European University Institute

DEPARTMENT OF POLITICAL AND SOCIAL SCIENCES

Taming Regulatory Competition: Interest Groups v. Joint-Decision Trap

Four EU Policy Cases on Workers Mobility

Alexis Lubow

Thesis submitted for assessment with a view to
obtaining the degree of Doctor of Political and Social Sciences
of the European University Institute

Florence, 18 May 2017

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Examining Board

Professor Adrienne Héritier, European University Institute (EUI Supervisor)
Professor László Bruszt, European University Institute
Professor Pieter Bouwen, University of Leuven
Professor Susanne K. Schmidt, University of Bremen

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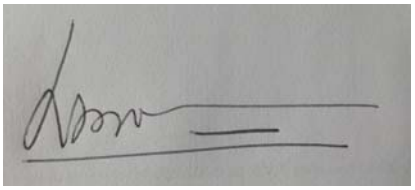

Abstract

Worker migration across EU member states' borders constitutes an increasingly salient issue. Unlike the liberalization of trade in goods, it has spilled into other policy areas in many unexpected ways. It contributed to turning the so-called Bolkestein Directive on services into a highly-politicized policymaking episode. Subsequent decisions adopted by the Court of Justice of the European Union (CJEU) have only aggravated looming conflicts between high- and low-standard countries, new and old member states, competing social partners and political parties within the European Parliament. Policy issues that are resolutely foreign to EU competences, like the right to strike, have been affected as well. Simply put, recent policy developments about worker migration illustrate the increasingly contested nature of European integration.

In that context, decision makers are trapped into a prisoner's dilemma that is a real or perceived risk arising from regulatory competition. Hence, member states' preference heterogeneity translates into an amplified risk of policymaking deadlock. Therefore, the question that this dissertation aims to answer is: under which conditions can EU institutions collectively negotiate positive policy solutions in the context of regulatory competition?

Taken in isolation, a change in member state's bargaining attitudes is unlikely and puzzling. Instead, I argue that when there is a high risk of deadlock in the Council the successful negotiation of policy instruments depends significantly on the relative homogeneity of preferences of competing social partners and their ability to defend pan-European interests next to national immediate interests. The empirical analysis examines four cases of policy negotiations in relation to worker mobility within the EU. Negotiations over the 2006 Services Directive are sliced into two distinct strategic interactions. In addition, I examine the failed negotiations over the 2012 Monti II Proposal on the right to take collective action and the successful negotiations over the 2014 Directive on the enforcement of the 1996 Posted Worker Directive. The selection of cases aims to carry out a conceptual experiment in which the strategic setting is maintained relatively constant while variations in actors' preferences and strategies may affect policy outputs.

Acknowledgements

In September 2012, during my first week at the European University Institute (EUI), I remember going to the library for the first time to read the PhD thesis of eminent past researchers: David Coen, Christine Reh, Pieter Bouwen and many others. At that time, I thought that the acknowledgement section was a sort of required formality. A PhD was supposed to be a lonely endeavour. Or so I was told. Five years later, I realize how wrong this is. In reality, writing a doctoral thesis is also a collective adventure. And in that adventure, there is no denying that the supervisor is a foremost condition of success. In that autumn of 2012, I learnt that my supervisor would be Professor Adrienne Héritier. I only knew Professor Héritier by reputation. And that reputation was both imposing and humbling. Of course, I was immensely grateful. But, in all honesty, I was also intimidated.

During those five years, Professor Héritier literally showed me how to think properly and meticulously. Confronted with my flaws, she exhibited patience and kindness. Against passing discouragements, she opposed a comforting impassibility. I would have never completed this thesis without her support. If some elements of my work happen to be worthy of a scrupulous examination, I owe it to her entirely. Five years were not enough to fully benefit from her exceptional mentorship.

I am also grateful to the faculty of the Department of Social and Political Science. The seminars proposed by Professor László Bruszt, Professor Pepper P. Culpepper and Professor Stefano Bartolini immensely contributed to my research, thinking and scientific literacy. Their arguments and critics formed an essential ingredient of my intellectual experience at the Institute.

Beyond the incredible facilities, grandiose Florentine location, and outstanding faculty, there is another reason why the Institute is a uniquely magnificent place to do research: its administrative staff. And I wish to wholeheartedly thank two of its members in particular. Maureen Lechleitner is among the kindest, most devoted and understanding persons I ever met. Two or three words from her are enough to cheer you up for the rest of the day. Her moral support from the beginning to the very end of the PhD program has been invaluable to me. Gabriella Unger has helped me so much on so many levels that I wouldn’t know how to thank her properly.

I could not possibly thank all my EUI friends without whom life at the Institute would have been a pale experience. But I must mention in particular Magnus G. Schoeller and Katharina L. Meißner, Emmanuel de Groof, Emmanuelle Mathieu, Katharina Wolf, Julian Schwartzkopff, Alkistis Zavakou, Viorica Vita, Camille Brugier, Alice Margaria and Guillaume Landais. There are many others and I am sure they will recognize themselves. But, from University College London to the EUI and from Barcelona to Florence, Alexander Katsaitis is the only one who could tell the whole story.

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This thesis is dedicated to Caroline Grigaut, the greatest friend and most wonderful mother.

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List of abbreviations

CJEU	Court of Justice of the European Union
CoOP	Country-of-Origin Principle
JDT	Joint Decision Trap
EBA	European Business Association
EFATT	Agriculture and Tourism Trade Unions
EFBWW	European Federation of Builders and Wood Workers
ETU	European Trade Unions
ETUC	European Trade Union Association
EU	European Union
FIEC	Fédération de l'Industrie Européenne de la Construction
MEP	Member of the European Parliament
UNICE	Former denomination of BusinessEurope

Introduction: Puzzle and research question

With considerable success and resilience in the face of constant theoretical innovation in the field of European Union (EU) policymaking research, classic rational-choice institutionalist framework still provides plausible explanations of the determinants of policy outputs.

In the EU, the puzzle that has attracted most attention from policy students concerns the tension between the continuous success of integration and the perceived risk of disintegration (Bach, 2006; Bideleux, 1996; Chryssochoou, 1997; Niblett, 1997; Gamble, 2006; Hayward and Wurzel, 2012); how can we simultaneously explain both the apparent inability to solve collective action problems at the supranational level and the reality of non-disintegration – and even increasing regional integration (Scharpf, 1988)?

So far, rational-choice institutionalists have indeed shown considerable success in shedding light on major questions, including the following:

- Why do some policy negotiation cycles lead to the adoption of positive outcomes, whereas others do not?

- Why, under given decision-making rules, do policies seem to be ubiquitously suboptimal?[1]

- Why are various policymaking modes favoured across policy problems and policy areas?

Nonetheless, a certain level of segmentation between various streams of research has led the creation of artificial blind spots in the literature. Rational-choice

[1] Ideally, an optimal policy sets an equilibrium that maximizes the aggregate interests of all participants.

institutionalists have tended to focus on formal institutional decision-making rules as their main explanatory variable when examining highly institutionalized decision modes (Tsebelis, 2011). They have also proposed interesting analyses of informal interactions and incremental change with regards to less institutionalized decision-making modes (Farrell and Héritier, 2003). Other streams of research, on the other hand, have put interests, influence and power, other than those of the member states, back at the centre of their analyses (Beyers, Eising and Maloney, 2008; Dür, 2008; Klüver, 2013). The key actors of interest thus become the special interests and pressure groups' that are active in Brussels. Their preferences and strategies can contribute to explain a good deal of the shape and direction of public policy (Michalowitz, 2007). They are not entirely dismissed in rational-choice institutionalism. But, they tend to take a backseat in research programs that typically aim to measure the gap between given special interests' preferences and policy outputs and outcomes (Dür, 2008; Klüver, 2009; 2013).

The two literatures are largely complementary. However, they are hardly compounded into single explanatory models. This is probably why Scharpf's Joint-decision trap (JDT) model (1986; 2006; 2011) tends to disregard the role of actors that do not enjoy formal institutional voting powers within the EU decision-making process. Those actors are the vested special and organized interests, which thrive in Brussels. They pool enormous effort, resources and expertise into influencing European policymakers, in an attempt to bend policy decisions in the direction that most favour their constituents' interests.

Cross-referencing and bridging isolated literatures can produce a more comprehensive understanding of EU policymaking. But there is also a more exciting motive for doing so. Institutionalist frameworks still fail to shed the full light on one key puzzle: why, under relatively constant institutional conditions involving a constant pool of actors, can relatively similar policy problems lead to dissimilar policy outcomes? Here is the key question that animates the present dissertation.

The following chapters will certainly show that the institutionalist literature has already provided convincing answers to this question. Yet, those answers often include sociological and constructivist explanations. Although those approaches do contribute to understandings of European decision-making, I argue that it is not systematically necessary to relax typically rationalist assumptions to devise convincing explanations. Rather, more inclusive institutionalist models can provide adequate explanations as well. To put it differently, organizations that lack formal decision-making rights, can also exert significant influence on policy outputs. Therefore, they must be included in more comprehensive rationalist models, so that their activities contribute to explain variations in policy outputs. Normatively, more inclusive models can also shed new light on the process of legitimizing public policies by providing a more complete story of the multilevel interactions among various constituencies, beyond those of supranational institutions and member states. A segmented literature may result in unintentional bias towards particular channels of preference aggregation at the expense of others. Conversely, bridging those literatures will help obtain a more contrasted story and advance systematic knowledge about the various modes of decisions employed in the European realm.

Therefore, the present dissertation aims to contribute to rationalist policymaking modelling by including the potential effects of organized interests, which do not enjoy formal decision-making power on policy outputs. It focuses especially on employment policy, workers' collective rights, and freedom to provide services. One can argue that regulatory competition between member states has recently become a ubiquitous European policy development and epitomizes the kind of interdependence problems that typically lead to occurrences of the JDT. Actual or expected regulatory competition between the participants of an open common market is identified as one of the most important sources of political 'turbulence' (Schmitter, 2004) in today's Europe. Regulatory competition inexorably exacerbates conflicts between the member states with apparently conflicting preferences. Yet, contrary to what the JDT

would traditionally expect, policymaking patterns are not always characterized by institutional blockage. The dissertation specifically contributes to the literature on this salient and policy-relevant issue. To that end, the rational-choice institutionalist JDT model is updated by way of bridging it with a more liberal intergovernmental approach to regional integration, *while keeping fundamental assumptions intact*.

In sum, the contribution of the dissertation is fourfold. First the dissertation specifies the conditions under which Fritz Scharpf's JDT can be evaded (Scharpf, 1988; 2006; Falkner; 2011). Second, I show that whether supranational institutions have increased power relative to the Council largely depends on the varying level of preference homogeneity among competing supranational social partners. Third, new light is shed on the much discussed 2006 Services Directive[2] through a comparison with more recent policy negotiations that have not been fully studied to date: the 2014 Directive on the Enforcement of the 1996 Posted Worker Directive[3] as well as the so-called Monti II Proposal that included a vilified clause on the right to take collective action.[4] Finally, the dissertation provides policy-relevant perspectives, notably regarding recent developments in the area of posted workers.[5]

Consistent with the JDT theory, policy outcomes are analysed based on a theory-driven understanding of potential and empirically observed interactions

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[2] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[3] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') Text with EEA relevance.

[4] COM (2012) 130 Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.

[5] Those perspectives were relevant to policy developments that unfolded at the time of writing in 2015-2016. During this period, a new proposal for a directive on posted workers was being negotiated.

between policymakers given their preferences over outcome[6]. Actors' preferences are deduced from a series of rational-choice assumptions about identified policy problems and their plausible developments. Given actual or expected deadlock in the Council of ministers, I hypothesize that variations in social partners' lobbying commitment contribute to explain differences in policy outcomes across policy negotiations.

Therefore, the key *research question* that motivates the present work can be framed in the following manner:

> *Assuming that actual or expected competition between regulatory units creates a high likelihood of JDT in the Council, why might EU institutions still produce market-correcting policy instruments in specific cases?*

Theoretically, the JDT presages the occurrence of a noncooperative game at intergovernmental level. And, "in a noncooperative game anything that may be said before the move is just 'cheap talk'" (Scharpf, 1997:8). Hence, a general hypothesis must propose an explanation for a shift from the initial state of affair to a new one, which is a cooperative game, "one in which binding agreements among the players are possible before each makes […] her choice" (Ibid.).

The first part of the dissertation re-examines the basic model of JDT that is used as a foundation to the research. I propose a differentiated and comprehensive analytical picture of decision-making modes in the EU and beyond. The literature is mapped out to demonstrate that the suggested puzzle has recurrently been solved by way of relaxing rational-choice assumptions. Although illuminating, that solution may discard other explanatory avenues that are more consistent to rationalist assumptions. Consequently, I argue that actors that do not enjoy decision-making

[6] Preferences are established based on prior rational-choice theorizing to design testable hypotheses about variations in policy outputs (see Frieden, 1999).

rights – i.e. interest groups – must be included in a more extensive explanatory framework. Those actors are fundamentally deprived of formal institutional power on policy outputs. However, they still manage to routinely imprint their influence on decisions and ultimately bend policies towards their interests in such a way that, under constant institutional rules, the stringency of policy outputs varies across cases.

Inspired by a more liberal take on the JDT theory, the remainder of the first part of the dissertation goes on to outline the puzzle in greater empirical and theoretical detail, so as to propose an updated explanatory model of the variations in policy output. As suggested, essential alterations are brought about to include the hypothetical effect of competing interest groups. The ambition is to show that when (1) de facto voting rules are maintained relatively constant (2) actors are also unchanged and, (3) collective action problems are highly similar, outputs can still vary while formal institutions' fundamental interests are initially unaltered[7].

The second part of the dissertation lays out the empirical strategy that is implemented to assess the validity of the explanatory framework. This includes a discussion regarding the selection of the four cases that will be analysed in the third, and last, part of the dissertation. Two cases are selected as instances of negotiation failure: the 2004 Bolkestein Proposal for a directive on the completion of the market for services ('Service I') and the 2012 Monti II Proposal on the right to take collective action. Two cases are selected as instances of negotiation success: the 2006 Directive on the completion of the single market for services ('Service II') and the 2014 Directive on the enforcement of the rules laid out in the 1996 Posted Worker Directive.

The third part of the dissertation is devoted to the empirical analysis with the aim of testing the hypotheses developed as part of the theoretical framework. For

[7] In doing so, we maintain features of the strategic setting constant to examine the effect of variations in preferences over outcomes and corresponding strategies on policy outputs (Lake and Powell, 1999).

each case, I first analyse the status quo ante and explore its various policy alternatives. Subsequently, each hypothesis is confronted to empirical evidence to draw conclusions on the validity of the theoretical model.

PART ONE:

THEORY

I. Bypassing or overcoming the JDT: Two literatures and a puzzle

The Joint-Decision Trap (JDT) theory has arguably provided among the encompassing frameworks to explain various patterns of EU integration as well as the characteristics and underlying philosophy of European policies, both positively and negatively. The JDT, as a theory, aims to shed light on both of the following questions: 'why do European policies take the form that they do?' and 'why are they not otherwise?'

The aim of this chapter is four-fold. First, I trace the development of the broad literature that has contributed to specify and test the JDT theory beyond the institutional framework provided by Federal Germany to the specific context of the EU.[8] Second, the literature is reorganized in two categories that delimitate two distinct sub-literatures based on distinction between, on the one hand, *overcoming* and, on the other hand, *bypassing* the JDT. The literature strives to identify causal mechanisms by which, within relevant decision-making procedures, the JDT could have expectedly led to decision-making deadlock, but has ultimately been *overcome* 'against the odds'. The second concentrates efforts in tracing the multitude of alternative policymaking routes that have progressively been discovered to *bypass* – i.e. avoid – those specific decision-making procedures within which the JDT phenomenon would have led to a far-to-high risk of deadlock. Third, arguments developed in the literature are divided between, on the one hand, hypotheses based on sociological institutionalist assumptions and, on the other hand, those rooted into rational-choice institutionalist ones. Finally, the chapter presents one of the central arguments of the dissertation, which is that interest groups' – in our cases, the social partners – lobbying undertakings and their influence on policy outcome are relatively disregarded in the JDT analytical framework; a gap that the present work contributes to filling.

[8] Originally, Scharpf used the JDT model as it was applied to federal systems (e.g. Germany) and subsequently transposed it the European Union (Scharpf, 1988).

I first review the development of the institutional joint-decision phenomenon that ostensibly occurs in the realm of EU policymaking. There remains much implicit confusion regarding the identification of the specific policymaking modes in which the JDT can expectedly be observed and the precise conditions under which it can occur. Therefore, clarifying those aspects is the first logical step that will be taken. Conversely, variations in several identified dimensions may plausibly curb the likelihood of a policy getting stuck in deadlock due to the JDT.

A. From the initial JDT model to successive updates

1. Basic puzzle of the JDT

At the outset, a diagnosis, largely influenced by functionalist reasoning, identifies an apparent contradiction between the efficiency and the legitimacy of regional integration. "Effectiveness often asks for larger political units while the logic of democratic representation works better in smaller ones" (Falkner, 2011:2; see also Hooghe and Marks, 2009 for a similar argument). An ever-growing transfer of competences to a higher institutional level of decision-making aims to solve problems stemming from proliferating forms of interdependence between constituting units. However, they are only justified insofar as they prove better suited to deliver Pareto-optimizing outcomes for all participants, without stalemating. In Majone's words:

> by integrating segmented national markets, internal market legislation significantly enhances efficiency. Companies no longer need to adapt their goods or services to the different domestic regulations of member states. Instead, there are either common harmonized rules, or there is mutual recognition. This lifting of market segmentation allows companies to exploit economies of scale, while customers may enjoy greater product variety. Internal market policies are thus classic

examples of measures increasing Pareto-efficiency[9] (Majone 1989: 166–8; Schmidt, 2009:848).

Yet, the adoption of European-wide solutions may require the agreement of each and every constituting unit (i.e. the member states) under the rule of unanimity. Unfortunately, the rule of unanimity carries the risk of consistently favouring a minority of members with deviating preferences at the expense of the majority. In other words, the rule of unanimity implicates that there is no legitimate selection procedure allowing for a discriminating filtering of heterogeneous member-states' interests at European level. Consequently, under both the assumptions of unanimity and heterogeneity of preferences, problems emerging from interdependence between constituting units are expected to persist and even worsen. The purpose of the institutional JDT theory is precisely to explain why policy solutions can be systematically suboptimal at best, stuck into deadlock at worst.

Unfortunately, the great success of the theory in terms of both citation index and explanatory power has also led to the stretching of its would-be relevance beyond its initially tightly bounded purpose. The original version of the JDT model was designed before the adoption of the Single European Act, the later completion of the Single Market program and the creation of the Monetary Union. Primarily, it explains systematic institutional blockage in federal systems – as illustrated by both Federal Germany and the European Union. And yet, attempts to rescue it from new institutional conditions led to a research agenda dedicated to explaining successful policymaking stories in the presence of sufficient conditions for expected deadlock (Héritier, 1999; Eberlein and Kerwer, 2002; 2004; Kerber and Eckardt, 2007). Nonetheless, this version of the puzzle is conducive to two important misunderstanding that relate to, on the one hand, the exact definition and purpose of the JDT and, on the other hand, what can appropriately be understood as exit from

[9] To be fair, this 'either-or' distinction between harmonized rules and mutual recognition has also been amended and contrasted (see Héritier, 2007).

the JDT. It turns out that not all phenomena leading to policy deadlock or suboptimal policy belong to the JDT problematic, in its narrowest sense. Consequently, it further turns out that not all response to policy problems will effectively falsify the JDT as a theory. This leads to the identification of at least three different problematic aspects with regard to the JDT:

(1) the identification of the precise conditions under which an institutional JDT may systematically lead to suboptimal policies;

(2) the identification of the specific conditions under which sub-optimality will be evaded under relatively constant decision-making procedures;

(3) the identification of the exact conditions under which alternative institutional avenues may provide effective circumventing paths to break up deadlocks due to the JDT.

The debate about the confirmation or falsification of the JDT is only relevant with regards to the two first questions. The first calls for the specification of the hypotheses according to which the occurrence of the JDT is varyingly likely. The second is conducive to the study of puzzling cases in which policies would not be trapped in such JDT while the conditions are present. This dissertation clearly aims to contribute to the latter aspect. The third type of questions refers to explanations as to how optimal policy solutions may still be successfully designed and adopted through alternative policymaking modes, even when they would otherwise have been challenged by member-states' veto right. Therefore, the third question draws the scope limits of the JDT model itself.

