>7</sup> where national industrial relations traditions produced divergent responses to EU intervention (Ozols et al., 2025). Social dialogue, therefore, does not function as a uniformly representative channel, but reflects and reproduces structural differences across Member States and sectors.

### 3.2 Institutional Balance and Executive Gatekeeping

In the context of social dialogue, the principle of institutional balance operates as a constraint for the social partners’ authority. Although the Commission is obliged to consult social partners, its right of legislative initiative is not displaced. In addition, Article 155 TFEU does not eliminate the Commission’s authority in social policy. The power to initiate is shared, in procedural terms, but not transferred. Thus, the European Commission remains the primary “gatekeeper” of legislative transformation.

The executive character of this arrangement is reinforced by supervisory functions. Before proposing implementation by Council decision, the Commission and the Council may verify the representativeness of the signatory parties, the compatibility of the agreement with Union law, and its potential consequences. If collective representativeness is insufficient, implementation may be refused. This review capacity confirms that social partner autonomy operates under institutional oversight (Velluti, 2022).

The European Parliament’s position is weaker in this process as, according to Article 155(2) TFEU, the European Parliament is informed, but does not exercise co-legislative authority. It is this procedural differentiation that distinguishes the European Social Dialogue from the ordinary legislative procedure and raises constitutional questions regarding democratic legitimacy. While the European Social Dialogue is often justified as a response to the democratic deficit, the minimal Parliamentary involvement complicates that claim (Bisson, 2022).

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<sup>5</sup> International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti, Case C-438/05, ECLI:EU:C:2007:772 (Court of Justice of the European Union, 2007).

<sup>6</sup> Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Case C-341/05, ECLI:EU:C:2007:809 (Court of Justice of the European Union, 2007).

<sup>7</sup> Directive (EU) 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, Pub. L. No. L 275/33 (2022). Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022L2041>

### 3.3 The UEAPME Case: Procedural Recognition Without Autonomy

The Court's case-law clarifies this structure in *UEAPME v Council*.<sup>8</sup> The General Court acknowledged that European Social Partners occupy a specific procedural position within the Union's decision-making framework. According to the Court, consultation under Articles 154–155 TFEU is not discretionary but mandatory.

At the same time, the Court did not elevate social partners to autonomous constitutional actors. Representativeness must be demonstrated in relation to the subject matter, and “sufficient collective representativeness” may suffice even where other organizations could claim participation (Smismans, 2007a; Franssen & Jacobs, 1998). The Court thus suggested that participation by adequately representative organizations could satisfy the principle of participation alongside parliamentary representation (Franssen & Jacobs, 1998). However, this recognition remained procedural rather than constitutive: social partners gained constitutional visibility, but not independent law-making authority, as their role derives from and remains bounded by the Treaties (Franssen & Jacobs, 1998).

UEAPME therefore consolidated procedural status without granting autonomy. Social dialogue became constitutionally recognized, but not constitutionally self-standing. In legitimacy terms, UEAPME confirms that participation in European Social Dialogue is structured through functional representation rather than electoral accountability. While the Court recognizes the procedural role of sufficiently representative organizations, it does not establish a direct link between participation and democratic representation in the electoral sense. This reinforces the mediated and indirect nature of input legitimacy within the social dialogue framework.

### 3.4 The *EPSU* Case: Executive “Gatekeeping” Constitutionalized

The structural limits of this arrangement became explicit in *EPSU v Commission*. The Court held that the Commission is not obliged to submit a proposal to the Council under Article 155(2) TFEU, even where social partners jointly request it. The Commission retains its exclusive right of initiative under Article 17 TEU and enjoys broad discretion in deciding whether to proceed, including assessing political, economic, and social considerations. This discretion extends beyond verifying representativeness and legality to evaluating the appropriateness of EU action, while judicial review remains limited (Article 296 TFEU).

The judgment confirms that European Social Dialogue does not entail a shared legislative initiative, but operates as a request mechanism, with the transformation of negotiated outcomes dependent on executive approval (Velluti, 2022). Carré and Steiert (2022) interpret *EPSU* as a constitutional redefinition of social dialogue, subsuming Article 155(2) TFEU under the general logic of Commission initiative and rejecting its characterization as a form of quasi-co-decision. The ruling thus reaffirms institutional balance by anchoring social dialogue within an executive hierarchy: participatory inclusion does not displace Commission authority.

