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Panel 4L "Never miss a good crisis:" New Modes of New Governance and Crisis Decision-making

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ABSTRACT

Legislative decision-making in crisis

How the crisis affects agenda and power dynamics in EU border policy negotiations

The migration and security crisis has overshadowed policy negotiations in the area of Justice and Home Affairs since 2011. How has the crisis affected legislative decision-making in the EU? Building on actor-centered institutionalism, this article argues that we should look at different policy stages and conflict dimensions to understand how the crisis affects decision-making. In the area of border policy, two aspects stand out: the crisis triggered hard bargaining over legislative influence of the Parliament, with Council battling Parliament over whether or not co-decision applies. It also increased framing dissonance regarding the agenda, as Commission, Council and Parliament adhered to different ideas about design and purpose of the new system. The case of the Schengen Governance reform (2011-2013) resulted in an inter-institutional power battle over the Council's attempt to exclude the Parliament from decision-making, which ended up in deadlock. It was resolved by the Council reneging its extreme positions and Parliament accepting a linkage compromise that prescribes co-decision for future Schengen Borders Code reforms. In comparison, the negotiations on the Smart Borders Package (2013-2015) demonstrate the effect of agenda divergence, as the proposal failed due to a conflict between the Council's security rationale and the Commission's attempt to push *communitized* external border management. After the recent crises, we observe a rising level of inter-institutional and intra-institutional conflict, as national sensitivities about border security and migration control increase. The main conflict lines are captured by a left-right and a pro/against integration cleavage: Parliament's internal division intensified, as the right-wing embraced the Council's agenda quite willingly, whereas the left-wing defended a more liberal agenda rejecting attempts of renationalizing border control. The analysis will rely on official documents and expert interviews, using process tracing and framing analysis to depict how key actors perceived and strategically influenced the process to achieve their preferred outcome.

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PAPER

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I. Introduction

How do crises affect EU policy-making? The crisis has undoubtedly affected the EU in numerous ways, there is no denying that. Evidence of the impact of the financial and the migration crises shows that asymmetries between states have increased, the security situation has worsened in numerous southern and even northern states and the EU as a whole faces a considerable amount of pressure to provide solutions for both the migration and the security challenges. But how does the EU respond to these challenges? How does it deal with the crisis context when making decisions about policy?

First of all, which crises are we talking about concretely and why do they matter for policy-making processes? The European Union has been suffering through a number of successive and interlinked crises, each of them has affected decision-making, changing the agenda and the conditions for successful negotiations: security becomes a primary concern, states view integration and competence transfer more suspiciously and Commission and Parliament are afraid of losing. The lingering financial crisis matters in terms of attitude towards money and spending, states are much less likely to agree to costly policy initiatives than they were pre-crisis, because they have little money to waste. The migration crisis is the most prominent one and has had tremendous implications on politics and policy-making in terms of pressure on states to deal with a sudden and large influx of people without a border control system equipped with the necessary tools. It has been swiftly followed by a security and terrorism crisis, which has shifted the focus of EU member states to a security agenda and increased attention paid to matters related to borders and internal security. All types of crises have affected policy dynamics in a similar way: contentiousness has increased, especially for home affairs matters due to the migration and the security crisis, and the fact that states are affected asymmetrically by the consequences in many different ways. Migration pressure is experienced by southern countries at the external borders, northern countries as destinations of secondary migration, in total states see migration as a burden, very different for the Commission and even the Parliament, states want control over their borders, the supranational institutions want to prevent that. Terrorism constitutes a new intervening threat to states, which changes the game in terms of border policy agenda and makes states even more unwilling to subscribe to non-border protection related measures. Consequently, conflict fields and interest constellations vary across issue-areas and actors involved: border protection has emerged as a salient issue and a main conflict field with strongly diverging preferences among states, but also between institutions, as the new agenda favors the security preferences of the Council over the integrationist agenda of Parliament and Council. Conflict can therefore be expected to be particularly prominent whenever either of the two supranationalist actors does not conform with the Council's security agenda (Ripoll Servent&Trauner, 2015)

Which crisis effects do we expect? Crises lead to higher relative salience of some policy areas, the crisis context also leads to higher expectation of conflict between states and also between institutions. Coincidentally, the crises lead to higher pressure on the EU to act and provide for solutions and a much bigger vulnerability to populist pressure. So the pressure to find agreement is high, yet so is the controversy, increasing the likelihood of conflict and deadlock. Where is the puzzling part in all this with regard to EU decision-making? Seemingly, according to prior studies on policy-making processes, a majority of policy

initiatives successfully pass the test of negotiations, and according to the literature 85% are even agreed upon consensually at the lowest level in the trilogue stage of negotiations without need for complex formal processes, let alone conciliation committees, leading scholars to presume a consensus-drive (Shackleton, 2000). Yet, negotiation failure happens, but not to the extent that it would be justified to speak of a joint decision trap (Héritier, 1999; Bovens&tHart, 1996). If crisis increases conflict, does it also increase failure? Well, not necessarily, sometimes conflict outweighs pressure to provide solutions and sometimes agreement can be found despite intense disagreements between states and institutions. And most of the studies written on consensus-behaviour in EU policy-making have been conducted pre-crisis, not taking into the account the high pressure, high conflict context of the current EU. Given that we see more and more failure in the EU, small-scale failure in policy-making, but also failure to keep integration together, as the Brexit debacle shows. It is worth investigating the negotiation processes to see if and how the post-Lisbon crisis context affects the EU's inner workings, when conflict can be turned into consensus and when it ends in failure (Ripoll Servent, 2011; Wallace&Naurin, 2008; Hayes-Renshaw&Wallace, 2006).

Which are the conditions separating failure and success in the crisis context? And more concretely with regard to one of the policy areas most affected by the crises: how can we explain success of the reform of Schengen Governance and the failure of Smart Borders, both border policy initiatives, negotiated under the same premises in the same decision-making context?

It will be demonstrated that as a result of the crises, the power dynamics between the institutions are even more skewed in favour of the states, due to increased pressure by public opinion. Commission and Parliament have much less leverage to push for integration. Yet, we do see that both supranational actors have not abandoned their quest for integration, even in high salience and sovereignty sensitive areas, like border policy. With regard to the impact of the process, we argue that in the case of the Schengen Governance Reform (2011-2013), a first border policy proposal in reaction to the migration crisis, the reason for successful unblocking of inter-institutional deadlock lies in the the combination of several conditions and strategic mechanisms, an EPP rapporteur trusted by both Council and Parliament, a creative legal solution developed by an assistant of the rapporteur, a delegation of the Presidency and the legal services of both institutions and lastly the exploitation of a well-known ideological division in the Parliament between the left and right in terms of securitization of borders and involvement of the EU in border control. The Smart Borders Package (2013-2015), a second border policy proposal, failed for a combination of reasons: the Commission, under the impetus of Commissioner Malmström, drafted and framed it as a migration management tool, disregarding the Council's request for a system to reinforce border security, and it failed to perform its technocratic duty of providing an appropriate solution to the problem of managing external border crossings, due to excessive costs, lack of law enforcement access and incomplete impact assessment. A number of conditions are isolated, which appear to have played a crucial role in enabling the mechanisms involved in unblocking: trust in relais actors, availability of legal and technical expertise and flexibility of all actors involved to review positions. An important factor seems to be learning, from previous experience with negotiation, concretely: (repeated) failure of a proposal in the past increases chances of success due to the Commission and the co-legislators learning from previous mistakes.