2. Initial developments of the JDT

The first step in Scharpf's (1988) original reasoning was to recognize that the assumptions underlying the so-called Coase theorem are not met in the real world

(Coase, 1960). Hence, under unanimity or quasi-unanimity and assuming heterogeneity of preferences policy outcomes would invariably be characterized by sub-optimality. What does it mean to recognize that Coasian assumptions are unrealistic, and why is it so important in the context of a literature review of the JDT? It is indeed a necessary step to acknowledge that – contrary to Coasian assumptions – in the actual world of policymaking, information is highly imperfect, transaction costs are high and logrolling strategies are often not identifiable. Even when they are, they often may not be readily available. Although Coasian assumptions are scarcely discussed in an explicit manner, it still is a key factor to take account of because almost all subsequent literatures boil down to generating hypotheses that ultimately show how some of the Coasian assumptions may be re-introduced as empirically more plausible than originally believed.

Again, in its initial forms, the JDT theory predicts that, under the unanimity rule, policy problems will most often persist since collective action through cooperation is unlikely. One single dissenting decision maker is enough to doom any potential policy solution. But simultaneously, establishing a less demanding voting rule according to a different representation principle – be it majority or qualified majority rule (QMV) – remains equally unfeasible for three reasons. First, in federal systems like Germany (and the EU to a certain extent), policies adopted under less demanding voting rules enjoy correspondingly less legitimacy. Second, the decision to change decision-making rules still requires a unanimous vote by all members in the first place. Third, even if the voting rules were relaxed, it would often be politically unacceptable to impose costly decisions on member states that remain in principle sovereign. Therefore, even under QMV, unanimity may persist as a *de facto* rule when policy problems are highly contentious and the potential solutions may create unacceptable political and economic costs at home.[10] In those situations, the member states that

[10] In other words, those decisions may be perceived as creating an unacceptable sovereignty cost for some member states.

most gain from the maintenance of the status quo will find themselves in a better bargaining position. Therefore, even though the Council's voting rules have undergone critical changes since the 1980s, the shadow of informal unanimity can still create deadlocks. It is especially true when policy issues are most salient and contentious. Salient policy problems – often those for which preferences also happen to be the most heterogeneous – will continue to be trapped into suboptimal equilibriums due to the inability of the voting members to collectively come to satisfactory solutions.

B. Overcoming v. bypassing the JDT

Taking stock of those clarifications, the present research distinguishes between exit from deadlock within the relevant policymaking modes in which the JDT may actually occur, and exit-routes from negotiation gridlocks that are foreign to those modes. This distinction is reflected in the vocabulary used in the dissertation by separating the circumstances in which the trap may be considered to have been overcome from those in which it has been bypassed. On the one hand, the JDT may be considered overcome when a policy-solution has been successfully adopted using a policy-mode in which the JDT could have been expected. On the other hand, one can consider that the JDT has been bypassed – or 'avoided' – when, given a high risk of decision-making deadlock in policymaking modes that are relevant to the JDT, alternative decision-making procedures have been used (sometimes innovatively) to design and adopt contentious policies (Héritier, 2002). Alternative policymaking routes may certainly present less constraining procedures and decision rules to accommodate diverse interests and offer more potential to avoid complete gridlock. However, they are not directly relevant to the JDT as a theory of decision-making.

Confusing those two types of situations within a unique research agenda is certainly tempting. One appealing advantage of such stratagem is that it becomes easier to advertise the successful falsification of the JDT expectations whenever an

alternative policymaking forum has been efficaciously used with a view to bypass potential deadlock within those relevant modes in which the theory would have worked. Precision demands, however, that the two situations remain empirically and theoretically well differentiated.

Therefore, a key aim of the present dissertation is to re-specify the JDT as a general theoretical framework and inventory its many 'exit' hypotheses. Two aspects deserve special emphasis. On the one hand, despite countless innovations in the field of EU public policy theorizing, the classic and updated versions of the JDT display continuous and renewed relevance, even when taking into account that the European institutional settings have undergone major reforms over the recent years. On the other hand, the dissertation sets to identify the remaining gaps in the general framework. I argue that recent literatures, foreign to the JDT, have largely demonstrated the relevance of additional actors and variables that can fruitfully supplement the framework with a view to upgrade its completeness and ultimately increase its explanatory power. Therefore, it is important to focus on the conditions that help to overcome the JDT, not to circumvent or bypass it. The latter would equate to missing the point altogether.

True, identifying, tracing and explaining the production of optimal policies through avenues that bypass joint institutional decision trap prompts for a more differentiated picture of EU decision-making and policy integration but is not likely to advance research on the JDT as a theory that operate within a narrowly defined scope. By contrast, genuine falsification of the theory implies that, when all the conditions for an institutional JDT are met, a comparatively more optimal policy is, however, agreed upon. This is why it is important to secure a differentiated picture of the various policymaking modes and show where and when the JDT theory does apply.

C. The Joint-decision system and other policymaking modes

This section presents the policy modes that are available to member states negotiating between them in their international relations. Those are classified along two analytically valuable dimensions: (1) whether policymaking implicates actual and explicit negotiation or not and; (2) whether relevant actors – i.e. governmental units – participate on a voluntary or compulsory basis. Fritz Scharpf has already suggested that those two dimensions could help categorize the wide array of modes of governance (Scharpf, 2006). In the next pages, I use them in a more systematic way with a view to tabulate all the decision modes that are available in the international realm.

However, there is a residual level of ambiguity regarding the definition of 'policy'; is it really appropriate to afford the status of 'policy' to a situation that is not negotiated? Certain cells in the table may be more appropriately qualified as policy situations, problems or could just be considered as spontaneous outcomes of strategic interactions than public or private policies which express the notion of a decision being discussed, agreed upon, adopted and implemented. One may argue that, in some ways, actors' behaviour is always the results of decisions. Yet, de facto outcomes that result from individual strategic decisions may not reasonably be assimilated to those situations that result from rules and legislation adopted as a result of collectively concerted decision-making. Actors' unilateral strategies are nodes selected along interactions within a strategic setting that include environmental factors, other actors' strategies and reasonable expectations about those strategies. In other words, the description of a strategic constellation can hardly be defined as a policy. One should keep that in mind especially when dealing with coordination through mutual adjustment, which is a non-negotiated mode of governance. Therefore, it may hardly be considered a policy output, but more satisfactorily as a particular outcome of a strategic interaction.

Within the policy modes that are relevant to the JDT, we can further specify the conditions under which the JDT may occur. We then identify the key factors that can explain when and why an optimal policy can still be adopted in the presence of the identified conditions that most predictably lead to deadlock.

1. An increasingly differentiated picture of policymaking modes

Scharpf (1988) first identified the JDT in the framework of the so-called intergovernmental decision-making mode, which seemed to be the main avenue to adopt EU policies at the time. This was followed by an important work (Scharpf, 1996) on the structural dimensions that root preference heterogeneity among member states. Subsequently, Scharpf upgraded his approach in the light of later research and framed a more differentiated and comprehensive picture of the various policymaking modes and patterns of regional integration. Deeply rooted in rational institutionalism, his theory illuminates why negative integration through de-regulation would take precedence over positive regulation through re-regulation (Scharpf, 1999).

The JDT must now be re-located in the broader context of the various policymaking modes that are available in an international setting. Originally, three modes were identified (Scharpf, 2006). A fourth one was then included in an extended map of the various policymaking modes (Scharpf, 2011). Ranked in order of increased institutionalization, these are: (1) coordination by mutual adjustment, (2) intergovernmental negotiation, (3) the joint-decision system and, (4) the supranational-hierarchical mode. According to Scharpf, these "differ in the degree of institutionalization and hence the degree to which they impose hard constraints on lower-level policy choices" (Scharpf, 2011:218). Scharpf (2011) presented those modes according to the level of institutional constraints that it imposes on the participants. By contrast, a key purpose of the present chapter is to insist on the location of the JDT within a comprehensive mapping of various decision-making modes. Therefore, on the one hand, I stress the presence or absence of negotiations

within given modes and, on the other hand, if actors' participation is voluntary or compulsory.

Table 1 represents all the modes available in a two-by-two table according to their degree of compulsoriness and negotiation. According to this representation, it is clear that the trap can only occur in the so-called joint-decision system of policymaking, which is marked by two characteristics. First, the joint-decision system points to a policy mode that requires negotiation among participating actors. Second, it implies that those actors will be compulsorily engaged within those negotiations, and will thus be obliged to implement whichever decisions are eventually adopted out of the negotiations. In addition, non-negotiation modes, whether voluntary or compulsory, can create specific distributive problems that may contribute to the increased salience of the JDT in compulsory-negotiated modes. The two following sections present the non-negotiated and negotiated modes in turn.

Table 1. Classification of policymaking modes

	Non-negotiated modes	Negotiated mode
Voluntary	Coordination by mutual adjustment	Intergovernmental mode
Compulsory	Supranational-hierarchical mode	Joint-decision system

2. Non-negotiated modes: Voluntary v. compulsory

The modes that are not negotiated are those that give way to some sort of coordinated behaviour between actors without consultation between them so that there is no cooperative agreement. Those modes are either self-produced in response

to incentives generated along relations of interdependence, or decided by institutions that are foreign to the direct relation of interdependence between the concerned actors. In addition, there is a hierarchical-legal component according to which adopted policy are binding for the actors. Therefore, interdependent actors have the duty to comply with decisions that they did not collectively agree upon through negotiation. Two decision-making modes fall into this first category: 'coordination through mutual adjustment' and 'supranational-hierarchical mode'.

a) Coordination by mutual adjustment

Policy coordination generated through mutual adjustment was the last decision mode to be fully integrated into Scharpf's classification of the various modes of producing policies (2011). It is also the most ambiguous. In Scharpf's 1988 original paper, the highly institutionalized joint-decision mode was presented as the one in which the JDT could occur. By contrast, coordination through mutual adjustment is the least institutionalized. It is also voluntaristic and does not implicate any formal or informal cooperative interaction between actors. Situations are created outside any form of dialogue or consultation. They are self-produced by the spontaneous behavioural adjustments of actors operating in the market and responding to various incentives in the pursuit of the maximization of their individual utility. In making adjustment decisions they adapt their behaviour in relation to other actors' actions and according to their anticipations about counterpart actors' future moves.

To the extent that those adjustments are fundamentally based on self-interested independent actions, the eventual equilibrium could virtually turn out to be Pareto-optimizing for all actors. That potential outcome may occur under the condition that the constellation of actors' interest is reasonably homogeneous. By contrast, it could also create deeply entrenched distributional conflicts between losers and winners if respective actors' interests are starkly heterogeneous. The phenomenon of so-called 'regulatory competition', which is the initial policy problem

at the centre of the present work, is a prime example of such mutual and somewhat automatic adjustments. Its distributive consequences may in turn create new problems that may necessitate cooperative solutions at a higher level of institutionalization.

This mode has given rise to heated debates among policymakers and academics alike as to the consequences of mutual adjustments on regulatory standard settings. Some argue that the liberalization of trade between units with asymmetric regulatory standards is most likely to initiate regulatory competition – also denounced as the so-called 'race-to-the-bottom' – whereby all participants engage in a process of relaxing costly product and process requirements with a view to remaining competitive (Brueckner, 2000; Franzese and Hays, 2006). The specific hypothesis that holds that different standards, when put in competition, will mutually re-adjust to a lower level is also known as the 'Delaware effect'. However, evidence supporting the actual materialization of such race is often inconclusive (Basinger and Hallerberg, 2004; Klevorick, 1996; Subramanian, 2004). In contrast to the Delaware effect, others have also argued that units with lower standards may systematically try to raise them to gain access to foreign markets, which have more demanding standards (Vogel, 1997; 2009; Radaelli, 2004). This pattern has often been called the 'California effect'. And it has been highly contested overall (e.g. Fredriksson and Millimet, 2002). Others have convincingly argued that asymmetries between regulatory standard levels of interdependent countries would lead to downward interactions even without economic operators actually playing those asymmetries as an easy way to compress production costs (Kvist, 2004).

Conflicting and inconclusive evidence of race-to-the-bottom and race-to-the-top is also fuelled by ideological bias and under-conceptualization. If proved right, the Delaware effect can justify the maintenance of restrictive regulation because regulatory competition can put social and environmental standards and jobs at risk. On the other hand, if the California effect is proved right, it may serve to advance a

deregulatory agenda by arguing that free-trade, far from inflicting destructive pressures on jobs and standards, may in fact influence other markets to align on higher standards.

Besides these underlying political agendas, the debate is also rigged with under-conceptualization. Maintaining a clear distinction between product and process standards can help structure the controversy in a more productive fashion. While, the Delaware effect is likely to adversely affect process regulations indeed, the California effect is more likely to impact on product standards.[11] Of course, the California effect is more likely to occur if the country of destination is legally allowed to demand compliance with its standards to potential importers. However, under the constraint of mutual recognition, the California effect may still occur if, for example, customers equally care not only about product prices but also about product quality.

In the next chapter, I model the strategic interaction between regulatory units involved in regulatory competition over process standards as a game theoretic prisoner's dilemma. Accordingly, regulatory competition is shown to systematically create suboptimal outcomes that may result in distributional conflicts. In those events, cooperation through negotiated policymaking modes may be recommended, and yet be scarcely feasible.

b) Supranational–hierarchical mode

A foremost development in the effort to specify the conditions under which the JDT may occur is the identification of an additional decision-making mode. In the realm of the EU, it recognizes a key role for the Court of Justice of the European Union (CJEU), which has had enormous impact on patterns of European integration (Weiler, 1994).

[11] This is because certain products standards are likely to directly affect the quality of the products. By contrast, many process standards – like social protection – may increase the cost of production without necessarily improving the quality of the product.

The Court's remarkable activism has been the subject of intense scholarly attention (Héritier, 2007; Schmidt, 2017). Scharpf labelled it the supranational-hierarchical mode (2006). In contrast to negotiated modes, decisions are taken in a non-political and non-representative way. Here, the notion of 'non-political' decision means that decisions are not adopted in cooperative arenas. Within supranational-hierarchical policymaking modes neither government executives nor national parliaments enjoy any kind of decision-making voting right. As suggested, judges settling conflicts in Courts are a prime example of those 'none-political' decision makers. Yet, the denomination does not deny that courts' decisions may have critical consequence of a typically political nature. They may influence electoral behavior, candidate discourses, political agenda and even general pattern of regional integration (Scharpf, 1999). However, those modes do not recognize any formal decision power to political institutions.

It remains that interdependent units affected by policies designed through that mode do not get the chance to negotiate outcomes between them. In that sense, there are curious similarities with mutual adjustments, because there is no (formal) cooperative dialogue, bargaining, or negotiation in order to find a collectively acceptable equilibrium. However, this mode is highly institutionalized and constraining. Indeed, the marked specificity of this mode compared to mutual adjustment is its compulsory nature.

Lower governmental units – i.e. the member states in the context of EU policymaking – are required to implement the new policy equilibrium in their domestic apparatus. And yet, they – within the Council – do not have a say. The European Parliament is not involved either. Only supranational institutions enjoy actual decision-making powers. Those powers were initially granted to supranational

institutions[12] based on legal provisions enshrined in treaties that had previously been negotiated by the member states themselves. However, supranational institutions have often found critical ways to increase and extend the powers that were initially granted to them in the treaties. Under certain conditions, supranational institutions can significantly shift policy equilibriums based on unilateral interpretation of primary and secondary law. Classic examples are interventions of the European Commission in competition policy (Thatcher, 2013) and the considerable case law of the CJEU (Garrett et al., 1998). The remainder of the section focuses on the CJEU, since its decisions arguably provide the most emblematic instances of policymaking in the supranational-hierarchical mode. Yet, other supranational institutions with delegated powers could also affect policy equilibriums through this supranational–hierarchical policymaking mode.

In any event, the CJEU has unremittingly been extending its reach on the process, shape and patterns of European integration through daring casuistic interpretations of the treaties (Stone Sweet, 2005). This was made possible by the case-based development of two steppingstone legal doctrines: supremacy and direct effect. It then allowed the Court to directly and efficiently intervene in matters that are not negotiated by the member states beforehand and against which member states are almost completely disarmed in practice. This led Scharpf to famously declare the emergence of the Court as a 'dictatorial power' (Scharpf, 2006:860).

In the 1996 Van Gend en Loos case, the court decided that European law constituted a new level of hierarchy in the legal order "for the benefit of which the

[12] The Commission has the power to try the member states before the CJEU if it believes that they fail to comply with EU law. The CJEU has a remarkable margin of manoeuvre to interpret treaty provisions, and has often used it in a rather extensive fashion. National courts also afford further interpretative opportunities to the CJEU through preliminary questions that can be referred directly to the EU judges in relation to a case being decided by the domestic judicial system (Héritier 2007; Schmidt, 2016; Stone Sweet, 2005).

states have limited their sovereign rights, albeit with limited fields."[13] It further claimed that EU law created rights for individuals, and that clear treaty provisions could be directly invoked before the Court. Such an interpretative step obviously allows decisions to be taken based on broad treaty provisions and grants the Court considerably more leverage on the process of European integration.

While positive harmonization of domestic regulations requires intergovernmental agreement between member states, in the subsequent Cassis de Dijon case[14] the Court deduced a principle of mutual recognition between member states regulations based on the principle of non-discrimination. Several important cases subsequently affected particularly salient sectors for which integration was not initially foreseen without negotiation between the member states. This was particularly so in the so-called Viking and Laval cases.[15]

Typically, such policymaking modes are rightly seen as offering avenues to bypass potential JDTs in the sense that they can further European integration without the need to resort to intergovernmental negotiations between the member states. There are two reasons why they must remain as key elements of the general picture within the present research. On the one hand, new equilibria generated through the activism of the CJEU have sometimes produced distributional conflicts and turned member states and economic operators into lasting winners and losers. Frustratingly, therefore, JDTs become even more likely and entrenched within the intergovernmental arena precisely because those conflicts have the potential to exacerbate multiple tensions and preference heterogeneity on issues that, had they had the option, member states would have been well advised to keep out of

[13] Case 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratis der Belastingen.
[14] Case 120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein.
[15] See also the 2008 decision of the European Court of Human Rights in the Demir and Baykara v Turkey case (ECHR 1345) that deals specifically with workers' right to collective bargaining.

negotiations. On the other hand, both Schmidt (2000) and Scharpf (2011) have insisted on the links between the very existence of the supranational-hierarchical mode and exits from deadlock. They have convincingly argued that the Commission can indeed use this option as a credible threat to provide additional incentives that prompt the member states to come up with common positions within the Council, despite their preferences being heterogeneous (Schmidt, 2000; 2016). The threat to pass the issue over to the CJEU can be all the more effective, since judicial decisions are extremely hard to alter through cooperative decision-making. The assumptions implicit in the argument is that even partially satisfactory solutions adopted by negotiation may often be more acceptable to member states with significantly conflicting interests than the imposition of uncertain equilibria designed behind the closed doors of other European institutions. The following subsection presents those policymaking modes in which member states negotiate new equilibria between them.

3. Negotiated modes: Voluntary v. compulsory

There are two types of so-called negotiated modes. On the one hand, the policymaking modes that require the obligatory participation of the concerned actors belong to the so-called 'joint-decision system'. On the other hand, the modes that only involve the member states that voluntarily wish to be so are categorized as 'intergovernmental negotiations'. This distinction between voluntary and compulsory decision is crucial to specify the conditions under which the JDT may occur.

a) Intergovernmental negotiation mode

The intergovernmental negotiation mode is the least institutionalized within this category of policymaking modes. The participants are free to decide whether they wish to engage in cooperative negotiations with their peers. And even where they do, they are also free to decide whether they wish to bind themselves to the final collective policy agreement. To this extent, only those whose benefits outweigh the

costs are likely to bind themselves. Unwilling participants can choose to deal with the policy problem on their own if they believe that their interests will be best served in this way. Typically, so-called 'grand bargaining' within which framework treaties are negotiated between states that are institutionally independent from one another belong to this broad category. For example, the 1951 Treaty of Paris, which established the European Coal and Steel Community, was negotiated among five institutionally independent state governments. Belgium, France, West Germany, Italy, the Netherlands and Luxembourg accepted to sign and later became effective members because, at that time, they collectively and individually believed that the economic benefits would outweigh the costs (Moravcsik and Vachudova 2002; Anderson and Reichert, 1995, see also Alter and Steinberg, 2007). Should any one of them have believed otherwise, it would have been theoretically free to opt-out without any form of institutional obstacle. This option is not available where member states have already committed to negotiate collective policy decisions within a joint-decision system.