The constitutional structure of European Social Dialogue is therefore characterized by duality. While Articles 154 and 155 TFEU institutionalize functional participation and grant social partners a structured role in norm production, institutional balance preserves executive initiative and Council authority while limiting parliamentary involvement. Social dialogue is

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<sup>8</sup> Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v Council of the European Union, Case T-135/96, ECLI:EU:T:1998:128 (Court of First Instance, 1998).

thus constitutionally recognized but hierarchically constrained. From a legitimacy perspective, the *EPSU* case highlights the limits of input-based participation. Although social partners contribute to norm-drafting, Commission discretion constrains their influence on legislative outcomes, making throughput legitimacy decisive as executive control determines whether participatory inputs translate into binding law.

## 4 Towards a Managed Regulatory Outsourcing Mode of Governance

The constitutional architecture analyzed above makes clear that European Social Dialogue cannot be accurately described either as a form of co-decision or just as a form of deliberative complement to representative democracy, giving rise to several competing potential interpretations.

### 4.1 Beyond Corporatism

The European Social Dialogue has often been interpreted through a corporatist lens. The institutionalized negotiation between employers and trade unions, the possibility of transforming agreements into binding law, and the relative marginalization of parliamentary mediation have encouraged characterizations of the system as “neo-corporatist” or as a form of “governance of private interests” (Schmitter, 1994; Smismans, 2007a; Bisson, 2022). However, classical corporatism presupposes a horizontal redistribution of regulatory authority between the state and organized interests. In such models, social partners exercise autonomous norm-producing power alongside or in partnership with public institutions (Molina & Rhodes, 2002; Dobbins & Labanino, 2023). The EU framework does not correspond to this structure.

As demonstrated by the *EPSU* case, social partner agreements do not bind the European institutions automatically. Legislative transformation remains contingent upon the European Commission’s exclusive power of initiative and the Council’s adoption. This hierarchical oversight is structurally inconsistent with corporatist autonomy, as the European Social Dialogue therefore does not displace authority but rather operates within Treaty-based limitations (Delfino, 2020).

### 4.2 Beyond Deliberative Democracy

A second interpretation frames the European Social Dialogue as a deliberative complement to representative democracy. In this respect, it enhances input legitimacy by incorporating organized socio-economic actors into law and policy-making (Smismans, 2007a; Heidbreder, 2012). The Court has suggested that participation through sufficiently representative social partners may satisfy the principle of participation alongside parliamentary representation (Franssen & Jacobs, 1998).

Yet this equivalence is normatively and institutionally unclear. Unlike the European Parliament, social partners are not elected bodies. Their internal democratic structures vary, their membership density differs across Member States, and sectoral asymmetries persist (Smismans, 2007b; Cárdenas Domínguez et al., 2025). As a result, functional representation is indirect.

Furthermore, the transformation phase excludes Parliament from full co-legislative participation. When agreements are implemented by Council Decision under Article 155(2) TFEU, Parliament is informed but does not exercise equal legislative authority like during

the ordinary legislative procedure. This procedural asymmetry complicates the claim that the European Social Dialogue simply supplements electoral representation. Instead, it partially displaces parliamentary mediation, and participation may be expanded, but under hierarchical conditions.

### 4.3 The Limits of the Co-Legislative Narrative

The idea that the European Social Dialogue represented an “alternative legislative procedure” has been decisively weakened by the *EPSU* case. As Carré and Steiert (2022) argue, the Court effectively redefined Article 155(2) TFEU as a request mechanism comparable to Articles 225 and 241 TFEU, reaffirming the Commission’s initiative monopoly. Social partners may trigger a procedural opportunity, but they cannot compel legislative action.

In this respect, the European Social Dialogue differs fundamentally from the ordinary legislative procedure. In co-decision, the European Parliament and the Council jointly exercise legislative authority. In the European Social Dialogue, substantive drafting may originate outside the institutional triangle, but legal force rests on the European Commission and the Council. The view of the European Social Dialogue as “co-legislator” is therefore obscured.

