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To my late father.

Für dich, Papa.

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Abstract

How and why do legislative proposals fail in the EU policy-making process? Previous literature on EU decision-making and policy-making processes strongly focuses on the phenomenon of consensus and consensus-building and the EU advertises that 85% of all legislative proposals end in first-reading agreements and only 15% fail. The EU seems to succeed more often than it fails. To understand, however, what motivates actors to approve a legislative proposal, it is important to understand what incites them to let others fail. The present study investigates failed cases where the Commission presented a proposal to the Council and the Parliament that, then, became deadlocked in the process. An interesting puzzle presents itself, which suggests that there is more to policy-making failure than the previous literature can account for: proposals that failed in the first round are withdrawn by the Commission, adapted and recast and lead to agreement in the second round. Which incentives do the Commission, the Council and the Parliament have to partake in a game with such failure? After conducting four comparative, in-depth case studies in two policy areas the answer is as follows: failure enables all actors to not only achieve gains through bargaining, but also frame losses in a way that brings reputational gains. Failure of policy-making becomes a strategic, mutually beneficial game, where everybody ultimately is a winner - if not in substance or procedure, then in reputation. The Commission plays an important role as the initiator of legislation as it controls its shape and framing and can set up the game in a way that enables success after failure. The Commission can also decide to pursue its own goals within the policy process instead of playing a strategic game with the co-legislators. It can also practice symbolic blame politics with failure instead of initiating a second round and pursuing agreement. In any case, the empirical analysis shows that the role of the Commission in the process of policy-making, and its impact on the dynamics of success and failure, are greater than anticipated by previous scholarship. The present study can be the basis for further in-depth process research on the role and behavior of the Commission in EU policy-making as it provides an innovative approach to understanding the dynamics between the three institutions and opens the black box of intra-institutional and inter-institutional decision-making. Actors, conditions and mechanisms are investigated in detail by triangulating documents, media reports and expert interviews, and carefully evaluating their explanatory power with regard to the strategic failure.

Kurzbeschreibung

Wie und warum scheitern Gesetzesvorschläge in EU-Gesetzgebungsprozessen? Die bisherige Literatur zu Verhandlungs- und Gesetzgebungsprozessen in der Europäischen Union konzentriert sich stark auf das Phänomen der Konsensbildung, denn die EU wirbt damit, dass nur 15% ihrer Vorschläge scheitern und 85% im Schnellverfahren bereits in der ersten Lesung erfolgreich beschlossen werden. Die EU scheint also mehr Erfolge als Misserfolge zu verzeichnen. Um jedoch zu verstehen, was Akteure motiviert, einem Gesetz zuzustimmen, muss man auch verstehen, was sie dazu bewegt, einen Vorschlag scheitern zu lassen. Die vorliegende Arbeit betrachtet gescheiterte Fälle, bei denen die Kommission einen Vorschlag vor Rat und Parlament brachte, dieser jedoch im Prozess blockiert wird. Ein interessantes Puzzle präsentiert sich, das nahelegt, dass mehr hinter dem Scheitern von Gesetzesvorschlägen steckt, als die bisherige Literatur aufgezeigt hat: in der ersten Runde gescheiterte Vorschläge werden von der Kommission in erneuter Form wieder vorgelegt und führen dann in der folgenden Runde zum Erfolg. Welchen Anreiz gibt es für die Kommission, den Rat und das Parlament, ein solches Spiel mit Scheitern zu spielen? Die folgende Antwort ergibt sich aus vier vergleichenden Fallstudien aus zwei Politikbereichen: Scheitern ermöglicht es allen Akteuren, nicht nur Gewinne zu erhandeln, sondern auch Verluste so darzustellen, dass sie daraus einen Reputationsgewinn ziehen können. Somit wird Scheitern von Gesetzen in der EU ein strategisches, gegenseitig nutzbringendes Spiel, bei dem letztlich alle gewinnen - wenn nicht in Substanz und Prozedere, dann an Reputation. Die Kommission spielt dabei eine herausragende Rolle, denn als Initiatorin hat sie die Kontrolle darüber, wie das zu verhandelnde Gesetz aufgebaut und dargestellt wird und es liegt an ihr, das Spiel so zu initiieren, dass eine Einigung in mehreren Runden letztlich möglich ist. Die Kommission kann jedoch, an Rat und Parlament vorbei, ihre eigenen Ziele verfolgen und statt eines strategischen Spiels mit dem Ziel einer erfolgreichen Politikgestaltung symbolische Politik betreiben, indem sie keine zweite Verhandlungsrunde einleitet und das Scheitern Rat und Parlament anlastet. In jedem Fall zeigen die empirischen Befunde, dass die Kommission mehr Einfluss auf den Gesetzgebungsprozess hat, als bisher angenommen, sowohl auf Scheitern als auch auf Erfolg. Die vorliegende Arbeit kann somit Grundlage für mehr und tiefergehende Prozessforschung zur Rolle der Kommission im Politikprozess der EU werden, denn sie liefert innovative Ansätze zum besseren Verständnis der Dynamik zwischen den drei Institutionen und öffnet die Blackbox der informellen Verhandlungsprozesse in und zwischen den Institutionen. Akteure, Rahmenbedingungen und Mechanismen werden mit Hilfe von Dokumenten, Mediendaten und Experteninterviews genau analysiert und geben Aufschluss darüber, welche Faktoren und Verhaltensweisen im Prozess den Ausschlag für Scheitern oder Gelingen geben.

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List of abbreviations

ALDE - Alliance of Liberals and Democrats for Europe (Parliament)

COM - European Commission

COREPER (I and II) - Committee of Permanent Representatives (Council)

Council - Council of the European Union/Council of Ministers

DG - Directorate General (Commission)

DG EMPL - Directorate General for Employment, Social Affairs and Inclusion (Commission)

DG Home - Directorate General for Migration and Home Affairs (Commission)

DG JUST - Directorate General for Justice and Consumers (Commission)

EC - European Council

ECJ - European Court of Justice

ECR - European Conservatives and Reformists (Parliament)

EES - Entry-Exit System

EMPL - Committee on Employment and Social Affairs (Parliament)

EP - European Parliament

EPP - European People's Party (Parliament)

EPSCO - Employment, Social Policy, Health and Consumer Affairs Council

EU - European Union

eu-LISA - European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice

FEMM - Committee on Women’s Rights and Gender Equality (Parliament)

Greens/EFA - Greens European Free Alliance (Parliament)

JHA - Justice and Home Affairs

JURI - Committee on Legal Affairs (Parliament)

LIBE - Committee for Civil Liberties, Justice and Home Affairs (Parliament)

MEP - Member of the European Parliament

RTP - Registered Traveller Program

SCIFA - Strategic Committee on Immigration, Frontiers and Asylum (Council)

S&D - Socialists & Democrats (Parliament)

(Council) SG - General Secretariat of the Council of the European Union

SIS - Schengen Information System

TCN - third country nationals

UK - United Kingdom

VIS - Visa Information System

I. Introduction: the EU's policy failure puzzle

European policy integration has always been marked by a contrast between rapid policy and institutional change on the one hand and controversial, obstacle-ridden policy-making processes on the other (Héritier, 1999). The EU advertises that 85% of all legislative acts are first-reading agreements[1], which suggests that either the process goes very smoothly, because everyone agrees with the Commission proposal and the co-legislators agree with their respective positions, or there is a lot of backdoor work. From previous research, we know that the latter is the case (Reh et al., 2013; Kleine, 2013; Smeets, 2013). Still, despite transparency initiatives and reforms introduced by the Treaty of Lisbon about accountability, the negotiation processes in and between the legislative institutions remain relatively secretive (Smeets, 2013; Smeets 2015). At best, the public can reconstruct which institution held meetings at which point in time and get a succinct summary of the outcomes, but how they get stuck with policy they very often do not like remains largely unknown to them. The strategic elements of the process such as how actors bargained, exchanged views or struck deals remain largely a mystery (Naurin, 2015). There is still comparatively little work on the inter-institutional dynamics of informal negotiations, specifically the informal interplay between institutions before and during trilogues (Rasmussen and Reh, 2013; Kardasheva, 2013; Héritier and Reh, 2012). Failure, as in rejection of legislative files, has been a rare occurrence since the birth of the European Union with the Treaty of Lisbon (Ripoll Servent, 2017: 73). Formal rejection, at least, has not been an instrument the co-legislators have used frequently. However, failure does not necessarily equal formal rejection, even though it has been treated as such even by the most recent scholarship (Ripoll Servent, 2017: 74f.). Failure encompasses controversial cases where formal rejection did not take place, but where there was inter-institutional deadlock and/or withdrawal of the proposal after pressure from the co-legislators. In the post-Lisbon era alone, there are an elevated number of such cases[2]. Withdrawn and blocked files are even more interesting than the formally rejected ones, because there seems to be something hindering the institutions to take the final step to formal rejection.

[1] Interview 4; Interview 5

[2] The Commission registers all withdrawals in the annex of its annual work programs. A complete list of those working programs including the withdrawal notices can be found here (2007-2018): https://ec.europa.eu/info/publications/european-commission-work-programme_en

> "Wir haben das neulich mal scherzhaft so formuliert: wenn die Kommission etwas vorlegt, muss man verhandeln. Es ist nicht so, dass man sagt, selbst wenn sich alle 28 einig sind, dass das absoluter Mist ist, was da vorgelegt wurde, wird das nicht zurückgezogen. Ist der Vorschlag auf dem Tisch, wird er verhandelt. Und wir haben dann im Scherz gesagt, der Rat, versucht dann, etwas daraus zu machen und das EP macht alles schlimmer. Letztendlich hat man dann etwas, das keiner wollte, aber man hat etwas. Ist vielleicht sehr pauschal gesagt, aber oft hat man dann in dem europäischen Prozess am Ende etwas, mit dem keiner glücklich ist, weder die Kommission, die den Vorschlag gemacht hat, noch das EP, das den Rat beschuldigt, etwas daraus gemacht zu haben, was keiner will, so dass letztlich der Kompromiss ungewollt ist. Ein Kompromiss ist also dann perfekt, wenn alle unzufrieden sind. In die Richtung geht es oft. Normalerweise würde man ja auch erwarten, wenn sich im Rat alle einig sind, dass man der Kommission sagt, sie soll ihre Hausaufgaben machen und einen neuen Vorschlag vorlegen, aber das passiert nicht. Wenn man das Thema hat, muss man sich damit auseinandersetzen."[3]

What happens to those 15% of legislative proposals that the institutions do not agree upon at first reading? What happens to those proposals that are stuck in or withdrawn during first reading? Current models of policy-making focus on the resolution of controversy and mechanisms of consensus-building between the institutions without providing clear models, conditions and mechanisms for explaining deadlock and failure.

Consequently, there is a gap in the literature as to the behavioral incentives to initiate in the policy process: Why propose legislation that fails? Why take the trouble of drafting a proposal and start negotiations only to let the proposal fail in the process?

The Commission holds extensive consultation procedures with stakeholders and has built networks of communication with member state governments and parliamentarians to know about preference constellations around a policy issue. Member state governments and parliamentarians lobby the Commission and try to put forward their interests and push for those issues that they consider most salient to be put on the agenda and those issues they wish to avoid to be kept off the agenda. There are numerous informal channels before and during a negotiation process through which all actors in the legislative institutions can acquire information across institutional borders. Why do legislative proposals fail despite extensive informal preparatory exchanges?

[3] Interview 23

These questions concern all the actors involved at all stages of the policy process: If the Commission can collect information about preferences and the agenda, why does legislation still fail in the negotiation process? If the co-legislators can lobby the Commission during the agenda-setting and policy formulation process, why let the Commission come forward with a proposal only to let it fail in legislative negotiations?

Empirically, there is a puzzling variation in types of failure: some cases where failure occurred and a proposal was withdrawn, like the Schengen Governance reform, the Smart Borders Package or the Maternity Leave policy reform, reappear in a different form, while in other cases, like the Gender Quota case, the proposal stays deadlocked without withdrawal or recast.

Very recently, there have been a number of controversial files, which failed in the negotiation process due to disagreements between the institutions. The Commission proposed a reform of the Schengen Governance in 2009 that failed twice at the early stages of informal trilogues. This means that it was informally rejected by the Council or the Parliament, which signaled to the Commission that the file was not negotiable, only to be approved in the third round after the proposal had been recast with significant modifications in substance and procedure. A similar procedure can be observed for the Smart Borders Package, which failed in the first round and is now on the road to approval after substantial amendments to the original proposal. The phenomenon seems to even extend to more than one policy area as apart from Justice and Home Affairs, similar processes can also be observed in areas where the interests and stakes are somewhat different, such as Social and Employment Policy. The Maternity Leave Directive, failed in the first round. The policy idea was then reframed and presented in a reconfigured package in the second round, which is on the road to agreement now.

1.1 Research question

To understand policy failure in the context of European Union policy-making, we need to look both at causes and conditions and mechanisms of failure. Therefore, this thesis investigates the question of policy failure from a process perspective (“how”) and a causal perspective (“why”), combined in an approach that accounts for structural factors as well as actor behavior.

The overall research question this thesis attempts to answer is the following:

How and why do proposals fail in the European policy-making process?

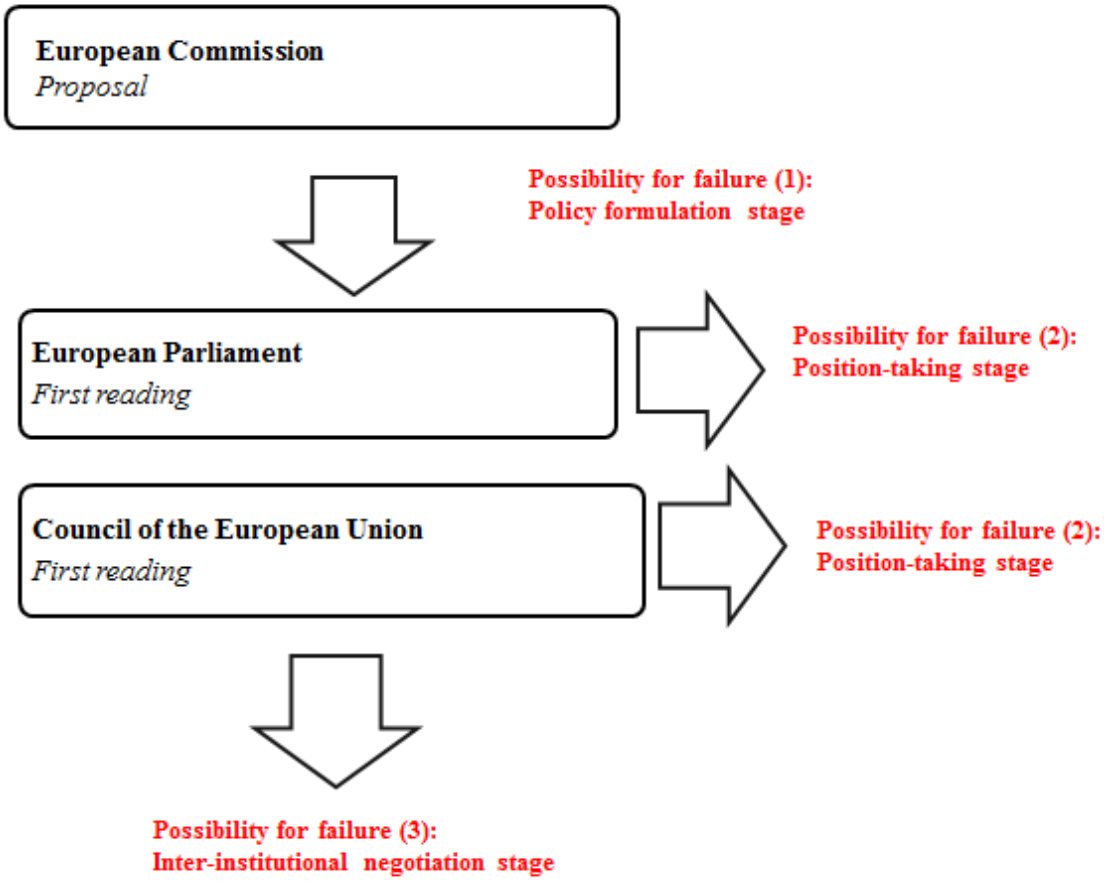
The first step in answering the question is providing a definition and conceptualization of policy failure as the outcome to be explained.

1.2 Defining and conceptualizing failure: what do we understand by failure in the EU policy-making process?

Most of the research on deadlock and policy failure is based on the assumption of unanimity, the common decision-making procedure in the Maastricht and Amsterdam era of the European Union (Héritier, 1999; Bovens and t'Hart, 1998) where the veto of one state representative in the Council could block a negotiation process (Moravcsik, 1998) and the European Parliament arguably limited influence (Moravcsik, 1993). However, there were indications of increasing involvement of the European Parliament in policy areas where qualified majority voting was applicable (Raunio and Hix, 2000; Hix, Raunio and Scully, 2003). In this thesis, the few systematic approaches to explaining policy failure (Bovens and t'Hart, 1998; Moravcsik, 1998; Héritier, 1999), all quite dated, will be combined with more recent insights into the politics of controversy and consensus in the European Union (Thomson, 2011; Smeets, 2016) in order to present a new approach in understanding how and why policy-making processes fail in the European Union. More specifically how actors strategically exploit deadlock and failure for a mutually beneficial game of blame attribution and blame avoidance.

The types of failure that are relevant here are those negotiation processes, which are controversial and end in deadlock over a policy proposal (Héritier, 1999). Failure as the outcome of a policy-making process is understood as "deadlock followed by withdrawal", as it concerns the informal stage of the policy-making process. This is the stage before the formal first reading, when the co-legislators negotiate their positions on the Commission proposal and coordinate in trilogues. The outcome occurs when negotiations are deadlocked in the legislative process and the Commission withdraws the proposal. Deadlock can occur at different stages (see figure 1). The proposal can fail directly after transmission by the Commission to the

co-legislators (failure at the policy formulation stage), the proposal can end in deadlock at the stage where Council and Parliament negotiate internally to develop a position (failure at the position-taking stage) and it can fail in trilogues between Council and Parliament (failure at the inter-institutional negotiation stage).



(Figure 1, stages of failure, source: own illustration)

Failure due to deadlock can either lead to a recast by the Commission, which launches a new round of negotiations that once again opens the possibility for deadlock or success or to the Commission shelving the policy idea, which would result in complete failure of the proposal.

To be precise, there are three possible final outcomes of the policy-process after withdrawal and recast: the first one is success following failure (1), wherein failure of one or more rounds of negotiations should eventually be followed by success and agreement on a modified version of the policy idea, usually starting with an extensive proposal and extreme positions, leading to a lowest common denominator outcome.

The second possible outcome would be continued deadlock or final rejection even after recasting to attempt more negotiation rounds, which could be classified as complete failure (2). In this case, the Commission should be expected to shelve the entire policy idea. But with the long shadow of the future of the EU where proposals can remain deadlocked for more than 5 years without any reaction from the Commission. There is also a third outcome, it is a form of uncertainty, which is hard to fit into an outcome-focused model, but can be captured to some extent by a process model, at least to some extent. This outcome is persistent deadlock (3), without rejection or withdrawal being formalized. In this case negotiations are deadlocked in trilogues, but the Commission does not withdraw the proposal and co-legislators do not formally reject it. This can result in some form of "legislative limbo" where the proposal simmers somewhere between the legislators without any negotiations or progress on the file. It can be a strategic move initiated by either of the co-legislators or the Commission, if persistent deadlock is preferable to actual failure or investing in consensus-building. The Commission might eventually withdraw the deadlocked proposal, the new Juncker REFIT/better regulation program actually makes withdrawal more likely[4] than under previous Commissions. In this case, two follow-up outcomes are possible: the policy project would either end up being part of a strategic second round of negotiations or completely fail.

The final outcome this thesis tries to explain is the first one: success following failure. Problems are identified and the Commission has taken on the task of developing a legislative proposal, but the negotiations end in deadlock and it fails at one of the stages of the negotiation process, either agenda-setting, (intra-institutional) position-taking or (inter-institutional) negotiation.

Deadlock means that the co-legislators were not able to agree on the proposal and directly, by outward rejection, or indirectly, by stalling the negotiations, failed the proposal. Deadlock encompasses procedural and substantive dimensions, legislators can produce deadlock over the decision-making procedure as well as the substance

[4] The REFIT (Regulatory Fitness) program is part of the European Commission's better regulation agenda, under the lead of President Juncker, which aims at evaluating the necessity of each policy instrument, simplifying the process and verifying that law is current, relevant and simple. It also includes a clause that foresees the withdrawal of initiatives still under negotiation, if they are no longer up-to-date with the requirements, no longer correspond to the policy objectives or have been blocked in co-decision without indication of agreement for a sufficiently long time.
Source: https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

of the proposal. Procedural dimensions include decision-making rules and their implications for actor involvement, actor behavior, and hierarchy within institutions. Substantive dimensions encompass quantitative and qualitative targets of the policy proposal such as quotas, deadlines, financial targets and so forth, but also the scope of the proposal.

Failure in that regard is process-specific and means a negotiation round ended without an agreement between the co-legislators on the given proposal. Hence, the concept does not refer to the failure of policy implementation or enforcement or the non-proposal of policy, but to the failure of a round of negotiation.

As mentioned in the previous section, deadlock can lead to two final outcomes: firstly, deadlock can lead to success after several negotiation rounds, which would be the "sequenced game" model of policy-making. Actors agree on the value of having the policy change, but do not agree on the proposal presented as it is, which results in a series of negotiations interrupted by deadlock periods, withdrawals and re-submissions or significant amendments of the proposal. Secondly, deadlock can lead to actual failure, also described by the literature as a zero-sum bargaining game, where one or more actors do not agree on the value of having policy change and prefer definite failure by forging and sustaining deadlock over investing in consensus-building. Either actors are committed to finding a way to agree and accept to engage in several rounds of negotiations to sort out the modalities of agreement, if the benefits and gains of material or reputational nature outweigh the costs of repetitive negotiations, or they are willing to risk negotiation failure, if the costs of pursuing negotiations are higher than the gains from having the policy proposal adopted (Héritier, 1999; Tsebelis, 1990).

From the perspective of each of the three legislative institutions, there are three possible outcomes for the legislative game: win (1) where an actor achieves an outcome that is favorable to one's interests; lose (2) when the achieved outcome is not favorable to one's interests and draw (3) if an outcome is acceptable, because it is balanced and takes into account all relevant preferences.

1.3 The contribution

The central argument for why policy proposals fail in one negotiation round and then reappear and lead to agreement in following rounds is that the process of failure is a strategic bargaining game orchestrated by the Commission. Actors play a game with bargaining over small gains in substance and procedure and place blame on the others (Bovens and t'Hart, 1998; Héritier, 1999; Novak, 2013). Formal rejection seldom occurs, because the three institutions are playing a strategic informal game with deadlock and withdrawal, that always fall short of rejection (Ripoll Servent, 2017). In fact, actors play an informal game with deadlock where rather than investing in avoiding it (Héritier, 1999; Örnberg, 2009; Kardasheva, 2013), they exploit it strategically.

Proposals fail as part of a staged process of several negotiation rounds through which actors in the different institutions try to exploit policy change in their favor and achieve procedural, substantive and reputational gains in several rounds of negotiations. This reflects the conception of the European Union as a “diverse polity in flux” (Héritier, 1999: 9) where actors try to accommodate diverse interests, and try to avoid policy failure by offering material compensations in the form of issue-linkages, side payments or package deals (Bauer and Trondal, 2015; McKibben, 2013; McKibben, 2014; Kardasheva, 2013) or procedural balancing through granting decisional rights or access (Benz, 1992; Smeets, 2015; Smeets, 2016). However, in this thesis, we go a step further in illuminating controversy by shifting the focus from explaining avoidance of deadlock and consensus-building to understanding failure, which is still largely missing in EU scholarship on policy-making (Wallace, Pollack and Young, 2015; Hayes-Renshaw and Wallace, 2006).

Each institution tries to be a winner in the bargaining game while propagating the credo that consensus is the alleged goal, yet empirical studies have shown that not everybody can win in each negotiation (Veen, 2011). Framing becomes primordial, especially for the losers, to compensate their losses to their audiences and constituencies. Whenever actors speak about negotiations, they advertise early agreements and strive for consensus, or rather the need to avoid producing losers. Nevertheless, underneath the public framing and carefully crafted rhetoric, they hide

the bargaining battle to enable the actors involved a face-saving way to handle losses they have had to accept (Bovens and t'Hart, 1998; Daviter, 2011).

The blaming game is beneficial to all actors involved in a setting where consensus is not mandatory, which is the case for post-Lisbon co-decision with QMV, because it offers a face-saving way of dealing with losses in policy by compensating them with reputational gains (Boin, t' Hart and Connell, 2009). Within the institutions, actors focus on blame avoidance when moving across hierarchical levels during the decision-making process (Häge, 2011; Häge, 2013). The benefits the legislative institutions can draw from engaging in a blame game are worth the effort of dealing with policy failure: if they cannot achieve the necessary gains with the proposal, it is worth letting it fail to exploit failure for reputational purposes, which are sometimes more valuable than the substantive or procedural gains that could be achieved through the policy change.

This thesis will contribute to the understanding of when failure is preferable to success for legislative actors and how they deal with deadlock in the process to achieve and appraise their gains while attributing and avoiding blame for losses. To do this, the scholarship on EU policy-making, decision-making and informal governance will be combined with comparative politics insights into bicameral dynamics to develop an approach to failure, which takes into account the institutional environment and the structural determinants and the process, namely the actors and the mechanisms leading to deadlock. In the theoretical framework, bargaining models of failure will be complemented by explications of the causal mechanisms leading to failure: for example structural elements such as the use of formal and informal rules. Three models will recapitulate and further substantiate previous findings about Commission behavior and link it to the process of failure to produce four different ways of explaining legislative failure: failure due to co-legislator position-taking after submission of a proposal (1), technocratic failure of the Commission due to high uncertainty and information asymmetry at the agenda-setting and policy formulation stage (2), failure due to Commission supranational activism at the agenda-setting and policy formulation stage (3) and lastly, a process model, which can not only account for failure, but also for those puzzling cases where a proposal comes back

after failure and is agreed upon: strategic failure, where failure is one step in a multistage policy and blame game (4).

The models will account for all stages of the process and feature the behavior of all three institutions, the Commission, Council and Parliament to bring together the often fragmented policy-making research, which tends to only look at one institution, or, the bicameral dynamics between Council and Parliament. A set of comparative case studies show whether any findings can be extrapolated to other policy and issue areas, thereby extending the existing qualitative scholarship that tends to only stay within one policy, or issue area.

The methodological contribution is threefold: looking at the informal process before the formal first reading procedure helps uncover the strategic game the legislative institutions play with each other (Brandsma, 2015; Ripoll Servent, 2011). It is important to include alternative explanations and allow for the possibility that there might be other ways to explain an outcome (Beach and Pedersen, 2013; Beach and Pedersen, 2011). This is why the theoretical framework will include all the thinkable ways of explaining failure and the empirical analysis will determine the one that is most likely to explain failure by carefully examining and evaluating the evidence (Beach and Pedersen, 2013). Considering different policy making stages enables us to understand which role particular actors and their strategies play and where exactly a process fails. Policy-making involves various stages, from agenda-setting to adoption and ratification, all of which bear the possibility for failure. The analysis of frames actors use to justify choices and attribute and avoid blame enables is to understand how (Bovens and t'Hart, 1998; Daviter, 2011).

Empirically, it will be shown that the failure models (1)-(3) and the strategic failure model are not necessarily mutually exclusive, but their complementarity strongly depends on how the Commission reacts to failure and whether it adapts its behavior. Through the study of four failure cases, it will become clear that the Commission not only has a key role in setting the legislative agenda and providing proposals, but also in steering the process and dealing with negative outcomes.

Furthermore, through the comparison of former key policy areas of state sovereignty, where the potential for controversy in and between the institutions is high, it is clear that turning failure into success works better in areas where the EU has more competence and the record of co-decision negotiated proposals is longer. Where the EU has more formal competences after the implementation of the Treaty of Lisbon and longer records of co-decision, like Justice and Home Affairs (Laursen, 2012; Wallace, Pollack and Young, 2015), the strategic failure game is easier to play for all actors involved, because there is a better foundation for conflict management strategies and the blame game. It is clear in the case of Justice and Home Affairs that negotiations take place in a forum where all actors involved have long-standing experience in competence and policy substance battles (Brandsma, 2015). It is much easier to orchestrate policy failure in an environment with strong interaction networks and trust and a long shadow of the future due to a long-standing tradition of policy integration (Versluis, van Keulen and Stephenson, 2011). In less established policy areas where the EU possesses less formal competence and member states to a large extent retain legislative power like Social and Employment Policy (Hantrais and Campling, 1995; Duncan, 1996; Tomlinson, 2011) where policy integration is less dense and actors have less experience in negotiating with each other, the game is more difficult to play, because the stakes are different (Geyer, 2013). The area is much less integrated and actors have much to lose in negotiations in terms of competence and can rely on much less experience in negotiating agreements (Forest and Lombardo, 2012). This makes it more difficult to enact a strategic game, because the roles are less clear to everyone and there is not as dense a network and as much trust as in other policy areas (Lombardo and Meier, 2008; Jenson, 2008).

1.4 Summary, research mandate and proceedings

This thesis makes three important contributions to the study of legislative failure in the European Union. The theoretical argument provides a possible explanation for policy failure, which goes beyond the existing literature by modeling the process between all three institutions, including elements of the intra-institutional processes and providing a detailed typology of conditions and mechanisms of different variants of failure. The key insight gained through this study is how actors can exploit failure strategically in the process and through an accompanying framing game to turn failure into a reputational benefit and compensate for procedural and substantive

losses. Methodologically, the thesis contributes to a better understanding of the process dynamics through a detailed account of actors, strategic mechanisms, stages of possible breakdown and also key conditions, which enable or disable actors from pursuing strategic behavior. Empirically speaking, this thesis expands on existing research of policy-dynamics, especially qualitative research, by attempting a comparison not only of cases within one policy area, but a set of four cases across two policy areas. This enables us to draw conclusions about whether mechanisms and conditions found in one area might extend to other areas and whether it has potential for generalization, if tested further.

The second chapter represents the first part of the theoretical framework of this thesis, as it gives a review of the existing literature on the policy making process by looking at how different studies have tried to explain the story of success and failure with a particular focus on the role of different types of actors, institutions as collective actors and individual actors, especially relais actors and their ability to steer the process. By looking at different stages of the policy process it will become clear that breakdowns of the negotiation process can occur at different stages depending on the type of controversy, the preference constellations and the actors involved. This chapter will be the first step in theorizing the policy-making process from a process perspective with the aim of explaining failure by looking at the dynamics within and between institutions.

In the third chapter, the theoretical framework will be substantiated by a number of models to explain failure. The three Commission-centered models draw on existing literature, but complement and extend it by paying more attention to the process, the conditions and mechanisms of success and failure and the role of different actors. The fourth chapter provides a detailed explanation and discussion of the research design, including arguments for conducting process analysis and comparative case studies to test the model of strategic failure and a presentation and discussion of the document and interview data base. The expectations formulated in the theoretical chapter will be tested on four cases in a detailed comparative process analysis in chapters five and six before presenting and discussing comparative findings in chapter seven. The eighth and final chapter will be devoted to a broader discussion

of the benefits and limitations of the theoretical assumptions and empirical findings, as well as the overall framework of the present study.

II. Theorizing failure in the policy-making process: the importance of structure

This chapter constitutes the first part of the theoretical framework. It combines the review of existing literature on the role of institutional factors and agency in the legislative process with a discussion of the role and behavior of different types of actors in the process of failure. The institutional framework, the co-decision framework or ordinary legislative procedure (OLP), will be presented alongside important structural factors as legislative negotiations under the OLP are tightly embedded in a two-level setting that structures policy controversy and the party politics dynamics. General expectations about how they can affect the process and lead to failure will be derived for each sub-section and modeled into the causal mechanisms of the different process models in the following chapter. The same will be done for the key actors in the process, whose role and influence will be discussed to determine who is most likely to shape the outcome of the policy process. The expectations, based on previous findings, are that failure occurs if the agenda at the national and European levels does not coincide leading actors to not value and not invest in policy change. If they can achieve electoral, partisan, reputational or influential gains, actors will invest in achieving an agreement if that is not possible through the proposed policy, failure and deadlock are likely outcomes.

2.1 The decision-making framework: the legislative procedure

This section, as well as the following two, will introduce structural factors, which encompass the process of legislative negotiations, in particular the formal and informal rules of procedure, which enable or limit actor behavior. Apart from institutional rules, context also matters for success or failure, and the current crisis context is likely to affect the interests and incentives of all actors involved.

2.1.1 Co-decision in the post-Lisbon era: the ordinary legislative procedure

Secondary law-making presents a different type of collective action problem than intergovernmental bargaining over the creation of an institution. Quarreling over policy is different from quarreling over integration and competence distribution (Bauer

and Trondal, 2015). The stakes are not the same for policy change as they are for competence transfers in treaty negotiations. The post-Lisbon era has brought new types of battles in a more integrated policy environment: strategic and orchestrated battles over competence, procedure and nitty gritty details of policy proposals (Smeets, 2013; Bauer and Trondal, 2015). Defending your interests in a setting without unilateral alternatives (Héritier, 1999; Falcó-Gimeno, 2012) means that negotiations of individual proposals take place in a context of overall path dependence in terms of the general direction in the policy fields where integration has been proceeding for a while. Therefore, it is difficult to reverse. While this is true for EU policy-making, it is not true in the same way for Treaty negotiations where member states negotiate relinquishing sovereignty, which is a core constitutional matter. Actors calculate strategies differently if they know it is a context of repeated interaction and they will have to face the same partners again in the future; there compromise becomes more likely (Falcó-Gimeno, 2012), and they make concessions that might not be necessary in order to reach an agreement (Tsebelis and Ha, 2014).

The Treaty of Lisbon has rendered collective decision-making more complex: inter-institutional dynamics have been complicated by the extension of co-decision due to the increased involvement of the Parliament, the generalized application of qualified majority voting in the Council, as well as the new political agenda of the Juncker Commission. It has been argued that competition and controversy between institutions has increased. Competition due to national sensitivities in the Council has been amplified by the economic and migration crises, conflict in between states is more pronounced and representatives are more likely to enforce national positions and red lines (Wallace, Pollack and Young, 2015). In parallel, competition due to an activist Parliament has become more prominent. The Council and Parliament increasingly engage in fights for influence and rights over policy proposals (Naurin, 2015). Lastly, competition is reinforced by a more political Commission whose role behavior is somewhat ambiguous as it oscillates between mediating and strategic interference (Bauer and Trondal, 2015).

Lisbon has also changed intra-institutional dynamics as the new voting rules and the extension of QMV relieve the consensus-necessity to a certain extent. It is no longer necessary to please everyone and actors pick whoever is worth their attention. In the

Council, QMV slightly shifts the balance of power towards the bigger states, meaning the ones with more votes, especially Germany, France and the UK, and forces smaller states to look for coalition partners early on and/or look towards the big states to know what their position will be and where a possible majority or blocking minority coalition might be found (Thomson, 2011). This does not mean that big states always win and are never isolated, but it lowers the odds. Germany in particular is seldom if not never disregarded, as it is the biggest state with the most votes and most often needed to form either a majority or a blocking minority (Veen, 2011). As a result, the post-Lisbon setting with new voting rules reshapes the strategic possibilities of different actors and forces them to consider the bigger states with the most votes before anyone else. This makes it necessary for state representatives to seek informal connections early on in the process to try to form alliances.

The co-decision procedure as applied today is the result of numerous formal treaty changes and informal rule interpretations over time. Codified in the Treaty of Amsterdam (1997) and renamed the ordinary legislative procedure (Art.294 TFEU) with the Treaty of Lisbon (2009), it is postulated as the default legislative procedure (Ripoll Servent, 2017). Over time, the application of the legislative procedure has resulted in more or less equal rights for the Council and the Parliament (Hix, 2002; Rittberger, 2005; Rittberger, 2012). Formally, the Parliament is on equal standing with the Council, informally, there are still significant differences in terms of power and influence over the legislative process (Wallace, Pollack and Young, 2015). The genesis of the current co-decision procedure was a rather rocky process for the Parliament. In the first version of co-decision - negotiated in the intergovernmental conference that led to the Treaty of Maastricht - the Parliament's role was much less extensive than expected (Hix, 2002; Ripoll Servent, 2017). In the early period of co-decision, the Council and Parliament were still exploring their options; the Parliament had received a number of formal powers, especially a proper veto power to reject any Commission proposal even if the Council had reached unanimity and a third reading position where the Council is forced to negotiate a joint text to which both co-legislators have to agree to be able to pass the legislation (Crombez, 1996; Ringe, 2010; Ripoll Servent, 2017). The time limits, the weight of the Parliament's first reading opinion and the use of the extra readings were subject to controversies, leading Council and Parliament to develop more informal channels of negotiation and

exchange over time. The most important and durable of these being trilogues, the informal bargaining before the formal legislative agreement is struck, which was widely used by both Council and Parliament to try to widen their influence (Hix, 2002). Co-decision has only recently become the most important procedure for legislative decision-making. Before the Treaty of Lisbon (2009), the consultation procedure was the most commonly used for legislative negotiations (Varela, 2009:10; Ripoll Servent, 2017:58-72). The Council preferred consultation as it enabled government representatives to concentrate on the Commission without having to give much consideration to the Parliament's opinion (Costello, 2011). However, the Parliament used all its formal rights, including bringing the Council before the European Court of Justice and threatening with rejection of the Commission proposal, which would postpone the decision, forcing the Council to reconsider its amendments (Kardasheva, 2009).

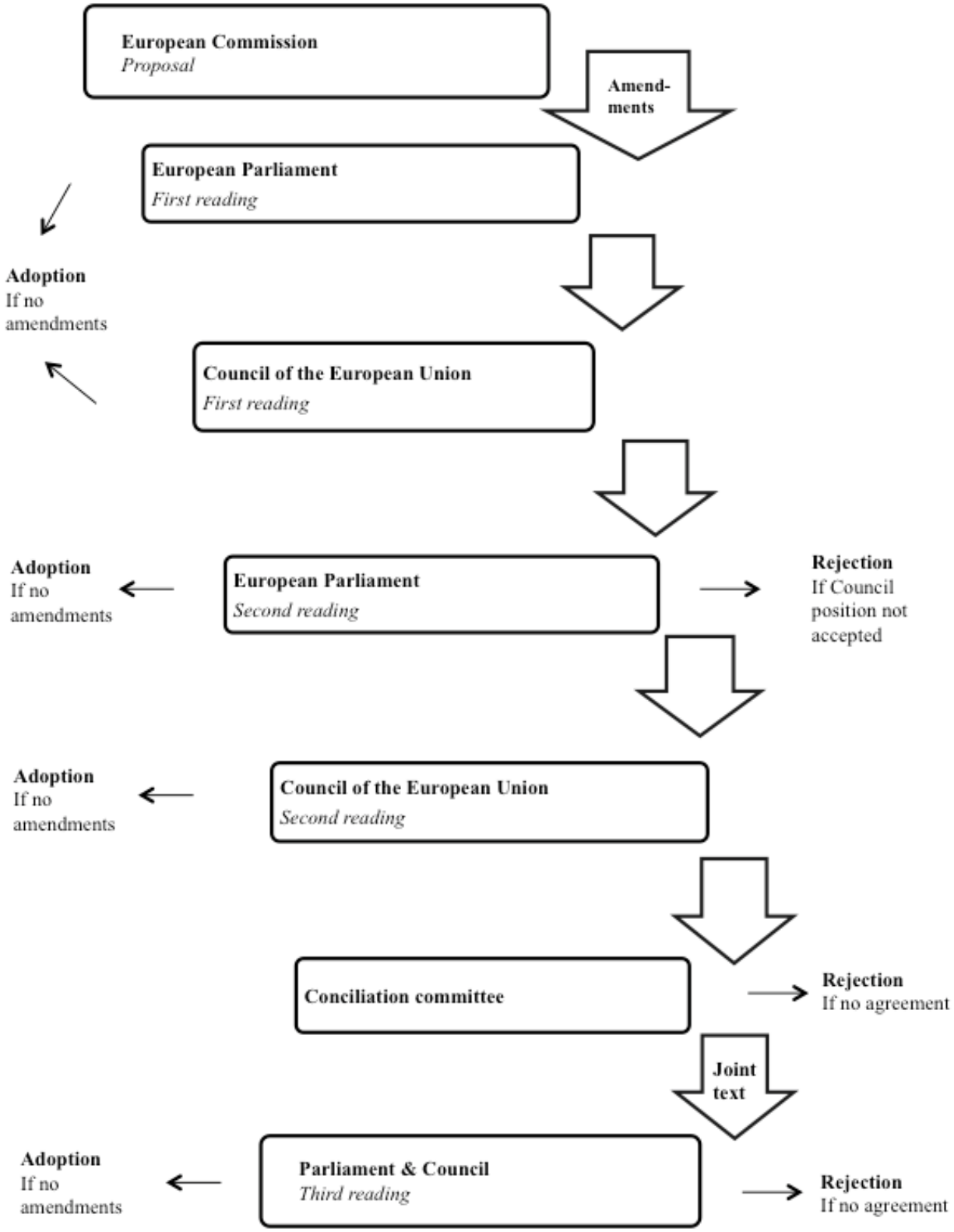
The ordinary legislative procedure as codified by the Treaty of Lisbon foresees the following formal process: the Commission submits a legislative proposal to the Parliament and the Council, apart from a few exceptions (Ripoll Servent, 2017), the right of initiative is the Commission's privilege, even though the Council and Parliament can ask for a proposal. Once the proposal is transmitted to Council and Parliament, both institutions start intra-institutional negotiations to determine their position.

The Parliament will appoint the committee responsible, which in turn will appoint a rapporteur and shadow rapporteurs to give an opinion on the file. The opinion will be delivered to the plenary and the Parliament can vote by simple majority on whether to approve the proposal without changes, with amendments or reject it. While formal rejection is not possible, the Parliament can informally ask the Commission to withdraw or send the file back to the committee for further deliberation, if the plenary does not approve. The Council sends the file to the working party responsible where delegations from all member states discuss the technical details of the proposal. In parallel, the file is given to COREPER, the committee of permanent representatives, where diplomats of all member states discuss the political elements of the proposal. The last step is transmission to the Ministers and formal acknowledgement of the proposed common Council position by the responsible Ministers of all member states

(Naurin and Wallace, 2008; Naurin, 2010). If the proposal is approved, either by consensus and without vote or by qualified majority, the Council has achieved a formal position for negotiations with the Parliament (voting dynamics in the Council see: Hagemann, 2015; Hagemann and Høyland, 2008). If the Parliament has no amendments to the Commission proposal, the Council can also adopt it without changes, in which case the legislation is adopted. If the Parliament has amendments and the Council decides to accept them, the proposal is also agreed upon.

The Council can agree upon a first-reading position if it decides to amend the Commission proposal, by qualified majority if the Commission is willing to incorporate the amendments, or by unanimity if that is not the case, or the legislation concerns specific special areas (taxation social security, foreign policy, defense and police cooperation) (Ripoll Servent, 2017: 69ff). Until the point where the Council has officially taken a first reading position, the Commission can still amend or withdraw the proposal. The Council can reject the Commission proposal as a whole at first reading. While this is a rare occasion both the Commission and the Council can use the threat of withdrawal or formal rejection to their advantage, if need be. Also, first reading does not have any formal time limits that co-legislators must respect. The informal coordination and position-taking negotiations can continue without pressure, leaving all three institutions strategic opportunities to exploit the lack of time pressure for both consensus-building and controversy-seeking.

Both the Council and the Parliament can prolong internal negotiations, thereby de facto blocking the process by stalling the negotiations (Ripoll Servent, 2017:70f.). The second reading is essentially similar to the first, except that there are strict time limits within which positions must be taken, communicated and agreements must be struck in order to adopt the legislation. Also, second readings require an absolute instead of a simple majority in the Parliament, which makes it strategically preferable for the Parliament to avoid second reading. The conciliation committee is an absolute rarity in the legislative process, empirically spoken. For example, in the period from 2009-2014, only 9 files reached the conciliation stage (Ripoll Servent, 2017: 71) with most having been settled before. Conciliation is highly formalized and requires both co-legislators to follow a set of clearly defined steps to produce a joint text (see Ripoll Servent, 2017: 71ff.)

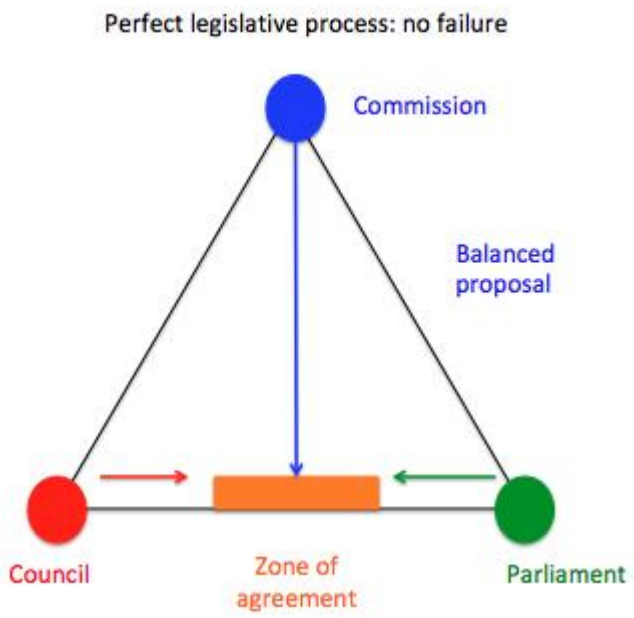


(Figure 2, the ordinary legislative procedure, source: own illustration, after Ripoll Servent, 2017)

It has been argued that the Commission's formal standing has been weakened in the co-decision setting, as it was not clear whether the Commission could still withdraw a proposal once the Council had reached a common position. This has been clarified by the Treaty of Lisbon. The Commission provides its opinion on the Parliament amendments and Council position in first reading, and on the Parliament's amendments in second reading (Tsebelis and Garrett, 2000). The Treaty of Amsterdam also clarified that the Council could not fall back on its position if conciliation was unsuccessful, but that the proposal would be considered not adopted (Hix, 2002). The Treaty of Lisbon also established a fast track for legislation and enabled first reading agreements (Art.294 TFEU, Art. 295 TFEU), foregoing the other formal stages of the decision-making. Since then, the EU has established a record for fast-tracking agreements. Rather than resolving controversy, it has been shifted to a new and informal stage of decision-making, the trilogues, which take place before any formal position-taking and official first reading negotiations. This has shifted most of the negotiation process to an informal phase before the formal first reading, where Commission, Council and Parliament informally negotiate to exchange views and positions on the files to sort out controversies before any formal decision is made.

2.1.2 The structural origins of failure: the formal practice of first reading agreements and the ambiguity of informal trilogies

All the institutions assume specific roles in the process. The ideal legislative scenario pictures the Commission as a formal agenda-setter, an honest broker and gatekeeper with little strategic influence on the ensuing process (Rasmussen, 2007; Crombez et al., 2003). It proposes a policy that lies between the expected positions of Council and Parliament after the consultation of both. The co-legislators adopt compromise-seeking positions within the possible zone of agreement (figure 2) (Wallace, Pollack and Young, 2015). In this case, agreement will be found somewhere within the bounds of the zone of agreement, it can slightly favor the Parliament or the Council, depending on who was more influential in the bargaining process (Tsebelis, 1990; Wallace, Pollack and Young, 2015). In a perfect scenario, where all institutions performed according to their role, failure would not occur, because the placement of the proposal by the Commission enables a deal that satisfies both co-legislators in one round of negotiations (Wallace, Pollack and Young, 2015).



(Figure 3, bargaining model of legislative success, source: own illustration)

The process of legislative bargaining would then consist of concessions being made by the co-legislators, the Council and Parliament, in order to find a compromise that lies towards the middle of each institution's preference. It is possible that due to the shadow of the future or cross-issue linkages during the process, either one of the co-legislators makes unnecessary concessions to the other, leading to an outcome that is closer to the interests of one co-legislator rather than the other (figure 3) (Thomson et al., 2006; Wallace, Pollack and Young, 2015).

The increasing importance of informality and the normalization of consensus have been widely addressed and discussed by rationalists (Thomson, 2011, Reh et al., 2013) and constructivists (Kauppi, 2010; Kauppi and Madsen, 2008; Saurugger, 2014) alike. It has been argued that the expansion of informal trilogues and the tendency towards early agreements shifts decision-making power to key actors, such as rapporteurs, shadow rapporteurs or the Council Presidency (Judge and Earnshaw, 2011; Farrell and Héritier, 2004; Ripoll Servent and Trauner, 2015). Trilogues were the result of an exercise of balancing out the expected negative consequences of the generalization of the co-decision procedure (De Ruiter and Neuhold, 2012) and both co-legislators tend to exploit the lack of formal time limits to take their time to settle conflicts during controversial negotiations (Shackleton, 2000).

Failure is also much more an informal than a formal question. More often than not, the Council does not formally reject the Parliament amendments and the Commission proposal, but rather stalls negotiations by discontinuing its intra-institutional work on the file or forming an informal blocking minority thereby presenting the other two institutions with the looming threat of rejection without actually carrying it out (Ripoll Servent, 2017).

Formally, Council and Parliament are on equal footing in the legislative procedure and formal rejection of a proposal is a rarity in European policy-making. Important negotiations take place in a highly informal setting and controversies are settled in informal exchanges between institutions. This is important to keep in mind when trying to investigate instances of legislative failure and understand the dynamics of success and failure in policy-making from the perspective of the actors involved. Informality provides actors with behavioral incentives and the choice to either rely on informal mechanisms or make formal or public statements. This is important as it can have a decisive influence on the process and outcome of the negotiations (Heisenberg, 2005; Schneider, 2008).

The EU is a special institutional setting with two distinct, but closely interlinked levels: the national and the European level. Changes at the national level, like elections or crisis-induced changes, affect the dynamics at the European level and vice versa as all three institutions are connected to the national level: the Parliament is elected by national electorates, the Council is almost entirely composed of state representatives and the Commissioners are appointed national officials and the European Council, the patron of the legislative agenda, is composed of the heads of state. A decisive connecting element, which has a crucial influence on the policy-making process is party politics. Party agendas at the national level can be uploaded to the European level and coalition dynamics at the national and European level are strongly codependent (Mühlböck, 2013).

2.2 Two level setting: conflict interactions between the European and national level

In this section, we will look more closely at the peculiar institutional structure of the European Union and the closely intertwined national and European institutional structure, which is reflected by the central role of the Council of Ministers and the

European Council, two solely intergovernmental institutions with dominant positions in the legislative process. It will be argued that national actors use the European level to further their interests and exploit the institutional venues to outsource or settle national controversies.

Political agents maneuvering in multilevel settings always face tension between autonomy and control. Therefore, the situation is complex as many different actors are responsible for finding compromise. Everyone has to make concessions, but each individual representative also has to justify the decision and get it approved "back home" (McCubbins and Schwartz, 1984; Trondal, 2004; Trondal and Veggeland, 2003).

2.2.1 Bottom-up: how national controversies shape European policy-making

Changes in the two-level setting and national political dynamics affect European political processes; actors anticipate and incorporate European policy developments when seeking to influence national political processes and vice versa (Héritier, 1999; Ruggie, 1993; Aspinwall, 2002; Aspinwall, 2007).

The two-level setting is conditioning the process in a straightforward manner, as all of the key actors involved in legislative decision-making have double allegiances to the national and the European level. Supranational policy change is evaluated by the extent to which it results in losses of competence, distributive losses and how high the costs of instrument adjustment will be. The higher the losses and costs, the more likely it is that actors will oppose policy change (Héritier, 1997; Ripoll Servent, 2017). Depending on the political system and the internal organisation of the state, coordination between levels can be difficult, the involvement of national parliaments through ratification and consent might be necessary, which adds another veto player. Minister portfolios and the support of other subnational actors must also be secured (Benz, 1992). Throughout the process of coordination of levels, actors in the national polity who fear a loss of decisional power or losses on substantive grounds are likely to lobby governments to oppose the policy change, which results in a reduction of the zone of possible agreement and an increased risk of deadlock (Sebenius, 1992).

The uploading phase, where issues are brought to the European agenda, is strategically crucial, as actors have to produce timely, coherent and sensible national

positions and build support for them at the European level. Before policy negotiations start, actors have to maneuver on both the national and European level to coordinate between and within policy departments (Geuijen et al., 2008). The two-level platform can be exploited for controversies, famously called “venue shopping” (Guiraudon, 2000) translating public opinion sentiments and trends or particular government agendas from the national to the European level, which can result in the contestation of integration and policy change or support thereof (Guiraudon, 2000; Ripoll Servent, 2017). If an issue is salient to a constituency and there is a demand for a policy solution to be found at the European level, actors are more invested in bringing about policy change and will fight harder to secure gains for their constituents. On the other hand, if an issue is considered to be of little importance or better solved at the national than the European level, actors will not invest in finding agreement and prefer failure over policy change.

Actors in European institutions, especially in the Council, are dependent upon national political agendas; hence, changes in government due to national elections are likely to affect both actor constellations and dynamics in the Council. Reconfigurations of governments, such as dismissals and replacement of Ministers (Sundström, 2016; Sabatier and Weible, 2014), or ideological shifts due to a new party or coalition taking office, can affect the positions and behavior of state representatives (Niemann and Mak, 2010). These changes affect the time horizon of Council actors who are much more focused on the short-term than the Commission and can pursue a more long-term policy strategy (Hartlapp, Metz and Rauh, 2016).

European Parliament elections alter the power balance between groups within it and are therefore likely to affect the balance between the Council and the Parliament (Ripoll Servent and Trauner, 2015; Hagemann and Høyland, 2010; Costello, 2011). Similarly replacements or changes in the actors participating in the Council can affect the negotiation process (Sundström, 2016), either by removing brakemen and enabling drivers to build supporting coalitions or by adding breakmen and increasing the number of actors opposing the policy change (Smeets, 2015). National elections can bring different parties with different policy preferences and priorities into power, which results in a replacement of Ministers in the Council and a reconfiguration of

national positions, sometimes in the middle of a negotiation process on a legislative proposal (Niemann and Mak, 2010).

Apart from the links between the national level and the Council and the Parliament, there are also a number of important cross-level links with the Commission, which can influence the policy process. Commissioner appointments and seconded national experts to the Commission are mechanisms of influence across the two levels. Member states strategically place national experts in the Commission to lobby their interests in the Commission's internal policy formulation process (Wonka, 2008; Trondal, 2007; Sundström, 2016). The Commission exploits this opportunity strategically to gain as much information about member state preferences as possible to see which proposal might get the most support in the Council (Geuijen et al., 2008; Gornitzka and Sverdrup, 2011). Commissioners are also an important tool of influence for member states, as they have the authority to steer the policy trajectory in their Directorate-General (DG) and give the member state sending the Commissioner the ability to control the agenda to a certain extent (Liefferink and Andersen, 1998).

2.2.2 Top down and bottom up again: the effect of crises in a two-level setting

Apart from changes in the national system due to elections and the dynamics of party politics, exogenous shocks, such as crisis events, sudden migration influx, economic collapse and terror attacks, also affect the policy agenda of governments. In turn, governments might value differently a policy proposal coming from the European level, it might be perceived as a solution to a problem, or, on the contrary, become an undesirable policy change Princen, 2007; Zahariadis, 2013). Hence, crises can be a catalyst for the success or failure of particular political projects by either opening or closing windows of opportunity (Princen, 2007; Brändström and Kuipers, 2003). Crises raise the stakes and affect the agenda, as they shift attention to particular issues and away from others. Crises issues make controversy more likely, which in turn increases the odds of failure (Princen, 2007; Princen and Rhinard, 2006).

How do crises concretely affect the legislative process in the EU? Crises change the political and economic context, within which negotiations take place. Crisis in combination with the reformed institutional setting increases complexity (Zahariadis,

2013; Bauer and Trondal, 2015). Vertical and horizontal interactions between actors in a multi-level setting multiply and more actors enter the scene. This creates more institutional complexity due to the multitude of rules governing interactions between actors within the legislative institutions. The crisis also increases issue complexity as well as the amount and nature of informational linkages. The more actors, the more information overload, the more complex the collective decision-making process becomes. The institutional setting in which negotiations take place, the stages of the process, and the issue characteristics greatly impacts the strategies actors can use (Lewis, 2010; Elgström and Jönsson, 2000; McKibben, 2010; Oppermann and Viehrig, 2011).

The crises have increased urgency and uncertainty due to disruptions in the political and economic context and actors use crises to engage in framing contests and blame avoidance (Boin, 'tHart and McConnell, 2009). It has been shown for EU decision-making that crises increase urgency, in turn, urgency increases both pressure to act and conflict, alter preferences and affect positions actors take during negotiations and the strategies they use (Princen, 2011). Effects of issue salience differ between high politics and low politics areas (McKibben, 2010). Justice and home affairs issues have a similar importance level as social and employment issues overall, compared to a number of other issue areas, because politicians attach sovereignty concerns to these areas as they are connected to the most important policy concerns of citizens, namely security and welfare. High politics areas are those areas where states are most concerned with relative losses and will be less inclined to compromise, whereas in low politics areas, absolute losses matter and more compromising behaviour can be expected (Dür and Mateo, 2010; Wallace, Pollack and Young, 2015; Forest and Lombardo, 2012; Graziano and Hartlapp, 2015).

But do crises lead to more failed proposals? That is an empirical rather than a theoretical question, since crises affect the preference constellations and salience of the actors involved, but do not alter the process itself. Different issues might arise and negotiations might become more controversial, but crises can function as catalysts for policy change (Hartlapp, 2016; Scherpeel and Perez, 2015). Issues can fail, because the stakes are too high, or because actors do not consider them worth

their while or they can succeed, because a crisis opened a window of opportunity (Kingdon, 1984; Héritier, 1999; Wallace, Pollack and Young, 2015).

Within the area of Justice and Home Affairs, not all issue areas have the same salience level. For examples, issues concerning immigration and security matters and data protection rank higher than questions of police cooperation and civil justice. Obviously salience is also coupled with the current agenda and can be affected by sudden shifts: the more salient, the higher the pressure on governmental actors to find solutions and depending on the level of political conflict in the domestic arena, the lower the chance of resolving it on the domestic level (Laursen, 2012; Roos, 2013). Looking at issues in the border policy area with migration relevance would therefore provide for critical cases as the migration and security crisis is of crucial importance to states (high politics, high salience). Within the area of justice and home affairs, security measures are more salient than migration management measures: the more salient the issue, the more likely states are to contest extant policy or propose policy reversal (Roos, 2013). Since the outbreak of the migration crisis and the following security crisis, pressure has been highest on national governments and the EU to act in this area. Public opinion has also devoted more attention to Justice and Home Affairs issues (Monar, 2014; Haverland, De Ruiter and Van de Walle, 2015).

This trend has shifted attention away from other policy areas, which are generally important to actors, because they link to core state topics like sovereignty or budgets, but are not in the immediate focus due to more pressing need for action in other areas. Social and Employment Policy is one policy area where public opinion and policy-makers have devoted less attention to in the crisis context, even though it is generally considered to be a core sovereignty issue. In addition, the economic and financial crisis has only confirmed the fact that the cooperation and integration in social and employment matters remains very contested (Pollack, Wallace and Young, 2015). The financial crisis in particular has shifted resources from some areas to others and the combination of financial and economic crises has shifted the attention away from areas that do not need immediate policy responses to problems (Wallace, Pollack and Young, 2015). In the area of Social and Employment Policy, questions with labour market and welfare provisions relevance are considered very important,

because they touch upon one of the core parts of member states and have redistributive consequences. Within the area of Social and Employment Policy, measures combating unemployment and aiding businesses are more salient than measures geared towards combating social inequalities. In the crisis context, all measures touching upon the labor market are of high importance in the aftermath of the economic and financial crisis, which left European welfare states weakened and under pressure from the public. Gender equality issues are relatively less important in this area in the crisis context, unless they are linked to labor-market related measures with distributive consequences (Pollack, Wallace and Young, 2015).

2.2.3 Patronage by the European Council: no priority, no success

Recently, scholars have also investigated the role and impact of the European Council on the policy process, especially, but not limited to the agenda-setting process. It has been argued that the European Council and the Commission are joint agenda-setters, which depend on each other, but also engage in power play (Bocquillon and Dobbels, 2014). While not technically a legislative institution, the European Council is very much part of the overall process and strongly influences the dynamics of success and failure by its strategic agenda-setting and interventions, as it is often the source of policy initiatives and makes specific demands to the Commission (Tallberg, 2008; Puetter, 2012; Wallace, Pollack and Young, 2015).

Salience is affected by the European Council as it determines which areas and issues have priority for the member states and outside events, especially the occurrence of crises, show that heads of state exert decisive influence on the agenda and the process of policy-making (Tallberg, 2008). If an issue is not considered a priority for the heads of state, it is likely that the European Council does not invest much in pushing for an agreement. If on the other hand the heads of state value and encourage policy change we can expect to see an agreement (Smeets, 2016). If this applies to intergovernmental Treaty negotiations (Beach, 2004), why would it be different in policy-making processes (Naurin and Wallace, 2008)?

2.2.4 Summary

The involvement of the European Council determines the fate of a Commission proposal insofar as its support of a proposal determines how important the issue will

be to state representatives in the Council. If it is not a priority, it is likely to be neglected on the agenda. If the Commission proposal goes against the interests of the heads of state, Council opposition is likely to be the consequence. If actors exploit the European level to settle national conflicts, it can lead to failure of the initiative, if they cannot rally sufficient support among the other actors. If on the other hand, actors can build supporting coalitions and convince their partners of the value of uploading an issue and handling it on the European level, conflict can be outsourced and possibly solved with a European policy decision.

2.3 Party and coalition politics: ideology structures conflict and controversy

In this section, party politics and coalition dynamics will be discussed as a special kind of linkage between the national and European level, which influences the negotiation dynamics and has an impact on the success or failure of a negotiation in so far as it enables or disables certain strategic mechanisms. This is particularly important, as the co-decision procedure, as explicated above, requires actors to build majority coalitions to approve a proposal and minority coalitions to block it.

2.3.1 National and European party politics: contradictory or complementary?

Party politics in the EU are only partly similar to national politics. They aggregate citizen interests and provide ideological platforms for political debate and policy-making, yet European elections are second order compared to national elections. There are no clear majorities or stable coalitions and no institutionalized government/opposition dynamics (Hix, Noury and Roland, 2007; Mühlböck and Yordanova, 2017, Rasmussen, 2008; Rasmussen MK, 2008).

Co-decision and bicameralism create a smaller set of winning coalitions between the institutions and determine clearer winners and losers in negotiations (Costello, 2011), which makes it even more important to all actors involved to bargain for gains and find a face-saving way of dealing with losses. This is especially true for smaller parties and smaller member states (De Ruiter and Neuhold, 2012; Farrell and Héritier, 2003)

In the Parliament, studies have shown that MEPs tend to vote according to national party lines rather than European ones if an issue is very salient domestically, despite

high levels of cohesion across European ideological groups (Hix et al., 2007; Frantescu, 2015; Mühlböck and Yordanova, 2015). The higher the incentives to follow national party lines, the more likely it is that they will defect in European policy negotiations (Meserve et al., 2009; Meserve et al., 2017). Nonetheless, there are variations according to role conceptions and aspirations of MEPs, depending on whether they focus on the national or the European career path or if they are oriented towards the party or towards a career within the European institution and so forth (Lindstädt et al., 2012).

There is a constant interplay of levels to find agreement in the Council (Häge and Naurin, 2013; Smeets, 2015; Grøn and Salomonsen, 2015). Brakemen want to increase the level of contestation by moving the issue up to the political levels and drivers want to keep the issue from the ministerial level. Ministers tend to pursue a different agenda and are more concerned with communicating at the national level (Smeets, 2015). States build coalitions to find majorities to support or oppose a proposal. Coalition dynamics are dynamic and complex, as actors balance various allegiances (Bailer, 2011; Bailer, 2010; Bailer, 2004; Finke 2016). There are numerous factors which can influence coalition-building such as power-based dynamics (Lindberg, Rasmussen and Warntjen, 2008) , issue-based considerations (Odell, 2000; Veen, 2011), ideology (Hagemann and Høyland, 2008), culture, geography and attitude towards European integration (Kaeding and Selck, 2005, Aspinwall, 2007). While findings on the impact of ideological, territorial and other coalitions have been inconclusive (Kaeding and Selck, 2005; Veen, 2011), it has been shown that power asymmetry in the Council largely influences coalition dynamics (Thomson, 2011; Naurin and Lindahl, 2008) as powerful states are better able to steer a process towards success or failure, because they are better able to build blocking minority or majority coalitions due to their advantage in formal bargaining power (Bailer, 2011; Naurin and Lindahl, 2008; Veen, 2011; Thomson, 2011). Larger states are less willing to make concessions, since they have better outside options and are less sensitive to reputational costs (Dür and Mateo, 2010; Kleine, 2013; Naurin, 2015).

2.3.2 How do party politics matter for policy failure?

In a multilevel-setting like the EU, actors face competing demands due to their multiple allegiances. National and European party politics can have a significant impact on the policy process, depending on how actors interpret their roles and functions (McKibben, 2015; McKibben, 2007). The less national and European party politics agendas coincide, the higher the likelihood that a proposal fails: contradictions or tensions between the European and national agenda affect coalition dynamics in the Council and the Parliament and increase the likelihood of opposition and formation of blocking minorities. Disruptions due to changes in the national arena can shift the majorities in the Council and affect coalition dynamics in a way that can both make or break deadlock depending on whether actors make use of the strategic opportunities.

For legislative negotiations, party politics are very important as all three institutions, especially the co-legislators have to ensure during trilogues that they can secure both a stable majority coalition within Council and Parliament and an inter-institutional overlap that is large enough to enable a first-reading agreement (Costello, 2011; Hagemann and Høyland, 2010; Finke 2016). Hence, actors have an incentive to exploit the national party politics agenda and the coalition possibilities in the European institutions to their advantage (Schneider, Finke and Bailer, 2010). Actors who are set on failure of the negotiation have an incentive to increase controversy, build blocking minorities, signal opposition through isolation (Smeets, 2015; Smeets, 2016) or stall the negotiations by keeping the issue from moving through the institutional channels necessary for achieving an agreement. This is most often done through silent opposition, where actors do not voice an opinion on an issue and thereby hindering the consensus-building process (Smeets, 2016; Novak, 2013).

2.4 Structural determinants of failure: reviewing key conditions

The generalization of the ordinary legislative procedure and the qualified majority voting rule have changed the setting for policy-making and thereby altered the stakes and strategic opportunities for the actors involved. The Council has to deal with a Parliament on equal standing and consider compensation mechanisms to make up for procedural and substantive losses the Parliament has to accept in the process. Internally, the member states encounter different incentives for coalition-building. As

it is no longer necessary to achieve unanimity, state representatives now focus on either building supporting majority coalitions or blocking minority coalitions. The Parliament has more formal influence, which it can use to extract substantive, procedural or reputational gains from the Council. The Commission can no longer mainly focus on accommodating the Council, but also has to consider the Parliament.

The process is further complicated by the interdependence of dynamics between the European and the national level. Any significant changes on the national level can compromise the success of a policy proposal, because a crisis disrupts the process and actors reevaluate their positions or divert their attention. Crises can open or close windows of opportunity for a particular policy change. If the crisis shifts attention away from the issue or increases the costs compared to the benefits, failure becomes more likely. A replacement of actors on the national level can lead to the breaking or building of coalitions in European institutions. A blocking minority can become possible due to more actors opposing the proposal or new actors lead to a break-up of a blocking minority and there is an opportunity to negotiate compromises.

III. Theorizing policy failure: the importance of agency, negotiation processes and the process of failure

The goal of the second part of the theoretical framework (chapter 3) is to bring in agency and model and operationalize different approaches to explaining failure, thereby bringing structure and agency together (Ripoll Servent and Busby, 2013; Saurugger, 2014) in distinct models, which can be tested on actual legislative negotiations by performing a process analysis. The models will complement existing scholarship with a novel focus on inter-institutional dynamics and the role of key actors creating and strategically exploiting deadlock and failure. In a second step, after presenting and conceptualizing the different models, we will provide a detailed operationalization of the different models of failure to make them empirically testable and distinguishable.

3.1 The key actors: institutions and individuals as agents of failure

Who are the actors and what is their function in the process? What are preferences and which role do they play? Which strategies do they use and how do they use them in the process?

In this section, the concept of agency will be more closely examined and a typology of actors will be presented, which play important roles in the process and can direct it towards either success or failure depending on their behavior. The importance of actor characteristics and strategic incentives for the success or failure of a policy proposal of will be discussed in the subsequent chapter after having distinguished and examined the various collective and individual actors involved in the legislative process. After looking at each institution as a collective actor, it is worth opening the black-box of each one of the three legislative institutions to see which actors are in charge of navigating the process and where incentives for strategic or inadvertent failure might be found.

It is necessary to define what an actor is and which types of actors should be distinguished and taken into consideration for negotiation analysis. This includes actors on a macro-level (collective/institutional actors) and actors on a micro-level (individual actors) (Saurugger, 2014). Agency at the institutional level is understood as interactions between the institutions, the inter-institutional dynamics and interactions of different types of sub-institutional actors within each of the institutions. Interaction dynamics between individual actors concerns the micro-dynamics within each legislative institution, as well as between the institutions (Saurugger, 2014; Trauner and Ripoll Servent, 2015).

Collective or institutional actors represent aggregated interests. The Council, Commission and Parliament and states as institutions are usually referred to as actors when trying to refer to bigger conflict lines and negotiation dynamics where there is no immediate need to differentiate between sub-dimensions. This shortcut will also be used in this thesis, without however presuming that this type of collective agency assumes that these institutions are unitary actors since it is important to consider the competing interests within the institutions, which are often dissimulated in models that rely on common institutional positions, without looking at intra-institutional dynamics of position-taking (McElroy, 2007; Ringe, 2010). Individual actors, on the other hand, can be captured by the following behavioral typology: (1) relais actors pursue a general strategy of exerting influence among peers, (2) economic actors partake in utility-maximizing and focus on the economic dimension, whereas political domestic (3) actors can be linked back to party politics dynamics at

the national and European level (Odell, 2000; Favell and Héritier, 2004). Whether actors display one or the other type of behavior depends on preferences (Moravcsik, 1998) and strategic goals (Héritier, 2010) in combination with the influence of norms and socialization at the European level (Farrell and Guiraudon, 2011; Saurugger, 2013).

Relais actors, drivers and brakemen, etc., are those actors that have important strategic advantages in steering negotiations in their favor, brokering deals and mediating conflicts (Héritier, 1999; Farrell and Héritier, 2003; Ringe, 2010; Smeets, 2013; Smeets, 2015). In relation to explaining failure of negotiation processes, actors matter in so far as they have different sensitivities to failure based on the different levels of importance they attach to issues. The more they are affected by a potential outcome, the less credible their threats (Farrell and Héritier, 2003).

An EU institution can also serve as an actor, as it aggregates the preferences of the individual actors, which it encompasses. EU institutions are of increasing importance in the intergovernmental setting of the Union (Beach, 2005). An institution, as a concept, stands for a set of rules and practices that guide the interactions of actors in the given structural context (March and Olsen, 1998).

With regard to the role of actors in the process we observe, from the previous review of the two-level setting and the many structural factors that condition actor behavior, that the complexity of representation and actor behavior in EU institutions is still unresolved. There are no straightforward interpretations or prevailing logics. Patterns of behavior are complex, dynamic and contingent. The behavior of actors within the institutions remains not only largely ambivalent, but also highly context-dependent (Beyers, 2010; Trondal, 2008; Kassim, 1994), which makes it difficult for research to predict how issues and interests will play out at the supranational level (Daviter, 2011; Cross, 2013).

Role conceptions matter, as agency in the EU is linked to questions of representation, similar to those in national political systems. The representative role of actors comprises four possible types, which are complementary, rather than being mutually exclusive: a (1) formalistic type, which captures the level of discretion or the

formal authorization to act by a mandate, a symbolic (2) type, which is embodied in behavioral norms and habits that are considered appropriate, and an imperative (3) type where actors behave under clear guidance of instructions defined by political superiors, in the EU. This means that domestic officials act on the basis of national instructions, individual autonomy and discretion are restricted. Civil servants possess lesser, developed bureaucratic networks and have no involvement in political conflicts. Politicians are the main actors, other societal actors are not involved. The last type is a liberal (4) type with almost infinite autonomy, where representatives are independent experts, unbiased by domestic interests, and have the possibility to include non-national interests in their strategies. Bureaucrats act independently from politics, while politicians have less concrete preferences for policy outcomes and high trust in bureaucrats and networks with other societal actors are strong (Beyers and Trondal, 2004; Saalfeld and Müller, 1997).