Yet, even in the intergovernmental mode, joining is not always entirely voluntaristic since decisions made by the participants may create negative externalities for those who have decided to remain outside. The anticipation of those externalities can provide further incentives to join.

b) Joint-decision system

Finally, the most institutionalized mode is labelled either the 'joint-decision mode' (Scharpf, 2006) or the 'joint-decision system' (Scharpf, 2011). The key difference with intergovernmental negotiation is the adjunction of a condition that crucially contributes to increase the likelihood of negotiation deadlock. In this mode, governments are not free to decide to join negotiation based on their respective interest-driven cost-benefit analysis. Instead, they are all institutionally locked-in by the previous decisions that contributed to incorporate them within an

institutionalized community of equal members. Typically, member governments are recurrently confronted with problems emerging from interdependence within that community. In response, they must participate in negotiations that, if successful, will lead to the adoption of common policy solutions that may affect them in a beneficial or costly manner.

In his original 1988 paper, this is the specific policymaking mode that Fritz Scharpf had in mind when he found similarities between the European Union political system – when legislating under the 'codecision procedure' – and the German federal system. Drawing from those similarities he argued the JDT model that had emerged in the German context could also shed light on European negotiations and policy outcomes, given the fact that member states with diverging preferences all enjoy a veto right under the still-dominant rule of unanimity. The difference lies in the fact that the constituting units are Länder in the German case and member governments voting within the Council in the case of the EU.

While the intergovernmental negotiation mode is relevant to a wide range of international negotiations between independent states, both EU governments and German Lander are submitted to compulsory forms of negotiations. They could not opt out if they believe that they have more to lose than to benefit from a particular policy negotiation. Therefore, voting rules become a crucially important variable to examine "because, in contrast to intergovernmental negotiations, participation in joint-decision processes is not voluntary but compulsory for those state that have joined" (Scharpf, 2011:219). The next section will discuss how, within this mode, the risk of deadlock mechanically increases and also the routes available to overcome it.

In sum, this section has clarified at least four points in relation to the institutional JDT phenomenon. First, there are four differentiated modes of policymaking according to Scharpf's extended theory. Second, they differ according to the degree of institutionalization that can be evaluated according to two important

dimensions: (1) whether policy equilibria require negotiation and; (2) whether the participants are willingly or unwillingly bound together. Third, strictly speaking the JDT can only occur in the negotiated and compulsory mode within a joint-decision system. However, fourthly, other modes are also relevant for the joint-decision in two ways. On the one hand, other modes may provide convenient circumventing routes toward the adoption of specific policies to avoid high risks of deadlock. On the other hand, such routes may also have the potential to increase the likelihood of deadlock due to JDT, if they eventually affect the member states' pay-offs in a way that exacerbate the heterogeneity of preferences between them.

The next section will explore the more specific conditions under which the joint-decision system may be plagued by seemingly inescapable deadlock or, at least, recurrently produce sub-optimal policy solutions. I will then proceed to identify the conditions under which the JDT may be overcome.

D. Falling into the JDT and getting out

First, we further specify the conditions for a JDT to emerge within the joint-decision system. Second, we detail the circumstances in which it may be overcome.

1. The JDT model specified

The JDT phenomenon is based on a classical application of Coasian negotiation theorem. According to the Coase theorem, "in the absence of transaction costs, all potential welfare gains which a benevolent and omniscient dictator might provide could also be realized by negotiations between self-interested and fully informed actors" (Scharpf, 2006:848; Coase, 1960). But, in the real world, the condition of perfect information is evidently fictional, transaction-costs are typically high and side-payments are not easily available. In addition, designing package deals is a practically arduous exercise.

One can use the Coasian theorem as a point of departure to present the literature that investigates the circumstances of emergence of the JDT and the ways to exit it. In the end, the literature can be ordered as a discussion over the empirical plausibility of the assumptions underlying the Coase theorem. While Scharpf has questioned Coasian assumptions within a rational institutionalist approach, subsequent hypothetical exit-routes out of the JDT have generally tended to restore those assumptions to favour.

In this section, I provide a comprehensive inventory of the conditions under which the JDT occurs. The JDT presupposes a policy problem of interdependence within a given strategic setting that takes account of the existing institutional system. This, in turn, implicates several additional presuppositions. The problem creates a constellation of preferences that develops in the specified institutional system. Thus, the existence of an institutional trap sees negotiations more or less inexorably move into deadlock.

a) A specific type of problem

An important condition of the JDT concerns the constellation of preferences, which is largely determined by the problem at hand. Let us consider a distributional conflict that creates winners and losers under a given regulatory status quo. Understandably, the actors that benefit from the status quo have no interest in a cooperative agreement whose aim would be to deviate from that status quo. On the other hand, the actors that suffer a loss under the status quo are logically in favour of the adoption of a more beneficial policy equilibrium. Unfortunately, the unanimity rule acts to "discriminate between the defenders of the status quo and the promoters of policy reforms" (Scharpf, 2006:848) in favour of the former. The next chapter provides a detailed analysis as to how regulatory competition provide a textbook theoretical instance of such problem.

The essential assumption, then, is that the JDT presumes a problem stemming from a pre-existing relation of interdependence that has distributional implications for the participants. There must be some pre-existing interdependence between lower units. In that sense, the negotiating participants find themselves stuck in a deadlock precisely because they are dependent on each other, not only to find a solution that would increase their collective utility, but also because the very problem stems from an ongoing interdependent relationship. For example, deregulation through mutual recognition imposed by the CJEU under the supranational-hierarchical mode can create distributive conflicts between the member states. As Scharpf notes, "The assumption [is] that coordination is desirable either because the problems are caused by border-crossing factors or because the policies chosen have border-crossing effect" (Scharpf, 2011:218). In connection to that particular aspect, the next chapter shows that regulatory competition exemplifies the problem of interdependence. That is why the dissertation focuses on understanding the conditions under which regulatory competition might or might not be tamed within the European version of the joint-decision system.

b) An institutional setting

The original JDT model is also deeply institutionalist in the sense that it uses the institutional environment – especially voting rules and decision-making procedures – as the prime dimension that eventually explain policy outcomes (Scharpf, 2011:218), assuming that Coasian assumptions are wrong. Therefore, for the JDT to occur, the institutional setting must be intergovernmental. Intergovernmental decision-making forums are ubiquitous in international relations. They are characterized by distinctively unanimous, or nearly so, voting rules and constitute a necessary condition.

Nonetheless, within the ordinary legislative procedure, a large majority of issue areas are now submitted to a qualified majority-voting rule (QMV). Since November 1,

2014, a decision is adopted if it gathers the approval of 55 per cent of the member amounting to at least 65 per cent of the total EU population. A minority of four member states representing at least 35 per cent of the EU population may assemble a blocking minority. Before that, member states used a weighted-vote system that roughly reflected member states' share of total EU population.

Although QMV evidently helps overcome the JDT as compared to de jure unanimity, it still is a demanding rule and may be conducive to persistent deadlock. As a matter of course, this is likely to be so if, ceteris paribus, the number of losing actors is greater or equal to the maximum number of dissenting votes that are 'allowed' by the specific voting rule for the decision to be adopted anyways – assuming, again, that logrolling strategies are not easily available.

In addition, establishing voting rules for constructing an analytical model may be more problematic than it would seem at first sight. On that question, one traditionally distinguishes between formal voting rules and de facto voting rules. For instance, the Luxembourg Compromise could often impose de facto unanimity (Mattila and Lane, 2001). In addition, it has often been argued that a culture of consensual compromise stemming from the ubiquity of unanimity tend to prevails within the Council (Lewis, 2002). In the present dissertation, we consider that de facto quasi unanimity generally tends to dominate when policy problems are highly contentious. The more contentious an issue is, the more demanding the de facto voting rules will be. The introduction and extension of QMV has indisputably eased the process of adopting policies within the joint-decision system. However, for the most controversial issues – those that constitute the prime focal point of the JDT theory – the de facto voting rules are still more demanding. This is why particularly controversial policy issues have been selected in the present research. They illustrate the problems that the EU faces when certain issues may create large costs for certain member states, while dangerously interfering with their exclusive competences. In addition, we must not overlook that the Council's voting rules still retain de jure

unanimity in areas that are at the edge of EU competences, like the right to take collective action in the context of the posting of workers across borders. The Monti II Proposal for a Council Regulation on the right to take collective action, selected as Case III in the present research, deals with that particular policy issue.

c) Actors' preferences

The JDT model then uses a rationalist approach to determine the participants interests and preferences over outcomes. Accordingly, governments compute their self-interested cost-benefit analysis with regards to the problem at hand. They can thus determine their preferred ranking of available policy outputs in a consequential manner. Given the decision-making rules, specific policy alternatives can be derived from deductively-established interests of identified voting actors (see Frieden, 1999). Thus, under unanimity rule, if preferences are homogeneous, a suitable policy-response can be expected. By contrast, under constant voting rules, if preferences are heterogeneous, policy solutions are most likely to end-up into deadlock or, at least, they will most plausibly embody a lowest 'common denominator'.

This leads to two observations. First, in the joint-decision system, most policy problems involving distributional conflicts between member states are likely to remain stuck into the status quo. Second, the more heterogeneous the preferences of the voting actors – each of them being granted a veto – the most entrenched the JDT will be (Tsebelis, 2002).

d) Costly negotiations

Finally, the last assumption underlying the JDT model tends to make stalemating even more likely. The theory recognizes that negotiations are incredibly burdensome. Under unanimity rule, the transaction-costs are particularly high because the negotiations are typically long, complex and involve a formidable number of actors

mediating the preferences of member states and other interests. Even if one assumes that preferences are not necessarily incompatible in theory, the efforts that must be deployed with a view to discover appropriately reconciling equilibria may truly be enormous. More often than not, multiple alternative equilibria can virtually be imaginable. However, determining those alternatives that are acceptable to all participants is often unfeasible in practice. In addition, the costs attached to the determination of all such equilibria within those negotiations also increase exponentially with each supplementary actor, for the impact of every potential policy solution must be assessed on a bilateral basis. It means that the likelihood of the emergence of a JDT increases as the number of voting actors increases under ceteris paribus conditions. Nonetheless, this holds true if we assume that the actors are negotiating without the help of a benevolent external agent in charge of investigating potential equilibria on the behalf of the participants. In the European institutional setting, the Commission takes up this role within the joint-decision system. Such intervention may indeed contribute to significantly reduce transaction costs so as to overcome the JDT (Scharpf, 2006:850).

The next section inventories the various dimensions that may contribute to overcome the JDT.

2. Overcoming the JDT

The genuinely puzzling question regarding the JDT itself relates not only to how other decision-making modes may help in imposing optimal policy outcomes and further European integration, even against the unanimous will of the member states. Rather, it is important to ask whether – and under which conditions – compulsory intergovernmental negotiations of the joint-decision kind may still produce cooperative policy agreements in cases in which a deadlock is strongly expected.

Various explanations have been proposed. At the outset, the JDT is virtually inescapable when Coasian assumptions are not met. Nonetheless, in the real world, the fact that package deals and side payments are not easily available does not mean that they are altogether absent. It has been argued that they may indeed give way to better than sub-optimal policy solutions, even in a strict rationalist perspective. Moreover, I already suggested that the Commission might not only play a role as an honest broker, but also manipulate the agenda to render logrolling strategies more readily available. Finally, constructivist approaches also help to show how preferences may change due to mutual learning, socialization and the revisions in preferences stemming from a revised interpretation of interests (Adler, 1997; Checkel, 1999; 2001; Christiansen et al., 2001; Lewis, 2005). It has even been argued that the incremental emergence of a shared identity has led member states to value the perception of a common fate as more important than their own. Yet, a certain ambiguity still exists regarding the distinction between rational-choice and constructivist exit routes from the JDT. A review of the literature is an opportunity to clarify this aspect.

Given the re-specification of the conditions of the occurrence of the JDT, several variables have been identified to help providing viable exit routes within the joint-decision system itself. Gerda Falkner proposed a systematic and illuminating compilation of such conditions (2011:4-8). However, decision-making modes and categories of explanation can be confusing. Therefore, the following presentation re-organizes such conditions with a view to exclude the potential exit-routes outside the joint-decision system because – in line with the distinction that was suggested – they do not overcome the JDT but merely bypass it. The next subsection inventories rationalist arguments. The subsequent one deals with more sociological arguments.

a) The rationalist approach

There are at least three variables that can be manipulated to decrease the likelihood of deadlock within a rational-choice institutionalist approach. First, voting rules may be relaxed. Next, member states may adopt more accommodating negotiation attitudes. However, the manipulation of those dimensions may pose some theoretical problems. Then, bureaucrats and experts can play a critical role in dissolving obstacles in the way of viable and agreeable policy solutions.

The first situation considers the manipulation of voting-rules. If the unanimity or quasi-unanimity rule is relaxed in the direction of more majoritarian sorts of decision-making (i.e. if at least qualified majority voting takes precedence over de jure or de facto unanimity voting rules) then the negotiation of optimal policy solutions is more likely to be successful. Therefore, an obvious solution to the pervasive and recurrent risk of deadlock is to alter the voting rules. However, it would still require a burdensome cycle of grand bargaining, one that is precisely marked by the predominance of the rule of unanimity, which creates a high risk of deadlock again. The current version of the JDT already explains this.

More interesting would be the identification of an exit-route that the theory is not already able to explain and for which additional explanatory variables might be necessary. To put it differently, altering the preconditions according to which a theory is claimed to apply does not mean that the theory is wrong or falsified, but precisely that the theory no longer applies or only partially applies. One such interesting lead was opened in examining the role of the European Parliament as a 'conditional agenda setter' (Tsebelis, 1994). If the European Parliament collectively agrees on a policy, then the JDT automatically becomes less likely to occur because amending the proposal requires unanimity in the Council, whereas adopting it only requires qualified majority. Although this is still an instance of altered voting rules that explain the outcome, the framework of analysis must be extended to the European Parliament as an additional actor to be reckoned with.

Second, member states may alter their bargaining attitude toward a softer and more accommodating posture, which may be conducive to more conciliating bargaining strategies (Elgström and Jösnson, 2000). If member states adopt a problem-solving approach to ongoing negotiations rather than hard bargaining strategies, then the likelihood that the negotiation will lead to the successful adoption of a policy compromise may increase. Indeed, negotiating actors will probably be more enthusiastic in designing a greater number of unsuspected Pareto-optimizing equilibriums. Compromising attitudes may also contribute to decrease transaction-costs since the participants may be more willing to share information and expertise in the search for a mutually beneficial agreement.

And yet, brutal changes in member states bargaining attitude are difficult to explain. Why would any member states suddenly decide to become more compromising in defending its interests within a narrow rationalist perspective? It is of course conceivable that member states may come to understand their interests in a slightly altered manner. For example, they may take account of the participants' collective interest on top of their own. But further explanations to this sort of change would need to be provided. Other scholarship has illuminated the phenomenon (McKibben, 2008).

On the one hand, it is possible to alter rational-choice assumptions to frame an argument that would be more constructivist in style. Along that reasoning, member states may indeed come to view the collective interest as equally important to their own. On the other hand, member states may come to value longer-term benefits more greatly than short-term ones. This equates to an argument about 'return on investment'. It may be more beneficial for everybody to gain less immediately in the hope to get more in a slightly more remote future through policy solutions that are more acceptable to everyone now.

But another approach may be less inconsiderate in altering rational-choice assumptions in explaining changes in member states' bargaining attitudes. Indeed, in a third instance, if bureaucratic and expert decision makers take precedence in the decision-making process relative to member states, policy solutions may be more easily agreed upon. This relates to two lines of arguments. On the one hand, outside intergovernmental negotiations, expert committees have an overwhelming tendency to design policies in a rather non-transparent way. Those 'technical' negotiation cycles are most often carried out behind closed doors and have been analysed as potential 'subterfuges' to circumvent deadlock (Héritier, 1999). Second, the intercession of permanent representatives and domestic bureaucrats also seems to be closely related to variation in negotiation strategies. As an emblematic example, the Council's Committee of Permanent Representatives (COREPER), through its day-to-day work, has been shown to contribute in eventually shifting member states' bargaining attitudes from hard bargaining to softer and routinized problem-solving patterns of negotiations (Peterson, 1995; Lewis, 1998).

Finally, when the Commission is in a position and willing to investigate new equilibria in a creative way to propose innovative Pareto-optimizing policy solutions, the transaction-costs of negotiations between member states can be greatly reduced. In other words, the Commission can act as an honest broker, which will not only help pioneering inventive solutions but also ease logrolling through the tactical manipulation of the agenda, thereby creating the conditions to slightly shift assumptions closer to the Coasian ideal (Scharpf, 2006).

Hence, the literature has examined many paths out of the JDT. Those explanations may often be largely compatible with the assumptions used by the original model. But the sociological institutionalist literature has also vastly contributed to the discussion.

b) The sociological institutionalist approach

Next to the rational-choice institutionalist approach to overcoming the JDT, sociological institutionalists have suggested that preferences could also be deeply altered in ways foreign to approaches that assume self-interest utility maximizing actors. I propose to identify two different streams of explanation for such a shift in preferences. Some explanations are still somewhat familiar to rational-choice institutionalism. Others depart from it in a more radical way.

First, a change in the strategic setting might alter policy preferences. A change in EU membership – which occurred when eastern European countries joined – or unforeseen events disrupting the current economic conjuncture belong to this category. A recent example is the Eurozone crisis which prompted the member states to be less reluctant to pool additional power and resources at the supranational level. However, those preferences over particular policy outcomes may be modified without necessarily witnessing variation in the perspective that member states hold regarding their underlying meta-preferences. In that event, proper specification of variations in the environment may suffice to explain exit from deadlock without the need to alter underlying assumptions, including potential shifts in governments' normative 'worldviews'. A radical and/or brutal change in environmental conditions – as well as a more incremental and progressive one – may indeed alter member states' perceptions of their individual and collective interest in some fundamental way. On that occasion, the very definition of member states' self-interest may become more conditional on the collective one, for instance. The perception of an immediate economic or military threat that may not have been evident in the past may perfectly reinforce a sense of collective belonging and shared fate. It is clear, then, that the likelihood of deadlock may undergo a significant blow if heterogeneous preferences are homogenized in the wake of such events. These types of explanations are indeed more typically sociological institutionalist.

Next to the effect of variations in the strategic setting on preferences over policy outcomes, various processes of mutual learning may also alter individual

preferences. Those patterns may certainly be classified as constructivist as well. Nonetheless, mutual learning may also translate into improved knowledge about the potential consequences of certain policy choices. This can prompt member states to update their preferences over policy outcome in ways that are partially compatible with rationalist assumptions. In the light of a better understanding of the likely consequences of various alternative solutions, learning could simply lead member states to improve the way they comprehend their best interest and the most efficient strategies that are available to maximize it.

However, learning can also be understood in a more straightforwardly constructivist way. Moving from a strict rational-choice approach, past experience of integration can lead the balance between the individual and collective interest being altered. It can, in other words, bind together the fate of independent governments with initially conflicting goals. A process of socialization between governments may arguably take place (Lewis, 2005; Lempp and Altenschmidt, 2007). Prosaically, member states' representatives may become used to negotiating, compromising and acting together within the muted atmosphere of chancelleries in Brussels. Consequently, a shared sense of appropriateness (Peters, 1997) may contribute to defining self-interest. Eventually, a 'sense of community' and belonging may play a more than benign role in increasing preference homogeneity among members. In addition, proponents of constructivist approaches have repeatedly insisted on the importance of discourse as a selection process by which the underlying philosophy of particular solutions is accepted as appropriately foreseeable and others as simply intolerable or barely conceivable to start with (Schmidt, 2000a; 2010; Schmidt and Radaelli, 2004).

Finally, models that explain particular policy outputs are too often limited because they focus on too narrow negotiation cycles. By contrast, Peters (1997) convincingly argues that negotiation cycles, particularly in the context of the European Union, cannot be entirely isolated from one another. Quite the contrary. They

effectively take place in a continuous stream of bargaining processes in which attitudes and strategies regarding one issue may have consequences on another. So much so that specific policies may no longer be meaningfully reflected upon if considered in isolation, disconnected from the whole continuous flow of simultaneous policy negotiations. This phenomenon is relevant to the present research, and was reflected in both interviews and secondary sources. The implication is that it is often incomparably more important to secure continuous access to ongoing negotiations rather than recklessly battle over ephemeral positions. Trade association affiliates seem to care dearly about this aspect and, therefore, try to use standard policy philosophy in favour in the Commission to avoid being cut out entirely. Over time, as Peters (1997) argues, the continuous nature of EU policy negotiations can create a sense of belonging. Being part of a stable group of negotiators takes precedence over winning isolated cycles. In the real world of European policymaking the issues can hardly be grasped outside an ongoing stream of simultaneous negotiations. Not only logrolling strategies are made more rightly available, but also maintaining constructive good relations and access to negotiations become crucial.