### 4.4 Defining Managed Regulatory Outsourcing

The European Social Dialogue can be better conceptualized as managed regulatory outsourcing. While this framing draws on longstanding analyses in EU governance literature, such as the hybrid hard/soft law mechanisms in new modes of governance (Trubek & Trubek, 2007), the “shadow of hierarchy” that conditions social partners’ autonomy through the threat of unilateral Commission action (Smismans, 2008), and post-*EPSU* critiques of “corporatism without autonomy” that highlight the subordination of negotiated outcomes to executive discretion (Carré & Steiert, 2022; Dorsemont & Van Malleghem, 2021), it offers a distinct lens.

More specifically, managed regulatory outsourcing foregrounds the post-Lisbon and post-*EPSU* constitutional reality by emphasizing the deliberate, hierarchical relocation of substantive norm-drafting to functional actors under irreversible executive supervision, the structural sidelining of parliamentary co-legislation in the binding pathway, and the resulting redistribution of legitimacy across fragmented channels rather than its resolution.

This model consists of five interrelated features. First, substantive norm-drafting is delegated to organized interests. Social partners negotiate framework agreements, draft regulatory standards, and shape policy content outside the ordinary legislative procedure (Smismans, 2007b; Trubek & Trubek, 2007). The production of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, and Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE, and CEEP illustrates this delegation of drafting capacity. Second, the Commission retains the monopoly of legislative initiative. Even where social partners conclude an agreement and request implementation, the Commission decides whether to submit a proposal. The *EPSU* judgment confirms that this discretion is substantive and constitutionally protected, extending beyond procedural checks to assessments of political opportunity, subsidiarity, proportionality, and the Union’s general interest. Third, the Council exercises formal adoption authority. The binding force derives not from social partner negotiation alone, but from institutional

endorsement through Council Decision. Fourth, the European Parliament is structurally limited in the transformation phase. Unlike in the ordinary legislative procedure, Parliament does not act as co-legislator when agreements are implemented under Article 155(2) TFEU. And fifth, accountability becomes diffused. Norms are drafted by organized interests, filtered by the executive, adopted by the Council, and implemented through multi-level structures often dependent on national actors. Responsibility is distributed across functional, executive, and territorial channels without a single, clearly identifiable center of democratic control.

Outsourcing, in this sense, does not imply abdication of public authority. It describes the relocation of substantive drafting capacity to actors external to the institutional legislature, under conditions defined and supervised by executive institutions. It is “managed” because the delegation is conditional, reversible, and embedded within hierarchical oversight, ensuring that participatory expansion occurs without displacing the EU’s institutional balance or fully alleviating the democratic deficit.

#### **4.5 Post-Crisis Governance and the Soft Law Shift**

The post-2008 transformation of EU governance reinforces this interpretation. The production of binding legislative agreements has declined, while autonomous and non-binding instruments have become more prominent (Bisson, 2022; Cárdenas Domínguez et al., 2025). The rise of coordination mechanisms, including the European Semester, has embedded social dialogue within recurring executive-led policy cycles (Pecinovsky, 2018; Schmidt, 2019).

Soft-law instruments, process-oriented texts, joint opinions, and monitoring frameworks increasingly define the practical output of social dialogue. From a functional perspective, such instruments may foster learning, trust-building, and horizontal coordination (Larsson et al., 2020). Yet they further distance regulatory production from formal parliamentary oversight.

The shift from binding directives to autonomous implementation and coordination-based governance illustrates a broader move from shared legislative production toward regulated participation within executive steering frameworks (Bogg & Dukes, 2013; Cárdenas Domínguez et al., 2025). As such, social dialogue is being integrated more deeply into managed governance structures. And this trajectory confirms that the central dynamic is not the expansion of co-decision but the consolidation of conditional delegation.

#### **4.6 Legitimacy Redistribution Through Outsourcing**

Conceptualizing social dialogue as managed regulatory outsourcing clarifies its democratic ambivalence. Input legitimacy may be enhanced through functional inclusion. Output legitimacy may benefit from negotiated compliance and stakeholder ownership (Cattaneo, 2018). However, throughput legitimacy becomes dependent on executive filtering and multi-level coordination. Authority is redistributed: (1) From Parliament to organized interests in drafting, (2) From public consultation to negotiated compromise, (3) From visible legislative arenas to procedural frameworks shaped by the Commission.