II. Theorizing legislative decision-making in crisis: increasing Council-dominated interinstitutional battles over competence and money

The most recent literature on decision-making dynamics in the post-Lisbon setting, focused on the border policy area, has postulated an erratic, unpredictable style, rather than premeditated and clear patterns, because the agendas of each institution are inward-looking and not geared towards developing a normalized policy-making process. In Justice and Home Affairs, the age-old cleavages are present and shape decision-making processes consistently: restrictive versus liberal and Europeanized versus national. The result are tense negotiations both in and between institutions, especially in urgency contexts (Ripoll Servent&Trauner, 2015; Naurin, 2015; Bauer and Trondal, 2015).

2.1 Agenda-setting and the imperfect Commission: technocratic underperformance and ambition as reasons for failure

Theoretically, the first step in the decision-making process is to address the agenda-setter, which means dealing with the ambiguity of the Commission's role: is the Commission a strategic agenda-setter or a technocratic broker between interests?

This paper postulates that in co-decision and crisis settings, the Commission is neither purely strategic, nor is it an honest broker between the co-legislators' interests (Nugent&Rhinard, 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, the resources both actors and expertise and the context surrounding the negotiations (Princen, 2011; Princen, 2007; Princen&Rhinard, 2006; Boin, Hart & McConnell, 2009). The Commission has been conceptualized as an honest broker due to its role as the guardian of the Treaties and the initiator of legislation, 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 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 and 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&Trauner, 2015; Cini&Suplata, 2017). Empirically, we would expect for this type actor behaviour that the proposed Commission proposal is accepted by the co-legislators and negotiated internally, thus surviving the agenda-setting stage. If the Commission is indeed an honest broker and perfectly anticipates the ground for compromise, the proposal does not require many changes and the final agreement resembles the initial proposal, but reflects some concessions made by both co-legislators. Conflict is possible, but failure due to agenda-setting is unlikely, because the proposal adequately anticipated the co-legislators preferences.

Other strands of research have taken a different approach and view the Commission as a strategic actor and political leader: if the Commission 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, 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&Trauner, 2015; Boswell&Geddes, 2010; Corrado, 2006; Kassim et al., 2013; Princen, 2007). If the Commission is a strategic agenda-setter, we can expect to see ambitious and integrationist proposals, 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&Trauner, 2015).

A third strand views the the Commission as an imperfect technocratic bureaucracy: 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. However, the Commission's resources and expertise are also limited, its bureaucracy is developed, but 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, such the border policy area, especially dealing with external borders, which has long been guarded by member states (Boranbay-Akan, König and Osnabrügge, 2016; Lelieveldt&Princen, 2015; Sabatier&Weible, 2014; Ackrill, Kay & Zahariadis, 2013). Lastly, conflict or failure of negotiations due to bureaucratic inefficiency are to be expected if the Commission fails to provide appropriate solutions for the problems perceived by the co-legislators and fails to adequately take into consideration their concerns or incorporate their preferences.

2.2 Bicameral dynamics: Parliament caught between procedural power play and substantive pragmatism facing a relentlessly self-centered Council

How does the crisis and the increased pressure on states affect the dynamics between the two co-legislators, Council and the Parliament? Does the migration and security crisis make the Parliament more lenient towards the Council?

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&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 in substance to be able to secure its procedural influence and avoid being sidelined by the Council. It will do so in substance 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 as closely as possible to the state competences (Ripoll Servent, 2015; Huber, 2015)

As for the role of the Parliament, there are different views on its role and influence. Some are conceptualizing the Parliament as a veto-player to the Council: in the traditional conceptualization of the EU's bicameral dynamics in Justice and Home Affairs, the Parliament is the Council's opponent, providing an integrationist and liberal counterbalance

to the Council, which is focused on sovereignty and security, the Parliament tries to get support from the Commission in its quest for power (Ripoll Servent&Trauner, 2015; Liefferink&Andersen, 1998). In terms of actor behaviour 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&Trauner, 2015; Huber, 2015). According to this conception of bicameral dynamics we would expect Parliament to favour a pragmatic and feasibility-oriented approach, being 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.

Since the focus of this paper lies on understanding the inter-institutional dynamics, especially the agenda-setting stage and the bicameral dynamics between Council and Parliament, the inner workings of each institution will not be examined in as much detail, as they deserve. However, there is excellent structural, process-focused and actor-centered research for each of the institutions, which will be able to cover any gaps this analysis might leave open: a number of studies have focused on the structural level of decision-making in the inter-institutional setting of decision-making, with a focus on the importance of institutional rules and the impact of external factors (Saurugger, 2013; Gehring, 1998; Gehring&Kerler, 2008 etc.) and the occurrence of bargaining strategies (Kardasheva, 2013; McKibben, 2014; Johansson, 2013 etc.). Furthermore, there is in-depth case-study based analysis of the role of the Parliament in co-decision with the Council in the post-Lisbon setting, especially with regard to internal motivations for actor behaviour, but also voting behaviour and preference constellations and position change in the Parliament (Ripoll Servent, 2015; Ripoll Servent, 2014; Finke, 2016 etc.). Quantitative and qualitative analyses of decision-making in the Council and its structural advantage compared to the Parliament are numerous and include structural aspects of negotiation processes, such as preference constellations, position-taking, voting behaviour, coalition-building, bargaining strategies and deliberation dynamics and informal governance (Hagemann&Hoyland, 2010; Costello&Thomson, 2013; Thomson et al., 2011; Veen, 2011; Häge, 2008; Johansson, 2013; Kleine, 2013, Smeets, 2015 etc.).