E. Persistent puzzles: Toward an updated model

1. Tacking stock of existing knowledge

So far, we have located the JDT in the broader context of the various decision-making modes that are characteristic of the EU in particular, and international relations more generally. In so doing, a complete typology of the various modes is drawn that reflects criteria such as whether participation is voluntary or compulsory, and whether policy equilibria result from formal negotiation or unilateral decisions. Whereas it is tempting to consider all suboptimal outcomes as stemming from the JDT and all optimal ones as breaking it, the JDT is only concerned with explaining gaps between policy problems and solutions within the ambit of the joint-decision system as a specific policymaking mode. This mode involves both negotiation and compulsory

participation. In addition, further conditions must be met. The policy problem must have certain characteristics including pre-existing interdependent relations between the participants. There must be an institutional setting with specific characteristics. Actors are assumed to feature heterogeneous preferences and engage in negotiations that implicate high transaction costs. Any factor that may contribute to dilute one of those conditions will logically contribute to overcoming a persisting sub-optimal policy solution, or complete deadlock. Hence, it is also possible to intentionally ease the conditions given on one of the two dimensions through institutional design, so that the JDT can be more easily overcome.

On the one hand, voting rules may be relaxed along a continuum that goes from strict unanimity to simple majority. Thus, the defenders of the status quo may lose the privilege that they enjoy, unduly or not, under unanimity. Nonetheless, such a solution would also undermine the legitimacy of European policies. In addition, this would require calling grand bargaining conferences in which certain member states may have a deeply entrenched interest to oppose such change, especially in the most sensitive issue areas for which preferences also happen to be most heterogeneous.

On the other hand, the compulsory character of participation may be diluted. For example, opt-outs may be more easily available to member states that are unsatisfied with an outcome that deviates from the status quo. Most importantly, a coalition of the willing could emerge that exclude reluctant actors. This last alternative equates to the implementation of a 'two-tier' union in which a core group of members are more willing to negotiate collectively (Stubb, 1996; Radosevic, 2004; Piris, 2012), without being prevented to do so by more reluctant member states.

2. Persistent puzzles

I suggested that, in and of itself, the JDT model is still a robust theory in the sense that it has not been strictly falsified. Yet one puzzle still needs clarification. Moreover, its

theoretical relevance is only supported by its empirical veracity. As the EU is encroaching on increasingly sensitive policy issues, the academic debate persists over the question as to why European integration has become more contested, and the conditions under which it can still be successfully furthered anyways (Schmitter, 2012). Thus, the dissertation focuses especially on a series of controversial policy issues in which intense distributional conflicts seem to trap viable solutions into deadlock.

However, negotiations still lead to open exit-routs out of the JDT within the joint-decision system. Despite the extension of QMV in the Council (Sieberson, 2010), and the progressive empowerment of the European Parliament in the framework of ordinary legislative procedures (Hix and Høyland, 2013), when regulatory issues touch upon core state competencies, the voting rule in the Council has often remained de jure or de facto unanimity (Mattila and Lane, 2001). This holds especially true when salient issues are at stake. Hence, further integration may become more difficult and scholars lament about an ever closer dead-end (e.g. Hayward and Wurzel, 2012).

In some empirical cases, however, they seem to be proven wrong. In 2006, the Council and the Parliament managed to come to an agreement on a transversal directive on the completion of the service market (Directive, 2006/123/EC). Yet, it was marked by multiple conflicts between stakeholders and unprecedented levels of politicization (De Witte, 2007; Nicolaïdis and Schmidt, 2007). At the time, the debate revolved around the risk (real or fantasized) that European-wide deregulation would trigger swift regulatory competition – more infamously called 'race-to-the-bottom' and 'social dumping' – among the member states. By contrast, in 2012 the same constellation of actors, faced with a similar framing of the policy problem of regulatory competition among segmented job markets, could not work out a collectively acceptable agreement on the conditions of the use of the right to take collective action in the context of workers mobility across EU borders. In both cases the same substantive policy problem was indeed at stake: to what extent may

competitiveness gains through deregulation threaten different domestic social contracts and welfare models?

Empirically, it is already puzzling to observe that when there is high likeliness of deadlock over such salient issues, some positive policy outcome can still emerge through alternative policymaking avenues (Héritier, 1999). But it is even more puzzling when, keeping policymaking procedures relatively constant, the same constellation of actors with expectedly constant preferences is indeed capable of working out cooperative agreements in some cases but is incapable of doing so in others. Thus, I specifically focus on variance in policy outcome within the joint-decision system. The explanatory model does not cover the so-called supranational-hierarchical mode (Scharpf, 2006:851-854), nor does it apply to other innovative policymaking modes (e.g. Héritier, 1999). However, CJEU activism often contributes to problems that may require some cooperative response within the joint-decision mode.

Despite much advancement in the theory of the JDT, the following research question remains:

> *In the presence of actual or expected regulatory competition that is most likely to lead to decision-making deadlock, why does the European version of the joint-decision system seem to be conducive to the adoption of positive policy instruments in some cases, while the status quo prevails in others?*

3. The effect of lobbying on policy outputs

For all its assets, the rational institutionalist model designed by Fritz Scharpf mostly emphasizes the impact of voting rules and institutions with formal decision-making power – The Council, the European Parliament and the Commission – on policy outcomes.

Within the meaning of this dissertation, institutions designate actors with formal decision-making power to set the agenda and adopt, refuse and amend legislation by using the voting rights that they are granted based on quasi-constitutional rules enshrined in the Treaties. Those institutions are key to understand policy outputs and outcomes. Yet, assuming that one can keep all conditions relatively constant across cases, the remaining variations in policy outputs and outcomes must be explained by the intervention of other variables that have so far remained relatively foreign to the model. In that regard, we have suggested that the activities of actors that neither enjoy formal voting rights nor constitutional power within the joint-decision system still have considerable influence on the shape of policy outputs (Beyers, 2008; Beyers, Eising and Maloney, 2008). Those actors are mostly interest groups, of which social partners constitute a sub-category. Hence, they do deserve examination, not only in isolation but also within a broader analytical framework of the joint-decision system.

The next section discusses how to examine those actors with a view to include them in the joint-decision system.

F. The explanatory gap: Interest groups

Actors other than those institutions with formal decision-making power interacting within the EU's ordinary legislative procedure matter. They deserve a preeminent place in the formal theoretical definition of the joint-decision system identified as the mode of governance that the present research must focus on.[16] It is not easy, however, to draw definitional lines that distinguish between more and less relevant actors. Important discriminating decisions are required. The challenge is to obtain a more complete picture of the various channels through which basic preferences are

16 However, the present dissertation focuses on interest groups – social partners in particular – only to the extent that they help completing and understanding the joint-decision trap model. In that sense, it would be over-ambitious and somewhat misleading to maintain that the thesis primarily aims to make a major contribution to the theoretical scholarship on interest groups.

aggregated with a view to understanding how they interact in the negotiations over particular policy issues. Indeed, the literature has persuasively argued that those institutions that channel specific interests without enjoying any formal power can still have significant policy influence (Dür and De Bièvre, 2007). Yet, one must carefully maintain the equilibrium between the need to render a more complete picture of policy negotiations, while securing a reasonable degree of theoretical parsimony. Therefore, we make the decision to focus only on those main interest groups that have direct stakes in specific policy negotiations and are routinely associated with the decision-making process. Those are also the actors that will most plausibly be able to recurrently impact policies in some significant way. Of course, other actors may, from time, impact on policies outputs. Overall though, their role is unlikely to be more than anecdotal.

Interest groups have been defined in a plethora of ways (Baumgartner and Leech, 1998). For the present dissertation, it is not especially useful to discuss all the subtle notional differences between 'lobby groups', 'organized groups', 'special interests', 'interest groups', 'pressure groups' and various other proposals. In-depth discussion can be found elsewhere (Baumgartner and Leech, 1998:22-30; Beyers, Eising and Maloney, 2008:1106-1111). Bentley's classic definition is surely too broad in the sense that it simply equates the group to its interest: "there is no group without its interest. An interest […] is the equivalent of a group [….] The group and the interest are not separate" (1908:211; quoted by Baumgartner and Leech, 1998:23). Following Knoke,

> a minimal definition of an association is a formally organized named group, most of whose members – whether persons or organizations – are not financially recompensed for their participation. Whenever associations attempt to influence governmental decisions they are acting as interest groups (1986:2).

We propose a definition that is more illuminating to the present research. First, it is not possible to include every virtual pool of members that might attempt – even anecdotally – to influence public policy in some way. That would lead to an overstretched and confusing notional scope. Second, although membership may be voluntary, there is no reason to think this should be treated as a necessary condition. In many instances, the voluntaristic participation of members may be debatable, even regarding associations whose membership is officially voluntaristic. Third, the members may of course seek direct and indirect benefits from participation within a given association whose aim is precisely to bend policy output in a way that maximizes their affiliates' pay-offs. Hence, interest groups are those identifiable, named and organized actors that represent the manifest interests[17] of determined constituencies, which are directly affected, normatively or materially, by specific policy negotiation cycles.

Those organizations are identifiable, meaning that they have a legal existence and their arguments and positions are routinely given significant consideration in negotiations because the policy community recognizes them as relevant organizations to best represent certain collective interests. Typically, they seek (and are regularly invited) to participate in consultations. Consequently, there are also consistently referred to in the general as well as in the specialized media. They are organized in the sense that they have expectable and intelligible rational strategies given the preference constellation of a reasonably stable pool of affiliates, which they aggregate.

Hence, for the specific purpose of the present research, these do not include informal groups, spontaneous social movements or isolated opinionated individuals for at least three reasons. First, it may be difficult to find a criterion for selecting and mapping informal organizations that may potentially intervene in the policy process,

[17] Truman contends that one should define manifest and latent interest as opposites (Truman, 1959).

let alone to trace their strategies empirically. Second, those groups may be unstable in the sense that potential members may join or leave in a very fluctuant manner. Therefore, their aggregated preferences may swiftly change over time. Third, it is difficult to assume with certainty that those groups have clear, consistent and deliberate collective strategies.

In addition, we may assume that more formal, inclusive and organized interest groups – those with identified and substantial resources, which they can deliberately allocate in a coherent means-to-end manner – may have more capabilities to influence policy outcomes once formal negotiations start. Think tanks, individual experts and other diffused collectives with an intellectual or ideological agenda probably have complex long-term subtle effects on the general political orientations in the EU. They may do so by means of a myriad of direct and indirect channels. This is, however, tremendously hard to measure and is outside the scope of this research. Of course, research centres and think tanks (in particular) do exert a certain level of influence of public policy. In fact, the present research found some evidence of such influence. Yet, those are quite isolated and it is impossible to directly connect such influence to potential benefits gained by any pool of members.

Therefore, I focus only on those groups that serve as preeminent fora for actors that have a direct stake in specific policy issues under negotiation. In the broad policy areas that are covered in the dissertation, those groups are primarily the social partners representing employers and employees interest at the EU level. The question thus remains how to characterize those interest groups, examine the way they operate as interest aggregators, and classify different strategies that they use.

The next section examines the characteristics of those interest groups. The subsequent one proposes ways to distinguish between different strategies.

1. Interest groups' characteristics

Interest groups have various characteristics. Those characteristics provide potential predictors of variation in interest groups' behaviour (e.g. Beyers, 2004; Eising, 2007). For example, whether interests that are represented are diffuse or concentrated may significantly affect groups' decision regarding patterns of access to the policy process (Beyers, 2002). And these aspects certainly vary considerably. Moreover, they are important because, taken as independent variables, they may explain variations in behaviour, strategies, and mobilization. Subsequently, those variations may crucially contribute to explain relative influence on policy outcomes, the dependent variables that motivate the dissertation.

This section suggests several dimensions that are expected to impact on interest group mobilization and strategy. First, the nature of interests and the distributive consequences of proposed regulation may play an important role. Second, internal homogeneity of preferences can be key to special interests attempting to define a common position about specific policies. Third, internal decision-making procedures must be considered, for these may affect how particular groups define their position. Some actors within given organizations may display a superior ability to define a common position according to their own preferences, for example. Fourthly, we envisage the question of long-term programmatic commitment toward a more general goal. This dimension may indeed impose additional rigidities on the part of given groups. Therefore, they may not be able to define preferences over outcome according to the aggregation of immediate affiliates' interest, but may instead have to ensure that there is a reasonable degree of consistency between particular policy positions and long-term programmatic commitments. Securing such consistency can be key to maintain credibility in the eyes of decision makers, which is a necessary condition to access institutions so as to influence policy outputs.

a) Diffuse v. concentrated interests

Normatively and empirically, the foremost dimension concerns the nature of the interests represented by rival organizations. It is possible to distinguish between groups that defend concentrated interests as opposed to groups that represent diffuse interests.

Building on Mancur Olson's (1977) original theory of the logic of collective action, Wilson (1980) argues that mobilization of groups on specific regulatory issues is essentially a function of a cost-benefit analysis between the potential distributional consequences of a proposed regulatory issue and the concentration of costs of doing something about it:

> When the benefits of a prospective policy are concentrated but costs widely distributed, client politics is likely to result. Some small easily organized groups will benefit and will, thus, have a powerful incentive to organize and lobby; the costs of the benefits are distributed at a low per capita rate over a large number of people, and hence they have little incentive to organize in opposition – if indeed they even heard of the policy (Wilson, 1980:369).

Obviously, organizations representing concentrated costs and benefits will expectedly be more easily mobilized since issues under negotiations have more directly tangible impacts on their affiliates' individual utility, regardless of whether the group that they represent is large or small. By contrast, groups whose members suffer diffuse costs and benefits will have a harder time organizing and mobilizing with a view to collective action because members are subject to limited incentives to get involved.

On the one hand, business associations and large firms (Coen, 1997) are often depicted as exemplifying those categories of groups featuring concentrated interests. On the other hand, consumer groups, environmental associations and women's organizations (Pollack, 1996) are archetypal groups of diffuse interests.

b) Heterogeneous v. homogeneous preferences

Some groups may be more cohesive than others on specific issues. Within the rationalist approach, a pool of actors aggregating homogeneous preferences will plausibly express policy positions differently than a group that does not. The former may find it significantly easier to express a more vigorously asserted position conducive to coherent, and therefore more effective, strategies. It will be more active in publishing various position papers and react to various negotiations event by way of press releases. It will seek more intensely access to decision makers. And if need be, will more rightly mobilized through public protests and demonstrations.

Hence the procedure to follow to deduce plausible preferences of interest groups is to identify the various organizations and actors that belong to a certain pool of actors and establish their preferences beforehand according to the features of the specific policy problem at hand. This can be done in two ways. On the one hand, members' preferences over alternative policy outcomes may be deductively established based on prior theorization. On the other hand, preferences can be empirically investigated.[18] Both techniques have some limitations, though. The former theoretical technique can result in mistakenly assigning preferences to groups. This can happen if the environment in which an actor evolves is not well known to the researcher, or if assumptions have not been defined precisely or consistently enough. The latter empirical technique may lead to misleading results since actors can find various reasons to not state their true preferences (Dür, 2008b). Cross-referencing findings by using both techniques is thus advisable, to secure more reliable results.

[18] Frieden contends that there are three ways to establish actors' preferences: by way of assumption, based on prior theory, or through empirical investigations. Assigning preferences per prior theory seems to be an analytically superior approach. However, checking preferences empirically can also ensure the plausibility of theoretical deductions. One must, however, be careful not to confuse actors' strategies – which can be directly observed – and preferences – which may not (Friden, 1999).

In the next chapter, we will show that group members may not share the same preferences at the supranational level. Members operating in given regulatory environment may feel that their utility is threatened through the destruction of existing rents or the imposition of additional costs incurred by potential policy solutions. Conversely, members located in another regulatory environment may see their position fortified. The theoretical framework expects that pools of actors with heterogeneous preferences will find it significantly more difficult to implement consistent and efficient lobbying strategies than pools of actors with homogeneous preferences. Yet, the impact of heterogeneity of preferences on the behaviour of given groups also depends on the leeway that is left for the members to advance their preferences. Some actors may implement rules to contain internal disagreements or, on the contrary, forums that collect the diversity of preferences. It is thus important to examine the many ways members' preferences aggregated among various interest groups. Internal decision-making procedures may play a role. Long-term programmatic commitments also do.

c) Internal decision-making procedures

Institutional rules and procedures matter in all organizations. It is crucial to understand not only who the members are and what preferences they have, but also how their preferences aggregate given known procedures for negotiating common positions and defining efficient lobbying strategies. Of course, voting rules may play a role. There might also be some internal power asymmetries, with some members dominating others in such a way that they can impose their preferences. In addition, rules determining a common position may leave important leeway for interest group secretariats to determine a common position and a strategy.

However, trade associations at the EU level often carve out common positions in an informal and non-transparent manner. To optimize lobbying outcomes, it is important that internal debates and potential disagreement remain hidden, once a

common position is agreed upon. Fortunately, disagreements between competing groups within the same pool of actors are often easier to identify than within-group disagreement. For example, various associations representing employers' interests at the EU level may not necessarily be allies. They may hold different and relatively incompatible preferences that also reveal the level of preference homogeneity. The present dissertation has drawn on this sort of observation to gather evidence of varying preference homogeneity among business and workers' associations. However, the strategic choice approach highlights the risk of confusing strategies with preferences. While preferences are not directly observable, strategies may not accurately reflect those preferences either (Frieden, 1999). In the present dissertation, therefore, I attempt to mitigate those risks by observing strategies in the light of theoretically deduced preferences.

Finally, beyond a narrowly institutionalist approach, a more explicit link between internal dynamics of interest groups and their ability to achieve their very purpose (i.e. the exercise of policy influence) is required (Beyers, Eising and Maloney, 2008:1120-1122). Making those links explicit can shed light on how groups maintain winning mobilization strategies over specific issues. From that perspective, the existence and 'thickness' of groups' long-term programmatic commitments can also play a role.

d) The effect of long-term programmatic commitment

Finally, one can argue that associations' long-term collective commitment to broadly defined objectives can play a considerable role in the process of aggregating preferences. Like internal procedures, this factor can intervene in explaining the level of within-organization preference homogeneity. Put simply, the core values that are promoted by an organization may define the boundaries between the preferences that can appropriately be defended by its members, and those that misalign with the

explicit collective agenda. Thus, they cannot be expressed without undermining the credibility and the raison d'etre of the organization.

Nonetheless, those cannot simply be vague ideas that are disconnected from material interests but rather long-term programmatic commitments of an organization (Hooghe and Marks, 2009:19). Those ideological rigidities may be more or less imperative. Some groups may have loose ideological biases. They may maintain a nebulously defined 'pragmatic line', which does not overly constrain the definition of specific policy positions. Others may be more intransigently committed to some ideal policy objectives so that short-term preferences of certain members over specific outcomes may easily be silenced if they deviate excessively from the organization's general agenda. In those circumstances, such wildly deviating preferences may undermine the credibility of a given group's voice in the future as well as in the present (Hooghe and Marks, 2009:19). In other words, those groups with strong and clear commitments may be more constrained by the necessity to maintain coherent and consistent arguments across policy negotiations.

Normatively rigid organizations and more 'pragmatic' organizations may simultaneously enjoy certain advantages and suffer from shortcomings. As just suggested, organizations with long-term commitments may not be as free to select positions that most closely reflect the short-term preferences of their constituents. However, that might also help maintaining strategic coherence, because they can easily silence passing and short-lived interests that only undermine the homogeneity of preferences within the organization. By contrast, groups with a more pragmatic agenda may be able to advance the material interests of their members without resorting to a thick normative commitment to some quasi-ideological beliefs. They may find it easier to select specific policy positions in line with their constituents' material interest regarding specific policy issues. And yet, a plausible expectation is that it will be more difficult to silence dissenting voices in case of internal heterogeneity of preferences over policy outcomes. This is because there might not

be enough long-term commitments to value the relevance of a specific interest for the advancement of more general long-term policy commitments.