As role conceptions differ, the incentives for behavior also differ. Actors who are set on extending the decisional influence of an institution are likely to perform differently from those actors who are focusing on policy integration or contestation thereof, which is particularly valid for actors in the European Parliament (Ripoll Servent, 2017; Bale and Taggart, 2006; Scully and Farrell, 2003). But questions of socialization effects and role conceptions extend to the Council (Bauer and Trondal, 2015; Beyers and Trondal, 2004; Lewis, 2010) and the Commission as well (Geuijen et al., 2008). With the two-level setting and the shift from the national to the European setting, actors face tensions between different roles and functions. They have more or less autonomy to make choices in the process (McCubbins and Schwartz, 1984), depending on how tightly they are bound to national prerogatives and mandates (Odell, 2000).

Socialization, in combination with the dependence on reciprocity in light of the EU's long shadow of the future, makes certain actor characteristics indispensable for avoiding or resolving deadlock. Interpersonal relations, familiarity and trust are understood through judging a negotiation partner to be dependable, true to their word and deliver on their promises. Reciprocity is the reward given in response to trustworthiness, which can be a concession in some form, a deal or even an abandoning of a position or a reservation (Liefferink and Andersen, 1998; Bovens and t'Hart, 2016). Familiarity enables close interpersonal relations, which in turn

make successful conflict management more likely, because actors possess the necessary entry points to address problematic positions (Falcó-Gimeno, 2014) and try to avoid deadlock and failure (Schimmelfennig, 2003; Schimmelfennig, 2005; Niemann, 2006) or reinforce controversy and create blockages (McKibben, 2013).

Decision-making processes are made of different stages, not only comprising an intra- and inter-institutional dimension, but also agenda-setting, position-taking and ultimately trilogue sequences. Negotiations resemble less a clear-cut staged bargaining, but rather a nested, interconnected and often circular process. The complexity of the process leaves considerable leverage to all institutions and actors within them to exploit strategic options and manipulate the process (Brandsma, 2015; Bauer and Trondal, 2015). Complexity is further increased by the fact that most of the negotiations take place in highly informal settings (Kleine, 2014), which is a key condition for achieving policy change in the European setting, as it enables actors to negotiate without facing public scrutiny (Smeets, 2015).

To better understand these complex dynamics of the co-decision process, it is important to clarify the roles and functions of the different institutions involved and shed light on their internal dynamics (Costello and Thomson, 2013, Hagemann, 2015; Warntjen, 2012).

3.1.1 The Council and state representatives: the intergovernmental stronghold

Arguably, the most important institution in the legislative system is the Council of the European Union, as it is the representative of member states' interests. Unlike the Parliament, the Council has extensive decision-making powers that extend beyond co-decision, including the possibility to unanimously change the legal basis of a proposal to avoid the co-decision procedure altogether (Naurin and Wallace, 2008; Wallace, 2006; Warntjen, 2007). Also, recent research about the effects of the crisis on institutional dynamics in the EU has demonstrated that the crisis benefits the intergovernmental bodies, the Council and the European Council increasingly call the shots, not only deciding on the agenda, but also intervening in the policy process. Additionally, the Council becomes the main focus of the legislative process as the executive organ of national governments (Puetter, 2012; Puetter, 2015).

Member state representatives demonstrably defend very different interests and are by no means always easily persuaded to give them up or accept compromises (Wallace and Naurin, 2008; Smeets, 2016, 2013). Most of the Council research has focused on initial preference divergence and the different types of division and cleavages, finding empirical evidence for ideological, territorial and issue-based cleavages (Dür and Mateo, 2010; Bailer, 2011, 2010, 2004). Recent research has acknowledged that the extension of co-decision introduced by the Treaty of Lisbon changes the dynamics, making them more complex, less sequential and more informal (Häge and Naurin, 2013). Despite the growing influence of the Parliament, the primordial role of a few member states remains unchanged, especially those with the best network and the strategic advantage of being the biggest players in terms of voting power and path-dependent influence, such as Germany, France and the pre-Brexit UK (Arregui and Thomson, 2009; Häge, 2011; Johansson, 2013; Naurin, 2015).

The importance of cleavages also remains unchanged as member state representatives still diverge in their interests across party and ideological lines (Lindberg, Rasmussen and Warntjen, 2008; Hagemann and Høyland, 2008) and sometimes also across territorial lines (Kaeding and Selck, 2005; Schimmelfennig, 2003, Schimmelfennig, 2005). However, quantitative research has acknowledged that findings about the Council regarding the causes and determinants of negotiation outcomes are still inconclusive, especially with regard to failure. This leads us to conclude that success or failure are neither solely based on initial positions and conflict settings, but a complex number of aspects in the actual negotiation, evolving over the course of the decision-making process, which are likely to be different for each policy area and even vary across issues.

With the increase in intergovernmentalism in the post-Lisbon setting, the dynamics in the Council and between the Council and European Council have shifted towards more intergovernmentalism. As the European Council gets more and involved the importance of the Minister level increases and the role of COREPER decreases in terms of decision-making power. Political decisions are increasingly made at ministerial level or by de facto intervention of the European Council through statements made by the heads of state while negotiations are still ongoing (Bailer,

2011; Bauer and Trondal, 2015). There is a constant interplay of levels to find agreement in the Council (Häge and Naurin, 2013; Smeets, 2015; Grøn and Salomonsen, 2015). Brakemen want to increase the level of contestation by moving the issue up to the political levels and drivers want to keep the issue from the ministerial level as the involvement of Ministers tends to increase controversy making it harder to resolve deadlock (Häge, 2011). Ministers play an unpredictable role, as they tend to pursue a different agenda and are more concerned with communicating towards the national level and can upload unintended issues to the policy process (Smeets, 2015). However, involvement of Ministers cannot alway be forgone conclusion, as at COREPER level, we observe variance in autonomy and constraints for actors. State representatives possess varying levels of discretion for delegates (Häge, 2008) based on how much the state is interested in finding agreement (McKibben, 2007). Actors tend to operate between the technical and political level to try to solve issues left over by working parties and avoid conflict at the ministerial level (Smeets, 2015). The working party level (Häge, 2008) anticipates what COREPER and the ministerial level would do and tries to solve as many technical issues as possible to avoid political conflict (Smeets, 2015) .

As for intra-institutional decision-making, research has convincingly demonstrated the existence of a consensus-seeking nature (Lewis, 2000, Lewis, 2003; Lewis, 2010) in the Council. It contains a special club-like culture with somewhat flexible discretion levels where actors discuss their national positions in a setting of high levels of trust, mutual responsiveness, shared responsibility and repeated interaction (Bauer and Trondal, 2015; Smeets, 2015). The consensus norm in the Council is also biased in favor of the big three (Germany, France and the United Kingdom) who are less willing to make concessions, since they have better outside options and are less sensitive to reputational costs (Dür and Mateo, 2010; Kleine, 2013; Naurin, 2015). Isolation in the consensus culture is the decision to voice opposition or signal commitment to a position for brakemen to hinder the blame avoidance strategy and drivers to use the different levels to avoid isolation and negotiation failure (Smeets, 2015, 2016). Similar strategic options involve threatening to take issues up to ministerial level to ensure that there is sufficient contestation to get other actors to move the issue up to that level for brakemen to stop it. Supporters try to avoid excessive exposure at

ministerial level by appealing to solidarity and limiting the amount of Minister interventions (Smeets, 2013).

Blame attribution and blame avoidance are a means for the Council to exploit policy failure rather than voting explicitly against an issue (Hayes-Renshaw, Aken and Wallace, 2006) or practicing an absence of explicit opposition so not to compromise their credibility Informal rather than formal blockage is a way to circumvent formal breaking of consensus politics, while still interrupting the negotiations. Most often, actors use informal blocking voting minorities and backdoor lobbying to enquire after other actors with blocking positions (Häge, 2011).

Avoidance of vetoes and deadlock in the Council (Hayes-Renshaw, Aken and Wallace, 2006; König and Junge, 2009) and why the Council does not use its possibilities for blockage (Sullivan and Selck, 2007; Smeets 2016) have been either explained by normative pressure (Heisenberg, 2005) and a shared responsibility to keep the process going (Lewis, 2005) that make obstructive behaviour inappropriate and expose those obstructing actors to stigmatization (Adler-Nissen, 2014; Schimmelfennig, 2003) or as the winning majority handing out unnecessary concessions to a non-blocking minority (Häge, 2013; Tsebelis, 2013).

There is a transparency-efficiency trade-off (Hillebrandt et al., 2014; Hagemann and Franchino, 2016), which the literature has conceptualized as information exchange through voting and public statements. Lower transparency means negotiators have little information about the strength of policy positions of co-negotiators, which can lead to negotiation failure. High transparency means negotiators can proceed more efficiently, but it raises reputational costs due to public commitment to a position (Stasavage, 2004; Hagemann and Franchino, 2016). This is relevant when it comes to the choice of how to frame decisions, especially in cases of failure.

3.1.2 Spotlight on relais actors: the Council Presidency and the Council SG

All levels are involved in the decision-making process in the Council (working groups, COREPER I or II, Ministers), but some actors play a particular role and have special strategic opportunities that deserve to be examined more closely (Schalk et al., 2007, Häge and Naurin, 2013). Member state representatives at all levels fulfill a role that is

characterized by their duty to best represent the will of the national government to which they are accountable. The main relais actor in the Council undoubtedly is the Council Presidency (Kleine, 2013; Veen, 2011, Häge and Naurin, 2013), as it is a broker within the Council and is supposed to act as a mediator (Niemann and Mak, 2010). Every state will assume this role at some point, regulated by a fixed schedule with a rotation period of six months for each Presidency. Its role is supposed to be one of a neutral mediator, but every state assuming that role obviously also has a preference over the issue, which can lead to problems if the interest supersedes the mediation role (Niemann and Mak, 2010).

Within the Council, the Presidency assumes an important role as the agenda-setter, it decides what to put on the Council agenda and what to keep off the agenda; it can decide to keep conflictual issues off the agenda or push them, shorten or lengthen the negotiation process by setting up more or less meetings (Tallberg, 2004; Tallberg, 2008). It thereby not only controls the speed of negotiations on an issue, but can also strategically create or prolong blockages (Thomson, 2011). In reverse, the Presidency also assumes an important role in consensus-building by deciding upon compromise proposals and on the use of levels. The Presidency decides which issues are taken on board and when a proposal is moved to a different level (Novak, 2013; Smeets, 2016). It is assumed that QMV increases the importance and strategic influence of the Presidency since it can pursue its agenda without having to fear opposition by other member states through vetoes (Roos, 2013; Kleine, 2014).

The Presidency is assisted by the Council Secretariat General, which is formally an administrative aid to the Presidency. As an apolitical actor it can play an important role in mediating conflicts and offering unbiased solutions. It often provides for creative textual and political solutions together with the Presidency (Beach, 2004; Christiansen, 2002). The Council legal service is the fourth actor in the triangle of important Council actors, as it offers legal support and is a valuable source of creative legal and textual solutions (Tallberg, 2008).

3.1.3 The Parliament and MEPs: between rights protection and power play

The co-decision setting would not be complete without accounting for the ever-increasing role of the European Parliament. It has become a considerable actor in

many policy areas and continues to be a strong advocate of integration, even though it is increasingly concerned with uncertainty and internal preference divergences (Ringe, 2010).

The Parliament's role and influence in the EU's institutional setting has gradually been strengthened, mainly regarding its legislative functions through the extension of co-decision, its budgetary control and the role of representation of citizens through the creation and extension of accountability channels (Ripoll Servent, 2017). The Parliament's powers stem largely from its repeated efforts to push the formal boundaries of the institutional framework and challenge the decision-making rules. Often the Parliament has been successful in achieving and formalizing changes that strengthened its position, but sometimes these attempts backfired (Ripoll Servent, 2017).

The Parliament as a co-decider has taken on the practice of "anticipatory compliance", as it uses the informal stage of decision-making, in particular trilogues, to test which amendments are more acceptable to the Council and the Commission and leave those out of the draft report that might be considered too radical (Burns and Carter, 2010). In comparison, before the generalization of co-decision the Parliament had adopted more controversy-seeking maximalist positions (Huber and Shackleton, 2013), leading to more moderate position outputs and a dominance of grand coalition politics instead of ideological cleavages (Hix and Høyland, 2013).

Comparable to the Council, the EP also faces a double struggle: defending its position vis-à-vis the Council, whilst dealing with increased internal contestation (Ringe, 2010; Ripoll Servent, 2014). Party allegiances and ideological alliances play an important role in the Parliament. Research has extensively investigated party group cohesion and competition between groups (Hix, 2002; Hix, Noury and Roland, 2005, 2007; Lindberg, Rasmussen and Warntjen, 2008), so much so that Parliament actors cooperate with actors from other institutions if they have similar ideological allegiances (Bauer and Trondal, 2015).

The hierarchically structured internal decision-making procedure makes permanent committees and rapporteurs important brokers of interest in the position-taking

process and relais actors for the ensuing negotiations between Council and Parliament (extensive explanation: Burns, 2013; Ringe, 2010). As Commission proposals are first discussed in the relevant committees in the Parliament where MEPs can table amendments before the proposals is passed on to the plenary for discussion and formal validation, this particular institutional level and its actors have a significant strategic influence. Rapporteurs possess the most expertise on the issue and are in charge of drafting the reports on the proposals under discussion, which permits them to direct the debates and lay the groundwork for the Parliament's official position for co-decision (Ringe, 2010). We argue, in line with previous quantitative and qualitative research on salient policy areas that though formally the Parliament's power increased, the Council still calls the shots in policy-making, especially in crisis settings, thus giving indications of a reversion to intergovernmentalism (Costello and Thomson, 2013).

The Parliament's internal logic is inherently ambiguous: different settings for negotiations (policy area committees with sub-committees for specific policy portfolios, party groups, plenary) make it unclear which allegiance dominates for MEPs (national/territorial, portfolio, ideological). Due to the multiplication of settings and overlaps in competence, conflicts between committees over policy issues have become more common (Mather, 2001; Neuhold, 2001; Burns, 2006). MEPs are committed to both supranational committees and ideological party groups as well as national party assemblies (Raunio, 2000) and the operational logic of the Parliament permits them to interpret their roles as they see fit (Whitaker, 2005; Scully, 2003). Intra-institutional processes are similar to those of national parliaments: political conflict takes place along traditional left-right lines, MEPs vote in accordance with their party affiliations rather than national affiliations, the party system becomes more consolidated and competitive as the powers of the EP increase and party group cohesion is generally higher than in other parliaments (Hix, Noury and Roland, 2007; Lindberg, Rasmussen and Warntjen, 2008; Ringe, 2010).

Quantitative and in-depth qualitative analyses of position-taking and negotiation processes in various policy areas (Ringe, 2010; Ripoll Servent, 2011, Ripoll Servent, 2012; Ripoll Servent and Trauner, 2015) have shown that the Parliament's negotiation process in the committees is similar to the Council in the sense that it is

subject to a consensus-building process, where MEPs search for other actors and groups closest to their interests. However, the actual role of the central actors, rapporteurs and committees is still largely understudied. The role of rapporteurs has been strengthened through the extension of co-decision and the allocation process of dossiers among party groups has become more important and more competitive (Yordanova, 2013), but it remains to be thoroughly investigated empirically how their influence plays out and what impact they have on the decision outcome.

To a certain extent, the Parliament's intra-institutional processes are similar to the Council: there are cleavages along sectoral and ideological lines in the internal position-taking process as well as similar patterns of conflict, which can then cut across institutional lines in the negotiation process if there is an ideological overlap (Costello, 2011; Bauer and Trondal, 2015). The tendency for early first-reading agreements affects the negotiation dynamics in the EP since it needs a simple majority for a first-reading agreement, but an absolute majority for a second-reading agreement. Increased co-decision competition with the Council has incited the right-wing to seek coalitions aside from the left-wing where it's possible (Yordanova, 2011). It has also increased the importance of pivotal groups, ALDE, since the coalition options are limited (Costello, 2011).

The first thing to observe about the Parliament's internal process of position-taking is the strong committee system (McElroy, 2007), similar to the US congress, which is in charge of structuring the Parliament's input into the legislative process and enables parliamentarians to express their opinions on policy outputs without any interference by an executive. Committees are structured by distributive and partisan cleavages and perform informational functions as parliamentarians exchange expertise on policy issues and bargain over gains for constituencies (Yordanova, 2011).

Committees are the main origin of amendments on a proposal as discussions on the Commission proposal take place in the assigned committees before the plenary formalizes and an opinion (Finke, 2017; Ripoll Servent, 2017). Committees have their own internal dynamics and different policy fields function differently. Some committees are more controversy-oriented, while others behave more consensually:

the Civil Liberties Committee (LIBE), for example, has shifted from confrontational to consensual after the shift to co-decision (Ripoll Servent, 2015).

The more influential the Parliament becomes in the legislative process, the more complex the task of MEPs has become as they have to manage a growing amount of political and technical information to perform successfully and influence the EU's policy output. To manage both preparatory work and performances in the plenary, alongside their representative functions in their constituencies, MEPs have strong administrative support, upon which much of the legislative preparative work depends (Busby and Belkacem, 2013; Winzen, 2011).

Similar to high-profile actors in the Council and the Commission, MEPs also have a wide and varied administrative support structure of parliamentary assistants, political advisors and secretariat officials who assist them in acquiring and processing information about legislative files and processes and filters the various demands the MEPs are confronted with (Roger and Winzen, 2015). The more salient an issue, the less discretion for administrative and support officials have in steering the process politically. The administrative actors become production support and provide guidance with regard to the role of the institution in the policy process, not the specific policy file (Neuhold and Dobbels, 2015; Dobbels and Neuhold, 2015).

How MEPs behave, how much they invest in policy negotiations and which goals they pursue depends on a number of factors: the salience of the issue to national constituencies and the position of national and European parties and groups, but also the process of acquiring and filtering information and the role conception of each actor. There is not one single role or type of behavior. Altogether, the context, incentives and individual preferences altogether shape individual behavior (Ripoll Servent, 2017). When trying to explain failure, it might therefore be worth looking at how MEPs perform in the policy negotiations, for example, which factors are more influential in explaining their behavior and where incentives for dissent might lie.

3.1.4 Spotlight on relais actors: the rapporteur and the shadow rapporteurs

Similarly to the Council, the Parliament's sublevels contain several types of actors with potentially decisive influence on the negotiation process and the outcome.

The institutional sub-bodies usually involved in legislative negotiations are the respective committees according to policy and issue area, but some actors play a particular role and have special strategic opportunities, which deserve to be examined more closely. They may play a key role in developing and proposing a compromise to the plenary, which will not only ensure the support of a majority of MEPs, but also the support of the co-legislator (Favell and Héritier, 2004; Brandsma, 2015). Committees formally have a strong role, which they exploit differently in different policy areas (Roederer-Rynning and Greenwood, 2017). Where in some areas, committees are very active and seek to be strongly involved in the trilogues (Roederer-Rynning and Greenwood, 2017), in other areas most of the work is done informally by the rapporteur and the shadow rapporteurs (Bressanelli, Koop and Reh, 2016).

In co-decision, rapporteurs are the main actors, as they have better access to information, can set the agenda and shape policy outcomes and can block or slow down negotiations (Costello and Thomson, 2010). Together with the shadow rapporteurs, the rapporteur holds a series of informal meetings inside the Parliament and with the other legislative institutions to determine the main cleavages and points of discussion (Ripoll Servent, 2017). Rapporteurs tend to be most trusted and valued in the Parliament, if they are considered to be loyal to the Parliament's general interests and work towards internal and inter-institutional compromise (Costello and Thomson, 2011; Yordanova, 2011). This means that they have to balance personal, partisan and institutional interests (Finke, 2012).

They have an ambiguous role, as they are not only relais actors and thereby represent the interest of the Parliament as an institution vis-à-vis the Council, but also political actors of a party group, which can create some tension. Research has shown that the more contested the rapporteur's position within the EP and the Council, the less likely agreement becomes (Naurin and Rasmussen, 2013; Naurin and Rasmussen, 2011). Rapporteurs are in charge of committee work on a Commission

proposal, by drafting amendments and a report to be presented to the plenary for a vote.

While committee chairs can have an important influence of the committee agenda (Reh and Héritier, 2012), trilogues tend to make rapporteurs the primary agenda-setters in the Parliament due to their strategic informational advantage (Favell and Héritier, 2004). They can largely shape the content of the proposal and the choice of rapporteur can affect the level of expertise embodied in the legislation, the strength and breadth of party group and plenary support (Yordanova, 2013). Similarly to the Council, alongside the rapporteur, there are a number of other actors, which perform important functions in how the Parliament forms positions and negotiates compromises with the Council. Shadow rapporteurs are procedurally not as important as the rapporteurs, but have more influence on the development of the Parliament position than other committee members or the plenary. They usually come from different political groups to provide balance and represent the polarization of Parliament. The Parliament's legal service, as an administrative actor, offers legal support and is a valuable source of creative legal and textual solutions.

As the role of relais actors is to provide information and find opportunities for linkages to achieve compromise, within and across institutional borders, they play an important role in turning conflict and controversy into agreement (Brandsma, 2015).

3.2 Co-legislator dynamics of failure

When it comes to the inter-institutional dynamics of the process, the literature has gone in different directions for explaining why bargaining processes end in deadlock: many have considered failure to be the result of co-legislator dynamics, namely extreme positions of Council and Parliament (Thomson, 2011; Veen, 2011). It can be both or either of the two co-legislators taking a position that deliberately departs from the possible zone of agreement as a strategic departure or through lack of knowledge about the other institution's positioning, due to information asymmetry, in which case even a Commission proposal that is geared towards the middle ground between the two and is compromise-oriented, would not lead to a successful outcome, because there would not be room to negotiate for the co-legislators (Thomson, 2011; Wallace, Pollack and Young, 2015).

The increased use of the OLP has made the Council and the Parliament negotiate more directly with each other (Mühlböck, 2013), and has encouraged the Parliament to look more closely to the Commission to ensure that its preferences are included in the proposal (Egeberg et al., 2014). In the process, the Parliament still takes a more pro-integration stance, making the Commission the pivotal actor between the co-legislators (Nugent and Rhinard, 2015).

There are different views on the role and influence of the Parliament in the legislative process. In the area of Justice and Home Affairs, for example, the Parliament has been seen as a veto-player to the Council, playing the Council's opponent, by providing an integrationist and liberal counterbalance to the Council. In Justice and Home Affairs, the Parliament is focused on sovereignty and security. The Parliament tries to get support from the Commission in its quest for power (Ripoll Servent and Trauner, 2015; Liefferink and Andersen, 1998). Though formally, the Parliament's power increased, the Council still calls the shots in policy-making, especially in crisis settings, thus giving indications of a reversion to intergovernmentalism (Costello and Thomson, 2013). In response, to avoid failure, the Parliament has to adopt a more feasibility-oriented position in Home Affairs matters and specifically accept a more securitized agenda for border policy to be able to secure its procedural influence and avoid being sidelined by the Council. It will do so if it can avoid compromising its own procedural influence and does not put into question competence distribution in border policy matters. The Council will pursue a security-agenda, insist on national competences and try to keep control over policy matters so that they remain as close as possible to the state competences (Ripoll Servent, 2015; Huber, 2015). In social affairs, as the role of the EU as such is still rather limited and policy is often non-binding, to avoid resistance by member states (Anderson, 2015), the Parliament's influence remains limited, it relies mainly on the Commission pushing for integration (Kantola, 2010; Guerrina, 2005). However, the Parliament has strongly and publicly pushed for more integration leading the Commission to propose more legislation (Van der Vleuten, 2007).

In terms of actor behavior, it would be expected that the Council pushes for state control and limited involvement of supranational institutions, which is countered by the Parliament's demands for a liberal approach and extended influence of supranational institutions. Conflict and failure are very likely if the co-legislators

manifest this behaviour throughout negotiations and do not adjust their positions to engage in consensus-seeking behaviour.

However, increasingly, the Parliament is perceived to have evolved in its role to focus on a more pragmatic approach oriented towards convincing the Council that it is a legitimate and trustworthy partner in co-decision matters and does not compromise policy efficiency. This strand therefore views the Parliament as a realistic co-legislator. According to their findings, the Parliament has demonstrated a willingness to concede to the Council on its security demands in different areas of Justice and Home Affairs, it has been argued that the Parliament behaves more pragmatically abandoning its more integrationist or liberal demands (Ripoll Servent and Trauner, 2015; Huber, 2015). According to this conception of bicameral dynamics we would expect Parliament to favour a pragmatic and feasibility-oriented approach and be more willing to side with the Council on security-related matters and refrain from making too integrationist or liberal demands, which would result in a lower likelihood of conflict and deadlock between Council and Parliament.

3.3 The closeted strategist at the center: Commission-centric models of failure

To this day, the literature disagrees as to whether the Commission has any strategic role beyond the one of an honest broker who considers the preferences of the co-legislators, knowing that the Council can unanimously amend the proposal and that the Parliament can reject it by a simple majority (Wallace, Pollack and Young, 2015). It has been argued that the Commission has lost power and influence due to the Parliament's empowerment under co-decision (Thomson and Hosli, 2006).

We argue that the role of the Commission as the official policy agenda-setter and initiator of EU legislation makes it the first important strategic actor to consider. The Commission as a policy entrepreneur has to identify the problems and policies that would be most likely to forge consensus among member states. Its success as an agenda-setter depends on how well it can anticipate and exploit preference ambiguity (Geuijen et al., 2008; Ackrill, Kay and Zahariadis, 2013; Pollack, 1997; Nugent and Saurugger, 2002; Zahariadis, 2008). The Commission is not an indifferent and impartial broker of interest, but a strategic actor itself, deciding on whether or not to consider the preferences of member states and the Parliament when drafting a proposal (Princen, 2011; Bauer and Trondal, 2015). The overall ambiguity and

heterogeneity of preferences in the co-decision procedure grants the Commission's drafting strategy considerable influence on how easy or difficult the negotiation process will be (Princen and Rhinard, 2006; Bauer and Trondal, 2015). In agenda-setting, its role is particularly important, as the proposal and the way it is framed set the tone for the ensuing negotiations between Council and Parliament. Which of the roles it assumes depends on the issue at hand, as well as the resources both actors and expertise and the context surrounding the negotiations (Princen, 2011; Princen, 2007; Princen and Rhinard, 2006; Boin, Hart and McConnell, 2009).

Nonetheless, the role of the Commission has been controversially discussed in the literature allowing for the conclusion that the Commission's role is multifaceted comprising at times a number of contradictory organisational logics, which reflect the tensions between its bureaucratic and political functions (Christiansen, 1997; Nugent, 1997; Cini, 2008; Bauer and Trondal, 2015).

The Commission's right to initiate legislation enables it to dictate the legislative agenda and force the Council to deal with issues (Roos, 2013; Thomson et al., 2006). With the increased use of the ordinary legislative procedure, the Commission influence has also expanded (Egeberg, 2014), especially with regard to its role in the agenda-setting process, where it possesses a strategic first-mover advantage. This is because it is the only one capable of proposing legislation and controlling the experts involved in the drafting process (Geuijen et al., 2008). The Commission can strategically take into account policy preferences of member states or EP actors, but rather than simply being a broker of interests and a pool of policy ideas, it is a self-interested seeker of capacity and power (Bauer and Trondal, 2015). By the way it acts at the agenda-setting stage, it can significantly shorten or lengthen the decision-making process. It most often opts for an incremental approach to policy formulation, as it anticipates the heterogeneity of positions, especially Council and Parliament (Bauer and Trondal, 2015). The Commission waits until a window of opportunity opens to push its desired policy, such as a crisis or changing interest constellations (Scherpereel and Perez, 2014) and distributes costs and benefits over time over time to move forward controversial policies (Müller and Slominiski, 2013).

At the agenda-setting stage, the Commission has a strategic first-mover advantage, as it is the only one to propose legislation and controls the national experts who will try to get their positions taken into account, knowing that the process will be in their favor if they can get their concerns taken seriously by the Commission at the drafting stage. However, the Commission controls this process and can interrupt the attempts at influencing at any time, if necessary (Geuijen et al., 2008). As an agenda-setter and policy formulator, the Commission is in charge of shaping the framing of the policy issue for the legislative negotiations. This drafting process contains framing competition inside the Commission (Baumgartner and Mahoney, 2008), which leads to diverse and sometimes conflicting interests into the policy-making process, as the Commission is selective in the way it incorporates interests and to what extent it takes into account different perspectives when drafting a proposal (Daviter, 2011).

Inside the Commission, lead DG and lead Commissioner control who has access to a file, and broker in case of conflict between DG's, the Presidency can also intervene to veto or steer the process, which resembles a mixture of issue framing and internal decision-making decide which issue makes it to the agenda and these processes entail a discrepancy between what would have been the solution to a problem and the actual result of the policy formulation process, which is a mix of coalitions, competition, compromise and confusion among officials, and have very different ways of framing issues (Hartlapp, Metz and Rauh, 2013). Commissioners are politicians that have national experience (Wonka, 2007) and can take on a number of different roles in the policy process (Egeberg, 2006), including national, partisan or sectoral roles (Thomson, 2011).

Based on the above, I will present and operationalize a set of concise and succinct variants to explain how failure occurs in legislative negotiations, with particular emphasis on the outlined strategic role of the Commission and its behavior at different stages of the process. A first variant will function as a null hypothesis to the assumption of Commission influence on the process of failure. The following three variants will specify a particular type of Commission behavior and how it leads to deadlock and failure of the policy-making process. Drawing on the institutional setting and structure presented in chapter two, each variant will provide two sets of models: a bargaining model to capture the inter-institutional dynamics of the process and a

causal mechanism model to provide an explication of the conditions under which the model is likely to occur alongside a specification of the strategic mechanisms that are expected to be present. Each variant will therefore contain a causal mechanism model, in graphic form accompanied by an explanation of the conditions and mechanisms, which draws on the previous chapter and the conditions and actors that have been presented in the previous chapter by specifying how and in which context their behavior is likely to lead to failure.

The inter-institutional dimension of EU policy-making is essentially a complex nested game (Tsebelis, 1990; Veen, 2011) consisting of a mix of bargaining and arguing, conflict and cooperation, party dynamics and coalition-building and multi-level considerations of negotiators, which provides the framework for a number of strategic moves of institutions and actors within institutions. The literature has come up with a set of bargaining models to explain legislative decision-making, specifically the path to agreement, I intend to provide a set of possible explanations for how and why proposals fail in the process. All behavioral incentives, channels of influence and important structural factors will be modelled into each variant as conditions and mechanisms in the process of policy failure.

The following general preference and conflict lines can be derived from previous literature: The Commission's main goal is to achieve an update of the status quo that increases supranational integration and involvement of institutions. Its main concerns and red lines in matters of substance and procedure are unilateralism by the Council and governments retaining too much power or attempting renationalization of competences and the downgrading of policy standards (Young, 2015). The Council wants to preserve the status quo and national rules to the greatest extent possible and concede as little sovereignty as possible to the other institutions, if more competence transfer or policy change is necessary to solve the given problem. National governments' main procedural red lines are the Commission and the Parliament gaining more control and influence over policy than the Council and its substantial concerns are avoiding binding legislation that overly restricts government discretion (Moravcsik, 1993; Moravcsik, 1998; Héritier, 1999; Elgström and Jönsson, 2000; Roos, 2013). The Parliament wants to achieve a transfer of competences from the national to the European level, secure and extend its own involvement and achieve an increase in policy standards. Its red lines are being excluded from the

process and the Council attempting re-nationalization or a lowering of policy standards (Ripoll Servent, 2012; Ripoll Servent, 2015).

Based on findings discussed previously, we can assume the following about an institution's sensitivity to failure: if the negotiation process does not provide incentives to the institution to realize its goals and most importantly, if the red lines have been crossed and there is no indication that it can be reversed, the actor will prefer negotiation failure (Scharpf, 2006; Héritier, 1999). The Commission prefers failure to an continuation of the negotiations on the proposal, if the continuation would result in an agreement that takes competences away from the EU level to repatriate them and/or lower policy standards (Princen, 2011; Wallace, Pollack and Young, 2015). The Council prefers failure to an agreement if it would result in transferring more sovereignty to the EU than is strictly necessary to solve the policy problem and/or upgrade policy standards below the lowest common denominator in a way that requires significant changes in domestic constituencies and that does not directly benefit governments (Costello and Thomson, 2013). The Parliament prefers failure to an agreement, if it would result in competences being taken from the EU and/or in the Parliament's influence being curtailed and/or policy standards being lowered to benefit governments (Tsebelis and Garrett, 2000; Hix et al., 2006).

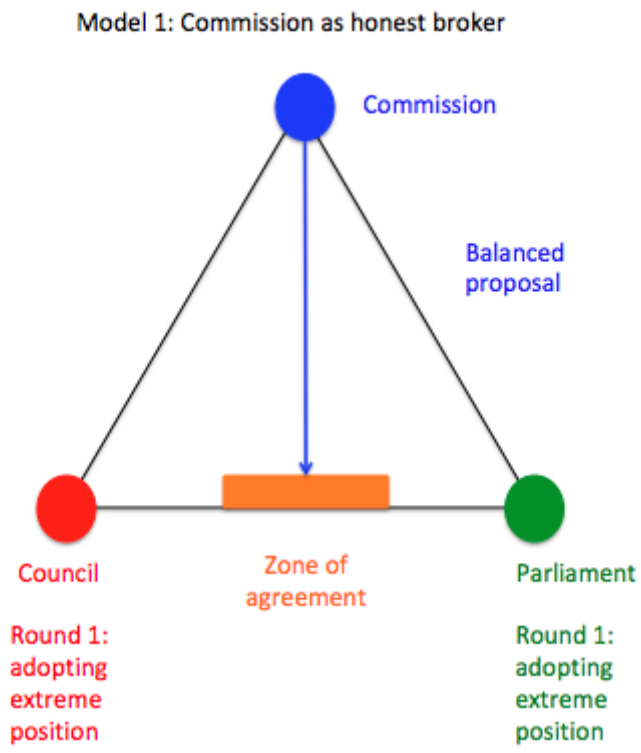
Failure can occur, because the Commission, as a policy initiator, was either unable to collect any or sufficient information about co-legislator positions (information asymmetry) or unwilling to do so, because it pursued its own agenda (activism), resulting in a policy proposal that strongly departs from the position of either of the two co-legislators and makes it impossible to settle for a compromise (Toulmin, 2003; Smeets, 2015). The proposal can be either too favorable to either the Council or the Parliament (Nugent and Rhinard, 2015). Positions between co-legislators would in this case be distant enough so that deadlock due to a proposal that departs too far from the middle ground becomes likely. Otherwise the co-legislators would have incentive enough to overcome differences and find an agreement, as it would be less costly (Nugent and Rhinard, 2015).

Drawing from and extending upon existing literature, four models of failure will be presented subsequently, which explain and account for how different types of Commission behavior are conducive to negotiation failure. These models will be

operationalized in the following sections to be tested on four empirical cases of policy failure.

3.3.1 The causal mechanism model 1: the Commission as a perfect agenda-setter

To begin, we will present the null hypothesis of sorts, a model of failure, which presumes that the Commission is doing its job as a policy formulator and honest broker and that failure is induced by the co-legislators in subsequent negotiations (figure 4). This is followed by three Commission-centric approaches to explaining failure, which will also account for the many aforementioned imperfections of and outside influences on the policy process: the informal and unregulated negotiations between Council and Parliament to resolve conflicts where much depends on the actors involved and their (limited) ability to exert influence including the informal influence of the Commission and the impact of contextual factors and external events (Wallace, Pollack and Young, 2015), as well as all the stages of the process (Bauer and Trondal, 2015).



(figure 4, honest broker, source: own illustration)

The Commission has been portrayed as a formal initiator of legislation (Tsebelis, 2002), a depoliticized technocrat (Haverland, De Ruiter and Van de Walle, 2016; Princen and Rhinard, 2006), or an honest broker due to its role as the guardian of the Treaties and the initiator of legislation (Nugent and Rhinard, 2015). The Commission is supposed to provide for proposals which respond to the problems at hand while brokering between the interests of the Council and the Parliament. Spatial models have placed the Commission on a position between the Council and Parliament, which are supposed to occupy the extremes of the scale. By occupying the middle ground, the Commission ensures that both co-legislators find the proposal acceptable, if they are willing to make some concessions to find agreement. The final agreement is likely to be quite close to the Commission's original proposal, if it has done its brokering job correctly (Ripoll Servent and Trauner, 2015; Cini and Suplata, 2017).

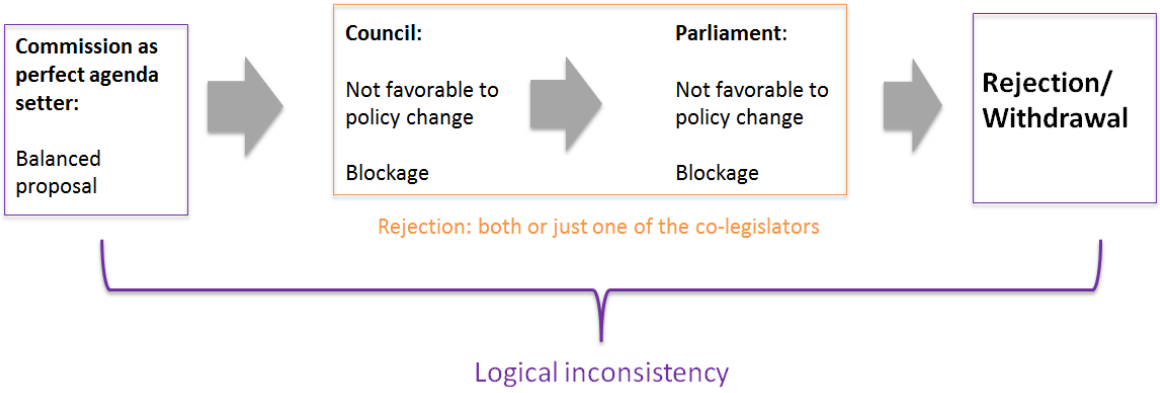
The first failure model, rather than being Commission-centric, postulates that the Commission is not in control of the process, but rather the co-legislators, as the Commission's initiatives are merely policy inheritance (Nugent and Rhinard, 2015). Most of the initiatives are a continuation of EU action, where the Council and the Parliament have already discussed the general lines and the Commission is clear about co-legislator preferences (Nugent and Rhinard, 2015). The Commission performs its duty as a formal initiator of legislation based on instructions by the European Council, but does not have any particular influence on policy formulation or the course of the legislative negotiations (Young, 2015). The main reason for deadlock are extreme positions by the co-legislators, with a greater likelihood of deadlock being the result of the Parliament expressing its preference too early and the Council stalling the negotiations, as the Council is much more willing and able to be obstructive than the Parliament (Nugent and Rhinard, 2015).

This shifts the emphasis from the Commission to the co-legislators. The Commission behaves like an honest broker during policy formulation with the goal of passing legislation. Failure would therefore be rooted not at the agenda-setting stage, but the negotiation stage and would be the consequence of persistent extreme positions of the co-legislators. It can be the Council taking and keeping an extreme position despite compromise offers from the Parliament, in which case Parliament is likely to call Council out for failure. If on the other hand, the Parliament takes an extreme

position and rejects compromise offers from the Council, the Council is likely to block and blame Parliament for failure. Hence, the Commission proposal as submitted after the agenda-setting and policy formulation stage is not the origin of failure. The Commission performed its duty as an agenda-setter, but the co-legislators did not adopt consensus-oriented behavior, either Council or Parliament or both, resulting in deadlock. The most common type of deadlock is the Council refusing to express its preference on the proposal when the Parliament has already done so, resulting in negotiation deadlock (Nugent and Rhinard, 2015).

Factors, which would explain failure after the agenda-setting stage that is not induced by the Commission would be the following: the situation in the domestic constituencies changes throughout the negotiation process, affecting co-legislator positions. Informal channels of negotiation are established and available to the actors and actor use them to exchange information about preferences and positions and strike compromise deals. In the case of failure, the co-legislators do not use these channels to search for compromise. Party politics and coalition constellations in national constituencies, and party politics in European institutions are initially favorable to the policy change and the proposal, during the agenda-setting and policy formulation process, as the Commission draws up a consensus-oriented proposal. Nontheless, change canoccur during the process when the proposal has already been submitted, for example due to national or European elections, leading to one or both of the co-legislators taking an opposing position (figure 5, orange marking).

Causal mechanism 1: deadlock due to co-legislator dynamics



(figure 5, causal mechanism of co-legislator deadlock, source: own illustration)

It has been argued that preferences are endogenous and therefore not stable, they are not fixed a priori, but develop during the process, making them subject to the exchanges between actors and other influences, which induce them to recalculate their priorities (Odell, 2000; Béland and Cox, 2011; Saurugger, 2013). Complex and changing positions result in complex strategies, actors can and do rely on different strategies at different stages of the decision-making process, even to the point of contradicting previous preferences and strategies by subsequent ones (Saurugger, 2013).

As discussed in chapter 2, state-level factors and EU-level factors can incite actors to adapt positions and strategies to become more demanding or accommodating or remain consistent (Odell, 2000; Gehring and Kerler, 2008; Gehring, 1998). There is, of course, remaining uncertainty (Héritier, 1999) and it is likely that not all positions are predetermined, before actors enter into negotiations (Smeets, 2015). Actors can be forced to make choices during the process, due to time constraints, which are not congruent with their initial preferences (Héritier, 1999).

However, this conception of failure only makes sense if we assume that co-legislator preferences change from the time the Commission collects information and drafts the proposal and when the proposal is actually submitted (figure 5, purple marking). It is rather unlikely that preferences, especially taken on an aggregate level, change to the extent that a co-legislator who has been supportive of policy change at the time of agenda-setting will have moved to opposition by the time the proposal has been submitted for negotiation (Bailer, 2011; Thomson, 2011; Garrett and Tsebelis, 2000; Moravcsik, 1998). Actors tend to invest in developing a clear position on an issue, if they attach importance to it (Falcó-Gimeno, 2014; Selck, 2006), which does not mean that all issues are equally important to all actors or all positions are equally developed (Falcó-Gimeno, 2014; Warntjen, 2012). There is remaining uncertainty and room left for negotiation. Nonetheless, despite some uncertainty and fluctuation, we can assume that preferences and conflict constellations are rather stable: economic preferences center around costs and redistribution, decisional preferences concern the prospect of winning or losing influence through a decision and instrumental preferences determine the need for creation or adjustment of policy instruments (Héritier, 1999; Gehring and Kerler, 2008; Bailer, 2011).

This dynamic applies to the Council and Parliament alike (Bailer, 2011; Hagemann and Høyland, 2010). Positions might be unclear to some extent at the policy formulation stage (Ackrill, Kay and Zahariadis, 2013), but the Commission tends to anticipate uncertainty and ambiguity and uses framing of the proposal (Daviter, 2011; Saurugger, 2014) and access points through seconded national experts and contacts to the Parliament (Sundström, 2016) to counterbalance the uncertainty and ambiguity. Negotiation strategies and mechanisms are also dependent on actors knowing each other's preferences. Consensus-building and controversy-seeking strategies such as coalition-building, issue-linkage, package deals and other types of deals are struck based on preference similarities (McKibben, 2013; McKibben, 2014).

Why would either of the co-legislators let the Commission draft and submit a proposal and engage in intra- and inter-institutional negotiations first, only to let it fail due to extreme positions?

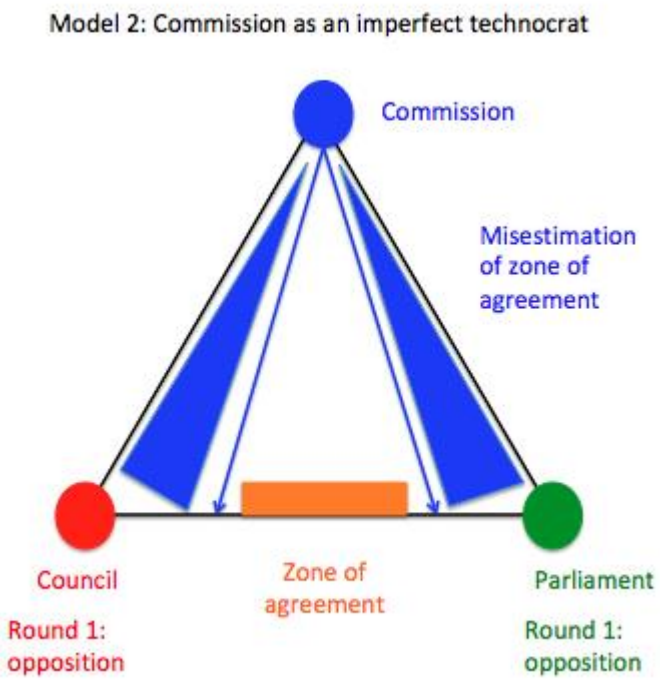
Assuming the Commission is an honest agenda-setter and wants to place the proposal in the possible zone of agreement, based on its knowledge about the preferences of the Council and the Parliament, which have been demonstrably argued to be quite stable (Freund and Rittberger, 2001; Thomson, 2011; Héritier, 1999; Bailer, 2013): And why then would the Commission be oblivious to changing dynamics in co-legislator preferences when considering policy change?

It is much more plausible to presume that the roots of failure lie with the performance and behavior of the Commission. This can be because the Commission was unable to perform correctly as an agenda-setter and policy formulator, because it was unwilling to and deliberately set the proposal up for failure, or because failure is an important and deliberate step in the policy-making process.

3.3.2 The causal mechanism model 2: the Commission as an imperfect technocrat

If the Commission cannot correctly perform its task as the agenda-setter, deadlock is the result of high uncertainty about co-legislator preferences and a wrongful estimation of those preferences by the Commission and/or a wrongful translation into a policy proposal (figure 6). To put it simply: the co-legislators have a more or less clear idea of what they expect from policy change, but the Commission does not correctly assess the situation.

To those who view the EU policy-making process as an exercise in bureaucratic and administrative governance, the Commission is an imperfect technocratic bureaucracy (Nugent and Rhinard, 2015): The Commission is conceived of as the technocrat of the European institutions. It executes the task of drafting complex technical proposals and is in charge of mediating the technical aspects of negotiations between the co-legislators, which requires a great deal of investment in expertise and an equivalent infrastructure (Zahariadis, 2008). However, the Commission's resources and expertise are also limited: its bureaucracy is developed, but it is as susceptible to failure as any national bureaucracy, especially in cases or areas, where substantial technical expertise is required and its experience in dealing with the policy matters are not as developed (Nugent and Rhinard, 2015). This is the case for less integrated policy areas, or areas where sovereignty has long been guarded by member states (Boranbay-Akan, König and Osnabrügge, 2016; Lelieveldt and Princen, 2015; Sabatier and Weible, 2014; Ackrill, Kay and Zahariadis, 2013).

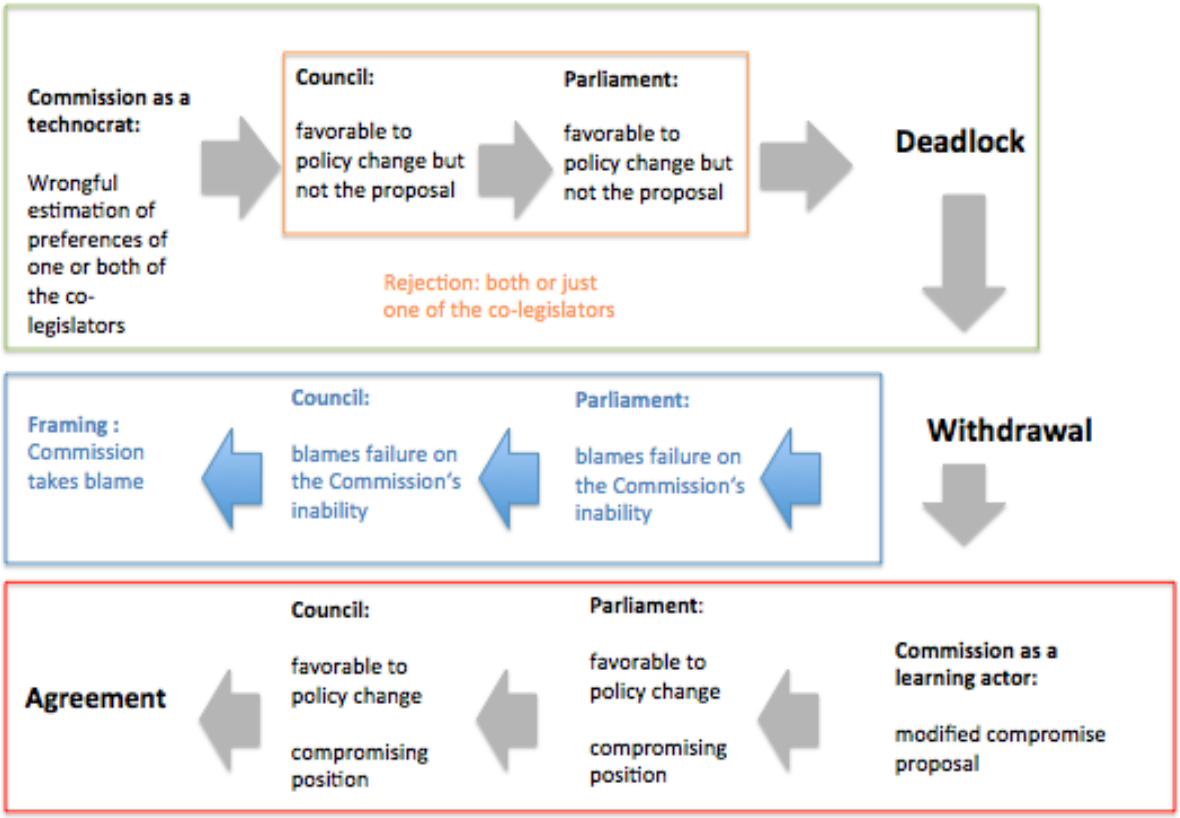


(figure 6, imperfect technocrat, source: own illustration)

If we transform this into a process model, this would mean that the Commission, due to high uncertainty, proposes legislation which deviates from the possible zone of agreement between Council and Parliament. The proposal is either too close to what the Parliament would prefer, or to the Council's preferences, and by consequence too

far away from the respective other co-legislator. For this to result in success, the Commission will have to adapt the proposal as it learns about the Council's and the Parliament's positions to move within the zone of agreement and the co-legislators likewise will have to adopt positions within the possible zone of agreement to enable a bargaining process. This scenario of course assumes that the Commission is willing to adapt the proposal and the co-legislators are willing to adapt their positions. Without learning and updating, the proposal will fail. The learning and updating exercise requires capability on behalf of the Commission, but does not presume any strategic behavior, as the Commission is a technocratic agent.

Causal mechanism 2: failure due to an imperfect technocratic Commission



(Figure 7, causal mechanism of technocratic failure, source: own illustration)

If the Commission's inability to perform its duty as a policy formulator correctly is at the root of failure, we would expect the following conditions to hold.

The overall policy agenda of the co-legislators is not opposed to policy change, both national governments and parliamentarians are aware of the problem and in favor of a European solution. National government officials and/or heads of state have

mentioned or raised the issue in meetings expressing themselves in favor of a European policy proposal. This is visible through mentions in European Council Conclusions or statements by national government representatives in favor of a European approach to a given problem. Party politics and coalition constellations in national constituencies and European institutions are favorable to the policy change at the time of agenda-setting, there is no signal of general opposition to policy change through public statements of national parties, heads of state and government officials and members of the European Parliament. Hence preference constellations regarding the policy change overlap sufficiently to enable a compromise. Failure would therefore be the result of a Commission presenting a proposal that does not fit the problem, or presenting a proposal too early, without the necessary opportunity in the agenda.

The Commission can be unable to correctly assess whether there is a window of opportunity for a policy change and whether the agenda of key actors coincides with the intended policy proposal and develops policies, before a problem has been identified (Zahariadis, 2013), which is further aggravated by the increasing complexity of EU policy integration, as multiple policies and policy objectives impede each other (Streeck and Thelen, 2005) and coordination has to occur across sectors and multiples levels (Zahariadis, 2008), turning the policy process into a "garbage can" (Cohen et al., 1972; Richardson, 2006). Despite the best intentions, the Commission can be a flawed, boundedly rational[5] policy initiator, which falls short of its task due to intervening factors such as time pressure, reduced capacities or normative pressures, which hinder the rational processing of information (Héritier, 2010; Zahariadis, 2008).

One typical Commission fallacy during policy formulation is the failure to correctly estimate the zone of agreement. Informal channels exist, but are not always sufficiently or correctly used by the Commission to communicate with the Council Presidency, the permanent representations or the parliamentary committees and MEPs. We would then observe in the data that the Commission did not formally and/or informally collect sufficient information about co-legislator preferences and

[5] "Bounded rationality asserts that decision-makers are intentionally rational; that is, they are goal-oriented and adaptive, but because of human cognitive and emotional architecture, they sometimes fail, occasionally in important decisions" (Jones, 1999: 297)

therefore falsely estimated the preference constellations in either or both of the co-legislators or falsely translated the preferences into the policy proposal. There would be no sufficient information flows between the three legislative institutions during the consultation and the policy formulation phase and/or wrongful translation of the information would be received into the policy proposal. This should be visible through an absence of official documents attesting to information collection or exchange and/or the affirmation in interviews that the Commission did not perform according to the expectations in matters of policy design. The Commission would be pointed to as the source of (procedural, substantial) flaws in the policy proposal by the co-legislators with emphasis on its technocratic inability to draw up an appropriate solution (Hartlapp et al., 2016; Howlett, 2012).

The lack of information collection can be due to the following factors. One factor is mishaps in information transmission due to faulty transmission channels between co-legislators and Commission (consultation phase). Consultation phase malfunction would imply no formal or informal contacts between the Commission and Council (Presidency, Secretariat or permanent representations) and Parliament (committees, MEPs, administration). If the malfunction occurs during the drafting phase, we would observe mishaps in internal coordination between directorates-general or policy units or hierarchical levels (desk officer, head of unit, director general, Commissioner, College of Commissioners) (Bovens and t'Hart, 1998). This would be visible in the data through contradictory information about preferences and positions provided by Commission and co-legislators respectively. Another factor is faulty transposition of information into the proposal (drafting phase). There are two types of mechanisms connected to the policy formulation phase that can lead to failure, due to erroneous Commission behavior. Firstly a lack of a window of opportunity: the Commission wrongly estimates the timing for the policy proposal and chooses a time where the focus of the co-legislators lies on other issues making them less inclined to invest in negotiations, as policy needs a window of opportunity and creative agenda-setting (Wallace, 1996). Secondly, the Commission can wrongly estimate co-legislator preferences, resulting in flaws in the design of the proposed policy change that leads to co-legislators opposing the proposal, but not the policy change. This can be framing conflicts, if the issue as presented and framed is not coinciding with the expressed preferences and salient issues of the co-legislators leading to frame

contestation regarding the design of the proposal (substance, procedure, scope) (Daviter, 2011).

Failure is expected to occur shortly after the agenda-setting stage, when the proposals are transmitted to the co-legislators for position-taking and the discrepancy is made between the proposal and the actual preference (figure 7, green marking). Either one or both of the co-legislators will reject the proposal or recommend revision of the policy proposal due to flaws in its design or the framing under which it is presented (figure 7, orange marking). Success is still possible, if the Commission engages in a learning and updating exercise (figure 7, red marking).

The premise of this model is that the miscalculation is unintentional; a malfunction that leads to failure does not include a strategic intention on the side of the Commission or the co-legislators. The Commission's performance as a policy initiator is called into question with regard to its ability to provide (legal, technical or political) expertise, which makes failure the result of a misfit between the policy solution and the perception of the problem (Scharpf, 1986; Zahariadis, 2008). Hence, we observe that the Commission is willing to withdraw and perform learning exercises in terms of acquiring more technical, legal or other information necessary to improve the proposal and make it acceptable to the co-legislators (Turnpenny et al., 2009; Howlett, 2012). This should be visible through the fact that the Commission seeks contact with the co-legislators, formally and informally, and engages in the acquisition of technical and legal expertise.

Blame attribution and blame avoidance rhetoric (figure 7, blue marking) would be technical and legal, rather than political, as there are no concerns for the co-legislators about the Commission pushing a particular agenda. There would be no particular mobilization by brakemen to oppose the policy change as such, but rather a questioning of factual accuracy or the framing of the presented proposal (Smeets, 2015; Smeets, 2016). The blame attribution in this scenario is rather straightforward for the two co-legislators. As the Commission's inability is the main reason for failure, the Commission will receive blame for not being able to draw up an acceptable proposal. Blame rhetoric by Council and Parliament centers around bureaucratic performance and the technocratic aspects of the policy formulation process such as

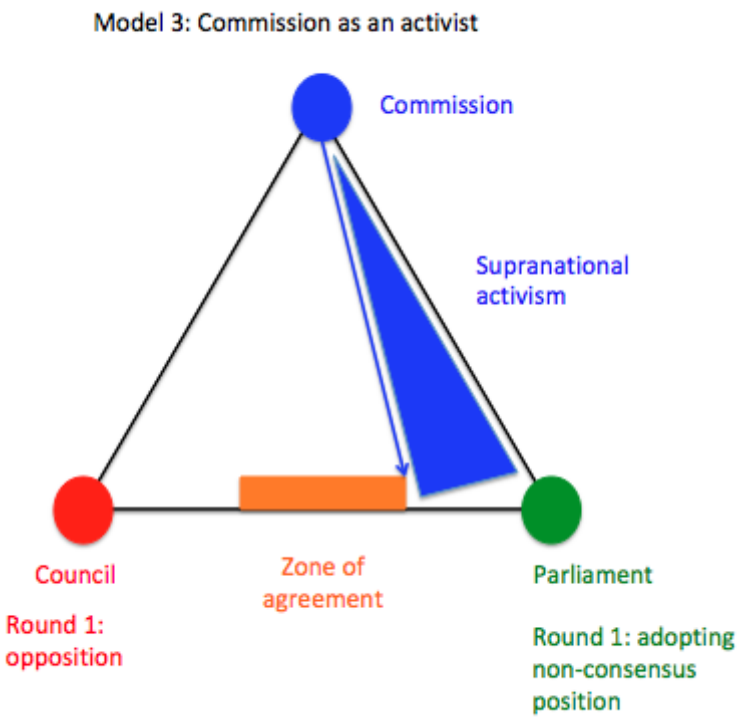
flaws in the procedure or the substance of the proposal with regard to technicality, feasibility, legal basis, financial costs, quantitative targets, or regulations.

It is expected that the Commission will justify failure in reference to the complexity of the task, bureaucratic malfunctioning or information transmission problems. Commission rhetoric is justificatory and geared towards accounting for any potential mishaps by referring to the complexity of the issue, to time pressure, and/or technical and legal feasibility.

3.3.3 The causal mechanism model 3: the Commission as a supranational activist

Rather than being a perfect honest broker or an imperfect technocrat, the Commission can also be an activist, who tries to expand its powers (Hartlapp et al., 2016) and pursue its own preferences (Franchino, 2009). The Commission can behave as a legislative activist, pushing for its own agenda when proposing legislation and thereby disregarding the interests and preferences of the co-legislators (Bauer and Trondal, 2015). The reasons for such a behavior could be found in the Commission's supranational identity as an institution and its naturally integrationist tendencies as an agenda-setter (Héritier, 1999). The disregard for the co-legislators preferences in policy formulation combined with the unwillingness to adapt the proposal during the negotiation process to move within the possible zone of agreement with the co-legislators explain failure in this case.

The Commission is a "purposeful opportunist" (Cram, 1997) or a "skillful entrepreneur" (Haverland, De Ruiter and Van de Walle, 2016) whenever it pursues a strategy of power expansion (Bailer, 2013) by selecting input and expertise, as well as elements in the political agenda, which fit its own preferences (Franchino, 2009). The Commission tries to exploit the other political actors dependence on immediate payoffs and its own longer time horizon to frame policy in a way that increases its symbolic and reputational gains (Hartlapp, 2016), for example by referring to values and strategically connecting normative elements to the desired policy change (Verloo, 2005; Klein, 2013).

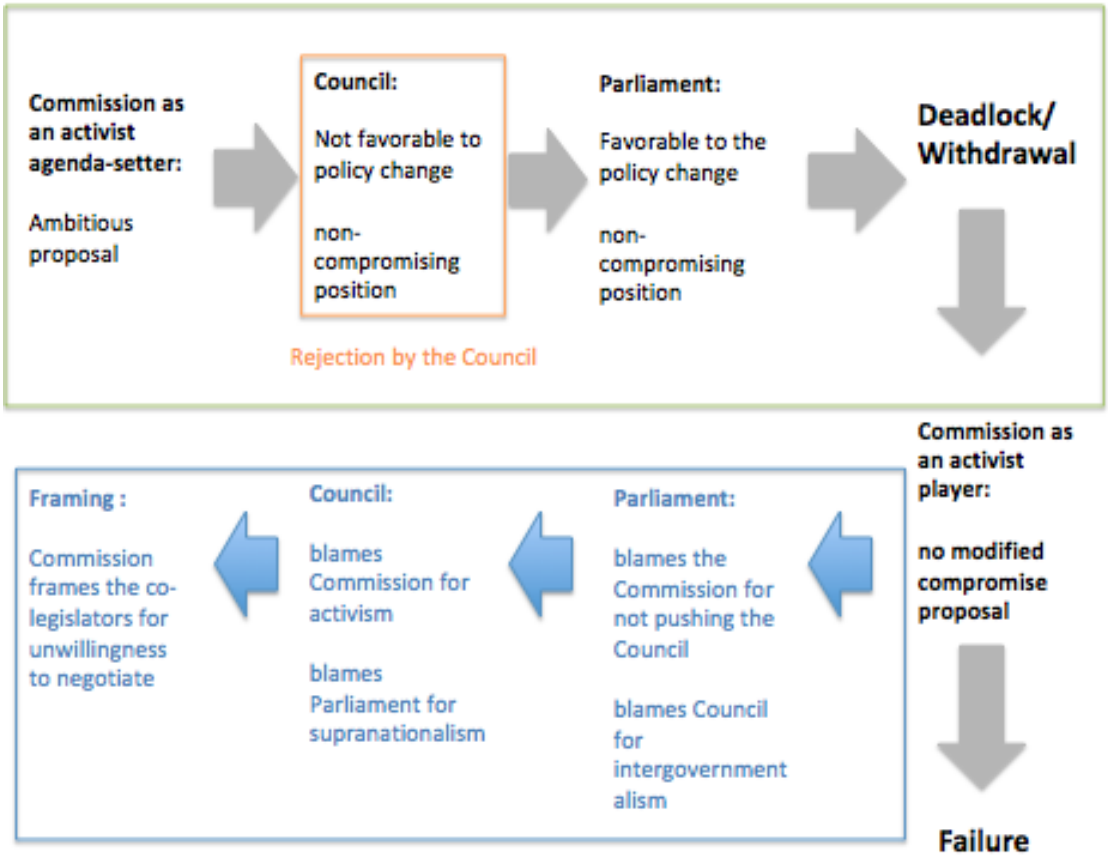


(figure 8, activist failure, source: own illustration)

While, in bargaining theory, it is possible that either of the co-legislators block an activist proposal, in the institutional constellation of the EU, it is much more likely that member states in the Council would reject overly ambitious supranationalist proposals. This is a key difference to technocratic failure, where the co-legislators both signal that the proposal is not acceptable, in the case of activism, given the overall preference constellations of the institutions, it is more likely that the Council will block, because the Commission is considered to be overly supranationalist and would therefore be further away from the Council than from the Parliament (Nugent and Rhinard, 2015). Evidence from several studies in different policy areas, for example Justice and Home Affairs (Roos, 2013; Bürgin, 2017) and Social Affairs (Van der Vleuten, 2007), suggest that the Commission as a policy entrepreneur and supranational activist is disregarding member states to the advantage of European institutions (Bauer and Trondal, 2015). The Parliament can therefore be expected to welcome and support the Commission initiative and side with the Commission, leading the Council to consider the Commission too responsive to EU institutions (Nugent and Rhinard, 2015).

Failure in this case is due to unilateral Commission action, a deliberate departure from the zone of possible agreement during the policy formulation process, which results in a proposal that does not correspond to the co-legislators' agenda. It has been shown for several policy and issue areas, that the Commission displays activist behavior by pushing for a strongly integrationist agenda against the opposition of the Council in particular (Cini, 1996; Woll, 2006; Radaelli, 2000; Hooghe, 2001). The Commission brings forward a proposal that pushes its own agenda without responding to the Council's preferences, but with an advertisement of its own agenda during the agenda-setting stage.

Causal mechanism 3: failure due to activist Commission



(Figure 9, causal mechanism of activist failure, source: own illustration)

The key condition for failure due to activist behavior by the Commission is the non-coincidence of the overall agenda of the co-legislators with the proposed policy change. In particular, there is no demand for policy change at the European level by national governments and no indication that a European policy would be well-received by domestic constituencies. Hence, national and European agendas of

national governments do not coincide, which makes the Council likely to oppose the policy change. There is no signal of support from national governments or explicit mention of a desire to have policy change on the issue. The European Council also does not signal support for the issue.

Despite the availability of informal channels between all institutions, but the Commission disregards information transmitted. The Commission has had access to information about co-legislator preferences during policy formulation, formally or informally, through public statements or informal connections to member state and Parliament representatives. The Commission does not advertise the proposal as something demanded by member states or the Parliament, but refers to a pro-European integration agenda and the benefits of the Commission being in charge of the policy issue.

We can expect strong public rhetoric by Commission actors in favor of a legislative proposal by the Commission and no signal of support by co-legislators during agenda-setting: Council and Parliament do not pronounce themselves in favor of the initiative beforehand during agenda-setting and policy formulation. We expect no Parliament committee reports or statements by MEPs and no statements by Ministers or national leaders calling for a Commission-led legislative initiative.

If the co-legislators are not in favor of the policy initiative, we should observe blockage by both co-legislators at an early stage of the negotiation process, as actors in both institutions will question the Commission claims and use of red lines, threats and blocking minority building to prevent progress on the proposal (Smeets, 2015; Smeets, 2016) (figure 9, orange marking).

Failure will occur shortly after the agenda-setting stage, when the proposals are transmitted to the co-legislators for position-taking and the discrepancy between the proposal and the actual preferences becomes evident (figure 9, green marking). The Commission does not withdraw the proposal to recast a modified version that would be more acceptable to the co-legislators. If the co-legislators are not in favor of the policy initiative and do not desire a policy proposal on the issue, we should not see a follow-up revised proposal, but rather a definite rejection or withdrawal of the

proposal without follow-up. Brakemen will strongly mobilize against the policy change and form durable blocking minorities against the proposal (Smeets, 2015), while not encouraging a revision and recast of the proposal.

Blame attribution rhetoric will focus on pinpointing Commission activism. The Commission will receive most of the blame for failure from both co-legislators (figure 9, blue marking). The Council will blame supranationalist Commission activism and the fact that the Commission is willing to forsake practicality and feasibility to propose legislation, which is not beneficial to member states. The Parliament will blame the Commission for not sufficiently pushing the Council. The Commission will attribute blame mainly to the Council for being unwilling to accept more ambitious policy change and refer to obligations they should to deliver to citizens. The co-legislators will also attribute blame to each other, as it increases their respective reputational gains: The Council will blame the Parliament for siding with the Commission or being too lenient with the Commission and its activism. The Parliament will blame the Council for being intergovernmentalist and restrictionist and unwilling to consider a more ambitious policy change.

3.3.4 Summary of previous models: conditions and mechanisms

The following table provides a summary of the conditions (table 1) that are expected to be present, if any of the respective models applies to a given case of legislative failure. If a condition is present, it will be denoted with a positive sign (+), if it is absent, a negative sign (-) will be used.

Conditions			
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist
Availability of informal channels/networks	+	-	+
European Council support	-	+	-
Issue salience to governments	-	+	-
EP issue support	-	+	-
Window of opportunity	-	-	-
Party politics overlap	-	+	-
Preference overlap	-	+	-
Agenda overlap	-	+	-

(Table 1, conditions model 1-3, source: own illustration)

The process of legislative failure is likely to contain the following mechanisms (table 2) that are to expected for each of the models, if they hold true. If a condition is present, it will be denoted with a positive sign (+), if it is absent, a negative sign (-) will be used.

Mechanisms			
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist
Relais actor behavior	-	-	-
Informal exchange during agenda-setting	+	-	+
Blame gains COM	+	-	-
Blame gains co-legislators	-	+	+
Learning/up dating COM	+	+	-

(Table 2, mechanisms model 1-3, source: own illustration)

The previous models encompass the main findings of previous literature on Commission behavior and its role in the legislative process. The following model, I argue, provides a better understanding of the dynamics of failure in the EU policy process.

3.3.5 The causal mechanism model 4: Commission as a strategic actor in incremental, multi-stage policy and blame game

Why, however, would the Commission go through the effort of drawing up a proposal only to risk failure? Because a proposal that does not build on the co-legislator preferences and is not geared towards a middle ground makes it likely that the co-legislators let the proposal fail and the Commission does not get the policy change.

The remaining puzzle, outlined in the introduction, for which none of the models presented so far can account is the fact that failed proposals often reappear in a changed form and are afterwards approved by the co-legislators.

The argument made about failure being strategic is building on the observation that failure of a negotiation process, either deadlock, rejection or withdrawal of a proposal, does not lead to the definite disappearance of a policy project, but rather results in the Commission, revising or redrafting the proposal and adapting its strategy. Rather than being mutually exclusive, the aforementioned three models of failure can be combined with a strategic approach, if we follow the argumentation in the literature that the Commission can pursue more long-term goals and approach policy change in an incremental manner, due to its linear time horizon as a policy-maker (Hartlapp, 2016). Where the Council and the Commission have a cyclic horizon, due to their dependence on elections, and need for more immediate payoffs, the Commission can delay success (Hartlapp, 2016; Nugent and Rhinard, 2015).

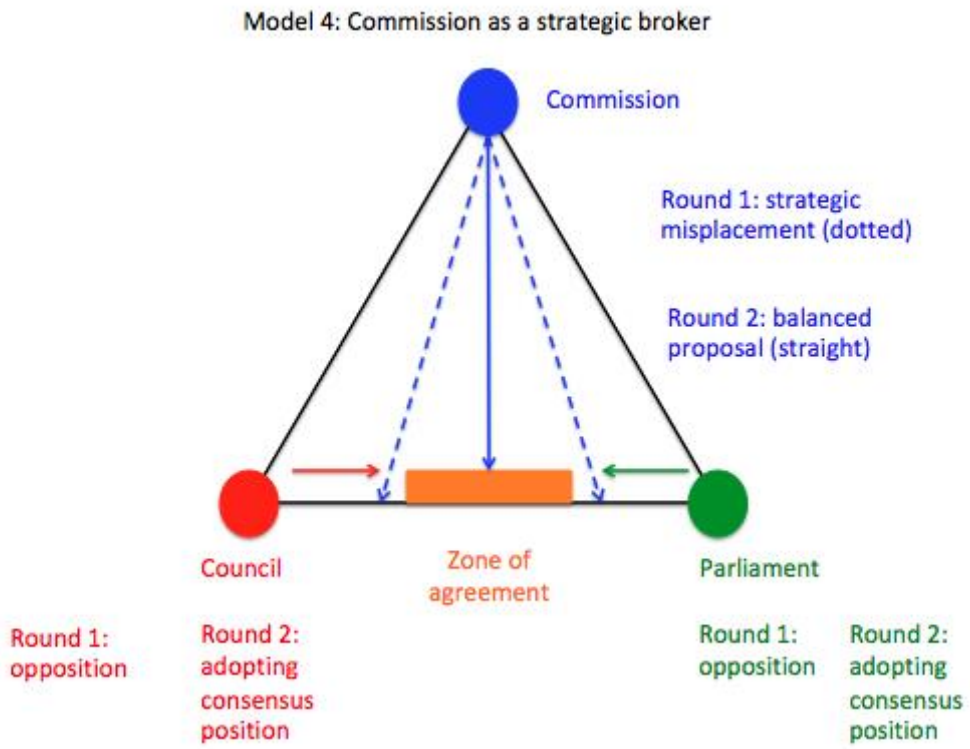
There is something to gain for all legislative institutions in not letting a proposal pass in the first round. This includes procedural, substantive and reputational gains. The legislative process becomes a multi-sequence game, where deadlock and failure are just the first stage, followed by one or more stages of negotiation that ultimately lead to success. The Commission behaves incrementally. It initially deliberately proposes legislation that is ambitious to enable a bargaining process in several rounds, interposed by a series of blame attribution and blame avoidance exercises by the Commission, Council and Parliament. The Council and the Parliament get immediate payoffs through the blame game and the Commission gets the desired policy change in the long run.