2.3 The groundwork of congruence analysis and structured comparison: tracing conditions and mechanisms of success and failure

Before laying out the actors, mechanisms and conditions of policy success or failure and diving into the process of blocking and unblocking, it makes sense to explicit the different

stages of the process and link them to the occurrence of conflict or deadlock (Versluis, Van Keulen&Stephenson, 2011; Naurin&Rasmussen, 2013; Beyers, 2011). The agenda-setting stage, as in the proposal drafting process, is the first stage of policy-making and can be the origin of conflict or failure depending on agenda-setting behaviour detailed above. If reasons for failure are to be found at this stage, it is likely that negotiations never proceed to position-taking (Gornitzka&Sverdrup, 2011). It is followed by the position-taking or policy-shaping stage, referring to the interdependent intra-institutional negotiations between state representatives in the Council and between groups in committees in the Parliament, is supposed to result in a preferably consensual common position of each institution to begin trilogues, the informal negotiations before voting on the compromise proposal. There are numerous occasions for conflict to occur, mainly caused by the positions taken by the different states or groups and the possibility for compromise as well as the willingness to engage in consensus-seeking. If agreement within either one or both of the institutions is not possible, the negotiations will stay deadlocked or fail at the position-taking stage (Håge, 2011; Finke, 2016). The negotiation or decision-making stage refers to the interinstitutional trilogue, where Council and Parliament, mediated by the Council Presidency and the Commission, are supposed to find a compromise agreement finalized and confirmed by a formal vote. Conflict is likely to occur if the positions of the two institutions are very far apart and either one of them takes an extreme position and compromise proposals are either not presented or not deemed acceptable (Costello&Thomson, 2013; Yordanova, 2011).

The concept to be clarified after the stages of negotiation is that of an actor. As mentioned before, the actor-centered approach used in this paper postulates that actors and their behaviour can make or break negotiations, they are in charge of negotiation positions, how they react to given circumstances, their flexibility and willingness to seek consensus determine success or failure (Odell, 2000; Ripoll Servent&Busby, 2013; Brandsma, 2015). We will not lay out different types of actors we find in negotiations: it is recommendable to break down the multi-level structure of the EU and distinguish types of actors, especially collective from individual actors, all of which are relevant for the negotiation process. Collective actors are essentially entities like institutions or states, which obviously cannot act in the same manner human individuals can, but are referred to in analyses as actors for the sake of simplicity. Thus, when speaking about the Commission, the Parliament or the Council as actors, we understand them as the collective of all individual actors comprised within and the institutional entity as acting on their behalf. Individual actors on the other hand are the people within these institutions, such as individual Commissioners, desk officers, state representatives, rapporteurs, MEPs and the like. And then there are formalized actor roles, which are assumed by individuals or collective actors: such the role of broker or mediator in negotiations, the so-called relais actor, which is assumed by the Commission, the Council Presidency assisted by the Secretariat and the legal service, as well as the rapporteur assisted by the committee secretariat and the legal service (Reh&Héritier, 2012). Relais actors focus on keeping the process going, making them a key component of consensus-building, with their ability to provide for the necessary information, form relevant ties and appease sensitivities can make or break negotiations (Farrell&Héritier, 2003; Ripoll Servent, 2015; Brandsma, 2015). These types of actors can be found in all three institutions, there are actors, which are designed to or supposed to be relais actors, such the Commission as a collective actor with its mission of a broker, including the individual Commissioner in charge of the proposal and the relevant desk officers drafting the legal text. In the Council, the task of relaying falls to the Presidency and the Council Secretariat

general for the political side, the legal service for the legal and technical aspects and occasionally, though not generally, also state representatives. In the Parliament, relais work is done by the rapporteur, assisted by the legal service and assistants of the committee secretariat, occasionally, though not generally, the role can also fall to individual MEPs (Brandsma, 2015).

To capture the process dynamics, mechanisms and conditions will be used as a framework to capture negotiations and bridge the gap between agency and structure: As discussed at length when reviewing the existing theory, research has struggled with the problem of disentangling strategic action from the influence of norms and rules. Conceiving of the process as an interaction of mechanisms and conditions can help bridge this gap, since it acknowledges that formal and informal rules and norms are present as conditions that frame actor behaviour, but agency brings about the decision outcome, actors negotiate preferences and find solutions for problems, or fail to do so (Roos, 2013; Héritier, 2010; Scharpf, 2006; Jupille and Caporaso, 1999). Mechanisms are a way of capturing actor behaviour in process-focused research, especially useful for informal secluded negotiation settings, where participatory observations are difficult, if not impossible and action usually has to be inferred ex-post. Mechanisms are what links actors and their preferences to the negotiation process. They can be thought of as either premeditated strategic or involuntary ad-hoc action, which brings about success or failure under certain conditions. As said above, actors can either seek consensus and act accordingly, or bring about conflict through controversy-seeking behaviour (Ripoll Servent, 2015). The existing literature already provides us with indications about what controversy-seeking behaviour, fostering or sustaining conflict, can look like: extending or reducing the scope of the proposal (substantially or procedurally), using threats or forming blocking minorities (McKibben, 2013; McKibben, 2010; Häge, 2013; Örnberg, 2009). Equivalently, we can take some ideas about consensus-building behaviour from previous research, basically actions taken to bring about agreement: issue-linkage, legal and textual flexibility or general wording and trying to establish a majority coalition (Smeets, 2015; McKibben, 2010; 2014).

Conditions capture the context and structural as well as agency-based factors necessary to enable the mechanisms of success or failure. The ensuing empirical analysis is supposed to identify the structural and agency-related conditions under which these mechanisms function. This is in part a reappropriation and extension of existing literature on structural determinants of negotiations as well as informal governance, which have provided interesting insights, but have not been able to disentangle the web of actors, strategies and rules and uncover the black-box of processes. Formal rules can be seen as conditions, voting rules for example play an important role in so far as they set the context for actor behaviour and choice options. A simple example is the difference unanimity makes with regard to qualified majority voting: under unanimity, it is not possible to disregard anybody's objections or concerns without risking failure due to the veto possibility of every actor involved, whereas under qualified majority voting, it is possible to pass a legislation against the will of a minority of states. Why then not simply focus on formal rules as predictors of behaviour and outcomes? Well, for qualified majority voting, which is the rule in the area we focus on, it can be simply put: because people have tried and results are inconclusive. Qualified majority voting does not always mean that the minority is outvoted, even though it would be possible, more often than not consensus is sought and concessions are made to reluctant actors, but it is also entirely possible and has happened quite frequently that a

minority of actors forms a blocking coalition to impede the process. Formal rules can be expected to guide behaviour, but don't determine it or provide a clear-cut prediction of an outcome without looking at the process.

Informal rules are also conditions: informality captures all those norms, habits, and social elements, which are not formalized or visible, but provide a framework for the negotiations and often incentives for actors to behave in certain ways (Kleine 2013; 2014). Socialization effects might be very difficult to prove empirically, but we can follow the existing literature in so far as actors interacting with each other regularly in the same setting over a long period of time, isolated in the Brussels setting, are likely to develop some shared habits and overall grow familiar with each other and each other's routines. However contrary to the relevant literature in that case, this concept of agency does not presume some form of predetermination or the existence of one particular mode of decision-making (Beyers, 2010). Some very common informal norms linked to the concept of socialization are those of trust, reciprocity, familiarity and interpersonal relations: informal norms, which are equally hard to observe, but more believable in negotiation contexts than a consensus-drive. A well-know one is the notion of trust or reciprocity, trust being understood as judging a negotiation partner to be dependable, true to their word and deliver on their promises, and reciprocity being the reward given in response to trustworthiness, which can be a concession in some form, a deal or even a renegation on a position or a reservation (Liefferink&Andersen, 1998). Familiarity enables close interpersonal relations, which in turn make successful conflict management more likely, because actors possess the necessary entry points to problematic actors to set up meetings and engage in persuasion exercises (Falco-Gimeno, 2014). Recent literature has discussed the notion of consensus-drive, especially the view of orchestrated decision-making, which we approach with a healthy amount of skepticism. While it is certainly possible that repeated negotiations induce consensus-oriented behaviour, as the main goal is to find a mutually acceptable solution to a shared problem, it entirely depends on the level of conflict and the importance of the issue, how difficult or easy it will be to find an agreement. Consensus is certainly the goal of an agreement, but actors do not always have the incentive to pursue agreement on a given issue, conflict can prevail and end in failure (Shackleton, 2000; Smeets, 2013; Smeets, 2016).