2. Interest groups strategies: Lobbying intensity

a) 'Insider' v. 'outsider' strategies

Interest groups do not enjoy formal voting rights in the legislative decision-making process. Therefore, their potential influence on policy outcome relies entirely on the direct and indirect relations that they maintain with, and the pressure they put on, legislative institutions. In that regard, interest groups may resort to various sorts of strategic channels. Some interest groups also seem to enjoy privileged access to the policy process (Coen, 1997) while others remain marginal (Grant, 2004). Plausibly, 'insider' groups would tend to use their privileged access to decision makers to make their voice heard, while marginal 'outsiders' are more likely to resort to strategies involving access to the media, street demonstrations, online petitions and other public strategies in the hope to put pressure on decision makers and to expand the scope of conflict (Beyers, 2004) to attract public attention. Yet, convincing research has shown that one strategy is not necessarily exclusive of the other (Binderkrantz, 2005).

In any case, interest groups operating in Brussels undeniably enjoy a wide variety of alternative access to the policy process, even when they represent diffuse interests (Pollack, 1996). They may also enjoy different type of resources in various quantities, and that has been shown to impact on access and strategies (Eising, 2007). One can also argue that certain groups are routinely privileged within the policy process (e.g. Schneider and Baltz, 2003).

The logical implication is that different strategies and different type of resources must be compared across groups competing for influence over policy outcomes.

b) Lobbying intensity, strategies and influence

There are at least three mutually exclusive dimensions that can be examined with a view to explain alternative dependent variables. We can study the intensity of lobbying undertakings initiated by various pools of interest groups on given issues, trace their strategies of influence or examine the influence they seem to have on policy outcome in terms of policy attainment.

The distinction between lobbying intensity, strategies, and influence poses some difficulties. First, measuring lobbying intensity can be complex. Considering lobbying intensity in terms of 'mobilization' is conducive to confusion. Mobilization is reminiscent of social movement studies and draws attention to street protest and other outsider lobbying strategies. However, interest groups may involve a wide variety of resources in the execution of vastly different lobbying strategies. What do interest groups mobilize? They may allocate financial resources, expert knowledge, grassroots members, media and institutional connections. Not only is it difficult to distinguish between those different resources, it is equally complex to compare indicators that are different in kind, although they contribute to measure the same concept. In addition, assuming that groups may invest bundles and mixes of different kind of resources to maximize their chances of success, it will be difficult to evaluate an aggregate those cumulated resources.

Taking stock of those difficulties, recent works have exclusively focused on influence. Often students of interest groups have made the decision to disregard mobilization and strategies altogether to concentrate on measuring the gap between preferences expressed by interest groups and final policy outcomes (Dür, 2008; Dür and De Bièvre, 2007; Klüver, 2009; 2013). Yet, this approach also carries some limitations. It tends to over-represent or, on the contrary under-represent actual influence. Certain groups might benefit from policies in line with their preferences simply by chance. Other may have great influence but equally powerful competitors.

Therefore, they may invest massive resources to eventually only garner little visible success, which may look insignificant if they are not put in perspective with the competition they face. Therefore, certain groups, faced with mighty challengers holding opposite preferences will still be able to avoid greater policy costs by pulling their weight into the decision-making process as countervailing powers (McFarland, 1987; Fung, 2003).

Expressed preferences may also not reflect true preferences, hence the risk in confusing strategies and preferences (Dür, 2008b; Frieden, 1999). Another discrepancy may emerge from disregarding the preferences of the legislators themselves. If preferences happen to be shared by legislating institutions as well as given interest groups, it will become difficult to find out whether policy outcomes are the result of interest groups' influence or legislators' own initiative. In the present work, I assume that legislators lack strong preferences over the content or consequences. Instead, they hold preferences over policy stringency. However, this assumption can be amended in the face of empirical evidence. Here again, the concept of countervailing power may play a key role, one that is scarcely observable if one just examines preference attainment.

c) The problem of politicization

It is no longer possible to argue that the EU policymaking arena evolves without politicization. Indeed, the EU intervenes in sensitive issues that are not only relevant to member states, various national authorities, and businesses but in an increasingly tangible and direct way to the citizenry as well. EU policies clearly have enormous distributive consequences, and it is thus not surprizing that large sections of the EU population now identify themselves as losers in European integration. In addition (and as a consequence), whereas the media once ignored the EU as a political entity, the

spotlight is now squarely focused on Brussels. The EU is no longer insulated and it means that politicization is more likely and more frequent.

In fact, the question of politicization can help make sense of certain interest groups' strategies. Politicization can be used as a weapon to increase public mobilization beyond the narrow boundaries of a given constituency through the polarization of public opinion (De Wilde, 2011). The successful politicization of given policy issues may force reluctant decision makers to alter their position by increasing the costs attached to their initial one, e.g. in terms of the prospect of re-election. It might indeed be a powerful tool that may determine a policy campaign's success or failure.

However, politicization raises at least three sorts of problems. First, vague or broad definitions can make it hard to measure. Second, it may be easy to confuse strategies and outcomes of politicization. If a policy attracts mass public attention to the point that it becomes key to the outcome of periodic elections, we might say that it was politicized. But interest groups may also hold strategies that include attempts at politicizing an issue explicitly. Therefore, in the context of the EU, strategies of politicization can be understood in the sense suggested by Hooghe and Marks (2009); namely, as a strategy that connects one issue to a neighbouring set of issues. If the cost and/or benefits of given policies are diffused over large constituencies, then it may be particularly hard to mobilize grassroots members. Hence, for the groups that represent them, politicization may indeed help increase the perceived potential costs of given outcomes for stakeholders and even potential actors that are only remotely concerned. It might motivate a large portion of the population to mobilize, forcing decision makers to negotiate more transparently. There are two elements of a definition that can be borrowed from Philippe Schmitter's 1969 paper: (1) increased controversiality; (2) widening audience.

In the next chapter, I select and analyse regulatory competition between member states as a major policy relevant problem in today's Europe, because it is essentially conducive to distributive conflicts between rival member states that consequently hold heterogeneous preferences over policy outcomes. In turn, they should obviously lead to seemingly inescapable deadlock within the European critical instance of the joint-decision category of policymaking mode. I then introduce hypotheses inspired by a rationalist approach to supranational decision-making and the liberal intergovernmental emphasis on both interest groups and member states' attention to economic benefits to explain why policy outcomes may still vary across cases.

II. Taming regulatory competition: Interest groups v. the JDT

The JDT model detailed in the previous chapter posits that the first logical step is to analyse a policy problem stemming from interdependence between voting actors – in our context, the member states – that is especially conducive to the specific kind of deadlock phenomenon under study. Therefore, I demonstrate why regulatory competition is an especially interesting instance of a problem that is most likely result in deadlock within the Council. Based on rationalist assumptions, one can theoretically deduce the preferences of the actors that are included in the extended decision-making model. These are the Commission, the Parliament and economic operators, whose preferences are aggregated through two different channels: 1) member states within the Council, and; 2) interest groups representing them at the supranational level. Some associations represent the interests of operators in specific sectors, such as the trade union associations in the construction sector, which is mirrored by its sister organization that represents businesses. Other associations aim to aggregate more encompassing interests and represent national associations at the European level across sectors. The European Trade Union Confederations (ETUC) and BusinessEurope are prime instances. Because the selected empirical cases mainly deal

with issues that touch upon labour and employment issues, interest groups are collectively referred to as 'the social partners' as they are represented at the supranational European level.

A. Policy problem: Regulatory competition as a prisoner's dilemma

Which patterns of regional integration lead to regulatory competition and how may they affect the preferences of actors engaged in policymaking interactions? As already discussed, Fritz Scharpf (1999) demonstrated that different patterns of integration are immensely dependent upon variances in decision-making rules. Consequently, the dismantling of domestic regulatory standards (i.e. 'negative integration') – mainly through mutual recognition – emerged as a ubiquitous pattern of integration because it does not require the assent of the member government under variously demanding voting rules. Rather, the Commission and the European Court of Justice are relatively free to adopt the supranational-hierarchical mode through the direct activation of elusive treaty provisions that are typically interpreted as a quasi-constitutional commitment to liberalization and free movement of capital, goods, services and workers. In contrast, the adoption of re-regulatory market correcting measures (i.e. 'positive integration') typically demands European-wide harmonization, which must be agreed upon by virtually every member state. Hence, the adoption of otherwise necessary policies may well get trapped into policymaking deadlock due to the JDT (Scharpf, 1988; 2006).

In what follows, I analyse a typical policy problem of interdependence where member states engage in reciprocal strategic interaction and adapt their domestic policies in a race to protect their respective level of competitiveness. More often than not, such coordination by mutual adjustment is triggered because of negative integration based on the supranational-hierarchical policymaking mode. It is analysed in a manner that shows the underlying rationale of regulatory competition in the wake of negative integration by locking the participants into a prisoner's dilemma constellation that is eventually conducive to the JDT (Scharpf, 1999). Hence, a game

theoretic reasoning is utilized in a heuristic manner to help understand the dynamics behind operators' preferences and decisions. Regulatory competition can create an intense distributional conflict between winners and losers – those that have a direct stake. The definition of their meta-preferences[19] depends on an accurate formulation of the policy problem. The background understanding of the distributional conflict opposing the losers and the winners of regulatory competition is necessary, because their preferences are then aggregated at the EU level according the two distinct channels. On the one hand, domestic operators' preferences are aggregated within member states' preferences represented in the Council. This channel – coupled with voting rules – is key to figuring eventual policy outputs in the classic version of the JDT model. On the other hand, those same operators' preferences are aggregated according to different patterns within supranational social partners – identified as the main interest organizations to be included in the model. They are aggregated within encompassing trade associations representing employers and employees. They are also aggregated within more specialized associations, representing SMEs, industry-specific operators.

In the game played by the member states, the mutual recognition of their respective process standards incentivizes low-standard countries to free ride on high-standard countries. Regulatory standards can be interpreted as public goods, which may no longer be provided in the absence of timely cooperative reaction from member states, because they might otherwise have an interest in lowering their process standards to remain competitive in an open market.

In addition, the game generates external costs and benefits for actors that do not directly play. Anticipating the case selection method, we assume that the policy

[19] In this dissertation, meta-preferences refer to the underlying interests that are deductively attributed to actors. Those interests are relatively constant across strategic interactions and serve to deduce more specific preferences over outcome within specific constellations (Frieden, 1999).

problem involves working conditions and welfare protections in the job market as a specific instance of process regulations. We then stylize those external actors as 'employers', on the one hand, and 'workers', on the other.

To understand the dynamics of regulatory competition, let 'Country A' and 'Country B' designate two interdependent national markets engaged in trade relations. Hence, they are encouraged to dismantle domestic barriers to free movement of workers because of a competitive interaction. In other words, they engage in an interdependent economic relation, in line with the premises of the JDT theory. And they initially do so because an original decision was adopted to generate negative integration, for example, through mutual recognition. Those states may be facing the adverse side effects of the free movement of workers as such, but they may also be accumulating the benefits of the freedom to provide services across borders. Eventually, both may impact similarly on working conditions and job regulations, since pure services are characterized by the simultaneity of production and consumption. In other words, the freedom to provide pure services across borders necessarily implicates the posting of the workers who produce them[20] (Schmidt, 2009).

In line with rationalist assumptions, actors consistently pursue self-interested objectives in an opportunistic manner. Therefore, 'Country A' and 'Country B' individually seek to maximize fiscal revenues and balance of trade. Given downward deregulation supporting the intensification of workers' mobility, the easiest way to increase competitiveness relatively to the counterpart country is to reduce the production costs attached to regulatory standards for investors and firms (i.e. employers). Hence, 'A' and 'B' are put in a position where they may engage in open-ended competition; they will foreseeably respond to incentives that influence them to lower their respective regulatory standards at a more rapid pace than their

[20] Hence, the situation would be slightly different for 'posted services' because the service can 'travel' independent of its producer (e.g. financial services or postal services). Those types of products are excluded from the present analysis.

competitors. This situation is practically inescapable if one country starts the game with significantly lower regulatory standards than the other, as it mostly occurs in the real world. Cooperation is relatively unlikely.

Both businesses and workers are affected by this game. The former seek increased profitability and, where relevant, protection from foreign competition at home. Therefore, they are expected to engage in venue shopping, favouring the economic environment that offers the least demanding and costly process standards. But they will also seek to safeguard existing obstacles to foreign competition in markets where they are already established to protect existing rents. The latter simultaneously demand greater job opportunities, welfare protection and improved working conditions. Table 2 proposes a simplified tabulated representation of this prisoner's dilemma that helps figuring out the dominant strategy.

Table 2. The prisoner's dilemma game of regulatory competition

Two nodes: (1) Compete (2) Welfare		Country B	
		WELFARE	COMPETE
Country A	WELFARE	Outcome I: 1,1	Outcome II: -1,**3**
	COMPETE	Outcome III: **3**,-1	Outcome IV: 0,0

The table shows that, under the key assumption that each player expects the other to be as self-interested and opportunistic as herself, the dominant strategy is to freeride rather than cooperate. To simplify the game, the payoffs are calculated assuming that both countries have similar levels of regulatory standards in the initial position. But again, this is not the case in the real world, where regulatory competition is not only determined by the expected behaviour of the counterpart player but also by the initial gap between respective regulatory standards. In the case of initially asymmetric

regulatory standards, the prisoner's dilemma is even more entrenched because one player already benefits from more competitive conditions before making her first move. In addition, those lower standards do not inhibit accessing other member state markets because all are submitted to regulatory mutual recognition. This latter condition prevents the 'California effect' from materializing.

Therefore, it is possible to deduce distributional consequences for external winners and losers in each possible outcome. In 'Outcome I', employers lose opportunities to reduce production costs by moving to a low regulatory standards environment. Workers win quality working conditions and welfare protections. In 'Outcome II' and 'Outcome III', employers win opportunities to reduce production costs by moving to low regulatory standards environments, thereby generating incentives for high regulatory-standard countries to adjust downward to remain competitive. The long-term interaction provides strong incentives to both Country A and Country B to freeride. Therefore, their mutual adjustments will inexorably lead them to shift toward 'Outcome IV'. By contrast, workers in low-standard countries gain from a more dynamic job market in the short run, while workers in high-standard countries will struggle in a correspondingly more depressed job market. However, in the long run, strong incentives to shift towards the dominant strategy lead to a risk that all workers may eventually suffer from weakened working conditions and welfare protections in an environment that eventually stabilizes at a generally lower level of regulatory standards. Finally, in 'Outcome IV', employers can lower their production costs and win in the short run. Consequently, all workers experience a considerable deterioration in regulatory protections and working conditions.

Hence, the non-cooperative game of regulatory competition, which is characterized as a prisoner's dilemma, produces costs and benefits for actors outside the game. This results in distributional conflicts between firms and workers both within and across borders. If all the players must unanimously agree on a cooperative solution for 'Outcome IV' not to occur, there does not seem to be any simple

theoretical way out of the dilemma. The status quo is most likely to endure because of the JDT. For the analyst, the challenge thus lies in developing theoretical frameworks that have the potential to explain why cooperative outcome – materializing in successfully-negotiated policy outputs within the joint-decision system – can still be observed under JDT conditions.

B. The dependent variable: Policy output

It is already clear that the dependent variable is the policy output of EU negotiations within the joint-decision system in response to actual or expected regulatory competition. It remains for a detailed conceptualization of the dependent variable to be proposed in order to determine actors' preferences over outcomes.

If deadlock indeed persists at the end of the negotiation, the EU collectively fails to agree on a new equilibrium. Therefore, the adoption of a positive policy output cannot materialize. The status quo will thus persist. If, on the contrary, some compromise can be found around a positive market-correcting policy, the instrument might be more or less stringent depending on the extent to which actors involved in regulatory competition (i.e. member states) are willing to change their behaviour and credibly commit to such change.

The level of restrictive stringency is measured along a continuum (Trubek, Cottrell and Nance, 2005) that goes from 'lenient' to 'purely' stringent policy instrument (Abbot and Snidal, 2000).[21] According to Abbot and Snidal (2000), three attributes within the selected policy instruments can be singled out to measure the

[21] A measure of policy stringency as understood by Abbot and Snidal (2000) is neutral regarding whether cooperative agreements are more or less restrictive. Restrictiveness means that agreements impose more obstacles to trade to limit the risks of regulatory competition. Market-correcting measures are essentially restrictive, as opposed to market-making measures. In this dissertation, we are concerned with explaining the conditions under which restrictive measures can be adopted and how stringent they might be.

level of stringency: 1) from vague to precise policy goals; 2) from vague to precise obligations and; 3) from lose to dissuasive sanction mechanisms of non-compliance. At one end of the continuum, a precise policy with dissuasive sanctions mechanisms that deviates from the initial regulatory competition status quo will be stringent. At the other end of the continuum, it will be lenient.

However, this conceptualization can lead to misconceptions for this research, which examines whether collective actors can exit the status quo of regulatory competition so that regulatory standards can still be satisfactorily provided. Therefore, we focus on the potential adoption of more or less stringently restrictive regulation. Therefore, when assessing alternative variations in the dependent variables, one must evaluate the consequences of policy alternatives on national regulatory environments: are given supranational policies likely to translate into more leniently regulated market environments or more stringently regulated market environments? Eventually, regarding the game theoretic model, one must examine how stringently a cooperatively-negotiated policy decision is likely to alter the most likely outcome within the prisoner's dilemma. In that sense, a policy output will be decisively stringent if it alters the game from a typically non-cooperative game – the prisoner's dilemma of which regulatory competition is an instance – to a more cooperative one.

C. Policy preferences, legislative actors and actors without formal power

1. The actors

Within the EU decision-making process, one intergovernmental institution – the Council – two supranational institutions – the Commission and the European Parliament – and two broad categories of supranational interest groups – the European Business Associations (EBA) and European Trade Unions (ETU) - are relevant

to the policy areas investigated in the present work. Taken together, they designate the social partners.

On the intergovernmental side, the Council aggregates the preferences of the member states. Again, given the potential for regulatory competition to create controversy due to distributive consequences for the actors, we assume that the informal de facto voting rule will be quasi-unanimity even when the formal voting rule is qualified majority. This means that policy compromises will only be politically acceptable if they can gather virtual consensus among the member states. But, under rationalist assumptions, member states are not typically expected to adopt cooperative bargaining attitudes. Rather, problems are so controversial that solutions can only be politically acceptable if they can be adopted under demanding informal voting rules.

The theory expects that regulatory competition between states with initially asymmetric regulatory standards will lead to decision-making deadlock within the Council. The potential effect of member states' endogenous parameters is disregarded, especially potentially asymmetric bargaining power within the Council. However, we empirically identify that certain member states act as coalition leaders. Such potential leaders exist in both camps. Therefore, this parameter can be considered to generally cancel out in the policy areas examined. Instead, the dissertation takes for granted that exogenous factors are most significant in the Council (Bailer, 2004:99-123; 2010:743-757). Council voting rules and other environmental variances – e.g. the European Parliament and the Commission bargaining power – explain Council outcomes. This is also analytically consistent with Scharpf's JDT theory. On the supranational side, the European Parliament and the Commission are institutions with formal decision-making power within the ordinary procedure, together with the Council.

Finally, two categories of social partners aggregate the preferences of economic operators at the EU level. Those operators may identify as losers and winners because of actual or expected regulatory competition at the supranational level. Again, these are branded in a stylized manner as being the supranational organizations of trade unions, on the one hand, and the supranational business associations, on the other. Those social partners are cast as de facto decision makers, through their lobbying activities before the European Parliament and the Commission. Although they do not enjoy formal decision-making power under the treaties, they do influence policy decisions and must therefore be accounted for in any theory that strives to explain policy outputs.

2. Actors' preferences over policy outcome

On the intergovernmental side, assuming that the Council is stuck in deadlock due to the JDT, its aggregated policy preferences (i.e. preference over policy output) lean toward hueing to the status quo (i.e. deadlock) over lenient policy, and both of these over stringent policy. On the supranational side, in line with rational-choice assumptions, one can assume all actors are goal-oriented self-interested utility-maximizers. In that regard, the European Parliament and the Commission should compete with the Council (and between one another) to increase their relative institutional power. Hence, once the Commission has transmitted its initial proposal to the European Parliament and the Council, if the latter is irremediably deadlocked due to the JDT, and the policy fails to be adopted, this constitutes a policymaking failure. It can be viewed as an indicator of low EU decision-making capability and decreasing supranational institutional bargaining power relative to the Council. Hence, a rationalist perspective assumes that the European Parliament and the Commission will prefer a stringent policy solution, over a lenient one, and both of these over the continuation of the status quo. However, the political character of the Parliament means that that order of preferences may be impacted by ideological bias among

MEPs. Certain MEPs maintain concurrent objectives if their political affiliation dictates so and in accordance with their nationality.