The democratic deficit is therefore not resolved but re-allocated. The European Social Dialogue institutionalizes a hybrid governance structure in which substantive regulatory work is outsourced to social partners under the limits of executive control and institutional hierarchy. In this configuration, participation expands, but autonomy remains conditional on institutional balance.

## 5 Post-*EPSU* Governance Reinforcement: Procedural Expansion Without Power Rebalancing

The period following the *EPSU* judgement indicates an effort to consolidate social dialogue within the EU's broader policy architecture. It is noteworthy, however, that post-*EPSU* reforms increase procedural participation or political visibility, but they do not recalibrate constitutional authority.

A central milestone is the Council Recommendation of 12 June 2023 on strengthening social dialogue in the EU.<sup>9</sup> The Recommendation calls for improved conditions for collective bargaining, systematic and timely involvement of social partners in employment and social policy, and enhanced access to information and institutional support. As Hromadska (2025) notes, it frames social dialogue broadly across bipartite and tripartite formats and emphasizes its relevance at multiple governance levels.

The same pattern is visible in the Val Duchesse Social Partner Summit of January 2024 and the subsequent Tripartite Declaration for a Thriving European Social Dialogue. The Declaration situates social partners at the center of responses to labor shortages, skills gaps, and the green and digital transitions. It envisages strengthened monitoring practices, enhanced coordination, and the development of a Pact for European Social Dialogue, formally launched in 2025. These initiatives elevate social dialogue politically and symbolically. They integrate social partners more explicitly into strategic Union priorities (Cárdenas Domínguez et al., 2025; Galetto & Neri, 2026).

The growing integration of social dialogue into the European Semester further illustrates this trajectory. Since the post-crisis consolidation of economic governance, social partners have become increasingly involved in consultation, monitoring, and reporting linked to Country-Specific Recommendations and employment coordination (Cárdenas Domínguez et al., 2025; Guisset et al., 2025). The 2024 Action Plan on labor and skills shortages confirms this embedding within recurring Commission-led governance cycles (European Commission, 2024).

A similar pattern emerges in the European Pillar of Social Rights. Principle 8 emphasizes consultation, collective bargaining, and worker participation, while the accompanying Action Plan highlights the role of social dialogue in managing restructuring, economic transitions, and changing work patterns within the EU's broader regulatory framework (European Commission, 2021).

However, these developments remain non-binding and do not alter Articles 154–155 TFEU. Political elevation thus does not entail constitutional repositioning. At the same time, empirical research points to a shift toward non-binding and autonomous instruments, with fewer legislative agreements under Article 155(2) and greater reliance on soft-law coordination (Bisson, 2022; Cárdenas Domínguez et al., 2025). While such forms may enhance learning and coordination (Larsson et al., 2020), the decline in binding outcomes remains constitutionally significant.

European Social Dialogue has therefore entered a phase of procedural expansion without power rebalancing: its institutional visibility has increased, but its constitutional position has not. This development confirms the article's core claim that social dialogue operates as a form of managed regulatory outsourcing, in which participatory inclusion expands while executive authority remains predominant.

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<sup>9</sup> Council Recommendation (EU) 2023/C 185/01 of 12 June 2023 on strengthening social dialogue in the European Union, OJ 2023 C 185/1.

## **6 Democratic Legitimacy Revisited: Re-legitimation or Accountability Displacement?**

The analysis has demonstrated that European Social Dialogue is constitutionally embedded, procedurally reinforced, and structurally managed within an executive-centered governance framework. The remaining question is normative: does this configuration strengthen democratic legitimacy, or does it merely relocate its tensions? To answer this, it is useful to reconsider the legitimacy effects of social dialogue across three dimensions: input, output, and throughput.