Other more structural factors, which are not necessarily directly linked to the process, but specifically impact preferences in JHA matters are: economic factors like market structure, labour market conditions, also relative immigration share, political ideology of the governments in power, especially the left-right cleavage, attention by media and importance to public opinion (Lahav, 2004; Fellmer, 2008; Freeman, 2006; Roos, 2013).

III. Explaining success and failure in a high-conflict policy area: external border policy caught between pressure to deliver and reluctance to communautarize

The process analysis framework proposed above has to be tested empirically to see if the actor types and mechanisms identified are present and to identify the conditions under which the mechanisms can work. The cases selected for the empirical analysis were chosen for two reasons mainly: their direct link to the crises affecting the EU, thus high salience, and their level of controversy. Public opinion and media attention are key components of salience, which in turn affects behaviour of decision-makers (Oppermann, 2008; Oppermann&Viehrig, 2011; Warntjen, 2011)

As regards the salience of the policy areas affected by the crisis, not much has to be said, since the topics of migration, asylum and border control have been in the news for many years, yet it is worth noting that even though public attention and thus policy makers attention to the migration and security crisis has been continuously high over the past years, public opinion on the matter has developed in quite a diverse way across the EU. Now, attitudes towards migration, security and borders are not equivalent and inherently complex, since there is not one form of migration, not just one type of security and different aspects of borders and border control also trigger different responses in different states (Monar, 2014). However, opinion polls and surveys do not necessarily distinguish neatly between categories and often group immigration attitudes together under one heading, often including legal migration, irregular migration and asylum, even though they are fundamentally different in nature and implications for the EU and its member states. It is not surprising therefore, that results of opinion polls can be inconclusive with regard to the type of issue or vary from survey to survey. With regard to the topic of border control in relation to migration and security, which are the main conflict areas underlying the present cases, as expected, there is not one general trend, apart from maybe the general impression that attention on matters of home affairs has been particularly high since the outbreak of the Arab spring migration crisis in 2011.¹ Some polls report that the attitude of the EU's people towards immigration is generally negative and border control is in the focus due to an increased security concern, a fact, which can be presumed to influence all institutions involved (Haverland, De Ruiter & Van de Walle, 2015). The controversy element will be captured by a mapping out of preference and conflict constellations throughout the within-case analysis of each of the two negotiation processes.

The following analysis is based on qualitative content analysis of a database of both documents and expert interviews, completed by references to existing case studies on both cases if available. Between 30-35 expert interviews have been conducted so far on both cases to understand the negotiation dynamics, the sample contains all relevant actors, which were involved in the negotiations, most of which agreed to be interviewed². All available and accessible official and media documents on both policy issues chosen for the empirical analysis, collected via the official databases of the institutions, complemented by a manual search via Google and an automated search of the Council database to check for missing and linked documents using Webscraping in R to deal with transparency issues in the database and grab any documents the manual search might have missed out on. Existing

¹ <http://www.cnn.com/2015/09/08/how-europeans-have-reacted-to-migrant-crisis.html>;
<http://www.euractiv.com/section/social-europe-jobs/news/europeans-overwhelmingly-against-immigration-poll/>;
<https://www.ipsos-mori.com/researchpublications/researcharchive/2972/Global-Divisor-Survey-reveals-negative-attitudes-to-immigration.aspx>;

² Interviewees will be treated anonymously. Also, the evidence provided will be given in general terms, since the transcription of all interviews is not complete yet. Therefore, the number/quantity of confirmatory expert sources will be given for each part of the analysis, without quotes or further elaborations on framing based on transcripts for the time being. Once all interview data is transcribed and prepared, a comprehensive analysis of the way actors frame their choices during negotiation processes will be made to further corroborate the findings about mechanisms and conditions and use the interview data in a more thorough manner as evidence for empirical claims.

literature on both cases is referred to whenever it is relevant to underline the theoretical argument or complement the empirical analysis.

3.1 Schengen Governance Reform: a power battle for influence between Council and Parliament

Before proceeding to the analysis of the negotiation process, it is helpful for the better understanding of the stakes and issues involved to summarize the background and the substance of the legislative package. The Schengen Governance Package consisted of 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. 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 (COM (2011)559, 16.9.2011), which was the result of a previous proposal from 2010, that has been worked on by the COM since 1999 and emerged from discussions between COM, member states, experts and mainly the Schengen Evaluation working group in the Council (SCH-EVAL). The former Schengen evaluation mechanism constituted an intergovernmental system of peer-review, the COM played only an observer-role and the EP none at all. The 2010 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 COM the power to decide on which measures to take in case there are deficiencies in member states; instead of simply informing the state, the COM 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 COM considers that the deficiencies are persistent. It also gives a considerable role to EU agencies, like FRONTEX and EUROPOL, to assist member states and provide risk analysis, as well as act as observers and conduct on-site visits. With regard to the former SEM regulation, the COM 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 COM proposed a set of solutions: the possibility to conduct unannounced visits by teams of member states and COM experts appointed by the COM and the sending of questionnaires. On its basis, the COM 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 (COM(2011)560, 16.9.2011, Brussels). It postulated that the decision on whether or not to reintroduce border control should be taken by the COM 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 COM would also judge the lawfulness of requests to reintroduce border control thus making the role of the COM 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.