In the process, the Commission exploits the possibilities given by the formal and informal setting of the policy-making process to employ a combination of deliberate strategies, windows of opportunity and a policy of integration by stealth (Wallace, 1996), partitioning, coupling, salami tactics or packaging policy to achieve small improvements while accommodating diverging interests (Roos, 2013; Sabatier and Weible, 2014; Ackrill, Kay and Zahariadis, 2013; Smeets, 2015) and engaging in framing and priming (Zahariadis, 2008). The result is a complex inter-institutional process with a mixture of orchestrated moves and procedural battles (Smeets, 2013; Smeets, 2015), blame, entrapment and exposure (Schimmelfennig, 2001; Schimmelfennig, 2003).

The Commission as a policy inheritor is the pivotal actor (Nugent and Rhinard, 2015; Viteritti, 2010). Its policy initiatives are a continuation of previous EU action and the general lines have already been discussed by the Council and Parliament, so the Commission is clear on what the co-legislator prefer and can maneuver the policy process since it is present at all stages. However, it is not possible to clearly determine how responsive the Commission is to either of the two institutions, since exchanges are informal and not systematically recorded. Although crude figures indicate that the Commission is more responsive to the Parliament than the Council (Egeberg, 2014), the Commission's power has shifted from the agenda-setting stage, which is increasingly bureaucratic, to the negotiation stage where the Commission becomes an informal mediator (Nugent and Rhinard, 2015).

If the Commission is a strategic agenda-setter and political leader (Bauer and Trondal, 2015), it does not only provide for a compromise proposal, but actually sets the agenda strategically. It diverges from its role as a technocratic expert and a facilitator of EU policy-making. This means that the Commission intentionally drafts and frames proposals in a way that can diverge from both Council and Parliament preferences and continues to push for its agenda in the negotiation process, thus compromising the possibility for consensus (Ripoll Servent and Trauner, 2015; Boswell and Geddes, 2010; Kassim et al., 2013; Princen, 2007). If the Commission is a strategic agenda-setter, we can expect to see ambitious and integrationist proposals, or a framing, which true to the purpose of a supranational actor emphasizes the involvement of EU institutions and the transfer of competences from states to the EU level. Conflict and failure are likely in a setting where either

Commission or Parliament, or both, push for an agenda, which conflicts with the Council (Ripoll Servent and Trauner, 2015).



(figure 10, strategic failure, source: own illustration)

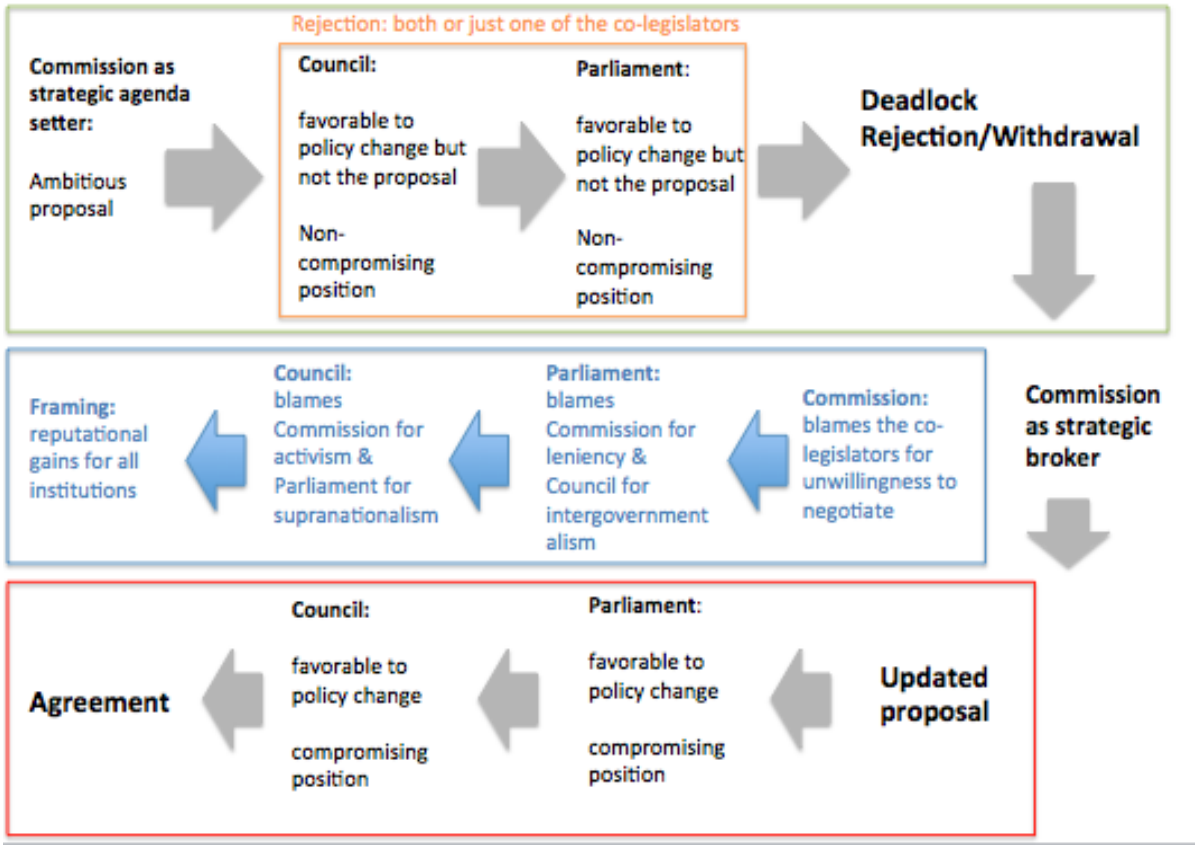
The rationale behind a multi-stage process is to enable all actors involved to not only bargain over gains and losses, but also frame others for those losses to escape blame vis-à-vis the respective constituencies, to which the institutions are accountable.

The Council, and the actors who form the institution, are accountable to national governments and have to fulfill governmental and coalition promises (Wallace, Pollack and Young, 2015). The Parliament is accountable to citizens and bound by its role as the defender of fundamental rights and citizen interests (Ripoll Servent, 2013). The Commission has to conform to both the role of mediator and promoter of European integration (Nugent and Rhinard, 2015). In the negotiation process, each institution tries to advance their interests to the greatest extent possible, but the understanding of consensus in the ordinary legislative procedure is one of balancing losses in substance and procedure with reputational gains. Similarly, Smeets (2013; 2016) argued for the unanimity setting that the long shadow of the future and the mutual dependency on the goodwill of the others in future negotiations induce actors

to make sure that everyone can deal with failure in a face-saving way (Bovens and t'Hart, 1998).

This is the model (figure 10) presumed to be most likely to explain policy failure in the legislative decision-making process. It presumes that the legislative institutions are strategic actors, who exploit the legislative game to maximize their gains through policy change, which includes procedural, substantive and reputational gains. Failure is therefore only a sequence in the set of negotiations that is necessary to achieve those gains.

Causal mechanism 4: strategic failure orchestrated by the Commission



(Figure 11, causal mechanism of strategic failure, source: own illustration)

The Commission performs a strategic role in policy formulation by setting the agenda of the proposal, it decides which elements to take up in the proposal and how much controversy to include. It tends to frame the initial proposal quite ambitiously instead of orienting it towards the lowest common denominator to increase the probability of a more ambitious policy output (Thomson et al., 2006; Daviter, 2011). The Commission collects information from all stakeholders, including the co-legislators and drafts an ambitious legislative proposal (Tsebelis, 1990; Roos, 2013) and

exploits the access to information about state preferences via seconded national experts to acquire information about which proposal would be most acceptable to the Council (Schmidt, 2000). The co-legislators respectively play a blame and threat avoidance (Naurin, 2010) and blame attribution game. They levels and institutional channels of access and exchange to each other and rely on relais actors, their experience, the trust in their ability and their personal contacts to counteract information asymmetry (Häge, 2011; Daviter 2011).

At the agenda-setting stage, there are already possibilities for informal strategic influence of both co-legislators on the Commission. Both Council and Parliament keep strong informal ties with the Commission and the Commission usually enquires after the preferences of both institutions. The Commission, Council and Parliament do not always have the same agenda and it depends on how the issue is framed as to whether or not they can agree on the policy formulation (Princen, 2007; Princen, 2011). There are several possibilities to frame a proposal and exert influence: The Council can uses seconded national experts or appeal to civil servants in the Commission based on nationality links, whereas the Parliament can form intergroups to have informal talks and try to put something on the EU agenda through statements and reports (Hartlapp, 2016; Bauer and Trondal, 2015; Sundström, 2016; Häge, 2011).

The main element of this variant of explaining failure is the possibility for all institutions involved to exploit failure to achieve reputational gains to compensate losses: those actors with the most losses in substance and procedure will be able to exploit failure to place blame on the others (Bovens and ‘t Hart, 1995; Brändström and Kuipers, 2003; Hood, 2002; Hood, 2007). Therefore, blame avoidance and blame attribution can be even more important than taking credit for successes (Weaver, 1986).

In the first round of negotiations, the three institutions can make maximalist demands to be able to downscale in the following rounds without too many losses. Depending on the issue and the preference constellations, maximalist demands can come from the Parliament, the Council or both. In either case, the process between the co-legislators will lead to deadlock.

The Parliament's position will be more extensive and expansive than the Commission's and much more than the Council's, who will agree to negotiate if states have an interest in shifting issues to the EU level to forego accountability or deal with domestic pressure and will weigh the sovereignty losses issue per issue (Tsebelis and Garrett, 2000; Roos, 2013). Either Council or Parliament initiate first round deadlock (figure 11, orange marking).

During the policy formulation stage, the Commission collects information from the co-legislators during the agenda-setting process. All institutions are aware of each other's preferences, but the Commission still submits an ambitious proposal, as part of the incremental approach, to ensure that after bargaining between the Council and the Parliament that the result is favorable to its preferences (Bauer and Trondal, 2015).

There have been sufficient contacts between the Commission and Council and Parliament during policy formulation and the Commission has received information from national governments and members of the Parliament through public statements and informal channels (Sundström, 2016).

After submission of the proposal, we should see the start of the intra-institutional position-taking discussions in the Council and the Parliament to form their respective positions and start informal trilogues. While, actors signal general approval of the intended policy change and signal their support for investing in negotiating, they also voice opposition to the proposal as presented. Despite opposition, the co-legislators make it clear that a revised proposal would be welcome. Challenges to the proposal can include procedural and substantive dimensions. Actors can contest the frame, the factual accuracy or the scope of the proposal, as well as the substantive provisions, such as quotas or other targets (Smeets, 2015) (figure 11, green marking).

In response to deadlock, the Commission will eventually withdraw the proposal and resubmit an amended version that is within the zone of agreement set by the co-legislators. As a result, the institutions can frame failure to their advantage. The expected final outcome would be agreement after at least two rounds of negotiation. The negotiation rounds following failure will be used for bargaining over the details of

the proposal, with each institution trying to gain ground and amend the proposal in their favor.

Everyone benefits from first round failure, because they get the opportunity to frame the gains and losses to their advantage: The Commission gets to first put out an ambitious proposal and advocate that it fights for a stronger Europe, for more integration and better policy solutions for the public, which is either too close to the Council or the Parliament in substance and/or procedure or promoting too much of a Commission-centric agenda. The Council gets to criticize the first proposal as far too ambitious and defend national sovereignty and frame the second, more moderate proposal as a success in defending national interests to the domestic public. The Parliament can take a strong position in the first round, defend rights and supranational integration thereby fulfilling its role as the defender of the European public and can blame any watering down on the Council.

In the negotiation rounds following failure, we should then observe consensus-building behavior and attempts at resolving remaining conflicts by all actors involved. The Commission will invest in exploiting windows of opportunity and frame the proposal in a way that enables compromise. And the Council and Parliament will employ strategic mechanisms to bring about majority coalitions and strike first reading agreements (figure 11, red marking).

For this game to work, the overall policy agenda of the co-legislators has to be favorable to policy change. There is a window of opportunity to put forward the proposal and actors attach particular salience to the proposal. Both national governments and parliamentarians are aware of the problem and are in favor of a European solution: In other words, national government officials and/or heads of state have mentioned or raised the issue in meetings expressing themselves in favor of a European policy proposal.

Preference constellations regarding the revised proposal have to overlap sufficiently to enable a compromise; as in, none of the actors oppose the policy change. Party politics and coalition constellations in national constituencies and European institutions are favorable to the policy change. Hence, there is no signal of general opposition to policy change through the public statements of national parties, heads of state and government officials and members of the European Parliament.

In terms of blame avoidance, we should see statements by actors from all institutions exploiting failure of the proposal to promote their respective agendas (Bovens and t'Hart, 1998; Héritier, 1999) (figure 11, blue marking):

The Commission will endorse a liberal pro-integration agenda, promoting the need for European policy solutions to improve citizen's rights, considering it is the best institution to represent those interests. The Council will defend a restrictive sovereignist agenda, promoting intergovernmentalism and the need to respect national policy traditions. Parliament will advocate itself as the advocate of a supranationalist agenda, promoting the need for European policy to counteract intergovernmentalist governments and advocating a citizen and rights-oriented perspective, considering it is the best institution to represent those interests.

The Commission will blame any watering down of the proposal, losses in terms of supranationalization both in terms of substance and procedure, on the other two institutions. The Council will blame the Commission and the Parliament for being too ambitious and defend national sovereignty. The Parliament will blame the Council for being too intergovernmentalist and the Commission for being too lenient with the Council if it concedes to any demands.

The changes made to the proposal in the second round give all institutions the opportunity to frame gains and losses to their advantage and benefit from an agreement that does not correspond to their ideal. The Commission frames any policy losses as a result of having to deal with an intergovernmentalist Council and an overzealous Parliament and frames any gains as a contribution to furthering integration. The Council frames the change from ambitious to more moderate as a gain in sovereignty and a success in defending national prerogatives and any losses as necessary concessions to a demanding Parliament or Commission. The Parliament will frame any losses as a result of Council dominance and the disregard of governments for citizen interests.

3.5 Summary of all models and research mandate

The following tables not only summarize the main conditions and mechanisms, but also indicate in a comparative perspective, whether they are supposed to be present (+) or absent (-) in the case, if the respective model applies. This does not say

anything about the effect, which has been explained in the previous causal mechanism section.

Conditions				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Availability of informal channels/networks	+	-	+	+
European Council support	-	+	-	+
Issue salience to governments	-	+	-	+
EP issue support	-	+	-	+
Window of opportunity	-	-	-	+
Party politics overlap	-	+	-	+
Preference overlap	-	+	-	+
Agenda overlap	-	+	-	+

(Table 3, summary models and conditions, source: own illustration)

Mechanisms				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Relais actor behavior	-	-	-	+
Informal exchange during agenda-setting	+	-	+	+
Blame gains COM	+	-	-	+
Blame gains co-legislators	-	+	+	+
Learning/ updating COM	+	+	-	+

(Table 4, summary models and mechanisms, source: own illustration)

The theoretical framework presented (chapter 2) and the proposed operationalization of the different models (chapter 3) will be tested on four cases of legislative deadlock and failure in two different policy areas, Justice and Home Affairs (chapters 5) and Social and Employment Policy (chapter 6), after a presentation and discussion of the chosen research design in the following chapter (chapter 4). The goal of the empirical analysis of the four cases of failure is to test the explanatory value of the proposed models and see to what extent actual inter-institutional dynamics correspond to the behavior we would expect. Furthermore, it will be investigated whether the expected conditions and mechanisms are present and conducive to failure or if there are other factors, we might be missing. Finally, the comparative approach will show if similar dynamics are at work in different policy areas.

IV. Research design: setting the baseline for process analysis

The present chapter explains the research design, specifically the motivation to conduct process research doing comparative case studies, the choice of cases, data collection and data analysis methods. All methodological choices, especially the choice to combine qualitative content analysis of documents and expert interviews and triangulate them with media reports will be critically evaluated.

4.1 Case selection strategy: qualitative comparative case studies to uncover processes of failure

Whenever possible, we should use qualitative data to interpret quantitative findings in order to "get inside the processes underlying decision outcomes, and to investigate the reasons for the tipping points in historical time-series." (Brady and Collier, 2000:109)

The goal of this study is to uncover mechanisms and causes of failure in contentious negotiation processes. There is a strong argument for an iterative design that combines deductive and inductive elements by using deduction to reconstruct potential explanations, specify the sequences and determine what should hold true for the explanation to be valid while also being open to adapting assumptions when discovering new evidence and gaining more insight into the cases (Bennett and Checkel, 2014).

The most straightforward approach to process research is to conduct case studies, as they help reveal conditions and mechanisms and account for causal complexity, involving the overall agenda and context surrounding negotiation, the institutional dynamics, the personnel involved, and the influence of outside factors, for example the situation in member states (Smeets, 2015; Bennett and Checkel, 2014). Strategic action can be traced like moves in a chess game by tracing causal mechanisms within cases comparing these mechanisms across cases can permit to unveil causal heterogeneity (Naurin and Rasmussen, 2013).

Comparing causal dynamics across similar or dissimilar cases can reveal if there might be a generalizable pattern and test whether there is a potential to generalize findings about mechanisms of failure. If related cases show similar dynamics, there

might be similar conditions and mechanisms at work (Bennett and Checkel, 2014). Choosing cases from similar policy areas is useful to see if the dynamics of failure tend to resemble each other in comparable cases with regard to the dynamics of failure. If just one case within one policy areas is analyzed, it is not possible to rule out that it might be a singular occurrence without any explanatory value or predictive capacity for other cases (Bennett and Elman, 2006; Bennett and Checkel, 2014).

However, often, process research focuses on just one policy or issue area and misses out on the opportunity to test, if the same mechanisms and conditions are at play in other policy areas (Bennett and Elman, 2007). Comparison across policy areas would permit a tackling of the question of whether failure is inherently issue-specific or policy-area-specific. Comparing issues within policy areas and across policy areas can help identify key factors/variables that enable success or condition failure (Bennett and Checkel, 2014)

Ultimately, the goals of case study-based process research in this study are first and foremost to detect mechanisms and conditions of failure and to shed light on the causal heterogeneity and attempt a first step at explaining why findings of quantitative studies regarding certain structural and process factors are often inconclusive (Beach and Pedersen, 2013; Bennett and Checkel, 2014). It will allow giving detailed accounts of why and how certain factors cause outcomes and verify claims over key factors made by quantitative studies about policy failure and fill the gap of comparative causal mechanism research left by qualitative studies (Smeets, 2015).

Case study based research of negotiation processes in just a few selected cases faces a number of limitations. A certain level of uncertainty will remain, due to missing evidence, biased case selection or insufficient corroboration of expectations by the evidence given. Also, the researcher will be unable to credibly generalize beyond the cases researched (Beach and Pedersen, 2013; Beach and Pedersen, 2011). It is possible to try looking at the bigger picture of all possible cases that are similar, but the mechanisms and conditions detected for the cases in question could turn out to be outliers in a larger set of cases. Apart from those cross-sectional limitations, the lack of longitudinal data does not provide the ability to convincingly

show whether the mechanisms are consistent over time or are just very specific to the context of the particular cases. Conclusions drawn about dynamics of failure will therefore be specific to a post-Lisbon and crisis setting context, the framework of co-decision and qualified majority voting and the policy areas of Justice and Home Affairs, as well as Social and Employment policy. One could even present arguments in the issue areas of border policy and gender equality policy, since the broader policy areas both contain a number of other issue areas, which are likely to follow different dynamics.

4.1.1 Choice of policy and issue areas: looking for controversy to find failure

Why choose cases from the area of Justice and Home Affairs and Social and Employment policy and why compare them?

In the context of the post-Lisbon era, it is interesting to look at cases in high politics policy areas, which are naturally prone to contentiousness, where Lisbon has affected the institutional framework, resulting in a deepening of integration and an increase in the competences of supranational actors, such as Justice and Home Affairs, and compare it to an area, which has been comparatively less affected by the Treaty changes, like Social and Employment policy. The degree of competence the EU possesses in policy areas and the experience with policy-making in the respective issue-areas is likely to affect negotiation dynamics and provide for more or fewer opportunities for strategic action.

The Lisbon Treaty also changed the applicable decision-making and voting rules in many policy areas. Not only did member states transfer further competences, they also integrated more policy areas into the co-decision framework while also expanding qualified majority voting. Co-decision puts Council and Parliament on equal footing, giving the Parliament more influence and also more opportunities to pressure and even threaten the Council, because of a longer shadow of the future that incites the Council to take its positions seriously, if it wants to avoid retaliation in future negotiations. Qualified majority voting influences the strategic choices actors can make: while in unanimity, every single position, reservation and opposition has to be taken very seriously, because it could lead to negotiation failure. This is entirely different in qualified majority voting where an outlier position can be outvoted if

necessary and where actors are forced to build majority coalitions to support their positions, making it more likely to be selective in the type of coalition partner one would look for, which mostly applies to the big member states due to voting weight.

We might expect that areas, which are less integrated provide for fewer opportunities for supranational actors, Commission as well as Parliament, to exert pressure, because they have fewer occasions and member states still retain the majority of competences. It is also conceivable that the Commission and the Parliament would be particularly keen on expanding their influence in these areas, by deliberately trying to push expansive proposals and be tough in the negotiations. The opportunities for strategic action are also likely to differ for actors depending on which policy area they negotiate in: issue linkages, package deals, coalitions and other strategies are more readily available in areas with high levels of integration, where repeated interaction and thick networks are a given, than in areas with relatively limited policy-making experience.

Justice and Home Affairs is significantly more integrated than Social and Employment Policy. There is greater policy interdependence due to a greater accumulation of policies over time. The EU possesses more competences in Justice and Home Affairs to legislate and the policy area is almost entirely under co-decision and QMV now (Laursen, 2012; Wallace, Pollack and Young, 2015).

The crisis context makes critical cases. It increases contentiousness and changes salience levels for high and low politics issues. It can be expected that cases with direct relation to the crises are of increased importance to policy-makers. Selecting current cases, in the post-Lisbon crisis setting, which are linked to the two major crises, the economic and financial as well as the migration and security crisis, therefore seems to be an appropriate choice.

What started as a primarily financial crisis in 2008, has now developed into a full-blown economic crisis with significant implications for the welfare state. The crisis affected many policy areas, amongst them social and employment policy, especially issue-areas related to national labor markets. It can be expected that member state governments show less willingness to agree to policy that has financial implications

or affects business in a way that is likely to interfere in the labor market and potentially cause adversity between governments and businesses.

The immigration crisis started in 2011 with the increased migrant influx due to the Arab spring and developed into a full-blown security crisis caused by external border problems and the multiple terror attacks starting in 2015. Justice and home affairs, is undoubtedly the area that has been most affected by the crisis, especially the area of border policy regarding Schengen's internal and external borders. It can be expected that due to increased urgency, member states would raise the issue of control and securitization in the Council more frequently, whereas the Parliament would be more concerned with civil liberties and rights protection (Ripoll Servent and Trauner, 2015). Member states are likely to show less willingness to accept Commission involvement, but a desire for quick and problem-focused solutions (Roos, 2013; Ette and Faist, 2007).

Research has not given a definite answer on how to conceptualize and how to measure salience levels of policy areas and issues (Beyers, Dür and Wonka, 2017; Leuffen, Marlang and Wörle, 2014), but the common ground is that an issue is salient if it is considered to be of great importance in comparison to other issue areas and actors dedicate a disproportionate amount of attention to it (Oppermann and Viehrig, 2011; Warntjen, 2012; Roos, 2013).

Controversy, deadlock and failure are more likely to happen in cases where conflict and preference divergence are present, which supposedly happens in areas of high importance to policy-makers (high salience policy areas). This also happens with issues that are high on the agenda for politicians and the public in their constituencies (high salience issue areas) (Thomson, 2011). Considering the above mentioned setting, it is not difficult to assume that in the crisis context, security and economy-related policies would be of particular importance to policy makers, but the crisis also creates a more complicated setting of interests and preference constellations and a higher potential for conflict, thus making these policy areas interesting choices for crucial conflict cases (Bauer and Becker, 2016). Within the area of Justice and Home Affairs and Social and Employment Policy, there are areas of particular importance and urgency for member state governments in the crisis

context, namely border policy and labour-market policy. At the same time pressure is high on the EU to find solutions and avoid failure in view of a skeptical public opinion whose opinions increasingly mirror populist forces.

Justice and Home Affairs has become the most salient area in EU policy-making and attracts the most attention from policy-makers as well as public opinion, gradually increasing since the outbreak of the migration and security crisis from 2011 onwards. Schengen, matters related to internal and external borders, are of particular importance to the public (De Capitani, 2014; Hilpert, 2015; Novotná, 2014).

Compared to Justice and Home Affairs matters, Social and Employment Policy is less salient, but remained very important to member states with regard to budgetary implications of labor-market related policy initiatives. Gender equality matters seem to be of particular importance in that regard, and public opinion seems to favor legal measures (Graziano and Hartlapp, 2015).

4.1.2 Choice of failure cases: explaining outcome selection

If failure is understood as proposals that have been withdrawn or rejected, deadlock should be understood as halt of negotiations due to lack of grounds to find agreement, as defined and conceptualized in the introductory chapter of this thesis., Therefore, we can set the following criteria for case selection: (1) failure followed by success (several rounds of negotiation), (2) failure without follow-up (absolute failure) and ultimately (3) deadlock without failure (halt of negotiations without withdrawal or rejection). Ideally, these cases would be clearly distinguishable in order to be able to clearly pinpoint types of failure and make a neat comparison of processes and causal mechanisms. However, due to the long time horizon of EU negotiations, not all cases are completed within 3 years. Consequently, there are cases, which are hard to classify, because negotiations have not formally ended in adoption of legislation or in rejection/withdrawal with an announcement of non-follow-up. For these cases, it is not possible to draw definite conclusions yet. It is only possible to evaluate the state of negotiations to see whether the negotiations point towards success or failure. Therefore, the typology more closely resembles (1) failure followed by success (2) failure followed by ongoing negotiations, with possible outcomes being either a

success or failure and (3) persistent deadlock, with possible outcomes being failure or success.

It is difficult to anticipate success or failure in ongoing negotiations. Some of the deadlocked cases can still result in success if one of the selected cases is deadlocked, but has not failed. Therefore, depending on changes in circumstances or positions of key actors, success is still possible. Comparing failure cases to at least one success case seems logical, since we want to distinguish between successful consensus-building and persistent deadlock that leads to negotiation failure. The cases, which have ended in deadlock will be considered positive cases, whereas cases where deadlock was successfully resolved and the negotiation ended in agreement will be counted as negative cases. Within the set of positive cases, there is a variation between them.

The following cases presented themselves for this analysis in the post-Lisbon co-decision framework were selected based on the conceptualization of failure provided in the introductory chapter:

1. Proposals where failure occurred in the first round and deadlock in the second round, but was turned into agreement: Schengen, Smart Borders

These two cases correspond to type (1) failure followed by success. Both policy-making processes contained instances of deadlock and failure in the first round, followed by agreement as the final outcome.

2. Proposals where failure occurred and the second round is still ongoing, without deadlock: Maternity Leave

The unclear state of the second round of negotiations in the third case (2), the Maternity Leave Directive, can most likely be attributed to the long time horizon of policy-making, and the the lack of time limits on informal negotiations prior to the formal launch of the first reading procedure. The recast package seems to be on the track to agreement in the Council, as there is no signal of blockage inside the Council and the Parliament is negotiating the file inside the relevant committees.

3. Proposals where deadlock occurred and the outcome is still uncertain: Gender Quota

The persistent deadlock (3) in the case of Gender Quota does not currently fall in the category of failure cases that qualify for the multi-sequence model, which makes it a negative case at this state. However, again, due to the long and rather uncertain horizon of EU policy-making, it cannot be entirely excluded that even after six years of deadlock, there will be a second round. Still, for the framework of this thesis, and according to the current state of the file, we can treat it as a negative case at this point.

There are other rejected or deadlocked proposals in the Commission's policy record, but they fall outside the scope conditions of this framework: this includes procedures other than the co-decision framework and proposals negotiated under unanimity. It also encompasses proposals negotiated before Lisbon, as well as non-legislative or other soft law measures, where the stakes for the actors involved are different than they are for binding legislation. Withdrawal and failure of proposals due to external factors that are not linked to the legislative process such as legal incompatibility with the Treaty are also not included. A proposal can also become obsolote, because the problem has been solved through other forms of measures or other legislation at the European, international or national level. But this does not fall into the scope of contentious cases either. While these cases also constitute instances of failure, it cannot be convincingly argued that there is a multi-sequence failure game orchestrated by the legislative institutions.

4.2 Data selection and collection

4.2.1 Strategies of data collection: purposive selection

Actual policy choices must be traced back to focal points that establish which specific aspects of a legislative proposal dominate the perceptions of political actors and motivate their actions (Hörl et al., 2005; Ringe, 2005; Rittberger, 2000). These focal points can, on the one hand, be important landmarks within the decision-making process, such as meetings and formal declarations dedcuted from official documents,

and on the other hand portrayals of actor perceptions, visible in the media and public statements, as well as ex-post interviews.

This approach faces the challenge of determining at where the start and end points of data collection should be set (Bennett and Checkel, 2014). When tracing legislative processes with the aim of understanding the dynamics of success and failure as presented in the theoretical framework presented above, there is no clear answer as to where data collection should start and where it should end. This is especially true for strategic processes with more than one round of negotiations. The cases chosen for the analysis all overlap, but each case has its own time horizon, some cases have a much longer genesis than others, dating back to European Council conclusions and Commission communications from times prior to the Treaty of Lisbon. This can make it necessary to go further back in time for data collection, while others have a much shorter life span.

If agenda-setting is considered, data collection cannot start with the formal submission of the proposal, since much of the strategic planning by the Commission and informal exchanges with the co-legislators will already have taken place before that (Geuijen et al., 2008). A starting point can be the explicit mention of the issue by heads of state in European Council conclusions, potentially accompanied by a call on the Commission to present a proposal since the European Council is the formal agenda-setter for European policy and the one giving incentives to the Commission on what to propose in terms of legislation (Bocquillon and Dobbels, 2014), or the absence thereof. As for the end date, for success cases, the end date of document collection occurs with adoption. However for failure and deadlock cases, there is no clear end point. Therefore, we chose a pragmatic approach and stopped data collection at the after the Maltese and the Estonian Council Presidency in November/December 2017 to include progress on second rounds in failure cases, while allowing for sufficient time to perform data analysis.

The data collection process for documents started in April 2015 and ended in December 2017 in order to be able to devote enough time to interview transcription, data preparation and data analysis. Additional documents were collected again in January 2018 to verify the progress of the three files, which were still under

negotiation by the end of 2017. It could be confirmed through this second round of document collection that the Smart Borders case had been concluded and an agreement had been reached by November and December 2017. For the analysis of the consensus-building process in the second round of the Smart Borders case, documents will be the main source of information due to time constraints, which render conducting more interviews impossible on such short notice.

There is a confidentiality issue regarding official documents in the Council and to some extent the Parliament: the relevant process documents about the trilogue negotiations are often not accessible to the public, even after request to the relevant bodies. This applies mainly the Council Secretariat General despite its transparency commitment. The justification provided by the Secretariat General in an official letter focused on the protection of sensitive information that could potentially compromise EU negotiations and action, and even affect public interest and security.

Here are selected quotes from the letter sent in June 2017[6] by the department of the Secretariat General of the Council dealing with transparency and requests for access to documents. This letter was the reply to several requests sent about the different cases:

> "Full release of the information contained in this document would reveal to third parties sensitive details of concrete cases. This would affect the efficiency of the European Union's action to combat illegal immigration, terrorism and serious crime in Member States." (Smart Borders)
>
> "Disclosure of the document would therefore undermine the protection of the public interest as regards public security. As a consequence, the General secretariat has to refuse full access to this document." (Smart Borders)
>
> "Release to the public of the information contained in these notes would affect the negotiating process and diminish the chances of the Council reaching an agreement." (Gender quota)
>
> "Disclosure of the documents at this stage would therefore seriously undermine the decision making-process of the Council. As a consequence, the General secretariat has to refuse access to these documents at this stage." (Gender Quota)
>
> "The decision-making process in question in currently ongoing. Moreover the discussions are sensitive and complex. The issue analysed in the opinion forms an important part of the basis

[6] The response letter from the Council Secretariat General can be found in the annex.

for the discussions. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence the risk compromising the capacity of the Council to reach an agreement on the dossier and thus undermine the decision-making process (...) Moreover, the legal advice covered by this opinion deals with issues which are contentious and where the legal position remains to be clarified. The legal advice is therefore particularly sensitive." (Gender Quota)

4.2.2 Official documents: the baseline to reconstruct the process

A little over 400 official case-related documents, of variable size and in multiple languages, German, English and French, were collected manually and through a programmed web-scraping search with R in the official EU databases, Consilium, EURLEX and the Legislative Observatory of the European Parliament. This was done to ensure that all relevant material connected to each of the four cases has been taken into account[7]. Only documents with immediate relevance to the cases and containing valuable information were selected for analyis. A great number of administrative documents were excluded from the analysis, because the content was not valid for the intended analysis and did not help answer the research question. The documents will be used as evidence in the in-depth process analysis of the four empirical cases in a two-tiered approach. Firstly, outstanding text passages will be used in the narrative of the process analysis to support arguments about frames, actions, conditions and mechanisms. Secondly, all document excerpts speaking for or against an explanatory model of failure will be collected and evaluated. This allows for the drawing of better conclusions about how much evidence there is in favor of the preferred explanation.

For the present analysis, all official documents, released by all three legislative institutions, with reference to the proposals under study have been collected and analyzed for all cases. Using the documents, a timeline for each negotiation process will be reconstructed to determine the landmarks in every process and reconstruct the formal process, which surrounds and frames the informal actor dynamics we are interested in. The documents were also used to trace the progress of negotiations in each institution and between the institutions, including both the temporal progress and the substantive negotiation process. Qualitative analysis and comparison of all

[7] A list of all the documents and links to the EURLEX process files can be found in the annex, sorted chronologically by case.

available documents on one legislative file allow for the reconstruction of the formal part of the negotiations. This includes both the procedural progress, such as the amount of exchanges and the substantial progress, as the documents reflect the textual amendments and changes actors negotiated in the meetings in the Council, the Parliament and the trilogue negotiations.

4.2.3 Media reports: complementary source for triangulation

A little over 150 media documents, of variable size and in multiple languages, English, German and French, were collected manually at first and through a LexisNexis search afterwards to complement the manual search and ensure that no important documents were missing[8]. It has to be said, however, that the search for non-English reports using software or LexisNexis, proved to be quite fruitless, as the results were often articles that were not at all related to the case. This might be due to translation problems in the search machines. Verifications at random by doing manual searches on Google for specific newspapers in other languages, however, indicated that there might not be more reporting on the issue, thereby supporting the scarce output of the automated search.Those media documents without valuable information for the study subject were excluded from the analysis, they either just mentioned the case, but did not contain any valuable information about the above-mentioned elements that would provide insight into the process of failure.

To understand why actors adopt certain positions and develop and publicly communicate certain perceptions, it is important to look at how they portray an issue to the public, mostly through media channels, and which elements they emphasize in particular. Communicating to the public is an important part of policy-making, as politicians will be evaluated at election times by how responsive they have been to the voter, hence their interest in constantly relating to public opinion (Kohler-Koch, 2000; Daviter, 2011). Actors engage in priming to set the agenda, by emphasizing particular elements of the issue when speaking of it and cause individuals to focus on these considerations when forming their opinion (Druckman, 2001; Druckman, 2004; De Vreese, 2012).

[8] Links to all online media reports can be found in the annex to this thesis, sorted by case. A PDF version of the document, media report and interview analysis is provided in a separate database CD annex, as it amounts to 265 pages for all three cases.

The media reports will mainly be used for triangulation purposes (Davies, 2001) to verify whether information provided in documents and interviews corresponds to the information given to the public via media channels as triangulation of data is an important part of verifying the reliability of the evidence collected to support claims. Triangulation in the case of inferring actor strategies from negotiation processes, using public statements and media reporting can be a means of cross-checking information gained from interviews in order to see whether there are any contradictions between public framing by an actor and what they reveal about the process in the interview setting (Druckman, 2004; Kangas et al., 2014). Relying on media reports alongside official documents and interviews is therefore part of the triangulation process to compare how issues and strategic choices are framed in the public media compared to how actors frame them in the confidential setting of interviews and detect potential contradictions[9] (Lecheler, De Vreese and Slothuus, 2009; Matthes, 2011). Eurobarometer and national opinion polls and media reports about public opinion trends at the European and national level provide a snapshot of trends in public opinion at specific times, and allow for the determination of how salient an issue has been at the starting point of a negotiation[10] (Oppermann and Viehrig, 2011). But to observe which elements are picked up by actors and put on the agenda, how the tone of the debate develops and to what extent contentiousness increases or decreases, it is necessary to monitor actor behaviour and their statements closely through all possible channels (Slothuus and De Vreese, 2010; Semetko and Valkenburg, 2000; Atikcan, 2015).

4.2.4 Expert interviews

From June 2015 to June 2017, a total of 145 interview requests were sent out to relevant experts in the institutions, including member state representatives in national capitals, which are connected to the cases[11]. The interviews will be used as evidence in the in-depth process analysis of the four empirical cases in a two-tiered approach. Firstly, outstanding statements will be used in the narrative of the process analysis to support arguments about frames, actions, conditions and mechanisms. Secondly, all

[9] Tables reflecting the collection and analysis of media reports for each case will be provided in the annex.
[10] See annex for salience reports for Justice and Home Affairs, speficially border policy and gender equality policy
[11] The transcripts of all interviews will be provided as PDF on a separate database annex, alongside the media reports. For practical reasons mainly, as the PDF counts 265 pages. Also, the content of the interviews is politically sensitive in some of the cases, there was no authorization by most of the interviewees to provide full transcripts along with the analysis, hence, only anonymized quotes will be used as evidence in the analysis of the cases.

interviews excerpts speaking for or against an explanatory model of failure will be collected and evaluated using the tailormade model of categories to look for position and conflict frames, as well as justifications of choices. This allows better conclusions to be drawn about how much evidence there is in favor of the preferred explanation.

The interview questionnaires were individually developed for each interview and tailored to the specific information the expert could provide for the case analysis[12]. This individual tailoring instead of standardization enables the researcher to specifically search for and not miss out on key information and reduces the amount of unnecessary noise to a minimum (Tansey, 2007; Gläser and Laudel, 2010). An example for such a tailored approach would be the following: for an interview with a Parliament rapporteur on a specific case, it makes sense to tailor the questions to the specific case and ask for as much insider information about the committee process and the trilogues as possible. For an interview with a Commission official in a DG that was in charge of the drafting of a particular policy proposal, it is advisable to ask about internal dynamics, priorities, consultation strategies and so forth. Depending on the case, questionnaires might need to be readjusted even for the same type of actor, because each process and each proposal is different. Therefore, each questionnaire is somewhat different from the other, as knowledge about the case and expertise in conducting interviews increased, the questionnaires became more and more elaborate and refined (Dilley, 2000; Goldstein, 2002). This can hinder comparability, but for the sake of uncovering as many details as possible about causal mechanisms of failure, it was commendable to focus on the acquisition of information, rather than on the standardization of questions and answers (Harvey, 2011).

A total of 61 semi-structured interviews were conducted in multiple languages, German, English and French and could be used for the empirical analysis, because they were of a sufficiently high value in terms of content and quality of the recording or notes, a couple of interviews from the early stages of the data collection process had to be discarded, because they did not contain information, which was helpful to the understanding of the cases or did not respond to the overall research question. Among those 61 interviews, there are actors in the Commission, Council

[12] Examples for interview questionnaires will be provided in the annex. They are representative of the type of questions asked.

and Parliament, at different levels of the institutional hierarchy, most of them directly connected to the cases. A few are not direct informants on cases, but rather general informants on the legislative process and the dynamics of controversy, success and failure. Even within those 61 interviews, the quality and amount of information provided vary greatly.

Not all could be recorded, because interviewees voiced confidentiality concerns. For those without recording, extensive notes were taken during and after the interview and transcribed alongside the recordings to be used for data analysis. There is no major difference in quality or evidence provided between recorded and non-recorded interviews. The willingness to divulge information did not depend on whether recordings were done, but rather on the personal preference of the actor and the level of discretion they had vis-à-vis their superior (Hermanowicz, 2002). All interviews have been fully transcribed, either by transcribing the recording or the notes taken during the interview. For the sake of comprehensiveness, language mistakes, stutters or digressions have been edited out of the transcripts, unless they were relevant for the message conveyed by the expert.

Interviews as a source for political analysis have been controversially discussed. The researcher has to face the difficulty of balancing the quest for access to the process and the risk of poor data quality, bias and trustworthiness issues. Such drawbacks of working with political elites have been extensively discussed in political science and qualitative methods research (Kvale, 1994; Kezar, 2003; Tansey, 2007; Glaser and Laudel, 2010).

However, interviews often serve as a means of inferring action post-hoc (Gläser and Laudel, 2010; Lodge, 2013). In this study, experts are viewed as sources of information, which provide access to the object of study: in this case negotiation processes, and enable the researcher to reconstruct the process (Gläser and Laudel, 2010: 13). The only alternative to gain access to highly informal and secluded negotiations would be participatory observation, the ideal source of information about negotiation processes (Smeets, 2015; Smeets, 2016). However, directly participating in the negotiations in order to be able to observe both the formal and the informal parts of the process is often impossible for the researcher.

Another common shortcoming of interviews is the problem of ex-post rationalization. By the time actors are interviewed, the process is often completed and even if it is not, the information is not directly taken from the process, but inferred from how actors recall the process. This poses a number of problems related to how humans process information, which encompasses a number of cognitive selection and processing elements, that can distort data quality and those can be intentional or unintentional processes. Actors can simply wrongly recall a process or deliberately try to misrepresent the process to propagate a certain point of view, neither of which can be assessed through the methods available in this type of research design.

This is linked to the problem of incorrect recollection or memory lacunae. Even if actors were accessible, data quality could still be impaired by memory lacunae. Some actors had difficulties recalling negotiations that were no longer ongoing, or that had been stalled for a while. There was also variation in terms of how much attention actors paid to the individual issues, which was linked to how important the issue was to their respective states, political groups or administrative units (Gigerenzer and Selten, 2002; Gigerenzer and Goldstein, 1996; Searing, 1991).

There is also a danger of potential selectivity and biases in evidentiary sources (Bennett and Checkel, 2014). Experts potentially have instrumental motives for the actors involved in conveying a particular message. Since it is difficult to assess the intensity and impact of instrumental motives in interview situations, the most convenient way of dealing with the credibility and dependability issue in this case is triangulation, as it allows for the detection of contradictions and verify the accuracy of statements, especially if expert interviews are triangulated with public sources.

Elite interviews are a special form of interviewing, in addition to difficulties mentioned above, the researcher also has to deal with reconciling scientific standards with requirements of confidentiality and political sensitivities (Davies, 2001; Dilley, 2000; Dexter 2006). Access to political experts is limited: the response rate is comparatively low, given the large time frame that was set for the data collection and the amount of requests sent out in terms of overall people and in terms of repeated demands to the individuals actors. Also, there are considerable concerns about confidentiality,

especially regarding controversial cases this is a common phenomenon. A small number of actors agreed to being quoted by name and affiliation, most preferred to remain anonymous, but still expressed concerns over how the data would be used, especially sensitive elements such as names of states and important actors, strategies and conflict dynamics, which could not be derived from public documents, a large majority of interviewees did not consent to be recorded and some information was only given off the record (Gläser and Laudel, 2010).

Apart from problems of access and confidentiality, expert interviews also produce problems of heterogeneity in terms of data quality and completeness (Tansey, 2007). The credo with regards to access to sensitive informal processes is often that 'little access is better than no access and some data is better than none', because even a small glimpse inside the process is already better than no insight at all (Beach and Pedersen, 2011) but the refusal of recording or taking refuge in off-record statements further increase problems with incompleteness and potentially decrease the quality.

Some of these problems could be resolved by promising to keep the information anonymous eliminating all elements that might give away the identity of the interviewee, such as names, affiliations with a country or institution. Often they agreed to be quoted in reference to their general affiliation, state representative, Commission expert or member of the European Parliament, but most preferred to keep it as general as possible. Some of the accessibility and quality problems could be resolved by selecting cases that were rather recent, thus increasing the chances of actors still being available. But none of the problems can be fully avoided, because people cannot be forced to respond, therefore the database will most likely contain some form of bias corresponding to the patterns discussed above.

Regarding the sampling strategy of expert interviews, a combination of random and purposive sampling appears appropriate. Actors which were actually involved in the negotiations will be contacted to get the information required to infer the course of the negotiation process, but the selection of actors within the sample of those involved will be randomized, to avoid creating a bias based on nationality (Bleich and Pekkanen, 2013; Hermanowicz, 2002).

Regarding the success rate, less than half of the people contacted agreed to be interviewed, the others did not respond or declined with the number of non-responses being generally higher than the number of refusals. The combination of purposive and random sampling only worked out in part, as there are some patterns with regard to which people were more likely to respond positively. In general, member state representations were more willing to talk than MEPs in absolute numbers, Commission officials were less reluctant to talk, but rather reclusive once interviewed. Between Council and Parliament members, there were no significant differences inter-institutionally as to how much information people revealed. Rather it seemed to be a question of national practices and personal preferences. Some examples for country-specific patterns, which emerged: Germans are generally hard to get and very non-responsive both when planning the interview and conducting it.

Regarding data saturation, there is also variation across institutions, both in terms of descriptive responsiveness (favorable responses to interview request) and substantive responsiveness (openness to reveal information) (Bleich and Pekkanen, 2013): As regards descriptive responsiveness of state representatives, there is a pattern of non-response: the southern European states can either not be reached, either because their email addresses did not work or because they never responded. Even personal connections did not help: the Greek delegation never responded, despite recommendations from a Greek connection. The only exception was one positive response from the Portuguese and one from the Spanish permanent representation after several tries. The Scandinavian states and the UK were extremely responsive. Tthe UK, Sweden, Denmark and Finland all agreed to be interviewed and even suggested further contacts that might be helpful. The same goes for the BENELUX countries. There is no clear pattern as to the CEE states, Poland was responsive after several attempts and agreed to interviews, Slovakia, Romania and Slovenia agreed in some areas, but not others, nothing came from the Czech Republic, Hungary, Bulgaria. There were similar patterns for France, Austria and Germany, interestingly, they were willing to talk about Justice and Home Affairs and not about Social and Employment Policy. The Baltic states display differences as well, the Lithuanian and Estonian representatives were quite responsive, while the Latvians were not.

Regarding substantive responsiveness, again, there are differences across state representations in terms of how much information and which type of information they were willing to divulge: BENELUX and Scandinavian representatives were the most talkative and the most willing to reveal sensitive information, German representatives were the least informative of those who agreed to be interviewed, keeping information rather general or refusing to respond on sensitive issues, Austria, the UK and France were informative, but cautious with very sensitive information. The CEE states strongly varied in terms of the amount and type of information they revealed. The Polish were more cautious than the others, the Baltic states, except for Latvia, were very willing to talk, but kept sensitive information to themselves. The Southern European representatives varied within the group, while the Portuguese kept sensitive information to themselves, the Spanish revealed it more eagerly.

Possible explanations for these differences could lie in variances in bureaucratic efficiency and political culture among other factors, as actors are socialized differently. They not only behave differently in EU institutions (Hooghe, 2005; Trondal, 2004), but they are also likely to display different types of behavior when responding to sollicitations by researchers. There is strong variation between member state representations with regard to the size of administrations, efficiency and resources. Unsurprisingly, size and resourcefulness of countries correlates with the size of their administrations and the resources at their disposal to deal with European affairs. Larger countries, like Germany, France and the UK, have bigger administrations, not only nationally, but also on the European level, thus they can handle inquiries faster and more efficiently. Older, but smaller member states, as well as newer member states with efficient and prosperous national systems, like the BENELUX countries, Austria, Poland and the Scandinavian states show similar behavior. They also allocate a considerable amount of resources to their European administrations. On the other hand, older or newer states, big or small, with less efficient national administrations can allocate fewer resources to their European representations, which sets different conditions for how they can respond to demands.

Literature about expert interviews and negotiation behavior has identified differences between actors in terms of how willing they are to open up and be transparent, which

can be linked to socialization effects and political culture (North/South and East/West) that can also be found in national administrations (Trondal and Veggeland, 2003; Trondal, 2004).

For the other institutions, Commission and Parliament, the number of responses, positive or at all, was comparatively lower, but there does not seem to be a pattern with regard to nationality. However in the Parliament, more MEPs and affiliates from bigger groups responded positively to the request. All MEPs from smaller groups, irrespective of whether or not they belonged to the left or right spectrum, either did not respond at all or declined. This can be a question of resources as well. Bigger political groups have much more resources at their disposal than smaller groups, and are more often in key influential positions with access to processes and information. Larger groups have a higher likelihood of being able to appoint rapporteurs for legislative files, thus a higher likelihood of becoming relevant experts to researchers.

4.3 Data analysis

4.3.1 Process research and structured focused comparison: qualitative content analysis with MaxQDA

Tracing processes is a crucial and non-negligible complementary step to understanding outcomes, as only it is only possible to pinpoint tipping points and uncover mechanisms through the deep understanding of the process (Brady and Collier, 2000). Process tracing can be ideally combined with expert interviews, as the purposive selection of key actors will provide valuable information about actors' patterns and strategies in the way they frame their choices (Tansey, 2007).

"Process tracing involves the examination of 'diagnostic' pieces of evidence within a case that contribute to supporting or overturning alternative explanatory hypotheses. A central concern is with sequences and mechanisms in the unfolding of hypothesized causal processes. The researcher looks for the observable implications of hypothesized explanations, often examining evidence at a finer level of detail or a lower level of analysis than that initially posited in the relevant theory. The goal is to establish whether the events or processes within the case fit those predicted by alternative explanations." (Bennett, 2000: 208)

To reconstruct informal negotiation processes in EU decision-making, where the goal is to understand how actors make and justify strategic choices, expert interviews can be analyzed through various methods. Qualitative content analysis appears to be the most appropriate in this case, because it provides an orientation for the researcher when entering the analytical process by developing categories for guidance, but also provides interpretative freedom (Mayring, 2007; Mayring, 2010).
Therefore, an iterative research design, combining elements of explaining-outcome and theory-testing process tracing (Beach and Pedersen, 2013), with systematic structured comparison of cases (George and Bennett, 2000), therefore appears to best fit the goal of understanding processes of negotiation failure and developing categories and typologies of strategic mechanisms. The analysis conducted sometimes comes close to theory-testing process tracing (Beach and Pedersen, 2013), as the different steps of the hypothesized causal mechanisms will be traced and accounted for in as much detail as possible. However, at times, due to the absence of data or the blackboxing of steps in the causal process, the analysis will more closely resemble congruence analysis and not satisfy the demands of rigorous process tracing (Beach and Pedersen, 2013).

In the theoretical parts of this study, a typology of actors, strategies and conditions has been presented, which provides guidance for the empirical analysis. However, there should be openness towards inductive proceeding, correcting and updating of theoretical frameworks and assumptions in the empirical analysis. Therefore, the hypothesized models of failure and accompanying causal mechanisms will be evaluated and updated based on the findings to mark the lessons learned about the theory (Beach and Pedersen, 2013). To facilitate the interpretation of document, interview and media data, a framing scheme will be provided, which details the different perceptions and arguments presented in the negotiation processes to make the conclusions drawn about actor behavior, strategic mechanisms and conditions transparent. The search for frames, the way experts describe the process that is studied, will be a means of extracting information from interviews (Gläser and Laudel, 2010; Mayring, 2007).

The literature on qualitative content analysis refers to this iterative type of design and determines a number of criteria research should fulfill (Gläser and Laudel, 2010): the

(1) principle of openness, which postulates that the process of empirical analysis has to be open for unexpected discoveries that cannot be accounted for by the preconceived expectations and hypotheses, therefore the analysis should not be too restricted by a theoretical framework; the (2) principle of theory-led interpretation, saying that all empirical research should be driven by theoretical expectations to structure the process and provide a framework for interpretation; the (3) principle of structured interpretation, focusing on comprehensible criteria, which can also be used by others to also interpret the data and reconstruct the proposed interpretation and lastly the (4) principle of comprehension as a basic way of proceeding in empirical social sciences, which focuses on the understanding actions and actors' motivation as the basic task of empirical social sciences.

Data analysis will be performed using a combination of congruence analysis for within-case process analysis and structured comparison for cross-case comparison. Congruence analysis allows for the detection of mechanisms and conditions of failure within cases, both structural and actor-focused (George and Bennett, 2005; Bennett and Checkel, 2014).

Around 560 case-related documents and 61 expert interviews were manually analyzed using qualitative content analysis (Mayring, 2007) to look for the following elements: positions and conflict constellations and main controversies in each case, key actors and relais actors, evidence of influence on relais actors, evidence for conditions and mechanisms having an influence on the process of legislative deadlock and failure. After the manual content analysis, all documents were processed with MaxQDA to systematically verify the frames actors use to explain and justify their actions and choices and collect evidence for the comparability of frames across cases. It also permits the evaluation of the amount of evidence in favor of a certain mechanism, which is crucial for process tracing methods (Beach and Pedersen, 2013).

4.3.2 Inferring strategic mechanisms and blame exchanges through frames

"To frame is to select some aspects of a perceived reality and make them more salient in a communicating context, in such a way as to promote a particular problem

definition, causal interpretation, moral evaluation and/or treatment recommendation for the item described." (Entman, 1993: 52)

Framing is linked to salience the more important the issue is to the public, the more likely it is that policy-makers will devote attention to it (Daviter, 2011; Lecheler, De Vreese and Slothuus, 2009; Weaver, 2007). It matters for the entire policy-making process from agenda-setting to success or failure, since how an issue is shaped or portrayed matters a lot for success or failure (Daviter, 2011). Framing should start with the definition of the problem, along with a determination of which elements are most prominent within the structure of political conflict and determine who is part of the political competition (Schattschneider, 1960; Riker, 1986). Framing captures the dynamic nature of the political process. It brings about an understanding as to why certain issues make it onto the agenda while others are left out and considers the ambiguity and contentiousness of a negotiation by looking at what actors focus on (Peters, 1994; Peters, 2001). During the policy-making process, the Commission frames proposals in a particular way and Council and Parliament frame their positions and strategic choices and moves (Daviter, 2011; Zahariadis, 2008). As argued in the models of failure (chapter 3), the framing of a Commission proposal can be challenged by the co-legislators and constitute a reason for failure.

Framing is better able to capture the complexity of EU negotiations, since "given the highly variant effects of EU political organisation on policy choices, the institutional level of analysis alone (thus) remains insufficient to predict how issues and interests will play out at the supranational level" (Daviter, 2011: 13)

"The way in which issues are perceived, packaged and processed systematically affects how policy conflicts form around the issues, how interests mobilize and restructure at the supranational level, and which of the conflicting organisational and representational logics of EU decision-making shape the lines of both intra- and inter-institutional competition" (Daviter, 2011:19). Actors use framing to advocate particular problems and highlight the dimensions that are most important to them as well as frame losses and gains (Zahariadis, 2008).

Framing occurs at different stages of the negotiation process, starting with policy

formulation, where actors have strategic opportunities to influence the agenda through framing (Daviter, 2011; Atikcan, 2015). Framing the agenda means setting the tone of the negotiation and defining the zone of agreement (Cobb, Ross and Ross, 1976; Daviter, 2011; Ackrill, Kay and Zahariadis, 2013). Framing in this case describes the process in which competing political elites define their most important issues for the public. The better elites are at placing issues on the agenda, the more likely it is that public opinion will perceive the issue or the arguments given as important. Successful framing affects the salience of an issue and can alter the negotiation outcome. Political rationality approaches describe framing as the manifestation of how actors define issues, how they handle interests, communicate their their perception of issues to get them included into dominant frames and make use of the availability of choices in the policy process (Verloo, 2005; Klein, 2013; Helbling, 2014).

Framing of choices includes reduction of complexity (1), the decision to focus the attention on specific aspects of the issue, the creation and use of policy venues (2), a choice to compartmentalize issues to create stability and structure the parallel handling of issues that are high on the agenda, policy shift (3) as frames change due to issues moving higher or lower on the agenda, framing contestation (4) to create or consolidate conflict or provide opportunities for policy change and the creation of policy interests (5) in areas where the EU does not have a policy legacy.

The policy formulation process has been characterized by frame competition in the Commission (Peters, 2001; Nylander, 2001; Daviter, 2011), where conflicts arise based on the initial choice of alternatives, which are framed strategically. Agenda conflict becomes a complex concept with different dimensions. Any manipulation of these factors turns them into political strategy (Bachrach and Baratz, 1962; Cobb and Elder, 1971; Baumgartner, Green-Pedersen and Jones, 2006). Frame competition includes the scope of the proposal and the decision to expand or restrict the issue to include more actors or exclude them, the intensity of policy change, the visibility of the measure and the degree to which the Commission decides to control the direction of the proposal, since new actors get involved in the course of negotiations and the lines of conflict shift and new alliances become possible (Daviter, 2011).

During negotiations, all actors frame their view on the issue to further their interest, by projecting their view in terms of irrefutable claims (Smeets, 2015). The Council Presidency, as the one in charge of negotiations in the Council can decide whether or not to include frames or spend time on discussing a proposal by a representative. If a proposal does not serve the interest of the Presidency, there is a lower chance of it being considered by the Council (Kleine, 2014). Dynamics are similar in the Parliament, where the rapporteur is the one steering the process and deciding, which elements of the discussion to take on board in the committee reports (Ringe, 2010; Ripoll Servent, 2012).

Ultimately strategic framing has an important impact on the dynamics of success and failure: the way an issue is framed, from policy formulation to negotiation can increase or decrease the likelihood of adoption. Initiatives that fail under one frame can become feasible under a different frame (Radaelli, 1995). It has been shown that, in the area of Social and Employment policy, the Commission argues in reference to the single market and the EU's founding principles, equality, non-discrimination, social, civic and personal freedom rights (Klein, 2013). In Justice and Home Affairs, there is a cleavage between rights-driven and security-driven rhetoric at the EU level, which is used by national actors to oppose liberal immigration measures by reference to security (Guild and Mantu, 2011; Roos, 2013).

Nonetheless, it is still insufficiently studied how differences and conflicts about perceptions of issues impact the policy process, how institutions or actors engage in framing or reframing, how they explain their policy choices through frames (Daviter, 2011) and how framing is used in actors' handling of policy failure (Héritier, 1999; Bovens and t'Hart, 1998).

The blame game is also a framing game. Actors refer to particular frames and concepts of blame attribution and blame avoidance when trying to justify failure (Héritier, 1999; Daviter, 2011) and explaining the origins of particular controversies and disputes, which lead to conflict and deadlock (Matthes, 2012). The more often actors mention particular frames, the more explanatory weight they have in accounting for strategies and choices (Helbling, 2014; Hänggli, 2011).

Framing can be combined with content analysis as a means to empirically demonstrate strategic action and strategies in documents and interviews in order to make strategies visible, the arguments more tangible and the research on processes more systematic and transparent: "suggest that a frame is a 'central organizing idea or storyline that provides meaning to an unfolding strip of events, weaving a connection among them. The frame suggests what the controversy is about, the essence of the issue'" (Gamson and Modigliani, 1989:143).

Inferences from qualitative content analysis without coding are usually a detailed narrative of the researcher's understanding of the data. Qualitative analysis with coding can be helpful in some instances, but can also become an unnecessary and unhelpful forced quantification of qualitative data without real added benefit. However, a certain balance has to be struck between depth and richness of the empirical narrative and verifiability, to achieve credibility and dependability of the analysis. The goal is to understand how actors describe their actions and choices in a negotiation situation, which elements appear to have been most important and how their choices are motivated (Baumgartner and Mahoney, 2008). How actors legitimate their strategies and choices can be analyzed by looking at the use of arguments, norms and ideas in their statements (Beyers, 2011). The framing categories and classifications chosen for the detection of justifications used in EU decision-making are in line with existing scholarship on framing mechanisms as strategies in political communication and political psychology (Snow and Benford, 2000; De Vreese, 2002; Entman, 2004).

Doing framing analysis without coding requires a tailor-made system of categories[13] of frames relying on previous research on frame analysis and observations about strategic dynamics from qualitative and quantitative research, which will then be used as a guideline for the analysis of interviews and different types of documents (De Vreese, 2012). The researcher looks for "the presence or absence of certain keywords, stock phrases, stereotypical images, sources of information and sentences that provide thematically reinforcing clusters of facts or judgments" (Entman,

[13] The tables with categories developed for this analysis can be found in the annex. Sources for framing analysis in the EU: Daviter, 2011; Verloo, 2005

1993:52) and pays attention to “choices about languages, quotations, and relevant information” (De Vreese, 2012, after: Shah et al., 2002:367).

The present analysis of strategic framing in EU legislative processes will encompass actors at different levels in the Council, the Parliament and the Commission, which are framing their strategic choices or the strategic choices of others. Framing includes strategic choices that are made at any stage of the negotiation. From agenda-setting to inter-institutional trilogues, actors continuously frame their choices and actions. Looking at how actors frame their choices allows for the inference of strategic mechanisms leading to deadlock or failure of a negotiation in an ex-post manner through interviews, official statements and documents or media reports, when participatory observation is not possible.

4.4 Discussion of the methodological approach

An additional challenge qualitative content analysis of documents and interview material faces is how to address questions of reliability and validity. External validity will be discussed at a later stage, but it is necessary to discuss the choice of methods with regard to whether conclusions drawn will be valid and the empirical analysis reliable.

There have been decade-long debates about whether or not qualitative research needs to engage with debates on methods standards of quantitative research (Brady and Collier, 2000). From the 1980s onwards, the general tenor has been negative with the main argument being that qualitative studies should be evaluated with regard to the trustworthiness and utility of their conclusions and findings. However, soon enough, scholars have reopened the debate about rigor in methods (King, Keohane and Verba, 1994; Adcock, 2001; Morse et al., 2002).

Case-based process research on informal negotiation processes is again a special case again, because access to data is difficult and information is often confidential and therefore not suitable for reliability exercises or available for replication to other researchers. As long as permission for publication of data has not been given by the sources, the researcher runs the risk of compromising the data.

MaxQDA will provide a basis for a systematic proceeding in data analysis of documents and interviews, used to structure the documents and interview transcripts, and assess the appearance of frames in the data, in a way that could potentially be replicated by someone in possession of the data and the guide used for the framing analysis[14]. It cannot respond to all concerns about replicability, because the information given by the experts in the interviews is of course sensitive to the interviewer and the context of the interview situation (Aberbach and Rockman, 2002).

4.5 Summary and research mandate

Failure is a more pressing issue in distributive policy areas, like Social and Employment Policy, or high politics areas, like Justice and Home Affairs, where the stakes are higher for member states and there are controversial issues with higher potential for inter- and intra-institutional conflict, which allows for disentanglement of conflict lines and gives actors incentives to bargain over gains and losses. A triangulation of official documents, media documents and expert interviews permits analysis of informal actor behaviour, by inferring choices and actions from the justifications and explanations actors provide and the traces of those actions in official documents. A structured approach using MaxQDA allows the analysis to be more transparent and enhance the credibility of the proposed interpretation. In the following two chapters, the models presented in chapter 3 will be tested by applying congruence analysis and structured focused comparison to investigate which models have the most explanatory value. Analysis of the frames used by actors to justify their actions, choices and perceptions will be used to unveil the blaming game regarding origins for blockage and failure and attempts at resolving controversy.

In the following two chapters, the dynamics of legislative failure will be analyzed first in the area of Justice and Home Affairs (chapter 5), specifically the area of border policy, on two recent cases, the Schengen reform (subchapter 5.2) and the Smart Borders Package (subchapter 5.3). The same type of analysis will be conducted for two cases in the area of Social and Employment Policy (chapter 5), concretely the area of gender equality, on the two recent cases of the Maternity Leave Directive (subchapter 6.2) and the Gender Quota Directive (subchapter 6.3). A detailed

[14] An overview over the complete MaxQDA dataset and the framing analysis will be provided in the annex, including documents, media reports and expert interviews

analysis of the provisions of the proposal, the agenda-setting and policy formulation by the Commission, the causes, conditions and mechanisms of deadlock and the behavior of key actors will be incorporated in the process analysis. To uncover as much as possible about the dynamics of each case, all the relevant intra-institutional and inter-institutional processes will be included in the analysis.

V. Justice and Home Affairs: dynamics of policy failure in the area of border policy

5.1 Introduction

Justice and Home Affairs has long been marked by intergovernmentalism and member states defending their fiefdoms against supranationalization, but with the Treaty of Lisbon, as the formal decision-making procedure has changed with the generalization of co-decision, there is a move towards integration (Lavenex, 2015).

The Europeanization of justice and home affairs matters has been a tough process involving a number of open and lengthy conflicts between member states and supranational institutions about competence transfers, the role of different actors in the area and the amount to which policy instruments in different subfields of justice and home affairs (Geddes, 2003). Even after the significant leap forward in terms of competences the Treaty of Lisbon brought about, the entire area is still marked by the tension between the persistent intergovernmentalism of member states and steadily reinforcing supranationalist tendencies of Commission and Parliament (Roos, 2013). In the subarea of home affairs, which is of particular interest here because it is at the forefront of the EU's crisis management, the changes brought about by the Treaty of Lisbon, in particular the extended use of co-decision and thereby the increased influence of Commission and Parliament, have only aggravated this tension (Roos, 2013). In substance, as regards concrete policy instruments, the picture is much more complex: it has long been argued that member states pursue largely restrictive preferences in home affairs matters (Givens and Luedtke, 2004; Papagianni, 2006) and tend to oppose communautarization of key policy areas like legal migration and asylum (Freeman, 2006; Lahav, 2004). However, recent studies, which take into account the role and impact of the Commission and the Parliament come to a different conclusion: first and foremost, it

is necessary to distinguish between issue-areas and even issues when speaking about preferences, as member states do not necessarily pursue either purely restrictive or expansive preferences in a consistent manner across issues and over time (Roos, 2013; Boswell, 2007). Yet, scholars continue to disagree on whether the area of home affairs is dominated by either a securitization or a burden-sharing trend (Boswell, 2000; Bigo, 2002), which some have tried to explain by a discrepancy between short-term and long term interests of governments and a carefully constructed security and anti-immigration rhetoric towards the public, while in the background policy-makers pursue and agree to liberal migration policies (Castles, 2004; Guild and Mantu, 2011).

Border and migration policy are tightly linked and indeed there seems to be a trend to combine liberal with more restrictive measures, making scholars claim that the EU is developing into a “gated community” (Van Houtom and Pijpers, 2007) and moving towards “Fortress Europe” (Geddes, 2008). A restrictive and control-oriented approach to external border policy is used to reinforce the securitization of asylum and migration (Léonard, 2010) by emphasizing the systematic selection of and distinction between different types of migrants and travelers who are subject to different kinds of control to verify their permission to enter the territory (Van Houtum, 2010).

Preference and conflict constellations in the Council are predominantly determined by the following factors (Lahav, 2004; Freeman, 2006): Economic factors (single market, welfare systems, labour relations), immigration share, political partisanship (left-right cleavage), public opinion and media trends, dynamics at the national level dominate the Council agenda and negotiations in the Council (Papagianni, 2006). Debates in the Parliament are centered around increasing the role of the Community and a balance between facilitating travel within the Schengen area and ensuring high security standards, transparency and information for citizens (Huber, 2015).

Since the abolishment of internal border controls with the Schengen agreement in 1985, external borders have become a common concern for member states, but only the aftermath of 9/11 has added a security element to it, which made external border security a key instrument together with policies to combat illegal migration to form an

“integrated management” of external borders (Monar, 2014). From 2002 onwards, the EU engaged in a number of significant policy reforms regarding external border management, specific bodies, cooperation mechanisms and financial burden-sharing initiatives were launched, among them FRONTEX and a European Border and Coast Guard (Monar, 2014). The aim was to achieve a progressive integration of national border security services and enhance operational homogeneity across the different member states to ensure an even level of protection (Monar, 2014).

European Council and Commission are joint agenda-setters in matters of Justice and Home Affairs, they mutually depend on each other, yet engage in a subtle power play (Bocquillon and Dobbels, 2014). With regard to the policy agenda, the Commission plays power games with the European Council in border policy matters, in the post-Lisbon era, the Commission played a double-faced game with the heads of state, expressing itself in favor of revising and tightening border control, but ultimately presented a proposal that did not at all correspond to the intergovernmental measure the European Council had requested (Bocquillon and Dobbels, 2014).

The Commission strategically consults stakeholders to ensure support for its policy initiative and tests how extensive its proposal can be, Commission and Parliament preferences tend to be more expansive than member state preferences, who prefer less integration and more restrictive policy (Roos, 2013). The co-legislator dynamics post-Lisbon have been marked by an increase in influence of the European Parliament in the Justice and Home Affairs area (Ripoll Servent, 2012; Ripoll Servent 2013; Ripoll Servent, 2014), and it has become a credible and legitimate actor and has made a substantial difference in the integration of in border policy matters, successfully shaping border policy according to citizen interests (Huber, 2015), in previous border policy reforms, the Parliament had to fight for its involvement, as the Council favored consultation, but the Parliament eventually insisted on co-decision for matters concerning Schengen in individual cases, but struggled to more generally push for a more Community-based approach to border control matters, as the Council continued to refuse a stronger involvement of Community institutions (Huber, 2015).

It is not yet clear if the post-Lisbon era can be seen as the start of a new inter-institutional phase in border policy where the EP takes a more affirmative stance vis-à-vis the Council or if the successful pushes for co-decision have been the result of ambiguity in the Treaty and the confrontation with intergovernmental leftovers: despite the increasing co-legislative experience of both institutions and the Parliament's attempts to take a constructive approach and show the Council that its amendments lead to better and more balanced legislation, the Council still considers member state interests to be more important than Parliament amendments. Increased problem and time pressure can both facilitate and complicate inter-institutional negotiations: the Council has shown greater willingness to make concessions to ensure speedy agreements, but also evaluate the added value of Parliament involvement based on whether or not it slows down the process (Huber, 2015).

Pre-crisis, it was an orchestrated game as well, there were no big fights or major stakes, despite it being a core-state-power area, post-crisis a high salience area with increasing pressure on member states and the EU to deliver policy and an incentive for member states to contest integration and demand policy reversal in favor of taking back control, if EU policy is seen as too extensive or counter to member state interests (Roos, 2013).

In the post-9/11 EU, there have been ongoing discussions about how to expand and improve data and information collection about migration and travel flows to better control entries into and exits from the European territory and several centralized databases and information processing systems have been set up, the most important ones being the Schengen Information System I and II and the Visa Information System. Both systems have been subject to data protection concerns and criticism from the European Data Protection Supervisor, other stakeholders and most importantly the European Parliament (Bigo et al., 2012). The migration and security crisis has given an impetus for the European Council to call upon the Commission to reform and further expand the integrated border management system, by reforming existing tools and adding new ones, that would allow further securitization and control of external and internal borders. These instruments include the European Border and Coast Guard, Passenger Name Records and ultimately the Smart Borders initiative.

All new systems would be connected to the existing ones and create a comprehensive set of instruments and databases to systematically collect traveler data, patrol and secure borders and monitor entry and exit from the territory (Monar, 2014).

5.2 The Schengen Governance Package: strategic failure in several rounds

The reform of the Schengen Governance took several attempts to result in agreement, a first attempt by the Commission to reform the Schengen Evaluation Mechanism in 2009 through a Council regulation under the consultation procedure was immediately rejected by the Parliament, a second attempt in 2010, a regulation of the Council and the Parliament under the co-decision procedure, was formally amended by the Commission in 2011 after insistence by key member states, Germany, France and Italy, to include a reform of the provisions for reintroducing border control at internal borders alongside the reform of the Schengen Evaluation Mechanism and negotiate both as a package. The first proposal was rejected by the Parliament in 2009, the second unanimously amended by the Council in a battle over the legal base in 2012, while the Commission remained at the sidelines. The co-legislators mainly attributed blame to each other, the Council accusing the Parliament of a lack of pragmatism and an insistence on being involved at all costs and the Parliament accusing the Council of intergovernmentalism and trying to circumvent the Parliament to avoid facing public accountability. The Commission was accused by both of being overly lenient with the other, but was able to avoid most of the blame by portraying itself as an honest broker.