### **6.1 Input Gains**

The European Social Dialogue clearly enhances input legitimacy in a functional sense. In policy areas directly affecting socio-economic actors, such inclusion can increase the responsiveness of regulation and ensure that expertise and sectoral knowledge inform legislative design. Particularly in complex labor market contexts, negotiated drafting may produce more context-sensitive norms than purely parliamentary deliberation. Yet input gains remain uneven. Social partners derive their authority from organizational membership structures that vary across Member States and sectors (Curtin & Meijer, 2006; Cárdenas Domínguez et al., 2025). Functional representation is therefore indirect. Moreover, parliamentary participation in the Article 155(2) process is limited, meaning that electoral channels are not reinforced but partially displaced. Input legitimacy is therefore broadened, but not democratically equalized.

### **6.2 Output Gains**

Social dialogue may also contribute to output legitimacy. Negotiated agreements can foster compliance, reduce implementation conflicts, and enhance ownership among stakeholders. Where actors become co-authors of regulatory standards, regulatory acceptance and effectiveness may increase (Cattaneo, 2018). Empirical studies further suggest that effectiveness is often measured by participants in terms of trust-building, coordination, and learning rather than exclusively through binding legislative outcomes (Larsson et al., 2020).

However, the post-crisis decline in legislative transformation and the increasing reliance on autonomous or soft-law instruments (Bisson, 2022; Cárdenas Domínguez et al., 2025) demonstrate that output effectiveness becomes more diffuse. Output gains are therefore plausible, but they are structurally contingent and unevenly distributed.

### **6.3 Throughput Gains and Accountability Risks: Re-legitimation or Re-distribution?**

The most significant legitimacy tension arises at the level of throughput legitimacy. As demonstrated above, the European Social Dialogue operates within a governance structure characterized by institutional hierarchy. This layered configuration diffuses accountability. Regulatory content originates in private negotiations, is filtered by executive assessment, formally endorsed by the Council, and implemented through multi-level arrangements.

The European Social Dialogue represents a project of democratic re-legitimation. It expands participatory inclusion, institutionalizes functional representation, and may enhance regulatory effectiveness. Its procedural reinforcement in the post-*EPSU* period confirms its political centrality. In this respect, accountability becomes dispersed across functional, executive, and territorial channels.

The resulting chain of responsibility is neither purely electoral nor purely functional but fragmented, resulting in the democratic deficit not disappearing or being reduced. In effect, the European Social Dialogue re-distributes the democratic deficit from “participation deficit” to “accountability slippage” and diffused responsibility.

## 7 Conclusion: Innovation Under Constraint

The European Social Dialogue is often portrayed as a democratic corrective within the EU’s constitutional order, and I have argued that it rather constitutes a distinct governance mode instead, something which I have described as managed regulatory outsourcing. Under Articles 154 and 155 TFEU, norm-drafting is delegated to organized socio-economic actors, yet legislative transformation remains dependent on executive initiative and institutional balance. In this framework, the Commission retains discretion, the Council formalizes adoption, and parliamentary participation is structurally limited. The result is neither privatized regulation nor shared legislative authority, but a hybrid architecture in which participation expands within constitutional constraints. And this arrangement reflects a deeper constitutional ambivalence: while the Social Dialogue strengthens functional representation and may enhance regulatory responsiveness, it preserves hierarchical control and diffuses accountability. The democratic deficit is therefore not eliminated but reconfigured, i.e., participation widens, yet responsibility fragments.

My historical analysis showed that the Social Dialogue has evolved cyclically, alternating between phases of autonomy and executive steering. The post-*EPSU* trajectory confirms a shift toward the latter. Although institutional visibility and procedural integration have increased, constitutional authority has not been reallocated. As such, reinforcement has occurred within existing limits rather than through structural rebalancing.

More broadly speaking, the Social Dialogue illustrates a transformation in EU governance. As executive coordination and multilevel steering expand, participatory mechanisms are increasingly embedded in managed frameworks rather than autonomous democratic processes. The future of EU legitimacy may thus depend less on expanding participation than on strengthening accompanying accountability structures. Innovation, in this context, operates under constraint. The European Social Dialogue exemplifies the Union’s experimentation with new forms of representation while remaining anchored in a constitutional order that prioritizes institutional balance and executive initiative. Its central challenge is not merely to deepen participation, but to align it with coherent and transparent democratic responsibility.

Accordingly, the European Social Dialogue embodies, I believe, both democratic innovation and structural ambivalence, revealing the promise and tensions of hybrid legitimacy within the EU constitutional framework.

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