Before proceeding to the analysis of the different negotiation stages and the uncovering of mechanisms and conditions of conflict-solving, it is necessary to map out the different preference constellations of the actors involved, to understand the conflict dynamics. 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, as well as one attempt to reform the Schengen Evaluation Mechanism in 2009, which the Parliament rejected, under rapporteur Coelho, who would also be in charge of the file later on, because the Commission chose consultation as the legal basis thus excluding the Parliament (Dobbels, 2014; Huber, 2015; Interviews with DG Home officials and ANTICI officials). Obviously, Parliament was not in favour of tightening border control, but it did support 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, especially in Schengen evaluation matters, where the Parliament had been deploring the dysfunctional peer-review system for a long time (Huber, 2015; Interviews with EP rapporteur, EP LIBE secretariat officials, MEPs). 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. State representatives in the Council were skeptic of the proposed reform of the evaluation mechanism, especially the involvement of supranational institutions, supportive of a revision of border control rules in general, but diverged on the details of the two proposals (Huber, 2015; Hilpert, 2015). Different coalitions emerged initially divided along functional lines and ideological lines, there is not much of a geographical cluster: functional and ideological divisions mainly. 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, Luxemburg, Portugal. Then there were those states, which saw the need to reform Schengen, but did not favor a substantial amendment in the form of renationalization of border control competences or extension of criteria for internal border control: Eastern European states. In terms of ideology, the countries with right-wing governments or right-wing dominated coalition governments were more inclined to support a reform to encourage more national control over internal borders and more reluctant towards closer involvement of supranational institutions in Schengen evaluation, whereas countries with left-wing governments were more supportive of the evaluation mechanism reform than

the tightening of border control. Countries in support of border control tightening from the outset were Netherlands, Austria, Spain, Sweden, UK, Denmark. The pivotal state proved to be the usual suspect: Germany. It is noteworthy that Belgium, Italy, France and Germany changed preferences: Belgium considered the more moderate approach on border control, which prevailed during negotiations, to be acceptable, Italy and France changed governments from conservative to left-wing, whereas Germany became a supporter due to internal pressure on the conservative party by voters (Hilpert, 2015; Interviews with EP rapporteur, EP LIBE secretariat representatives, Council Secretariat general, Council Presidencies and state representatives). As preference coalitions go, no clear geographical pattern appeared throughout the negotiation process, especially with regard to the border control issue, it was not a classical north-south or east-west coalition.

Moving on to the process, starting with agenda-setting it is clear that states effectively use the crisis for power play and the EU as a platform for sovereignty battles: France and Italy engaged in power play over the migration crisis, when the Italian authorities decided to grant migrants arriving from Africa residence permits with Schengen visa and send them on a train to France. The French President Sarkozy replied by closing the French-Italian border and reinstating border control, in breach with European law, denouncing the provocation by President Berlusconi. Since the controversy didn't benefit any of them, they both united against Schengen and decided to appeal to the Council and the Commission denouncing a malfunctioning of Schengen at external borders and demanding renationalization of border control (Interviews with state representatives in Permanent Representations, Council Presidencies, Council Secretariat General). The Commission seized the opportunity provided by a quarrel between France and Italy over internal border control and a call upon the EU to reform the management of Schengen borders to repropose the Schengen Evaluation Mechanism alongside new legislation on reintroduction of border control in a package (Interview DG Home, state representatives, Council Presidencies, Council Secretariat General). The initial Commission proposal main content reflects an attempt to provide for a compromise proposal, which satisfies both Council and Parliament in both their core demands: Art. 77, additional possibilities to reintroduce border control, more involvement of Commission and Parliament in the Schengen Evaluation Mechanism (Interviews DG Home; ANTICI official). However, it did not accurately anticipate the clash of institutional agendas: Commission proposed a package for Schengen Evaluation and reintroduction of border control, which would de facto further supranationalize control over borders by giving it the final say in most cases, only allowing for few exceptions. The Council's stance on this was made explicit in COREPER and working group discussions, where member states counteracted the Commission agenda with a request to correct the proposal to only include a requirement to notify other states of impending reintroductions, rather than seeking permission from the Commission (Ripoll Servent&Trauner, 2015; Pascouau, 2013; Interview Council Secretariat General).

There are several reasons for the subsequent deadlock. First a number of conflict issues in the Council: in terms of Schengen evaluation, the position of the Council was fairly clear: as little supranationalization as possible, Commission involvement was acceptable, the Parliament was to be sidelined. The main conflict axes in the Council involved the renationalization of border control aspect of the package, France and Italy had very little support for their request to renationalize border control, the other states were supportive of the more moderate Commission proposal, which favoured regulated exceptional

reinstatements of internal border control under strictly defined criteria. France and Italy could rally a few countries behind them, but then adjusted their position, due to elections and switches in government from right-wing to left-wing, which explains why the final agreement on border control is not a significant review of border control rules in the sense of a quasi-renationalization as originally requested by France, Italy and some other states, but rather a moderate reform, which provides member states with some additional leeway, but does not question the integrity of communautarized border control (Interviews state representatives, Council Presidencies, Council Secretariat General).

As for the conflict between Council and Parliament: the main reason for deadlock in this case lay in the discussions on the Schengen Evaluation Mechanism and the fact that the Council unilaterally and unanimously changed the legal basis of the Commission proposal from Art.77 to Art. 70, de jure excluding the Parliament from the decision-making process. The Parliament replied in kind by halting negotiations and furthermore blocking negotiations with the Council on 5 other unrelated dossiers to take a stand. The negotiations remained frozen for over a year. Mainly due to the fact that the Danish Presidency, very receptive to the request of renationalizing border control as much as possible and keeping the involvement of supranational institutions to a minimum, had not proven to fulfill its role as a relais actor satisfactorily, and thus lost trust by the Parliament to be able to turn things around (Interviews state representatives, Council Presidencies, Council Secretariat General, LIBE secretariat, EP rapporteur).

Unblocking was possible due to the following mechanisms and conditions: a well-performing and trusted Presidency and rapporteur as relais actors. The Cypriot Presidency and the EPP rapporteur Carlos Coelho established a very close relationship and negotiated informally together with their teams and the legal services, despite the official blockage (Huber, 2015). A legally creative team of the rapporteur together with the legal services of both Parliament and Council came up with a compromise proposal based on a passerelle clause for the Schengen Evaluation Mechanism proposal, which postulated that any future reform of said legal text would have to be under co-decision. This satisfied the Parliament and made it acceptable for them to pass the current proposal based on Art. 70 TFEU, thus accepting the formal exclusion in the current negotiation process (Huber, 2015). Concretely, the rapporteur and the Council Presidency agreed on a safeguard clause in a joint statement and in recital 20 of the Evaluation mechanism (Interview EP rapporteur) the Council agreed to consult the EP if the text should be revised, a clause entitled "Evaluation mechanism" (Article 37a) was included in the SBC which is subject to codecision and sets out details that relate to the SEM (Huber, 2015)

In conclusion, the process proved to be a policy battle of subsequent retaliatory blows, starting with the Commission's ambitious proposal for supranationalization of Schengen evaluation, the Council's aggressive correction under the Danish Presidency and ultimately the Parliament's retaliation with the issue-linkage, which ensured its involvement (Ripoll Servent&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. 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&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 France and Italy, which made the Council position overall more moderate and made it easier to push for a compromise on border control rules, which was 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. 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.