Schengen: Timeline of negotiations (formal procedure)			
Previous legislation	Round 1	Round 2	Round 3
Regulation of Council and Parliament (EC) No 562/2006 on the Schengen Borders Code Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen SCH/Com-ex (98) 26	4 March 2009: Commission proposal for a Council Regulation COM(2009)105 final 2009/0032 (CNS) 20 October 2009: Opinion of the LIBE committee: rejection recommended by rapporteur Carlos Coelho due to request of co-decision instead of consultation 30 November 2009: Council approves the item for discussion 1 December 2009: Withdrawal	16 November 2010: Commission proposal for a Regulation of the Council and the Parliament COM(2010) 624 final 2010/0312 (COD) 16 September 2011: Formal amendment to include a second proposal on the reintroduction of border control at internal borders and present both as a package	16 September 2011: Commission proposal for a Regulation of the Council and the Parliament COM(2010) 624 final 2010/0312 (COD) on the Schengen Evaluation Mechanism Commission proposal for a Regulation of the Council and the Parliament COM/2011/0560 final 2011/0242 (COD) on reintroduction of border control <u>Proposal on Schengen Evaluation:</u> 13 December 2011: Discussion in the Council 7 June 2012: Discussion in the Council 12 June 2012: Opinion of the LIBE committee, rapporteur Carlos Coelho, Parliament proposes amendments and adopts the first reading position 12 June 2013: Commission approval of Parliament amendments 7 October 2013: Parliament's position adopted by Council <u>Proposal on internal border control:</u> 13 December 2011: Discussion in the Council 12 June 2012: Opinion of the LIBE committee, rapporteur Renate Weber, Parliament proposes amendments and adopts the 12 June 2013: Commission approval of Parliament amendments 7 October 2013: Parliament's position adopted by Council 22 October 2013: signature by Council and Parliament President

(table 5, Schengen timeline, source: own illustration)

5.2.1 The previous rounds of failure

The Commission wanted to push a reform of the Schengen evaluation mechanism and took the opportunity of the controversy over the Schengen internal borders to propose a package in hopes of increasing the chances to pass it through the Council, since there apparently were several attempts by the Commission for the Schengen Evaluation mechanism, which were scrapped immediately by the Council, informally before they were presented for negotiation.

“Since 1999, there have been several discussions between Member States and the Commission on making the Schengen evaluation mechanism more efficient, in

particular concerning the second part of the mandate, namely verification of the correct application of the acquis after the lifting of internal border controls.[15]"

The Commission continuously exchanged information with the member state delegations on the design of a possible reformed Schengen evaluation mechanism: "The concrete need for on-site visits will be determined by the Commission after seeking the advice of the Member States taking into account changes in the legislation, procedures or organisation of the Member State concerned as well as the risk analysis provided by Frontex regarding external borders and visas."[16]

As well as one attempt to reform the Schengen Evaluation Mechanism in 2009, which the Parliament rejected, because the Commission chose consultation as the legal basis thus excluding the Parliament (Dobbels, 2014; Huber, 2015). The Parliament supported the Commission's proposal for a reform of the evaluation mechanism, in particular the proposal to involve both Commission and Parliament more strongly in the decision-making and implementation process[17]. Especially in Schengen evaluation matters, where the Parliament had been deploring the dysfunctional peer-review system for a long time (Huber, 2015). Parliament was generally divided between a right-wing sympathizing with the Council's security concerns and wanting the proposal to pass and a left-wing keen on fighting a battle of principle over competences and influence would later on provide a good loophole for relais actors to escape the deadlock situation[18]. State representatives in the Council were skeptic of the proposed reform of the evaluation mechanism, especially the involvement of supranational institutions (Huber, 2015; Hilpert, 2015).

While the 2010 Commission proposal was considerably more ambitious in terms of not only strengthening the involvement of the EU, but also increasing the role of the Commission in national border control activities, the 2011 proposal provided the

[15] European Commission, Proposal for a Regulation of the European Parliament and of the Council on the establishment of an evaluation mechanism to verify application of the Schengen acquis, 16 November 2010
[16] European Commission, Proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen acquis, COM/2009/0105 final, 4 March 2009
[17] Official Journal of the European Union, European Parliament, European Parliament resolution of 7 July 2011 on changes to Schengen, P7_TA(2011)0336, 7 July 2011
[18] Interview 21; Interview 22

Council with the requested separate proposal on the reintroduction of border control at internal borders[19].

In both the 2010 and the 2011 proposals, the Commission focus was on the reform of the SEM and its desire to be in charge of the evaluation process to be sure that states properly applied the Schengen agreement and did not unilaterally reinstate border control[20]. The idea of member states touching upon the Schengen acquis is a big issue for the Commission, it tried to find a way to circumvent the problem by framing the package as an "EU response, thereby avoiding unilateral decisions by individual member states and establishing a collective approach to protect our common interests"[21]

The Council informally demanded the amendment of the 2010 right after it was presented, mainly because of the very Union-focused approach of the SEM and border control reform and the increase in competence for the Commission it would have entailed[22]. Apparently, some state representatives in the Council had defended stronger positions over border control and outright rejected the Union-led approach proposed by the Commission for the Schengen evaluation mechanism, the French delegation in particular[23].

"Without wanting to diminish the Commission's role as guardian of the Treaties, we believe that the conditions in which the provisions of the Schengen acquis are put into practice on the ground are the responsibility of the Member States, in particular as far as the aspects covered by the proposal for a Decision are concerned, and that this argues in favor of a balanced approach to the distribution of responsibilities when it comes to implementing evaluation."[24]

Attempts by the Commission to increase its power have been received as a provocation by the state governments: "We consider that such a mechanism could lead to a loss of substance compared to evaluation as currently defined in the

[19] Interview 17; Interview 9; Interview 21
[20] European Commission, Memo, "Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis", MEMO/11/538, 25 July 2011
[21] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of an evaluation mechanism to verify application of the Schengen acquis, Amended proposal, 16 September 2011
[22] Interview 49
[23] Interview 49
[24] Council of the European Union, Note Presidency to Schengen Evaluation Working Party, Overview of questions and contributions from member states, 11087/09, 16 June 2009

mandate of 16 September 1998, the object of which is manifold: not only to evaluate how the Schengen acquis is actually applied and identify any shortcomings, but also to make recommendations and promote best practices in a spirit of mutual cooperation and trust between Member States."[25]

Many national governments were facing increasing pressure by extreme right wing parties due to nationalist backlashes and populist waves in other parties and uploaded their controversies to the European level[26]. Rather than encouraging more involvement of the EU, the Ministers of the Interior, challenged in their national arenas, perceived the Council to be the ideal platform to reinstate their contested political leadership by demanding more leeway for national governments (Carrera, 2012; Pascouau, 2013).

5.2.2 The proposal

The so-called Schengen Governance Reform Package consists of two legislative files in one package: Regulation no 1051/2013/EU of the Parliament and the Council of 22 October 2013 amending Regulation No 562/2006/EC in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, associated to this a second proposal directly linked in substance and in terms of negotiation, the Regulation No 1053/2013/EU of the Council of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen (SEM). The origin has been, first of all, a Commission Proposal for a Regulation on the establishment of an evaluation and monitoring mechanism to verify the application of the Schengen acquis[27], which was the result of a previous proposal from 2010, that has been worked on by the Commission since 1999 and emerged from discussions between the Commission, member states, experts and mainly the Schengen Evaluation working group in the Council. The former Schengen evaluation mechanism constituted an

[25] Council of the European Union, Note Presidency to Schengen Evaluation Working Party, Overview of questions and contributions from member states, 11087/09, 16 June 2009
[26] Interview 9; Interview 49; Interview 24; Interview 28
[27] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of an evaluation mechanism to verify application of the Schengen acquis, Amended proposal, 16 September 2011

intergovernmental system of peer-review, the Commission played only an observer-role and the Parliament none at all. The proposal foresees a stronger role of the COM in the implementation and evaluation process. The new version actually goes even further and also gives the Commission the power to decide on which measures to take in case there are deficiencies in member states; instead of simply informing the state, the Commission is able to request a state to close a border crossing point for a certain amount of time or can deploy European Border Guard Teams under FRONTEX. The new proposal foresees the introduction of border control only as a measure of last resort and only if the Commission considers that the deficiencies are persistent. With regard to the former SEM regulation, the Commission identified a number of deficits: inadequacy and lack of clarity as regards the rules on consistency and frequency of evaluations, without the possibility of unannounced visits (1), lack of method for "priority-setting" based on risk analysis (2), ensuring high quality expertise during the evaluation exercise so that the experts taking part in the evaluation show an adequate level of legal knowledge and practical expertise (3), weaknesses in follow-up and post-evaluation to the recommendations made after the on-site visits and the measures taken to address identified deficiencies and the timeframe within which they need to be remedied (4). The Commission proposed a set of solutions: the possibility to conduct unannounced visits by teams of member states and Commission experts and the sending of questionnaires. On its basis, the Commission would draft an evaluation report analyzing the main aspects, listing shortcomings and weaknesses and putting forward specific recommendations for remedying the action as well as deadlines for their implementation. The second part of the package was the Commission Proposal for a Regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances[28]. It postulated that the decision on whether or not to reintroduce border control should be taken by the Commission and the evaluation of the situation should be based on two main criteria: a serious threat to public policy or internal security, such as a sudden inflow of migrants that might cause such a risk, and serious deficiencies identified by the SEM and cause an equal threat to public policy or security. The Commission would also judge the lawfulness of requests to reintroduce border control thus making

[28] European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, 2011/0242(COD), 16 September 2011

the role of the Commission a major one, as it would be the one taking decisions in all cases except for immediate/short term introduction of border control, which is limited to five days, and can be done by member states directly[29].

5.2.3 The policy formulation, conditions and conflict constellations

The agenda on border control had been subject to controversy around the time of the reform proposal on internal border control, the heads of state called for a revision of border control policy[30] and the Commission manifested its support arguing that it had also considered such a reform[31], which immediately prompted the liberals and the left of the European Parliament to accuse the Commission of blindly following member states (Bocquillon and Dobbels, 2014).

The Commission's initial proposal in 2010 did not entirely correspond to what the European Council had asked for[32], the Commission advocated a much more supranational agenda than the heads of state had agreed to[33] (Bocquillon and Dobbels, 2014): "But in 2011, the EC announced it wanted progress on the internal security strategy, yet the Commission still took its time, did not hurry and even changed the framing. So the Commission does what it wants and when it wants."[34]

The Commission and experts from relevant agencies it had consulted during the drafting process, asserted that reintroduction of border control should "be applied in a gradual, differentiated and coordinated manner", say that "as a very last resort (...) a safeguard clause could be introduced to allow the exceptional reintroduction of internal border controls in a truly critical situation where a member state is no longer able to comply with its obligations under the Schengen rules. Such a measure would be taken on the basis of specific objective criteria and a common assessment, for a strictly limited scope and period of time, taking into account the need to be able to

[29] European Commission, Press release, "Traveling without borders: Commission proposes stronger monitoring of respect of Schengen", IP/10/1493, 16 November 2010
[30] European Council, Cover Note, European Council Conclusions, 24-25 March 2011, 20 April 2011
[31] European Commission, Press release, "Traveling without borders: Commission proposes stronger monitoring of respect of Schengen", IP/10/1493, 16 November 2010; European Commission, Communication, Communication on Migration, COM (2011) 248 final, 4 May 2011
[32] European Council, Cover Note, European Council Conclusions, 24-25 March 2011, 20 April 2011
[33] Interview 24; Interview 25; Interview 22
[34] Interview 1

react in urgent cases."[35] Heads of state had set a clear agenda for the border control element: more influence for supranational institutions and a limited extension of internal border control.

If we look at the order of events, we observe that there has been a European Council meeting with conclusions on the topic in July 2011 right before the Commission submitted the new proposal in September 2011, where heads of state very openly asked for legislative action by the Commission[36]. The reason why the EC considered the issue important can be found in events taking place earlier in 2011 that took place in Italy and France, where the French government decided to reinstate border controls at its internal borders after the Italian authorities had issued residence permits with authorizations to travel within the Schengen area and let them travel to France. The incident was brought to the European Council's attention by letter by President Sarkozy on April 26, to which President Van Rompuy responded on May 11 that the European Council would encourage action on the matter at the European level[37]. Sarkozy had made promises to his electorate about taking back control of the borders, but offended Berlusconi with the unilateral decision to close the border to Italy, that the two heads of state decided to solve the problem by forcing the Commission to deal with it[38].

Some have tried to explain this controversy by a resurgence of nationalism in member states, arguing that governments find it increasingly difficult to domestically justify the restrictions in competence over border control and migration[39] (Hilpert, 2015). Governments hoped to renationalize the border control issue under the guise of wanting to reinforce security, in particular France, Italy, Denmark and the Netherlands, which had defected from EU rules before[40] (Carrera, 2012). The urge to renationalize border control supposedly stems from a shift in priorities for national governments towards securitization in reaction to the early stages of the migration crisis[41]. France was the most prominent national delegation to use Schengen to

[35] European Council, Cover Note, Conclusions, General Secretariat of the Council to Delegations, European Council 23 and 24 June 2011, 24 June 2011
[36] European Council, Cover Note, Conclusions, General Secretariat of the Council to Delegations, European Council 23 and 24 June 2011, 24 June 2011
[37] Conseil Européen, Le Président, Lettre du président Herman Van Rompuy au Président Nicolas Sarkozy concernant la situation migratoire dans la région de la Méditerrannée, 11 Mai 2011
[38] Interview 1; Interview 22;
[39] Interview 1; Interview 17
[40] Interview 49; Interview 15
[41] Interview 1; Interview 17

satisfy populist needs and react to the increasing popularity of extreme right wing Front national leader Marine Le Pen in an attempt to counterbalance the dissatisfaction of the French population with French national politics as well as European migration politics[42](Carrera, 2012).

When presenting the first proposal in 2009 on the Schengen Evaluation Mechanism reform, the Commission framed the choice of instrument as a means to ensure that mutual trust between member states is compatible with the new legal and political requirements of post-Lisbon Europe and used references to state sovereignty and division of competences as an explanation for why the mechanism is state-centered and without a role for the Parliament: "maintain mutual trust between member states in their capacity to effectively and efficiently apply" the Schengen rules"[43]

In 2010 and 2011, Commission framed the choice to go from intergovernmental peer-to-peer mechanism to a Union-based mechanism, and a Commission-led evaluation with the possibility of unannounced visits to state borders as a reaction to the Parliament's rejection of the first proposal and a means of retaining control over Schengen matters[44]: "The Commission in its proposal decided to focus on the question of authority over reintroduction of border control, and not the aspect of border control as such. States made it clear that they want to keep the authority over decisions."[45] It was also meant as a clear signal in opposition to intergovernmental trends in border control, especially in the light of unilateral reintroduction of border control by Denmark, Italy and France[46].

To make it acceptable to both the Council and the Parliament, the Commission linked a more member state oriented proposal to a more supranational one: the Schengen Evaluation mechanism proposal to a new proposal to reform the rules of internal border control in exceptional circumstances which was framed as a common way to respond to border deficiencies in a way that represents the common interest[47].

[42] Interview 1; Interview 9; Interview 49
[43] European Commission, Proposal for a Council Decision on the establishment of an evaluation mechanism to monitor the application of the Schengen acquis, COM/2009/0105 final, 4 March 2009
[44] Interview 1; Interview 22; Interview 49
[45] Interview 1
[46] European Commission, Memo, "Statement by Commissioner Malmström on the compliance of Italian and French measures with the Schengen acquis", MEMO/11/538, 25 July 2011
[47] Interview 48; Interview 12

5.2.4 The negotiation process: mechanisms of deadlock

At the beginning of negotiations in 2011 there were a number of states, which didn't consider the situation at external borders to be a reason to review the rules for border control and were therefore generally not in favour of a revision of the Schengen Borders Code: Cyprus, Malta, Belgium, Sweden, Finland, Luxembourg, Portugal[48]. Then there were those states, which saw the need to reform Schengen, but did not favor a substantial amendment in the form of re-nationalization of border control competences or extension of criteria for internal border control: Eastern European states.[49] Countries in support of border control tightening from the outset were France, Netherlands, Austria, Spain, Sweden, UK, Denmark[50]. The pivotal state proved to be the usual suspect: Germany.

France and Italy jointly demanded In the Council, France and Italy made their positions heard by other member states looking for potential allies and were successful in rallying Germany, which became a supporter due to internal pressure on the conservative party by voters (Hilpert, 2015), and later on Spain by 2012. While there was little support in the Council initially for the demands by France and Italy to renationalize border control, there was more support for the more moderate, but still very security-focused appeal by the French and the Germans in 2012, who wrote a letter to the Danish Presidency demanding for an intergovernmental and security approach to the Schengen package[51].

Apparently, there has been some inconsistency in the German position, this time from opposing a reform of the Schengen border code, especially a reintroduction of border control in 2011, to requesting such a reform in 2012[52] (Hilpert, 2015). The German discourse consisted of saying that the way of regaining confidence in Schengen was to extend member states' competences in the security area of border management; the aim of the German position was therefore to defend national

[48] Council of the European Union, Outcome of Proceedings, Working Party for Schengen Matters, 15346/11, 18 October 2011
[49] Council of the European Union, Note Czech Delegation, Comments on Schengen Governance Package, 16136/11, 21 October 2011; Council of the European Union, Note Hungarian Delegation, Communication "Schengen governance - strengthening the area without internal border control", 16136/11, 27 October 2011
[50] Council of the European Union, Note French Delegation, Comments on Schengen Governance Package, 16136/11, 21 October 2011
[51] Bundesministerium des Innern, Bundesminister Hans-Peter-Friedrich; Ministère de l'Intérieur, de l'Outre-Mer, des Collectivités Territoriales et de l'Immigration, Ministre Claude Guéant, Lettre au Président du Conseil de l'Union Européenne, Ministère de la Justice du Danemark, Ministre de la Justice Morten Bodskov, 17 April 2012
[52] Interview 17; Interview 18; Interview 19; Interview 20

sovereignty and get to the introduction of an emergency clause permitting states to unilaterally reintroduce border control[53].

The Italian position also evolved considerably, from strongly advocating for a reform that reinstates state control over borders to supporting a Union-based solution, which prevents unilateral border control actions by other states (Hilpert, 2015). After the question of whether or not the reintroduction of border control would serve Italy was controversially discussed in the Italian government, parliament and public opinion, the Italian representative argued that the 2011 announcement by Berlusconi about the request of re-nationalization was made under pressure, concretely, extreme right wing pressure both in Italy and France. An important factor in this evolution is the government change in Italy, as afterwards and in the following 2 years of negotiation, the Italian position changed almost completely to supporting a union-led mechanism with a strong role of the commission and a reduction of national sovereignty. The Italian position thereafter concentrated on the argument that unilateral action by states and lack of solidarity among Schengen states had undermined the governance in the past and the Italian government heavily criticized the French government for having reintroduced border control and supporting a security-focused approach in the reform process (Hilpert, 2015).

Discussions in the Council were quite sovereignty- and security-oriented and referred to the need to ensure that governments still had control over their borders when confronted with a threat to their territory, all delegations considered that it should be up to member states to decide on duration of border control: “a member state may exceptionally reintroduce border control” and that it should be the member state that is in charge of the “evaluation of the threat presented in a member state”[54]

In both rounds of negotiations on the Schengen Evaluation Mechanism, the Council framed its criticism of the communautarization of Schengen Evaluation and the increased involvement of the Commission as a sovereignty issue, referring to border issues as a sensitive matter for states, and linking it to the importance of mutual trust in ensuring good performance during evaluation, which the involvement of the

[53] Interview 17; Interview 20
[54] Council of the European Union, Outcome of Proceedings, Working Party for Schengen Matters, 5546/12, 19 January 2012

Commission could jeopardize[55]. In the second round, on the second and amended third proposal, Council repeated its criticism of the excessive involvement of the Commission in evaluation, however, it focused more strongly on the newly increased role of the Parliament using similar arguments about state sovereignty and the respect for competence distribution[56]. Delegations used a legal rhetoric to frame their legal base conflict arguing that "disregarding Art. 70 could create a permanent change in the Schengen field, legally and politically, depriving the intergovernmental framework of its "effet utile"[57]

The Parliament was initially strongly against the proposal to revise the criteria for internal border control and give more control back to member states, saying that the migration crisis did not justify questioning the Schengen agreement.[58] However, the focus of the Parliament entirely shifted to the Schengen Evaluation mechanism and the conflict over the legal base, as soon as it became clear from informal negotiations in the Council that member states considered excluding the Parliament from the process[59].

The Council built unanimity about rejecting the involvement of the Parliament and requesting Art. 70 (consultation) over Art. 77 TFEU (co-decision) (see table in annex) for the reform of the Schengen Evaluation mechanism. The Council framed the position using legal rhetoric by referring to the special provisions in the Treaty regulating decision-making about Schengen evaluation and the Parliament's blatant disregard for Treaty provisions in an attempt to grab power[60]. The Commission agreed to the change in legal base from Art. 77 to Art. 70 TFEU as requested by the Council[61], which the Parliament framed as incompatible with the requirements of the Lisbon framework, an intergovernmentalist attack on the democratic powers of the EU[62]. The Council, on the other hand, approved the intergovernmental framework by

[55] Council of the European Union, Outcome of Proceedings, Working Party for Schengen Matters, 15346/11, 18 October 2011; Council of the European Union, Note Presidency to COREPER, Schengen Governance: Political Guidance, 17280/11, 28 November 2011
[56] Council of the European Union, Note Presidency to COREPER, Schengen Governance: Political Guidance - Legislative Proposals, 17280/1/11, 29 November 2011
[57] Council of the European Union, Note Presidency to COREPER, Schengen Governance: Political Guidance - Legislative Proposals, 17280/1/11, 29 November 2011
[58] Official Journal of the European Union, European Parliament, European Parliament resolution of 7 July 2011 on changes to Schengen, P7_TA(2011)0336, 7 July 2011
[59] Interview 9; Interview 49
[60] Interview 17; Interview 13; Interview 49; Interview 25
[61] Council of the European Union, Note Presidency to Council/Ministerial level, 10319/12, 7 June 2012
[62] European Parliament, Article, "Schengen: MEPs angry at Council attack on democratic powers", 12 June 2012

referring to state sovereignty in border matters and the special provisions regarding evaluation in the Treaty[63].

The successive Council Presidencies played a very ambiguous, yet important role in the negotiation process. The Polish Presidency handled the issue in 2011 until December, but was unable to strike a compromise in the Council both with regard to substance and procedure. The Danish Presidency took over in 2012 and played a very controversial role: initially, the Danish Presidency did not follow the request of a large majority of states and the recommendation of the Council legal service to use Art.70 TFEU and started negotiations with the EP under Art. 77 TFEU, but the following decision to change the legal basis of the proposal from Art.77 to 70 TFEU and thus excluding the EP, also has been taken under their lead (Dinan, 2013).[64] This prompted the Parliament to acclaim treason and accuse the Danish Presidency of having lost all credibility as a broker and all trust of the European Parliament[65]. The Parliament played the blame framing game very successfully and vocally, it issued several reports on the matter and even involved the highest echelon, the Parliament Presidency.[66] The following Cypriot Presidency in late 2012 was perceived to be considerably more diplomatic and officially resumed negotiations to ease the tensions[67].

The Schengen case is a good example of the complicated role of the Council Presidency, as it shows that depending on the importance of the policy-area or issue to the respective state holding the Presidency, it has more or less interest in pursuing its own agenda and this can affect negotiations both ways: worsen conflict between national actors if the Presidency is perceived to fail at its role of mediator or striking compromise if actually refrains from substantively engaging its interest in the proposal. There was particularly great pressure on the Danish Presidency, coming from a majority of actors, except the Belgian and the Luxembourgish representative, to change the legal basis to exclude the Parliament and the Danish Presidency was

[63] Interview 17; Interview 3; Interview 13; Interview 49
[64] Council of the European Union, Note Presidency to Council/Ministerial level, 10319/12, 7 June 2012
[65] European Parliament, Debates, "Legal basis of the Schengen evaluation mechanism", 12 June 2012
[66] European Parliament, Report, Committee on Civil Liberties, Justice and Home Affairs, A7-0200/2012, 14 June 2012; European Parliament, Report, Committee on Civil Liberties, Justice and Home Affairs, Committee report tabled for plenary, 1st reading/single reading, 2011/0242(COD), 14 June 2012;European Parliament, Speech by EP President Martin Schulz to the European Council, 28 June 2012
[67] Interview 22; Interview 6; Interview 13; Interview 9

judged to have failed at it, since the change could only be voted in June 2012, when the Cypriot Presidency had already taken over[68].

The Danish Presidency falsely assumed, coming from an obvious lack of communication or a deliberate misunderstanding of the position of EP LIBE rapporteur Carlos Coelho, that the EP would be willing to accept a change of the legal basis if the Council ceded to the rapporteurs demands in substance, which was absolutely not the case[69].

The negotiations were on hiatus from June 2013 until almost a year later, after the Council unanimously voted to amend the Commission proposal to Art. 70 TFEU in its Minister reunion on June 8th, 2012[70]. The process entered its second conflict phase, the deadlock between Council and Parliament over the legal basis of negotiations.

The Parliament strongly reacted to the process in the Council and interpreted the actions as a signal that states are asking for a repatriation of border control competence. Interestingly, there has been a strong debate about the procedural elements, not only between the Council and the EP, but also within the institutions coming from the legal services of both institutions[71]. From a purely legal perspective, argued by the Council and to some extent also the Parliament legal service, the Commission‘s decision to use Art. 77 TFEU as a basis for the SEM reform has not been the correct decision, Art. 70 TFEU would have been correct[72]. As there are numerous problems related to the purpose of Art. 77 TFEU, which mainly concern the limited and specific scope of the article: it is meant to deal with the absence of border control and reflects the fact that between the Treaty of Amsterdam and the Treaty of Lisbon, the purpose changed from promising to establish an area of free movement to the promise to offer one. So the article is devoted to the absence of internal border controls and does not specifically relate to the question of reintroducing controls. This legal basis does not allow the COM to interfere in the evaluation mechanism or ask member states to introduce or abolish temporary border controls. Art. 70TFEU has been introduced by Lisbon specifically to permit the

[68] Interview 22; Interview 6; Interview 13
[69] Interview 22; Interview 6; Interview 9
[70] Council of the European Union, Note Presidency to Council/Ministerial level, 10319/12, 7 June 2012
[71] Interview 22; Interview 3; Interview 17
[72] Interview 17; Interview 13; Interview 49

Council to manage Schengen evaluation together with the Commission without mention of the Parliament. Therefore, the Council argued that Art. 70TFEU would be the more legitimate basis, since they all agreed to and ratified it. The opposition by the EP is based on concerns about democratic legitimacy of the decision, if it is not involved, which was the same reason for rejecting the proposal in 2009[73]. The Council further argued that the use of Art.77 TFEU would however involve a risk of annulment by the ECJ for cause of wrong legal basis, and de facto exclude the UK and Ireland from participating in the evaluation mechanism (Carrera, 2012; Pascouau, 2013).

The Parliament's blockage reaction was not only informal, but very formal, as rapporteur Carlos Coelho (EPP, PT) and the LIBE committee convinced the MEPs to announce to interrupt all negotiations in Justice and Home affairs with the Council under the Danish Presidency and a majority of the plenary proposed to freeze the negotiations on five proposals for a year[74]. Rapporteur Coelho recommended to the plenary to block the negotiations on the following proposals: (1) Amendment of Schengen Border Code and Convention implementing the Schengen Agreement; (2) Judicial cooperation in criminal matters: combating attacks against information systems; (3) European Investigation Order; (4) Budget 2013 aspects relating to Internal Security; (5) EU Passenger Name Records (PNR)[75] And the plenary decided to remove the discussion of the draft reports from the July 2012 agenda as a signal that the Parliament had officially interrupted negotiations with the Council[76].

The reform of the Schengen Governance is good example of the inter-institutional quarrels between the three main institutions about competence and power distribution: under the Danish Presidency, the Council said that it would interpret the legal basis of the Schengen Evaluation Mechanism in a way that excludes co-decision, excluding the EP from influencing the negotiation process; the EP in consequence blocked a significant number of dossiers related to Schengen and threatened to cut funding and the EP (committee JURI) insisted that co-decision would be appropriate legal basis for the procedure, informally disagreeing with the

[73] Interview 22; Interview 48
[74] European Parliament, Press release, "EP decides to suspend cooperation with Council on five JHA dossiers until Schengen question is resolved", P7_TA(2012)0422, 14 June 2012
[75] European Parliament, Article, "Schengen: MEPs angry at Council attack on democratic powers", 12 June 2012
[76] Interview 22; Interview 21; Interview 9

legal service of the EP[77]. Even President Schulz interfered and declared it a political affair by stating that the Council disregarded parliamentary democracy to fall back into intergovernmentalism to be able to conceal the fact that more and more member states introduce illicit border controls at internal borders (Dinan, 2013; Zaiotti, 2013).

5.2.5 The mechanisms of consensus-building: from deadlock to agreement

Conflict between the co-legislators, however, was eventually resolved and the process ended in a second round agreement. The Commission, it seems, played a strategic game with the legal base and achieved an upgrade in substance and decisional influence for itself by inciting the co-legislators to start a battle over the legal base and the procedural framework of the policy reform: "And one controversy between the Council and the Commission was of course the legal basis, and the Commission acted very smartly, I mean they did not put themselves versus the Council, but they used the Parliament to fight with the Council, it was really smart. So, actually, what Parliament wanted, was exactly the same what the Commission wanted and from the moral point of view, from the ethics, it was simply not fair, but this is the game that the Commission is conducting since some time, I mean they simply stopped to be, long time ago, to be just the Guardian of the Treaty but they started to have their own policy"[78].

Rather than starting with a supranationalist proposal, the Commission responded to the Council's preferences immediately and decided to base the reform on Art. 70 TFEU and use the consultation procedure instead of co-decision, which could be expected to provoke the Parliament and lead to opposition[79]. The second attempt was too close to the Parliament, the procedure was based on Art. 77 TFEU, which in combination with an expansive proposal in substance was likely to incite opposition by the Council[80]. The Council, on the other hand, knew that the unanimous amendment of the proposal to return to Art. 70 TFEU would not be acceptable to the Parliament and deadlock was to be expected[81]. Since, however, the Commission had strategically linked the Schengen Evaluation reform under co-decision to the desired

[77] Interview 3; Interview 17
[78] Interview 49
[79] Interview 22; Interview 21
[80] Interview 21
[81] Interview 21; Interview 3; Interview 4; interview 5

reform of internal border control the Council was advocating for[82], thereby pleasing the Parliament as well, which feared that it would be sidelined[83].

The first outbreak of the migration crisis due to the Arab spring in 2011 provided a window of opportunity for the Commission to link the two reforms and give the co-legislators the opportunity to bargain over the shape of the policy change, knowing that the package provided the necessary elements for both to be able to strike a deal[84]. In the end, the desire to have the internal border control flexibilization convinced the Council to accept a package and issue-linkage deal to settle the procedure conflict with the Parliament, which de facto allowed the Commission to take over the evaluation mechanism[85].

This stepwise game was both facilitated and hindered by the behavior of the relais actors involved. The Commission representative in the first round in 2009 was perceived as incompetent and unfit to be a mediator, the actor was replaced in the second round in 2010 and 2011 and was considered to be much better fit[86]. The most important relais actors were the rapporteur and his assistants, they were both advocates of deadlock and facilitators of resolving it at a later stage, as the rapporteur, Carlos Coelho, was trusted by both the Parliament to act in its best interest and trusted by the Council's conservative majority to work towards a compromise that would be acceptable to the Council[87]. The fact that Coelho belongs to the conservative EPP group helped establish a majority in both Council and Parliament for the compromise solution. The rapporteur in turn trusted his assistants with very informal contacts and negotiations with a few selected state representatives, Portugal and Luxembourg, to find a creative legal and textual solution for compromise[88]. The Council Presidencies had a more ambiguous role, the Danish Presidency, while trusted by the Council members to defend their interests, was not accepted by the EP to be an honest broker, because it was not seen as

[82] "We judged that the last proposal, number 3, was a lot more tangible, also on the Schengen Borders Code, at that time, the experts which participated in Schengen evaluation made us support it, because we saw that we missed in the original mechanism, that after discussions there was a need to act, which some member states simply ignored, so we thought that with the transfer of competences, this would change, there would be an incentive in the new one to say when it is enough." (Interview 49)
[83] Interview 22; Interview 21; Interview 4; Interview 5
[84] Interview 22, Interview 21
[85] Interview 13
[86] Interview 49
[87] Interview 21; Interview 9; Interview 25
[88] Interview 22; Interview 21

being sufficiently impartial, the Cypriot Presidency was more trusted to be a neutral broker, but was not the main driver to conflict management. It can therefore be said that deadlock and failure are facilitated by relais actors' divergence from their intended role as mediators and providers of information and informal contacts, for example, by Council Presidencies that defend national interests instead of acting as mediators, like the Danish Presidency did.

5.2.6 The agreement

The risk of the EP refusing to adopt the changes to the border control part of the proposal, very much desired by Germany, France and other influential states, prompted the Council as a whole to reconsider its stance[89]. Thus, between June and September, the Council agreed to a compromise, initiated by the LIBE rapporteur and the Cypriot Presidency in cooperation with the respective legal services of the two institutions, accepting to ask the EP for its opinion on the SEM with regard to the content[90]. This was made possible by linking the two proposals and convincing the Council that the EP would never yield to the Council's demands on internal border control, which was under co-decision, if the Council disregarded its opinion on SEM[91]. The solution proposed was a so-called bridging clause, a form of package deal, in the Schengen Borders Code: the new proposal on internal borders included a paragraph with reference to the SEM and its general guidelines, thus co-decision, meaning that if the SEM was ever going to be reformed again, it would have to be with the involvement of the Parliament[92]:

"They understand that any future proposal from the Commission for amending this evaluation system would be submitted to the consultation of the European Parliament in order to take into consideration its opinion, to the fullest extent possible, before the adoption of a final text."[93]

In conclusion, the process proved to be a policy battle of subsequent retaliatory blows in several rounds of bargaining, starting with the Commission's ambitious proposal for supranationalization of Schengen evaluation, the Council's aggressive

[89] Interview 22; Interview 3; Interview 49
[90] Interview 22; Interview 21
[91] Interview 21; Interview 22; Interview 3
[92] Interview 21; Interview 22
[93] Council of the European Union, I/A Item note, General Secretariat to COREPER, 14057/13, 27 September 2013

correction under the Danish Presidency and ultimately the Parliament's retaliation with the issue-linkage, which ensured its involvement (Ripoll Servent and Trauner, 2015). Rather than consensus, the negotiation produced a hard-fought and fragile compromise, which reflects the tension between both camps. The Commission was both strategic and a good anticipator or honest broker of Council and Parliament preferences in this case, it knew of the Parliament's desire to be involved and the Council's desire to have a reinforced mechanism of internal border control and heeded both in its proposal (Carrera et al., 2013; Carrera, 2012).

Council and Parliament engaged in a power battle over influence in the Schengen case, because the Parliament had been facing a security-focused Council in many negotiations in the JHA area and states increasingly showed a tendency to revert to intergovernmentalist methods; the Parliament's hardcore blockade strategy worked, because it involved a number of sensitive files, which were of interest to the Council and it actually succeeded in extracting concessions from the Council on procedural matters (Ripoll Servent and Trauner, 2015).

If the Parliament uses co-decision rules to its advantage and knows when a battle is worth fighting, it can extract concessions from the Council and get its way. The Parliament ultimately privileged pragmatism over power battle, fearing to compromise its past efforts to become a credible actor in Justice and Home affairs matters (Huber, 2015). The compromise accommodates both agendas, the security-focused state agenda and Commission's and Parliament's need for supranationalization, since the Schengen Evaluation mechanism has been moved from a peer-review system to a centralized system monitored by the Commission, but the control over the reintroduction of border control at internal borders remains in the hands of the states (Ripoll Servent and Trauner, 2015).

The unblocking mechanism proved to be the rapporteurs' team and their ability to exploit loopholes in the blockage situation, namely the fact that the right wing majority in the EP would be likely to agree to a reform in substance if its procedural influence was guaranteed. The team of actors rightly anticipated the Parliament valuing procedural elements over substance and benefitted from the change in governments in key member states, among them Germany, France and Italy, which made the

Council position overall more moderate and made it easier to push for a compromise on border control rules, tight enough to please the Council, yet not threatening the Schengen agreement in principle. The actual strategic solution was fairly simple and legal in the end, but required a certain amount of political maneuvering:

> "So we continued in what was more of a goodwill than anything, so basically there were too member states, I don't know if I should say their names, but very pro-European member states, that continued to have meetings, I met with them, just the three of us, we refused the blockage, so we continued to meet, every week, going through the text to see where we could find compromises and come with the better text that could be accepted, they have the idea of what would be acceptable to member states and I had an idea of what would be acceptable to the Parliament between the political groups. And that's how we started working on a different proposal. From the beginning I always said, if you someone else, let me them join, if others are interested, let them join, we start with these two member states."[94]

As for conditions of consensus-building, both trust and legal expertise were given in the case of the rapporteur and the Cypriot Presidency, which were aided by very astute legal services[95].

In content, the reform changed little with regard to the extant rules. The Council therefore could not achieve a more security-based approach to border control and a renationalization of border management. The SEM reform ultimately benefits the COM and to some extent also the EP, which are more involved now in the management and evaluation process. Therefore, the EP, though it has lost the procedural battle formally, as the wording states that the proposal was decided under Art.70 TFEU, has gained influence and control informally, by an extension of its influence.

The Schengen case also attests to the strong interdependence of the national and EU level in a two-level setting: changes in the domestic arena can completely reset the conditions for the negotiation game at the EU level, a situation of conflict or deadlock can just as easily be created as it can be solved by changes in the national preference setting[96]. This can lead to inconsistencies in national positions, which in the case of Schengen was clearly a case of populist exploitation of an issue by politicians in power with respect to national public opinion, as soon as government

[94] Interview 22
[95] Interview 22; Interview 21; Interview 3; Interview 48
[96] Interview 18; Interview 19; Interview 20

changed, the issue was no longer politicized and therefore perceived to be less salient[97].

5.2.7 The blame framing game

The Commission blames failure on the Council's extreme position, especially the unwillingness to accept the involvement of the Parliament. The main element of blame rhetoric is that the Council could have anticipated the political upheaval with the Parliament, yet insisted on sticking strictly to the Treaty provisions, knowing that a combination of intergovernmentalist procedure (consultation and limited role of supranational institutions in implementation) and substance (keeping peer-to-peer mentality) would be impossible to accept for the Parliament.

The Commission blames deadlock on the Council and uses a rhetoric of political pragmatism, blaming the Council's decision to exclude the Parliament for the conflict, as Parliament involvement would add legitimacy to the policy instrument from a citizen rights' perspective:

The Commission is siding with the Parliament by framing co-decision as a political ambition to ensure that the evaluation mechanism would be properly enforced and announces to cooperate closely with the Parliament:

Ultimately, the Commission plays a game with substance and procedure and exploits divergences in general preferences and agenda of the co-legislators to focus on one conflict dimension and gain in the other: it gains decisional influence in the Schengen Evaluation Mechanism by accepting a security rationale and rhetoric for the internal borders reform. Any power gains, upgrades in the standards of evaluation and competence increases, are framed as successes in protecting Europe and its citizens, saying that a European mechanism ensures that all member states correctly apply the Schengen acquis. The Commission frames concessions to the Council as a necessity with regard to the border control aspect to be able to push for a stronger role of supranational institutions in the Schengen Evaluation Mechanism[98].

[97] Interview 20; Interview 18; Interview 19

[98] "(...) at a certain point, the situation was so complicated and so tense that the consequences of not having agreement were so bad for the entire EU that they wanted a compromise at any cost. So I have to say that after a

The Council blames deadlock on the Commission's and the Parliament's procedural power-grabbing using efficiency and accountability rhetoric and the the legal base: "The Commission is equally focused on power politics and and tries to avoid each reform that would grant more influence to states, even if it might make sense from a content point of view."[99]

The Council also blames the Parliament's insistence on being involved in negotiations on the Schengen Evaluation Mechanism, where it had already been offered by the Council to fully participate in the internal border control part, rather than keeping the eyes on the bigger picture and focusing on delivering results for citizens: "The EP is very naive often due to its fixation on power politics, extension of influence in interior politics, especially in border matters, it lacks realism in political assessment and is too idealistic often."[100] In parallel, the Council praises itself for being pragmatic and choosing the easiest way to deliver a result on the evaluation mechanism reform, accusing Parliament of prioritizing power politics[101]: "The Council takes into account the position of the Commission, but can and has actually outvoted the Commission before, they do try to find a compromise, but the Commission is not an honest broker. Compromises like package deals, are all found informally, consensus as a result often involves hard bargaining in negotiations, along the logic of "it's better to have 50% of something than 100% of nothing". Package deals can be struck across issues or over different files, with the EP it's usually within the same file. Both institutions promise things that they will not fulfill in the future just to reach agreements, the Council Presidency tends to make such proposals in negotiations knowing that it might not be possible."[102]

Conflict is also blamed on the Commission's strategic manipulation of the cleavage between Council and the Parliament: "Commission acted very smartly, I mean they did not put themselves versus the Council, but they used the Parliament to fight with the Council, it was really smart."[103] "The Commission plays a manipulative informal

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while they were very quiet on the negotiations, saying please discuss, find an agreement, we will accept it (...)" (Interview 22)

[99] Interview 17

[100] Interview 17

[101] Interview 17; Interview 49

[102] Interview 4 (and Interview 5)

[103] Interview 25

game, smaller countries or countries who think that they can't afford to offend the Commission are systematically manipulated, it says "if you vote against or for this, we will not forget" or " if you support our position, we will reward it"."[104]

The Council frames its losses in substance in the Schengen Evaluation proposal by highlighting procedural gains, the reform was passed under Art. 70 TFEU, formally excluding the Parliament, and its losses in matters of Schengen Evaluation by highlighting the fact that the criteria for internal border control have been flexibilized and allow for more state discretion[105]. The main elements of the framing exercise include the emphasis of the achieved balance between sovereignty and preservation of state competences and common application of Schengen rules and flexibilization of border control criteria as a means to ensure security[106].

The Parliament on the other hand recognizes that the Commission successfully exploited the Council's demand for border control reform to push the evaluation mechanism reform in package and frames its losses in terms of procedure by highlighting substantive gains and projecting to future negotiations[107]. It argues that the new evaluation mechanism increases citizen's rights by allowing for systematic checks of whether or not member states respect Schengen rules and highlights that the Parliament has fought for and won safeguards in terms of limiting possibilities for border control and intergovernmentalist elements in Schengen evaluation[108]. It also emphasizes that the Commission's role has been increased as a counterbalance to intergovernmentalism and that the Parliament will be involved in future negotiations through the bridging clause: "(...) it was one of our key demands, because the idea was to move towards a more European approach, leave the intergovernmental approach, okay, they are state borders, but they are also European borders, we have a common VISA policy, we have asylum, still not at the stage that we would like, but we have a common interest in protecting the borders. And states at that point accepted it, because it was this or nothing"[109].

[104] Interview 17
[105] Interview 6; Interview 12
[106] Interview 3; Interview 17; Interview 13
[107] Interview 22; Interview 6
[108] Interview 22; Interview 6
[109] Interview 22; Interview 6

The Parliament blames deadlock on the Council's intergovernmentalist agenda and accuses the Council of abuse of trust by voting to exclude the Parliament from the decision-making process and of having an intergovernmentalist agenda of gradually re-nationalizing Schengen and rejecting a European model[110]. The Parliament particularly blames the Danish Presidency of betraying the trust of Parliament and accuses the Minister of going against the social-democratic agenda of his own government. Meanwhile, the Parliament praises itself for looking out for citizens by ensuring that it is involved in decisions about freedom of movement[111].

5.2.8 Model fit and evaluation of the evidence

There is strong evidence for a strategic game for a policy update in several rounds with blame attribution and blame avoidance. The formal indicators for a strategic multi-round game, are the recast attempts by the Commission in 2010 and 2011, after the 2009 attempt had been rejected and the final approval by co-legislators, even after several instances of severe deadlock. The has been constant support by all institutions for the intended policy change and constant informal contacts between Commission and member states, member states and Parliament to exchange information and try to find solutions for conflicts.

Originally, repeated deadlock between Council and Parliament in the last round of negotiations before agreement is not something anticipated by the Commission-centric model of failure, as it would be expected that once the Commission conforms to its role as the honest broker and recasts the proposal, the co-legislators would agree without further serious conflicts. However, if we look closely at the blame game, we see that the second round of conflict was necessary for the Parliament to reap sufficient reputational gains to be able to accept severe losses in substance and procedure in the final agreement: after all, the Council got more control over borders and the Schengen Evaluation Mechanism was ultimately agreed upon based on Art.70 TFEU, despite the bridging clause. For the Council, accepting blame and a year of blockage was acceptable, given the considerable gains in control over national borders. The Commission as able to achieve significant increases in

[110] Interview 6; Interview 13
[111] Interview 6; Interview 22

competence in the Schengen Evaluation Mechanism, at all steps of the evaluation process, which was its main focus for the policy change.

Conditions – Schengen **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Availability of informal channels/networks	+	-	+	+
European Council support	- Repeated statements and intervention	+ No evidence for Commission not being aware	- Repeated statements and intervention	+ Strategic use of European Council support to achieve agreement on both proposals
Issue salience to governments	- Strong evidence for salience	+ No evidence for Commission not being aware	- Strong evidence for salience	+ Second round exact response to the attention focus of the Council actors
EP issue support	- EP supported the policy change, even during deadlock situation	+ Some indication that Commission was not aware of support situation regarding procedure in the failure round	- EP did not side with the Commission and continued supporting the issue	+ Commission responded to EP situation in success round
Window of opportunity	- Some indication for Council in first round (pre-crisis)	- Some indication for Council in first round (pre-crisis)	- Some indication for Council in first round (pre-crisis)	+ Commission exploited crisis window to link proposals
Party politics overlap	- Evidence for party politics changes due to elections	+ No indication for information asymmetry	- Some indication that the Commission tried to force supranationalism	-/+ First round no, second round yes
Preference overlap	- First and second round, strong indication that proposals went against preference of co-legislators respectively	+ First round no overlap with Parliament, second round with Council, no indication for lack of information when drafting	- Evidence for some supranationalism in drafting	-/+ Due to the responsiveness to both co-legislators, in successive rounds, some indication for strategic proceeding
Agenda overlap	- Proposals corresponds to problem pressure	+ Strong overlap with national and European agenda	- Proposals corresponds to problem pressure	+ Strong overlap with national and European agenda

(table 6, evaluation conditions Schengen, source: own illustration)

Mechanisms – Schengen **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Relais actor behavior	- Failure round no influence	- Failure round no influence	- Failure round no influence	-/+ Failure round no influence, sucess round strong influence
Informal exchange during agenda-setting	+ Honest broker intention in failure and success round	- Failure and success round no evidence for faulty transmission or translation	+ Failure round some evidence for deliberate inclusion of supranationalist elements, success round no evidence for disregard	+ Failure round repeated exchanges, success round repeated exchanges
Blame gains COM	+ Commission achieves gains for being honest broker	- Commission achieves blame gains	- Commission achieves blame gains	+ Commission achieves gains for updating proposal, successfully blames deadlock on co-legislators
Blame gains co-legislators	- While Commission gains from blaming co-legislators for failure and deadlock, co-legislators also gain from second round success	+ No blame rhetoric focused on technocratic failure by the Commission	+ Some blame by Council for Commission siding with Parliament	+ All institutions gain, especially from second round success
Learning/ updating COM	+ Commission updated after input from co-legislators about positions	+ No reference to technocratic failure by the Commission	- Commission updated significantly	+ Commission updates the proposal twice to enable the game between the co-legislators and procure gains for all

(table 7, evaluation mechanisms Schengen, source: own illustration)

5.3 The Smart Borders Package: strategic failure in two rounds

The Smart Borders Package was a package of two proposals aiming at integrated external border management, mainly consisting of an automated Entry-Exit-System and a Registered Traveller Program, the Commission presented in 2013. The Council and the Parliament held internal negotiations on the proposals in the LIBE committee and the relevant working groups and COREPER II in the Council and came to the conclusion that the Commission should reassess the package, especially with regard to costs and feasibility, which resulted in the withdrawal of the package and the recast of a new and considerably amended proposal for an Entry-Exit-System. Failure of the first round was mostly blamed on the Commission for presenting a proposal that was overly costly and not adapted to the external border policy problem. The Council wanted it to be geared towards border protection and law enforcement, the Parliament wanted more safeguards against data protection violations and lobbied against the security rationale. The Commission framing changed alongside the substance in the second proposal, presented in 2016, where before it advocated citizen rights under Commissioner Malmström, the new rationale of Commissioner Avramopoulos was security and law enforcement. The Parliament's shift to the right with the 2014 benefited the conservative rapporteur Diaz de Mera Consuegra, who was able to rally a majority behind the new proposal leading to informal agreement being achieved in autumn 2017.

Smart Borders: Timeline of negotiations (formal procedure)		
Previous legislation	Round 1	Round 2
Regulation (EC) No 767/2008	28 February 2013: Commission proposal for a Regulation of the Council and the Parliament COM/2013/095 final 2013/0057 (COD) establishing an Entry-Exit-System 16 April 2013: referral to LIBE committee 18 January 2016: wrap-up discussions in the Council to prepare the new proposal	6 April 2016: Commission proposal for a Regulation of the Council and the Parliament COM/2016/0194 final - 2016/0106 (COD) establishing an Entry-Exit-System and determining conditions for law enforcement 8 April 2016/26 April 2016/27 June 2016/8 July 2017/24 September 2016/7 October 2016/7 December 2016/7 March 2017/23 March 2017/26 June 2017: discussions in different Council preparatory bodies 9 May 2016: referral to LIBE committee 27 February 2017: first reading vote in LIBE committee with recommendation to open inter-institutional negotiations 8 March 2017: committee report tabled for plenary 25 October 2017: Parliament adopts first reading position 8 November 2017: Council adopts first reading position 30 November 2017: Final adoption
Regulation (EU) No 1077/2011		
	28 February 2013: Commission proposal for a Regulation of the Council and the Parliament COM/2013/097 final - 2013/0059 (COD) on establishing a Registered Traveller Programme 16 April 2013: referral to LIBE committee 18 January 2016: wrap-up discussions in the Council to prepare the new proposal	

(table 8, Smart Borders timeline, source: own illustration)

5.3.1 The proposal

The original package from 2013 contained three proposals: a proposal for the establishment of an Entry-Exit System (EES) at the EU external borders, a proposal for a Registered Traveller Programme (RTP) and an amendment to the Schengen Borders Code. The idea of the EES was to register entry and exit of third-country nationals (TCN) and thereby keep track of the circulation at EU external borders, verify the length of stay and register potential overstayers, by using alphanumeric data at first and supplementing biometric data after 3 years by collecting 10 fingerprints upon border crossing. The Commission proposed for data to be retained in a central database for 6 months in regular cases and 5 years in case of detection of overstay. Access to the collected data should be granted to border authorities for identity verification and otherwise be strictly limited for data protection purposes, law

enforcement access for national authorities was not foreseen, but considered possible via amendment at a later stage. The RTP was supposed to apply to TCN with or without VISA to facilitate repeated border crossings, access was foreseen for maximum 5 years, with a 1-year initial period extendable two times by 2 years. The program should also contain alphanumeric and biometric data (4 fingerprints) and data should be stored for 5 years in a central repository with restricted access for national authorities. The total costs of the package were estimated at € 1,1 billion. The revised package presented in April 2016 contained a few significant changes. The RTP proposal has been completely withdrawn from the package and the proposal for an EES has been amended in several ways: interoperability between the EES and the Visa Information System (VIS) is foreseen from the outset of the new system, biometric data will be collected from the beginning, but 4 fingerprints and facial image, the total amount of data collected is reduced from 36 to 26 items, but data will be stored for 5 years in all cases. And most importantly, law enforcement access for national authorities is possible from the beginning, under "strictly defined conditions". The cost estimate has decreased to €480 million.The scope of the system as proposed is to register short stay (maximum 90 days within a 180 day period), entry and exit, of non-EU nationals with a visa, the aim is threefold: to address border check delays and improve the quality of border checks for third-country nationals (1), ensure systematic and reliable identification of "overstayers" (2), reinforce internal security and the fight against terrorism and serious crime (3). The system will register standard alphanumeric and biometric data (the name, type of travel document, biometrics (four fingerprints and a visual image) and the date and place of entry and exit). The broader objective is to facilitate the border crossing of bona fide travelers, detect overstayers and illegal migrants in the Schengen area. The new system of entering entry and exit data into a central database will replace the practice of manual stamping of passports, which had been the standard way to calculate duration of stay, but deemed to be slow and error-prone[112].

[112] European Commission, Proposal for a Regulation of the European Parliament and the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union, COM/2013/095 final, 28 February 2013;
European Commission, Proposal for a Regulation of the European Parliament and the Council establishing a Registered Traveller Programme (RTP), COM/2013/097 final, 28 February 2013

5.3.2 Policy formulation, conditions and conflict constellations

Before diving into the process dynamics, we will map out the initial positions and preference constellations to understand the conflict dynamics and subsequent actor behavior. The Commission announced a clear preference for a system, which would grant better involvement of the Commission in external border management, keep law enforcement access and data retention to a minimum and not contain any tightening of the border control system[113] (Bürgin, 2017). The Parliament showed no particular internal or inter-institutional division on the problem of cost and feasibility, all camps agreed that the proposals was by far too costly and sided with the Council on the demand for better proof of practicality and impact assessment[114]. However, there was a significant left-right division on law enforcement access: the left opposed the large data collection and retention system and did not favour law enforcement access, the right was more sympathetic to the Council's demands[115].

"(...) you will see that the more centre-right groups like EPP and ECR will be in favour of the EES, but we're quite sure that the liberals, ALDE, will be divided, because they usually are on these issues and we have for example Sophie in t' Veld in LIBE, who is very much against all big system from the argument of data protection, but we have other liberal politicians in the EP that will be in favour and then of course you have on the left side S&D and the Greens and so on, which will not be very keen to have such kind of system, they would see as a big information system interfering with people's private lives and costing too much in comparison to what it's meant to bring."[116]

The situation was similar in the Council: again little division on the overall doubts regarding feasibility and benefits of the system as well as the cost problem, all states doubted the cost-benefit ratio and found the impact assessment results lacking proof of practicality[117]. However, state representatives were divided along functional and

[113] European Commission, Communication, "Next steps in border management in the EU", COM (2008) 69 final, 13 February 2008; European Commission, Press release, "Commission proposes better management of migration to the EU", IP/11/532, 4 May 2010
[114] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Interparliamentary Committee Meeting, European Parliament - National Parliaments, Smart Borders Package: European challenges, national experiences, the way ahead, 23-24 February 2015
[115] Interview 24; Interview 47
[116] Interview 24
[117] Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, Access for law enforcement purposes, 13617/13, 13 September 2013; Council of the European Union,

ideological lines on the substance of the EES: the functional elements mainly concerned the focus of the proposal and the requirements to make it work at different types of borders[118]. The Eastern European states wanted to focus on matters regarding land borders and the challenges of installing high-tech systems at vast land borders, whereas southern European states were mostly concerned with the management of mediterranean sea borders and the almost impossible endeavour to use high-tech border stations on islands or continental sea borders. Germany and other central states focused its attention mainly on air traffic, since this is its biggest challenge in terms of migration influx[119]. The ideological differences regarded law enforcement access and data protection, the most sensitive issues involved: the more conservative governments favoured longer data retention periods, the inclusion of biometrics from the start and a broad law enforcement access, the more left-wing governments were against long data retention periods and viewed biometrics more skeptically, they also favoured limited law enforcement access[120].

There were two main conflict lines between the legislative institutions were the following: (1) the balance between security and rights protection was contested between the institutions, Commission, Council and Parliament disagreed on where the balance should be struck between law enforcement access and data protection, the Council demanding more law enforcement and the Parliament more data protection, and they also disagreed on scope extension and proportionality of the EES, the Council wanted to extend it to a larger population of migrants and collect more data, the Parliament wanted to keep the scope restricted and reduce data collection and retention to a minimum. Feasibility and interoperability (2) were the elements of the second conflict line of the co-legislators with the Commission, despite extensive impact assessments and pilots, the Council argued that there are concerns with regard to the implementation and points to the potential dangers of malfunction or misfit to national borders and border systems when moving from sovereign

Outcome of Proceedings, Strategic Committee on Immigration, Frontiers and Asylum, Access for law enforcement purposes, 14066/13, 1 October 2013

[118] Interview 47; Interview 28

[119] Council of the European Union, Note Presidency to Working Party on Frontiers, Smart Borders, Wrap-up of discussions, 15024/15, 10 December 2015

[120] Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, 14073/1/15, 13 November 2015; Council of the European Union, Outcome of Proceedings, Working Party on Frontiers, 13193/15, 17 November 2015; Council of the European Union, Note Presidency to Working Party on Frontiers, Smart Borders, Wrap-up of discussions, 15024/15, 10 December 2015

systems to harmonized ones. The Parliament put less emphasis on feasibility, but agreed with the Council that the measure was too costly.

The inspiration for the system the Commission proposed came partly from its own evaluations of existing systems and possibilities, and partly from discussions in the Council among technical experts in SCIFA[121] and the evaluations of national practices and was justified in reference to European Council conclusions on the need to improve border management systems[122]. In the first round, the Commission proposed the EES framed as a border and migration management tool, restricted to third-country nationals and limited law enforcement access and data retention: justified the choice by referring to the need to protect citizens' rights, the ECJ jurisprudence and the Parliament's stance on data protection. The RTP was framed as a facilitation mechanism for border crossing and justified it by a need for balance between border security and mobility facilitation. To justify the choice in terms of technical feasibility, the Commission carried out several impact assessments to analyze the modalities of a smart borders system (2008, 2012 and 2013) and explored many different options for data storage for the EES in combination with the RTP. To justify the cost-added-value ratio, the Commission developed a funding plan for the entire system, which would cover the set-up at the EU level and in the member states, future operational costs would have to be covered by national programmes[123]. The Commission had conducted extensive assessments and consultations and even sought contact with member states[124].

Negotiations on the "Smart Borders Package" have formally been ongoing since the Commission presented its proposals in February 2013, however, the impulse for a reform of external border management dates back over a decade: in reaction to 9/11, the European Council issued a specific conclusion with regard to the management of

[121] Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, "Integrated Border Management, Strategy Deliberations", 13926/3/06, 21 November 2006

[122] European Council, Cover Note, Conclusions, General Secretariat of the Council to Delegations, EUCO 23/11, 23 and 24 June 2011

[123] European Commission, Staff Working Document Impact Assessment, Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD/2013/047 final, 28 February 2013; European Commission, Staff Working Document Executive Summary of the Impact Assessment, Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an Entry/Exit system (EES) to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD/2013/048 final, 28 February 2013; European Commission, Staff Working Document Detailed Explanation of the Proposal by Chapters and Articles, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council, SWD/2013/049 final, 28 February 2013

[124] Interview; Politico, 30 October 2011;

external borders at its Laeken meeting in December 2001:“ Better management of the Union’s external border controls will help in the fight agains terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created (...).”[125]

The Commission responded with a Communication to the Council and the Parliament, announcing that it would pay particular attention to the issue of joint management of external borders when accompanying member states in the implementation of the Schengen acquis. But the tone of the Communication insinuates that the Commission blames a lack of competence transfer and integration in the third pillar for its inability to act and deplored the resulting lack of operational coordination: “The institutional reality of the three pillars which is an absolute must for the creation of legal norms remains unaffected (...) The acquis communautaire as regards external border management still lacks proper operational coordination.”[126]

The Commission Communication to Council and Parliament, however, already included a very detailed discussion of the stakes involved in creating a system of integrated border management. While there is no explicit mention of an electronic IT-based system, the Commission does discuss the challenges of conducting border checks at different types of borders in detail, proof of its awareness and anticipation of the criticism that would later on be raised in the discussion of the EES system. The Communication alerted both member states and MEPs to the topic and, in hindsight, gave ample time to prepare and assess the stakes.

The Council adopted a Plan on external border management in reaction to the Commission Communication, where it highlighted 5 components of such an integrated border management system: a common operational cooperation and coordination mechanism, common risk analysis, personal and operational equipment, a common corpus of legislation and burden sharing between the member states and

[125] European Council, Conclusion No 42 of the Laeken European Council of 14 and 15 December 2001, 15 December 2001

[126] European Commission, Communication, Towards integrated management of the external borders of member states of the European Union, COM(2002) 233 final, 7 May 2002

the Union.[127] After the Council adopted its plan, the issue remained off the agenda without any legislative proposal by the Commission until the Council brought it to the SCIFA agenda in 2006.[128]

The issue was then revived by a Communication by the Commission in 2008 and a European Council meeting in 2011, where the heads of state called for the Commission to present a strategy for integrated border management[129].

The Arab spring provided a window of opportunity for discussions to be reopened as it entailed a major migrant crisis for the European Union and it has been struggling since 2011 to find solutions for the issues arising from the increased influx of people at its external borders. Border management has been a key interest for national governments since the outbreak of the migrant crisis and the issue of securing external borders while maintaining the Schengen acquis has been very actively and controversially discussed in European (and national) media between 2013 and 2015[130].

As mentioned above, the idea for a reform of the external border management originated directly from the European Council, and it again encouraged the Commission in 2011 to reflect on possible forms of integrated border management, explicitly mentioning legislation. This prompted the Commission to present proposals on the so- called "Smart Borders Package" in 2013. The intention was clearly described at that time: provide for a European border management system to facilitate border crossings for third country nationals and keep track of potential overstayers with the help of a technologically advanced IT-system. The rationale of the legislative package was clear in 2013: border management facilitation[131]. The Commission, when preparing for the legislative proposal, has conducted a great

[127] Council of the European Union, Plan for the Management of the external borders of the member states of the European Union, 10019/02, 13 June 2002

[128] Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, "Integrated Border Management, Strategy Deliberations", 13926/3/06, 21 November 2006

[129] European Commission, Communication, "Next steps in border management in the EU", COM (2008) 69 final, 13 February 2008; European Council, Cover Note, Conclusions, General Secretariat of the Council to Delegations, EUCO 23/11, 23 and 24 June 2011

[130] "In the aftermath of the Paris attacks, France and the European Commission are pushing for intensified measures on fighting terrorism and radicalisation as well as on border controls and arms regulations." "France is also demanding that the EU quickly create a European border and coast guard, adopt the 'Smart Borders' package, and step up measures against the financing of terrorism." (EUObserver, 18 November 2015); "Meanwhile, a core group of member states are already pushing to get law enforcement access to the system, set for launch either in 2015 or 2016, depending on the legislative resistance met from sceptical MEPs and civil rights groups." (EUObserver, 2 October 2013) "Pressure from a core group of member states, including Germany, the Netherlands, and the UK, helped silence the dissenters, despite the enormous costs involved." (EUObserver, 2 October 2013) (more examples in complete analysis table in data annex)

[131] Interview 47; Interview 44

series of impact assessments and actively sought the input of public stakeholders[132]. There were also contacts to member state representatives and the Parliament, which were used to exchange views on the issue and exploited by the co-legislators to give the Commission input:

> "(...)one important issue that influences negotiations is also what has been done before the current negotiation, the idea for Smart Borders has first been brought up in 2008/2009, after that you start inputting ideas into the Commission, trying to negotiate with them what they are looking at, whether they are coming up with a proposal and what they are considering about specific issues, like land borders, so exchanging views. First step is to get the position of the Commission and get the Commission to understand what could and could not be done, to get as good a proposal as possible and that is totally done at the margins, so you cannot officially affect the process, because you do not have a national position yet, but you still have to maneuver in the playing field."[133]

The Commission's ambition was to provide better mechanisms of controlling border traffic and supervising migration, in particular TCN and the danger of over-stay. However, many operational questions were left open by the Commission to be addressed during the legislative negotiations: whether the interoperable systems should be centralized or decentralized, with the Commission favoring a centralized one, centralized or decentralized data storage and the Commission arguing that a centralized system would be cheaper and equally problematic in terms of data protection than a decentralized one, the inclusion of biometric data, where COM recommended starting with alphanumeric data and including an option to activate biometric data at a later stage and data protection as a main priority and recommended a restricted law enforcement access. At the outset of negotiations in 2013, the Commission was open to the input by the co-legislators, but the rationale seemed to be clear: border management facilitation with an objective to aiding migration control[134]: "Commissioner Malmström was Commissioner at that time, and

[132] European Commission, Staff Working Document Impact Assessment, Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an entry/exit system to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD/2013/047 final, 28 February 2013; European Commission, Staff Working Document Executive Summary of the Impact Assessment, Accompanying the document PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing an Entry/Exit system (EES) to register entry and exit data of third-country nationals crossing the external borders of the Member States of the European Union, SWD/2013/048 final, 28 February 2013; European Commission, Staff Working Document Detailed Explanation of the Proposal by Chapters and Articles, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council, SWD/2013/049 final, 28 February 2013

[133] Interview 47

[134] Interview 47; Interview 50

of course the world was different, but from her political background, what I have understood, she is more pro on facilitating travelling and connections of societies, (…)"[135]

This rationale was pushed in particular by the Commissioner Malmström, who was in charge of the dossier at the time, since she did not consider the issue to be a priority and did not support a security approach, being explicitly against law enforcement access and data retention due to data protection concerns[136]. Malmström responded to the pressure by heads of state and agreed to develop a file, but used her level of discretion for policy entrepreneurship (Bürgin, 2016). Since no other DG's or the President Barroso and the Secretariat General were involved, as they trusted Malmström to handle the dossier by herself, she benefited from a low level of interdepartmental coordination, as the unit for borders in the DG Home was the lead unit on the substance and the framing of the system[137](Bürgin, 2016): "(...) but the Commissioners and their highest hierarchy, the Commissioners are also politicians, so they need to get something for themselves, if they are prone to some ideas, they must show their voters and the public that they are defending the ideas and can manage to put them forward, because they have been put into these positions for some reason."[138]

Malmström's team made strategic use of the impact assessments and the preparatory information available to the Commission. The impact assessments did not produce a clearcut result as to which format of data collection and data retention would be preferable[139]. It has been criticized by some member state delegates that the communications by the Commission were biased in favor of data protection instead of considering all policy options laid out by the impact assessments and stakeholder consultations equally to focus more on how to counteract irregular immigration, fight against terrorism and serious crime, rather than data protection[140] (Jeandesboz, 2013).

[135] Interview 47
[136] "One issue is here that when the first proposal came, it was more about balancing security and fluency of traffic, and Commissioner Malmström was Commissioner at that time (...)" (Interview 47)
[137] Interview 50
[138] Interview 47 (see also: Interview 16)
[139] European Commission, Staff Working Document Detailed Explanation of the Proposal by Chapters and Articles, Accompanying the document Proposal for a Regulation of the European Parliament and of the Council, SWD/2013/049 final, 28 February 2013
[140] Interview 51; Interview 47

In fact, the Commissioner Malmström stated upon release of the proposal, that the Entry-Exit System was not a priority for the Commission, restricted law enforcement access and data retention were a consequence of the Commission's belief that further information databases were not needed at EU level, as information exchange was already sufficiently developed[141]. Commissioner Malmström was able to impose her preferences in this case and exert political leadership, because she enjoyed discretion within the Commission, due to low interdepartmental coordination and a disengagement by other DGs[142] and she herself decided to frame the proposal as modernisation of border management with the aim of facilitating mobility as a political narrative for the discussions about the Entry-Exit-System and strategically used impact assessments, which were biased in favour of data protection instead of considering all options equally[143] (Jeandesboz et al., 2013).

5.3.3 The negotiation process: mechanisms of deadlock

Some member states in the Council considered that the Commissioner had disregarded their interests, rather than incorporating security concerns into the Entry-Exit-System[144]:

"(...) this is also why in the beginning we were not very convinced, because there was no law enforcement access from the beginning, so where we saw or though, if you do such an important investment and you cannot draw any positive effects of it in the whole security issue, what is then the added value, is it only to create lists and so on."[145]

Additionally, member states were not welcoming the proposal for a RTP, first and foremost, because it was considered too costly and of little benefit and they also did not appreciate the Commission's decision to make them negotiate as a package, seeing it as an attempt to force the RTP upon them in exchange for the EES (Bürgin, 2016). Rather than admitting to it, delegates instead framed the removal mo the RTP as a sensible measure by the Commission to reduce costs[146] and as a logical step to

[141] Interview 47; Interview 27
[142] "(...) la Commission, c'était un peu ambigu, parce que les services de la Commission étaient favorables notamment a ces propositions, la Commissaire l'était moins, et donc on sentait, on a eu en plus un changement de 4 chefs d'unité en 6 mois, donc 4 interlocuteurs différents pour le groupe Frontiers au Conseil, donc on a senti un vrai flottement au sein de la Commission, on a fini par se mettre d'accord" (Interview 16)
[143] Interview 16
[144] Interview 51; Interview 50
[145] Interview 24
[146] Interview 24; Interview Interview 51

separate the two systems and first provide the EES as a base, thereby pushing the RTP issue into the future to avoid conflict in the present negotiations[147].

Since the first meetings on working group level in the Council, in the Working group on Frontiers and SCIFA, the Council discussed preferences on law enforcement access. From the outset of Council negotiations in February 2013 until September 2013, the successive Irish and Lithuanian Presidency noted that a large majority of delegations have argued in favour of providing access to the EES for law enforcement, in particular for the purpose of combating cross-border crime and terrorism, from the date of start of the operation of the EES[148]. The Lithuanian Presidency suggested to SCIFA to discuss granting law enforcement access as a secondary objective: under specific conditions in a limited manner, which would imply redrafting the proposal to clearly define the relations of the EES to national border authorities and law enforcement authorities. To collect the views of delegations, the Presidency issued questionnaires to find out whether law enforcement access would provide benefits in terms of combating crime[149]. Repeatedly, the different levels in the Council, mostly the Working party on Frontiers and SCIFA, but at times also the Ministers and COREPER, discussed the proposals and slowly edged towards a more security-focused rationale, in particular regarding the EES. At working party level, the technical conditions and prerequisites of granting law enforcement access have for example been discussed since 2013, even though neither the Commission, nor the Parliament desired granting law enforcement access from the outset at this stage of negotiations[150]. The agenda on the inclusion of law enforcement access was politically endorsed by the Minister level and became the main concern of the Council in 2013[151]. In later meetings, a majority of states declared themselves in favour of law enforcement access from the outset and see a clear added value for national law enforcement, cannot provide any statistics on how this plays out in practice, however some delegations underlined that it is necessary to ensure the feasibility and

[147] Interview 50
[148] Council of the European Union, Note Presidency to Delegations, Letter from the LT Presidency to the incoming EL Presidency on the future development of the JHA area, 17808/13, 16 October 2013
[149] Council of the European Union, Note Presidency to Delegations, Discussion paper on the future development of the JHA area, 14898/13, 16 October 2013
[150] Council of the European Union, Outcome of Proceedings, Strategic Committee on Immigration, Frontiers and Asylum, Smart Borders Package - approach to follow for further proceedings, 17127/13, 11 December 2013
[151] "(So in the Council there is also debate about law enforcement access and data protection.) For sure. Nobody wants to have a legal base, which is struck down by the Court at the first opportunity, when we want the tool for our law enforcement to use, we want the tool to be one that withholds in front of every court in Europe, so for us it is a bit surprising that this keeps resurfacing as something that is the devil's advocate. There is a similar discussion on another file, and member states are saying that out of the different options, some are clearly going too far." (Interview 50)

operability of the systems in view of the high costs, COM responded by suggesting to assess these aspects in the impact assessment study and pilot undertaken by COM, eu- LISA and member states until 2015. Until 2014, there was some degree of division in the Council, in particular on matters of law enforcement access, however, the European Council picked the issue up in its conclusions in June 2014, after which there was agreement among the delegations[152].