The relevant social partners operating in Brussels aggregate – at the supranational level – the preferences of losers and winners of regulatory competition. It is assumed that the losers of regulatory competition display clear preferences toward stringently restrictive policy solutions, over lenient ones, and both of these over the comparatively less restrictive continuation of the status quo. This is because the status quo, which is detrimental to the losers, means that regulatory competition would persist. Under the status quo, losers would continue withstanding losses.[22] By contrast, we assume that winners' preferences lean toward the preservation of the status quo over a lenient policy solution and both of these over a stringent policy solution. Again, this is because the status quo equates to the maintenance of regulatory competition, while restrictive market-correcting policy intervention that modifies the status quo would obliterate winners' benefits. Under the status quo, the winners continue to benefit from regulatory competition.

In the rationalist perspective, one should further assume that supranational trade associations aggregate preferences of winners and losers according to different rationales depending on the rigidity of long-term organizational policy commitments within two categories of interest groups: business associations and trade unions. Groups' preferences over outcome are not only the product of short-term pragmatic interests per the anecdotal pattern of distributional conflict, free of any institutional context. On the contrary, one must "resort to institution-specific information for the specification of actor capabilities, cognitions and preferences" (Scharpf, 1997:22). In other words, in the examination of the generic categories of institutions, the specific

[22] Even in areas in which the Court has not had the opportunity to shape the status quo toward a less restrictive state of affairs, the actors negotiate in the shadow of the Court's future decisions. In general, the actors consider the risk that the Court might favour lesser restrictiveness through mutual recognition, as it has done so repeatedly in the past.

features of different organizational settings can affect actors' preferences. Hence the theoretical framework takes account of potential variances in the degree to which organizations identify with long-term policy commitments to the EU as an ongoing political project. This can indeed play a role as an intervening variable to explain variations in the degree of preference homogeneity among social partners.

On the one hand, we might expect business groups to hold pragmatic values in designing collective policy positions. Their behaviour will rely on a rational understanding of their members' distributional position because of regulatory competition. Subsequently, their lobbying behaviour may be affected by short-term cost-benefit analysis advanced by their members regarding regulatory competition. Business groups' strategies may more noticeably depend on members' rationally-ordered preferences over policy outcomes. Hence, their members' actual preferences over policy outcome may be relatively more heterogeneous. Losing members of the business community – e.g. large rent-seeking firms seeking protection from foreign competition at home – may happen to prefer more stringently restrictive policy instruments over lenient policy instruments, and both of these over the status quo. Winning members of the business community, on the contrary, would prefer the preservation of the status quo over lenient policy instruments and both of these over stringent policy instruments. If business operators identify themselves as absolute winners from regulatory competition, then the business associations that represent them at supranational level will homogeneously prefer the unrestrictive character of the status quo over lenient market-correcting alternatives and either of these over stringent market-correcting alternatives. But, for example, if large groups of small-to-medium sized enterprises (SMEs) or businesses in specific sectors consider themselves likely to lose from unrestricted liberalization, then the associations that represent them are likely to have preferences that will distance themselves from other associations.

On the other hand, supranational confederations of trade unions noticeably express a more intense and ubiquitous commitment to long-term objectives in favour of a supranational political project that is relatively incompatible with de-regulation, regardless of the distributional position of their individual affiliates. In other words, if some members are likely to benefit from regulatory competition – because low-standards country will probably create more jobs for workers – they are more likely to be silenced at the supranational level in favour of the losers. This is because advocating re-regulation rather than regulatory competition is significantly more consistent with trade unions' long-term normative commitment toward a more 'Social Europe' over a 'Neo-liberal Europe'. Hence, in the wake of regulatory competition, supranational confederations of trade unions are expected to display relatively stable preferences toward stringently restrictive policy, over lenient alternatives over the perpetuation of the status quo. Table 3 summarizes actors' preferences over outcome.

Actors	Intergov.	Supranat.		Social partners			
	Council	EP	EC	Business			Trade unions
Preference concentration	Hetero	Ho-mo	Ho-mo	If Homo	If Hetero		Homo
					Losers	Winners	
Policy preference	SQ	S	S	SQ	S	SQ	S

	L	L	L	L	L	L	L
	S	SQ	SQ	S	SQ	S	Q

Table 3: Policy Preferences in the Wake of Regulatory Competition

SQ: status quo; L: lenient; S: stringent.

D. Exit from the JDT: An extended framework

So far we argued that even though formal decision-making rules do matter in explaining policy outputs a noteworthy variance can still be observed when holding decision-making rules constant across policy negotiation cycles. This suggests that other important parameters are at play, particularly variations in interest organizations' lobbying undertakings.

Given deadlock within the Council, and assuming relatively constant and homogeneous Commission's and Parliament's aggregated preferences over outcomes, the theoretical framework hypothesizes that a variance in competing interest groups' preferences affect their lobbying behaviour, which significantly contribute to explicate variations in policy outputs. Based on the argument about interest groups' preferences, it is expected that this variation mainly occur among business actors.

Hence, the following hypotheses predict variations in policy outputs.

1. Hypotheses

Given initial deadlock due to the JDT in the Council, the more heterogeneous business groups' preferences are the more stringent the policy outcome will be.[23] In other

[23] The theoretical section on interest groups does acknowledge the potential effect of relative variation in material resources, next to preference homogeneity. However,

words, the more internally divided business associations' members are in terms of preferences over outcome, the more successful trade unions will be in furthering preferences that deviate from the status quo before supranational institutions, which are generally assumed to prefer more stringent market-correcting supranational solutions, as well. Put differently, if the Commission, the European Parliament and interest groups operating in Brussels together feature more homogeneous preferences, their collective bargaining power will increase relatively to the Council. Hence, the Council is more likely to deviate from the status quo toward relatively more stringent market-correcting policy solutions as compare to the initial deadlock.

The analysis is segmented in two analytical steps, in line with a strategic-choice approach (Lake and Powell, 1999). In the first step, the independent variable is the constellation of preferences among supranational interest groups. We argue that variations in business associations' internal structure of preferences is key in explaining variations in the first dependent variable, which is the level of mobilization of those business associations relative to their competitors, i.e. trade unions. In the second step, this last parameter is taken up as an independent variable affecting policy output depending on the additional political leverage provided by social partners lobbying undertakings in the Commission and the Parliament against

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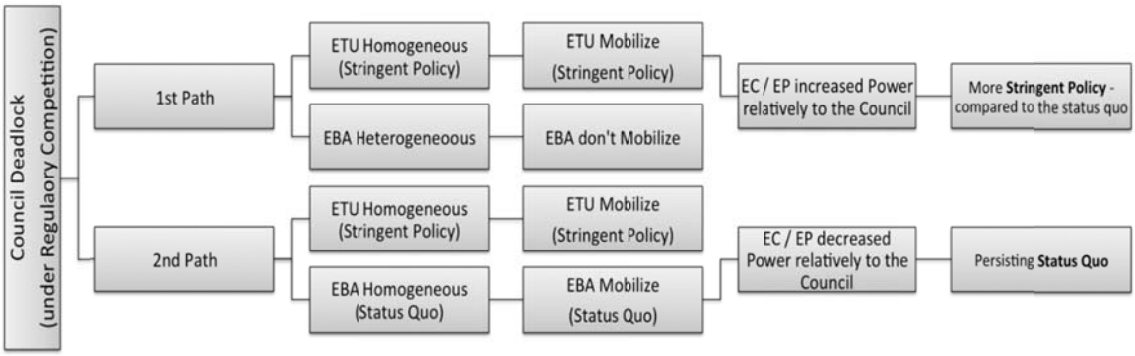
evaluating those relative variations between various groups is difficult in practice. For example, the volume of staff does not necessarily may not always provide a convincing indicator, since certain groups could also outsource their lobbying endeavours and mobilize other groups' staff. This last possibility may only occur if two groups hold similar or converging preferences. Therefore, preference homogeneity can be understood as a precondition to the mobilization of material resources. In other words, it is not entirely clear whether material resources should be on the independent or on the dependent side of Hypothesis 1. In addition, financial resources are not always stated in a transparent and meaningful way in activity reports. Therefore, in order for the explanatory model to remain theoretically consistent, I assume that material resources are equally distributed among actors.

intergovernmental structural JDT. Figure 1 summarizes the causal path that links the independent variable to the dependent variable.

Figure 1: Causal path from supranational interest groups' preference structure to final policy outcome



2. First step: Preferences over outcome and lobbying intensity

Given the initial occurrence of a JDT in the Council – or the shared perception of a flagrant risk of it – the first analytical step consists in predicting the level of competing interest groups lobbying intensity relative to one another. One can argue that the parameter that crucially affects interest groups' lobbying intensity lies in the aggregation of preferences of losers and winners from regulatory competition, under the condition that such aggregation fits with the long-term political commitment of competing social partners (Hooghe and Marks, 2012). In other words, the social partners' ability to successfully mobilize in favour of any given policy output depends on the preference homogeneity relatively to competing social patterns' policy preference homogeneity.

In the present model, the relative variation in material resources is not considered at the theoretical level. This does not mean that such a variable is not entirely relevant. Nonetheless, a valid measure of material resources is very difficult in practice. For

example, the volume of staff may not always provide a valid indicator of resources. Indeed, various groups may outsource their lobbying endeavours and mobilize other groups' staff in their lobbying endeavours. This may only occur, however, if two groups hold similar or converging preferences. Therefore, preference homogeneity can be understood as a precondition to the mobilization of material resources. Consequently the first hypothesis is based on the assumption that material resources are equally distributed among actors.

The social partners' membership structure consists in the expected or actual losers and winners of regulatory competition in the event of the persistence of the status quo. The losers are assumed to prefer stringent market-correcting instrument, over lenient market-correcting instrument, over the status quo of regulatory competition. By contrast, the winners are assumed to prefer the persistence of the status quo, over leniently restrictive policy instrument, over stringently restrictive policy instrument. Therefore, an organization that only aggregates the preferences of winners (or losers) has more homogeneous preferences over outcomes than an organization that aggregate a mix of both losers' and winners' preferences. This reasoning can be formally expressed through the following hypothesis.

Hypothesis 1 (H1): The more homogeneous the preferences of a category of social partners are relative to a competing category, the more intense its collective lobbying efforts relative to the competition.

3. Second step: Inter-institutional interaction and policy output

In the second step, policy output is the final dependent variable. It reflects how the outcome dictated by the game theoretic model is likely to be affected. The Commission and the European Parliament (the supranational institutions) and the Council (the intergovernmental institution) are the actors directly involved in the interaction.

Let us recall that Council members are assumed to hold heterogeneous preferences over outcomes, so that, given unanimity or quasi-unanimity voting-rules, the Council's aggregated default preference leans toward the persistence status quo, over leniently restrictive policy, over stringently restrictive policy. It is further assumed that the European Parliament and the Commission are supranational power-maximizing institutions. Thus, they will plausibly lean towards policy outputs that increase the potential clout of the supranational actors relatively to the intergovernmental Council. When a proposal is transmitted by the Commission to the European Parliament and the Council for codecision, if a policy instrument is not adopted because the Council is deadlocked, it signals that the supranational institutions' leverage relative to the Council is decreasing. Thus, the Commission and the European Parliament are assumed to prefer stringent policy output over lenient policy output and both of these over the status quo. In other words, the supranational institutions and the Council have relatively conflicting aggregated preferences over policy outputs.

Therefore, variance in the dependent variable is affected by the interaction between those actors, given a variance in the relative bargaining power of supranational institutions due to interest groups' mobilization. In those particular circumstances, variations in policy outcome will depend on whether supranational institutions have the backing of a winning coalition of interest groups aggregating losers' and winners' preferences at supranational level. If the winning category of interest groups – i.e. those groups best able to operate successful lobbying strategy according to H1 – hold preferences that are in line with supranational institutions' preferences, they will be willing to provide political backing to supranational institutional forces. The European Parliament and the Commission are likely to gain bargaining power in their negotiations with the Council. Hence, chances are that they will be collectively more successful in obtaining that the Council deviate from de facto deadlock stemming from the JDT.

Supranational institutions are well aware of the Council's rank ordering of preferences, for the likelihood of intergovernmental deadlock is common knowledge at this stage. Trade union confederations and the supranational institutions may hold compatible preferences for stringently restrictive policy outputs. However, it does not automatically mean that the adopted instruments will necessarily be stringent. It only means that policy output is likely to deviate from the status quo of negative integration toward a more stringent market-correcting policy outcome along the dependent variable. In fact, given the Council's assumed preferences for the status quo due to the JDT, the interaction between supranational institutions and the Council may lead to the adoption of a lenient market-correcting policy as an acceptable compromise between the Council and supranational institutions' primary preferences.

For example, Frieden (1999:42-45) proposes a stylized example of a situation in which a regulatee would prefer outcome 'x' over outcome 'y' over outcome 'z'. However, the regulatee is also well informed that the regulator, which has the final word, would prefer outcome 'z' over outcome 'y' and would reject outcome 'x' under every circumstance. Given this knowledge, the regulatee would be well advised to lobby the regulator in favour of 'y' - rather than 'x' – as a reasonably feasible compromise instead of unwisely insisting on supporting 'x' at the risk of receiving nothing in the last instance.

Thus, when the hypothesis posits that an increase in supranational institutions' bargaining power explains why the Council may deviate from its original status quo position toward a relatively more stringent market-correcting policy output, it does not mean that it will agree on adopting a stringent policy as such. Rather, it means that the Commission and the European Parliament, given their strengthened political leverage according to H2, are well advised to profit from their new window of opportunity to further a compromising policy alternative that deviate from the status quo with the backing of winning interest groups. This policy is not likely to be

remarkably stringent though. This suggests an additional condition to H2. H2 will be confirmed only if the Commission and the European Parliament do not use increasing bargaining power to advocate extreme values in the dependent variable, if the Council would reject such an alternative under every condition. This argument leads to propose the following general hypothesis (H2).

Hypothesis 2 (H2): The more homogeneous the preferences of supranational institutions and interest groups are, the greater supranational institutions' bargaining power relatively to the Council will be. Therefore, policy outputs are more likely to deviate from the Council's initial preferences toward the Commission's and the European Parliament's preference for more stringently restrictive policy output.

In order to avoid confusion, H1 and H2 function together as two segmented predictions of two distinct analytical steps. The dependent variable of H1 is taken up as an instrumental element of explanation for the variation of the dependent variable in H2. Yet, the formulation of H2 may still be confusing.

H2 suggest that the narrower the distance between supranational institutions' preferences and *winning* social partners the greater their collective leverage on the Council. The formulation "*winning* social partners" is a simplification. But it hopefully conveys the idea that the group of social partners that holds the greater relative homogeneity of preferences will also implement the most intensive and efficient lobbying plan – as H1 suggests. The following schematic render the simple idea that the dependent variable of H1 is taken up as an independent factor in H2.

Figure 2: Schematic representation of the two analytical steps

However, in this visual representation, the causal link between the variation in social partners' lobbying intensity and the variation in policy stringency does not tell anything about the causal link that ties them together. Lobbying develops in a complex environment of inter-institutional negotiations in which decision-makers also hold their own preferences. H2 formulation aims to reflect the nature and effect of this environment and those institutional actors given the joint-decision trap, notably by including the distance between supranational decision-makers' and *winning* social partners' preferences.

PART TWO:

MEASUREMENT STRATEGY

III. Empirical measurement of variables

A. Summary of hypotheses, variables and indicators

To summarize, the two key hypotheses are:

Hypothesis 1 (H1): The more homogeneous the preferences of a category of social partners are relative to a competing category, the more intense its collective lobbying efforts relative to the competition.

Hypothesis 2 (H2): The more homogeneous the preferences of umbrella associations are, the greater supranational institutions' bargaining power relatively to the Council will be. Therefore, policy outcome will deviate from Council's initial preferences for the status quo ante.

Four variables are conceptualized: (1) preference homogeneity of competing interest organizations, (2) their relative intensity of their lobbying intensity; (3) the ability of supranational organizations to build coalitions against the JDT, and; (4) the corresponding variation in policy output.

Thus, it is possible to lay out the argument in greater detail as follows: (1) Competing social partners may hold varyingly homogeneous preferences. Organizations' affiliates may disagree on the best output to pursue with a view to maximizing their utility. Various organizations that would normally be expected to be on the same side may also find themselves defending conflicting positions. One might expect that such a level of disagreement would have consequences for (2) the intensity and effectiveness of the lobbying undertakings of those organizations. This is the dependent variable in the first hypothesis. In the second hypothesis, the latter variable becomes an element of the independent variable. In effect, the theory posits that (3) if there is a greater homogeneity of preferences for stringently restrictive policy outputs on the part of social partners, they may provide additional resources to supranational institutions in breaking the structural deadlock in the Council. One

would, therefore, expect (4) variation in policy output as the dependent variable that we ultimately aim to measure.

The following table summarizes the variables, corresponding indicators and the empirical techniques used to assess the variations in those indicators. The means of measurement are ranked according to the decreasing added value that they can bring in terms of reliability.

Table 4. Variables and measurements

Variables	Indicators	Means of measurement
Preference homogeneity	Identified actors with deviant preferences within a group relative to fewer in competing group	1. Semi-structured interviews 2. Content analysis 3. Secondary sources when they exist
Relative mobilization	Insider strategy: • Frequency of contacts with decision makers • Clarity of the message addressed • Actors evaluation of relative lobbying intensity Outsider strategy: • Remarkable protests, both national and European • Occurrence of groups' position mentioned in specialized press	1. Semi-structured interviews 2. Content analysis 3. Secondary sources when they exist
Supranational coalition	• Aggregated institutions policy position relative to one another • Inter-institutional frequency and intensity of contact • Narrative provided by interviewees and reflected in specialized media	1. Semi-structured interviews 2. Content analysis 3. Secondary sources when they exist
Stringency	• Ranking of alternative policy measures • Interviewees' analysis/opinion	1. Qualitative legal analysis 2. Semi-structured interviews 3. Secondary sources when they exist

B. Policy Output: Status quo v. policy stringency

We distinguish between negotiation cycles that led to the persistence of the status quo – 'negative cases' – and negotiations cycles leading to the adoption of more restrictive regulatory outputs – 'positive cases'. Cases are selected within both categories. Then, within the pool of positive cases, we measure whether the policy outputs are conducive to creating a more or a less stringently restrictive regulatory environment, as compared to the status quo. Therefore, the dependent variable can take up the following variations:

- the persistence of the status quo ante – assuming that the initial pattern is one of negative integration;
- the exacerbation of the status quo through variously stringent deregulatory policy outputs;
- a comparatively more or less stringent market-correcting policy instrument, which is likely to establish a more restrictive environment for member states and economic operators across Europe.

1. Positive and negative cases

The dissertation answers the question under which conditions varyingly stringent policy decisions may or may not be adopted to cooperatively alter the most likely outcome that the prisoner's dilemma predicts. The research design includes cases of successfully negotiated agreements and cases of failed negotiations.

One needs a convincing rationale to differentiate positive and negative cases. In that regard, a legal procedural criterion would mean that positive cases are simply those in which a policy has successfully been adopted. Conversely, negative cases would be those in which policy were proposed and discussed but failed to be adopted, leading to the maintenance of the status quo. This seems straightforward enough.

Unfortunately, this rationale would certainly complicate the selection of negative cases (Rutherford, 1989), because the legal procedural categorization is not operational in the context of EU policy making. In fact, the Commission rarely propose policies that have little chance of being successfully negotiated in the Council and the Parliament in the first place. In general, the Commission wishes to show its ability to pass legislation. By contrast, failed negotiations demonstrate the Commission's inability to solve policy problems. If the Commission inadvertently issues proposals that are highly likely to fail, it may prefer to withdraw them before explicit rejection in the Council and the Parliament. Therefore, the population of negative cases, according to a legal procedural definition, is very small and is not empirically relevant.

Empirically, proposals that would eventually prove highly contested are likely to undergo one of the following fates. First, there are those policy projects that the Commission decides not to propose at all. The Commission may worry about whether there is sufficient support in favour of proposed policies well in advance.[24] The Commission makes sure to maximize the chances that proposals will eventually make their way through negotiations successfully. One way to maximize success is to ensure that there is minimum resistance to and maximum support in favour of given policy proposals as early as possible.