3.2 Smart Borders Package: an ambitious Commission with a flawed agenda-setting performance

A short summary of the Smart Borders Package is necessary to understand the details of the legislation under negotiation and better grasp the complexity of the controversy. The original package from 2013 contained three proposals: a proposal for the establishment of an Entry-Exit System (EES) at the EU external borders (Commission 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, COM (2013) 95 final, 2013/0057 (COD), 28 February 2013), a proposal for a Registered Traveller Programme (RTP) (Commission Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme, COM (2013) 97 final, 2013/0059 (COD), 28 February 2013) and an amendment to the Schengen Borders Code (Commission Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 562/2006 as regards the use of the Entry/Exit System (EES) and the Registered Traveller Programme (RTP), COM (2013) 96 final, 2013/0060 (COD), 28 February 2013). 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. (For more detailed information on the proposals: Commission Memo, MEMO/13/141, 28 February 2013; Commission Press Release, IP/13/162, 28 February 2013; Commission Staff Working Document, Detailed Explanation of the Proposal by Chapters and Articles, Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme, SWD (2013) 52 final, 28 February 2013; Commission Staff Working Document, Detailed Explanation of the Proposal by Chapters and Articles, Proposal for a Regulation of the European Parliament and of the Council, SWD (2013) 49 final, 28 February 2013). The Commission after having had to withdraw the proposals in 2015 presented a revised package in April 2016. The new package 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 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. (Commission Communication to the European Parliament and the Council, “Stronger and Smarter Information systems for Borders and Security”, COM (2016) 205 final, 6 April 2016; Commission Fact Sheet, “Smart Borders Package: Questions & Answers”, 6 April 2016)

Before diving into the process dynamics, we will map out the initial positions and preference constellations to understand the conflict dynamics and subsequent actor behaviour. 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 (Bürgin, 2017). The Parliament showed little 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. 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. Similar situation for 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. However, functional and ideological divisions on the substance: the functional elements mainly concerned the focus of the proposal and the requirements to make it work at different types of borders. 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. 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.

Proceeding to the analysis of conflict dynamics in the negotiation process, it becomes fairly obvious that the reason for failure of Smart Borders is to be found at the agenda-setting stage, since the Commission's task to anticipate preferences in a way to present a compromise-prone proposal proved to be the most challenging stage in this case. There are indicators for both strategic miscalculation by the Commission, as well as technocratic failure when drafting the adequate proposal in response to the given problem. To a certain extent, the Commission acted as a failed or inefficient bureaucracy: to a certain extent, it can be said that the Commission has tried to come up with an appropriate response to the call for a better external border management protection, by using all expertise and knowledge available in a short time span, collecting evidence from a lot of experts and opinions from the many stakeholders involved to reflect as many practical interests as possible, however in its impact assessments, the Commission failed to catch the key elements, not because it didn't want to, but because it proved to be a challenge for its bureaucracy to capture the essence of the problem.

First the idea of the Commission as a strategist who miscalculated and went overboard: however, apart from the technical and practical failure, that was undeniably also a strategic element, since the Commissioner and thereafter the representatives in charge of negotiating framed the proposal as a tool for migration management and deliberately not as a tool for border security and border control, which was in clear contradiction with the Council's general line on border control during the negotiation period. The framing didn't 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 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 (European Commission, 2012). 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 and President Barroso. Malmström was considered to be trustworthy to handle this issue by fellow Commissioners 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 (Jeandesboz, 2013)

In the very early stages, the Commission's failure was not yet apparent, as Council and Parliament disagreed on substantial elements and the Parliament was internally divided on

key elements: 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. In terms of substance, the Council was able to prevail in substantive matters: member states agreed that the package as proposed would not be discussed, because it lacked any of the necessary security elements and member states accused the Commission of deliberately having disregarded state preferences on the matter. The Registered Traveller Program was deemed too costly and clearly not a priority in view of the security agenda, 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). 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). However, as it became clear to Council and Parliament that the Commission proposal would not accommodate their interests in its current form, the result of this process was deadlock at agenda-setting stage due to the Commission's failure of selecting the appropriate framing and also a general failure of designing a system that responded to the problem given and corresponded to the agenda of the states in particular, which was not focused on management, but rather on control and security. The Council strongly suggested a halt of negotiations to which Parliament agreed (Interviews with state representatives, Council Presidencies, DG Home desk officer in charge of drafting, MEPs).

It is important to mention that the failure turned out to just be a first try, the Commission has decided to trash the previous proposal and come up with a new one, so the plan to have Smart Borders has not been abandoned. The second round of negotiations is still ongoing, the package has been decomposed, the EES is still under negotiation, the Registered Traveller Program has been abandoned, substantive changes have been introduced to the EES, reflecting mainly the preferences of the Council in the first negotiation round, with extensive law enforcement access and prolonged data retention periods included in the new Entry-Exit proposal.

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 (Interviews with state representatives, Council Presidencies, DG Home desk officer in charge of drafting, MEPs).

3.3 Comparative findings: the EU in crisis - between power play and pragmatism

A few comparative observations about how the crisis seems to have affected the decision-making process, followed by findings about mechanisms and conditions of deadlock and unblocking: Negotiations matter, but so does agenda-setting, since conflict can arise at all stages and be solved at all stages, if the drafting process is flawed, a proposal can fail before negotiations even start, if positions are too extreme between the three institutions, negotiations can become deadlocked and fail, if there is no appropriate solution to be found. The Commission does not display one type of behaviour coherently: the Commission displays all three types of behaviour, depending on the issue under consideration, the actors in charge and its previous experiences. Bicameral dynamics do not follow one pattern and closely involve the Commission's behaviour as a trigger for certain actions in co-decision, the Commission is part of the game beyond drafting. Parliament can alternate between liberal/integrationist and pragmatic from issue to issue in the same policy area and pragmatism between Council and Parliament does not mean that agreement is a given, rather both institutions can team up to oppose a Commission proposal if they it doesn't conform to their expectations. There are some actors, which are more important than others when it comes to conflict-solving: relais actors seem to be particularly important, especially the rapporteurs and their network, as well as the legal services and the Council Presidencies.

Which conclusions can be drawn from the analysis with regard to how negotiations end up either in failure, deadlock or agreement?

Pre-existing distribution of preferences and preference constellations: the further apart initial positions of actors involved are, the more likely it is that conflict arises. Presence or absence of trust in relais actors: if all actors involved trust the relais actors, Presidency, rapporteur and Commission to do a fair job of mediation and brokering, the conflict can be solved, if trust in these key actors is not given or broken, they are not deemed capable of providing adequate compromise proposals, it can compromise negotiations and lead to failure. Presence or absence of flexibility both on the level of the actor, in the sense of being willing to reconsider a position to move forward, and on the level of the policy proposal: if the actors are flexible in changing their positions and the proposal can be amended in a way flexible enough allow a compromise which works for both co-legislators. If the proposal is too difficult to amend, legally, technically or politically. Appropriate legal and technical expertise: mostly coming from the legal services of both institutions, but also the Commission desk officers at the drafting stage, they have to have the necessary knowledge about the subject matter to provide for appropriate solutions where required and come up with creative legal and technical solutions in case of political problems.