The following negotiations in the working parties and COREPER raised a number of other issues, on which delegates did not agree, such as the number of biometric data used, abolition of stamping, use of accelerators etc., however, these issues were much less controversial than law enforcement access and data protection.[153] The occurrence of the terrorist attacks on Charlie Hebdo, 8 January 2015, changed the setting of the negotiations and considerably affected the Council, Parliament and the Commission positions on the matter of external borders and security. A number of EU member states (Germany, Latvia, Austria, Denmark, Spain, Italy, Belgium, Netherlands, Poland, United Kingdom) joined France in a joint declaration of Ministers of the Interior on 11 January 2015 requesting a speedy improvement of external border management with a view to reinforcing security measures when examining external border crossings[154]. In a following meeting of the Working group on Frontiers, 16 February 2015, the Commission expressed its reluctance to make a decision on the topic of law enforcement access in view of the concerns of the EP, prompting the German and French delegation to demand the position of the Commission on the security issue in the Schengen area in view of the Paris attacks[155]. The Latvian Presidency supported the Commission's hesitation and suggested waiting for the results of the EP debate on law enforcement access, before making a decision. This reluctance gave the French delegation an incentive to bring forward a formal strong statement in the Working Party on Frontiers advocating a clear security rationale for the Smart Borders Package[156].

[152] Council of the European Union, Council conclusions on Terrorism and Border Security, Justice and Home Affairs Council meeting, Luxembourg, 5 and 6 June 2014
[153] Council of the European Union, Note Presidency to Working Party on Frontiers, The consequences of abolition of stamping, 12527/1/15, 13 November 2015; Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, 14073/1/15, 13 November 2015
[154] Council of the European Union, Outcome of Proceedings, Working Party on Frontiers, 13193/15, 17 November 2015
[155] Council of the European Union, Note Presidency to Working Party on Frontiers, Smart Borders, Wrap-up of discussions, 15024/15, 10 December 2015
[156] Interview 18; Interview 19; Interview 24; Interview 47

The French position was quite extreme, demanding to extend the Smart Borders system to all travellers, including EU citizens. Germany, France, the Netherlands and the UK formed a coalition to defend the proposal under a security rationale. This idea was not taken up by the other delegations, however, they pronounced themselves in favour of including residence permit holders, a proposal that was viewed critically by both the Commission and the Council legal services and therefore not upheld by the Council in further discussions[157]. By the end of 2015, after discussions of the results of the impact assessment study and the pilot had been concluded, the delegates agreed on including law enforcement access, biometric data collection and the abolition of stamping and requested a general data retention period of 5 years for all systems. France used national security threats and appealed to its fellow big member states, Germany, UK, Netherlands to back its security rationale. Especially the German- French axis became quite strong and visible after the Paris attacks in 2015: both delegations wrote an informal letter to the Commissioner demanding an increased use of biometric data and unlimited access for law enforcement authorities[158]. In the Council, they teamed up to advocate the use of biometric data at Minister level, which proved to be successful. The use of issue-specific and interest-based coalitions in combination with a use of political pressure, by moving up to the Minister level appears to have been a winning strategy for the French and German actors in this case[159]. As an institution, the Council strongly benefitted from the EP's inaction in most parts of the 2015 negotiation, used links via national parties in the EP to gain access and persuade MEPs[160], and the Commission's weakness towards the security threat, especially after 2015, to exert pressure regarding the key issues: law enforcement access and use of the biometric data of the EES for security reasons: "(...) and Commissioner Malmström was Commissioner at that time, and of course the world was different, but from her political background, what I have understood, she is more pro on facilitating travelling and connections of societies, people to people, than what we have now in the Commission, with Juncker, Timmermans and also Commissioner Avramopoulos, so they have been in quite a

[157] Council of the European Union, Note Presidency to Strategic Committee on Immigration, Frontiers and Asylum, 14073/1/15, 13 November 2015
[158] Interview 47; Interview 50; Interview 23; Interview 18; Interview 19
[159] "But I think in the migration and terrorist crisis, Germany and France have been working together quite closely, on the ministerial level (...)" (Interview 47)
[160] "Then you will get the proposal, you have to know that the LIBE committee will at the same time create an EP position, so we will contact the Finnish LIBE members, but also others that we know, trying to explain how we see the proposal in practice, to try to explain to both institutions why we see things a certain way. That is something quite important in the whole process of agreement, that the different parties see the issues a bit in the same way when they are formulating their positions." (Interview 47)

tough position due to the security situation on the ground, so of course all these facilitation programmes can be exploited (...)[161]

Summarizing the Council agenda, the following points have to be highlighted: the Council position became more and more focused on security rather than border crossing facilitation, the Council pressured the Commission to revise the proposals and kept the EP fairly sidelined, mainly insisting on the Council being regularly informed by the Commission[162].

The Commission, despite the initially not security-oriented framing, manifested an intention to include the Council's suggestions and revise the proposal. On law enforcement access, for example, the Commission position significantly evolved from 2013 to 2016: while it was reluctant to include it in the proposals and only mentioned the possibility of a future amendment of the EES in that regard, it had conceded to demands by the Council by the time the revised proposals were presented in April 2016 and included law enforcement access from the outset as a secondary/ancillary objective[163]. In 2013, the Commission had still insisted on the need for a clear justification for granting access to the EES for law enforcement purposes and emphasized that the costs of the EES could not constitute in itself a justification for expanding the objectives of that system[164]. COM finally reserved its position pending the outcome of the discussions within the Council and, later on, between the co-legislators. In 2015, after the Paris attacks in January, the Commission position still remained quite hesitant with regard to law enforcement access and did not relinquish to the demands of the French delegation about including all travellers. Commissioner Avramopoulos stated at the European Parliament Plenary Session on the Smart Borders Package, on 9 June 2015 and 28 October 2015, that the COM insists on the system applying to TCN, not EU citizen and law enforcement access was being investigated, but should be weighed against proportionality and necessity:

"Possible law-enforcement access will be a key issue to be addressed in the impact assessment for the new proposal. The Commission has already acknowledged, in the impact assessment for the 2013 proposal, that the data generated at entry/exit

[161] Interview 47

[162] "(...)so it was normal for the Parliament to get involved, but of course they don't have the technical and operational means, the knowledge to really participate like member states' experts would do in this proof of concept." (Interview 24)

[163] European Commission, Communication, "Stronger and smarter Information Systems for Borders and Security", COM (2016) 205 final, 6 April 2016

[164] Council of the European Union, Outcome of Proceedings, Strategic Committee on Immigration, Frontiers and Asylum, Smart Borders Package - approach to follow for further proceedings, 17127/13, 11 December 2013

could be of use to law-enforcement authorities in the fight against terrorist offences and serious crime in specific cases – both as an identity verification tool and as a criminal intelligence tool. (...) "But any decision to allow law-enforcement access from the outset will need to be based on the demonstrated necessity and proportionality of the measure. Strict, specific substantive and procedural safeguards would need to be laid down, taking into account, inter alia, the rulings of the European Court of Justice on data protection"[165]

The Commission emphasized both its awareness of the existing problems and tensions between the co-legislators, already when proposing the package in 2013, as well as its openness towards including Parliament suggestions.

The EP agenda showed some inconsistency at the early stages of negotiation, the rapporteurs had divergent opinions on the value and conception of the proposed border system and interestingly the initial rapporteurs of the package: the left wing of the Parliament, aided by the European Data Protection Supervisor and the European Court of Justice, strongly agreed with the Commission's assessment regarding data protection, whereas the right wing supported the Council on the necessity to provide for law enforcement access and reevaluate the risks regarding data retention more objectively.

Renate Sommer (EPP, EES) and Ioan Enciu (S&D, RTP), were replaced between 2013 and 2015 and the package was split, the EES file was taken over by Agustin Diaz de Mera (EPP) and the RTP file by Tanja Fajon, (S&D), Fajon in turn was also taken from the package by the time the proposals were recast in 2016 and Diaz de Mera took over both proposals. The first rapporteur reshuffle in 2014 could be explained by the intervention of EP elections, which changed the personnel in the LIBE committee and shifted majorities in the entire EP. Most likely the choice of a conservative rapporteur was the EP's way of ensuring better links to the Council's conservative majority[166]. It could be a counterbalance to the left-leaning tenor in the meetings of the LIBE committee in 2014, chaired by Claude Moraes (S&D), where a number of concerns, especially by the left wing MEPs were raised: across groups, the EP expressed a wish for more clarity on a number of issues, especially the general rationale of Smart Borders, but also interoperability, data protection. Overall,

[165] European Parliament, Plenary Debate, Strasbourg, 9 June 2015

[166] "(...) the rapporteur is EPP so it will not be a problem, it's a positive approach, but I think, of course some political groups are not yet in favour, but the general approach is much more positive. The political priorities have changed and they see that maybe there will be an added value to it." (Interview 22)

the EP questioned the legal basis to allow for EP involvement in pilot schemes and the usefulness of the new system for combatting terrorism and illegal migration, increased administrative burden (Carrera et al., 2013). RTP rapporteur Fajon, also left-wing, pointed out that the impact assessment study raised a number of concerns and questioned whether the COM would be willing to withdraw the proposal if the study showed that the objectives are not met, or whether other scenarios are considered and specifically highlighted data protection issues. ALDE openly questioned necessity and proportionality of the proposal alongside the excessive costs. Greens/GUE opposed the proposals qualifying them as generalized surveillance system, criticizing the poorly defined objectives and costs and pointed out data protection concerns and specifically opposed law enforcement access. EES rapporteur Diaz de Mera, though generally supportive, demanded more time to examine the material, raised concerns about the costs and the timetable, wanted to have a hearing with national parliaments, expressed concerns about the options and the unclear objectives, law enforcement access was considered a major concern as it lacked concrete proposals, interoperability was a main issue[167].

As for the positions of the different rapporteurs in more detail, there were disagreements between the right-wing rapporteur Diaz de Mera and co-rapporteur Fajon from S&D and the left-wing shadows, ultimately the disagreements were not settled in negotiations on the first proposal, but through the strategic exploitation of the opportunity provided by the recast. The following comparisons of positions show that the disagreements could have complicated the negotiations in the Parliament, had it not been for the Commission recast and the disappearance of the RTP[168]:

Rapporteur Diaz de Mera (EEP, EES) supported the comprehensive, European-led management of border controls and the idea of granting access to security forces would make the EES more useful and effective, which would, in turn, help to improve the management of the Schengen Area. Diaz De Mera, who became the lead rapporteur on the recast proposal as well, argued that there is a choice between

[167] Council of the European Union, Note General Secretariat of the Council to Delegations, Summary of the meeting of European Parliament Committee on Civil Liberties, Justice and Home Affairs, 16 October 2014, 14627/14, 22 October 2014

[168] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document, on the Entry/Exit System (EES) to register entry and exit data of third-country nationals crossing the EU Member States' external borders, rapporteur Agustín Dí z de Mera Garcí Consuegra, 6 January 2015; European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document, on the Amendment of Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), co-rapporteurs Agustín Díaz Mera García C nsuegra, Tanja Fajon, 6 January 2015; European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document, on the Registered Traveller Programme, rapporteur Tanja Fajon, 6 January 2015

security and speed with regard to the use of biometrics: the more fingerprints, the more reliable the result, but also the slower the border crossing. Data retention should uphold the principles of need and proportionality: the current data retention period is too short to ensure correct management of traveller movements, the study has demonstrated that 5 years are more feasible and proportionate, as stipulated in the RTP, but the issue is dependent on the structure of the system architecture in particular whether or not it will be linked to extant systems (VIS/SIS), in any case the data retention period for both systems should be aligned. Cost reduction can be achieved by linking RTP and EES and extant system, as minimizing costs for establishment and maintenance are important.

Renate Sommer (EPP, EES), rapporteur before Diaz de Mera, strongly lobbied for the proposal and its potential security elements, considering it useful and necessary and expressing herself in favor of law enforcement access from the beginning as member states in their national systems have made positive experiences and it appears valuable for combating crime and terrorism. Ioan Enciu (S&D, RTP), former RTP rapporteur, considered that the policy-making process does not allow for properly structured debates focusing on the key elements of the COM proposals, namely a clear definition of the problem and an open debate on possible solutions, the proposals and the study, as well as all supporting documents are drafted in a view to supporting the creation of new systems and not to assessing their necessity or proportionality, which remain unproven, just as there is no evidence that the objectives will be reached. Tanja Fajon (S&D, RTP), the co-rapporteur on the RTP, broadly supported the point of view of her colleague and former rapporteur Enciu, who was not reelected in 2014. Proportionality and necessity have not been sufficiently demonstrated, the compatibility with data protection standards has not been addressed properly in any study, neither have alternative options, cost evaluations have not been reconsidered as to providing clear estimates. Law enforcement access is included as a secondary objective and seems to become increasingly central to the proposals without having been properly analyzed. She argues that the objectives of the system would change if law enforcement access is included, from facilitating border crossings to a tool for fighting crime and terrorism. The implications of data retention, especially in view of recent court rulings, have not been properly taken up and answered by the study. The impact study does not suggest granting law enforcement access and the 5 year period of data retention

seems to be sufficient. Fajon points out that the suggestions made by the study vary considerably with regard to the initial COM proposals, some of the options raise security questions and would need further consideration, such as the use of online applications for the RTP. Options regarding use of biometrics should be tested before making a decision. Integration of the systems, EES, RTP and VIS would be useful from a capabilities and data point of view, but then data retention has to be harmonized and the rights of the data subject fully guaranteed.

Given the EP's fear of being sidelined or excluded from the negotiations during the time of impact assessment and pilot studies due to the arguable lack of expertise[169], a likely assumption would be that the Parliament's best strategy for remaining involved would be to move towards the Council, especially on matters of law enforcement and security elements like collection of biometric data data retention[170]. Since 2013, the Council had indicated, at working party level, that the EP should be "associated" to negotiations with the Commission during the assessment period, whereas the Council should be informed at all times and Commission should manifest full transparency with the Council actors[171].

Council and Parliament ultimately agreed on the necessity to halt negotiations and focus on impact assessment and practicality questions, the Parliament was convinced by the Council to fail the original package due to the proximity between the conservative EPP rapporteur and the conservative majority in the Council (Bürgin, 2017).

In terms of substance, the Council was able to prevail: member states agreed that the package as proposed would not be discussed, because it had previously lacked the necessary security elements[172]. The Registered Traveller Program was argued to be too costly and and not a priority in view of the Council security agenda[173], which made states conclude that the Commission proposed it as a package alongside the desired border management system to force the Council to negotiate it (Bürgin, 2017).

[169] "If you ask people to think in this way, they see it, but it has more to do with knowledge awareness, and the EP is even a step further away from the field than the national parliaments, and two steps further than governments who have to implement policies." (Interview 50)
[170] Interview 51
[171] Council of the European Union, Note General Secretariat of the Council to Delegations, Summary of the meeting of European Parliament Committee on Civil Liberties, Justice and Home Affairs, 16 October 2014, 14627/14, 22 October 2014
[172] Interview 27; Interview 16
[173] Interview 16; Interview 48

5.3.4 The withdrawal and blame framing game

There is a strong focus on the technocratic nature in the way all actors in the three institutions frame failure[174]: "Yes, but honestly, when the European Council formulates the demand for smart borders, and the Commission has to table a proposal, nobody really knew in the Commission either, it would have been a lot easier if the Commission had already made that thought exercise, but it wasn't possible. So our thinking evolved incredibly over the 3 years, I now know what smart borders will look like, I didn't know 3 years ago, so it's normal that the text didn't represent the idea that was behind it."[175]

The Council unanimously voiced support for such a system, but criticized the Commission's framing and also a general design of the system, by saying that it lacked consideration for security elements and did not respond to the demands of member states, whose agenda for external borders was not focused on management, but rather on control and security: "(...) It's clear that we need such a system. 13 member states have national EES and there is a need for shared control of entry, once people entered and moved within the borderfree zone, they disappeared from the national system, it's beneficial to all of us to have an EU level EES, so the system is really important and it can help a lot, but some points in the proposal we are not so happy with."[176]

The Council framed reluctance to negotiate the proposal as a cost-added-value issue and linked it to the question of how this centralized data collection tool would be useful to increase security without law enforcement access. The criticism of the limited availability of security measures was framed as a question of added value. The Council questioned the benefit to states in view of the costs if the system was mainly directed at monitoring and not at law enforcement[177].

"(....) so of course all these facilitation programmes can be exploited, it's always a possibility, if you talk about 200 million border crossings, there might be one or two rotten apples always, that's why we have the law enforcement authorities to pick

[174] Interview 47; Interview 50; Interview 51; Interview 27; Interview 28; Interview 24
[175] Interview 27
[176] Interview 51; also: Interview 50; Interview 21
[177] Council of the European Union, Outcome of Proceedings, Strategic Committee on Immigration, Frontiers and Asylum, Smart Borders Package - approach to follow for further proceedings, 17127/13, 11 December 2013

them up. But that was one of the biggest reasons why substantive changes were made, that the balance between facilitation and security was a bit shifted and now it is more about security than facilitation."[178]

The critique of the RTP was framed as a question of avoiding additional costs for little comparative benefit. The Council also emphasized feasibility concerns, in particular regarding implementation for different kinds of borders and the proceeding of border control by border guards and demanded a more detailed impact assessment and pilot to test different options[179].

The Parliament joined the Council in cost-added-value concerns, substantively emphasized concerns about data protection safeguards and doubted the feasibility of the Commission's proposed design[180]: "Back then, the Commission really tried to finalize the SIS II after a few years of delays and the Parliament was very critical about the Commission's capability of delivering large scale IT-projects, which is one of the reasons why eu-LISA was created, to have a competent IT center to deal with technical issues. And it goes quite well, so now there is more trust that ideas put forward of a technical nature can also be implemented."[181]

The Parliament welcomed the Commission's framing of the package and framed the system as migration management and facilitation tool, while criticizing the Council demands in data retention matters as disproportionate to the purpose[182]. The Parliament did not voice particular procedural concerns, as it approved of the centralized system under supervision of the Commission and its own involvement in the decision-making process. The Commission pursued a double agenda with the co-legislators: it wanted to push for a European-based and integrated external border

[178] Interview 47
[179] Council of the European Union, Outcome of Proceedings, Strategic Committee on Immigration, Frontiers and Asylum, Smart Borders Package - approach to follow for further proceedings, 17127/13, 11 December 2013; Council of the European Union, Note Presidency to Working Party on Frontiers, Smart Borders, Wrap-up of discussions, 15024/15, 10 December 2015
[180] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document, on the Entry/Exit System (EES) to register entry and exit data of third-country nationals crossing the EU Member States' external borders, rapporteur Agustín Díaz e Mera García C nsuegra, 6 January 2015; European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Working Document, on the Amendment of Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), co-rapporteurs Agustín Díaz d Mera García C nsuegra, Tanja Fajon, 6 January 2015
[181] Interview 50
[182] Council of the European Union, Note General Secretariat of the Council to Delegations, Summary of the meeting of European Parliament Committee on Civil Liberties, Justice and Home Affairs, 16 October 2014, 14627/14, 22 October 2014

management to please the Parliament, but was also aware of the need to consider the security incidents and the implications for border policy for the member states:

"Parce que la Commission envisage cette proposition principalement sous l'angle de la mobilité, plus que sous l'angle de la sécurité et de la gestion des problématiques migratoires. Alors il y a un peu de tactique de la part de la Commission, la tactique notamment envers le Parlement (...)"[183]

"Wie das konkret ausgehen wird mit den neuen Vorschlägen, ist zu früh, klar ist natürlich, die Vorschläge haben jetzt eine sehr viel stärkere Sicherheitsdimension bekommen, auch in der aktuellen Diskussion, als das vorher vielleicht der Fall war und die Kommission ist ja auch nicht blöd, die haben zwei Datenbanken vorgeschlagen, eine die mehr die repressive Seite darstellt, über das EES, und eine, die mehr die positive Seite darstellt, das wir erleichtern den Grenzübergang, diese positive Seite ist jetzt ein Stück weit weggefallen."[184]

As a result, the national governments and the national public are very likely to blame the Commission for not sufficiently taking into account the views of the co-legislators.

"Malmström had her ideas and views on the facilitation issues for example, but the Commissioner can only influence the main idea and maybe a few concrete issues, at that time that was the case, she would take aboard her ideas and you can of course try to influence, but the Commissioners and their highest hierarchy, the Commissioners are also politicians, so they need to get something for themselves, if they are prone to some ideas, they must show their voters and the public that they are defending the ideas and can manage to put them forward, because they have been put into these positions for some reason."[185]

But, rather than blaming it on straightforward activism, the blame was attributed to an unfortunate lack of overlap of the old proposals with the new security agenda:

"The former EES system that came under the previous Commissioner, it was not one of her priorities, but clearly, you have to understand that it was in 2013, before any attacks, and before the migration crisis, so Europe then was a different place. It would not say that she necessarily did a bad job, simply the circumstances were different. (...)

[183] Interview 16
[184] Interview 21
[185] Interview 47

She did not see, in that context, as relevant as it is in today's context. The decisions are taken in time and place and that time and place was different from today."[186]

The faulty design was attributed to the fact that the policy agenda had changed in the meantime, making the old proposals unfit. There is also mention of potential internal coordination problems in the Commission at the policy formulation stage:

"Then internal procedures for the adoption of the proposal, it was a little bit hard in terms of, yes, it's an element of decision-making process internal discussion within the Commission, it's also something that is influencing the content of a proposal, because here we had several internal stakeholders, more active ones were DG Just and the legal service. (...) So, it has changed, it has an influence on the way you can propose, because this inter-service consultation, it's important, it's essential, you cannot for a decision of the Commission if you don't pass this, if you don't have the green line from the legal service, from the General Secretariat of the Commission, these are elements that are also changing a proposal, even if you have agreements with the Parliament and the Council, you have to be compliant with all these internal stakeholders."[187]

The tenor on all sides was clear that the Commission had indeed conducted extensive consultations and that member state representatives had sought to influence the DG and the responsible units during the process[188]:

"For bigger proposals, like Smart borders, apart from the Parliament and national expert groups, the Commission also holds hearings with stakeholders and conducts pilots. Proposals like that also involve a larger number of DGs in the Commission, in the case of Smart Borders the IT unit regularly reported to the borders unit. Smart Borders proved to be challenging, because positions were different and financial implications of the project quite huge."[189]

"But then there are many other persons, you go into a certain DG, trying to influence more in detail at the DG level, and go to the head of unit to have the actual expert who is writing the proposal, where you can also have discussions, and many times small details are really big details when you come to the practice, for example changing "and" to "or" can make a big difference for border control when you talk

[186] Interview 50
[187] Interview 28; Interview 50
[188] Interview 47; Interview 27
[189] Interview 3;

about 500 million border crossings. It's those small issues also that you try to influence."[190]

However, underneath the rhetoric about technicalities and feasibility, there is the clear baseline of wanting to avoid blame from the constituents, not only for failure, but also for an outcome that was not desired, especially on the side of the co-legislators: "The absence of transparency it's also the result of this attitude: it's Brussels doing this. Yes, but you were involved, your administration was involved (…) and your members in Parliament elected by your people were involved. It's also the way it's communicated: it's not me it's the other."[191]

5.3.5 The recast: conditions and mechanisms of consensus-building

Time passed and the circumstances changed. Within one year, three terrorist attacks occurred on European soil, two in Paris in January and November 2015 and one in Brussels in March 2016. These incidents brought the security question to the forefront of member states' concerns and changed the setting for the negotiations on external border management[192]. What had been a management issue, loosely linked to concerns about irregular migration, now became a major security question[193]. In meetings on the aftermath of the attacks in Paris in November 2015, the European Council and the Council made it abundantly clear that changes in external border management had a new goal: help combat terrorism and reinforce internal security[194].

It is important to mention that the European Council is now much more involved in the negotiations than it was on the previous proposal. It exerts more pressure on the legislative institutions, has set a clear deadline for agreement by saying that an inter-institutional agreement needs to be found by the end of June 2017. This was used by the Maltese Presidency as an argument to push the trilogue mandate through the Council, even though some delegations still do not agree with some of the elements.

"The European Council at its meeting of 20 October 2016 called on the Council to establish its position by the end of the year. The Presidency is deploying its best

[190] Interview 47; Interview 21; Interview 28
[191] Interview 28
[192] Interview 47
[193] Interview 16; Interview 47
[194] Interview 48; Interview 27

efforts to meet this objective to the extent possible, without losing sight of the need to address adequately all the legal and practical concerns which have emerged during this examination and which have ramifications on other parts of the acquis as well."[195]

"The importance and the priority nature of the file has been repeatedly underlined by the European Council. Most recently, at its meeting of 15 December 2016, the European Council considered that the co-legislators should agree on the Entry/Exit System by June 2017. The Presidency is doing its utmost to meet this objective, without compromising the quality of the text."[196]

About half a year later, the Commission submitted revised "Smart Borders" proposals, in April 2016, which clearly reflected the security rationale that had been set out by the heads of state and the ministers[197]. The evolution in the border policy rationale surrounding the "Smart Borders" negotiation favors the Council, as the European Parliament has been co-legislator since 2013 and emphasized that it did not agree with the framing of the proposals, fearing a securitization of border management, at a time, when the proposals showed little of the security rationale.

The Commission had presented its original proposals with the intention of pushing forward a more European external border management and encouraging member states to agree on facilitating border crossings for third country nationals. The framing was oriented towards a balance of security and migration facilitation elements:

"enabling national authorities to identify overstayers and take appropriate measures" since "third country nationals not requiring a visa are currently not subject to any systematic check for border control purposes before arriving at the border itself" and RTP could "offset better management of the flow of passengers" and "other positive aspects such as the satisfaction of travellers and the symbolic effect of showing the EU as open to the world", but balanced it by saying that "time savings in border crossings" would "allow border authorities to focus their resources on those groups of third country nationals that require more attention, thus improving overall security at borders".[198]

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[195] Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016 , p 3
[196] Council of the European Union, Note, Presidency, 6572/17, 27 February 2017
[197] European Commission, Proposal for a Regulation of the European Parliament and the Council establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third country nationals crossing the external borders of the Member States of the European Union and determining the conditions for access to the EES for law enforcement purposes and amending Regulation (EC) No 767/2008 and Regulation (EU) No 1077/2011, COM (2016) 194 final, 2016/0106 (COD), 6 April 2016
[198] European Commission, Communication, "Next steps in border management in the EU", COM (2008) 69 final, 13 February 2008

Commissioner Malmström presented the project for Smart Borders with a double agenda "recalling that the purpose of border control is to facilitate legitimate travel and trade while preventing irregular migration and cross-border crime: having safe and reliable external borders is a priority for the EU and its member states"[199].

Between 2013 and 2016, there is little left of the facilitation rationale in the Commission proposals and the statements made by relevant Commission representatives, especially lead Commissioner Avramopoulos, increasingly highlight security aspects.

The Commission insisted more strongly on the security aspect "EU citizens expect external border controls on persons to be effective, to allow effective management of migration and to contribute to internal security. The terrorist attacks in Paris in 2015 and in Brussels in March 2016 bitterly demonstrated the ongoing threat to Europe's internal security." and specifically referred to the migration and security crisis and used it as a basis to link "border management, law enforcement and migration control" by describing them as "dynamically interconnected" to "enhance both external border management and internal security in the EU"[200].

The Commission changed the framing of the project from migration management to a border management and security tool with more extensive law enforcement access and data retention provisions. The scrapping of the RTP was framed as a cost reduction measure to avoid blame for taking away the liberal, pro-migration element of the package[201]. The Commission used reframing of the agenda from migration management to border security to make the proposal more acceptable to the Council and added data protection rhetoric to make it acceptable to the Parliament, which joined the frame of border management and security, but retained the criticism about data retention.[202]

By 2016, the Commission rhetoric about external border management had shifted to security[203], as the official declaration stated that: "The access to the Entry-Exit-System by law enforcement authorities will constitute an additional instrument to prevent and combat terrorism and serious crime, by tracking travel patterns and

[199] European Organisation for Security, Report, High Level Security Roundtable, Brussels, 21 March 2012
[200] European Commission, Communication, "Stronger and smarter Information Systems for Borders and Security", COM (2016) 205 final, 6 April 2016
[201] Interview 24
[202] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Committee Report, A8-0057/2017, 8 March 2017
[203] Interview 47

combatting document and identity fraud. Commissioner for Migration and Home Affairs Dimitris Avramopoulos declared that "(t)errorist attacks on our soil have shown the threat to our security, at the same time as we face a migratory crisis of unprecedented proportions. Information sharing is at the nexus of both. Our border guards, customs authorities, police officers and judicial authorities must have access to the necessary information and the right tools to tackle these issues rapidly, efficiently and effectively."[204] Commission Vice-President Frans Timmermans' position on law enforcement access was equally straightforward: "Border and law enforcement authorities in the EU must have appropriate access to all the existing databases when needed to help them do their specific jobs. Better information sharing is a priority of the European Agenda on Security and the recent attacks confirm our resolve. We will find a way to do this whilst ensuring that individuals' data is safe and that there is no infringement of their right to privacy. This is about the intelligent, proportionate and carefully regulated access all our information border and security authorities need to do their job – to protect us and the freedoms we defend."[205]

Overall, the Council as a whole expressed support and confirmed that the new proposal constituted a significant improvement over the old proposal, in matters of design and framing:

"These are a revised version of the proposals presented by the Commission in February 2013 and for which the co-legislators had voiced technical, financial and operational concerns."[206]

"Widespread support was expressed by Member States to the objectives of the proposals. As far as the substance was concerned, delegations considered that the new proposals represented an improvement compared to the version presented in 2013."[207]

The new proposal has two equal purposes namely migration management and law enforcement access, where the Council wanted both principles on equal standing, whereas the Parliament wanted law enforcement access to be a secondary objective, it contains biometrics, 4 fingerprints, which is less than the Council wanted initially,

[204] European Commission, Communication, "Stronger and smarter Information Systems for Borders and Security", COM (2016) 205 final, 6 April 2016
[205] European Commission, Communication, "Stronger and smarter Information Systems for Borders and Security", COM (2016) 205 final, 6 April 2016
[206] Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016, p.1
[207] Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016, p 3

thus most likely a concession to the Parliament, from the outset, which is not what the Parliament wanted and definitely what the Council requested, with a data retention period of 5 years, again corresponding to what the Council requested, and not to the 2 years the Parliament proposed, an element which is still highly controversial. The proposal is also focused on interconnectivity with VIS and the SIS systems[208]. The Commission presented it under the headings of addressing border check delays and improve the quality of border checks for third-country nationals, ensuring systematic and reliable identification of overstayers and reinforcing internal security and the fight against terrorism and serious crime.

Trilogues from 2016 to early summer 2017, until the informal agreement, were very secretive, there is little to no access to documents about the progress on the proposals between EP and Council. Despite the lack of access to official information about the progress on the substance of the proposal, the official documents record a great number of meetings at different levels in the Council.[209] It can be concluded that there was an interest among member state representatives to reach an agreement on the new proposal, since the Council meet very frequently at all levels to produce a compromise to enter trilogues: "The technical examination of the proposals by the Working Party on Frontiers started right after their presentation. Since then, ten meetings were held, which allowed for several readings of the proposals, as well as the examination of a number of compromise suggestions presented by the Netherlands and the Slovak Presidencies. The JHA Counsellors also met to further develop the work carried out at Working Party level. Policy debates were held at political level, both in the JHA Council (21 April and 13 October 2016) and in SCIFA (21 June, 13 September and 25 October 2016), to give guidance to the Working Party on some of the most sensitive issues."[210]

From the few documents available, which reveal information about the conflict constellations within the Council and the Parliament, it emerges that there were still a number of controversial issues for both institutions, both not the same ones as on the first proposal, the focus was less on data protection and more on the question of

[208] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Committee Report, A8-0057/2017, 8 March 2017; Council of the European Union, Outcome of Proceedings, COREPER, 6960/17, 7 March 2017
[209] Council of the European Union, Note, Presidency, 10545/17, 26 June 2017
[210] Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016, p.2f

scope, where the Parliament demands strict criteria for non-Schengen countries, and the conditions of law enforcement access, the Council would like to have rather broad approach.

In the Council, the Dutch, Slovak and Maltese Presidency had to solve a number of controversial issues the Council did not agree on, the calculator and the role of Bulgaria, Croatia and Romania, access for law enforcement, connection with other databases like VIS: "The Presidency intends to pursue actively the examination of the outstanding issues with a view to finding an agreement on a mandate to open interinstitutional negotiations as soon as possible."[211]

By the end of June 2017, the Maltese decided to leave those issues open for trilogues and push for the the trilogue mandate and give the compromise proposal to COREPER for approval.[212] In the Council progress reports and mandate for trilogue negotiations, from December 2016 to March 2017, the following controversial issues were especially highlighted: on the issue of the scope of the EES, COREPER guidance from 1 February 2017 established that all states should be included if they are eligible under Art. 60 of the proposal, even though they are not full members of Schengen, based on a proposal by the Council legal service to get the calculator through in the Council, disregarding the opinion of the Commission legal service on the matter, 7 December 2016.[213] With regard to the calculator application, the Presidency insists that the COREPER guidance on a uniform application of the automated calculator should be followed, even though some states still oppose it on legal and practical grounds, again a proposal by the Council legal service, disagreement between Commission and Council legal service, 29 September 2016. The issue of bilateral agreements remained unresolved, the Presidency proposed a compromise that would allow the agreements about visa waiver to stay in force, but the Commission rejected the proposal, but the Presidency proceeded with a compromise proposal, even though a number of delegations did not agree with it. Lastly, regarding the application to EU nationals, the French proposal was not taken

[211] Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016, p 5
[212] Council of the European Union, Outcome of Proceedings, COREPER, 6960/17, 7 March 2017
[213] Council of the European Union, Progress report, 12661/16, 7 October 2016; Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016

up, but COREPER mentioned the possibility of addressing the issue in separate legislation[214].

As for the positions of the EP LIBE committee, based on Draft Report December 2016, which was approved by the plenary on 27 February 2017[215]: overall, the Parliament is not happy with the decision to combine two purposes without clarifying what it implies for data protection, migration management should remain the first purpose and law enforcement access a secondary one, as the implications for data management and storage are not the same. The plenary as a whole rejects the idea of data transfer to countries that are not part of the EES and still wants to reduce the data retention period: 4 years in case of overstay and 2 years for regular cases. There is disagreement within the LIBE committee between the different parties, the right is more in favor of the whole system, the left and liberals do not approve of the new framing and the data protection standards.

However, the approach by the rapporteur, Agustín Díaz De Mera García Consuegra (EPP, Spain), who stated before the LIBE Committee, 11 May 2017, that progresses have been made during the "trilogue" negotiations and that the good cooperation between delegations will probably allow to come to a political agreement by the end of the summer, there was little official output by the Parliament on the issue[216], was rather conciliatory.

Nonetheless, there was quite some remaining controversy in the LIBE committee and the Commission's decision to put a stronger emphasis on law enforcement to enable the right-wing rapporteur to promote the system to the plenary by stressing the security links to the Council majority:

> "(...) European Parliament will be divided, but you will see that the more centre-right groups like EPP and ECR will be in favour of the EES, but we're quite sure that the liberals, ALDE, will be divided, because they usually are on these issues and we have for example Sophie in t' Veld in LIBE, who is very much against all big system from the argument of data protection, but we have other liberal politicians in the EP that will be in favour and then of course you have on the left side S&D and the Greens and so on, which

[214] Council of the European Union, Progress report, 12661/16, 7 October 2016;
Council of the European Union, Progress report, Presidency to Council, 15350/16, 7 December 2016
[215] Council of the European Union, Note, Presidency, 6572/17, 27 February 2017
[216] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Meeting, 11 May 2017

> will not be very keen to have such kind of system, they would see as a big information system interfering with people's private lives and costing too much in comparison to what it's meant to bring. So I expect very difficult discussion in the EP on this file, they will have many difficulties finding a common position and then you can expect that it will be a common position that is somewhere between the big data protection concerns and the concerns for more security, so I think in the end, it might be a good idea to include this law enforcement access from the beginning, because of course the opponents will have more strong arguments against, but I can imagine that on the right side, this will help EPP defend the system, because they would also see it as an element in the fight against terrorism and so on (...)"[217]

Rapporteur Diaz de Mera is generally favorable, but insisted on the balance between security and fundamental rights, voiced concerns about data protection with regard to interoperability with other systems, data retention and law enforcement access, technical questions regarding the modalities and procedures of access, as well as the procedure for dealing with temporary failure of the systems. Shadow Tanja Fajon (S&D) is not in favor of the new framing decision and the link make between border control and crime prevention, insists that it should be presented as a border management tool and the differences with regard to data collection and retention between trusted travelers and criminals should be made clear to guarantee fundamental rights, criticizes the data retention period as disproportionate and voices feasibility concerns for countries with busy land borders. Shadow Jussi Halla-Aho (ECR) strongly supports the new framing in terms of security and would like to extend law enforcement access. Shadow Angelika Milnar (ALDE) considers that the amendments have improved the Commission proposal, but there are still problems regarding the disproportionate retention period and the unclarity regarding protection of fundamental rights, criticizes the new framing and the double purpose of the new proposal saying that the law enforcement purpose is unjustified. Shadow Jan Philipp Albrecht (Greens/EFA) argues that data protection standards should be ensured at the highest level, data retention period and conditions of access for law enforcement most controversial, risk of turning it into a costly system of data collection with long retention periods that does not facilitate border control in the end.[218]

However, the perception the Parliament gave in the second round of negotiations with the Council was quite compromising, it signalled awareness of the security

[217] Interview 24
[218] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Committee Report, A8-0057/2017, 8 March 2017

agenda, and an instrumental goal of avoiding blame for a potential failure to produce results in matters of combating terrorism: "for the EES trilogues the mood is very different in the EP, from financial concerns are less important now, everyone is fully committed to having a quick agreement until June, every institutions is adapting to the new context, no institution wants to be the one to be blamed for not having new tools to combat terrorism, which matters for EP."[219]

There have been some compromise attempts between Council and Parliament, initiated by the rapporteur and the Presidencies. Regarding law enforcement access, some national delegations in the Council wanted to further extend access, but eventually agreed to the Presidency compromise which limits law enforcement access to what is possible under the current legal framework. The compromise proposal by Presidency from 22 May 2017 summarizes the following positions: the Council wanted to extend the scope by changing the (a) the reference to 'designated authorities' rather than 'law enforcement authorities', also allow for (b) the possibility to access the EES even when the search in national databases results in a hit, include the (c) the possibility to proceed to access the EES once the Prum search is launched, and (d) the possibility to also check against refusal of entry records[220].

The Parliament on the other hand argued for (a) limiting the urgency procedure to cases where there is an 'imminent danger' related to a terrorist offence or other serious criminal offence and requiring the ex post verification to take place within two working days and also argued that (b) providing that there must be reasonable grounds to consider that consulting the EES will contribute to the detection, investigation or prevention of a terrorist/other serious criminal offence. Actually, it should be noted that 'reasonable grounds' would still be enough and certainty is not required. Moreover, a substantiated suspicion that the person falls within the scope of the EES would still be sufficient to fulfil this requirement[221].

Open issues between the three institutions that had remained after June 2017 are especially data retention period, data transferability, bilateral agreements, and the

[219] Interview 48
[220] Council of the European Union, Note, Presidency, 9415/17, 22 May 2017
[221] European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Committee Report, A8-0057/2017, 8 March 2017

scope of the system, especially whether or not to include non-Schengen members[222]. Nonetheless, the Maltese Presidency and the Parliament negotiating team were able to announce an informal agreement by 30 June 2017, which would result in an overall agreement after technical details had been settled:

"Malta is very good as a Presidency on this, they are a small team, but very coordinated, very involved in different dossiers, they have a language advantage with the EP, are very organized on the files, even if they did not expect to be involved in EES negotiations, because it should have been agreed upon under the Slovak Presidency, but there were coordination problems between EU and member states. Agreement would have been possible in December 2016, with a bit of pushing by the Slovak Presidency, the law enforcement access was the biggest issue, and the declaration by member states could have been a way out of the blockage."[223]

There are no official records of these negotiations, but the agreed upon inter-institutional position after trilogues shows that on most issues, the Council has agreed on a number of safeguards regarding access to data for law enforcement purposes and the Parliament agreed to a more extensive data retention period for overstayers (5 years instead of 4 years as demanded by the LIBE rapporteur)[224]

After summer, the rapporteur confirmed the final agreement in the Parliament in late October 2017 and the Council signaled informal agreement through the Estonian Presidency in late November 2017[225]. The formal adoption was confirmed on November 29 by Council and Parliament and the adopted proposal was published in the official journal on December 9[226]. The solution for the more controversial issues was, comparable to the Schengen case, a creative legal and textual one, in this case constructive ambiguity in the formulation of the legal text, which leaves discretion for implementation and enables the actors to frame the agreement in a way that is beneficial for them.

[222] Council of the European Union, Note, Presidency, 10545/17, 26 June 2017
[223] Interview 48
[224] Council of the European Union, I/A Note, Council Secretariat General, 14092/17, 10 November 2017
Council of the European Union, I/A Note, Council Secretariat General, 14092/1/17, 15 November 2017
[225] Council of the European Union and European Parliament, First reading position, Legislative Acts and other instruments, PE 47 2017 INIT, 8 November 2017
[226] Council of the European Union and European Parliament, Legislative Acts, PE 47 2017 REV 1, 30 November 2017

5.3.6 Model fit and evaluation of the evidence

Looking at the process analysis, we find a clear indication in the data that the reason for failure of Smart Borders is to be found at the policy formulation stage. There are indicators for both strategic miscalculation, some evidence in favor of technocratic failure and activism and no indication that the Commission did not play an important role in the origin and process of failure.

In this case, the compromising positions of both institutions in the second round seem to stem from a concern to ensure that everyone can achieve gains, which is in line with the assumption that the institutions strategically use the second negotiation round to create winners: "It cannot be at the end of the day that the Parliament thinks that the Council won more, it has to be a win-win situation, to keep the balance between the institutions, at least to me, it's always something people keep in mind, whether you have personal success or not."[227]

Reviewing the process leading to withdrawal, the following conclusions can be drawn about the mechanisms of failure and the conditions, which were present or absent in this case.

As regards mechanisms, faulty agenda-setting due to a flawed drafting process in the DG Home and a deliberately dissonant framing of the package in combination proved to be an impossible ground for negotiation for Council and Parliament, states in particular felt that the package as presented did not correspond to their needs in terms of border management and border security. The key component of failure was the division in the Parliament and the state representatives' ability, led by the Presidencies, to exploit the division and rally the conservative majority to the Council majority, by appealing to the EPP rapporteur. In terms of conditions, both trust in the Commission as an agenda-setter and technical expertise and preparation on the side of the Commission by Council and Parliament were lacking. Due to the technical complexity of the issue and the insufficient evidence, flexibility on the side of the Commission to adequately respond to Council or Parliament demands was not given either and the Commission was deemed unfit to mediate and find an acceptable compromise based on its proposal. The new Commissioner, the conservative Greek Dimitris Avramopoulos, adopted a position that was less directed at promoting liberal

[227] Interview 47

rights and pronounced himself more in favor of a security approach than the former Swedish socialist Commissioner, Cecilia Malmström.

The discretion available to Commissioners in the drafting process and the framing of the proposal was exploited by Commissioner Malmström to steer the proposal towards a liberal rights agenda, Commissioner Avramopoulos showed more willingness to include co-legislator demands into the draft proposal, which explains why the new proposal responds to the demands made during negotiations between Council and Parliament in the first round, mainly the Council's demands about security elements.

As for the influence of relais actors on the process of failure, there was no particular contribution of the Council Presidencies in pushing for failure, since the positioning of state delegates was rather clear on the issue and the proposal was rejected by both Council and Parliament before actually adopting formal positions and starting trilogue negotiations. However, the Irish and Lithuanian Presidencies invested much time in collecting information about the preferences of the different delegations and working out the problematic substantive aspects of the proposal, the Greek and Italian Presidencies continued the technical discussions about the system, especially the request for more law enforcement and the Latvian and Luxembourgish Presidencies mainly discussed law enforcement access and the French proposal to extend the system to EU nationals. Those were the main Council inputs for the Commission's redrafting exercise and the new proposal strongly reflects the elements agreed upon by the Council in working party and COREPER discussions. The Presidencies therefore have contributed to playing the part for the Council in the strategic game of informally lobbying the Commission to achieve gains in the second round.

As would be expected in a strategic model, in the second round, there was a stronger role for Presidencies and the behavior was geared towards consensus-building, because the new security rationale of the proposal was better received by the Council, but there were still controversial aspects remaining, before an agreement could be reached. The Dutch and Slovak Presidencies proposed compromises on the calculator issue, interoperability law enforcement access and data retention and Malta was able to achieve a trilogue position in March 2017, even though most of the

controversial discussions were still ongoing, which shows that the second proposal was much closer to Council interest and there was a general push to negotiate with the Parliament and achieve an agreement on the policy instrument.

Both LIBE rapporteurs on the first and second round EES proposals came from the EPP group, the RTP rapporteur was from S&D, the first round rapporteur Renate Sommer (EPP, Germany) already pushed for a security rationale in LIBE in 2013, her successor Diaz de Mera Consuegra (EPP, Spain) focused more on the cost and feasibility concerns in the first round in 2014 and 2015, because those were the main concerns for S and D and ALDE MEPs who would be necessary for the supporting EPP to form a majority. In March 2017, around the same time the Council reached a trilogue position, the rapporteur Diaz de Mera Consuegra was able to rally a majority to adopt a trilogue position by inviting the Commission to discuss the inclusion of data protection elements and ensure proportionality and necessity in law enforcement and interoperability matters to make the proposal acceptable to the S&D and ALDE. This indicates that for the Parliament as well, the second proposal was acceptable and there was a desire to push for agreement on the policy instrument.

There as a reframing exercise by the Commission which points towards the strategic model. The initial framing did not help convince Council and Parliament of the usefulness of the tool, since it aroused the suspicion that the Commission was trying to create a huge centralized system, which would ultimately benefit itself, but not states (Bürgin, 2017). In the second round, as the data shows, the Commission adapted its framing to include more security elements and took over many of the Council's suggestions regarding law enforcement access and other security elements, thereby displaying the intent to achieve a compromise that would acceptable to the Council. In the negotiations between Council and Parliament, the Commission assumed an honest broker role in the second round, leaving it to the co-legislators to bargain over the detailed provisions.

As far as structural factors and the influence of the two-level setting go, we can observe that the coincidence of migration and security crisis made it more attractive for the Council to consider the proposed package even if it is costly, where before the Council considered it an additional costly Union instrument without added value. The

aggravation of the crisis in 2015 opened a window of opportunity for the Commission to exploit with a more security-oriented framing of the proposed border system. Therefore, the Commission changed its framing to respond to the Council demands in terms of security elements, especially regarding law enforcement access, collection of biometric data and removed costly and non-security related elements, such as the Registered Traveller Programme. The framing concerns both official documents and public statements, as well as informal signals to the co-legislators.

For the Parliament the shift in public opinion and government agenda in reaction to the migration and security crisis mattered in so far as it adapted its position to be more open towards a security approach. The Parliament was aware that as pressure increases on national governments due to rising concerns in the public opinion and pressure by populist parties, the representatives in the Council would adapt their strategies to focus on border security rather than open borders.

The European Council conclusions also reflect this shift, from 2013 to 2015, heads of state amplified the security rhetoric and asked for an extension of the scope to law enforcement. After the 2015, the European Council set a time horizon for negotiations and put pressure on the co-legislators to negotiate speedily.

The following tables summarize the main findings about conditions and mechanisms:

Conditions – Smart Borders **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Availability of informal channels/networks	+ Repeated exchange	- No evidence for lack of access to co-legislators	+ Repeated exchange	+ Repeated exchange
European Council support	- Support for policy change	+ No evidence of Commission not being aware of conclusions	- Support for policy change	+ Repeated exchange between Comission and European Council statements
Issue salience to governments	- Issue very salient	+ Evidence that Commission miscalculated the key focus	- Some evidence for attempt at push supranational elements	+ Evidence that Commission adapted to key focus in second round
EP issue support	- Support for the policy change	+ Commission aware of EP support	- Support for the policy change	+ Support for the policy change at agenda-setting
Window of opportunity	- Lack in the first round	- Evidence for Commission wrongly estimating agenda	- Some evidence that Commission pushed its own agenda	+ Commission exploited the window for a second round
Party politics overlap	- Evidence for agenda change unanticipated by Commission	+ No evidence for Commission not being aware of party majorities	- Some evidence for Commission pushing supranational design against party majority preferences	-/+ First round no, second round yes, after linkage of proposals
Preference overlap	- Evidence for lack of overlap in faiure round	+ Evidence for Commission not correctly translating	- Some evidence for Commission pushing supranational design	+ Proposals were adapted after failure to correspond to national preferences
Agenda overlap	- Agenda supportive of policy change	+ First round some indication of agenda miscalculation	- Agenda supportive of policy change	+ Linkage of proposals to respond to security agenda

(table 9, evaluation conditions Smart Borders, source: own illustration)

Mechanisms – Smart Borders **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Relais actor behavior	- Failure round no influence, second round strong influence	- Failure round no influence, second round strong influence	- Failure round no influence, second round strong influence	-/+ Failure round no influence, sucess round strong influence
Informal exchange during agenda-setting	+ Repeated informal exchanges, but no balanced output	- Repeated informal exchanges, but evidence for faulty translation	+ No evidence for deliberate disregard of evidence	-/+ Repeated informal exchanges, but evidence for faulty translation in the failure round, adequate translation in the second round
Blame gains COM	+ No evidence for balanced proposal	- Strong evidence for Commission miscalculation	- Some evidence that the rationale was supranationalist	+ Blame gains the second round for providing a centralized system, but no blame gains in the first round
Blame gains co-legislators	- Blame gains in the first and second round	+ Strong evidence for blame attribution for miscalculation	+ Limited blame attribution for supranational elements	+ Blame gains in the first and second round
Learning/ updating COM	+ Updating and learning in reaction to agenda change	+ Updating and learning in reaction to input from co-legislators	- Deletion of supranational elements	+ Strategic balancing between co-legislators in second round

(table 10, evaluation mechanisms Smart Borders, source: own illustration)

5.4 Border policy: comparative findings and conclusions

There is evidence in both cases for a strategic game between the three institutions, but also some evidence for technocratic failure. The Commission clearly responded to member states' input on the framing and the purpose of the Smart Borders system and recast a more security-oriented second proposal, and it also responded to the member states' demands for a compensatory security element in the Schengen case, to make the supranationalization of the Schengen Evaluation Mechanism acceptable. The Commission failed to link its proposal to the member state agenda in the first round, but successfully used the shift to a security agenda as a window of opportunity for the second round.

When comparing the two cases, it becomes obvious that the conflict dimensions were different in nature, even though there were preference conflicts both in the Council and between Council and Parliament in both cases, the Schengen Governance negotiations mostly focused on the procedural conflict between the Council and the Parliament, whereas the Smart Borders negotiations ultimately brought Council and Parliament together and made them confront the Commission on a proposal that was considered disproportionate by the co-legislators

Though it is difficult to draw general conclusions from one case study, there are still a few things to be observed, most of which are unsurprising: National politics prevail over legal matters: legally, the two aspects, first the reintroduction of border control by France, and second the legal basis of the Schengen Evaluation Mechanism, would not have required new legislative action, as both were in conformity with the EU law, but national politics and saliencies triggered action on the European level. Salience or politicization however have to be put into perspective: salience and politicization of an issue on the national level might matter at the agenda-setting stage and even at the initial stage of negotiations in the Council, yet not be determinative for the decision outcome. Salience or politicization are endogenous in many ways: first of all it is not constant for states, thus state representatives, throughout a negotiation process (which sometimes takes several years) due to changes on the domestic level (such as elections, crises etc.), second there is no effect by itself on the negotiation process but needs to be strategically used by actors to be effective, and third, its effect depends very much on the context of the

negotiation (issue, actors involved etc.) whether or not a strategic use is successful. Salience or politicization of an issue is no guarantee of success in EU negotiations, though they might be a successful strategy for bringing an issue to the EU level, but not for being successful in the actual negotiations.

Overall, relais actors mattered, if they were considered trustworthy and experienced relais actors, like the rapporteurs in the second rounds of Schengen and Smart Borders, failure can be avoided, whereas untrustworthy actors, such as the Commission official in the first round of Schengen and the left-wing rapporteurs in the first round of Smart Borders had to be replaced to enable agreement. The Council Presidencies played an ambiguous role in the Schengen case, the Danish Presidency almost led to another round of failure in the second attempt, whereas in the Smart Borders case, they perfectly assumed their honest broker role.

The Council Presidency as a relais actor played an ambiguous role in the Schengen negotiations, it both aggravated the conflict and helped solve it in the end. The reason for this can be found in the individual Presidencies that took place during the process, especially the Danish Presidency and the subsequent Cypriot Presidency. Presidencies do sometimes take positions, making the negotiations very complicated, as the Danish Presidency did in 2012. There was great pressure by a majority of state representatives on the Polish and subsequent Danish Presidency to change the legal basis to Art. 70 TFEU to exclude the Parliament from the Schengen Evaluation Mechanism reform. However, there was no unanimity in the Council between 2011 and 2012, as the Belgian and Luxembourgish representatives firmly opposed the application of Art. 70 TFEU. In 2012, the Danish representatives decided to support and push the proposal for an application of Art. 70 TFEU and also supported the security rationale, more competences for member states in internal border control. This decredibilized the Danish Presidency in the eyes of the Parliament and encouraged the rapporteurs to break off the negotiations and suggest a blockade (Zaioitti, 2013). The Presidency changed at the end of 2012 and the Cypriot delegation decided not to take a position on the issue and focus on restarting negotiations with the Parliament. The Cypriots strongly relied on the assistance provided by the Council Secretariat General and the legal service, which came up with a proposal for a bridging clause, allowing the Parliament to be involved in future

reforms of the Schengen Evaluation mechanism through a reference to it in the Schengen internal borders file of the package. This created a de facto situation of co-decision for future reforms of the Schengen Evaluation mechanism, as all reforms of the Schengen Borders Code have to be executed under co-decision and the bridging clause included the Evaluation Mechanism in that list (Carrera et al., 2012; Dinan, 2013).

The Council legal service played a considerable role in the conflict resolution, as the legal experts came up with a solution that was sufficiently technical to take the political tension out of the procedural battle between the institutions, yet not so technical as to disregard the political importance and sensitivities involved for the Parliament. It also convinced the legal service experts of the Parliament that the application of Art. 70 TFEU was indeed correct in this case. The EP legal service in turn convinced the rapporteurs to accept an issue-linkage compromise, since a legal procedure before the ECJ could not be won by the Parliament in any case.

As for the role of the Council Presidency and the Council legal service in the Smart Borders case, it was less ambiguous and conflictual, because no Presidency took a particular position or exploited the issue in their favour, instead all delegations assumed their role of mediator and tried to establish a common position for the Council, but its behavior still proved to be important with regard to the failure of consensus-building on certain matters. The main role of the Presidency consisted of trying to abide conflicts between delegations on substantive matters, especially law enforcement access and data protection questions. The Lithuanian and Latvian Presidencies had to resort to a great number of informal meetings with delegations in working groups and COREPER II in order to bring member state delegations to a common position on these issues.

The issue-linkage proposal coming from the legal services and the Council Secretariat General provided a solution for the deadlock in the Schengen case: by depoliticizing the issue and providing a legal solution for the procedural problem, the actors were successful in convincing the majorities in their respective institutions of the value of an agreement. The state representatives in the Council were willing to accept the bridging clause solution, because they desired an agreement on the substance of the proposals, especially the strengthening of border control criteria in

view of the escalating migrant and refugee crisis. Coalition-building proved to be crucial in the Smart Borders case, as the security rationale was enforced through the initiative of the French and the German delegations and their success in building interest-based and issue-specific coalitions with other big member state delegations (law enforcement access, security rationale for the entire Entry-Exit System).

The rapporteurs, especially the EPP rapporteur of the Schengen Evaluation Mechanism file, Carlos Coelho, played an important role in the Schengen negotiations, both in terms of fostering the deadlock, as well as solving it. Carlos Coelho, very trusted by his committee colleagues from all parties as the expert on border matters, convinced the plenary to engage in the battle over competences with the Council and block the negotiations after Art. 70 TFEU was enforced and he was also the one who successfully negotiated a compromise between Council and Parliament after the deadlock. Together with the Cypriot Presidency, the Council General Secretariat and the legal services of Council and Parliament, Coelho managed to convince the plenary to accept the bridge clause solution in the two proposals forming the package, which guaranteed the Parliament's involvement in future reforms of the Schengen Evaluation Mechanism in exchange for accepting to vote this reform under Art. 70 TFEU. The importance of a united plenary for the negotiation power of the Parliament is crucial in case of conflict between Council and Parliament. The rapporteurs were successful in uniting the plenary on the procedural questions and form a large coalition to confront the Council, which resulted in augmenting the Parliament's influence on the negotiation process and contributed to its success in getting the Council to moderate its position.

As for the role of the rapporteurs and shadow-rapporteurs in the Smart Borders negotiations, the most interesting observation with regard to agency in the EP is the change of rapporteurs from 2013 to 2016, which resulted in a de facto exclusion of left-wing rapporteurs from the negotiations, as all rapporteurs are now from the EPP group. This probably accounts for the fact that the EP no longer shows internal division on matters of data protection and law enforcement access and is more supportive of the security rationale in the LIBE committee than it was in 2013.

In the Schengen governance negotiations, the Commission representatives tried to push for a more Union-based mechanism from the outset, but did not play a very important role and they were quickly sidelined as the conflict between the Council and the Parliament escalated. The delegates were also not very successful in

contributing to the resolution of conflict. However, the solution that was finally found did resemble its initial preferences quite a lot, since the Evaluation Mechanism now contains safeguards against member states relying on peer-to-peer procedures rather than conducting proper evaluations of border control performances. Also, the Commission is significantly more involved in the process of border control evaluation and got the right to undertake impromptu control visits. So, the Commission seems to have benefited from the conflict between Council and Parliament in substantive terms. The European Council intervened in the beginning of the negotiations by supporting the request for a strengthening of national competences in internal border control questions, but withdrew from the negotiations as the conflict between the Council and the Parliament escalated over procedural questions, as there was no point for the heads of state to get involved in this matter.

The Commission started of ambitiously by framing the Smart Borders Package as a means to communitize external border management and develop a monitoring mechanism for movements inside the Schengen area, but from a very technical perspective. The combination of a highly technical, costly system that did not provide any measurable security benefit and the underlying intention of the Commission to increase its influence through the system proved to be off-putting for the Council and the Parliament. Thus, the Commission found itself confronted with criticism from both co-legislators, who focused on their rejection of a financially unsustainable project, rather than their differences regarding the content of the proposals. Strategically, the Commission's agenda setting was not very beneficial, so it had to reconsider its strategy and withdraw the proposal, as it was clear that it would be rejected under these conditions. The new proposals seem to be much closer to the requests by the Council, in particular, and reflect the security rationale that was desired after the agenda shifted to focus on terror prevention. The European Council set the framework for the proposal in 2013 by encouraging the Commission to come up with an idea for better management of the external borders. However, the heads of state were sensitive to the agenda change with the occurrence of terror attacks in several member states, so the European Council changed preference and intervened in 2015 to call for a revised rationale of the Smart Borders Package with a stronger focus on security.

With regard to the success or failure of consensus-building, the following observations can be made:

In the case of the Schengen Governance Reform, actors managed a to achieve an agreement in the second round, which is quite balanced and does not overly favor any of the institutions. Nevertheless, the Parliament's blockage strategy paid off, even though the package was not decided under co-decision for the Schengen Evaluation Mechanism, the decision-making process of the package de facto involved the Parliament in every step of the negotiations and eventually resulted in the Council agreeing on a bridge clause between the two proposals guaranteeing the Parliament a say in all future reforms of the Schengen Evaluation Mechanism. The Council had to concede to the Commission and especially the Parliament on a number of substantive and procedural aspects: the Commission negotiated its involvement in the decision-making process about Schengen border control evaluation and the Council had to relinquish the peer-to-peer mechanism for a more standardized evaluation system. The Council successfully defended the strengthening of the criteria regarding the reintroduction of border control, but the Commission and the Parliament succeeded in avoiding renationalization of internal border control competences. The Commission's original proposals foresaw a much stronger role for itself both regarding Schengen evaluation and decisions about border control. It had to renege most of its positions in the course of the negotiations, as the Council and the Parliament.

As for Smart Borders, the initial negotiations resulted in a failure to reach a consensus on the proposal between co- legislators and disagreements with the Commission on the package, in particular the conditions of functioning of the Entry-Exit System and the purpose of the Registered Traveller Programme in view of its costs. Two reasons seem to prevail: The Commission submitted a proposal that was framed in a way that was not acceptable to the Council and the Parliament, as it was highly technical, to Union-focused and involved exorbitant costs compared to perceived small benefits. Persuasion and informal negotiations seem to also be the working mode of rapporteurs to exert influence for the Parliament in co- legislation processes, however, the Smart Borders case suggests that the Council actors are more successful than the Parliament actors, as the new proposals are closer to the Council's initial positions and overall, those representatives with a stronger preference for a security rationale seem to have been more successful, as both proposals ultimately contained a security rationale, linking border control and management to the terrorist threats and the uncontrolled migration influx. The final

agreement achieved in the second round of negotiations is closer to the Council than the Parliament, but the Commission gains significant influence in the external border policy area with the new centralized monitoring system. Thus, the Commission's strategic approach in the second paid off: the Council accepted the new centralized border management approach in exchange for more security elements in the design.

In comparison, the role of the Commission, its influence on the process and success in having a favourable decision outcome strongly vary and depend to a large extent on its agenda-setting strategies: the more sensitive the Commission is to the saliencies on the agenda of member states and the Parliament, the more likely it is that they will view the proposal favourably and actually enter into negotiations. However, this does not guarantee a favourable outcome, as the behavior of Commission representatives during the negotiations is also crucial: the more successfully they convey the relevance of the proposal to the institutions, the more likely it is that agreement is found, but if they cannot convey their position, the success depends on the Commission adapting its position to move closer to the co-legislators. So relais actors in this case have to be willing to seek compromise and push the relevant Commission unit to reconsider its framing if necessary, as it happened in the Smart Borders case. The European Council has an impact on the Commission's agenda setting strategies, but its influence seems to vary according to the political agenda of the heads of state: the more political an issue, the more involved they are throughout the negotiation process, whereas they tend to disengage once the issue is or becomes technical or procedural.

All in all, Justice and Home Affairs seems to be an area where the strategic game functions particularly well, for all institutions, presumably due to the longstanding experience of all institutions in dealing with each other. The Commission knows where and to what extent it can push the co-legislators with demands and when it has to adapt to the Council, in particular, to exploit the window of opportunity for policy change.

VI. Social and Employment Policy: dynamics of policy failure in the area of gender equality policy

6.1 Introduction

Overall, the area of Social and Employment Policy has been a policy area of minimal EU involvement, where the nation state prevails (Falkner, 2000; Offe, 2003), however the progress of single market integration has led to the inclusion of social issues in the European policy agenda (Obinger et al., 2005; Anderson, 2015). The entire policy area has remained a challenge for European Integration due to member state insistence on state competence before, but post-crisis less important and overshadowed by other areas and issues. To this day, it has remained one of the most contested policy areas in the EU, there has been comparatively little binding legislative output: only 5 directives have been adopted since the beginning of communitarisation in the mid-1990s. A majority of proposals were either significantly watered down or outright rejected. The most disputed and rejected proposals concern the impact on member states' socio-economic structure, especially the labour market and welfare system (Tomlinson, 2011; Ostner and Lewis, 1995). Since the late 1990s, the EU changed its focus in the area from employment to dealing with inequality in the larger sense, including household relations and welfare provisions and developed a "gender mainstreaming" strategy, which affected a number of policy areas in the Lisbon framework (Duncan, 1996; Rubery, 2002). Yet, in that same framework, the Commission also continued pushing for equality in the employment sector and started setting concrete goals in terms of quantitative targets in the employment sector: achieve 70% total employment, 60% employment for women and childcare provision to cover 33% of children aged 0-3 and 90% aged between 3 and mandatory school age by 2010 (Tomlinson, 2011). As social policy remains an area of sovereignty, the preferred mode of decision-making is non-binding legislation, soft law and the open method of coordination. Member states are most sensitive about binding legislation, especially if it concerns the labour market. The Commission deliberately links gender equality measures to the labour market in its discourse, to make up for the fact that it does not possess much competence in employment matters. By linking gender equality and family policy matters to the labour market, the EU can push integration of employment policies through the back door (Lombardo and Meier, 2008).

Social and employment policy oriented towards gender equality is an area of high importance to member states, leading them to frequently resist and oppose Commission proposals on the matter (Klein, 2013; Van der Vleuten, 2007; Leibfried and Pierson, 1996). Of all member states, the British have been the most reluctant to agree to any form of interference of the EU in social and employment policy matters (Van der Vleuten, 2007; Ravn-Nielsen, 2016). The areas of gender equality and family policy are particularly interesting, because most member states significantly invested in national legislation on that matter in the past decade, regarding both family policy measures like paternity and maternity leave, as well as child-care provisions, and gender equality measures in the workplace, including (Franceschet and Piscopo, 2013; Praud, 2012), yet continuously contest the EU's attempts to legislate in these areas (Tomlinson, 2011). Some argue that due to this resistance and the many unsuccessful attempts to push for common legislation, the Commission has decreased its efforts over time (Jenson, 2008). Others do not consider the Commission to have given up on her efforts, but rather focused on the economic dimension, thus framing policy in terms of work-family reconciliation and labour market participation of women (Lewis, 2006; Duncan, 1996). The European Parliament has become a crucial factor for policy progress, since it strongly advocates gender equality and family policy measures (Van der Vleuten, 2007). Similar to other studies about policy-making, scholarship on social and employment policy also mainly focuses on institutions apart from each other or the EU's action as a whole compared to member states. What is missing is an analysis of the process, including the negotiation process between the institutions leading to policy success or failure. Especially since there are no comprehensive explanations for why some proposals have passed, where many others fail.

Even after Lisbon still one of the least integrated areas, member states are very reluctant to give up competences to the EU and there is comparatively little in terms of strategies and programmes coming from the European Council (Klein, 2013), member states carefully protect their prerogatives in social policy (Leibfried and Pierson, 1995; Van der Vleuten, 2007). Any intervention that is accepted by member states is due to normative pressure no to refuse equal rights measures and the primacy over ideological benefits of claiming to promote gender equality, which can

outweigh economic costs (Milward, 2017). The British have been the most resistant in terms of family policy, the UK has vetoed several parental leave proposals and later on opted out of most gender equality measures (Van der Vleuten, 2007).

Since the 1990's, the EU has delivered little in matters of gender equality, since the outset of the Union, the EU has adopted 5 equality directives, including provisions on women's health over the past two decades, all of them have been either watered down entirely or rejected outright (Tomlinson, 2011), all those proposals that were contentious and either modified or rejected would have had a major impact on women's socio-economic status in many member states and public spending (Lewis, 2006; Van der Vleuten, 2007).

The early 90's EU's gender equality measures were focused on employment rather than decreasing inequalities beyond the labor market, in household relations and provisions (Duncan, 1996), later it also included provisions on the EU's commitment to equal opportunities following improvements on women's representation in parliaments and working-time arrangements, regulation of part-time work and a more developed framework on the reconciliation of work and family life (Tomlinson, 2011).

However, the EU has largely preferred soft law and the Open Method of Coordination, which do not coerce member states, all legislative measures are closely to the labor market, any measures on "gender mainstreaming" are largely soft policy coordination (Shaw, 2002; Lewis, 2006; Tomlinson, 2011). Interestingly, the EU's Lisbon Strategy is more ambitious, setting quantitative targets for women's employment rates to achieve 70% total employment and 60% employment for women, the reduction of the gender pay gap and child-care coverage of 33% for children aged 0-3 and 90% for children aged 3 to mandatory school age by 2010 (Jenson, 2008; Tomlinson, 2011).

Social and employment policy is significantly less integrated than other policy areas, yet it is not a fully sovereign area anymore either, since there have been significant spillover effects from internal market policy since the 1980s (Van der Vleuten, 2007). The Commission as long pursued a low politics strategy in social policy, since it has little room for maneuver due to restrictive treaty provisions (Haverland, De Ruiter

and Van de Walle, 2016). The area is increasingly marked by high politics struggles over proposals to strengthen treaty provisions on social policy and a gradual erosion of national sovereignty in matters of welfare by the Commission and the CJEU and the Council trying to guard its right to being gatekeeper to Commission initiatives. Before 2014, the Commission DG Employment, Social Affairs and Equal Opportunities (DG EMPL) was in charge of gender mainstreaming, mainly focusing on ensuring that all directives are legally compatible with the equal opportunity requirements (Jenson, 2008), with the Commission's shift to the center-right and the Eastern enlargement, gender mainstreaming has lost importance in terms of policy output compared to the 80s and 90s, the EU focuses on discrimination, employment and inequality more generally now (Jenson, 2008). The Parliament has developed into a key element of policy progress in substance and quantity of policy measures (Van der Vleuten, 2007).

States still show a diverse picture when it comes to passing gender equality legislation, yet they increasingly invest in gender equality measures in the post-Lisbon period, including the introduction of quota legislation, at the national level, signalling that there is a consensus about the necessity to introduce measures to promote women (Franceschet and Piscopo, 2013). There have been recent legislative reforms in Portugal, France, Belgium, Italy, Spain, Germany and Sweden, party ideology and contagion across borders as well as EU discourse on the necessity of enhancing women's involvement in decision-making providing the impetus for the changes (Praud, 2012). As for the influence of party ideology, France, Portugal, Spain, Germany, Sweden: social democratic and socialist parties pushing for legislative change with party contagion effects in Portugal, Spain, Belgium (Baum and Espirito-Santo, 2012; Murray et al., 2012), the women's branch of political parties and civil society impulses have a particular importance in Portugal, Spain, Belgium (Meier, 2012) where as in Italy, policy change often occurs through constitutional court advancement (Suni, 2012).

6.2 The Maternity Leave Directive: (ongoing) strategic failure?

The reform of the Maternity Leave Directive dates back to 2008 and was a Commission initiative to reform the very dated directive from 1992, which was considered to no longer be adapted to the current situation in society and in the labor market. The main aim of the reform was to increase protection of pregnant women and young mothers, legally from a health and safety perspective by extending the duration of maternity leave and politically from a gender equality perspective from being discriminated against by providing a higher level of pay and guarding them against termination and demotion. The proposal was immediately welcomed by the Parliament and the relevant committee for gender equality developed a strong position, exceeding the proposals of the Commission in most aspects. The Council reacted very negatively to the Parliament's demands and halted negotiations for six years, never formally adopting a trilogue position. The Parliament exploited the Council's blockage for a very public blame attribution and the Commission benefited from the Parliament's activism to be cast in the role of mediator. The Council's blame avoidance strategy consisted of constantly throwing the ball at the Parliament and demanding that it give up its ambitious position. Ultimately, the Commission withdrew the directive in 2015 and recast it in 2016 as part of a work-life-balance package in the European Pillar of Social Rights, after holding a number of consultations. The negotiations have not progressed past intra-institutional coordination, the Council is discussing subsidiarity issues and technical details of the proposal, the Parliament is still negotiating in the relevant committees. There is no signal of blockage from either of the institutions at this stage.

Maternity Leave: Timeline of negotiations (formal procedure)		
Previous legislation	Round 1	Round 2
Council Directive 92/85/EEC (reference for round 1) Council Directive 2010/18/EU (reference for round 2)	3 October 2008: Commission proposal for a Regulation of the Council and the Parliament COM/2008/0637 final COD 2008/0193 on measures to improve health and safety of pregnant workers, women who have recently given birth and women who are breastfeeding 9 March 2009: discussions in the Council preparatory bodies 6 May 2009: Parliament referral to committees 8 June 2009: discussions in the Council preparatory bodies 20 October 2010: Parliament opinion on first reading 6 December 2010: discussions in the Council preparatory bodies 17 June 2011: discussions in the Council preparatory bodies 6 August 2015: withdrawal	27 April 2017: Commission proposal for a Regulation of the Council and the Parliament COM/2017/0253 final - 2017/085 (COD) on work-life balance for parents and carers 28 April 2017/28 June 2017/30 June 2017/7 July 2017: discussions in Council preparatory bodies 15 May 2017: Parliament referral to committees

(table 11, Maternity Leave timeline, source: own illustration)

6.2.1 The proposal

The so-called Maternity Leave Directive, officially the “Directive of the European Parliament and the Council amending Council Directive 92/85/EEC 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”, negotiated from 2008 to 2014, contains several aspects regulating women’s work conditions during pregnancy and after childbirth. The most important and most controversial aspects were the following: the Commission proposed an increase of maternity leave duration from 14 to 18 weeks, proposed full payment for the entire leave period, but included a possibility for member state to set leave allowance to the level of sick pay.