Second, the Commission could propose a policy but withdraw it as soon as it realizes that it has little chance of finding negotiation success. The Commission may simply have misjudged the disposition of stakeholders and other institutions and may thus choose to step back. In that event, withdrawing a policy proposal seems like the lesser evil than having it explicitly rebuffed in the Council and the Parliament.

[24] The Commission increasingly insists on carrying out a careful analysis of stakeholder's opinions and the policy positions of other institutions within comprehensive impact assessments. The present research also found evidence that the Commission is increasingly averse to negotiation failure, given that recent proposals were met with unusual resistance. Those episodes were quite politically detrimental to the Commission. This is reflected in the 2015 Better Regulation Guidelines (SWD (2015) 111 final).

Third, the Commission may propose a policy that is so heavily amended along negotiations that the initial proposal and the adopted policy output become vastly dissimilar. In that latest situation, it may therefore be analytically appropriate to categorize the initial proposal as a case of unsuccessful negotiation and the heavily amended version as a separate case of successful negotiation.[25]

Empirically, it is therefore difficult to find policy cases that have been formerly rejected by a vote in the Council and the Parliament, while conforming to other crucial criteria for selection – notably the need to control several other variables. One may thus include policy proposals that have not been formerly outvoted but that, given the political context and behaviour of decision makers, might reasonably be considered to be negative cases. Accordingly, the so-called Monti II Proposal[26] on the right to take collective action is identified as a policy that has been designed and formally proposed by the Commission to the Parliament and the Council. It was, however, met with so much resistance from such a variety of actors inside and outside EU institutions, that the Commission eventually withdrew the policy.

2. Variance in positive cases: Lenient and stringent policies

a) Conceptualization

Beyond cases of negotiation success and failure, we must also secure a finer-grained measurement of the variances that occur between various cases of negotiation success. There are many sorts and degrees of success, depending on how much cooperative policy outputs can alter the regulatory competition game in ways of varying stringency. Compared to the status quo, a positive policy output may stringently exacerbate member states' incentives to engage in mutually destructive

[25] This is how the present research analyses the two different versions of the 2006 Services Directive – namely, as 'Service I' and 'Service II' – along the policy process. McKibben (2008) proposed a similar analytical approach.

[26] Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (COM (2012) 130 final).

competition. It can also implement variously stringent market-correcting measures that will restrict or annihilate the incentives that drive national regulators into destroying regulatory public goods in the name of competitiveness. Market-correcting policies may grant member states greater leeway to implement more restrictive market access conditions. It may also force them to implement harmonized measures to ensure a level playing field. Those measures may be sanctioned by variously coercive enforcement mechanisms as well. The level of stringency of market-correcting measures will most likely coincide with variations in social partners' support. Conversely, the adoption of lenient policies may coincide with a very different constellation of preferences on the part of both social partners and decision makers.

Finally, there remains the question whether an extremely lenient policy may sufficiently alter the regulatory competitive game to be considered as a cooperative outcome. In reality, the mere codification of existing case law may significantly alter actors' pay-offs insofar as it reduces legal uncertainty, increases legal awareness and is, thus, likely to increase compliance rates.

b) Measurement

Stringency restrictiveness is a concept that poses several measurement difficulties. The qualitative evaluation of the extent to which an instrument can restrict market operators' behaviour and *affect the regulatory competitive game* poses problems. We determined that the three attributes of stringency most likely to affect the initial game are obligation, precision, and enforcement.

The measure of how stringent restrictive measures are can be determined through legal analysis of the policy alternatives. Complementarily, the preferences of the actors and their statements about policy stringency must also be accounted for in the evaluation. However, those measures may be clouded by actors' strategic

misrepresentations of the various policy alternatives.[27] Hence, we cross-reference imperfect information with secondary sources and analyses provided by legal and academic experts.

The measurement strategy must minimize the risk of faulty results. Variation in policy stringency is measured in both direct and indirect manners using three different approaches. First, alternative version of legal instruments can be pair-compared to one another to build an ordinal stringency scale. A qualitative legal analysis of alternative wordings with a view to assign values on the three attributes of stringency – obligation, preciseness and enforcement. Second, the results obtained through legal analysis are cross-referenced with stakeholders' analyses and opinions within interviewees and policy publications. Third, when available the analysis of stringency is informed by secondary sources and academic research on alternative policy measures. In that regard, certain policies have created greater academic attention than others.

C. Independent variables

1. Preference homogeneity of competing social partners

Within H1, the relative variation of preferences homogeneity of competing groups of social partners constitutes the independent variable. At European level, the function of the social partners is to ensure that their affiliates preferences are coherently aggregated to efficiently influence policy outputs. As Bouwen notes:

> European associations are specialized in building consensus positions by channelling the different opinions of their member associations. They aggregate the interests of their members, which, for their part, are already the result of a bundling of the needs and interests of these

[27] They may overstate them, calculating that they may not get as much as they wish if they state their real preference over stringency. Conversely, they may understate them to avoid antagonizing key decision makers (Dür, 2008c).

> national associations' member at national level. This extensive consultation mechanism allows the European associations to present an encompassing European perspective on their sector and provide good quality information about the European encompassing interest (Bouwen, 2004:344).

In issues relevant to employment policy, collective action and trade in services, there are different groups of social partners that represent business associations, on the one hand, and trade unions, on the other[28]. Expectedly, the category that displays the greatest degree of homogeneous of preferences over outputs will more coherently and intensely lobby to attain its objectives. Therefore, it has comparatively more chance to influence institutions in adopting their most preferred policy outputs.

The framework assumes that stakeholder conflicts over policy alternatives that are ordered in a two-dimensional space in which groups defend competing preferences. Different sides may display varying level of preference homogeneity depending on the more specific make-up of their pool of members. In policies relevant to the present research, those two sides consist in two generic groups of

[28] European social partners aggregate the preferences of national operators. To the extent that the thesis theoretically focuses on the homogeneity of preferences among them, it might also seem natural to trace the history of preference aggregation and mobilization of national social partners, in addition to European ones. However, such strategy would require selecting certain – representative – member states and certain representative actors within them. The methodological principles for doing may be debatable and the material feasibility of the research may also be significantly undermined. Consequently, the approach adopted in this research is pragmatic. As the theoretical model suggest, the empirical investigations have primarily targeted elements of internal heterogeneities among national affiliates within the main umbrella organizations at EU level. Yet again, interviewees understandably tend to be secretive about – and sometimes misrepresent – such information. Therefore, I also sought elements of disparities and convergences among various organizations at EU level. For example, to what extent do UEAPME and BusinessEurope – both business organizations – or ETUC and EFBWW – both trade union organizations – converge or not toward similar policy positions? Such information can be more easily and reliably collected through interviews and cross-referenced through content analysis.

social partners that routinely compete with one another. The business associations represent the employers. Trade unions represent the employees. This is a simplistic manner to represent a complex reality. Interviewees were first asked to identify the main groups of stakeholders and classify them. Business associations are not the only organized group that defend the interest of employers. Large firms also advance their individual preferences on their own. Subsequently, interviewees, including European institutions' officials, were asked to gauge the level of social partners' respective preference homogeneity.[29]

In addition, a content analysis of available publications issued by preeminent interest organizations was carried out. The organizations that were included on the business side were BusinessEurope, FIEC, EuroCommerce, UEAPME, and EuroChambers. The organizations that were included on the trade union side were ETUC, EFBWW, EFATT and Uni-Europa. The content analysis aimed to evaluate the social partners' preferences and their evolutions along negotiations. In certain cases, the opinion expressed by the UEAPME, BusinessEurope and the FIEC about the need to amend the rules on posted workers were quite contrasted. While the FIEC and the EFBWW – the business and workers' associations in the construction sectors – not only share some views, but were also found to coordinate. As a general rule, it was also possible to see a high level of coordination among trade union organizations. Associations often relay and advertise each other's initiatives. Finally, the intensity of publication activity was used as a partial evidence to assess lobbying intensity.

[29] Yet, institutional interviewees' answers must be treated with caution because their main source of information about competing social partners' preference homogeneity is often gathered because of the various lobbying activities that they observe from their position – as potential lobbying targets. Those activities are evidence of lobbying intensity rather than preference homogeneity. Yet, many observers could reflect on the unusual variety of opinions – sometimes described as cacophonic – coming from one side or another. And that can also safely be understood as evidence of preference heterogeneity.

Interviews carried out in trade unions and business associations contributed to answer three types of questions. First, they were asked to describe the internal decision-making procedure – formal and informal – leading to the adoption of common positions. This was an opportunity to identify potential dissenting voices among affiliates, the reasons underlying those objections and, if at all, the way they were eventually reconciled. Do those groups needed to carry out internal votes? In that event, which voting rules did they apply? What kind of internal negotiations occurred between affiliates? Understandably, asking umbrella associations to reflect upon internal disagreements can be embarrassing for certain interviewees. Some may be tempted to downplay internal disagreements to safeguard their credibility as the intermediaries of encompassing political positions. Nonetheless, many interviewees readily admitted the existence of internal debates and persisting disagreements also.

Second, they were invited to report on their lobbying undertakings and interactions with other organizations. In some situations, it emerged that certain associations stood in favour of one policy position, while potential partners defended a diverging policy position. Those situations were taken as evidence of preference heterogeneity. Third, if interviewees had relevant knowledge, they were encouraged to formulate their opinions about the positions, preference homogeneity, and lobbying modus operandi of competing organizations. Yet, interviewees could also be tempted to misrepresent their competitors' activities and positions, if only to question their credibility. While some reacted in this fashion, others seem to hold more contrasted views. When possible, those answers were cross-referenced to secure a reasonable degree of reliability.

2. Lobbying intensity

Lobbying intensity is understood in an encompassing manner. It does not only referrer to social movements' ability to organize crowded street protests as implied by the concept of mobilization. Rather, all social partners mobilize and lobby to influence EU decision makers in various ways. They can use all the channels of influence that are

available to them. They do so more or less intensely. As one experienced interviewee navigating the EU lobbying 'bubble' put it: "it is not the same to issue a policy position and actively lobby EU institutions" (Interview with former business association official). Therefore, position papers and social partners' publications included in the content analysis may not render an unequivocal picture of how preferences are translated into lobbying intensity. Thus, social partners' lobbying undertakings were also evaluated from the point of view of the decision makers, as the main targets of those undertakings. Hence, interviews with institutional officials also informed lobbying intensity. Those actors were asked three types of questions. First, which organizations were they mainly targeted by? Second, what policy preferences were those organizations promoting? Third, which strategies were seemingly used to influence them? And how coherent did undertakings appear to be? Thus, a number of decision makers pointed at contradictory signals sent by certain social partners, which undermined their ability to influence policy outputs.

Social partners were also asked to describe the lobbying strategies that they implemented to advance their preferences and the institutions that they targeted in priority. Three types of lobbying strategies were discussed with both decision makers and social partners. First, umbrella associations can directly lobby EU institutions staff members. This may help ensure that the message that they wish to put forward remains undistorted and effectively communicated. For example, some sector-specific association chose to stay away from the decision-making process (interview with UNIT officials; interview with EPSU official) in order to leave partner associations free to get a message across without risking the addition of unnecessary 'noise' to an arena already overcrowded with messages and policy positions.

Second, umbrella associations and their affiliates may orchestrate their lobbying efforts to maximize their influence. An encompassing association may be more effective in getting access to selected Directorates-General and certain MEPs. Depending on the specific make-up of their constituency and underlying political

allegiances, other MEPs may be more amenable to lend an ear to the opinion of selected sector-specific associations. The same goes for different Directorates-General, depending on the specific features of a particular policy area or policy proposal. Certain affiliates may also act in a coordinated manner to access national governments and parliaments at home as well as Permanent Representations in Brussels. Those multilevel strategies can be highly effective. However, they may require a high level of agreement among national social partners and an ability to coordinate various groups in an effective manner.

Finally, organizations that seem to be on the same side may also compete for influence. On the one hand, certain associations may compete to attract more members than other organizations defending similar interests. On the other hand, some affiliates and members of encompassing associations may also hold dissenting opinions that did not find their way in the common position expressed by an association. Ceteris paribus, the more encompassing an interest organization is, the more heterogeneous its affiliates interests are likely to be. Therefore, certain affiliates may be tempted to organize side-campaigns. In that case, as reflected in H1, the likelihood that those groups will secure lobbying success decreases if rival groups display relatively greater homogeneity and less corresponding competition on their own side.

3. Coalition

The formation of different coalitions between EU institutions and social partners is the factor that eventually determines the negotiators' ability to adopt policies. As explained earlier, it is assumed that the Council is structurally biased towards the maintenance of the status quo ante of negative integration. On the other hand, the Commission and the EP will generally try to favour the adoption of negotiated policy instruments. In that generic constellation, supranational institutions may benefit from the additional political leverage and tradable resources brought by winning coalitions of social partners promoting cooperative policy solutions. However, Permanent

Representations are often secretive about the relations that they maintain with MEPs, Commission officials and interest groups' representatives. Some were quick in denying that they allow any type of interest groups' access at all (interview with Belgian Permanent Representation official). Certain officials, especially government negotiators, seemed eager to maintain the perception that they never let their positions become biased by special interests. Yet, certain decision makers in Permanent Representations admitted meeting relevant MEPs and being approached by a range of interest organizations. Nonetheless, they often insisted that they ring-fenced themselves against exogenous influence (interview with Slovenian Permanent Representation official; interview with Greek Permanent Representation officials).

The role the Commission plays as a middleman between the Council and the Parliament – and between Council members – is real and openly discussed by many interviewees. Certain officials specifically pointed to the role played by winning coalitions facing blocking minorities in the Council, which eventually had to accept the terms, advanced by those coalitions. This occurs in ways expected in H2. However, such patterns are more visible in certain cases than others.

One can pinpoint at least six different paths to influence national positions on any given policy:

(1) Social partners may directly lobby national negotiators in the Council. They can choose to directly approach staff members within the Permanent Representations. There are three patterns of interaction. First, generalist EU umbrella associations may take steps in contacting Permanent Representations. Second, national organizations may take steps in contacting the Permanent Representation of their own nationality. The frequency of those contacts seems to vary across member states. In the Council, national negotiators defend their national interest. Therefore, national social partners' preferences are especially relevant to them. Nevertheless, national negotiators most often defend positions that are largely – but not only – dictated by the mandates delivered by their government. Depending on the preciseness of their mandates, they

may be variously constrained in their ability of lend ear to national and European social partners. That is why multilevel strategies of influence at very early stage in the ministries' offices are key. Third, organizations of any nationality may decide to take step in contacting Permanent Representatives of any other nationality. We expected and found this pattern to be quite anecdotal. This is because Permanent Representations are vested with the mandate to defend national interest. Thus, special interests originating in different member states are often irrelevant to national negotiators. In addition, those organizations may not dispose of resources that are relevant to a foreign Permanent Representation to engage into some sort of resource-exchange relationships (Bouwen, 2002).

(2) National social partners, in coordination or not with EU encompassing associations, may choose to engage into so-called multilevel lobbying strategies. In addition to the lobbying undertakings that take place in Brussels, multilevel strategies also attempt to directly influence governmental positions at home, usually at an early stage in the policy process. To implement those strategies, national organizations use their usual access point to the ministers according to national patterns of industrial relation so as to signal their position to their government regarding given EU policy proposals. Governments may then decide to integrate those demands to the mandate of their negotiators operating within their Permanent Representation. Unsurprisingly, national organizations use their significant national resources to make their voice heard in inter-governmental decision-making.

(3) Since the creation of the so-called Yellow Card procedure, national parliaments are gaining a greater role in EU decision-making. Thanks to the subsidiarity control mechanism inserted as a Protocol No.2 of the 2009 Lisbon Treaty, one-third of the national parliaments can ask the Commission to re-examine its proposal if they consider that the initial one infringes on the subsidiary principle. It is still unclear whether this new mechanism will only become an accessory safeguard, or whether the Parliament will manage to overcome sheer coordination problems to emerge as

significant political actors within the EU policymaking process. The few instances in which the national parliaments managed to raise a Yellow Card – including in one of the cases selected in the present research – tentatively suggest that it might become a fairly resourceful political weapon in the future (Cooper, 2013; 2015). The national parliaments have been quick in realizing how they can use the procedure beyond the original idea. In the event that one-third of national parliaments are recurrently able to coordinate, the procedure could provide the social partners with a key new point of access to implement complex multilevel lobbying strategies. The national parliaments have already shown a certain inclination to use the procedure to advance political argument beyond the strict protection of the subsidiarity principle (Cooper, 2015).

(4) Permanent Representations may also maintain close ties with MEPs of four different kinds: particularly experienced and politically influential MEPs, MEPs of the same nationality, MEPs that share the same political affiliation as the national government and MEPs vested with crucial institutional responsibilities regarding certain policies, like the Rapporteur and Shadow Rapporteurs, for example. In their relations, MEPs and National Representations attempt to either influence each other, or devise common strategies to advance their shared interest. It is also an opportunity to 'count your forces'. MEPs may be backed up by groups of social partners and try to use this as a political resource to apply additional pressure along their negotiations with the Council.

(5) Permanent Representations will also maintain contacts with the Commission officials. As a result, Commission staff members may have garnered enough backing from relevant social partners across the board to enhance their political leverage and curb Council members position so as to overcome the JDT.

(6) Finally, outsider's strategies can also have considerable effects in terms of influence on policy outputs (Beyers, 2004). Street protests and campaigns to increase public awareness may affect decisions in the Council. Yet, it is not clear whether the Council is that sensitive to such strategies. The Council is a relatively isolated

institution and negotiations about technical policies are usually carried out behind closed doors. Therefore, these outsider strategies may affect intergovernmental negotiations more significantly if some kind of political coalition displays exceptionally homogenous preferences and is able to implement effective communication strategies to target the public in a context of intensely politicized policy issues. Although scarce, occurrences of this pattern have been observed in the past and have been considerably more successful than one would expect from a political system deemed undemocratic and isolated.

D. Other issues with measurement

1. Actors' preference 'plausibility test'

Actors' preferences over policy outputs are theoretically deduced from an analysis of the initial problem of regulatory competition between asymmetric regulatory regimes. Yet, interviews provide opportunities to test how plausible those preferences can be empirically. By and large, actors' preferences as deductively established are essentially mirrored in the empirical material. Certain elements, however, do not seem to be suitably accounted for theoretically. Some actors' preferences are coloured by normative beliefs that drift apart from purely rationalist premises. Without seriously undermining the theoretical expectations, they contribute to render a more plausible and contrasted picture.

Regarding the Council, the best predictor of member states preferences is economic utility-maximization determined by whether they are net senders or net recipients of posted workers and the level of regulatory standards already in force on their own territory prior to negotiations at EU level. Member states generally seek three objectives: maximizing their own job market competitiveness relative to others, minimizing competition from foreign workforces at home and minimizing the costs of implementing EU policies (Börzel et al., 2010). By contrast, member states' government's political affiliation is not always a good indicator to determine

preferences over policy output. For example, centre-right governments in France have often defended positions that would normally be expected from socialist governments, whereas socialist governments have sometimes proved more pro-market. Therefore, regarding the policy issues selected in the present research, member states that are net-senders of posted workers and display relatively less restrictive regulatory standards will tend to advocate the persistence of the status quo. Conversely, Member States that are net receivers of posted workers and display relatively more demanding regulatory standards will generally advocate more restrictive measures.

Regarding the Commission, its most effective instrument to maximize power and significance within the European policymaking realm is to try and secure the successful adoption of new policies through negotiation. However, the Commission is not always at liberty to simply seek constant production of supranational policy that has the highest chance of being adopted given other actors' preferences. It may also have to comply with other political commitments. The Parliament, in particular, may partly constrain the agenda of the Commission, notably on the occasion of the election of the President. This contributes to explain the Commission's decision to initiate negotiation over certain policies in the striking absence of any significant political backing. In addition, the Commission also cares about securing policy quality because it can be an essential ingredient of its long-term credibility.

Turning to the Parliament, MEPS mainly strive to adopt positive EU policy outputs rather than the maintenance of the status quo because it is more likely to benefit the Parliament in its inter-institutional struggle for power. The empirical material tends to confirm this assumption. However, MEPs are also politically affiliated and they thus hold preferences that are partly determine by their party's political orientation.

2. 'Ideology', 'dogmatism' and 'pragmatism'

Interviewees made extensive use of notions like 'ideology', 'pragmatic posture' and 'dogmatic attitude' to describe various actors' preferences and strategies. Certain actors try to denounce the homogeneity of preferences of their competitors which, they argue, is only made possible through technical misrepresentation and artificial analytical cues.