How does the interaction between mechanisms and conditions work? Deadlock or failure likely if the following conditions are given: initial positions are extreme, or at least very far apart from each other, trust in relais actors is low or absent, individual or collective actors are rather inflexible in their positions and technical/legal expertise is not available or given. The case of the Schengen deadlock to put it simply: initial positions of Parliament and Council were extreme, the respective Council Presidencies were not performing well in terms of

trust, especially the Danish Presidency, which pushed for the exclusion of the Parliament from the process, until the Cypriots took over and proved themselves trustworthy. In the case of Smart Borders unblocking was not possible, because flexibility was not given in any case, based on the Commission proposal, trusted relais actors were not available, because the Commission was not perceived to be a dependable mediator, so the Council did not even bother, which resulted in an inability of the Commission to establish the necessary inter-institutional dialogue or network and to convince the co-legislators that it possessed the relevant legal and technical expertise.

3.4 Discussion: why care about actors, mechanisms and conditions, when it might all just be a undecipherable path-dependent cobweb of joint-decision traps?

A few observations about decision-making, which might have been overlooked in the previous analysis, but can provide alternative explanations for success and failure. First, the importance of path dependence (previous negotiation experience as a scope condition): perhaps a proposal has to fail several times until the Commission gets it right, which would mean that ultimately the Commission learns from agenda-setting mistakes, either due to strategic pushing of an integrationist agenda or inefficiency of its technocratic bureaucracy, and ultimately presents a proposal geared towards compromise, thus assuming the role predicted by spatial models. Also, we have to be careful not to overemphasize the detected mechanisms and conditions: for one, there might be omitted factors, also it is possible that there are outside influences, from other policy areas, power politics or other types of interests a negotiation-focused analysis cannot capture. However, finding out that there are process factors beyond the initial preferences, which influence decision outcomes and whose absence can result in failure, is a finding worth noting. From interest constellations alone, it is hard to predict the outcome of negotiations, as preferences and positions change, making it worthwhile to look more closely at the process.

IV. Conclusions: the EU's response to the crisis - more of the same while failing forward

Generally, we can draw the following conclusions with regard to the effect of crises on EU decision-making: more conflict over competences, influence and sovereignty first and foremost. 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 lose against a Council that masters the game of blame and fear-mongering. Secondly, more power-driven scrappy policy solutions for complex problems: the Schengen reform as a perfect example for 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. 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 solve the perceived security problem nor counteract 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 as a perfect example for a hugely costly and only vaguely useful project for a border

management system, which does not correspond to the political needs of the member states and does not satisfy the technical requirements of external border management

Bibliography

Ackrill, R., Kay, A., & Zahariadis, N. (2013). Ambiguity, multiple streams, and EU policy. *Journal of European Public Policy*, 20(6), 871-887.

Boin, A., Ekengren, M., & Rhinard, M. (2013). *The European Union as crisis manager: patterns and prospects*. Cambridge University Press.

Boin, A., 't Hart, P., & McConnell, A. (2009). Crisis exploitation: political and policy impacts of framing contests. *Journal of European Public Policy*, 16(1), 81-106.

Boranbay-Akan, S., König, T., & Osnabrügge, M. (2016). The imperfect agenda-setter: Why do legislative proposals fail in the EU decision-making process?. *European Union Politics*, 1465116516674338.

Boswell, C., & Geddes, A. (2010). *Migration and mobility in the European Union*. Palgrave Macmillan.

Brandsma, G. J. (2015). Co-decision after Lisbon: The politics of informal trilogues in European Union lawmaking. *European Union Politics*, 1465116515584497.

Bürgin, A. (2017). Internal coordination and legitimation strategies: assessing the influence of individual commissioners in the policy formulation process. *Journal of European Integration*, 39(1), 1-15.

Carrera, Sergio; Hernanz, Nicholas; Parkin, Joanna (2013): Local and Regional Authorities and the EU's External Borders. A Multi-Level Governance Assessment of Schengen Governance and 'Smart Borders', CEPS, Brussels.

Cini, M., & Šuplata, M. (2017). Policy leadership in the European Commission: the regulation of EU mobile roaming charges. *Journal of European Integration*, 39(2), 143-156.

Corrado, L. (2006). Negotiating the EU External Border?. *Security versus Freedom*, 183-204.

Costello, R., & Thomson, R. (2013). The distribution of power among EU institutions: who wins under codecision and why?. *Journal of European Public Policy*, 20(7), 1025-1039.

Costello, R. (2011). Does bicameralism promote stability? Inter-institutional relations and coalition formation in the European Parliament. *West European Politics*, 34(1), 122-144.

Dobbels, M. (2014). 'Runaway Train Never Going Back?' The Implications of the New Economic Governance for Democracy in the EU. *Journal of Contemporary European Research*, 10(2).

Falcó-Gimeno, A. (2014). The use of control mechanisms in coalition governments: The role of preference tangentiality and repeated interactions. *Party Politics*, 20(3), 341-356.

Farrell, H., & Héritier, A. (2003). Formal and informal institutions under codecision: continuous constitution-building in Europe. *Governance*, 16(4), 577-600.

Fellmer, S. (2008). Europäische Migrationspolitik gegenüber Drittstaatsangehörigen. Ein klubtheoretischer Deutungsansatz zum Vergemeinschaftungswillen der Nationalstaaten. In *Migrations- und Integrationsprozesse in Europa* (pp. 101-122). VS Verlag für Sozialwissenschaften.

Finke, D. (2016). The burden of authorship: how agenda-setting and electoral rules shape legislative behaviour. *Journal of European Public Policy*, 23(4), 604-623.

Freeman, G. P. (2006). National models, policy types, and the politics of immigration in liberal democracies. *West European Politics*, 29(2), 227-247.

Gehring, Thomas (1998): Die Politik des koordinierten Alleingangs. Schengen und die Abschaffung der Personenkontrollen an den Binnengrenzen der Europäischen Union. *Zeitschrift für Internationale Beziehungen*, 5. Jahrg., H. 1. (Juni 1998), 43-78.

Gehring, Thomas; Kerler, Michael (2008): Institutional Stimulation of Deliberative Decision Making: Division of Labour, Deliberative Legitimacy and Technical Regulation in the European Single Market. *JCMS: Journal of Common Market Studies*, Volume 46, Issue 5, December 2008, pages 1001–1023.

Gornitzka, Å., & Sverdrup, U. (2011). Access of experts: Information and EU decision-making. *West European Politics*, 34(1), 48-70.

Häge, F. M. (2013). Coalition building and consensus in the Council of the European Union. *British Journal of Political Science*, 43(03), 481-504.

Häge, F. M. (2011). The European Union policy-making dataset. *European Union Politics*, 1465116511398739.

Häge, F. M. (2008). Who decides in the Council of the European Union?. *JCMS: Journal of Common Market Studies*, 46(3), 533-558.