The new proposal is situated within the “European Pillar of Social Rights” and the broader objective of addressing work-life-balance challenges faced by working parents and carers. The Commission presents the revised directive on leave provisions as part of taking a “broader approach in order to address women’s

underrepresentation in the labour market"[228]. The new legislative proposal is taking "into account the developments in society over the past decade in order to enable parents and other people with caring responsibilities to better balance their work and family lives and to encourage a better sharing of caring responsibilities between women and men."[229]

The proposal for a "Directive on Work-Life-Balance for Parents and Carers"[230] addresses several types of leave: four months of parental leave compensated at least at the level of sick pay and non-transferable from one parent to another. Parents will also be able to take part-time leave in a flexible way and the age of the child up to which parents can take leave is increased from age 8 to 12. Paternity leave is introduced, fathers/second parents will be able to take leave up to 10 days around the time of the birth, compensated at least at the level of sick pay. Carers' leave is also introduced, workers caring for seriously ill or dependent relatives can take 5 days per year, compensated at least at the level of sick pay. The right to ask for flexible working arrangements is also extended to parents with children up to the age of 12 and carers.

6.2.2 Policy formulation, conditions and conflict constellations

In 2008, the Commission decided to propose a revision of the maternity leave directive from 1992, proposing a 4 week increase of the period of maternity leave arguing that it corresponds to a "modest increase", with full payment, which corresponds to the situation in most member states, notwithstanding the fact that there is a variation which goes from 14 weeks to 28 or 52 weeks in some states. The Commission combined different types of frames, arguing from an economic perspective, that a longer maternity leave will discourage mothers from taking parental leave, from a health perspective that longer maternity leave is better for the health of mother and child and from a rights and gender equality perspective that longer paid maternity leave will decrease the inequalities between men and women. It included possibilities for discretion for member states in implementation, as they would be allowed to cap the allowance and determine the share of the allowance that is financed by the state.

[228] European Commission, Communication, COM(2017) 252 final, 26 April 2017
[229] European Commission, Communication, COM(2017) 252 final, 26 April 2017
[230] European Commission, Directive of the European Parliament and the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU COM(2017) 253 final, 26 April 2017

The first Maternity Leave proposal was not perceived as overly ambitious on the Commission's side by the member states[231], but it was framed as a rights-based proposal as visible in the Communication accompanying the presentation of the proposal, where the Commissioner deliberately presented it as a rights-proposed initiative that aims at improving women's rights and considerably increase the standards[232]. However, despite the rights-based framing, the text of the proposal allowed for several possibilities for discretion for member states and even considered the necessity to closely involve national governments and social partners in the process and the Commission was open to propositions of the Council Presidency to water down the proposal[233]. Actually, the Commission proved to be an imperfect agenda-setter rather than an overzealous one in this case. It significantly underestimated or misjudged the Parliament's intention in matters of maternity leave, overlooking the fact that the Parliament, at this stage still leaned towards the left and would take this as an opportunity to push for more integration in the social and employment area. In fact, the Commission's proposed flexibility measures would be the main reason for the Parliament to put forward even stricter demands to prevent member state representatives from watering the regulation down.

The conflict lines on the Maternity Leave proposal center around two dimensions: the choice of substance (1) and the choice of legal base (2). The Commission justified its choice for a significant upgrade in substance (1), especially duration of maternity leave and level of pay by referring to the international standards, set in the ILO Convention[234], to which the EU should adhere to ensure adequate protection of its citizens[235].The Commission justifies the choice for hard law by arguing that non-legislative measures, which have prevailed in the area, apart from the Directive on Maternity Leave (1992) and and the Directive on Parental Leave (1996), are not enough to reconcile private life and work and promote gender equality on the labour market[236], referring to the Impact Assessment of 2008 and several Commission staff documents that reflect social partner and stakeholder consultations. Regarding the

[231] Interview 41
[232] Interview 41; Interview 35; Interview 36
[233] Interview 29; Interview 61
[234] Interview 55; Interview 56
[235] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 14520/08, 24 October 2008
[236] Interview 55; Interview 56

role of social partners and the question of EU competence on the matter, the Commission argues that national social partners negotiate measures for parental leave, which means that Community action is required with regard to maternal leave only[237].

"In 2006 and 2007, the Commission consulted the European social partners on better reconciliation of professional, private and family life (...) In December 2007 the Commission consulted the Member states on the same range of options which had been included in the consultation of the social partners. As regards maternity leave, some member states were in favour of (modest) increases in the duration, some were in favor of increasing the payment and some were against any changes at EU level. Some other member states did not reply to the questionnaire."[238]

The Commission used the divisions inside the Council to its favor and presented the proposal, which corresponded to a policy upgrade, but argued that the proposal was justifiable as proportionate and did not violate member states concerns about violations of national sovereignty[239].

"In the light of the results of the consultation process and of the study commissioned by the Commission, the option of extending the duration of maternity leave and increasing the payment was considered a proportionate way of improving the health and safety of women as well as allowing women to better reconcile their professional and family obligations, thereby fostering equal opportunities between women and men in the labour market."[240]

The Commission also enquired after the positions of national stakeholders, social partners in particular, and claimed that it had included their views, however, a closer

[237] European Commission, Commission Staff Working Document, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, SEC(2008) 2595, 3 October 2008
[238] European Commission, Commission Staff Working Document, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, SEC(2008) 2595, 3 October 2008
[239] Interview 55; Interview 56; Interview 30
[240] European Commission, Commission Staff Working Document, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, SEC(2008) 2596, 3 October 2008

examination shows that a majority were not in favor of the proposal for the most part[241]: “In Germany, the proposal stirred a huge debate on why change legislation if it’s not necessary and there is no immediate pressure for it.”[242]

The justification for proposing binding legislation (2) despite the knowledge that it would be difficult for the Council to accept was to present it as a package of binding and non-binding work-life-balance measure, the binding ones being maternity leave and a directive on self-employed women, and the non-binding ones recommendations on parental leave and childcare[243]. It also justified the legislation as a health and safety measure towards the Council, rather than equal opportunities and gender equality, as the old directive was based on Maastricht Treaty provisions about health and safety at work, even though the directive also referred to equal treatment provisions in the Treaty of Lisbon[244][245].

The Commission linked the proposal to a demand by the heads of state for EU action in the area of gender equality. Indeed, the European Council mentioned work-life-balance three times in the conclusions from 2006 to 2008, specifically the reconciliation of work and private life, without an explicit mention of maternity leave.

“The March 2006 European Council stressed the need for a better balance between work and private life in order to achieve economic growth, prosperity and competitiveness, and approved the European Pact for Gender Equality. (...) In December 2007, the Council called on the Commission to evaluate the legal framework supporting reconciliation and the possible need for improvement. (...) The March 2008 European Council reiterated that further efforts should be made to reconcile work with
private and family life for both women and men.”[246]

[241] Interview 55; Interview 56; Interview 41; Interview 61
[242] Interview 31
[243] Interview 30; Interview 55; Interview 56
[244] European Commission, Commission Staff Working Document, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, SEC(2008) 2595, 3 October 2008
[245] Interview 34; Interview 32; Interview 41; Interview 57
[246] European Commission, Commission Staff Working Document, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, SEC(2008) 2595, 3 October 2008

However, while the heads of state referred to reconciliation in the years shortly before the economic crisis, afterwards the European Council did not actively push for the proposal anymore or call for any gender equality measures related to leave policy in particular. There was no signal of support by the heads of state throughout the negotiations on the file in the first round. Comparing the first and the recast proposal, it comes clear that the second package, explicitly dealing with work-life-balance and reconciliation of work and private life in a holistic fashion, not singling out mothers, corresponds more to the original request by the European Council, in substance and framing.

The first proposal to reform maternity leave came in the context of the aftermath of the economic crisis and fell into a period where member states' agendas were very sensitive to cost-heavy measures with a strong impact on the national labor markets and welfare systems[247]:

"Und 2008 war voll während der Krise, da waren die ganzen südlichen Länder waren zwar nicht dagegen, haben aber nicht gewusst, wie sie das zahlen sollen. (...)[248]"

"(...) but it feel as though the level of concern grew in the Council over that period, because we had the financial crisis, which hit around the time as the EP report, so member states which had been broadly supportive of the proposal became more concerned about the costs, (...) so we entered that kind of stalemate period and that persisted for a long period of time (...)"[249]

"Of course, during the period of handling this directive, the financial crisis at the European level occurred and there were some member states in the beginning that stated that the fully paid maternity leave could be launched, but when the years went on and the financial crisis hit those countries the hardest, they were not supportive anymore."[250]

There was overall little to exploit in terms of a window of opportunity, both when the Commission proposed the file originally and throughout the 7 years that it was

[247] Interview 57; Interview 53; Interview 54; Interview 61; Interview 34
[248] Interview 39
[249] Interview 61
[250] Interview 57

negotiated. The momentum for the proposal had passed by the time the Parliament delivered its opinion, because the Council had moved on to other files, and the situation in member states had changed as well, more states had taken their own measures on gender equality, so the policy demand was not the same anymore[251]. The momentum for compromise between the co-legislators passed very quickly, due to prolonged blockage, the Council had shifted attention away, as member states were less and less willing to engage with the Parliament's requests, given that the Parliament did not show willingness to engage with member state concerns in the wake of austerity[252]:

"(...) that the aspect of austerity measures was also a decisive element in the negotiations, member states emphasized that after the crisis in 2008, they had to cut certain benefits, including maternity leave, but the Parliament was not flexible enough to address these concerns and wishes of the delegations, so it was also quite an important aspect in the process."[253]

6.2.3 The negotiation process: mechanisms of deadlock

In the Council, conflict lines between member state delegations during intra-institutional negotiations in 2008 and 2009, centered around two dimensions, first a contestation of the legal base linked to subsidiarity concerns (1) and second criticism related to the design of the directive, especially the quantitative targets on duration of leave and level of pay (2).

The Council criticized the choice of legal base (1) as inappropriate and recommended gender equality or family policy as a better area of the Treaty to base the proposal on, as in this area, the Commission only has very limited possibilities to use binding law and would not have a precedent to build on[254]. The Council thereby suggested that the Commission change from binding law to non-legal measures and framed the possibility of changing from hard to soft law as a way out of potential, as non-binding would eliminate the co-decision problem and make the Council more willing to agree[255].

[251] Interview 41; Interview 34;
[252] Interview 34; Interview 61; Interview 38
[253] Interview 55, Interview 56
[254] Interview 34; Interview 61
[255] Interview 61; Interview 34; Interview 35; Interview 36; Interview 31

Substantive criticism of the Council focused on the mandatory period of leave and fixed level of full pay and the majority of delegates concluded after a year of discussions in the relevant working parties and COREPER I that "the Community rules were only minimum standards and that the Member States should be allowed to decide on the other rules concerning maternity leave in national legislation, referring for example to the timing and the obligatory nature of maternity leave."[256]

However, the Council as a whole did not have one clear-cut preference throughout the internal discussions from 2008 to 2011, there was a great amount of intra-institutional division on all fronts: The first controversial element was the duration and scope of maternity leave: a majority of delegations support the Commission proposal to extend maternity leave to 18 weeks, one third of delegations expressed reservations on extending maternity leave as proposed as they did not wish to only extend the leave solely to the mother, a number of delegations wanted to review parental leave more generally. The second element was the passerelle clause, a number of delegations were happy with the Presidency compromise solution, while others considered that the passerelle clause would not help all delegations as it excluded some issues like paternity leave, some delegations considered that mixing two systems could lead to confusion and implementation problems. Delegations also stressed the diversity of national legislations, some delegations emphasized that national regulations are very diverse and the proposal by one delegation to formulate the article more generally to allow for more discretion was welcome by some but criticized by others as it would lead to EU à la carte, whereas EU legislation in this case should just set minimum standards and not try to regulate flexibility or diversity. The obligatory portion of maternity leave and timing of maternity leave were also still controversial. Lastly, regarding level of pay, a number of delegations considered it unnecessary and not useful to include the reference to full salary, but the Commission maintained its proposal to fix full salary as an aim even if the Directive would allow for other practices[257]. Some members states, especially the northern and western member states, like Sweden, Denmark, the Netherlands, were not against EU legislation on the matter in principle, but rather criticized the narrow scope and

[256] Council of the European Union, Press release, 2930th Council Meeting, Employment, Social Policy, Health and Consumer Affairs, 6854/09, 9 March 2009
[257] Council of the European Union, Note General Secretariat to Delegations, 5004/11, 5 January 2011

demanded a more general assessment incorporating different measures of family-related leave[258]. Other states argued that regulating mandatory maternity leave might negatively affect the situation of women and mothers on the labor market, as it would disincentivize employers from hiring women[259].

"A certain number of delegations welcomed the extension of leave proposed by the Commission; some delegations, however, expressed doubts."[260]

"Issues regarding the length of maternity leave, the allowance and relation with paternity leave are more sensitive. Views expressed during the EPSCO Council showed a broad diversity of situations in the different Member States. Accordingly, Member States' positions vary considerably and will require in-depth discussions."[261]

Council Presidencies initially played a strong role in trying to find a compromise in the Council, until the Parliament adopted its position. The French and Czech Presidencies strongly invested in finding compromise between member states, the Czech Presidency proposed a flexibility clause, which would allow member states more discretion in implementation[262]. The French Presidency was the first to propose a compromise to deal with the duration of leave issues, especially dealing with the controversial Article 8a of the proposal. A large majority of delegations affirmed that they liked the flexibility of the previous Directive (1992), but some delegations accepted the Commission proposal (Estonia, Italy, Lithuania, Hungary, Finland, Latvia) and were in favour or a more ambitious approach. Critics of the proposal mainly referred to concerns about implementation (Malta, Spain) , some delegations also criticized the restrictive scope, as the proposal only referred to mothers and not generally to parents (Belgium, Germany, Denmark, Luxembourg, Malta, Netherlands, Austria, Portugal and Sweden) had reservations on extending maternity leave as proposed, the majority of them did not wish to reserve the extension solely to mothers.

[258] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 14520/08, 24 October 2008
[259] Council of the European Union, Press release, 2930th Council Meeting, Employment, Social Policy, Health and Consumer Affairs, 6854/09, 9 March 2009
[260] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 14520/08, 24 October 2008
[261] Council of the European Union, Note, Presidency to COREPER I/EPSCO Council, Progress Report, 10541/11, 31 May 2011
[262] Council of the European Union, Note General Secretariat to the Working Party on Social Questions, 8817/09, 17 April 2009

During the Czech Presidency, delegations discussed their general positions on the proposal, some delegations questioned the need for the proposal saying that the 1992 directive provided sufficient protection, joined by others who said that the maternity leave proposal should not negatively affect the goal of female labour market participation, a majority of delegations stressed that different national traditions should be respected and Community standards should only set a minimum. The Presidency formulated a number of compromise texts, working party discussions led to "a good understanding of the issues at stake in the proposal and, in particular, in its most controversial article, Article 8, dealing with the length of o and other provisions regarding maternity leave.

The Presidency developed a concrete, creative legal and issue-linkage compromise proposal about Article 8 and duration via a "passerelle clause" in Article 8 (1a) for further discussions[263]. The Presidency suggested including an option under which states that offer less than 18 weeks of maternity leave would still be considered compliant with the Directive if family-related leave offered to the mother other than maternity leave fulfilled the criteria set out in the Directive, with the main principle being that the period of parental leave provided must exceed what is offered in the parental leave directive from 1996. Concerning allowance: for member states to still count family-related leave as maternity leave the overall level of pay must not fall below a certain level, the exact level was left open for later discussions, as was the exact relation between maternity leave and other family-related leave measures. Germany, Finland, Sweden and Denmark were satisfied with the compromise, but other delegations were more critical and entered scrutiny reservations, considering that it did not solve the issue of the restricted scope and arguing that the issue should be tackled from the perspective of parenthood in general (Portugal, Belgium, Luxembourg, Spain), some also considered it a step backwards with regard to the former Directive if paternity leave was reduced to grant 18 weeks solely to mothers, ES requested that any links between paternity and maternity leave should be made in this Directive. Regarding allowance, delegations did not agree on the terms and criteria for which types of leave and remuneration should be considered as benchmarks. Regarding the duration of mandatory maternity leave, the Presidency

[263] Council of the European Union, Note Presidency to Working Party on Social Questions, 7879/09, 20 March 2009

proposed to keep the current rules of 2 weeks, which was supported by a majority, while others requested a longer period. The Presidency concluded that a majority preferred to keep the status quo on the issue. The Czech Presidency had completed substantial work on the legal text, mainly focusing on adapting the text to make it more acceptable to a majority of delegations, moving it closer to the status quo in terms of maternity leave. However, after the Czech Presidency, by the end of 2009, there were a number of open issues[264].

Afterwards, the Spanish and Swedish Presidencies did not invest much in negotiations inside the Council, as the Parliament had formally delivered its position, but instead demanded an impact assessment to determine whether the Parliament's requests would be feasible at all, compared to the Commission's original proposal. The Belgian Presidency then signalled through a position paper addressed to the Commission that the Parliament's position was not acceptable to a majority of member states and under the Hungarian and Polish Presidencies the Minister level intervened and recommended halting negotiations with the Parliament, however the Polish Presidency informally continued talks to find out whether there would be possibilities for compromise[265]. The Danish Presidency again improved the compromise proposed by the Czech, the subsequent Cypriot, Irish and Lithuanian Presidencies did not put the issue on the agenda[266]. Under the Greek and Italian Presidencies, the Commission already informally signalled its intention to withdraw and recast the proposal. Latvia and Luxembourg signalled the Council's support for withdrawal. The Maltese Presidency has negotiated the first part of the new proposal and together with the Estonian Presidency achieved first compromise possibilities on leave and pay provisions.

In early 2010, the Council began engaging with the Parliament position and quickly, a great majority of delegations announced that they would not accept the Parliament's amendments in the first reading, particularly the request to increase the period of maternity leave to 20 weeks at full salary: "The Belgian Presidency started the examination of the EP amendments, in particularly (sic!) focusing on those

[264] Council of the European Union, Note General Secretariat to the Working Party on Social Questions, 8817/09, 17 April 2009
[265] Council of the European Union, Note General Secretariat to Delegations, 5004/11, 5 January 2011
[266] Council of the European Union, Note Presidency to COREPER, Guidance for future work, 9449/12, 3 May 2012 (also Interview 41)

acceptable to the Commission. The Council debate on 6 December 2010, shortly after the adoption of the EP's position, revealed that a number of EP amendments could be difficult to (sic!) the delegations to accept. In particular, a very large majority of the member states were unable to accept extending minimum maternity leave to 20 weeks full pay and as a consequence called for thorough reflection in the Council. However, a number of Member States expressed their willingness to continue discussions on the file."[267] Eight delegations submitted a declaration (Czech Republic, Denmark, Germany, Estonia, Netherlands, Slovakia, Sweden, UK) asking the Council and the other member states to halt the negotiations with the Parliament to assess the amendments properly, by leaving more time for national social partners to evaluate the impact and conduct an impact assessment regarding the financial, social and economic consequences[268]. The main criticisms were that the proposal, especially as amended by the EP, focused entirely on duration and financial compensation and does not consider the other forms of maternity leave that exist in member states[269]. The delegations argued that in this regard, other initiatives to improve reconciliation between work and family as discussed between member states and the Commission in the (non-legislative) framework of Europe 2020 have been more successful[270]. Subsidiarity and proportionality concerns were raised, it was argued that the EU is supposed to set minimum standards in the area of social and employment affairs, not maximal standards, especially member states' right to define the fundamental principles of their social security systems and their financial implications, as well as the participation and involvement of social partners[271].

The Belgian Presidency concluded that the Council as a whole could not accept a substantial part of the amendments proposed by the Parliament, especially the duration of 20 weeks with full salary. It stressed that the Council would be more open to discussing other EP amendments, in particular passerelle clause, evaluation of health risks, reintegration after maternity leave and concluded that the Ministers want to pursue the discussions on the amendments that are acceptable as well as on a potential impact assessment[272]. In an EPSCO meeting in 2011, the Ministers agreed

[267] Council of the European Union, Note Presidency to Working Party on Social Questions, 7759/11, 16 March 2011
[268] Interview 41; Interview 30; interview 39
[269] Interview 33; Interview 39
[270] Interview 59; Interview 41; Interview 40
[271] Council of the European Union, Note General Secretariat to Delegations, 5004/11, 5 January 2011
[272] Council of the European Union, Note Presidency to Working Party on Social Questions, 7759/11, 16 March 2011

with the COREPER and working group reservations on the COM proposal and the EP amendments, some Ministers even advised against continuing the negotiations, others requested that it continue[273].

The Parliament not only strongly supported the Commission proposal in matters of the legal base and the choice of co-decision, but also the increase in both duration of leave and amount of pay[274]: In fact, the FEMM committee report, which was the lead committee on the file, developed a position, which exceeded the Commission's position in substance, by requesting more in terms of leave duration and payment, with a citizen's rights oriented framing of its position[275]: "I think the reason why a common agreement could not be reached was that the European Parliament at the first stage, because they had two opinions on this directive, and the first opinion they went further than the Commission and no country was able to agree with the Parliament, so at the same time, the Council had not reached an agreement and it was difficult to reach an agreement in Council because now the opposite was the EP with the amendments which they proposed."[276]

The Parliament justified its demands by a need to further women's rights and accused the Council of abusing the subsidiarity argument and thereby turning the matter into a fight of conservative governments against liberal supranational institutions[277]. The Parliament argued that governments focus on the economy and businesses whereas the Parliament and Commission focus on citizens and framed the choice for binding legislation as a necessary step to remedy persisting intergovernmentalism[278].

The Council framed the position as excessive, both in terms of interference into national labor markets and cost implications for national budgets, and used the same framing to justify its sovereignty concerns: "The discussions showed however, that a

[273] Council of the European Union, Note, Presidency to COREPER I/EPSCO Council, Progress Report, 10541/11, 31 May 2011; Council of the European Union, Press release, 3099th Council meeting, Employment, Social Policy, Health and Consumer Affairs,11574/11, 17 June 2011
[274] Interview 30; Interview 29; Interview 58; Interview 32; Interview 33
[275] European Parliament, Report, Committee on Women's Rights and Gender Equality, A6-0267/2009, 23 April 2009; European Parliament, Legislative Resolution, on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, P7_TA(2010)0373, 20 October 2010
[276] Interview 57
[277] Interview 29
[278] Interview 35; Interview 36

large majority of the Ministers considered the Parliament's position in favour of extending maternity leave to 20 weeks as going too far, and expressed concern regarding the cost implications."[279]

The conflict frames centered around feasibility questions, with delegates stressing national diversity of regulations, for example with regard to the degree of involvement of social partners[280]. The Council argued that negotiations could be continued on the basis of the Commission proposal, but not the proposed Parliament amendments:

"They therefore considered that the EP's opinion could not constitute a basis for compromise at this stage. A very large majority of Member States agreed that the Commission's initial proposal constituted an acceptable basis for the negotiations. (...) As the debate has shown, the member states do not seem ready to accept the amendments of the European Parliament in favour of fully-paid maternity leave lasting 20 weeks as a basis for further negotiations. A great majority of delegations is rather in favour of discussing on the basis of the Commission's proposal, which de facto does not represent any substantive amendment to the proposal requiring a new impact assessment at this stage."[281]

Those previous factors limited both the influence of relais actors, as well as the relevance of factors, such as informality. Informal contacts enabled Council and Parliament discussions to form positions, but due to a lack of consideration for each other's positions, there was no opportunity to negotiate an informal inter-institutional agreement once the Parliament's position had been formalized, even though there were intense informal exchanges between Council Presidency, Commission and the rapporteur[282].

[279] Council of the European Union, Outcome of Proceedings, The Working Party on Social Questions, 9616/11, 19 May 2011
[280] "Since the social partners play an important role in social policy formation, the Presidency will ask the European social partners to analyse and express their views on the main topics discussed. The social partners' views could indeed provide a useful contribution", Council of the European Union, Note, Presidency to COREPER I/EPSCO Council, Progress Report, 10541/11, 31 May 2011
[281] Council of the European Union, Note, Presidency to COREPER I/EPSCO Council, Progress Report, 10541/11, 31 May 2011
[282] Interview 30; Interview 29; Interview 55; Interview 56; Interview 41

In matters of actor behavior, specifically relais actors, the Parliament rapporteurs stand out as those with the greatest impact on the failure of the process between the co-legislators from the Council perspective.

The 2009 and 2010 reports of FEMM committee rapporteur Edite Estrela (S and D, PT) reflected a maximalist position, which exceeded the propositions of the Commission proposal in substance on both leave and level of pay[283]. The Parliament demanded an increase from 14 to 20 weeks, based on a suggestion by the rapporteur referring to the situation in member states where the general duration is 18 weeks and the recommendation by the Advisory Committee on Equal Opportunities which was 24 weeks. The rapporteur also argued that allowance should be equal to full salary, workplace safety and health requirements have to be ensured before and after birth, and there should be a ban on dismissal. The rapporteur proposed to delete the reference to a recommendation of 18 weeks, so that member states with more generous provisions would not be discouraged or prompted to lower the conditions. Apart from duration and level of pay, the rapporteur insisted on the complementarity of the national measures regarding paternity leave, maternity leave and parental leave and called on the Commission not to separate the measures artificially.

The rapporteur played a twofold role in encouraging failure: first, she pushed for a narrow and contested left-wing majority in the plenary, instead of considering the intra-institutional divisions and striking a compromise. And secondly, she refused to concessions to the Council despite the repeated informal attempts by several Presidencies to explain the Council's problems with their position[284].

The Parliament negotiated the proposal in several committees, FEMM, in charge of gender equality and women's issues, JURI, the justice committee, and EMPL, the employment committee in charge of social and employment policy. All committees have different political shades, FEMM is reported to be more to the left, while EMPL is a more right-wing committee, and JURI tends to be a very formalized, but slightly

[283] European Parliament, Report, Committee on Women's Rights and Gender Equality, A6-0267/2009, 23 April 2009; European Parliament, Legislative Resolution, on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, P7_TA(2010)0373, 20 October 2010

[284] Interview 41; Interview 60; Interview 59

right-wing committee. The proposal had left-wing rapporteurs, which steered the reports and debates about the amendments to the left quite early in the negotiations. FEMM disagreed with JURI and EMPL on the necessity of both proposals, as well as the content, with JURI raising subsidiarity concerns and EMPL considering the demands made with regard to duration and amount of the remuneration for maternity leave, as well as the targets set for gender quota, to be excessive[285].

The Parliament ultimately agreed on a very strong and very left-wing position. The success of this narrow left-wing majority is the fruit of very active rapporteurs that personally lobbied MEPs from the left as well as the liberals to join the majority, by framing both proposals as crucial matters of women's rights and justice against discriminatory member states. The framing as a rights matter was very successful, since it even convinced the skeptical liberals that such a measure would not constitute an excessive interference in business matters. Ultimately, the rapporteurs negotiated a small, but sufficient left-wing majority in the plenary, by convincing parts of ALDE, the liberals and usually the pivotal group when it comes to coalitions, to back the Parliament amendments. The conservative groups in the Parliament did not back the demands of the more left-oriented FEMM committee, in charge of gender equality proposals. Neither did the JURI committee, which was associated to the negotiations on both proposals, as it considered the demands of the Parliament's left-wing rapporteurs to be excessive. The conservative groups, especially the EPP, accepted the final EP position, because they faced some internal division themselves, as some EPP MEPs supported the idea of setting minimum standards for duration and allowance of maternity leave[286].

The new rapporteur Arena (S&D, Belgium), who took over the file in 2014, openly signalled willingness to compromise by a letter to the Council Presidency and the Commission to offer a reconsideration of the Parliament position if informal talks were relaunched: "The Chair of the FEMM committee and the Rapporteur have, in recent weeks, signalled their desire to reach progress with a view to avoiding the withdrawal of the proposal by the Commission after six months. The Presidency has received two letters from the Chair of the FEMM committee to this effect. In both letters, the Chair proposes 'the establishment of a Working Group, comprising representatives of

[285] Interview 31
[286] Interview 31; Interview 34

the Trio Presidency, in close cooperation with the European Parliament in order to channel efforts to make progress on the file'"[287]

The attempt, while welcomed by the Council in principle, came too late to still be considered by the Council, arguing that it was not a trustworthy attempt, as the Parliament had turned down any attempts at achieving a compromise beforehand, despite the continuous effort by all Presidencies[288].

In early 2015, the Council concluded that withdrawal was the preferred option, as there was no majority in the Council for continuing negotiations with the Parliament: "it became clear that there was no general support for the establishment of a Working Group as suggested by the Chair of the FEMM committee. Some delegations were still inclined to keep the door open for possible future negotiations with the European Parliament. However, a large number of delegations, including some that had previously supported the Directive, spoke in favour of a fresh start. The Presidency concluded that it had no mandate for entering informal negotiations, although informal contacts with the European Parliament could still take place."[289]

The Commission remained rather unengaged in the negotiation process, the previous Commissioner Spidla (DG EMPL) did not steer the proposal in a particular direction, but rather proposed a minimum standards and lowest common denominator approach based on stakeholder consultations, social partners and member states and impact assessments on member states[290]. The new Commissioners, Jourova (DG Just) and Thyssen (DG EMPL), also took a mediator approach by trying to reframe the proposal in a way that would satisfy the co-legislator demands, including more flexibility and a broader scope with more non-legislative measures to make it acceptable to the Council[291].

6.2.4 The withdrawal and blame framing game

Ultimately, the struggle about the file also points towards a strategic staging of bargaining with the goal of giving each institution the necessary leverage to achieve

[287] Council of the European Union, Note Presidency to Delegations, 7570/15, 1 April 2015
[288] Interview 30; Interview 41; Interview 55; Interview 56
[289] Council of the European Union, Note Presidency to Delegations, 7570/15, 1 April 2015
[290] Interview 30; Interview 55; Interview 56
[291] Interview 41; Interview 35; Interview 36

and frame gains and losses: “Each has a game to play, they know that for example when the Commission comes up with a proposal, the Council is going to try to lower the levels, so they need to increase them in order to strike a balance, and hopefully on the other end come out with something that is a bit balanced for everyone. It’s a game.”[292]

The Council proved to be the initiator of deadlock from an institutional perspective, since it refused to take an official position for trilogues in both cases and stalled the negotiations. However the Council claims to have been pushed to a strong reaction, as the previous accounts of the Commission’s and the Parliament’s strategic actions show, much more extreme than it might have been without the ambitious framing and the blaming approach of the Parliament. In fact, all member state representatives, even those generally skeptical towards EU intervention in social and employment policy, argued that the proposals might have reached the trilogue stage, had it not been for the Commission’s leniency and the Parliament’s overzealousness[293]. Now, this does not mean that the intra-institutional negotiations in the Council were consensual, far from it[294]. In fact, the delegates admit that internal negotiations on both directives are examples of the integrationist-sovereignist debate between those reluctant to progress in social and employment policy on the European level and those pushing for the EU to take measures against gender inequality[295].

The Commission blames deadlock on the Parliament’s insistence on taking a very strong public and final position early in the process and not reneging on it even when the Council made it clear informally that flexibility would be needed[296]. The Commission particularly criticizes the Parliament’s insistence on sending strong public signals and getting a significant improvement in standards rather than settling for a moderate outcome: “I remember that the aspect of austerity measures was also a decisive element in the negotiations, member states emphasized that after the crisis in 2008, they had to cut certain benefits, including maternity leave, but the Parliament was not flexible enough to address these concerns and wishes of the delegations, so it was also quite an important aspect in the process.”[297] The

[292] Interview 41
[293] Interview 41; Interview 34; Interview 33
[294] Interview 40; Interview 55; Interview 56
[295] Interview 41; Interview 34
[296] Interview 55; Interview 56
[297] Interview 56

Commission specifically singles out the rapporteur as the origin of the blockage: “The rapporteur was a socialist and it explains a lot, actually, she didn’t show any flexibility on this, on the different elements of the proposal, so the negotiation was blocked, because the Council had its own red lines and the Parliament was not flexible,so there was no room for the Commission to negotiate with both parties in a trilogue.”[298]

Alongside that, the Commission also blames failure on the Council’s unwillingness to accept binding measures and interference in labor market regulations and budgets to increase women’s rights and gender equality[299]. The withdrawal and recast are framed as a way to start anew and incorporate lessons learned from co-legislator exchanges to avoid giving the impression of the EU failing to deliver[300].

The Council strongly blames failure on the Parliament’s extreme position and its unwillingness to abandon excessive demands, on duration of leave and level of pay, for a pragmatic approach that reflects what is compatible with member state systems and economically feasible[301]:

Failure is framed as the result of a lack of flexibility of the Parliament and especially the rapporteur and their unwillingness to engage in compromise-seeking: “It was incredibly frustrating, we did pick up that there was division within the committee and the Parliament more generally, between those who absolutely wanted to stick to the position, because they felt it was right, and those who thought it would be better to be a bit more pragmatic and get a deal even if it was not the perfect deal, but we never broke through and I don’t know whether that was purely due to the strength of feeling and the weight between the groups, or whether it was a bit of the Parliament also wanting to push back and kind of demonstrate its own strength in not being pushed around by Council, there was quite a bit of challenge to the Council position, with the view that Council was just refusing to discuss this.”[302]

Despite clear signals from the Council Presidencies that the Parliament position was perceived to be excessive, for too long there were no attempts to forge a compromise

[298] Interview 55
[299] Interview 55; Interview 56; Interview 30
[300] Interview 55; Interview 56; Interview 30
[301] Interview 61; Interview 32; Interview 60
[302] Interview 61

and no encouragement of contacts to solve the issue between co-legislators[303]: "They know that and they are entitled to learn, it may be that once this new package comes out, the Commission may also say to them, please be careful, if you are too aggressive, the Council will just back off and you will not get anything."[304]

The Council also partly shifts blame to the Commission for not providing the necessary evidence to support or invalidate the claims about feasibility, proportionality and necessity of the Parliament's requests[305]. The Council partly also blames the initial Commission, especially Commissioner Reding, for siding with the Parliament and actively placing blame on the Council: by insisting on binding legislation, it compromised the negotiation process and further pushed Council into isolation while encouraging Parliament to keep its extreme position[306]. Delegates argue that failure of this measure is a means for the supranational institutions to recognize that these types of measures, related to the labor market and social affairs, are better dealt with at the national level[307].

In the period following its own internal negotiations and the publication of its position, the Parliament awaited the Council position, which did not come, as the Council had taken note of the Parliament's position and considered them unacceptable in the form they were presented[308]. The framing of both proposals as an absolute necessity for the progress of women's rights by both the Parliament's FEMM committee and the rapporteurs, as well as the Commission, made it impossible for the Parliament to withdraw or reconsider its position without risking to lose face. The Commission tried to frame it as a procedural matter towards the Council: "Commission to some extent tried to persuade us that procedurally it was not possible for the Parliament to change its position, because it had a first reading position and under the procedures it could not change."[309]

The Parliament openly frames failure as a scandal and the abandonment of women and women's rights and accuses the Council of being vindictive in not accepting the

[303] Interview 53; Interview 54
[304] Interview 41
[305] Interview 61
[306] Interview 61; Interview 34
[307] Interview 41; Interview 33; Interview 34; Interview 38
[308] Interview 61; Interview 29; Interview 41
[309] Interview 61

later-stage informal compromise offer[310]: "The Parliament pointed out all possible ways for compromise, talked to all delegations, with or without Commission and Presidency, but supported by the Italian Presidency and the Germans, as well as the left wing parties. But the response by the Council to the EP was that the file was clearly not a priority anymore."[311] The failure of the measure is a sign of a lack of engagement by the Presidencies and a lack of understanding in a large majority of member states that there is a political need for a strong impetus in women's rights and gender equality matters[312]. According to MEPs, deadlock is to be blamed mainly on the Council refusing to make concessions to increase women's rights and gender equality: "(...) it had a lot to do, I think, with the European Parliament, or at least a lot of members of the European Parliament, being fed up with discussions in the Council on subsidiarity, proportionality, the money side, the not taking, in the perception of the member states, not taking the position of pregnant women seriously, the breastfeeding part, not taking that seriously, this whole bunch of factors led to a feeling on the Parliament's side and at least by a lot of members of frustration, anger, towards the Council[313]

The Parliament also criticizes the Commission's disengagement, as it is not pushing the Council to making concessions and actively/publicly pushing for a rights agenda to pressure the Council: "Yes, and to send a signal. It's not necessarily always to the Council, it's sometimes also the Commission, they can say it's an indirect way of saying that they are sick and tired of the Commission always being so careful with their proposals, telling them to be more ambitious. It's a way for them to send a signal. They see it like this, if they are too careful themselves, the Commission will say, well okay, the Parliament is going to be easy peasy, so we will just draft it as we would like, because they are just going to say yes and bla bla. So it's a relationship built up through many years."[314]

[310] Interview 30; Interview 29
[311] Interview 29
[312] Interview 34; Interview 29
[313] Interview 34; Interview 29
[314] Interview 41; Interview 29

6.2.5 The recast: mechanisms of consensus-building

As for the new proposal, the Commission has changed the framing and extended the scope, and most importantly, it has thereby removed the main element of controversy and the origin of deadlock: the focus on maternity leave. The priority is now to improve work-family-life balance, references to improving or increasing women's rights are connected to a labor market oriented perspective, in the sense of increasing women's participation in the labour market. A reaction to the experience that a rights perspective doomed to fail in the Council and the Parliament is too maximalist on the rights perspective. In parallel, the proposal has been reduced in substance, while scope has been extended and a focus on parental leave has been more clearly included, alongside an additional focus on carer's leave. The reference to maternity leave as such has disappeared completely: "(...) the previous proposal was more based on rights, and women's rights and here they've changed a little bit, it's still gender equality, but they have changed the perspective a little bit in saying it is about having more women into the labour market and I think it's wise of them to do that, because the problem is that every time you come up with a new proposal under the setting of rights, you go wrong in the Council, we have these discussions and we can never agree on anything that has to do with rights, so in that sense, it is very wise of the Commission to focus more on labor participation and that part, whereas the maternity leave was more about rights for women and mothers and that was a different setting."[315]

Measures are much softer and don't diverge much in substance from the previous maternity or parental leave directives. The parental leave part sets a standard of 4 months, so 16 weeks, which is no different from the previous standards of the 2010 directive, so no would not constitute a substantive improvement, there is a mention of pay at least at the level of sick leave, which is also not a significant change compared to the previous proposal. The paternal leave just sets a minimum standard for paternal leave (10 days around the birth of the child) and a minimum requirement for pay (at least sick leave). This is an obvious reaction to the demands by the Council in terms of watering down the substantive elements, so the new proposal is far away from the maximalist framework the Commission and the Parliament requested in the

[315] Interview 41

first attempt of maternity leave[316]. However, the extended scope, family and other types of leave included, alongside more soft-law measures against discrimination and for the promotion of gender equality, is an apparent attempt at satisfying the concerns of the Parliament. Nevertheless, the new proposal clearly corresponds more to the demands by the Council than it does to those by the Parliament[317]. Another indicator is the inclusion of more non-binding measures in the entire package, the Commission seems to have learned from the maternity leave mishap and gone back to focusing on non-binding legislation mainly in terms of social policy, which works better for member states, as the history of the policy field shows[318].

The Council has started examining the file at COREPER level, and the last progress reports show that there is one remaining reservation on the new file, pertaining to Article 8, and the "concept of defining the minimum level of adequate income in the Directive and tying it to the sick-pay level".[319] The progress report also attests that there have been discussions in the Social Questions Working Party between July 2017 and November 2017, but there are no official records of these meetings and the discussions therein. The Commission has conducted a number of impact assessments prior to submitting a recast and the Social Questions Working Party has examined the results alongside the responses to a questionnaire submitted to all member states by the Estonian Presidency.

It seems that the new round of negotiations in the Council is leading to a compromise, as delegations strongly invest in negotiating the different provisions of the directives and the Presidency is successful in proposing compromises[320]. This can be interpreted as a sign that the second Commission proposal is viewed favorably by member states and the bargaining now centers around determining the concrete provisions, rather than fighting battles over principles[321].

In working party negotiations, the delegates generally supported the mandatory parental leave provisions, and there is little controversy about the proposed 10 days and the application of the sick-pay level. Carer's leave is more controversial,

[316] Council of the European Union, Presidency to COREPER, Progress Report, 14280/17, 24 November 2017
[317] Interview 31; Interview 41; Interview 59
[318] Interview 41; Interview 33; Interview 61
[319] Council of the European Union, Presidency to COREPER, Progress Report, 14280/17, 24 November 2017
[320] Interview 53; Interview 54
[321] Interview 59; Interview 41

especially the definitional aspects, the amount of leave days and the level of pay. The Presidency has proposed a compromise of more general wording and discretion for governments and social partners to decide upon the amount of pay, which was acceptable to most delegations. The increase in non-transferable months of parental leave from 3 to 4 months is the most controversial aspects, the Presidency has again proposed a compromise, lowering the targets and making them most flexible, which again is supported by a large number of delegations. The overall controversy about whether or not the EU should be allowed to determine a minimum level of pay for leave has not been fully settled, but the Presidency compromise to entirely separate leave pay from sick pay and give member state the maximum amount of discretion.

The Estonian Presidency seemed confident that a first reading position could be reached in the Council on the basis of the compromises achieved since April 2017, provided some technical details could be solved in negotiations under the following Presidency, and submitted the report to the EPSCO Council.

"Overall, the Estonian Presidency considers that the basis for a final compromise has been established on a number of provisions. With a view to finalise the work in the Council as soon as possible, further discussions should focus on the remaining issues outlined above."[322]

The progress on the file was swift for the Council and attests to the fact that the recast Commission proposal was more in line with member state preferences and most importantly, that there seems to be a general interest in having the policy change and achieving an agreement on the file. However, the Parliament has not yet determined its position. It seems, as committee negotiations have not progressed, that the Parliament is waiting for the Council to move first in this second round. This could be due to the experience in the first round, where the Parliament's maximalist demands pushed the Council to blocking the file. Strategically, this would make sense in a multi-sequence game, where the Parliament wants the policy change and accepts making the necessary concessions to the Council, but also needs to fulfill its role as the advocate of citizen rights, pushing it to activism and maximalist demands in the first round.

[322] Council of the European Union, Presidency to COREPER, Progress Report, 14280/17, 24 November 2017

There is a general problem between Council and Parliament in the sense that if the Council waits with its official position and the EP adopts one, which is stronger than the Commission, it's usually a lost case, so the Council will try to kill it by waiting, it's a common strategy."[323]

However, there is no clear indication yet, if the Parliament will strategically opt for a more moderate position to pursue the policy change, or if it will instead focus on reputational gains by repeating maximalist demands and risking another round of failure.

"(...) it is not beyond imagination that the Parliament will put some maternity leave requirements in, it is not beyond imagination that the Parliament will look for a different rate of pay, so we could still see some quite significant changes coming from the Parliament. I suspect the mood in the Council has not changed dramatically, I do not know whether the mood in the Parliament has changed, I imagine it will be more pragmatic, but I don't know."[324]

"Ich weiß noch nicht genau wie, aber das Gespür in Brüssel ist, dass es eher in die Richtung geht, die sind immer für maximalen Schutz und im EP sind sie ja auch gewählt und wollen 2019 wiedergewählt werden und sehen, was sie nach außen vertreten können und es ist natürlich politisch immer schöner, etwas zu vertreten, womit man sagen kann, es wird Frauen, Männern und Eltern im Alltag geholfen, sie sind immer positiver, nicht finanziell so eingeschränkt, weil sie nicht für eine Regierung arbeiten."[325]

As the Parliament has not yet presented its report, it is difficult to tell which gains they consider more valuable at present.

6.2.6 Model fit and evaluation of the evidence

The following tables assess and summarize the main findings from the case with regard to conditions and mechanisms and model fit.

[323] Interview 35; Interview 36
[324] Interview 61
[325] Interview 39

Conditions – Maternity Leave **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Availability of informal channels/networks	+ Repeated exchange, Council portrays proposal as balanced	- No evidence for information asymmetry or miscalculation	+ Weak evidence for deliberate disregard of Council input	+ Repeated exchange in failure round and second round
European Council support	-/+ No clear support for the proposal in round 1, more support for round 2	+ No evidence for miscalculation or information asymmetry	- Some evidence for self-serving interpretation of conclusions	-/+ No clear support for the proposal in round 1, more support for round 2
Issue salience to governments	- Not clear: the objective yes, the proposal no	+ Not clear: the objective yes, the proposal no	- Not clear: the objective yes, the proposal no	+ Not clear: the objective yes, the proposal no
EP issue support	- Strong support by EP	+ Commission aware of EP position	-/+ Strong support by EP, joining sides with Commission	+ Strong support by EP, joining sides with Commission, Parliament more activist than Commission
Window of opportunity	- Council not favorable to the proposal when it arrived due to sudden crisis impact	- No indication of misapprehension of crisis agenda	- Commission pushes proposal despite adverse agenda	+ Commission adapts proposal to agenda
Party politics overlap	- First round no, second round yes (responsiveness to Council)	+ Commission was aware of national politics	- First round no, second round yes (downgrading)	+ First round no, second round yes (Commission included Council input)
Preference overlap	- First round no, second round yes (Council)	+ Commission thoroughly assessed preferences	- First round no, second round yes (Council)	+ Commission responds to Council input and adapts the proposal
Agenda overlap	- First round, the Commission proposes supranationalist legislation despite, but second round significant downgrade	+ Agenda was not favorable to a strong proposal	- First round, the Commission proposes supranationalist legislation despite, but second round significant downgrade	+ Commission responds to agenda and adapts proposal

(table 11, evaluation conditions Maternity Leave, source: own illustration)

Mechanisms – Maternity Leave **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Relais actor behavior	- Strong influence of relais actors, but leading to failure not compromise	- No indication of information asymmetry on the side of relais actors	-	+ Strong influence of relais actors on failure in the first round, indication of compromise in the second
Informal exchange during agenda-setting	+ Commission collected sufficient evidence	- No indication of information asymmetry	+ Some indication of deliberate choice of focus on maternity leave, despite critique from Council	+ Continued informal exchanges and adaptation of the proposal
Blame gains COM	+ Council suggests that failure might not be the fault of the Commission, but the Parliament, Commission as honest broker	- No mention of lack of miscalculation due to information asymmetry	- No evidence that co-legislators blame Commission	+ Commission gains from reframing the second proposal to correspond to state interests
Blame gains co-legislators	- Council strongly gains from blaming Parliament, Parliament strongly gains from blaming Council	+ No mention of lack of miscalculation due to information asymmetry	+ Council strongly gains in blaming Parliament, but only associates Commission	+ Council strongly gains from blaming Parliament, Parliament strongly gains from blaming Council, Commission gains from being honest broker
Learning/ updating COM	+ Moving away from Parliament and closer to Council	+ Repeated informal contacts, but several new impact assessments	- Withdrawal, downgrading and recast	+ Reframing to respond to Council

(table 12, evaluation mechanisms Maternity Leave, source: own illustration)

The Maternity Leave proposal was the result of a thorough consultation of all institutions and stakeholders and presented as a substantive and procedural compromise proposal, the Commission framed it as a rights initiative, but meanwhile insisted that was openness for compromise. The Commission's role in the process varied with regard to how strongly it pushed for progress between the Barroso and Juncker Commission, as Commissioner Reding was much more engaged in pushing for the Council to take a position and openly taking a side in favor of the Parliament's position.

In terms of substance, when comparing the first and second round, there is definitely failure of the original Commission project to regulate maternity leave, since the provisions specifically dedicated to mothers has disappeared in a much broader

scope of family and carer's leave. However, the actors within the two institutions do not signal that they oppose the new scope, the Parliament has not given any indication that second round agreement is impossible. The radical shift of scope and the resulting increased investment by the Council in finding a trilogue position together with the Parliament's more cautious attitude, waiting for developments in the Council, rather than bringing forward another strong position, rather suggest willingness to invest in compromise.

There are, also indications that the dynamics between Council and Parliament are at the origin of failure, specifically the Council refusing to take a position after the Parliament has public made maximalist demands. The Parliament's demands did indeed exceed the Commission's proposal was more moderate and more balanced in comparison to the Parliament's demands. This suggests that the Commission might have performed its task as a perfect agenda setter and the Parliament has surprised by developing a position, which could not be anticipated by either the Commission or the Council.

6.3 The Gender Quota Directive: persistent deadlock?

The Gender Quota Directive, officially denominated as “Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures”, was an initiative by the former Justice Commissioner Viviane Reding in November 2012, who promoted a stronger gender equality agenda and referred to Commission assessments of the disparities across member states with regard to the representation of women in the upper echelons of the labor market. The Parliament enthusiastically welcomed the proposal, as it responded to a number of resolutions the Parliament had adopted on the matter since 2007, and decided on a first reading position in November 2013 already, hoping to prompt the Council to enter trilogues. The Council, however, only held very few meetings on the file, 5 in total from 2013 to 2017, and never agreed on a first reading position to enter trilogues with the Parliament. The last unsuccessful attempt at bringing the Council to a common position came from the Maltese Presidency in late May 2017.

Gender Quota: Timeline of negotiations (formal procedure)	
Previous legislation	
	14 November 2012: Commission proposal for a Regulation of the Council and the Parliament COM/2012/0614 final - 2012/0299 (COD) on improving gender balance in company boards of stock-listed companies 20 November 2013: Parliament first reading opinion, approval with amendments 20 November 2013: Commission partial approval of Parliament amendments 11 December 2014/5 October 2015/30 November 2015/2 December 2015/31 May 2017: discussions in Council preparatory bodies

(table 13, Gender Quota timeline, source: own illustration)

6.3.1 The proposal

The main element of the Gender Quota Directive, as proposed by the Commission, officially called “Directive of the European Parliament and the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures”, introduced in November 2012. It was a proposal for a fixed quota, a clear quantitative target, set at 40% of women for non-executive board members, or 33% for both executive and non-executive board members for stock-listed companies to be fulfilled by member states until 2020. The quota rule would apply to 5000 companies in the EU, but not to small and medium sized companies or non-listed companies[326].

6.3.2 Policy formulation, conditions and conflict constellations

The Commission justifies the choice of a fixed quantitative target by the lack of progress using non-binding measures and the trend of national governments to also use legislative measures instead of entrusting it to companies and social partners. The Commission argues that the legal base, foreseeing binding legislation as a remedy to persisting inequalities across member states in women’s representation[327].

In 2011, the Commissioner Reding issued a number of public statements referring to studies, which have revealed that there is still a huge gender gap in representation of women in business, women making up only 11,9% of board members, despite being 45% of the labor force: "I want to send a clear message to corporate Europe: women mean business," said Vice-President Reding, the EU’s Justice Commissioner. "We need to use all of our society’s talents to ensure that Europe’s economy takes off. This is why the dialogue between the Commission and the social partners is so important. I believe that self regulation could make a difference if it is credible and effective across Europe.
However, I will come back to the matter in a year. If self-regulation fails, I am prepared to take further action at EU level."[328]

[326] European Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, 2012/0299 (COD), 14 November 2012
[327] Commission, Communication, IP/10/236, “European Commission aims to significantly reduce the gender pay gap”, 5 March 2010
[328] Commission, Memo, MEMO/11/124, “EU Justice Commissioner Reding challenges business leaders to increase women’s presence on corporate boards with “Women on the Board Pledge for Europe”, 1 March 2011

In 2011, after receiving the support of the EP, Commissioner Reding underlined that if member states did not comply with the goal of voluntarily increasing women on boards by 2012, the Commission would take legislative steps[329]. She underlined that only Spain, France, Netherlands, Belgium, Italy had introduced quota for women's representation in business leadership. She insisted on a proposal for quota with fixed quotas of either 40% of women for non-executive board members, or 33% for both executive and non-executive board members. In 2011 and 2012, the Commission published a special Eurobarometer on Gender equality revealing that the European public would like to see more women on boards and in business. In parallel, the Parliament presented a resolution requesting the Commission to present a proposal on gender equality in business[330]. From March to May 2012, the Commission held a public consultation to gather views on women representation and on 8 October 2012, Commissioner Reding held a speech on gender equality attacking member states for lack of progress: In particular, gender diversity in the boardrooms of European companies is showing no signs of improvement. Across the EU, company boards are currently dominated by one gender: 86.5% of board members are men while women represent just 13.5%. 97.5% of the chairpersons are men and only 2.5% are women. If you compare this to the 60% of female university graduates, you understand that something is profoundly wrong. Women and men should have the opportunities to take leadership positions."[331] In November 2012, the Commission submitted a proposal for 40% of women as non-executive directors in boards of listed companies by 2020[332].

The Commission subsequently proposed legislation in 2012, which contained a compulsory request for member states to increase the representation of women in company boards to 40% and impose sanctions for noncompliance, Commissioner Reding wanted to set a rapid pace to address the problem (Ravn-Nielsen, 2016). The Commission decided to opt for a broad approach and not only deal with the problem

[329]" I have called on publicly listed companies in the EU to sign the "Women on the Board Pledge for Europe" to voluntarily increase women's presence on corporate boards to 30% by 2015 and to 40% by 2020. However, if there has not been credible progress by March 2012, I stand ready to take the necessary legislative steps at EU level." European Commission, Memo/11/487, "Reding welcomes European Parliament's strong support for more women in decision-making positions", 5 July 2011

[330] Commission, Eurobarometer, "Women in decision-making positions", Special Eurobarometer 376, 2011-2012

[331] Commission, Speech/12/702, Speech by EU Justice Commissioner Viviane Reding, "Mapping EU action on Gender Equality: from the Treaty of Rome to Quotas", 8 October 2012

[332] European Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, 2012/0299 (COD), 14 November 2012

of underrepresentation, but also remedy the divergences between countries, which interfere with the functioning of the single market in terms of cross-border employment (Ravn-Nielsen, 2016). The proposal constituted a strong ambition by the Commission to push for legislation, arguing that soft law measures had failed: "However, progress in increasing the presence of women on company boards has been very slow, with an average annual increase in the past years of just 0.6 percentage points. The rate of improvement in individual Member States has been unequal and has produced highly divergent results. The most significant progress was noted in those Member States and other countries where binding measures had been introduced. Self-regulatory initiatives in a number of Member States have not yielded any similarly noticeable changes. At the current pace it would take several decades to approach gender balance throughout the EU."[333]

The Commission's rhetoric, especially the aggressive rights-oriented framing by Commissioner Reding was negatively viewed by the Council, who later justified its objections based on the obstinacy of the Commissioner to force binding legislation[334]. Over the course of the negotiations, this very ambitious approach led to dissonance in Commission leadership, since Commissioner Reding from Luxembourg was replaced by Commissioner Jourova from Slovakia, who did not consider the issue an absolute priority and informally announced to some member states, amongst them the Slovak delegation, that she did not support the substance of the proposal and would therefore not specifically push for it in the Council[335].

Commissioner Reding strongly intervened in the drafting process, from the initial idea to the final proposal, Reding steered the process and strongly communicated her agenda to the public, to justify her choices she referred to the Parliament which had issued several resolutions calling for more gender equality measures[336], Commissioner Jourova showed less interest in pushing for the proposal to be unblocked[337].

[333] European Commission, Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM (2012) 614 final, 2012/0299 (COD), 14 November 2012
[334] Interview 34
[335] Interview 35; Interview 36
[336] Interview 39; Interview 55; Interview 56; Interview 41; Interview 34
[337] Interview 35; Interview 36

However, the behavior of the Commission has changed from 2012 to 2017, as the new Commissioner of Justice, Vera Jourova, has introduced changes in policy priorities, which have shifted the issue from the agenda of the Commission, leading the Commission to be less involved in the file[338]. In fact, the new Commissioner does not support the approach take, especially the aspects of binding legislation and EU intervention in that area, and does not publicly fight for the file anymore, as it is considered an inherited file.[339] The Commissioner Jourova still invests in informal contacts to blocking member states, but does not frame the proposal as actively and aggressively to the public as Commissioner Reding did, an approach that is supported by the Council but not the Parliament[340].

> "It was Viviane Reding, the former Commissioner of Justice, she was very keen on this, very much about women's rights are very important, bla bla, and it was her idea, the first proposal she came up with in 2012, was very much with financial sanctions and it was very different. It was her idea. And this Commissioner who has the file now, Jourova, she has never actually hidden the fact that it was not her idea, it's not her baby, she comes from the Czech Republic and they at first were very much against the file and then eventually she succeeded in turning over her own country, so now they are for the file, but it's never been her idea, and that you can tell, it's very easy to feel it that she is not too keen on it, she has to pretend that she likes it, but deep down I think she's quite irritated about this directive."[341]

Timing, window of opportunity and salience of the gender equality issue played a role for the Council, as there was little momentum for such a proposal in the Council in the aftermath of the economic crisis where the focus lay on fiscal consolidation and avoiding any negative impacts on national labor markets[342]. Also, the the longer the blocking minority persists the less willing member state representatives are to actively work towards finding an agreement, because their attention has shifted to other, more pressing issues on the agenda, which are not linked to gender equality. An argument used by the German delegation for example, is the impact of the crisis and need to focus on the economy, not on social policy[343]. The European Council, meaning the heads of state, has also disengaged from the area, there has not been a mention of the directive as a priority in Council conclusions[344].

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[338] Interview 55; Interview 56
[339] Interview 35; Interview 36
[340] Interview 41; Interview 34
[341] Interview 41
[342] Interview 55; Interview 56; Interview 32; Interview 53; Interview 54
[343] "So there is a clear linkage, social policy is less important to Germany in a situation of economic crisis." (Interview 29)
[344] Council of the European Union, Conclusions on gender equality, Press release, 337/16, 16 June 2016; in reference to: Conclusions of the European Council (25/26 June 2015) (EUCO 22/15)

6.3.3 The process: mechanisms of deadlock

In the Council, the conflict centers on the combination of binding law and quantitative targets. The Council frames the combination of binding law and fixed quantitative targets as excessive, the Commission and Parliament frame it as a necessary remedy to gender inequalities since non-binding measures had proven ineffective.

The obvious cause for deadlock was the building of an informal blocking minority in the Council, by the following member state delegations, which still persisted in January 2018: Denmark, Germany, Estonia, Hungary, Latvia, the Netherlands, Czech Republic, Slovakia, UK and Sweden[345]. These member states formed a blocking minority to signal their general opposition to the proposal on grounds of subsidiarity, claiming that interference of the EU in company law violated sovereignty and proportionality, insisting that binding measures would have a disproportionate impact on the labor market[346]. The Council reacted to the binding legislation with a claim to sovereignty concerns, spelled out as concerns over cost and procedural implications for national companies, the impact on company budgets and the workings of hiring processes[347]. Delegates argued that such a legislation would be disincentivizing companies from encouraging job growth and work-life-balance. The Council framed subsidiarity reservations as concerns over necessity and proportionality of a binding measure with quantitative targets[348]. Delegates referred in particular to the organization of national labor markets, especially the reliance on regulation by social partners and constraints on companies due to the economic situation post-crisis[349].

Informal attempts by successive Presidencies to convince members of the blocking minority to engage in negotiations were not successful, since the opposition was framed as a matter of principle, namely rejection of legislative intervention at EU level, and the Commission was not willing to consider transforming it into soft law or further watering it down[350]. From June to December 2013, the Council negotiated the proposals, and the Irish and Lithuanian Presidencies concluded that overall, all delegations were in favour of improving gender balance on company boards, some

[345] Council of the European Union, Presidency to EPSCO Council, General approach, 14343/15, 30 November 2015
[346] Interview 30; Interview 55; Interview 56; Interview 61; Interview 41; Interview 32
[347] Interview 59; Interview 32; Interview 52
[348] Interview 58; Interview 55
[349] Interview 58; Interview 41; Interview 41
[350] Interview 34; Interview 41; Interview 32

prefer national measures while others support EU-wide legislation, but the situation was not entirely unfavorable in the Council[351]. A progress report on 7 June 2013 summarized the following issues: while discussions in the Working Party show a broad consensus in favour of the objective of the proposal, however, representatives had different opinions on how to achieve it. Some delegations supported the proposal, but others preferred a voluntary approach, non-binding legislation, which would allow member states more discretion in policy choice and some delegations criticized the proposal for not complying with the principle of subsidiarity: many national parliaments have submitted scrutiny reservations and reasoned opinions (Denmark, Netherlands, Poland, Sweden, UK, Czech Republic, France) saying the proposal violates the principle of subsidiarity[352].

Representatives were particularly divided on the threshold of the quota, some member states supported the 40% threshold, some member states criticized it saying that states come with very different standards, some states wanted the 33% objective to be better explained with regard to practical implications, some delegations wanted the quantitative objective of 40% to be better put into perspective and understand it more as a general objective for which the Directive would provide procedural requirements[353].

Procedural requirements were also subject to controversy, as a number of delegations questioned the practicability of provisions such as the obligation for companies to draw up "clear, neutrally formulated selection criteria" [354]for the selection of board members especially the application in selection processes, some member states warned against interference with the employees freedom to select their own representatives in member states where employees are present on boards. As for the disclosure requirement, some delegations considered that it went beyond existing discrimination legislation and might compel companies to reveal company strategy. Some member states were not in favour of sanctions and some member

[351] Council of the European Union, Report Presidency to COREPER, 16437/13, 22 November 2013
[352] Council of the European Union, Report, Presidency to COREPER I/ EPSCO Council, Progress Report, 10422/13, 7 June 2013
[353] Council of the European Union, Note Presidency to Working Party on Social Questions, 14412/14, 31 October 2014
[354] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 8002/13, 22 April 2013; Council of the European Union, Note Presidency to Working Party on Social Questions, 11584/13, 25 June 2013

states raised the concern that the proposal might not be consistent with company law[355].

By November 2015, discussions at Working Party level confirmed that while the objective of the proposed Directive was supported in principle, the opposing delegations criticized non-compliance with the principle of subsidiarity and referred to the variance in national legislation and the difficulties the directive would produce for some states, which would have to significantly adapt their national systems[356].

The Luxembourg Presidency wanted to put the issue to the EPSCO agenda for 5 October 2015, but the issue was withdrawn to have further discussions, Presidency drafted further suggestions, which were submitted to the working party on social questions on 5 and 7 November and COREPER I on 25 November[357]. Commission decided to not adopt a position on the compromise text. The Luxembourg Presidency fine-tuned the cases in which the flexibility clause would apply, extending it to those cases where states do not cover all listed companies falling within the scope of the Directive but compensate with other national measures, which was broadly supported by some delegations (Belgium, Bulgaria, Ireland, Greece, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Malta, Austria, Romania, Slovenia, Finland), while others remained opposing (Czech Republic, Germany, Spain, Portugal, Poland, Denmark, United Kingdom, Hungary, Croatia, Sweden).

In 2015, the December conclusions of the Luxembourg Presidency stated that there was no consensus on the substance of the Directive in the Council, so the Council would not be able to agree on the Directive, as there was no qualified majority[358]. Even though there was a broad consensus on the general idea of taking measures to improve gender balance on company boards, some member states insisted that measures be taken at the national level and stressed that the proposal does not comply with subsidiarity. In reaction to those critiques, the Presidency had redrafted

[355] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 8002/13, 22 April 2013
[356] Council of the European Union, Outcome of Proceedings, Working Party on Social Questions, 14126/15, 19 November 2015
[357] Council of the European Union, Presidency to EPSCO Council, General approach, 14343/15, 30 November 2015
[358] Council of the European Union, Presidency to EPSCO Council, General approach, 14343/15, 30 November 2015

the text, making it more flexible, national measures are now fully recognized and the deadlines have been extended:

> "One of the big countries who really did a lot of work to amend it and to get the general approach was actually Italy during their Presidency in 2014, Greece also did some attempts to water it down or at least adjust it, so that member states would actually say yes to it. Throughout 2015, there were some minor changes, but it was mostly Italy that changed it, along with the Commission obviously, but they didn't succeed, and then for the entire year of 2016 it was blocked and taken off the table, because it was the Dutch and the Slovaks, their Presidencies and none of them want it, so they had no incentives of trying to move forward, so it's been now up to the Maltese, they've tried to bring it up again, we've only met once, and it means that for all of us who have been sitting with the file, we have to think about it one more time and see about the status of it and what we are all going to do."[359]

In the meantime, while negotiations stalled in the Council, several more countries have implemented quotas to boost female access to boardrooms, some before the EU proposal was presented, others during the negotiations: Spain, France, the Netherlands, Denmark, Finland, Ireland, Germany and the UK. From the beginning, the UK has shown the strongest opposition, since the very announcement of the plan to present a legislative proposal they threatened blockage, emphasizing that they are while they are against interference by the EU, they are not against quotas as such (Ravn-Nielsen, 2016; Teigen, 2012), but they also announced to encourage gender equality through national non-binding measures, and proceed along with like-minded member states, but insisted on subsidiarity[360]. The UK framed the proposal as a use of force by the EU, blaming the EU for using force to impose an idea and arguing that the UK would reply in kind and use force to oppose it, throughout the entire process, both government representatives and British media used negative phrasing painting the picture that the entire idea of European Gender Quota is a measure of force where it is not needed (Teigen, 2012; Ravn-Nielsen, 2016). Together with the UK, the Germans are currently leading a blocking minority and refusing to change positions despite their national legislation, as a symbolic statement of opposition to EU interference in crucial matters of sovereignty (Ravn-Nielsen, 2016). Germany has voiced its opposition against interference by the EU and while it has not formally taken a blocking position[361]. National elections in several other European countries

[359] Interview 41
[360] Interview 61; Interview 34; Interview 41; Interview 35; Interview 36; Interview 55; Interview 56
[361] Interview 35; Interview 36; Interview 31; Interview 29; Interview 55; Interview 56

are making the Council Presidencies reluctant to bring the controversial issues back on the table, especially considering the failure of previous Presidencies[362].

In parallel, the occurrence of the Brexit crisis has shifted the attention, with the UK announcing Brexit, the Council had a good excuse to shift attention away from dossiers that were controversial for the British, this being one of the more important ones. The UK representatives and government had publicly stated several times, both in negotiations in the Council and on the national level by public statements of government representatives, that it was set on stopping the Gender Quota plan[363]. Britain has entered parliamentary scrutiny reservations and the UK Parliament has rejected the directive proposal, former Prime Minister David Cameron had announced fighting the directive based on subsidiarity claims (Ravn-Nielsen, 2016), as the House of Commons had objected to an EU regulation saying it should be resolved on the national level on voluntary basis. The House of Commons was joined by the Danish, Swedish, Czech, Dutch and Polish Parliament[364]. The UK also opposed the compromise agreement proposed by the Luxembourg Presidency. Given that the majority of delegations are in favour of the proposal and the UK has to fight quite hard to keep the minority in place, but remained opposed despite having introduced national gender quota legislation in 2015[365]. Indeed, in Germany has introduced a 30% gender quota for company boards, which is inspired by the debate on EU gender quota and caused Germany to switch its position nationally. It is most likely at Chancellor Merkel's initiative and constitutes concessions to her coalition partner SPD that had requested gender quota to be introduced for a while, she supported the proposal of SPD Minister Schwesig against the opposition of her own party[366].

The Parliament framed its support for quantitative targets as a question of fighting for women's rights. It repeatedly referred to governments' unwillingness and inability to combat gender equality on the labor market and the lack of progress in the European Union as a whole. MEPs also claimed to be supported by insights on how companies and society benefit from improving female labor market participation and female

[362] Interview 34; Interview 35; Interview 36
[363] Interview 61; Interview 34; Interview 35; Interview 36
[364] Summary of the state of negotiations: Council of the European Union, Presidency to EPSCO Council, General approach, 14343/15, 30 November 2015
[365] Interview 61; Interview 34
[366] Interview 41; Interview 55; Interview 56; Interview 34

representation in high levels of decision-making. The Parliament defended European intervention and binding legislation as a question of combating intergovernmentalism, referring to governments' persisting inability and reluctance to use binding legislative measures and the resulting discrepancy between male and female representation on the labor market, especially in high levels of decision-making.

In the Parliament, the co-rapporteurs Regner (S&D, Germany) and Kratsa-Tsagaropoulou (EPP, Greece) issued a report in 2013, the baseline for the Parliament's first reading position, supporting the Commission proposal and adding extension, in particular sanctions, a scope extension to include more types of companies, binding procedures for the hiring of executive committee members and a procedure for achieving balanced representation. The position was confirmed by the plenary, but there were no trilogues possible, since the Council did not agree to a position. Informal contacts with Presidencies were useful to signal willingness to negotiate a compromise, but did not enable trilogues, as the blocking minority in the Council persists.

By 2013, negotiations in several relevant committees in the Parliament produced a rather strong position, siding with that of the Reding Commission. Overall, the EP requested a clear goal in terms of improving gender equality by increasing the presence of women on boards and strongly agreed with the Commission on setting the goal of 40% by 2020. The Commission responded to the EP position saying that most of the amendments are acceptable in principle, but the proposal will not be amended until the Council has put forward a common position. The Commission specifically pointed out in its response to the Parliament that the Council internal decision-making process is going very slowly, but that agreement before EP recess, due to elections in 2014, is possible, as some member states are proposing compromise texts.

In October and November 2013, the Parliament presented another report and formally adopted its position by vote in the plenary on 21 November 2013. However, even by December 2014, the Council could not reach a general line on the Directive, the Greek Presidency presented a revised flexibility clause and prolonged the deadlines: the flexibility clause was supposed to deal with subsidiarity concerns to

permit member states to realize the objectives of the Directive on their own terms. A deadline delay was introduced to give states and companies more time and flexibility to adapt and prepare their own measures, the transposition deadline was extended to 3 years and the deadline for the presentation of progress reports also has to be delayed to fit the new calendar.

In December 2015, in a plenary debate, the Parliament expressed its dissatisfaction with the Council's delay of adopting a position on the Directive. Co-rapporteur Mariya Gabriel (EPP, Bulgaria) from the FEMM committee, argued that subsidiarity concerns were not valid or acceptable, since the legal basis of a directive was already chosen to leave sufficient discretion to member states. Meanwhile, Regner has been replaced by Rodi Kratsa-Tsagaropoulou (EPP, Greece). Co-rapporteur Evelyn Regner (S&D, Austria) from the JURI committee, also argued that the directive respected subsidiarity and does not set women quota, but rather lays down rules for procedure for all candidates.

Although, publicly, the position of the Parliament was to demand a fixed quota to be implemented by a certain time under the threat of sanctions for the company in case of non-compliance, but they informally signalled flexibility to the Council on all the important issues[367]: "Yes, but frankly speaking, when it comes to maternity leave, there was really a push from the Parliament side, but I don't think it is the case in this dossier, but maybe I'm not aware of that, it's on the Presidency. But I think it's not pushy like on the maternity directive."[368]

The blocking minority still persists and the Maltese Presidency has announced that the proposal will be a key priority on its agenda for the social and employment area, but was unable to progress on the proposal, due to a persistent refusal of the German delegation to announce whether or not they would change their position[369]. The last official mention of negotiations in the Council dates back to May 2017, when the Maltese Presidency delivered a progress report to COREPER[370]. The Maltese Presidency put the issue on the agenda of COREPER in May 2017, after noting that

[367] "As they support this file, there will´be no problem, I don't foresee any problem with the Parliament, agreement should be found more easily." (Interview 59); "(...) I think on this file they will be flexible on both sides, Council and Parliament, to make some changes and make more member states accept the proposal."(Interview 52)
[368] Interview 40
[369] Interview 53; Interview 54; Interview 41
[370] Council of the European Union, Presidency to COREPER, Progress Report, 9496/17, 31 May 2017

the issue had been kept off the Council agenda since the Luxembourg Presidency in 2015. The Working Party on Social Questions had been discussing the text again in a meeting on 15 March 2017, with the Maltese Presidency making a set of compromise suggestions, in line with the text discussed by EPSCO on 7 December 2015. Member states especially discussed the possibility of a flexibility clause. The Presidency concluded that while there were a number of supporting delegates in favor of EU wide legislation, there was still a significant number of delegates that preferred national measures or non-binding EU measures[371]. The Presidency was not confident that a compromise could be reached soon and concluded that there was still need for further technical and political discussions. The European Council mentioned gender equality and the need for member states to take measures to promote equality in its conclusions in December 2015, did however not specifically call on the Council to negotiate the Gender Quota Directive[372].

The evidence is not entirely clear on whether the problem lies in fundamental disagreements between the co-legislators or if there is simply a lack of momentum for compromise: "Yes, and actually the problem is a different one, because the file is broadly supported by the Council and it has also strong support of the Parliament, but still there is no momentum for a general approach."[373] "There is a general problem between Council and Parliament in the sense that if the Council waits with its official position and the EP adopts one, which is stronger than the Commission, it's usually a lost case, so the Council will try to kill it by waiting, it's a common strategy."[374]

6.3.4 The blame framing game

The analysis of the Council statements reveals that, despite the compromise attempts, the Gender Quota proposal was perceived by the Council as a personal project of the former Commissioner, Viviane Reding, which used the issue to achieve her personal ambition of becoming a candidate for the Presidency of the Commission by pushing particularly integrationist and ambitious proposals to promote a European agenda. She personally framed the project very assertively towards the public and presented the directive as a long-overdue rectification by the EU of member states'

[371] Council of the European Union, Presidency to COREPER, Progress Report, 9496/17, 31 May 2017
[372] Council of the European Union, Draft Council Conclusions, 14325/15, 2 December 2015
[373] Interview 55; Interview 56
[374] Interview 35; Interview 36

negligence in promoting women in business. Her speeches were considered as too forward by member state representations, which biased them against the proposal from the outset[375]. Ultimately, the personal dimension is further proven by the fact that even the new Commissioner, Vera Jourová, which took over the proposal, did not actively support the proposal in the same way and stopped pushing for it[376]. In this particular case, the Commission deliberately and visibly disregarded the Council's critical stance to push a proposal, which in substance might have been acceptable to the Council for negotiation, since the legal text provided for a number of opportunities to negotiate compromises and more flexibility[377]. The Commissioner Reding put all blame on the Council and member states and very clearly sided with the Parliament. She publicly promoted a rhetoric of neglect on the side of member states and presented the European institutions as the defenders of women's rights: "She said at some stage that the Council was stupid and inflexible and conservative and didn't know what they were talking about (...)That made not a good impression in the capitals, not with the experts, but certainly not with the Ministers involved (...)"[378]

The Council proved to be the initiator of deadlock from an institutional perspective, since it refused to take an official position for trilogues in both cases and stalled the negotiations. In fact, all member state representatives, even those generally skeptical towards EU intervention in company matters and framed it as subsidiarity and proportionality concerns, often times referring to the diversity in national labor market systems and company law: Some representatives also referred to the effects of the crisis and austerity measures and argued that governments would be the best instance to judge on relevant and necessary labor market measures:
The Council blames the Commission for an overly aggressive rhetoric, especially the Commissioner Reding repeatedly blaming member states for a lack of progress in gender equality and building a large front claiming to speak for the entirety of the non-intergovernmental European institutions, both Commission and the European Parliament[379].

[375] Interview 35; Interview 36
[376] Interview 35; Interview 36; Interview 34; Interview 41
[377] Interview 34; Interview 55; Interview 56; Interview 30
[378] Interview 34
[379] Interview 34; Interview 35; Interview 36

The Council blames the Parliament for reinforcing the Commission rhetoric instead of taking a pragmatic and compromising stance[380]. Delegates especially criticize the Parliament's public siding with the Commission and the public of accusing member states of lack of progress in gender equality matters without being open to the subsidiarity argument[381]: "(...) you have quite a large group content to agree on the proposal and then you have a group that has been opposed pretty much before the proposal was even issued, largely on grounds of subsidiarity, the theory is that this is not something the EU should legislate for, and what happened throughout the negotiations is that the UK, Germany and others actually wrote to the Commissioner Reding even before the proposal was published to set out these concerns about subsidiarity and then that has persisted right away through the negotiations (...)"[382] Parliament blamed the Council for being uncompromising and stalling negotiations to avoid discussions about a potential middleground and the Commission for being too lenient with the Council: "The same on gender quota, the Council still doesn't take an official position, so the Commission should push the Council much more, a lot of member states already have it and it doesn't cost them, Germany has even introduced new legislation, but even when it doesn't cost anything, it doesn't pass. The Parliament has a hard time accepting the short-term financial arguments. In the Council, the Dutch delegation said that the more liberal states were opposed, because the file would have meant an interference in economic matters, and rejected it as one too many regulations on business matters. They reject quotas, because they come from a logic of merit. Arena also mobilized on this, talking to the capitals, but Germany said that they don't want to compromise their allies in austerity matters just for a file on social policy."[383]

But the comparison of statements by different MEPs also also internal divisions between left and right wing, the right wing sided with the Council and the left wing with the Commission, making it difficult for the Parliament to have a good bargaining position[384]: "The EPP eventually agreed that they would not support a rigid quota system, but wanted flexibility and held onto their position, which was why they got the passerelle to be introduced to be able to avoid sanctions. There was supposed to be

[380]"(...) some member states said that if the Commission wants to achieve something in this regard, it should think about a recommendation and not a directive." (Interview 40)
[381] Interview 53; Interview 54; Interview 32
[382] Interview 55; Interview 56
[383] Interview 29
[384] Interview 29

a joint report by FEMM and JUST committees, but it was difficult, because FEMM was so emotional about the issue, but the cooperation with rapporteur Regner was very good. She offered the possibility to get many people on board. She got the EPP to eventually support the proposal through the flexibility that was introduced, even though they were against quotas."[385]

6.3.5 Model fit and evaluation of the evidence

The model of strategic failure in several rounds does not seem to hold, the evidence seems to point into the direction of activist Commission. The Commission is not showing any signs of wanting to withdraw the proposal to submit a revised, more moderate proposal, which is more likely to secure the Council's support. Despite informal contacts to member state representatives, which have signalled their opposition and repeated contact to the rapporteurs, there is no indication that the Commission will withdraw and bring a new proposal, just as informal contacts have not led to unblocking in the Council, despite attempts by the Parliament.

[385] Interview 31

Conditions – Gender Quota **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Availability of informal channels/networks	+ No evidence for use of information to provide a balanced proposal	- No evidence for lack of access to information	+ Information was deliberately disregarded	+ No evidence for strategic use to achieve second round success
European Council support	-	+	-	+
Issue salience to governments	- No evidence for issue priority to governments	+ Commission had information about Council preferences	- No evidence for issue priority to governments	+ No evidence for plan to withdraw
EP issue support	-	+ No evidence for faulty translation	-/+ Support for the proposal as it corresponds to Parliament agenda	+ Evidence for Commission strategically using the Parliament to push the Council
Window of opportunity	- Strong evidence for disregard of Council agenda	- No evidence for lack of information about agenda	- Strong evidence for disregard of Council agenda	+ No evidence for strategic use of the agenda to adapt and push the proposal
Party politics overlap	- No priority for governments	+ Commission aware of party politics	- Commission pushes against national politics	+ No evidence for strategic use of national politics to achieve a second round
Preference overlap	- No priority for governments	+ Commission aware of preferences	- Commission pushes against national politics	+ No evidence for strategic use of positions to achieve a second round
Agenda overlap	- Overlap with Parliament, but not Council	+ No overlap with national agenda	- No overlap with non-supranational actors	+ No overlap with national agenda

(table 13, evaluation conditions Gender Quota, source: own illustration)

Mechanisms – Gender Quota **Color codes for model fit : strong evidence (green), moderate evidence (yellow), weak evidence (red)**				
Models of failure	Model 1: honest broker	Model 2: technocratic	Model 3: activist	Model 4: strategic
Relais actor behavior	- No influence in reaching compromise, but due to Commission persistence	- No influence, but also no need to provide information, as Commission had access	- No influence in reaching compromise	+ No sign for strategic influence to produce a second round
Informal exchange during agenda-setting	+ Commission does not produce balanced proposal	- Commission had access to information	+ Commission persists with proposal despite input	+ Commission learns about positions, but does not update the proposal for a second round
Blame gains COM	+ No blame gains for Commission as there is no success	- No possiblity to make excuses for technocratic failure	- No blame gains for Commission as there is no success and blame attribution for activism	+ No evidence that blame game is leading to second round
Blame gains co-legislators	- Council has blame gains from denouncing Commission activism, Parliament from denouncing Council	+ Blame gains are not referring to Commission miscalculation	+ Blame gains for Council in blaming Commission, blame gains for Parliament in criticizing Commission leniency	+ No evidence that blame game is leading to second round
Learning/ updating COM	+ No withdrawal	+ No withdrawal	- Persistent deadlock	+ No withdrawal, no indication for a second round

(table 14, evaluation mechanisms Gender Quota, source: own illustration)

On the structural side, there is a lack of support by national party politics and the policy agenda of national governments, as even those who are not openly blocking the issue are not investing in convincing the blocking states in the Council. Even social democratic governments, which traditionally are more supportive of equality measures, are not siding with the Commission. Apart from the lack of support by national party politics, there is also no broad support by the agenda for such a policy change, as many national labor markets still heavily struggle with the aftermath of the economic crisis. Even five years after the proposal, there is no window of opportunity for the policy change.

Indeed, the evidence points towards a reputational game without the final goal of achieving policy change. Institutions are setting things up for failure to distribute blame and praise oneself for gains and attempts to reconcile disputes, without

pushing for unblocking or withdrawal and recast. In this case, the goal of Commission activism would be to initiate a game of symbolic politics and propose policy change for the sake of sending a signal to the public that the Commission tries to advocate citizen rights and deliver policy, but the co-legislators block it. The Council on the other hand can blame the Commission for activism and impracticality and signal to national constituencies that it tries to reign in European activism and protect national sovereignty. The Parliament has the choice between blaming the Commission for not being more realistic and not active enough in pushing the Council and focusing on blaming the Council for being intergovernmentalist and unrelenting.

There is still a chance of the negotiations turning into strategic game, if the Commission agrees to withdrawing and proposing something more in line with Council preferences or agrees to the watering down and the flexibilization proposed by the successive Council Presidencies. However, so far, there is no indication that the Commission will do either. But the long shadow of the future of the EU's policy-making process does not allow to fully rule out that possibility at this stage.

There is some indication that blockage might be due to co-legislator dynamics, since the evidence collected from the Council suggests that the German delegation is a pivotal player in the deadlock situation. Negotiations might also be unblocked if the German delegation leaves the blocking minority.

The internal negotiations in the Council are an example of the integrationist-sovereignist debate between those reluctant to progress in social and employment policy on the European level and those pushing for the EU to take measures against gender inequality. However, both supporters and opponents of the proposal expected deadlock to be unlocked in the Gender Quota case once the Germans introduced their national legislation, it was expected that they would abandon their blocking position and support the project, since in substance the directive is not much different from the national legislation and the other states would have been willing to give concessions to the Germans in return for their support for the directive.

6.4 Gender equality policy: comparative findings and conclusions

The Council blamed the Parliament's extreme position and strong communication around the proposal as being the main problem for the lack of progress, using it to conceal an internal division and a general skepticism towards EU intervention in family policy matters. In fact, in the internal negotiations before the Parliament adopted and publicly communicated its position, the representatives had accepted a number of compromise proposals made by the successive Czech, Spanish and Belgian Presidencies regarding the duration and the amount of leave allowance, but most importantly the possibility of escaping sanctions for non-fulfillment of gender quota targets if a company can demonstrate that it has taken compensatory measures ("passerelle clause"). However, once it was clear that the Parliament position, which exceeded that of the Commission and therefore crossed the red lines of most state representatives, would not be abandoned and the compromise proposals by the Presidencies would not pass, the Council decided to unitedly refuse to halt internal negotiations. Even the successive Council Presidencies did not consider it worth their time to really invest in trying to forge a consensus between the state representatives after the Parliament had submitted its position and amendments.

If we take all three institutions together, it becomes evident that the first reason for deadlock are divergent agendas: the Commission framed the Maternity Leave proposal as a measure of improving women's rights on the labor market by increasing leave time and allowance and not working conditions, while the Council was expecting a moderate proposal that regulated work conditions for pregnant and breastfeeding women, as the previous directive did. The Parliament contributed to the aggravation of the conflict by advocating a gender equality agenda that mainly consisted of blaming member states for their negligence and positioning itself as the defender of women's rights and social progress. If we look into the dynamics within the institutions, the reason for deadlock and failure can be found in the very different approaches taken and the personal as well as political agendas pushed in each case: Viviane Reding's ambition of becoming a candidate for the Commission Presidency. Her attempt to use an aggressive campaign for gender equality against member states as a lever antagonized the Council to the point where member states disregarded their internal division and jointly decided to refuse negotiations by not

taking a position to start trilogues with. In the Maternity Leave case, the Parliament was the over-ambitious actor surpassing the Commission's demands in the initial proposal and further pushing an integrationist and interventionist agenda already deemed excessive by the Council, the left-wing rapporteurs in charge of the proposal in the FEMM and EMPL committees, both refused to depart from their extreme positions for years, inciting the Council to block position-taking and ultimately leading to a loss of credibility as a trustworthy partner for a compromise.

The Maternity Leave proposal built on previous legislation and was the result of a thorough consultation of all institutions and stakeholders and presented as a substantive and procedural compromise proposal, the Commission framed it as a rights initiative, but meanwhile insisted that was openness for compromise. The situation was quite different in the Gender Quota case, where the Commissioner herself advertised it as a personal project and strongly relied on the public communication of blame addressed to the Council. Where in the maternity leave case it behaved as an honest broker, in the Gender Quota case it was an activist, pushing for its own agenda. The Commission's role in the process varied with regard to how strongly it pushed for progress between the Barroso and Juncker Commission, as Commissioner Reding was much more engaged in pushing for the Council to take a position and openly taking a side in favor of the Parliament's position.

Reasons for legislative deadlock and policy failure can be found at different stages of the legislative process, originate from the behaviour and strategic decisions of all institutions involved, which in turn can derive from particular actors' ambitions regarding the proposals under discussion. The reasons for deadlock appear may appear trivial, yet the concurrence of conditions, formal rules and strategic actors determines whether consensus-building succeeds or fails. We know from other areas, like Justice and Home Affairs or Foreign Policy, that positions can be extreme in the beginning, but relais actors, like the Council Presidency or the Parliament rapporteurs can steer the discussion towards a compromise (Smeets, 2013; Ripoll Servent, 2012). Similarly, even a sovereignist Council can be skeptical of a proposal, but convinced by the proposals made by the Parliament or even the Commission, if they in turn are capable of anticipating the red lines. And last but not least, much

depends on the behaviour of the Parliament and the responsible rapporteurs: the more ambitious and assertive Commission and Parliament in their integration demands, the less likely it becomes that the Council will agree to its demands. This seems to hold true in particular for areas where the Council does not see a pressing need for action - and in the current climate, the focus of governments clearly is not on gender equality, but rather on migration and economics (Teigen, 2012; Forest and Lombardo, 2012).

Interestingly, compromise proposals by Council Presidencies in particular proved to be unsuccessful, in the maternity leave case, because the Council entirely focused on the Parliament's position, which was perceived as excessive and argued that it would not be worth engaging in finding a compromise among member states if it was doomed to fail in trilogies. The rapporteurs insistence and very public aggressive framing of the Parliament position against the Council further added fuel, as delegations could unite against the other institution instead of focusing on their own conflicts. The Parliament played a risky game in pushing the Council for more substantial policy change and lost. Ultimately, the rapporteur did not perform a broker role, but entirely focused on pushing a particular agenda, which centered the conflict around her as the metaphor for the Parliament being excessive and relentless. The long persistence in the extreme position shut the window of opportunity on the negotiation and by the time the rapporteur, which was no longer trusted by the Council, had changed, any compromise offer by the Parliament was no longer credible to the Council. For the Council, especially those delegations that were not keen on policy change, the rapporteur's persistence was an easy and welcome element to focus on to find blame for blockage, while portraying themselves as open for compromise. The Council Presidencies, who mostly disengaged from the file, also used the blame rhetoric. In the Gender Quota case, the Council found its scapegoat in the Commission and the reluctance to change the proposal into soft law or abandon the quota target. The Parliament and the fact that the rapporteur sided with the Commission were of secondary importance, as the position of the Commission came first and was most vociferously communicated from the beginning.

Despite the differences, the conflict dimensions in both cases were not much different, the Council opposed interference by the EU, claiming subsidiarity concerns

to conceal sovereignty arguments and opposed any measures that would have redistributive consequences or affect the national labor market systems in ways that would require significant legal changes. A strong preference for the status quo is obvious for the Council and it clashes with a strong rights-agenda of the Commission and the Parliament. The Parliament did not focus on procedural elements, since co-decision applied to both proposals and therefore entirely concentrated on making demands in substance. However, rather than being open to compromise, as it was the case in the border policy negotiations, even after deadlock had become apparent, the rapporteurs persisted in their positions for a long time, risking losing the window of opportunity for agreement. Pushing for a strongly supranationalist agenda has not paid off for the Parliament in both cases, mainly because the rapporteurs were not trusted by the Council to be willing to compromise.

After its largely unsuccessful attempts at promoting women's rights during the 90s, the EU introduced the gender mainstreaming rhetoric, a strategy to relate processes and outcomes of mainstream policies to the gender issue (Rubery, 2002). Since the 2000's, gender mainstreaming rhetoric has been the most common strategy for framing policy requests and proposals in the gender equality area (Verloo, 2005), the EU has attempted quite a few measures to implement gender parity, but mostly non-legislative measures, one of the most important ones being the 2006 Roadmap for Equality and a number of Action plans, which maintain equal participation of women in decision-making as one of the six key areas of gender equality. The goals fixed in the roadmap were used to judge the performance of states with regard to the indicators set up by the Finnish Presidency in 1999 (McRae, 2012), recent EU rhetoric is linked to the labor market, since the EU does not have much competence in social policy, hence it opted for a gender equality approach in labor-market related policy, the link to the labor market has opened possibilities for the EU to encroach upon family policy matters even though formally it does not have extensive competences in this area (Lombardo and Meier, 2008). The EU has pursued a similar strategy for the entire field of social policy since the Lisbon Treaty has been ratified, social policy has continuously been included in work programmes and action plans (Jenson, 2008). Work and family reconciliation has been promoted by the EU as a means for addressing a whole variety of problems, from low fertility rates to improving competitiveness and growth and achieving gender equality, the framework has

always been closely tied to the labor market and employment policy strategy (Lewis, 2006). Labor market participation frames dominate over social policy and rights-related frame, as the focus of member states lies on employment policy, the social dimension remains secondary. Similarly, business frame dominates gender equality frames. equal opportunities are framed in terms of business benefits or costs or integrated in a larger anti-discrimination framework.

VII. Comparing findings across policy areas: highlighting similarities and idiosyncrasies in processes of policy-making failure

Before proceeding to general conclusions about the implications of the findings for research on EU policy-making, it is commendable to bring together the comparative findings from the four case studies and evaluate the different components of the models presented initially.

Model evaluation			
Case	**Fit of strategic failure model**	**Possible other models**	**Success (success strategy)**
Case 1: Schengen Governance Reform	**Yes**	**None**	**Yes (issue addition and issue-linkage)**
Case 2: Smart Borders Package	**Yes**	**2) technocratic failure**	**Yes (scope reduction and reframing)**
Case 3: Maternity Leave	**Unclear**	**1) Honest broker: co-legislator position-taking**	**Uncertain (Scope extension, legal base modification and reframing)**
Case 4: Gender Quota	**No**	**3) activist failure**	**No (none)**

(table 15, overall model evaluation, source: own illustration)

As regards the evaluation of the overall fit of the models proposed initially in explaining legislative failure, we can draw the following observations from the case studies: there is evidence for strategic failure and a reputational blame game for the Schengen, Smart Borders and Maternity Leave cases.

“And they’ve (add: the Parliament) succeeded, because when the Commission drafts something, they very much look at the Parliament as well. But they also need to strike a balance with the Council, because they know if they look too much at the Parliament, we will see it, we see these things, you very easily see when you read

through a directive, it's very easy to see how much of it was intended for the Parliament and how much was not. If it it's too much for the Parliament, we will protest. It's a game. But for some reason, we always end up being able to strike a balance somehow."[386]

There is also evidence for other types of Commission behavior, the Commission might sometimes value pure activism and the reputational gains more than the actual policy change, as the Gender Quota proposal suggests, or have trouble correctly performing its agenda-setting, which seems to be the case in the Smart Borders negotiations. While theoretically plausible, the activism model still leaves the question of why co-legislators would engage in intra-institutional negotiations at all, if the Commission presented a truly activist proposal.

Taken together, three in four cases show indicators for a multi-sequence game, two of the legislative files being concluded, either formally or informally, and one being negotiated in the second round. The fourth case is an outlier in that regard, at least until the time the data collection and analysis was completed for this study, deadlock persisted. The Schengen, Smart Borders and Maternity leave cases not only show indicators for a multi-sequence game, but also strategic elements that indicate that the key actors, institutions and individual actors, use failure to their advantage to achieve procedural, substantive and/or reputational gains. The cases, however, demonstrate, that the models (1)-(3) and the model of strategic failure (4) are not necessarily mutually exclusive.

The Schengen case is a completed multi-sequence game, where failure and recast ultimately led to agreement, after a power battle over procedural and substantial gains and a mutually beneficial framing game. It is a textbook case for strategic failure, as everybody wins after the last round.

The Smart Borders case is clearly a comparable case, another multi-sequence game, after withdrawal and recast and bargaining about the scope and substance and blame framing exchanges between the institutions, there has been an agreement. It shows indications, that strategic games can be combined with first instance

[386] Interview 41

technocratic failure. The mechanism leading to success in this case is scope reduction, through elimination of RTP, and reframing.

The Maternity Leave case is still in the second round and there is no informal agreement yet, but the institutions signal an interest in producing an agreement, especially the Council, and they have practiced a similar blame game after failure and withdrawal of the first proposal. In this case, first instance failure due to co-legislator position-taking could be combined with strategic failure, as the Commission clearly took the main controversial element out of the proposal: maternity leave. The main mechanism of reacting to failure is a combination of scope extension, legal base modification, leading to the inclusion of more issue areas, more non-legislative elements and a reframing from maternity leave to work-life balance, which eliminated the main controversy.

The Gender Quota case is the only one that is currently not pointing towards strategic failure, but rather to absolute failure due to Commission activism, as blockage and deadlock have continued with no sign of withdrawal. However, it could still come about, as the Maternity Leave case also remained deadlocked for almost seven years, before the Commission formally withdrew it.

Based on the observations from the cases, the following table will provide general observations about the models and propose ways to refine them:

Model evaluation		
Model	**Observations**	**Proposals to refine**
Model 1: honest broker	Council and Parliament dynamics can change after submission of a proposal, but it only affects failure, if it leads to an extreme Parliament position, as the Council will block, if the Council takes an extreme position, deadlock can still be resolved The model tends to be combined with strategic failure	Council-centric: the model is sensitive to positional changes in the Parliament, which bring the Parliament position further away from the Council, but not the other way around, the Parliament still invests in negotiations even after deadlock, if the Council takes a more extreme position
Model 2: technocratic failure	Information transmission: there is sufficient transmission in all cases, the problem does not seem to be uncertainty or information asymmetry at the consultation stage Policy drafting inside the Commission: if failure due to uncertainty occurs, it seems to concern the Commission not putting the requests into action, which were input by the co-legislators	Focus on policy drafting and not agenda-setting or consultation: Commission possesses enough information, but there is legal, technical or political failure inside the Commission when translating it into policy
Model 3: activism	The Commission does display some activism, mostly initiated by a Commissioner with a particular agenda, but it is only conducive to failure, if it coincides with a restrictive and intergovernmental agenda in the Council Activism seems to be a matter of degree: some degrees of activism in the framing and text of the proposal at the initial stage will not lead to failure, if the Commission then accepts to modify the proposal and adapt to the input, persistent activism and strong public blame framing will lead to permanent deadlock	Commission activism is linked to Council preferences and Council agenda: investigate the Commission-Council relation Gradation of activism: activism leads to failure if combined with strong public blame rhetoric against the Council, which persists despite requests to adapt the proposal
Model 4: strategic failure	Strategic failure can be combined with Models 1-3 in the first round: proposals can fail due to position-taking dynamics between co-legislators or technocratic mishaps, to some extent activism by the Commission can be captured by the blame game and lead to a second round with a successful outcome, if everyone plays along and if the Council has an interest in saving the proposal	Council-centric game: it depends on the dynamics between Council and Commission, where the Council stands, if it has an interest in participating in both the policy change and the blame game, and if the Commission responds to the demands, the first instance of failure turns into a strategic game

(table 16, model evaluation and refinement, source: own illustration)

7.1 Causes of failure

The analysis has shown that structural factors play an important role in the process of legislative failure. Which ones are the most influential?

Preference and conflict constellations can be conducive to failure, especially if extreme positions persist a long time during the negotiation process, instead of being replaced by more moderate ones. In the Schengen case, position conflicts could be resolved through informal deals, whereas they persisted in the Maternity Leave case and also persist in the Gender Quota case. Conflict constellations evolved in the Schengen case, the re-nationalization aspect vanished and positions evolved to a much more moderate stance on internal border control, in the Smart Borders case from a conflict over law enforcement access and data protection to a much more security oriented compromise and in the Maternity Leave case to a more flexible approach to leave provisions and level of pay, which allows for more state discretion. Overall, all proposals, which have resulted in agreement or are moving towards it,

show a tendency towards more moderate positions in the second round, on all institutional fronts. On the other hand, conflict constellations consolidated and even worsened in the Gender Quota case over the question of quantitative targets and binding rules.

When it comes to the interaction between the national and the European agenda and the salience actors attach to the issues, there is crucial variance between the areas. This is induced by the overall crisis agenda, which strongly affects the national level. Governments consider immigration and border issues to be more important and dedicate more time and attention to these issues on the national and the European level. In the Schengen and Smart Borders case, the crisis led to a reinforced security agenda, which is why national actors pay comparatively more attention to the border policy area than the gender equality area, and insist more on security elements and rights protection. In the case of the Schengen reform, the sole reform of the evaluation mechanism was not considered a priority by member states, but rather the combination of the evaluation mechanism with border control made the issue attractive. The first Smart Borders package was not attractive to the Council when framed as a migration management tool. The second proposal which had a security angle was much more convincing. The gender equality measures were clearly not a primary concern for states, and the willingness to engage in negotiations decreased over time for member states when it became clear that there would be no progress. The Maternity Leave case was saved by the withdrawal and the Commission's decision to water down the new proposal and keep it at the lowest common denominator.

National level factors, such as coalition and party politics, timing of national elections and public opinion have affected the policy-processes in all four cases. National elections and the need to circumvent populist pressure gave the impetus for the Schengen Governance Package recast in 2011 with key member states insisting on the internal border control element. Coalition and party politics seem to play an important role in all negotiations. The Schengen negotiations were influenced by the conservative quest to ensure reelection or maintain governing coalitions and respond to perceived threats of public opinion, Smart Borders is also marked by left-right cleavages and disagreements between coalition partners. The role of governing

coalitions is even more pronounced in the Maternity Leave and Gender Quota case, where actors uploaded a strong left-right cleavage and internal disagreements, again centering around the grand coalition in Germany, which was the source of the German reluctance to take a position.

Alongside party politics controversies, public opinion has been mobilized as a justification for positions in all cases, by all institutions. The security element was instrumentalized by the Council in Schengen. The security as well as the data protection element were pitted against each other by the Council and the Parliament in the case of Smart Borders and the rights protection element was strongly advocated by the Commission and the Parliament in the cases of Maternity Leave and Gender Quota.

In the Schengen case, delegates uploaded national political competition to exploit EU policy-making to distract from populist pressure at the national level. This was done in view of upcoming presidential elections in France in 2012, where Sarkozy unsuccessfully campaigned for reelection, upcoming Länder elections in Germany in 2012, where the conservative parties needed a boost in key Länder like North-Rhine-Westphalia and upcoming general elections in Spain in November 2011, with a similar support problem for the conservatives. Similarly, in the Smart Borders case, national actors uploaded concerns about public opinion and populist pressure: for example the reaction of national governments to pressure by the public over terror threats to avoid controversies at the national level. Also, delegates uploaded the left-right cleavage over border control, establishing a preference for security versus protection of individual freedom and data protection concerns exploiting the uncertainty of the migration and terror crisis.

In the case of Maternity Leave, delegates were uploading national views on labor market regulation and austerity, creating a particular cleavage between a preference for redistribution and worker protection versus preference for budgetary consolidation. Alongside that, states also uploaded the left-right cleavage over labor market regulation, between creating gender equality obligations for employers versus leaving employment regulation to social partners. In the Gender Quota case, the blocking states in the Council were successful in uploading two types of national

concerns and found sufficient support, especially by big states, to build a blockage. The first national controversy that was uploaded were diverging views on labor market regulation, preference for state intervention versus preference for company self-regulation.

Positions can strongly vary over the course of a negotiation. Extreme positions make negotiations more difficult and can increase the likelihood of failure, but it depends on how willing actors are to accept compromise solutions and make concessions. The longer extreme preferences persist, the more likely deadlock becomes. Conflict constellations can also strongly vary. As actors change positions, conflicts can dissolve or shift. Success or failure of a negotiation depends on the ability to dissolve conflict. The more intense and durable, the more likely deadlock becomes. Salience also varies over the course of a negotiation. Actors shift their attention if the context changes, therefore the effect of salience can go both ways. As the literature has established, it makes finding agreement easier, if actors value an issue or parts of an issue differently, but it is important that actors agree on an issue being important enough to devote attention to it.

Using upcoming national elections or national populist pressure as a means to gain leverage in negotiations seems to be rather ineffective, if not counterproductive to enforce a position, especially if there is not broad support by other actors, who face similar pressures. Coalition politics are effective in creating and maintaining blockage, but do not necessarily lead to success in imposing a position. For this the strongest and most influential actors are needed, meaning the biggest states in the Council and the biggest groups in the Parliament. Public opinion influence is difficult to isolate, since it is not entirely clear to what extent governments respond to existing trends in public opinion or create them, but public preference for security over perceived threats seems to matter, as all the related proposals have been adapted accordingly.

With regard to the role of EU level factors, there are some interesting findings on the convergence or divergence of coalitions across institutions and the Parliament's tendency to take extreme positions. Overall, we observe a tendency of the Parliament to take extreme positions on substance in the social policy area and on

procedure in the Justice and Home Affairs area. It shows more willingness to abandon extreme positions in the latter than in the former. We observe ideological convergence across institutions in the border policy area. The right wing in Council and Parliament strongly coincide in their positions, as do the left wing parties, coalitions for the right wing center around security and sovereignty, while the left wing centers around rights protection and an opposition to intergovernmentalism. In the Schengen, Smart Borders, Maternity Leave and Gender Quota cases, the statements by members of the right wing in either institutions strongly resemble each other, with the Parliament right wing showing more understanding of the Council's preference for restrictive measures and limited intervention. The Parliament shows intra-institutional inconsistency, which make it easier for the Council to appeal to the right wing for compromise.

Ideological coalitions travel across institutional borders, but do not necessarily produce either success or failure of a negotiation. These coalitions are more influential in Justice and Home Affairs issues than in Social and Employment issues. Extreme positions of the Parliament are quite common and in line with expectations about the spatial positioning of the institutions, yet the Parliament does not always pursue extreme positions when it would be expected to, especially in Justice and Home Affairs matters.

7.2 Stages and institutional dynamics of failure

The in-depth analysis of the four cases has shown that the process matters and breakdown can occur at different stages, depending on the behavior of key actors. In this section, the key stages will be shortly reviewed with regard to their importance for the occurrence of failure.

In terms of agenda-setting and policy formulation, it can be observed that the Commission shows a willingness to adapt proposals, learn from failed position-taking attempts or trilogue negotiations and incorporate, especially the Council's demands in the Schengen, the Smart Borders and the Maternity Leave cases. In procedure as well as in substance, the Commission is more responsive to the Council. It changed to an intergovernmentalist procedure in the Schengen case, deleted most of the

rights-protection-oriented elements in the Smart Border scase, and watered down the Maternity Leave directive recast to a minimum.

In matters of position-taking, we observe that the Council and the Parliament work better together informally in Justice and Home Affairs matters. Second round agreements are swifter, after the big issues have been settled in the first round and they are more willing to move closer together in the second round and after having successfully demonstrated that they make maximalist demands to please their constituencies in the first round. Inside the institutions, Germany strongly dictates the game in the Council and the right wing dominates the committee work in all four cases in the Parliament. Timing and extreme positions are important at the position-taking stage, the more extreme a position and the longer it is kept, the higher the likelihood of failure.

As for trilogues and inter-institutional coordination, informal coordination is key, but it does not solve all the problems. In the Schengen case, it enabled the solving of the controversy in the second round, but in none of the case was it able to avoid first round failure. Informality is very important, however, in order for all institutions, to learn about the red lines and the requests for the recast, as well as to figure out where potential anchor points for textual, legal or political compromise might be found.

7.3 Actor influence and relais actors

Which actors play a key role in steering the process and how does their behavior affect the dynamics of success and failure? This section will contain a review of the key actors in the four cases.

The European Council is an underestimated actor in the legislative process. It strongly influences and more actively intervenes in the agenda-setting and policy formulation processes. Pushes for agreement, gives clear technical and political instructions and sets clear deadlines, like in the Schengen and Smart Borders cases, or manifests disengagement, like in Maternity Leave and Gender Quota. It leaves less leeway for the Commission and reinforces national influence on the policy

process, which leads to more competition between the Commission and heads of state over the European policy agenda.

The Council manifests an increase in intergovernmentalist behaviour in reaction to extension of co-decision and a desire to limit the influence of the Parliament and advocate more restrictive policy and less supranationalization. There is increased competition between Council and Parliament over substance, procedure and form of policy instruments, with the Council provoking deadlock and failure by stalling negotiations and insisting on extreme positions. In Schengen, Maternity Leave and Gender Quota, the Council is the institution that has forced the deadlock. Delegates are less compromising and more insistent on settling conflicts in favor of member state interests, which is clearly visible in all the evidence collected from member state delegates in all four cases.

The Council Presidency as a relais actor displays ambiguous role behaviour across the different Presidencies and cases. Some Presidencies took on an independent broker role, like Poland, Cyprus and Ireland in the Schengen case, all of the Presidencies in the Smart Borders case, Belgium, Czech Republic, France, Poland, Spain, Denmark in the case of Maternity Leave and Cyprus, Lithuania, Greece, Italy, Luxembourg and Malta for Gender Quota. Others sided with a certain position or group, either openly opposing the policy proposal or not including the issue on the agenda, like Denmark for Schengen, Netherlands and Slovakia who sided with blocking minority, Sweden and Hungary who did not address the issue in the Maternity Leave case, and again the Netherlands, Slovakia and also Denmark, who sided with the blocking minority on Gender Quota, Ireland and Latvia did not push for the file on the agenda.

Presidencies also show variation in contact and quality of relations with the Parliament actors: some Presidencies had good relations and extensive contact with the responsible rapporteur and committees. In the case of Schengen, it moved from bad relations with the Danish Presidency to compromise with Cyprus and Ireland. In the case of Maternity Leave, all Presidencies attested to bad relations with the rapporteur Estrela and better relations with rapporteur Arena. In the Smart Borders and Gender Quota case, there seems to be little decisive effect in that regard.

In the Parliament, we observe an oscillation between constructive pragmatism and supranationalist activism. Ultimately, behavior depends on the conflict dimensions and the overall stakes involved in the file, if they are procedural, and the Parliament is likely to gain influence, it will adapt its behavior in a way that is conducive to agreement, as the Schengen and Smart Borders case show. If the stakes are substantive in nature, the Parliament can insist on its extreme position by claiming to fight for an upgrade in standards for citizens. This is clearly visible in the case of Gender Quota, and also the first round of Maternity Leave.

Rapporteurs have the greatest influence inside the committee, because they have privileged access to information and are in a position of power as they are in charge of reports. They have to strike a balance between not compromising the EP's influence on the one hand and conceding enough to the Council to be able to get an agreement, as the Schengen rapporteur and the Smart Borders rapporteur have perfectly done. Most of the informal work is done in committees. Committees have strategic influence on the Parliament's position on each issue and have quite a large discretion in terms of determining its position for the trilogue, which makes them drivers or brakemen of compromise from the Parliament side. In the Maternity Leave case, rather than attempting a broad compromise that incorporates the views of the right wing, the rapporteur relied on a narrow left-wing majority, which was unlikely to find support in the Council.

In the LIBE committee, solving disagreements in the committee depends on how divided the committee is internally and how trusted the rapporteur is. On Schengen, EPP rapporteur Coelho was trusted by the left and right to defend the Parliament's interest. On Smart Borders, EPP rapporteur Diaz de Mera recommended a balanced position between security and data protection safeguards, because there was little leeway for battles with the Council. The issue is much more complicated in the social and employment area, where several committees are responsible for gender equality, concretely the FEMM, JURI and EMPL committees. The division of labor between the three committees can lead to disagreements over how to approach a proposal. In the case of Maternity Leave, the rapporteur from the FEMM committee, Edite Estrela, lobbied the EMPL and JURI committee to take an extensive position in terms of

duration and level of pay and was successful in rallying a left-liberal majority in the committee and the plenary, leading to failure. In the Gender Quota case, the committees, were more prudent, and the co-rapporteurs from the EPP and S&D recommended adopting the position of the Commission instead of going beyond it.

A well-connected rapporteur with a sense for how far interests can be pushed and when a compromising position should be adopted, can facilitate agreement with the Council, as the Schengen and Smart Borders case show. Disagreements within or between responsible committees hinder this process and can lead to extreme positions in the Parliament that in turn increases the likelihood of failure, which has been a crucial factor in bringing about failure in the Maternity Leave and Gender Quota case.

All four cases show that the Commission clearly is less and less an honest broker and more a strategic player and an activist, advocating its own agenda and willing to risk immediate failure to achieve mid- or long-term integration progress. Proposals are more failure-prone. If they do not provide a middle-ground between Council and Parliament and the Commission is less trusted as a broker, Council and Parliament rely on other relais actors for conflict management.

Commissioner influence is important in directing the drafting process of the initial proposal: if the Commissioner promotes a particular agenda or defends a particular position rather than looking for what could be an acceptable compromise for Council and Parliament, it can increase the risk of deadlock, as the Gender Quota case perfectly illustrates. In the case of Schengen, Commissioner Malmström supported a redraft with a legal base change in favor of co-decision, which subsequently led to the controversy between Council and Parliament in the second round and almost to another failure situation. Also, on Smart Borders, Commissioner Malmström advocated a rights agenda and limited any security elements to a minimum while Commissioner Avramopoulos was more in favor of security elements. In both the Maternity Leave and Gender Quota cases, Commissioner Reding promoted a strong rights agenda.

Legal services can enable compromises through strategic changes to the proposal that reflect a compromise. In the case of Schengen, together with the rapporteur and the delegations from Luxembourg and Portugal, the legal service drafted a compromise that included a passerelle clause to link the decision-making procedures of the Schengen Borders Code with those of the Schengen Evaluation Mechanism. In Smart Borders, Maternity Leave and Gender Quota, the legal service proposed flexibility provisions to enable a compromise in the Council. The contributions by the legal service can provide grounds for compromise, but do not necessarily lead to one, in Schengen, the solution was acceptable to both a Council and a Parliament majority. On Smart Borders and Maternity Leave the second round compromise proposals were also acceptable, but in Gender Quota, so far, the flexibility clause has not rallied a majority.

7.4 Conditions and mechanisms of failure: key findings

In this section, the key conditions and mechanisms, which can tip a process towards success or failure are reviewed, comparing insights from all four cases. A table for each summarizes the key findings.

Evaluation of Conditions			
Conditions	**Observations**	**Evidence (in favor of strategic failure)**	**Quality of evidence**
Availability of informal exchanges/ networks	Availability: there is no indication in any case that informal channels were not available or faulty Informality enables strategic failure: key condition to continously exchange views and mutually ensure the interest in agreement after bargaining	Evidence from all four cases that informality is widely used by all actors in all institutions and enables the strategic game	Strong evidence that it is a necessary condition, strong evidence that it is not a sufficient condition
European Council support	If the European Council does not support the proposal in the first round or if the Commission does not accurately translate the instructions, the proposal fails	If the European Council interferes to push for the proposal, it passes in the second round, enabling strategic failure	Strong evidence that support for the particular proposal and interference are a necessary and even a sufficient condition
Window of opportunity	Window of opportunity: if the Commission does not use a window of opportunity, the proposal fails, because actors divert their attention Windows of opportunity and strategic failure: a key condition for enabling a second round after failure, if combined with reframing and agenda overlap with Council (overlap with Parliament not necessary)	Evidence from all cases that attention spans are limited and the Commission has to link the policy to the pressing problem on the Council agenda, if that is successful, strategic failure becomes possible	Strong evidence for the need for a window of opportunity being a necessary condition
National agenda and politics (government preferences, issue salience and party politics) favorable to policy change	Rather than treating them separately, party politics, government preferences and issue salience (public opinion) can be summarized as national agenda Issue salience matters in terms of how important it is for Council actors to invest in negotiations and whether they desire a European policy on the issue, salience to the public or the Parliament is not important for the dynamics of success or failure If the national agenda does not overlap with the proposal, initally or due to changes in the process, falure occurs, however, only if the agenda non-overlap concerns the big key states and if they are successful in convincing the other delegations to support blockage	Evidence from all cases that national agenda overlap matters, in particular for the big states and that strategic failure becomes possible, if the Commission responds to the demands of key states in the Council	Strong evidence that it is a necessary condition, strong evidence that influence on the occurrence of fallure is dependent on states being big/ influential and being successful in building support

(table 17, general evaluation of conditions, source: own illustration)

Evaluation of Mechanisms			
Mechanisms	**Observations**	**Evidence (in favor of strategic failure)**	**Quality of evidence**
Relais actor influence	Relais actor influence is limited in the first round, if the proposal does not correspond to the agenda, the desired framing or is not close enough to the Council, there is no possibility to salvage the process Relais actor influence is strong in the second round to sort out the details and provide linkages for compromise	Relais actors are active in first and second rounds, but only in the second round they are a key element in producing agreement	Strong evidence for both lack of influence in the first round and key influence in the second
Informal exchange COM-co-legislators	Actors use informal exchange all throughout the process to both produce failure and salvage proposals in the second round Informal exchange is an enabler, but only conditions success in combination with a compromising position and failure in combination with an extreme position, taken either public or informal or both	Informal exchanges enable second round success, if the actors focus on exchanging gains and trading losses to strike deals and if they adopt compromising positions, both informally and publicly	Strong evidence for the use, strong evidence for the need to adopt a compromising position
Learning/ updating COM	Learning and updating in the second round is a key condition to enable second round success, the responsiveness should focus more on the Council than the Parliament	More evidence for responsivess and intention to enable a strategic game in JHA than in SEP	Strong evidence for learning and updating in JHA, moderate evidence in SEP
Blame gains COM	The Commission gains from being able to blame the Council for intergovernmentalism and the dynamics between the co-legislators for being the reason for deadlock	The moderate blame game works well in JHA, all actors play along and the gains seem to be rather equally distributed, with the Parliament and the Commission siding with each other more often and going against the Council The blame game does not seem to point towards strategic failure in SEP, which makes it likely that blame for purely reputational gains without the intention of enabling success might be preferable to actors in this area	Strong evidence for blame games to create winners, moderate evidence for the importance to create losers rather attempts at explaining misbehavior The game seems to be focused on portraying it as a winning game: confirmation of the need to regard the repeated interaction context and ensure the possibility of future games by not compromising the relation too much with blame attribution
Blame gains co-legislators	The Council gains most from portraying itself as the pragmatist who looks for compromise and also from blaming the Commission for being overzealous and the Parliament for being unpragmatic, overambitious and The Parliament gains most from portraying itself as the protector of rights and from blaming the Council for being intergovernmentalist Overall, the blame game is much more moderate and oriented towards still keeping the possibility for compromise open in the JHA area than in SEP		

(table 18, general evaluation of mechanisms, source: own illustration)

In the remaining part of the section, the conditions and mechanisms are evaluated in detail, drawing on insights from the cases.

Voting rules matter for the process, because they enable blocking strategies, such as blocking minorities, which have been the key strategy in the Council in both the

Maternity Leave and Gender Quota cases. Qualified majority voting in the co-decision setting benefits bigger states and disadvantages smaller states and weakens the consensus-drive. Bigger states can decide to outvote or even disregard smaller states and have better strategic opportunities for blockage. Due to QMV, bigger states have become even more pivotal as actors in the Council and smaller states are even more disadvantaged. However, bigger states also need coalitions with other big states or many smaller ones or they can also be isolated, if their position is not supported, as the French and Italian were in Schengen and the French again in Smart Borders. The evidence shows in all cases that Germany is the sole and clear winner, as its position is always considered, even if it is extreme, they receive concessions and are not outvoted.

Crises can be used as a window of opportunity. If the proposed policy solution corresponds to the perceived problem, a crisis can provide an opportunity for policy change, which is the case for Schengen and the second round of Smart Borders. If the proposed policy clashes with the perceived problems, a crisis can encourage failure. This is evident in the Maternity Leave and Gender Quota, as well as the first round of the Smart Borders cases.

Timing is crucial when considering the actor's ability to strike a compromise when preferences are sufficiently overlapping or when actors are willing to engage in negotiations to figure out compromises and the attention of actors is sufficiently focused on the issue. If actors pay attention to time constraints on attention and willingness to invest resources in negotiating a compromise, as Schengen clearly shows timing can help achieve agreement, even when preferences are initially very conflicted. If however actors remain on extreme positions for too long, the momentum for agreement will pass and even a preference change or compromise proposal will not lead to a restart of negotiations for an agreement, which was the case for Maternity Leave and Gender Quota. In this context, salience can be an enabler. The more attention an issue gets by the public, the more attention policy-makers have to devote to solving conflict. This is due to the fact that the more important an issue is to the domestic population, the more likely it is that policy-makers devote themselves to finding solutions, since the costs of failure, involving blame and potential electoral repercussions, become quite high. This dynamic could be observed for Schengen

and Smart Borders in the second round but salience only works as an enabler in combination with timing regardless of preference divergence. If actors miss out on the right time to conclude a negotiation, it is likely to end up in deadlock, regardless of preference constellations, because the focus shifts to other issues and it is difficult to get actors to devote the necessary attention and resources to the negotiation, as the first round of Maternity Leave shows.

How actors deal with uncertainty and information distribution is important, but possessing sufficient information about the positions of others is not sufficient to bring about success or failure, since positions can change. It is however very important to frame positions and perceptions in a way that appeals to the other actors in order to legitimize a position, point out common ground and have sufficient information about potential coalition partners.

Informal contacts prove to be a necessary condition for actors to build coalitions, either to support or block a proposal or to exchange information about preferences and positions without compromising potential coalitions. A level of secrecy is required in the first place, in the institutions and also in the trilogues to propose ideas. All types of actors, in all institutions use informality to defend their own interests and agenda on the one side and tread the ground for potential partners. Relais actors use informality to figure out potential avenues for compromise. However, informality is not a way to forego failure, issues can fail regardless of whether there have been informal contacts, what matters much more is the way positions are framed and perceived and how successful actors are in pushing the issue through the key channels to each institution, to the Commission for drafting and to the respective other co-legislator for trilogues.

Interpersonal relations and networks are very important in the way actors can make use of informality. Trust helps build these networks and make informal channels available, as trust works as an enabler of compromise across institutions if this trust is shared across institutional borders, otherwise there might be agreement within one institution, but not between the institutions. If trust is non-existent or broken in the process, a negotiation can be compromised. This particularly applies to relais actors. Bigger states have better influence on all levels in the Council, as bigger

administrations and those with more resources can build greater networks and have better abilities to mobilize, this works in particular for bigger state and richer state representations who can afford bigger administrations. They are therefore better able to make their positions count.

The Schengen case is the perfect example for how trust, networks and information availability in combination with knowledge about how to build a sufficient supporting coalition helped overcome the controversy over procedure.

Flexibility, stubbornness and personal ambition are particularly important for those singular actors who can steer the process, relais actors and especially the Commissioner or Commission officials during the drafting process, since they lay the groundwork with the draft proposal, if they depart from the potential area of compromise an actor's ambition can compromise negotiations. In the cases of Maternity Leave and Gender Quota, the rapporteur and the Commissioner pursued a personal agenda and proved unrelenting when facing opposition by the Council.

In this case, actor change can function as a window of opportunity, actor change either as a replacement of an actor by another or the exclusion of an actor from the process. Replacing a contested actor can unblock negotiations if the co-legislators both approve of the replacement or exclusion, which was the case for the Smart Borders rapporteurs and the Commission representative in Schengen. Replacing a contested actor can cause deadlock if either of the co-legislators does not approve of the replacement or exclusion or does not consider it a trustworthy move towards compromise, as it was the case in Maternity Leave.

By referring to an (individual or collective) actor's most and least contested elements of a proposal or package to offer alliances and compromises, variance in salience and sensitivity to issues is exploited. For example by focusing on procedure when substance is contentious to enable a compromise. If quantitative targets, rules or regulations are contested, offering changes to the decision-making or implementation procedure or the legal base can enable compromise, like the Presidency has tried to do in the Maternity Leave case. Offering discretion in terms of how to interpret deadlines, targets or process requirements to make a substantive requirement

acceptable, like in the Schengen and Smart Borders caes with the decision-making rules and the provisions on law enforcement access. On the contrary, offering concessions on substance when procedure is highly contested can enable compromise by offering or relinquishing targets or other substantive provisions to make a procedural request acceptable. This mechanism works as a remedy for deadlock, if there is sufficient support for the issue-linkage proposed, because the benefits of having the agreement are higher than the concessions that have to be made to enable the compromise. As a result gains can be material or reputational.

Coalition-building is important. Under co-decision and QMV member states in the Council and groups in the Parliament search for coalition partners. Both majority and blocking minority positions require support, so naturally the incentive is there. Within the Council, coalitions based on ideological proximity are important, but less important than coalitions based on economic performance, population size/voting weight of the country or influence. Everyone looks towards the big ones, France and Germany, as well as the older ones with lots of experience and influence, BENELUX, and the newer allies of the big ones, such as Poland and Austria. These coalitions extend to the Parliament, where the right wings often look to each other in trilogues. In the Parliament, which ideological coalition is more likely depends on how successful the rapporteur is in pushing for a particular position in the respective committees and which way the pivotal group ALDE is leaning. In the Schengen and Smart Borders case, a right wing coalition dominated, in Maternity Leave a narrow left wing coalition dominated in the first round and in the Gender Quota case, the right wing is also currently dominating.

7.5 Framing failure: reputational gains and losses compared

Actors frame positions and choices they make in the negotiation process and frame the gains and losses, which resulted from it. Failure largely depends on how actors make use of the structural conditions and the opportunities provided by the constellations, the context and the dynamics. In this section, the key frames in important dimensions of the process of failure will be reviewed and evaluated.

The dominant conflict frames that emerged from the analysis center around three dimensions are: (1) Legal/technical (relating to legal basis/feasibility/hard or soft law),

(2) Political (concerning party ideology and sovereignty versus supranational integration) and (3) Economic (relating to cleavages about redistribution and market regulation)

Legal and technical conflicts (1) have manifested in debates about the legal basis linked to quarrels about role of supranational institutions, with the Commission and the Parliament pushing for more procedural influence, for example in the Schengen and Smart borders case. There are also disagreements about the degree of supranational integration, with member states raising subsidiarity and proportionality concerns in the cases of Schengen, Maternity Leave and Gender Quota.

Actors mobilize ideological cleavages about the role of the EU and its right to interfere in member state competences and existing institutional quarrels between the EU, such as the role and influence of the Commission and the Parliament in former matters of national sovereignty, with Justice and Home Affairs and Social and Employment Policy being key areas, connected to the sovereignty of the territory and the control over the welfare state and the labor market. Common frames included questioning the right to propose policy, advocating a restriction of involvement and/or the extension of influence in decision-making processes and implementation.

In terms of political conflicts (2), actors mobilize well-known cleavages in the post-crisis context, and we can observe a preference for security frames and less room for pro-integration, pro-data protection and pro-rights frames in the Council. The Council majority mobilizes security concerns and sovereignty concerns in Justice and Home Affairs matters and focuses on keeping the Commission out of national labor markets to avoid further supranationalization of competences, which does not resonate with the situation in national constituencies in the face of populist pressure.

The Parliament is generally more divided and has better chances of agreement with the Council if the EPP group sets the tone in the committees, as its perception and framing of issues and conflict lines is closer to Council. If the Council internally has a clear position, like in the case of Schengen and Smart Borders, it helps the Parliament if it can overcome internal divisions to leave the negotiations to the majority that overlaps with the Council's. If the Parliament, however, mobilizes

internal divisions and goes against the dominant frames in the Council failure occurs, for example advocating for integration and a social rights agenda where the Council is clearly concerned with national competence preservation and avoiding any impact on national labor markets, as is the case in Maternity Leave and Gender Quota or requesting data protection and the defense of free movement, when the Council is focused on security and fortress Europe, as was the case in the first round of the Smart Borders case.

Similarly, in terms of economic cleavages (3), the Council is more likely to focus on cost implications of integration, and show less willingness to support a proposal if it implies high costs for the EU budget and national budgets, whereas the Parliament mobilizes social union frames and advocates inequality as a result of the member states focusing too much on budget concerns and too little on citizens. Debates about feasibility are often linked to cost-benefit concerns in the Council. Actors mobilize concerns about financial or infrastructural implications of required changes in national legal and political systems. The Parliament counters mostly with rights-based frames and advocates the need to compensate citizens through European policy for the lack of action by national governments.

Context and agenda are also used for framing positions and reinforcing conflict lines. Actors mobilize crises to frame a policy change as a response to a crisis.

A crisis can be a window of opportunity for policy change, if the proposed policy corresponds to the perceived problems, especially for the Council. The migration and security crisis worked as a source of failure in the first round and as an enabler in the second, because the Commission framed the second round proposals as a response to the perceived threats, as it had not been incorporated the pressure by the new security agenda in the first round. In the case of Schengen, the second round linkage of the proposal on the Schengen Evaluation Mechanism with a measure to reintroduce border control at internal borders corresponded to the member states' demands for more security and more control. In the case of Smart Borders, there was a preference to have a security system, rather than a migration management tool, and the reframing made it easier for the Council to accept the financial and implementation costs. The economic and financial crisis only worked as a blockage,

as the Commission did not incorporate member states' agenda on avoiding any unnecessary costs for national budgets and any disproportionate regulatory and distributive impact on national labor markets in the aftermath of the crisis. Both the first Maternity Leave and the Gender Quota proposal were framed in a way that led member states to believe that the constraints and costs on companies and national budgets outweigh the reputational benefits for governments.

How do actors frame blame attribution and blame avoidance? The comparison of the four cases shows that there is a common theme for each institution for both failure and success.

Actors frame failure in with a straightforward double agenda: draw a picture of themselves that is in line with the expectations of their constituents to which they are accountable, while putting as much blame on the other institutions, as is possible, without compromising the possibility to strike a deal later on. The Commission is the strategic broker at the center of it:

> "No, I think they are pretty good at being in-between, they have to take a little bit of the EP in. They want to get the proposal through, so they have to give the Council something and they have to give the EP something, so they have to be somewhere in-between, and when they negotiate with us, they throw the EP at us and when they negotiate with the EP they throw the Council at them, so they are playing a double game. Of course that is their game, that is how it needs to be done, they come to us and say that the EP has a strong position on this issue and we have to give them something or there won't be a compromise and then they go back to the EP and tell them that the Council has offered this and it's the last offer so they have to take it. that's how they do it and they are quite good at it. That's how we get all these very difficult compromises through."[387]

The Commission highlights European problem-solving, finding European solutions for shared problems, and practices blame avoidance by claiming to be an honest broker attributing blame for failure to the co-legislators extreme demands in the process.

The Commission plays a double-faced game and strategically maneuvers between the co-legislators and places proposals in a way that allows for a blaming game that focuses on the two co-legislators. The Council will have to take the blame for

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deadlock or failure based on positions that are perceived extreme, restrictive, conservative, intergovernmentalist by the Parliament. The Parliament will have to take the blame for deadlock or failure based on positions that are perceived extreme, supranationalist or activist or unpragmatic, irrespective of Treaty rules on procedure and subsidiarity. The Commission thereby portrays itself as the constructive honest broker that mediates between the two extremes to find a compromise and improve the proposal. It highlights any attempt at providing legal counsel and explaining the provisions of the initial draft, giving political guidance to the Council Presidency and rapporteur on how to approach the other institution. Lastly it provides technical expertise, on costs, feasibility and impact via impact assessments, studies and consultation reports.

The Council focuses on supranational activism as a theme for blame attribution to the Parliament and the Commission for deadlock and failure and refers to pragmatism and realism to avoid blame. The Council blames failure on the Parliament for keeping and publicly promoting an extreme position and showing persistent unwillingness to abandon excessive demands and adopt a pragmatic approach. The Council argues that if the Parliament has an interest in adoption, it has to concede to Council demands by framing it as a compromise. The Council also shifts responsibility for failure to the Commission because it is at the origin of the proposal and thus responsible for its outcome and the Council also criticizes its leniency with the Parliament's excessive demands. It argues that if the Commission has an interest in adoption, it has to concede to Council demands by framing it as being a mediator and honest broker.

The Parliament mainly focuses on attributing blame to the Council while claiming that the Council is compromising its defense of European citizens and the European project with its intergovernnmentalist behavior. It uses the same strategy for blame avoidance by claiming to act out of concern for democratic legitimacy and citizen rights. The Parliament blames the Council for keeping intergovernmentalist positions and isolating itself from the supranational institutions and the Commission for not pushing enough to force the Council to abandon extreme positions. Failure is the result of the Council's stubborn insistence on sovereignty where a European solution would be politically necessary or pragmatically needed to solve the problem. With

regard to failure in the process, the Parliament also blames the Council's persistence to keep the upper hand and its unwillingness to accept concessions that would be necessary to get an agreement and the Commission for not initiating a compromise process by forcing the Council to engage in negotiations. The Commission is overall criticized for not being engaged enough in the process to push the Council.

Success and gains achieved or losses endured in the process are framed in a very similar manner.

The Commission portrays itself as a successful policy initiator, a mediator and a defender of the European project. It highlights its achievements in being a facilitator of agreement between Council and Parliament alongside fulfilling its role as the guardian of the Treaty in pushing for policy integration to provide solutions for problems. Its desire for competence increase for supranational institutions is framed as a means to achieve democratic legitimacy and representation of citizen interests. The Commission blames any losses it had to accept in terms of procedure or substance on the need to balance between Council and Parliament: reneging on competences or policy elements as a concession to the co-legislators

The Council poses as the pragmatist and realist in legislative negotiations and always insists that in every instance it was open to accepting concessions in competence and policy substance matters to further European integration. It insists on a goodwill relation to the Parliament, where the Council is the benevolent actor accepting to include demands that are often unpragmatic in order to get a common solution to a shared problem. It also emphasizes the goodwill relation to the Commission, where the Council accepts solutions that are not ideal to show that it is supportive of European integration. The Council blames losses on its obligation to give concessions to the Parliament in order to each an agreement and the Commission's leniency towards the Parliament.

The Parliament portrays itself as the defender of citizens and the democratic legitimacy of the European project. In procedural matters, it argues that by fighting for procedural influence, it becomes the provider of a counterbalance to member state intergovernmentalism. In substantive matters, the insistence on upgrades in policy

standards is framed as part of the Parliament's obligation to be the provider of representation to citizens for the protection of their rights. The Parliament blames any losses on concessions it had to make to the Council to get an agreement and the Commission's leniency towards the Council. It portrays losses as a necessary evil to achieve more policy integration and a greater transfer of competences.

VIII. Lessons learned: discussion of findings and implications for policy research

Which conclusions can be drawn from the analysis with regard to how negotiations end up either in failure, deadlock or agreement? What do the findings imply for the understanding of policy-making dynamics and what do they tell us about failure? The last chapter will evaluate the contribution made, show awareness of the limitations of the present study and point to further avenues of policy research. The central argument and final conclusion about the theoretical models presented and the empirical evidence is provided is both optimistic and cautious. There is evidence for the EU institutions using failure strategically, but four cases are not sufficient to allow for final conclusions and methodologically, there is room for improvement in process research on EU policy-making.

8.1 Internal validity: how much failure can the approach explain?

The difference between success and failure seems to be Commission and Council centric. Commission behavior matters in agenda-setting and in the process of negotiations. The Commission can be strategic and ambitious, but it cannot be activist, if the proposal is supposed to go through, even after first-instance failure. Council preferences and behavior are key at all stages, as the Council still very much dictates whether a proposal is set for success or failure. If member states are set against a proposal and remain unrelenting throughout the negotiation process, it is unlikely to be adopted. Council preferences are more important for the success or failure of policy negotiations than Parliament. A proposal can pass with few concessions to the Parliament, but it cannot pass without important concessions to the Council.

The Council rejecting or recommending withdrawal or stalling the negotiations most often induces failure. If the Parliament does not agree with a proposal, deadlock is

possible, but is unlikely that it will fail entirely, as the Council will invest in pushing for agreement

The agenda-setting and policy formulation stage is crucial in the process of failure and the Commission plays a key role. The issue has to be salient enough to the Council in order to encourage state representatives to invest in an agreement. There also has to be a window of opportunity for actors to perceive that there is a common problem to which the proposed policy can provide a solution. The Council has to be sufficiently favorable to the proposed policy change to invest in building a supporting majority, if the issue only appeals to a small minority or is opposed by a sufficiently large minority, durable blockage is likely and the Commission and/or Parliament are unlikely to be able to convince the Council to agree to the proposal. An issue has the most success, if the Commission and the Parliament can connect it to those agenda points that are most important to state actors. The Commission has to strike a good and credible balance between pursuing an pro-integration agenda and responding to co-legislator preferences, in substance and scope especially with the Council and the procedure of the Parliament.

Salience to national actors and windows of opportunity matter, because national government preferences and political dynamics in the domestic constituencies are crucial. They are even more important as conditions than the leanings of the Parliament. Government agenda, national party politics and public opinion tendencies are more important than party politics in the Parliament in the sense that it has a greater impact on legislative dynamics if the Commission disregards government.

Overall, the Council is most concerned with protecting sovereignty and avoiding excessive upgrading of policy standards. If these red lines are respected the Council is likely to agree to policy change. On the other hand, failure is likely if the demands of the Parliament or the Commission are excessive in these areas. The Council appears to be more willing to make concessions in areas where it has more long-standing negotiation experience, even to expansive Parliament demands, than in areas where integration has not progressed very far and there is limited co-decision experience.

The Parliament is mostly concerned with safeguarding or extending its influence in Justice and Home Affairs, and with upgrading standards in Social and Employment Policy. However, while it has learned to play the bargaining game sufficiently well in Justice and Home Affairs matters, failure in the Social and Employment area is most often blamed on excessive demands by the Parliament, regularly linked to the Commission's attempt to supranationalize in a collective blame attribution to supranational institutions.

In the Schengen case, a crucial set of actors in the Council preferred a distinct security framework for the border control and evaluation mechanism reform and insisted on intergovernmentalism as the basis for the policy instrument. The first Commission proposal did not include the security-element of extended internal border control and was proposed in the co-decision instead of the intergovernmental framework, whereas the second proposal contained the security element and the Commission included the desired change from co-decision to intergovernmentalism. In the Smart Borders case, the majority of state representatives in the Council preferred an external border management system geared towards border protection and law enforcement. In the Maternity Leave case, national governments preferred to keep the upgrading of standards to an absolute minimum, which is why the original Commission proposal and the Parliament position were unacceptable. However, the recast with the lowest common denominator standards is receiving more support. The Gender Quota case is similar, a sufficiently large set of government representatives preferred low standards and non-binding solutions.

The co-legislator preferences can matter tremendously, if either of the actors persists with a position that is too far away from the other, or decides to block altogether by not taking a position. Taking and keeping extreme positions for too long or pursuing a position that is perceived as too extreme by the partner can result in a loss of credibility and compromise the strategic game leading to more losses in procedure and substance. The Parliament kept the extreme position on substantive elements for a long time in the Maternity Leave case, leading the Council to block negotiations and refuse unblocking even after the Parliament signaled willingness to compromise. The Council kept the extreme position on procedural matters for a long time in the

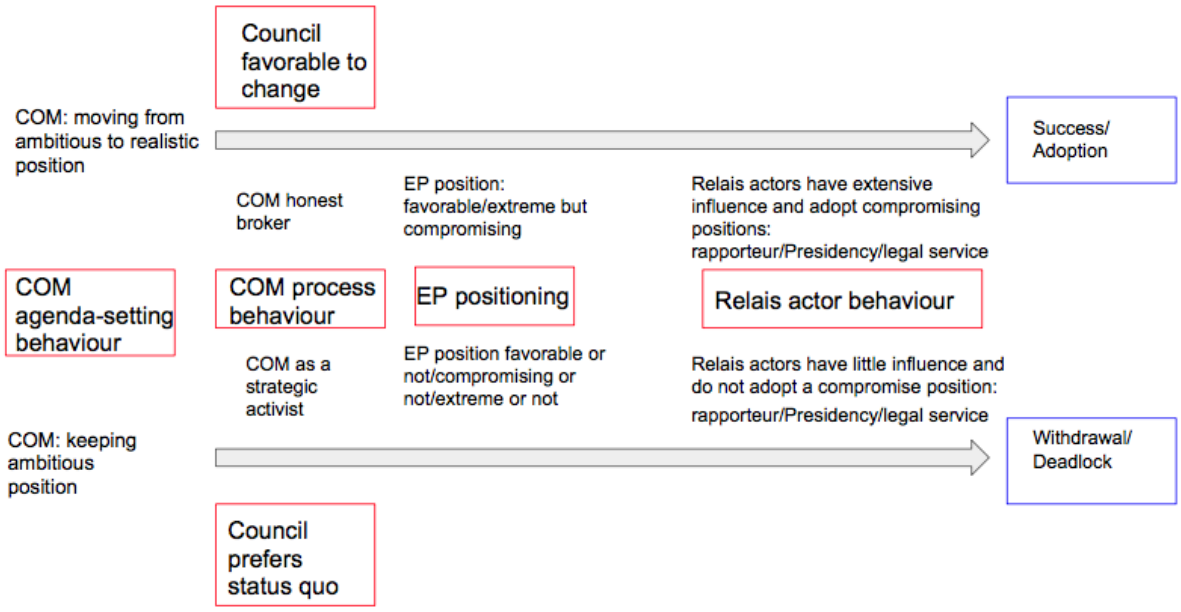
Schengen case, which prompted the Parliament to provoke a deadlock of the negotiations. Position changes, changes in actors, inclusion and exclusion of actors, shifting of negotiations to different groups of actors and/or levels in institutions have an important effect, but they can either induce success (if blocking actors are removed or convinced to change their positions) or failure (if blocking actors are added or more actors adopt blocking positions). The rapporteur in the Maternity Leave case was replaced leading to a position change in the Parliament from extreme to compromising. In the Schengen case, the deadlocked negotiations were shifted to a restricted and small group of selected Parliament and Council actors to unblock them and a Commission representative, which was not considered trustworthy and competent, was replaced from the first to the second round. In the Gender Quota case, several actors in the Council changed their position from opposing the proposal to supporting it without however unblocking it. In the Smart Borders case a conservative rapporteur replaces the socialist rapporteur. This led to the Parliament being more open to including security elements. However, the more vocal and ferocious the framing, the more difficult to revoke a position and turn deadlock into an agreement without failure. This is true for all three institutions, as three of the cases have shown.

Credibility of and trust in relais actors and their networks matter for co all three institutions, but particularly for co-legislator dynamics. The Council considered that the Parliament rapporteur had lost credibility in the Maternity Leave case, because she held onto the extreme position for too long. In the Smart Borders case, the EPP rapporteur was more trusted and had a better network in the Council than the S&D rapporteur. In the Schengen case, the credibility of and trust in the rapporteur and his team, an agreement could be reached after deadlock in the second round. In the Schengen, Smart Borders and Maternity Leave case, influence of relais actors before withdrawal and recast was either limited or conducive to failure, in the Gender Quota case, neither the Council Presidencies nor the Parliament rapporteur could dissolve deadlock. Nonetheless, the Schengen and Smart Borders case indicate, that there is a difference in influence, when it comes to disagreements between Council and Parliament: relais actors have limited influence if the Council takes issue with a proposal, but they can work towards unblocking deadlock, if the Parliament has fundamental issues with a proposal.

It can be said that the three institutions all perform well in the blame game, but taking both the actual procedural, substantive and reputational gains and losses altogether, the Council wins the most. The Council is successful in moving the policy proposal closer to its preferences in the second and following rounds, as the comparison of the legislative texts and negotiation documents show for all four cases. Regardless of whether the proposal was withdrawn or not, the negotiation process resulted in a watering down of the Commission proposal on the most controversial aspects. Even where the Parliament seemingly achieves gains, like the procedural issue linkage in the Schengen case, the Council actually dominates the negotiation. This was also the case for the Schengen reform, as the legal base remained as the Council desired. The Parliament is successful in achieving procedural gains if it is willing to yield in matters of policy substance. Its main gains remain reputational, it can very successfully place blame on Council and Commission for proposals failing and for final outcomes being lowest common denominator upgrades or even downgrades. The Commission is quite successful at the strategic game, as it gets policy change in areas and on issues where national governments are reluctant to accept interference, if it is willing to yield in substance to the Council and procedure to the Parliament. Even if it does not gain in substance or procedure, it tries to gain in reputation by blaming the co-legislators for failing to reach an agreement.

The negotiations lead to success if all actors play their part and the necessary conditions for actor influence are given: most importantly, the Council needs to be in favor of policy change, if there is no will of governments to engage in negotiations on the issue, because they prefer the status quo, deadlock is most likely. Additionally, compromising positions need to be adopted throughout the process to replace initial controversial ones. This is especially true for the Parliament, as the Council will continue to prefer deadlock and failure over investing in further negotiations if the Parliament is not willing to give up an extreme position. The Commission can pursue a strategic agenda to a certain extent, but it has to eventually move from an ambitious to a realistic position, that is acceptable to the co-legislators, and perform the role of an honest broker. Informal channels for influence of relais actors are given and relais possess the expertise and trust to be able to use them.

The negotiations lead to failure if key actors dissent and/or the necessary conditions are not present: if the Council prefers the status quo, there is little room for maneuver for the Commission and the Parliament. The Commission keeping an ambitious proposal or behaving like a strategic activist throughout the agenda-setting and the negotiation phase makes deadlock very likely, similarly the Parliament maintaining an extreme position will increase the likelihood of failure. If informal channels are absent or remain unused by relais actors, because they are unwilling or unable to, due to lack of expertise, networks or trust, it also increases the chances of negotiation breakdown also increase.



(Figure 12, paths to success and failure, source: own illustration)

The following causes of failure in the process could be observed from the cases:

Firstly (1) there is failure due to disagreement on substance. Factors that have emerged in the analysis include costs, quantitative targets and feasibility problems of a technical and legal nature. Failure depends on whether institutions abandon initially extreme positions on quantitative targets and related elements of policy design. If the extreme position is not abandoned, or not abandoned in a timely manner, the negotiation ends in failure. If the legislative institutions disagree on the technical, legal or financial feasibility of the policy project, success depends on whether solutions can be found to improve feasibility, change the scope and the technical

details or allow for sufficient flexibility to compensate for the shortcomings. If this is not possible based on the proposal, it will fail, as the costs of negotiating are higher than the expected benefits from the proposal.

Secondly (2), there is failure due to disagreement on procedure, such as legal base and decision-making rules. If the legislative institutions disagree on the appropriate legal base and/or decision-making procedure for a negotiation process, failure can be avoided. If a compromise can be found that satisfies the institutions, compromise solutions can include issue linkage, implementation flexibility and passerelle clauses.

Thirdly (3), we observe failure due to sovereignty reasons, where the legislative institutions, in all cases analyzed the Council, can voice objections and reservations based on proportionality and subsidiarity concerns. This is usually due to internal coalition politics in the different member states. Mechanisms of avoiding failure can be a change from hard to soft law, flexibility in implementation and passerelle clauses.

8.2 External validity: a generalizable approach to explaining policy failure?

A cursory look through the EU's policy registry of failed legislative proposals[388] shows indicators, if only formal for the time being, that the strategic maneuvering extends to other cases. The formal indicator of several rounds of negotiations, including failure and withdrawal or rejection, followed by a recast and ultimately agreement, appears in quite a few other instances in other policy areas as well. Table 19 (see below) summarizes all potential cases that might correspond to the strategic failure model proposed initially and that largely fit the case selection criteria.