Hagemann, S., & Høyland, B. (2010). Bicameral politics in the European Union. *JCMS: Journal of Common Market Studies*, 48(4), 811-833.

Hayes-Renshaw, F., & Wallace, H. (2006). Overlapping Competences: the Council and the European Council. *The Council of Ministers*, 165-185.

Haverland, M., De Ruiter, M., & Van de Walle, S. (2015). Producing salience or keeping silence? An exploration of topics and non-topics of Special Eurobarometers.

Héritier, A., & Reh, C. (2012). Codecision and its discontents: intra-organisational politics and institutional reform in the European Parliament. *West European Politics*, 35(5), 1134-1157.

Héritier, A., & Windhoff-Heritier, A. (1999). *Policy-making and diversity in Europe: Escape from deadlock*. Cambridge University Press.

Hilpert, I. (2015). Grenzen europäischer Grenzen. Das Schengen-System in der Migrationskrise. In *Krise und Integration* (pp. 107-129). Springer Fachmedien Wiesbaden.

Huber, K. (2015). The European Parliament as an actor in EU border policies: its role, relations with other EU institutions, and impact. *European security*, 24(3), 420-437.

Johansson, M. (2013). Domestic Constraints Tactics in the Council of the EU. In 13th European Union Studies Association biennial conference, Baltimore May (Vol. 9, No. 11, p. 2013).

Jupille, J., & Caporaso, J. A. (1999). Institutionalism and the European Union: Beyond international relations and comparative politics. *Annual review of political science*, 2(1), 429-444.

Kardasheva, R. (2013). Package deals in EU legislative politics. *American Journal of Political Science*, 57(4), 858-874.

Kassim, H., Peterson, J., Bauer, M. W., Connolly, S., Dehousse, R., Hooghe, L., & Thompson, A. (2013). *The European Commission of the twenty-first century*. OUP Oxford.

Kleine, M. (2014). Informal Governance in the European Union. *Journal of European Public Policy*, 21(2), 303-314.

Kleine, M. (2013). *Informal governance in the European Union: How governments make international organizations work*. Cornell University Press.

Lahav, G. (2004). *Immigration and politics in the new Europe: Reinventing borders*. Cambridge University Press.

Lelieveldt, H., & Princen, S. (2015). *The politics of the European Union*. Cambridge University Press.

Liefferink, D., & Andersen, M. S. (1998). Strategies of the 'green' member states in EU environmental policy-making. *Journal of European Public Policy*, 5(2), 254-270.

McKibben, Heather Eiko; Western, Shaina (2014): Levels of Linkage: Across-Agreement versus Within-Agreement Explanations of Consensus Formation among States. *International Studies Quarterly*, Vol. 58, No.1, 44-54.

McKibben, Heather Eiko (2010): Issue characteristics, issue linkage, and states' choice of bargaining strategies in the European Union. In: *Journal of European Public Policy*, Vol. 17, Issue 5, 694-707.

Monar, Jörg (2014): The EU's growing external role in the AFSJ domain: factors, framework and forms of action. *Cambridge Review of International Affairs*, Volume 27, Issue 1, 2014, 147-166.

Naurin, D. (2015). Generosity in intergovernmental negotiations: The impact of state power, pooling and socialisation in the Council of the European Union. *European Journal of Political Research*, 54(4), 726-744.

Naurin, D., & Rasmussen, A. (Eds.). (2013). *Dynamics of change in the European Union*. Routledge.

Naurin, D., & Wallace, H. (2008). Unveiling the Council of the European Union. *Games Governments*.

Nugent, Neill; Rhinard, Mark (2015): *The European Commission*. London: Palgrave Macmillan.

Odell, John (2000): *Negotiating the world economy*. Cornell University Press.

Oppermann, K. (2008). Saliency and sanctions: a principal-agent analysis of domestic win-sets in two-level games—the case of British European policy under the Blair government. *Cambridge Review of International Affairs*, 21(2), 179-197.

Oppermann, K., & Viehrig, H. (2008). Issue Saliency and the Domestic Legitimacy Demands of European Integration: The Cases of Britain and Germany.

Örnberg, J. C. (2009). Escaping deadlock—alcohol policy-making in the EU. *Journal of European Public Policy*, 16(5), 755-773.

Pascouau, Yves (2013): Intra-EU mobility: the second building block of EU labour migration mobility. European Policy Centre, Issue Paper No. 74.

Princen, S. (2011). Agenda-setting strategies in EU policy processes. *Journal of European Public Policy*, 18(7), 927-943.

Princen, S., & Rhinard, M. (2006). Crashing and creeping: agenda-setting dynamics in the European Union. *Journal of European Public Policy*, 13(7), 1119-1132.

Ripoll Servent, A. (2015). *Institutional and Policy Change in the European Parliament: Deciding on Freedom, Security and Justice*. Springer.

Ripoll Servent, A. (2014). The role of the European Parliament in international negotiations after Lisbon. *Journal of European Public Policy*, 21(4), 568-586.

Ripoll Servent, A., & Busby, A. (2013). Introduction: Agency and influence inside the EU institutions. *European Integration online Papers (EIoP) Special*, (1).

Roos, C. (2013). *The EU and Immigration Policies: Cracks in the Walls of Fortress Europe?*. Springer.

Scharpf, F. W. (2006). *Interaktionsformen. Akteurszentrierter Institutionalismus in der Politikforschung*. Unveränderter Nachdruck der 1. Auflage. Wiesbaden.

Sabatier, P., & Weible, C. (Eds.). (2014). *Theories of the policy process*. Westview Press.

Saurugger, S. (2013). Constructivism and public policy approaches in the EU: from ideas to power games. *Journal of European Public Policy*, 20(6), 888-906.

Shackleton, M. (2000). The politics of codecision. *JCMS: Journal of Common Market Studies*, 38(2), 325-342.

Smeets, S. (2016). Consensus and Isolation in the EU Council of Ministers. *Journal of European Integration*, 38(1), 23-39.

Smeets, Sandrino (2015): *Negotiations in the EU Council of Ministers*. ECPR Press.

Smeets, S. (2013). How issues move or get stuck: Or how to be effective in the EU Council of Ministers.

Thomson, Robert (2011): *Resolving Controversy in the European Union*. Cambridge: Cambridge University Press.

Veen, Tim (2011): The dimensionality and nature of conflict in European Union politics: On the characteristics of intergovernmental decision-making. In: *European Union Politics*, Vol. 12, No. 1 65-86.

Versluis, E., Van Keulen, M., & Stephenson, P. (2010). *Analyzing the European Union policy process*. Palgrave Macmillan.

Warntjen, Andreas (2011): *Interests and resources: the formation of national positions regarding EU-policies*. Konstanz, Universität Konstanz, Masterarbeit, 2002.

Yordanova, N. (2011). Inter-institutional rules and division of power in the European Parliament: Allocation of consultation and co-decision reports. *West European Politics*, 34(1), 97-121.