To investigate whether the proposed process models of failure are applicable, a process analysis would have to be conducted on those cases as well, as only a look into the negotiation process, the strategic mechanisms and the informal dynamics between actors during negotiations. Strategic elements are difficult to detect without looking directly at the process and engaging with the actors involved. To verify the causal mechanisms and models proposed extend to other cases, it might be worth looking at all co-decision cases that have been withdrawn for contentiousness. On

[388] European Commission Website with Work Programmes that include the list of withdrawals per year from 2007 to 2018: https://ec.europa.eu/info/publications/european-commission-work-programme

pre-Lisbon cases, where actors are no longer available for interviews to assess the informal dynamics and the blame attribution, archival research would be used to provide as much information about the process, as possible. On more recent cases, the same type of data can be used, perhaps even including some form of participant observation (participating in trilogues, in Council meetings as part of a state delegation, in Commission policy drafting processes as part of the policy unit, in Parliament committee meetings as an assistant etc.) to increase the depth of information about the informal dynamics. It is also conceivable that instead, the focus is shifted from the informal elements to depend more on the formal factors measuring those conditions and mechanisms that can be inferred from documents and media reports (frequency of interactions, amount of documents, etc.). This of course reduces the density and richness of the data, as it can inflate certain elements, which might not have been of particular strategic importance or influence in the process. For example there might be many documents released, but Council documents, for example, often contain repetitions, revisions or corrections by the Council Secretariat General of misspellings or other formatting mistakes, without contributing any valuable information to the decision-making process. Also, actor influence in the process is difficult to measure based on document data. Measures of influence would be reduced to factors like involvement (participation in meetings, number of statements, etc.) and substantive influence (number of amendments, success in pushing amendments reflected in the final legislation), which can be inferred through standard content analysis. Still, the problem remains that for most outcome-centered and quantitative measures, observing failure as an outcome and explaining it can be difficult. As regards generalizability, it is obviously too early and too risky to draw general conclusions about mechanisms and conditions of success and failure, especially since dynamics can prove to be very case-specific and vary even within policy-areas according to issues (Bennett and Checkel, 2014). To be able to draw more general conclusions, it would be necessary to collect data on more cases and include more policy areas and trace the negotiation process from the beginning, before proceeding to a systematic comparison to single out key conditions and mechanisms. Conditions and actor typologies depicted and modeled in this thesis could be tested using more case studies in the first place to see if the mechanisms found here can potentially apply to a larger set of cases, from different issue areas and policy areas and in different contexts. Once a sufficiently large number of cases

have been researched, qualitative comparative analysis can be used to detect conditions as well as generalizable patterns for actors and strategies. Qualitative comparative analysis would the able to show which conditions and mechanisms are necessary and which are sufficient to account for failure.

External validity		
Policy area	Withdrawal cases (with followup adoption or ongoing negotiations)	Withdrawal cases (without immediate followups)
JHA	COM(2005)276/1 2005/0127/COD (criminal justice, 2010): rejected by Council and EP as not sufficiently examined, follow-up announced for 2011, modified proposal in 2011 adopted in 2013 short negotiations http://eur-lex.europa.eu/procedure/EN/193131; http://eur-lex.europa.eu/procedure/EN/2011_137?qid=1498672199193&rid=10	
Transport	COM(2008) 650 2008/0650(COD) (2011): Commission changed position, after EP rejection, long silence, then Commission started consultations again in late May 2017 http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52008PC0650 COM/2009/0217 2009/0063/COD (2015): proposed in 2009, withdrawal because it is blocked since 2010, in 2015, the Commission published a new set of proposals under a new aviation strategy http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=celex:52009PC0217/ https://ec.europa.eu/transport/modes/air/aviation-strategy_en	COM/2011/0824 2011/0397/COD (2015): proposed in 2011, no agreement in Council, withdrawn without announcement of immediate follow-up http://www.kennedyslaw.com/article/groundhandling/
Regional policy	COM(2005) 108 final 2005/0033/COD (2012): proposal blocked in Council since 2006, new proposal adopted in 2012 as a Council regulation, revision as a COD directive adopted in 2013, short negotiations http://eur-lex.europa.eu/procedure/EN/2013_248?qid=1498679401921&rid=4	
Internal market and services	COM(2008) 194 2008/0083/COD (2012): proposed in 2008, withdrawn in 2012, follow-up in 2015 Commission indicated that reason for failure was absence of reasonable expectations that an agreement would ever be reached on this, the issue at hand was included in a much larger project of codification that followed an action-plan in 2012 http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52008PC0194/ http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1449665429348&uri=CELEX:52015PC0616	COM(2004) 582 2004/0203/COD (2014): proposed in 2004, no progress since 2014, withdrawn by the Commission, followed by a large technical study and impact assessment on the state of legal and economic design protection, results published in 2015 and 2016, follow-up not exlcuded https://ec.europa.eu/growth/industry/intellectual-property/industrial-design/protection_de COM/2010/0371 2010/0199/COD (2015): proposed in 2010, no progress in EP and Council, follow-up has not been announced, but also not been excluded https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/consumer-financial-services/investor-compensation-schemes_en COM/2012/0084 2012/0035/COD (2015): proposed in 2012, no foreseeable agreement, Commission currently investigating other possibilities https://ec.europa.eu/growth/sectors/healthcare/competitiveness/products-pricing-reimbursement/transparency-directive_de COM/2014/0344 2014/0176/COD (2015): withdrawal without any discussion in the Council or the Parliament, but announcement of a new initiative in the withdrawal statement http://eur-lex.europa.eu/legal-content/EN/HIS/?uri=CELEX:52014PC0344
Health and Consumers		COM(2008) 663 modified by COM(2011) 633, and COM (2012) 48 2008/0256/COD (proposed in 2008, blockage in Council, withdrawal in 2014, follow-up not excluded) http://ec.europa.eu/health/human-use/information-to-patient/legislative-developments_en
Health, Food and Safety		COM/2013/0262 2013/0137/COD (2015): withdrawal due to rejection by EP and Council, but announcement that there might be a follow-up http://www.consilium.europa.eu/en/policies/animal-plant-health-package/plant-reproductive-material/
Environment	COM(2003)624 2003/0246/COD (2014): proposed in 2003, no agreement in Council foreseeable, Commission withdraws in 2014 and comes up with a non-legislative solution (interpretative communication) in 2017 http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf COM(2006)232 final (2014): no agreement between the co-legislators, so Commission withdraws the directive and opts for a decision instead, which was adopted in 2013 under a much bigger framework, where soil protection is just one of the many issues http://ec.europa.eu/environment/soil/index_en.htm/ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013D1386#	COM(2004) 532 2004/0183/ COD (proposed in 2004, withdrawn in 2012, no follow-up until now, Commission indicated reason for failure was non-conformity to current scientific findings, so follow-up not excluded) http://ec.europa.eu/environment/biodiversity/animal_welfare/hts/index_en.htm

(table 19, external validity, source: own illustration)

8.3 Implications for policy research: theoretical limitations and prospects

Regarding the initial theoretical proposal that failure is part of a strategic game of multiple rounds, it is difficult to confirm or dismiss this explanation based on the findings of the empirical analysis. In the case of Smart Borders and Maternity Leave, we can presume from the data that the chances for negotiation success in the case of the new proposals are significantly higher as well as the types of substantive changes to the proposal. The negotiations on Smart Borders have successfully passed the agenda-setting and the position-taking stages and the co-legislators have now entered trilogues. The strategies used by the different actors indicate that the second proposal will be much closer to the preferences of the legislators and therefore have greater chances of resulting in agreement. The replacement package for Maternity Leave was only been submitted in late April and discussions have started in mid- to late May, therefore it is too early to say whether the position-taking stage will be passed this time. Should both Gender Quota and the replacement of Maternity Leave end up in failure even after repeated negotiation rounds, it would indicate that the dynamics between policy areas are indeed quite different and that factors like the level of integration play a more important role than currently assumed.

More research on intra-institutional processes which further opens the black-boxes of Council, Parliament, and especially the Commission, might bring about more information on strategic intent and mechanisms. This could be done through more interviews or even participant observation. More research on dynamics within the institutions would verify who dictates and dominates the blame framing game. It is very likely that bigger and more powerful member states fulfill this role. Research on intra-institutional processes should encompass relais actors and focus on their influence in terms of avoiding failure, especially the Council Presidency and the Parliament negotiating team, to evaluate whether there is a general indication of relais actors being crucial for the resolving of deadlock and consensus-building after failure.

Generally, there is a problem of proving the validity of the proposed explanations or determining a preferred one based on a small set of cases (Bennett and Checkel, 2014). It is difficult to determine which type of action actors have actually preferred, when inferring post-hoc, because actors placed in a strategic context have an

incentive to conceal or misrepresent their actions and preferences or the researcher might have a tendency of misconstruing the evidence to fit the preferred explanation.

Related to this, the problem of generalizability of the theoretical framework remains. The empirical analysis and comparison of the four different cases show that the nature of conflict, reasons for deadlock and success and the conditions and mechanisms of success and failure are quite specific to the case, that is if they are looked at in their entirety, without prescinding or overly reducing complexity with the use of proxies for key concepts. Looking cross-sectionally rather than longitudinally and only comparing a small number of cases is not sufficient to draw definite conclusions about whether or not policy failure is strategic or due to other elements, which have not yet been included in the model.

Other factors, which would need to be considered are the following: the degree of policy integration, longstanding and extensive the negotiation experience of the legislative institutions and the degree to which member states support integration in the first place (Wallace, Polland and Young, 2015; Laursen, 2012). Both explanations do not, however, fully exclude each other, since it is also possible that for some policy areas the shadow of the future is longer and repetitive games have more instances of failure over a longer period. Giving and taking in negotiations at a given point in time might be determined by and linked to previous negotiations, or even future ones. This makes it difficult to assess dynamics in case-based research with a rather short time frame and a limited scope.

As for external influences, it would be required to include the influence of stakeholders outside of the institutions, interest groups or other stakeholders might have a decisive impact on the course of negotiations, which cannot be captured by the current actor framework (Klüver, 2013; Dür, 2008). There is ample research demonstrating the influence of stakeholders and interest groups on the Commission, as well as member state governments and the members of the European Parliament (Aspinwall and Greenwood, 2013).

One step further to including a longer time horizon would be to explain the policy process entirely through path-dependence, where negotiation success and failure are purely the result of experience and tradition of policy integration, rather than actor

strategies and choices in individual negotiations (Saurugger, 2013). In this case actors and their strategies in individual negotiations would hardly matter, because failure or success would be predetermined by other external factors and prior to the negotiation process.

On the bargaining side, there is also an alternative explanation, rather than being conceived of as a strategic game of framing deadlock and failure, negotiation processes could also be explained as an endless series of joint decision traps (Scharpf, 2006), meaning that failure might simply be the result of a zero-sum bargaining game, where actors were unable to reach a unanimous decision based on a lowest common denominator compromise (Tsebelis, 1990).

8.4 Implications for process research: empirical limitations and prospects

Regarding the explanation of the failure from a process perspective, there is the remaining issue of disentangling rationality and socialization in actor behavior. Ultimately, with the data available and purely observational studies, it is not possible to determine whether a result is caused by strategic action, normative processes or other structural factors. Still, we argue that strategic considerations and social context go hand in hand. Actors operate in the Brussels bubble, but it doesn't eliminate concerns about national positions or discourage actors from pursuing maximal benefits from a negotiation. A related problem is that of distinguishing strategies from path dependence and learning effects. It remains difficult to pinpoint whether a particular condition or mechanism was at the origin of success or failure, since negotiations cannot be separated from previous and successive ones, a previous negotiation can have an effect on the following one or actors can project themselves into the future and make choices based on what they expect to happen in the future.

As already discussed for each individual case, we can observe that it is not possible to definitely confirm or disconfirm any of the models of failure with the data available. The stages at which the negotiations of the 4 cases currently are, do noi allow for the expression of a definitive preference for either of the causal mechanisms and models presented above. More comparative research, including archival research on older closed cases, where it is easier to judge whether negotiations are continued and several rounds lead to success, or whether there are indicators for activism with the

proposals being permanently discontinued due to either or both of the co-legislators rejecting it

In the empirical analysis, intra-institutional dynamics have been partly black-boxed and other potential external influences might have been disregarded. Black-boxing of intra-institutional dynamics in the Council and the Parliament makes it difficult to understand actor strategies that are linked to changes within the institutions, such as the reshuffling in the Parliament from the 2009 to the 2014 Parliament, which has affected polarization and coalition dynamics and so on (Finke, 2016; Finke, 2017). Black-boxing of processes within the Commission miss out on potential changes in the policy formulation dynamics from the Barroso to the Juncker Commission in terms of DG arrangements, decision-making dynamics and agenda for policy formulation (Nugent and Rhinard, 2015).

Qualitative process research in particular faces difficulties, when it comes to disentangling stages of negotiation, because the transitions between stages of negotiation are quite fluent in terms of conflict management and consensus-building and don't necessarily correspond to the quite neatly distinguished stages of formal decision-making. Similarly, it is challenging to separate issues and policy areas in the EU. All negotiations are somehow connected, as similar actors are participating and mobilizing their networks across issue and policy areas.

Empirically, this type of research faces several operationalization and measurement problems. Firstly there is the problem of accurately conceptualizing and measuring strategies, of differentiating between what actors preconceive and plan and what they decide upon ad hoc is as difficult as drawing the line between what is a rational decision and what happens due to socialization and norm effects (Saurugger, 2013). Therefore it is a challenge for congruence research to credibly argue where a strategic mechanism can be observed and whether it has really been the key factor in bringing about the outcome (Beach and Pedersen, 2011). This is further complicated by the method of data collection, as interviews are prone to bias and ex-post rationalization (Tansey, 2007). Interviews are perhaps not the best method to infer strategies and process dynamics, participant observation would be preferable, but that is seldom possible for researchers, especially for highly sensitive and controversial issues

Case study methods also run the risk of omitting variables or overemphasizing particular factors due to limited number of observations. As discussed before, there are a number of factors surrounding negotiation that might be overlooked by focusing on actors and their strategic interactions. Also small-n research runs the risk of over-emphasizing certain factors, in this case especially the role of particular actors, strategic mechanisms and conditions (Brady and Collier, 2000; Bennett and Checkel, 2014).

Ultimately, it is not possible to draw conclusions about general trends. The limited number of cases makes it difficult to tell whether the conditions and mechanisms found can be extrapolated to other cases. It could be that the selected cases are outliers. It might also be that extending the number of cases reveals conditions and mechanisms that have not appeared or were negligible in these 4 cases, and they might turn out to be crucial in explaining deadlock and failure. There is also the question of issue specificity and idiosyncrasies of issue-areas. The conflict constellations and negotiation styles might partly be specific to the issues. A balance has to be struck between assuming a singularity of policy areas in terms of strategies and conditions and over-emphasizing the comparable elements and too quickly assuming that there might be generalizable dynamics.

Part of the limited explanatory power comes from the difficulty of assessing and confirming strategic intention with the observational data available. Ultimately, observational data through documents and interviews can only infer post-hoc and from the outside, which makes it difficult to answer the question of whether the Commission is actually strategically planning a failure game and setting proposals up for failure, or if all three institutions are making the most of failure by staging a blame exchange. Assuming bounded rationality helps circumvent some issues, but it does not enable the researcher to actually infer strategies from observational data. Furthermore, it is equally conceivable that actors are not (boundedly) rational, but driven by norms and worldviews, which is partly reflected in the activism model. If actors are not rational, the process of failure cannot be explained with models of strategic action, and there would have to be other approaches, such as the analysis of socialization and norm effects or the use of heuristics in decision-making. In a norm or socialization-driven approach failure would be the result of unsuccessful socialization and norm transmission processes, whereas in a more ad hoc process

approach, success and failure would depend on process performance and the actors' ability to cope with the negotiation process itself. In this case, models of failure would rather focus on tracing socialization process and identifying different mechanisms of socializing and determining where and why they fail. This, however, demands an entirely different ontological and epistemological approach to policy-making and conceptualizations of agency, which run into measurement, validity and reliability problems when it comes to explaining decision-making processes in the EU (Heisenberg, 2005; Schneider, 2008).

Relying on how actors frame their actions and choices and the perceptions that are reflected in documents, media reports and interviews Further research framing, especially on how actors justify choices and deal with gains and losses in and after the process could help circumvent the problem of observing strategic mechanisms. This research would investigate the complexity of framing and blame attribution processes within institutions to see who is more successful in attributing and avoiding blame within the three legislative institutions: it is likely that some member states are more successful than others in playing the blaming game, larger member states can be expected to accept blame attribution to enable the less successful states to accept losses in substance and procedure. From the perspective of framing and policy-making failure, more research on failed cases and negotiation processes, especially informal trilogues, is needed to see if there is indication that the game might happen in other issue and policy areas, through both cross-sectional research (interviews and documents) on more recent cases and longitudinal research (archival) on older cases (Beach and Pedersen, 2013). From the perspective of actors and the decision-making process, it might again be interesting to use other kinds of data and methods, such as participant observation and ethnography to get closer to the actual decision-making process and observe behavior directly. The goal of more framing research would be to see who is most successful with the framing and how effective the frames are: is the blame attribution and blame avoidance game actually bringing the desired result? Do actors achieve reputational gains?

8.5 Failing forward: does the EU really deliver through strategic policy-making failure?

From the dynamics in the four cases analyzed in this thesis, we can draw the following conclusions with regard to the effect of crises on EU decision-making: more

conflict over competences, first and foremost influence and sovereignty. Generally, the analysis shows that states use the crisis in different ways to exploit the EU as a platform for their disagreements. The supranational institutions play along, but much less successfully so and end up losing against a Council that has mastered the game of blame and fear-mongering. Secondly, there are more power-driven scrappy policy solutions for complex problems. The Schengen reform is a perfect example of how the EU wastes time on power battles between states and institutions only to end up with half-baked policy that does not really solve the problem at hand: improving border security at external borders. The new tools for evaluation do not provide for adequate mechanisms to improve the implementation of the Schengen acquis. The revision of the rules for internal border control neither solves the perceived security problem nor counteracts the tendency of states to act unilaterally in that area, since only a few years after the reform, states are again demanding a revision and also unilaterally initiate and prolongate border controls at internal borders, de facto disregarding Schengen, as it was the case in 2011. More time wasted on inappropriate superfluous policy. The failed Smart Borders Package is another perfect example for a hugely costly and only vaguely useful project: a border management system, which does not entirely correspond to the political needs of the member states in matters of security, yet also does not satisfy the technical requirements of well-functioning high-IT migration management. The competence battles between the Commission and the member states in gender equality have not significantly improved in the post-Lisbon setting, the Parliament has only added a third player to the game, whose strategic maneuvers further complicate the negotiation process. Both maternity leave and gender quota show that power play is still more important than solving inequality problems, Parliament would rather risk failure than downscale its demands and Council insists on circumventing binding law by referring to national labor market structures and the role of social partners. Compared to border matters, the Commission is rather weakly engaged in negotiations on gender equality matters and largely leaves it to Council and Parliament actors to sort out their differences.

In the area of Justice and Home Affairs, we observe incomplete agreements due to increased pressure. The pressure on the EU to provide results in the crisis context caues the Council and Parliament to agree on proposals even though they are not elaborate or even very appropriate to respond to the problem at hand. Resistance

against the involvement of supranational institutions is the other important overall observation, this is linked to the perceived discrepancy in the Council that Commission and Parliament are pushing for rights and liberalization, where more restrictive and security-focused measures would be needed.

In the area of Social and Employment Policy, actors' inability to pass legislation might be due to a shift in attention. Social policy initiatives, in this case those related to gender equality, are not a top priority of governments, which is why neither the European Council, nor Ministers devote much attention to these topics, the problems are acknowledged, but there is no immediate pressure for solutions. There is also a general resistance against binding law. Sovereignty concerns in this area lead to increased conflict about the type of measure used. This is not only due to the involvement of EU institutions, but the choice and bindingness of legislation altogether.

If the EU plays a framing game by blaming others for failure and ultimately circumvents the problem of transparency and accountability to the public. Lengthy battles over competence and procedure, year-long debates about nitty gritty details of policy proposals take place in highly secluded settings and are hidden behind mutually beneficial blame rhetoric, to the detriment of efficiency and delivery of policy solutions to citizens. The consensus-norm is a convenient veil for hard informal bargaining, the EU portrays unity to the outside and advertises the impressive number of first-reading agreements and the 85% of successful legislative proposals, but conceals the difficult strategic battles that take place behind closed doors. Lowest common denominator solutions are often scrappy agreements, that take place after actors have worn each other out in long negotiations. The EU perhaps suffers from a diversity and representation trap. It is possibly that there are now too many actors involved, too many voices at the table. This leads to unnecessarily long negotiation processes and produces little result. Certainly, the Parliament provides a balance to the intergovernmentalist Council, but the co-decision processes take an infinitely long amount of time and often times. In addition, the Parliament is often a power player striving to increase its own influence in the EU's institutional framework, rather than fighting for the best possible policy solution for citizens. The Commission portrays itself as the savior of supranational integration and claims to respond to demands which arise from its continued consultation of and interaction with the public, but

more often than not is nothing more than another power player in the game, trying to maneuver the co-legislators to gain a little policy change. If we compare the amount of policy problems and severe challenges the EU currently faces to the output it produces, the result is rather disenchanting. Output involves tedious negotiation processes, and cumbersome administrative structures, power games and very few upgrades that would satisfy the demands of those hoping for deeper integration and a European Union that delivers to its citizens. In this regard, the failure, even if strategic, might actually be real failure, even if agreement has been reached.

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9.2 Documents and media reports

9.2.1 Official documents

Case study 1 - Schengen Reform

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X. Annexes

10.1 Expert Interview guide examples

The examples include questions from different data collection rounds over time and guides for different cases and different institutions (Permanent Representations, EP, and Commission), different types of interviews (face-to-face/telephone) in different languages (English, French, German):

1) Schengen Governance Package, telephone interview Council, JHA counsellor, 2/2/16

- Who was at the origin of the proposal for a reform of the Schengen Governance?
    - Did the Commission follow the request of France and Italy (aka the European Council)?
    - Was there a general wish for a reform of Schengen in the Council? Apart from Italy and France?

- Can you describe the process of negotiation in the Council?
        - Where there any disagreements on the proposal? Between states? Groups of states? (coalitions)
        - On the whole proposal or parts of it? Which parts?
- Did state positions strongly diverge?
        - Did France and Italy play a particular role?
        - What was the role of Germany, France, Italy and Spain? Why did they make such strong statements ? Did they also defend them in the COREPER/JHA counselor meetings? How did the other states react?

- **What was the role of the different Council presidencies?**
        - **Did the Danish presidency play a particular role?**
        - **How was the Danish position?**
        - **Is the criticism justified?**
        - **How were the other Presidencies?**

- How much did the Council disagree with the initial Commission proposal **in substance**?
    - How much did the Council insist on changing the Commission proposal?
    - Did the EP position matter to the Council? Did they discuss with people from the EP?
    - Who coordinated the debate between the institutions?

- **How were the disagreements solved?**
        - Who proposed a solution? Which solution?
        - Coalitions of different people?Was there a particular offer? (issue-linkage/package deals)
        - Compromises or deals?
        - Mediation by someone?
        - What brought Germany, Italy and France to abandon their positions or compromise?

- Which role did the Council General Secretariat play in the negotiations?

- Why were the negotiations with the EP problematic? What was the reason for conflict?
    - How was the problem solved?

- Who do you think is the winner of the negotiations?
- What would you say has been the most successful strategy in the negotiations?

2) Smart Borders, telephone interview, JHA counsellor, 1/2/16

Jusqu'à l'interruption des négociations:

- Pourquoi la COM a-t-elle décidé d'interrompre les négociations? La proposition a-t-elle été retirée par la COM ?

- Est-ce qu'il y avait du conflit au sein du Conseil ?
- Est-ce qu'il y avait des points particuliers qui étaient problématiques ? (protection des données, finance)
- Quels étaient les aspects les plus importants pour le Conseil ?
    - Quelle était la position française?
    - Est-ce qu'il y avait des divergences de position entre EM ? Sur la protection des données ? Sur les coûts ?

- Comment/Où la proposition a-t-elle été discutée au Conseil ? Quelles étaient les résultats aux différents niveaux ?
    - Groupes de travail ?
    - COREPER ?
    - Ministres ?

- Quel était le rôle des différentes Présidences ?
    - Présidences en 2011: Danemark, Pologne: apparemment sceptiques?
    - Présidences en 2013 : Irlande, Lituanie : opposés ? suspenseurs ?

- Comment se sont passées les négociations entre le Conseil et le Parlement ?
    - Quels étaient les points communs de critique ?
    - Quels points ont été défendus par le PE ?
    - Le PE a-t-il exercé de la pression sur le Conseil ?

- Le Conseil était-il en désaccord avec la COM ? Sur quels points ?

Actualité

- Est-ce que le Conseil est toujours en négociation (informelle) ? Avec le PE?
- Est-ce qu'il y aura une nouvelle propostion? Quels seront les changements?

3) Maternity Leave & Gender Quota, face-to-face interview in the EP, MEP, 6/12/16

1) Richtlinie zur Gewährleistung einer ausgewogeneren Vertretung von Frauen und Männern unter den nicht geschäftsführenden Direktoren/Aufsichtsratsmitgliedern börsennotierter Gesellschaften und über damit zusammenhängende Maßnahmen

- Welche Position vertritt die EVP-Fraktion zur Richtlinie?
- Wie stehen die anderen Fraktionen dazu?
- Welche Punkte sieht das Parlament bzgl. des Inhalts der Richtlinie als besonders problematisch an?
- Gibt es Konflikte innerhalb des Parlaments bzw. der zuständigen Ausschüsse?
- Wer hat sich letztlich durchgesetzt (für die offizielle Position des Parlamentes für Verhandlungen mit dem Rat)?
- Wie steht das Parlament zur Tatsache, dass der Rat keine Position bezieht?
- Wie beurteilen Sie die Arbeit der Ratspräsidentschaften bisher?

2) Richtlinie zur Änderung der Richtlinie 92/85/EWG des Rates vom 19. Oktober 1992 über die Durchführung von Maßnahmen zur Verbesserung der Sicherheit und des Gesundheitsschutzes von schwangeren Arbeitnehmerinnen, Wöchnerinnen und stillenden Arbeitnehmerinnen am Arbeitsplatz

- Wie hat das Parlament das Scheitern der Verhandlungen aufgenommen?
- Wie steht das Parlament zur Position des Rats?
- Warum hat der Rat die Position des Parlaments abgelehnt? Was waren die Hauptkritikpunkte?
- Welche Position vertritt die EVP-Fraktion zur Richtlinie?
- Gab es zum Inhalt der Richtlinie Divergenzen im Parlament bzw. den zuständigen Ausschüssen?
- Wie beurteilen Sie die Bemühungen der Ratspräsidentschaften in den Verhandlungen?

4) Maternity Leave & Gender Quota, face-to-face interview in the Commission, Head of Unit, 9/12/16

1) **Maternity Leave**

General

- With the withdrawal by the Commission, has the proposal definitely failed? Are there any intentions to resubmit a proposal on that topic?
- Why did the proposal fail?

Commission

- What was the Commission's position on the issue?
- How did the Commission handle the negotiations?
- How did it react to the Council's division?
- Did it interfere?
- Did the Commission consider changing its position?

Council

- What are the main points of disagreement in the Council? (substance/procedure)
- Why is the Council so divided on this issue?
    - Who opposed the proposal most in the Council?
    - What are the arguments by the opposing countries?
- Which countries group together/defend similar positions? (coalitions)
- How did the Czech Presidency approach the conflict? Why were they not successful in forging consensus?
- How did the Belgian Presidency approach the conflict?
- Were there any further negotiations after the Council decided to reject the Parliament's amendments?

Council and Parliament

- Why did the Council reject the Parliament's amendments? What were the main points of disagreement?
- Which amendments were particularly problematic?

1) **Gender Quota**

Commission

- What is the Commission's position on the issue?
- Did the Commission react to the Council not agreeing on a position? Did it try to interfere?
- Is the Commission closer to the Parliament or the Council on this directive?

Council

- What are the main points of disagreement in the Council?
- Why are is the UK opposing the proposal?
    - What about Denmark, Sweden, Poland, the Netherlands and the Czech Republic?
- Which role does Germany play in the negotiations? Did it change positions?
- Which countries group together/defend similar positions? (coalitions)
- Why was the Luxembourg Presidency not successful in convincing all delegations with the compromise text (flexibility clause)?

Council and Parliament

- How did the Council judge/receive the EP's position? (too strong, acceptable)
- How did the Council receive the EP's criticism for not taking a position?
- Do you know of any division inside the Parliament? (between the groups)
- How are informal negotiations between Council and Parliament going? Are there any ways of making progress?

10.2 List of interviews

The complete transcripts will be provided on a separate CD.

Wouter Van de Rijt	Interview 1	Principal Administrator Council: knowledge of cross-sectional negotiations and general dynamics in the Council due to his long-term employment in the General Secretariat (Council since 1999)	Council, SG, Principal Administrator/ Head of Sector, Directorate-General D, Justice and Home Affairs, Office of the Director General (Rafael Fernandez-Pita)
Laura Bérard	Interview 2	DG Home as Trainee	contractual/temporary employee DG Home, former Trainee DG Home
Monika Mosshammer	Interview 3	long experience in JHA sector in the Commission, expertise in Border issues (especially Schengen)	Deputy Head of Unit in the unit in charge of Border management and Schengen at DG HOME)
Hans Nilsson	Interview 4	long experience in JHA sector in the Council, mostly Justice, but considerable experience with negotiations and the effect of institutional changes on dynamics in the Council	until 2014 Head of the Division of Fundamental rights and Criminal Justice in the Council, in 2009 JHA counsellor for the Swedish PermRep
Hans Nilsson (second time)	Interview 5	talk about strategies in the Council (from experience in JHA)	
Carlos Coelho	Interview 6	rapporteur for LIBE committee on the Schengen Governance Package (SEM reform)	MEP for the EPP group, member of LIBE committee
Andrei Geica	Interview 7	Trainee in the EP	EP Trainee 2015, DG Comm EP
Daniel Woehl	Interview 8	experience in the JHA sector (mostly justice), important connections to COREPER II and knowledge about trialogues	Deputy Head of Antici, Commission, responsible for COREPER I and II and EC coordination
Hélène Calers	Interview 9	important insight in negotiations	former EP, Secretariat of LIBE

		within the EP, also trialogue experience, involved in Schengen reform (SEM and internal borders)	committee, now Commission DG Home
Katerina Demirova Vasey	Interview 10	JHA counsellor, working party experience	JHA counsellor, PermRep Cyprus
Alexander Sorel	Interview 11	long experience in the JHA sector and as a JHA counsellor (due to very few changes in personnel in the Dutch PermRep)	JHA counsellor, PermRep Netherlands
Eva Wipler	Interview 12	10 year experience in Austrian PermRep, JHA counsellor in charge of Home Affairs (mostly Asylum and Migration)	JHA counsellor, PermRep Austria
Raoul Ueberecken	Interview 13	long experience in JHA (few changes in Lux PermRep), in charge of migration and border stuff, extremely good insight in negotiation dynamics	JHA counsellor, PermRep Luxembourg
Olivier Mortet	Interview 14	recently came to be a JHA counsellor, little experience so far, but interesting to contrast with more established people	JHA counsellor, PermRep France
Thomas Hojgaard	Interview 15	JHA counsellor, PermRep Denmark,	JHA counsellor, PermRep Denmark
Thibauld de la Haye Jousselin	Interview 16	JHA counsellor, PermRep France, Smart Borders	JHA counsellor, PermRep France
Hans-Peter Friedrich	Interview 17	Former German Minister of the Interior,during the negotiations of the Schengen Governance Reform, as well as beginnings of Smart Borders	Member of Parliament, Former Minister of the Interior
Francois Hottin	Interview 18	working group level/COREPER responsible for Schengen Governance and Smart Borders: national expert (Tuma), former JHA counsellor (Hottin)	Chef de division, Division de l'Union européenne, des organisations internationales et des réseaux, Direction de la Coopération Internationale, Ministère de l'Intérieur
Rémi Tuma	Interview 19	working group level/COREPER responsible for Schengen Governance and Smart Borders: national expert (Tuma), former JHA counsellor (Hottin)	Chef de division, Division de l'Union européenne, des organisations internationales et des réseaux, Direction de la Coopération Internationale, Ministère de l'Intérieur
Annegret Korff	Interview 20	reponsible for the coordination of positions between the German and the French Ministry of the Interior	Verbindungsbeamtin Innenministerium Deutschland-Frankreich
Kathrin Huber	Interview 21	responsible from 2012 to 2013 Schengen Governance Package	L.I.B.E committee EP, secretary
Sandra Nunes	Interview 22	former assistant of Carlos Coelho	eu-LISA
Thomas Müller	Interview 23	JHA counsellor	PermRep Germany
Stijn De Decker	Interview 24	ANTICI, COREPER II	Permanent representation Belgium
Mariusz Boguszewski	Interview 25	Head of Section, COREPER II	Permanent Representation Poland
Andris Petersons	Interview 26	European Parliament, Political Strategy Advisor, EPP	EP
Hanne Carlé	Interview 27	JHA counsellor	Ministry of the Interior, Belgium
Marc Sulon	Interview 28	Commission DG Home, Unit Borders	DG Home Commission
Maria Arena	Interview 29	MEP, S&D, Belgium	Rapporteur Maternity Leave, Coordinator Committee on Women's Rights and Gender Equality
Baudouin Baudru	Interview 30	Commission, Expert on Maternity Leave and Women on Boards	Cabinet of Commissioner Marianne Thyssen DG Employment
Angelika Niebler + assistant	Interview 31	MEP, EPP, Germany	member of committee FEMM
Janja Kaker	Interview 32	Social Policy Counselor	Perm Rep Slovenia
Wivianne Hult	Interview 33	COREPER I, Social Affairs Counsellor	PermRep Sweden
Jan van der Velden	Interview 34	COREPER I, Deputy Head of Unit	PermRep Netherlands
Tomáš ŠEFRANKO	Interview 35	COREPER I, Head of Unit, Maternity Leave	Perm Rep Slovakia
Xenia Mala	Interview 36	Social Affairs Counselor, Women on Boards	Perm Rep Slovakia
Kees Terwan	Interview 37	PermRep Netherlands, COREPER I, Deputy Head of Unit	Perm Rep Netherlands
Fastré Frédérique	Interview 38	Social Affairs Counselor	Perm Rep Belgium

Delphine SCHLIM	Interview 39	Social Affairs Counselor	Perm Rep Luxembourg
Magdalena Klimczak-Nowacka	Interview 40	Social Affairs Counselor	Perm Rep Poland
Anne-Mette Kjær Hesselager	Interview 41	Social Affairs Counselor	Perm Rep Denmark
Deaglan O'Briain	Interview 42	Social Affairs Counselor	Perm Rep Ireland
Ioana CÎRCIU	Interview 43	Social Affairs Counselor	PermRep Romania
Kate Gowans	Interview 44	Home Affairs Counselor, external borders	Perm Rep UK
Maria Lindgren Saltanova	Interview 45	Home Affairs Counselor, Borders	Perm Rep Sweden
Sofia Hjertonsson + team	Interview 46	Home Affairs Counselor, Borders	Perm Rep Sweden
Matti Pitkäniitty	Interview 47	Home Affairs Counselor, Borders	Perm Rep Finland
Carlos Matos Moreira	Interview 48	Home Affairs Counselor, Borders	Perm Rep Portugal
Rudolf Kaniški	Interview 49	Home Affairs Counselor, Borders	Perm Rep Slovenia
Tõnu TAMMER	Interview 50	Home Affairs Counselor, Borders	Perm Rep Estonia
EUGENIJUS LIUBENKA	Interview 51	Home Affairs Counselor, Borders	Perm Rep Lithuania
Elias Potsides	Interview 52	Social Affairs Counselor	Perm Rep Cyprus
Brian Farrugia	Interview 53	Social Affairs Counselor	Head of Department of Social Affairs in Malta for EU
George Sultana	Interview 54	Social Affairs Counselor	Head of Department of Social Affairs in Malta for EU
Sabine Boehmert	Interview 55	DG Justice, responsible for Maternity Leave and Women on Boards	Directorate General Justice and Consumers Unit D.2 – Gender Equality
Vitalijus NOVIKOVAS	Interview 56	DG Justice, responsible for Maternity Leave and Women on Boards	Directorate General Justice and Consumers Unit D.2 – Gender Equality
Seija JALKANEN	Interview 57	Social Affairs Counselor, Women on Boards	Perm Rep Finland
Antero Kiviniemi	Interview 58	Social Affairs Counselor, Maternity Leave	Perm Rep Finland
Dolores Cano Ratia	Interview 59	Social Affairs Counselor	Perm Rep Spain
Audronė MORKŪNIENĖ	Interview 60	Social Affairs Counselor	Perm Rep Lithuania
Nicola Dissem	Interview 61	Social Affairs Counselor	Perm Rep UK

10.3 Data analysis: framing and data analysis catalogues for MaxQDA

Sources used to compile the catalogues: Daviter, 2011; Verloo, 2005

Catalogue for inferring positions and mechanisms with MaxQDA	Frame bridging	Frame amplification	Frame extensions	Frame transformations/ Frame resonance
Legal	Legal issue-linkage: linking different issues or issue-areas in the legal text Competence distribution/two-level setting: relating the issue at stake to questions of competence	Soft law/hard law and negative versus positive integration: arguing in favor of more or less supranational legal harmonization	Scope extension/ reduction: extending or shifting the scope of the proposal through the choice of or change of legal base (defining the participating actors and the actors affected by the policy)	Legal base change: can concern the specific issue-area or the larger policy area
Political	Political issue-linkage: linking different dimensions of the problem, linking different but related problems	Crises: relating the discussion to a crisis or crisis event to invigorate a position or advocate a particular solution Sovereignty: using a given issue to invigorate positions on national sovereignty	Scope extension/ reduction: to incorporate different political actors (parties, institutions) and their views	Agenda setting change: adapting the frames chosen to situate a policy proposal within the broader policy agenda and political context Position change: actors changing their framing
Economic	Labor market regulation: linking issues in the social policy area to labor market regulations	Austerity/financial crisis: referring to austerity and the economic context to advocate a particular position with regard to its redistributive consequences Sovereignty: using a given issue to invigorate positions on national sovereignty	Scope extension/ reduction: to incorporate different economic actors (companies, businesses, employees) and their views	Agenda setting change: adapting the frames chosen to situate a policy proposal within the broader policy agenda and political context Position change: actors changing their framing

Catalogue for inferring positions and mechanisms with MaxQDA	Home Affairs	Border Policy	Social Policy	Gender Equality
Legal	Disputes over the legal base, competence distribution and soveregitny: actors argue about the choice of legal base and the scope in relation to subsidiarity and proportionality (Council) and counteracting intergovernmentaiism (Commission/ Parliament)	Disputes over the application of co-decision and the legal base Disputes about EU competence: Councl argues against EU involvement and transfer of competence using protection of territory and sovereignty rhetoric, Commission and Parliament agued for EU inveolvement using accountability and democratic legitimacy	Disputes over soft or hard law and negative or positve integration: Council argues for soft law and negative integration arguing for discretion for member states and social partners, Commission and Parliament argue for binding legislation to improve harmonization and equality	Disputes over soft or hard law and negative or positve integration: Council argues for non-binding measures to avoid financial and legal constraints, Commission and Parliament argue for harmonization and accountability through co-decision
Political	Liberal versus restrictive: Council promotes a restrcitive agenda, Commission and Parliament argue for liberal rights	Migration management and rights protection versus security: Council wants border policy with a security objective, Commission and Parliiament argue for a rights perspective	Right-left cleavage: disputes over intervention in the labor market and welfare state, with Council arguing for limited intervention and national self-regulation and Commission and Parliament arguiing for positive legislative measures to counteract inequalities	Right-left cleavage: Council argues that labor market and companies should self-regulate gender equality, Commission and Parliament argue for binding standards and gender mainstreaming
Economic	Disputes over redistributive consequences: Council argues that EU measures negatively impact national systems due to feasibility and implementation costs, Commission and Parliament argue for harmonization to ensure policy coherence	Financial feasibility: Council argues that EU legislation overburdens national budgets, Commission and Parliament argue for equal and fair distribution of costs	Dispute over effects of economic crisis and austerity: Council argues with bdugetary contraints and Commission and Parliament argue for compensatory measures to combat inequality	Financial feasibility: Council argues that EU legislation overburdens national budgets, Commission and Parliament argue for neccesary expense to ensure gender equality

10.4 Treaty of Lisbon: article 70 TFEU and article 77 TFEU

Art. 70 TFEU	Art. 77 TFEU
"Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation."	"1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; (c) the gradual introduction of an integrated management system for external borders. 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders. 3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance

	with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament. 4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.”

10.5 Salience tables, graphs and documents

Summary of analysis of media reports/opinion polls to determine issue-salience (sources: Eurobarometer, media data see document bibliography)	Schengen	Smart Borders	Maternity Leave	Gender Quota

Relative salience policy area (compared)	Home Affairs get more media attention and are more controversially discussed in European and national media: 74% of Europeans consider migration to be a key issue for EU intervention and 82% say the same about terrorism		Gender equality measures get less media attention and are less perceived as important by the public: in comparison, 55% consider equal treatment of men and women to be an important issue for EU intervention, also people tend to consider that national interventions and non-legislative measures are better	
Relative salience of the issue (compared)	Schengen is of utmost importance to people, but public opinion is divided on whether or not to increase security through border controls or protect free movement: both rank very highly and have high approval rates for EU intervention Changes: from 2011 to 2016, people attach more importance to the protection of free movement: 2011: 67% 2016: 79%	Old proposal Less important than the new proposal, fewer media reports, no reports of public opinion polls on the matter: the focus was not on security and borders, but on migration more generally (legal and illegal migration, not refugees and asylum) New proposal much more discussed by national and European media: 71% of the people in Europe think that the EU should take more measures on external border protection, 61% judge current measures to be insufficient	People care about work-life-balance in terms of flexibility and provision of child-care, not necessarily fixed maternity leave	Gender equality measures on equal representation of women in key positions is relatively more important in the public opinion polls Gender Equality Public consultation in 2015: voluntary measures and targets seem to appeal to the public, but mandatory quotas are not among the top desired measures

- The proportion of Europeans who see terrorism and religious extremism as the main challenges to EU security has increased considerably since 2011 -

Respondents were asked to identify the most important challenges to the security of EU citizens at the moment[5]. They were invited to give a maximum of three answers, but they were not prompted – the following responses were all spontaneous.

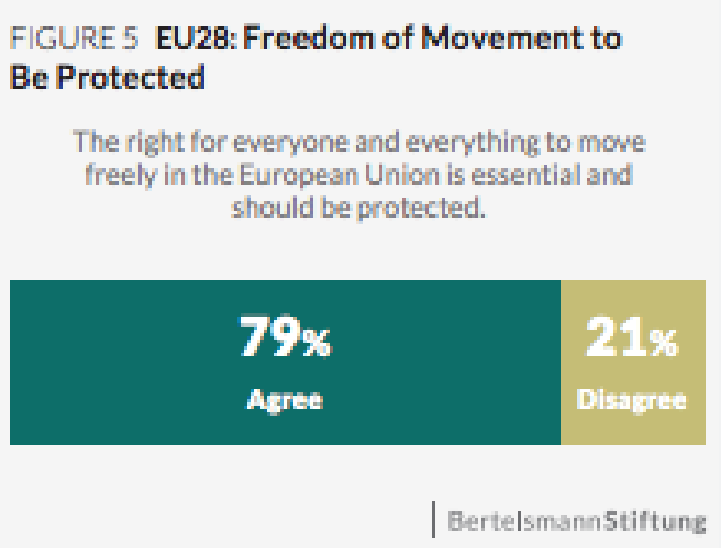
Roughly half of the respondents (49%) identified terrorism as one of the EU's most important security challenges. This is a substantial increase from the 33% of respondents who mentioned terrorism in 2011 (Special Eurobarometer 371).

Over a quarter of respondents (27%) think that economic and financial crises are among the most important challenge to security, down from 34% in 2011.

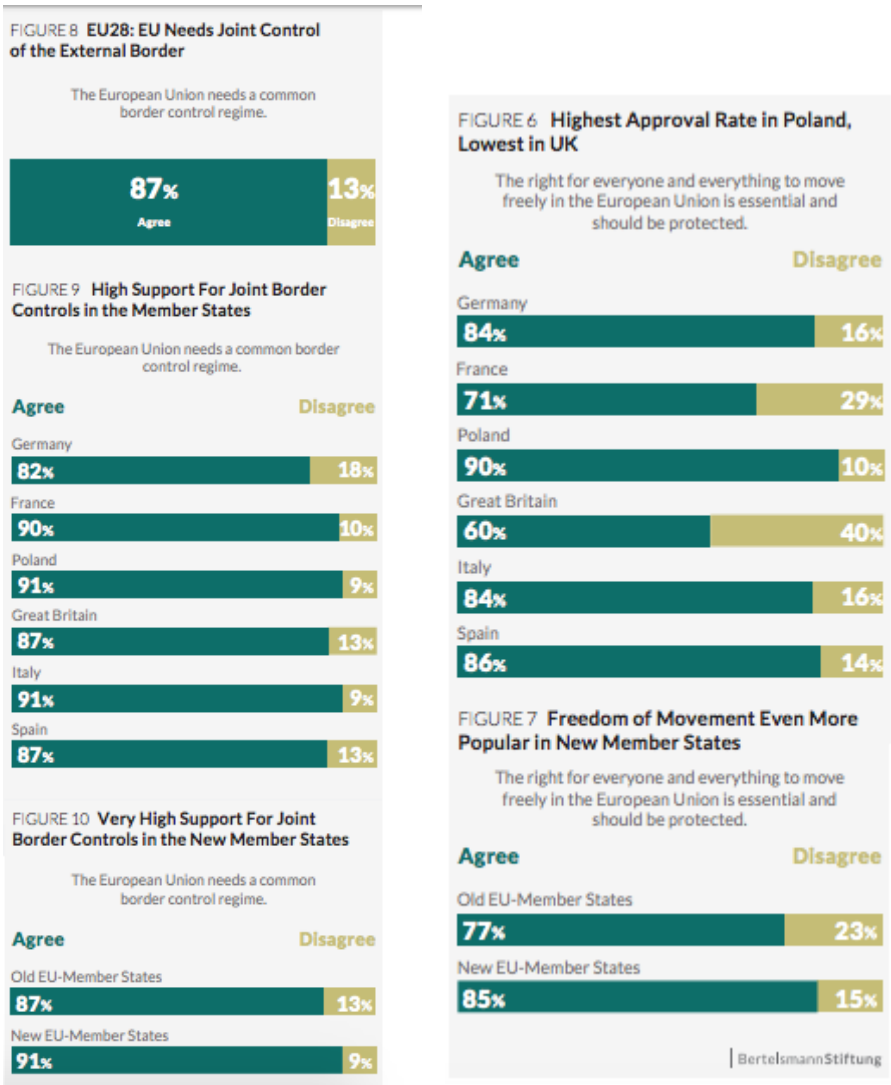
Just under a quarter of people mention poverty (23%, +5 percentage points compared with 2011), organised crime (23%, +2pp), and corruption (23%, +8pp). Around a fifth of respondents regard religious extremism (20%, +14pp) as the most important security challenge. A slightly lower proportion (19%, +3pp) view irregular immigration as one of the most important security challenges.

At least a tenth of respondents spontaneously say that cybercrime (12%, +3pp), and civil wars or other wars (11%, +4pp) are among the most important challenges to the security of EU citizens at the moment. Finally, less than a tenth of people mention petty crime (8%, +3pp), insecurity of the EU's external borders (8%, -2pp), environmental issues or climate change (7%, -5pp), natural disasters (6%, -5pp), nuclear disasters (4%, -6pp), or some other form of challenge (7%, +1pp).

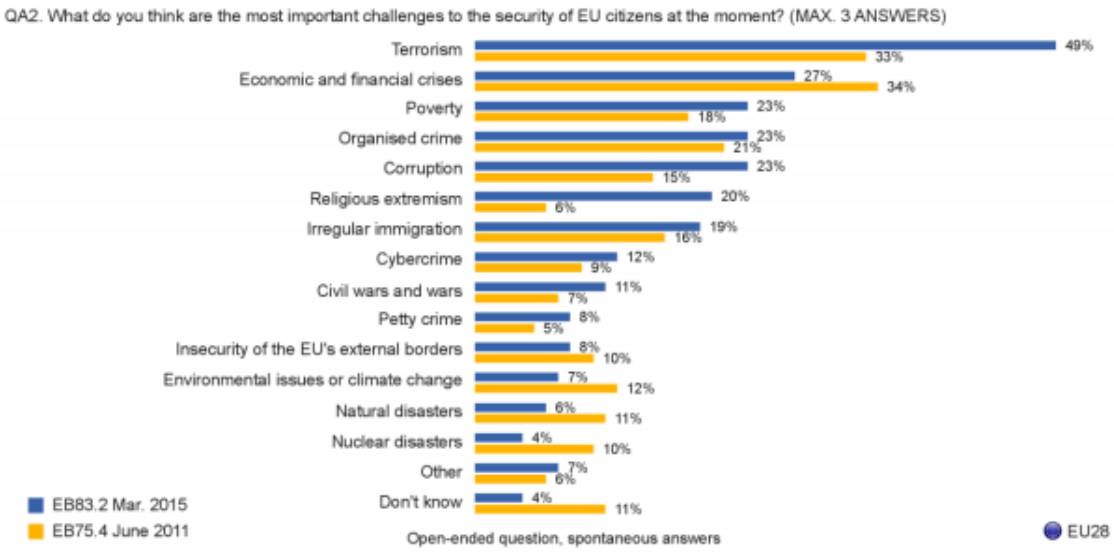
Source: Special Eurobarometer On Internal Security, 83.2, 2015



Source: Schengen, Free Movement and External Borders: Public opinion on European Competences (2016)

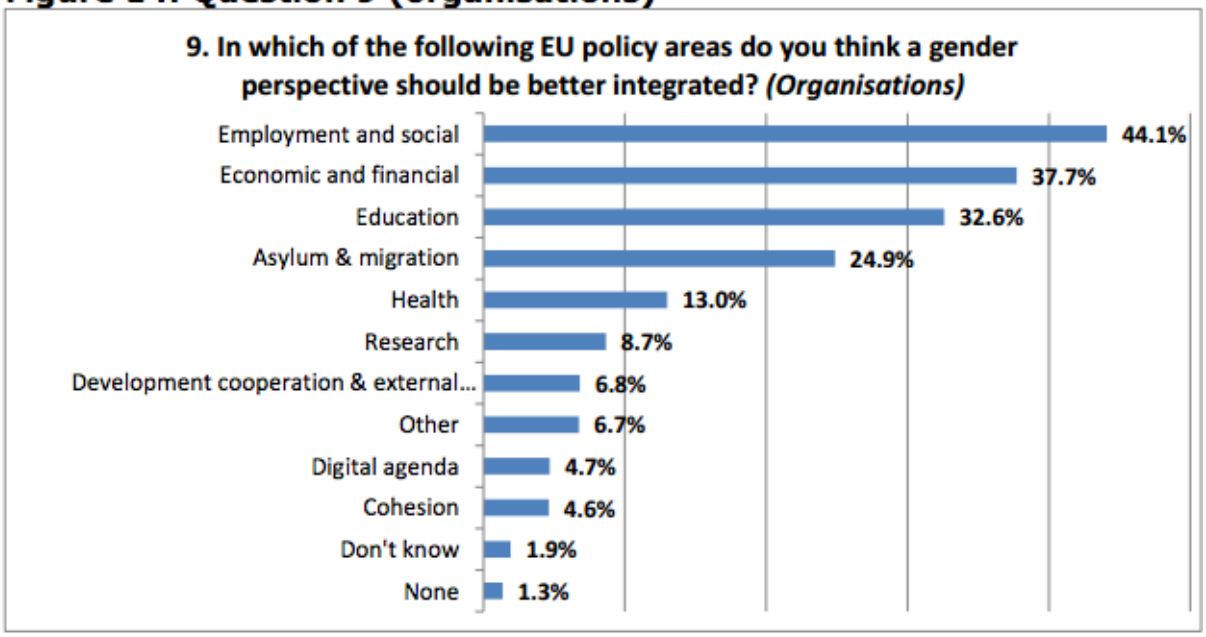


Source: Schengen, Free Movement and External Borders: Public opinion on European Competences (2016)



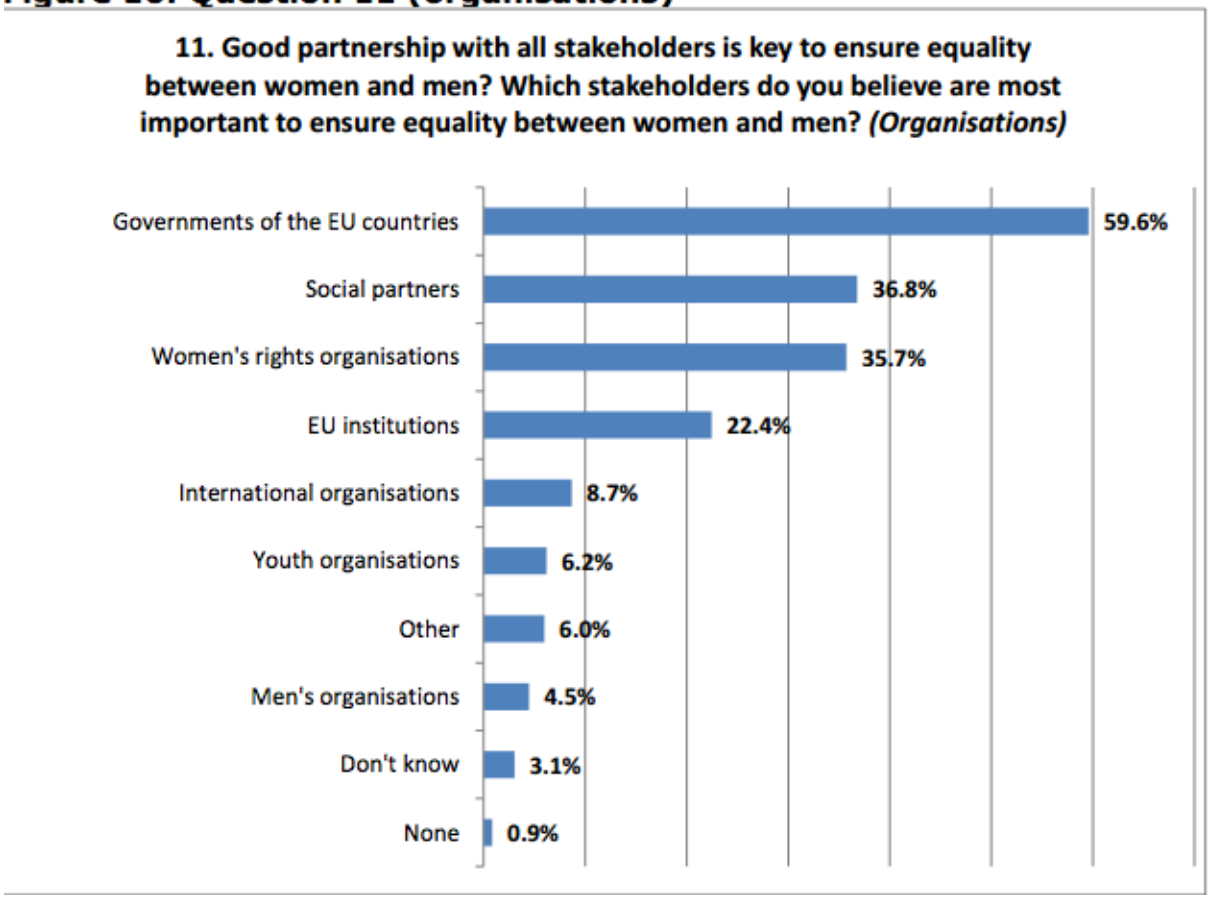
Source: Special Eurobarometer On Internal Security, 83.2, 2015

Figure 14: Question 9 (organisations)

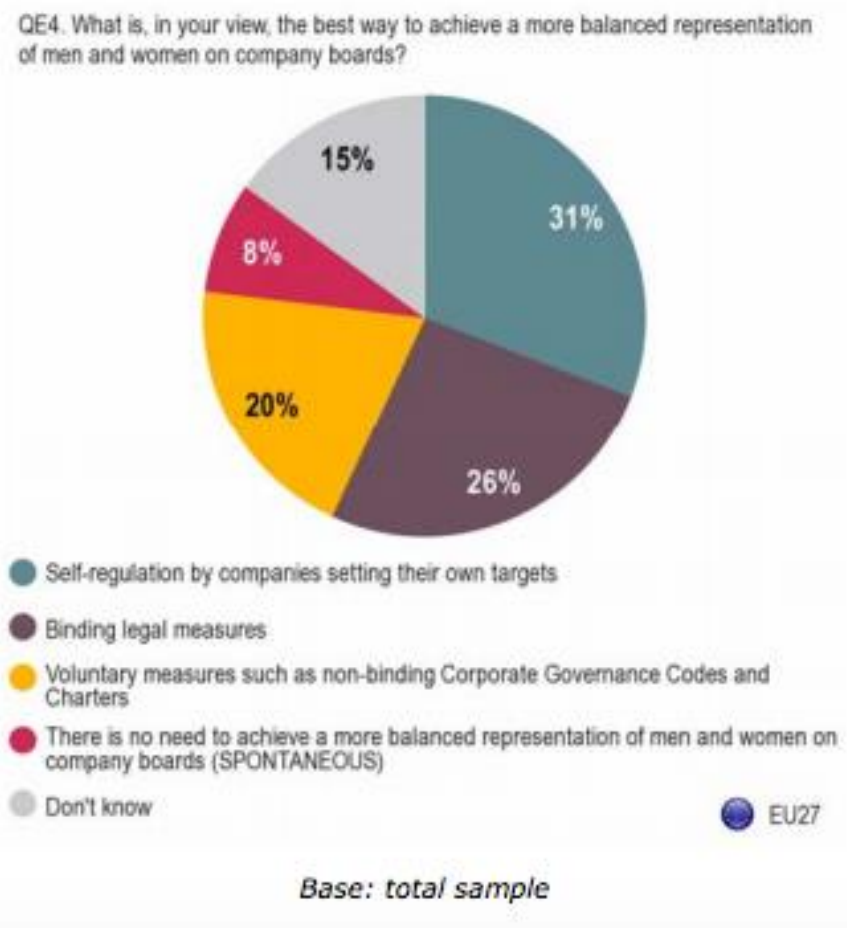


Source: Gender Equality and EU competences, Special Eurobarometer 428, 2014-2015

Figure 16: Question 11 (organisations)

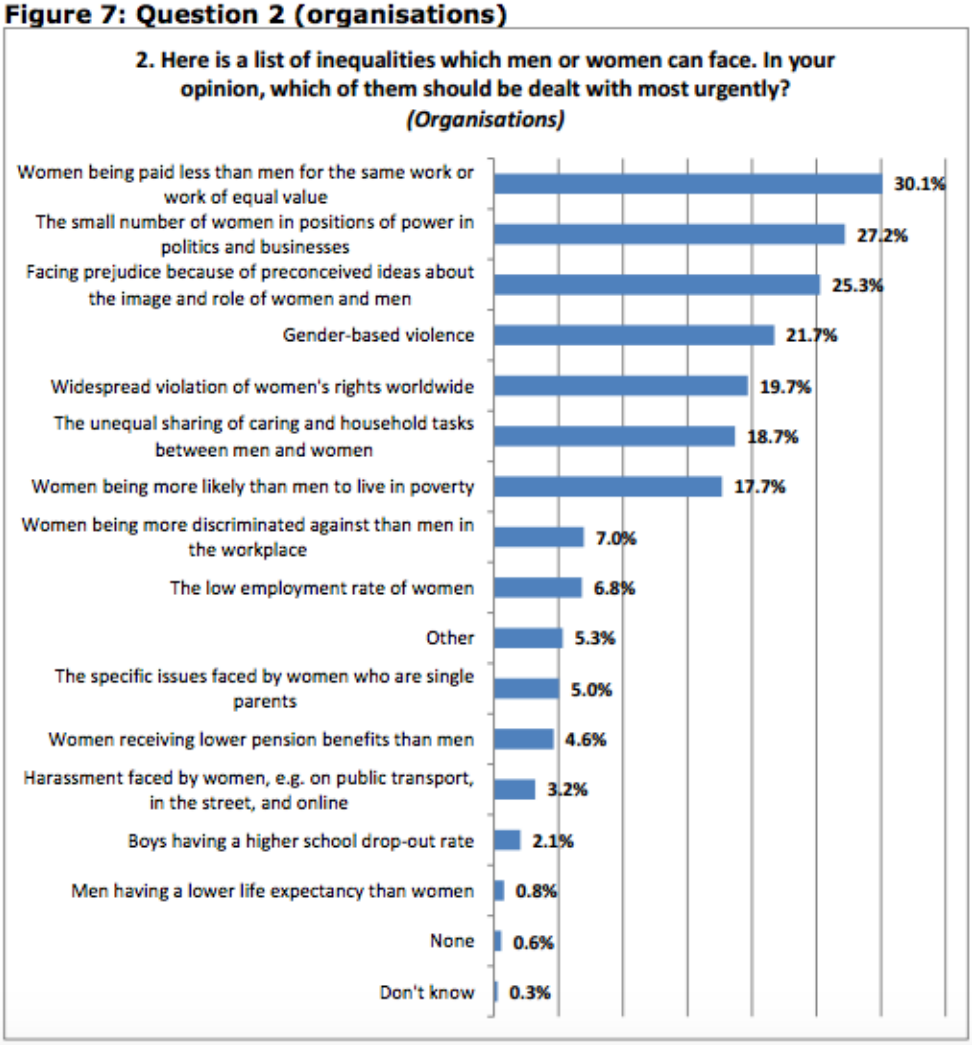


Source: Gender Equality and EU competences, Special Eurobarometer 428, 2014-2015



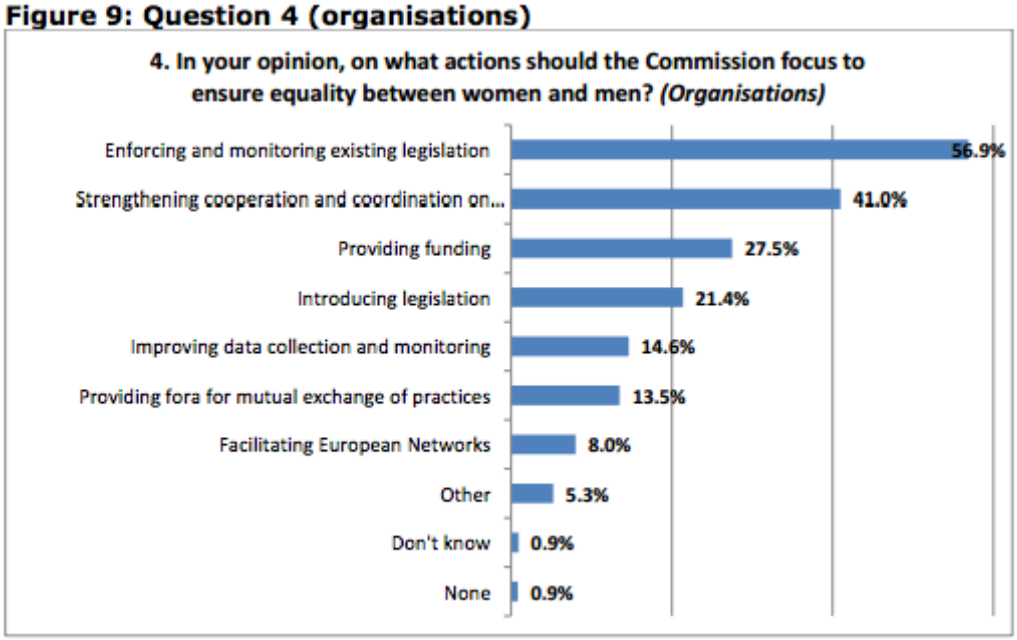
Source: Gender Equality and EU competences, Special Eurobarometer 428, 2014-2015

Figure 7: Question 2 (organisations)



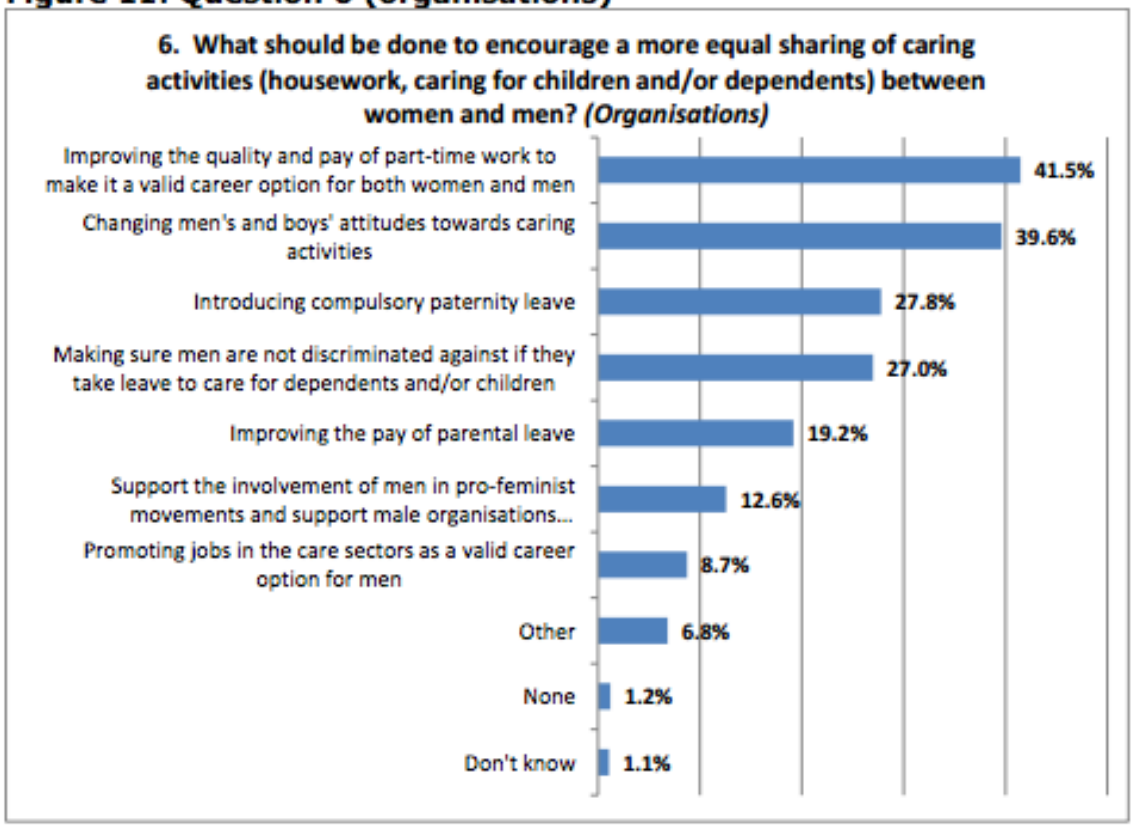
Source: Public consultation On Gender Equality, Commission, 2015

Figure 9: Question 4 (organisations)



Source: Public consultation On Gender Equality, Commission, 2015

Figure 11: Question 6 (organisations)



Source: Public consultation On Gender Equality, Commission, 2015

10.6 Council document access request: response letter

Brussels, 13 June 2017

Ms Isabel Winnwa
Email: isabel.winnwa@uni-bamberg.de

Ref. 17/1005-ld/rh/jj

Request made on: 25.04.2017
Deadline extension: 18.05.2017

Dear Ms Winnwa,

Thank you for your request for access to documents of the Council of the European Union.[389]

[389] The General Secretariat of the Council has examined your request on the basis of the applicable rules: Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.5.2001, p. 43) and the specific

Please find attached the documents you requested:

14310/11	13225/14	12322/13 COR1
10051/12	11337/14	12443/13
5815/14	10720/14	11584/13
14026/15	12860/13	11584/13 REV1
14026/15 ADD1	16279/13	10362/13
14026/15 ADD2	14852/13	6569/13
13270/15	14046/13	6569/13 REV1
13894/13	14046/13 COR1	
12531/15	12322/13	

Please find attached partially accessible version of document **8743/15**.[390]

However, I regret to inform you that full access to this document cannot be given for the reasons set out below.

Document **8743/15** of 19 May 2015 is a note from the Presidency to the Working Party on Frontiers/Mixed Committee (EU-Iceland/Liechtenstein/Norway/Switzerland) on *Draft Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union - Access for law enforcement purposes.* It contains concrete information about the fight with illegal immigration, terrorism and serious crime in Member States.

Full release of the information contained in this document would reveal to third parties sensitive details of concrete cases. This would affect the efficiency of the European Union's action to combat illegal immigration, terrorism and serious crime in Member States.

Disclosure of the document would therefore undermine the protection of the public interest as regards public security. As a consequence, the General secretariat has to refuse full access to this document.[391]

I regret to inform you that access to documents **7230/13, 8020/13 ADD1, 13191/13** and **6874/17** cannot be given for the reasons set out below.

Documents **7230/13** of 7 March 2013, **13191/13** of 2 September 2013 and **6874/17** of 8 March 2017 are notes from the General Secretariat to the Working Party on Social Questions

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provisions concerning public access to Council documents set out in Annex II to the Council's Rules of Procedure (Council Decision No 2009/937/EU, OJ L 325, 11.12.2009, p. 35).

390 Article 4(6) of Regulation (EC) No 1049/2001.

391 Article 4(1)(a), first indent, of Regulation (EC) No 1049/2001.

on *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures*. These documents concern an issue which is still under discussion within the preparatory bodies of the Council.

The notes give details of progress made, contain drafting suggestions prepared by the Presidency and identify the difficulties that still need to be addressed before the Council can reach a political agreement.

Release to the public of the information contained in these notes would affect the negotiating process and diminish the chances of the Council reaching an agreement.

Disclosure of the documents at this stage would therefore seriously undermine the decision making-process of the Council. As a consequence, the General secretariat has to refuse access to these documents at this stage.[392]

Having examined the context in which the documents were drafted and the current state of play on this matter, on balance the General Secretariat of the Council could not identify any evidence suggesting an overriding public interest in their disclosure.

We have also looked into the possibility of releasing parts of the documents.[393] However, as the information contained in the documents forms an inseparable whole, the General Secretariat is unable to give partial access at this stage.

I would also like to inform you that once the legislative act in question is adopted, and taking into account the provisions of Regulation (EC) No 1049/2001, the documents and any other legislative document relating to this legislative act will be made available to the public.

Document **8020/13 ADD1** of 11 June 2013 is an Opinion of the Legal Service - Addendum on *Proposal for a Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures - Legal basis.*

The decision-making process in question in currently ongoing. Moreover the discussions are sensitive and complex. The issue analysed in the opinion forms an important part of the basis for the discussions. Disclosure of the legal advice would adversely affect the negotiations by impeding internal discussions of the Council on the proposal and would hence the risk compromising the capacity of the Council to reach an agreement on the dossier and thus undermine the decision-making process pursuant to Article 4(3) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May

[392] Article 4(3), first subparagraph, of regulation (EC) No 1049/2001.
[393] Article 4(6) of Regulation (EC) No 1049/2001.

2001 regarding public access to European Parliament, Council and Commission document [394].

Moreover, the legal advice covered by this opinion deals with issues which are contentious and where the legal position remains to be clarified. The legal advice is therefore particularly sensitive.

Disclosure of such a document would therefore undermine the protection of legal advice under Article 4(2), second indent, of Regulation (EC) No 1049/2001. It would make known to the public an internal opinion of the Legal Service, intended for the members of the Council. The possibility that the legal advice in question be disclosed to the public may lead the Council to display caution when requesting similar written opinions from its Legal Service. Moreover, disclosure of the legal advice could also affect the ability of the Legal Service to effectively defend decisions taken by the Council before the Union courts. Lastly, the Legal Service could come under external pressure which could affect the way in which legal advice is drafted and hence prejudice the possibility of the Legal Service to express its views free from external influences.

As regards the existence of an overriding public interest in disclosure under Regulation (EC) No 1049/2001, the General Secretariat considers that, on balance, the principle of transparency which underlies the Regulation would not, in the present case, prevail over any such interests so as to justify disclosure of the documents.

[394] OJ L 145, 31.5.2001, P. 43

Finally, we have examined the possibility of granting partial access to the document for which access is denied. However, partial access is not possible, as the requested document is fully covered by the exceptions provided for in Article 4(2) and 4(3) of Regulation (EC) No 1049/2001.

In the view of the foregoing, the General Secretariat of the Council is unable to grant you access to this document.

You can ask the Council to review this decision within 15 working days of receiving this reply (confirmatory application).[395]

Yours sincerely,

Fernando PAULINO PEREIRA

[395] Article 7(2) of Regulation (EC) No 1049/2001.
Council documents on confirmatory applications are made available to the public. Pursuant to data protection rules at EU level (Regulation (EC) No 45/2001), if you make a confirmatory application your name will only appear in related documents if you have given your explicit consent.