A gap emerges between, on the one hand, what policy makers and stakeholders mean when utilizing ideational notions in both descriptive and normative manners, and, on the other hand, what the analyst measures through them. While being ubiquitous in political science, ideology still is an essentially contested concept (Gallie, 1956; Collier et al., 2006).

Ideologies can be defined as sets of shared values and ideas about political goals that ought to be fulfilled. There is a vast literature dealing with the concept, especially in relation to political parties' ideologies and electoral behaviour.

According to Downs (1957) ideologies provide actors with cognitive shortcut to set policy positions quickly and cost-effectively (Downs, 1957; Hinich & Munger, 1994; Ordeshook, 1976).

One can stick to a minimalist definition, though. Hooghe and Marks argue that "the ability of party leaders to chase votes by strategic positioning is constrained by reputational considerations and the ideological commitment of party activists […] Parties are membership organizations with durable programmatic commitments. These commitments constrain strategic positioning" (Hooghe and Marks, 2008:19). Interest organizations are not all that different. In that context, ideology may be understood as a general commitment to long-term policy goals that can constrain the formulation of certain policy preferences. As a result, large deviations from long-term

goals may create collective costs in terms of credibility. Therefore, long-term policy commitments can help silence affiliates, event when they hold different short-term material interest.

IV. Case selection

A. On the dependent variable

The rationale for case selection pursues a double objective. First, it ensures that the dependent variable can vary across cases. Second, the strategic setting is maintained relatively constant across cases. As a result, the comparative analysis permits to test a conceptual experiment in which one can examine the effect of preferences and strategies in a ceteris paribus environment (Lake and Powell, 1999).

The four selected policies are:

1) Case I: the initial proposal for a directive on the completion of the market for services, also the Bolkestein Proposal[30], labelled 'Service I'
2) Case II: the final Services Directive[31], labelled 'Service II'
3) Case III: the so-called Monti II Proposal for a regulation on the right to strike,[32] labelled 'Monti II Proposal'
4) Case IV: the Directive on the enforcement of the 1996 directive on posted workers,[33] labelled 'Enforcement Directive'.

[30] Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM/2004/2/FINAL).
[31] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.
[32] COM/2012/130/FINAL, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.
[33] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No

In a first analysis, 'Service I' and the Monti II Proposal are selected as cases of negotiation failure. 'Service II' and the Enforcement Directive are selected as cases of negotiation success.

Table 5 summarizes the selected cases based on the measurement of the dependent variable. Case I and Case III are instances of negotiations leading to the persistence of status quo, while Case II and Case IV led the adoption of lenient restrictive policy instruments.

Table 5. Case selection: variance in the dependent variable

Policy	Negative case	Positive case	
		Lenient market correcting	Stringent market correcting
Case I: Service I	X		
Case II: Services II		X	
Case III: Monti II	X		
Case IV: Enforcement		X	

1. Monti II and Service I as negative cases

The definition of unsuccessful negotiation is adapted to include policy cases that have not been sanctioned by a formal rejection in the Council and the EP. Given the variables that must be controlled to maintain a relatively constant strategic setting, two cases were selected: the negotiations on the so-called Monti II Proposal for a regulation on the right to take collective action, and the initial so-called Bolkestein proposal for a directive on the completion of the market for services (Service I). This case selection result from a trade-off between a broaden conceptualization of the dependent variable and the necessity to control variables that belong to the strategic setting.

1024/2012 on administrative cooperation through the Internal Market Information System.

On the other hand, the fact that the Monti II Proposal has been withdrawn means that the case does not provide detailed empirical material regarding negotiating events unfolding within and between the Council and the Parliament. This is because negotiations were abruptly put to a halt when the Commission withdrawn the proposal in the aftermaths of the Yellow Card.

2. Service I and Service II as two different cases

Many political (e.g. De Witte, 2007; Grossman and Woll, 2011; Höpner and Schaeffer, 2010; McKibben, 2008), legal (e.g. Barnard, 2008; Hatzopoulos, 2007) and economic (e.g. Kox and Lejour 2006) studies have already focused on the liberalization of services in the EU. Yet, past research did not shed the entire light on the negotiations, notably with regards to the role of the social partners. The policy itself, from proposal to final adoption has changed so much that many consider that the two texts have little in common (McKibben, 2008; Nicolaïdis and Schmidt, 2007; interview with business association official; interview with EP Rapporteur). But various actors as well as academic research also maintain that the legislative consequences have remained largely unaltered as reflected by the reactions from the Greens/EFA and GUE/NGL MEPs (Euractiv report, November 16, 2006). Yet, it is unanimously accepted that the initial Bolkestein proposal would never have been adopted without major modification. From an analytical viewpoint, some key actors visibly shifted position between one stage and the other to make sure that a compromise would eventually be reached.

Therefore, it makes sense to break the process leading up to the final legislation into two different cases. This strategy has already been used in earlier works on the Service Directive (McKibben, 2008:174-176). We generically refer to the first case as the 'Bolkestein Proposal' and 'Service I', which scores as a negative case within the dependent variable. It includes discussions, debates, coalition formation and mobilization on issues like the initial Article 16 of the CoOP and the extended horizontal scope of the policy project. Chronologically, the negotiations unfolded until

the end of 2005. The second case concerns negotiations leading to the final Services Directive – scoring as a positive market-correcting case within the dependent variable – in which we analyse shifting position form member states, social partners, and various actors within the Parliament as well as the Commission. It is referred to as 'Service II'. Negotiations around this policy project notably include discussions about reducing the scope of the proposal and altering Article 16 quite dramatically. Chronologically, negotiations run until the adoption of the final compromise adopted in the Parliament.

Slicing the negotiations over the Services Directive into two different cases means that variables belonging to the strategic setting can be parameterized to examine the effect of interest groups' variations in preference homogeneity, coalition formation and lobbying undertakings so that the trade-off is in favour of this decision.

B. Controlled variables

1. Policy areas

There are alternative ways to define policy areas. One simplistic way is to follow institutional policy segmentation. The other is to frame analytical categories independent from area segmentations that, for example, make up the Commission structure into Directorates-General.

Institutionally, policies belonging to the same area may be those that are proposed by the same Commission Directorate-General. Yet, analytically, one can argue that the policies that target similar sectors or tackle similar policy problems belong to the same area even though the proposing Directorates-General were different. Allocating policy proposals to different Directorates-General can be a political decision in itself (interview with Commission official). The same goes for the allocation of proposals to selected EP committees (interview with parliamentary assistant in the EP). From an institutional point of view, the selected policies do not *formally* belong to the same policy areas. Therefore, the Directorates-General are not

maintained constant. The liberalization of services as envisioned in the Bolkestein proposal and adopted as the Services Directive, originated in the Directorate-General for Internal Market and Services, whereas the Monti II proposal and the Directive on the Enforcement of the 1996 Posted Workers Directive are two policies that were designed by officials in the Directorate-General for Employment and Social Affairs. Yet, we selected one negative and one positive case for each Directorate-General.

However, as emphasised by Commission officials, those policies largely overlap. Arguably, they belong to a same bundle of problems that 'spill over' one another in various ways (interview with Commission official in DG Employment). In terms of policy areas, the Bolkestein proposal and Services Directive revolved around the consequences of liberalizing the market for services and raised intense concerned regarding their consequences on the posting of workers across borders. Unlike goods, so-called pure services are produced and consumed simultaneously. The common apprehension felt by various workers' organizations and small businesses was that workers employed by businesses established in countries with lower standards regarding employment conditions, safety and health, minimum wage or maximum weekly working hours, would start provide their services in countries with higher standards at a much lower overall cost. In addition, the consequences on industrial relations and the legal value of collective agreements adopted by business management and organized labour associations continue to raise much concern.

The Directive on the Enforcement of the 1996 Posted Workers Directive itself was demanded and negotiated with the ambition to prevent illegal posting, reinforce posted workers' rights, strengthen control and inspection measures. The Monti II Proposal on the Right to take Collective Action was a failed attempt to deal with the consequences of fundamental market freedoms on equally fundamental social rights in the member states, including the right of trade unions to take collective action.

Therefore, this group of policy constitutes an array of instruments that have created debates regarding the similar issues. Virtually identical groups of social

partners were mobilized and the debates were framed in a strikingly similar, if not identical, manner.

2. Policy problem

The general policy problem raised across all four cases is a perceived risk of regulatory competition and unfair competition as regards to workers' rights across the EU due to the liberalization of services between regulatory environments with initially asymmetric standards. The Monti II Proposal is an example of a policy that tackles a spillover effect of posting of workers on rules regarding collective action.

The policy problem is a key element, not only for case selection but also for proper understanding of the application of the JDT theory. The theory consistently assumes that the status quo ante is predominantly one of negative integration initiated by non-cooperative strategic interactions that create the conditions for a regulatory competitive game. It is this one problem that structure actors' preferences over outcome. This means that a policy outputs that results in the persistence of the status quo ante – or tend to exaggerate it – given the CJEU case law and the regulatory state of affairs would still score as the maintaining the *status quo in a game theoretic terms*.

3. Legislative procedures

Regarding policy procedure, all four selected negotiations but one were negotiated in the framework of the co-decision legislative procedure, now called the ordinary legislative procedure. The Monti II Proposal for a Council regulation on the right to take collective action was initially foreseen as part of a package including the Proposal for an Enforcement Directive of the 1996 Directive on Posted Workers. But the decision-making procedures, instrumentation and the voting rules were always intended to be different. This is because the treaty bases are different. However, the fact that both the Enforcement and the Services Directive were submitted to de facto quasi-unanimity due to high political saliency makes the comparison possible despite

differences in formal voting rules and procedures. This section briefly describes the procedures used for the four cases in a generic way. The specific decision-making story of each case will be described in the case-specific analytical sections.

The co-decision procedure has been introduced by the 1992 Maastricht Treaty, in the stead of the former cooperation procedure, and sought to increase the role of the EP, as a partial solution to the long-alleged democratic deficit of the EU institutional framework and decision-making process (Follesdal and Hix, 2006). In the event of the adoption of Article 251 and 289 of the Lisbon Treaty, the procedure was renamed 'ordinary legislative procedure' to reflect the fact that it was intended to become the principal decision-making procedure of the EU. The Commission retains its monopoly on the right to take policy initiative. But the Council and the EP are equal legislators.

The ordinary legislative procedure can be segmented into four phases: the first reading, the second reading, the conciliation phase and the third reading. The rejection of a proposal may occur in second or third reading. A proposal can officially become legislation at the end of the first reading if an agreement emerges between the Council and the EP.

The first step is for the Commission to adopt a white paper as a proposal, which officially trigger the legislative procedure. However, the analysis conducted in the present research starts before that because important events, notably with regards to social partners, pre-date the proposal itself. At earlier stage, the Commission conducts research, consultations and impact assessments. It is then sent to the Parliament and the Council simultaneously for a first reading. At this stage, the Parliament decides which committee will discuss the proposal and eventually issue a report. In certain cases, the decision to allocate a proposal to a Parliamentary Committee may be the result of internal political struggle because those committees often have a key impact on policy outputs. Within the Parliament, key institutional

actors at this stage are the committee chairman, the Rapporteur and the Shadow Rapporteur.

At committee level, the Council and the Parliament will work to increase the chances of finding an agreement in first reading. Although the Commission no longer has a formal role at this working stage, it acts as a key middleman and honest broker. The Commission, as policy initiator, can be regarded as the principal promoter of the policy. Its right to attend both Parliament and Council committee meetings reinforces its informal but critical role. The proposal is then submitted to a vote in Parliament plenary session. The Council can then decide to adopt the amended version by a qualified majority vote.

If the Council cannot strike a politically acceptable compromise and wishes to modify the Parliament's version, it sends a common position to the Parliament. Hence starts the second reading, during which both institutions attempt to come to an agreement along which the Commission also formulates its own opinion through communications. The Parliament can amend the proposal but if the Commission formulates a negative opinion about any of them, then the Council may bypass the Commission through unanimity only. If an agreement cannot be found in the Council, it may decide to postpone it sine die. This amounts to negotiation failure. But if the Council comes to an agreement in deviation to the Parliament's one, a conciliation committee is appointed. Informal trilogues meetings take place with the Commission acting as mediator. If the committee fails to come to a compromise, the proposal is dropped. If the committee manages to adopt a compromise that is not agreed upon by one or the other institution, then the proposal is dropped. If, by contrast, the Parliament adopts the compromise by a simple majority and the Council votes in favour of it according to the relevant voting rule (qualified majority voting or unanimity), then the compromise becomes law. To this end, the Presidents and Secretary Generals in the Parliament, and the Council sign the text.

As mentioned, the Monti II Proposal for a Council Regulation on the right to take collective action in the EU was not to be negotiated under the ordinary legislative procedure. Rather, the Commission proposed it based on Article 352 TFEU, which is a non-legislative 'consent' procedure that requires unanimity in the Council and the consent of the Parliament by an absolute majority. There is only one reading.

The Commission decision to opt for Article 352 TFEU has been highly criticized, in that case. Article 352 TFEU was initially inserted so as the EU would be able to act in areas when it is necessary to attain EU objectives in the absence of specific treaty provision. However, the policy must not lead to over-stretch the competences of the EU. It was not certain whether the Monti II Proposal overstepped that last condition.

4. Actors

The research design aims to maintain actors constant across cases. The Commission, the Council and the Parliament are all involved in each case, albeit taking variously important roles. However, the pool of stakeholders and interest groups acting as informal actors must also remain constant across cases. Therefore, the research focuses on neighbouring policy areas that recurrently spill over each other and one specific policy problem. Across cases, social partners representing both employers – business association – and employees – trade unions – are the most likely to mobilized. Yet, we observe an unusually massive population of interest groups that mobilized on the so-called Bolkestein proposal and Services Directive. Those policy negotiations were crowded by a colourful variety of unfamiliar actors than the Monti II Proposal and the Enforcement Directive. Yet, the actors that routinely lobby EU institutions remain constant across cases. Those are the most important umbrella associations representing both national business association and trade unions. There is also a wealth of sector-specific associations representing, the construction sector, tourism, regulated professions, social services, and health care.

NGOs seemed to mobilize in an inconsistent manner and are not referred to as key stakeholders by any interviewees. Those actors seem to impact in anecdotal manners within the policy areas that were examined in the research.

C. Imperfect case selection

As expected, such case selection also has shortcomings and imperfections. First, there is a slight alteration of actors across cases. As already suggested, the discussions about 'Service I' and 'Service II' mobilized an unusual number of stakeholders relative to the two other cases. But, the Commission make-up has also been altered across cases. This might have affected outcome if one consider personal and relational factors. Also, two different Directorates-General were in charge. They may have different approach as to what policymaking means, and the way of engaging into discussions with social partners and negotiating within the legislative process. For example, the Commission must put in place a social dialogue that is legally binding for any policy proposal that touches upon social issues. Yet, it seems that the Commission tends to interpret its obligation narrowly, strictly complying with this obligation for proposals that are design within the Directorate-General for Employment and Social affairs only. In the Parliament, as well, different majorities have come and gone across policies. Political leadership and available coalitions have changed across time. Likewise, member states' positions and strategies might have changed across cases, depending on variations in government party affiliations and policy objectives. Yet, empirical observations also show a remarkably stable member states' meta-preferences are across cases.

Second, policy instrumentation is not maintained constant since the Monti II Proposal was intended to be a Council regulation while the three other negotiation cases were carried out with a view to adopt directives under the ordinary legislative procedure. Table 5 summarizes how the strategic setting is maintained relatively constant across cases.

Table 6. Case selection: Control variables

Cases	Service I	Service II	Monti II Proposal	Enforcement Directive
Institutional Area (DGs)	Internal Market	Internal Market	Employment	Employment
Analytical Policy area	Posted Workers	Posted Workers	Posted Workers	Posted Workers
Problem	Regulatory competition	Regulatory competition	Regulatory competition	Regulatory competition
Scope	Horizontal	Horizontal	Horizontal	Horizontal
Salience	High	High	High	High
Instruments	Directive	Directive	Regulation	Directive

In sum, whereas the leading Commission Directorates-General are not constant, the analytical policy area is constant across the four cases. We argued that the core policy problem, regulatory competition, is similar from cases to cases and is analysed as a prisoner's dilemma. The scope of the policy designates the sectors that are concerned. Horizontality means that the policies are not sector-specific, although certain provisions may target specific sectors while others may create sector-specific exemptions. In addition, the policies may not have been equally salient in terms of significance and attention. But all cases can be labelled as highly salient. Finally, three cases are directive while one would have been a regulation. This likely limits the conclusion that can be drawn from the comparative exercise. However, we argued that for those salient policies that incur large distributive consequence and carry heavy political significance for the member states, the voting rule in the Council would most likely be de facto quasi-unanimity even when the formal voting system is QMV. Therefore, the variation in voting rule observed in Case III was not enough to dismiss the case altogether when put in balance with the advantage to select the cases in terms of controlling other variables.

PART THREE:

EMPIRICAL ANALYSIS

V. Case I and II: From 'Service I' to 'Service II'

The 2004 Bolkestein Proposal and the 2006 Services Directive represent two significantly different versions of the same policy proposal at two different points in time. In that sense, they belong to a unique co-decision policymaking process. However, key policy features have changed to such an extent that the set of issues determining the preference space and actors bargaining attitudes were altered in fundamental ways. One can thus analyse the two versions as two different cases – 'Service I' and 'Service II' – in which the dependent variable takes distinctly different values. Therefore, the negotiations must be approached as two different strategic interactions. The first phase covers the negotiation events regarding the initial Bolkestein proposal, which led to deadlock. This round closed when the Commission endorsed the new compromise reached in the Parliament and, consequently, adopted a revised proposal. The second phase addresses a modified set of issues with a different preference space. substantial modifications leading to the adoption of a policy instrument that initiated minimum harmonization and left more leeway for host state control. We can therefore test the congruence of those two different outcomes with expected variations in the independent variables.

The first section discusses the political background and the legal concepts regarding which the actors have formed their preferences. Together, they constitute the status quo ante against which backdrop stakeholders can calculate their utility as a result of various policy alternatives. They are included in member states' political economic features, pre-existing regulatory and economic asymmetries. Importantly, the status quo consists of the existing case law of the CJEU, which naturally influences the Commission legal reasoning underlying its policy proposals. The CJEU case law also has distributive consequences on key stakeholders, contributing to define the set of winners and losers of certain policy alternatives.

The second section provides a comparison of the main alternative provisions form a legal perspective to contribute in an assessment of their degree of stringency.

This serves to explore the universe of possible variations in the dependent variable – policy output – and the actors' respective preferences over those variations – the preferences over policy outputs. The second and third sections test the hypotheses in the light of the empirical findings.

A. From status quo to change: The political background

1. The politics of liberalizing services

a) Contentious services

The liberalization of service trade in the EU caused an unusual level of politicization and contention. Decision-makers, particularly in the Commission and in the Council, are more ordinarily used to negotiate technical issues behind closed doors rather than address street protests and intense media exposure. By comparison, the liberalization of the European market for goods was carried out in a much more muted atmosphere. In that respect, the manifest contestation that emerged with regards to the Services Directive took most observers and decision-makers by surprise.

There are concurrent explanations for such level of contention and politicization to emerge. First, stakeholders may be increasingly well organized and more easily mobilizable than in the past. Therefore, they may be able to responsively form stronger, more exposed and effective coalitions. They may have found new ways to mobilize affiliates and members to organize more complex multilevel lobbying strategies. The EP's increased power since the Maastricht treaty may also serve to amplify their voice. Second, European issues may be increasingly exposed to public scrutiny through national media that are more alert to what happens in Brussels. The public may also have better access to European and international media, resulting in increased awareness about European policy developments. Third, services may have special features that increase their inflammatory potential compared to goods. Last, the Commission has taken a bolder approach to the liberalization of the market for services, pushing stakeholders to react more radically and confrontationally.

In this section, we focus only on the last two potential explanations because they contribute to set the particular context of the liberalization of services, while the two first explanations may serve to illuminate a more general trend in patterns of interest groups' lobbying that is precisely the explanatory purpose of the theoretical framework.

- Services and other issues

Services trade has some specific features that make it more prone to functional spillovers than trade in goods.[34] There are indeed complex functional connections between service liberalization, workers' mobility, industrial relations, and welfare institutions. It may even have pervasive effects on the normative meaning of citizenship in Europe. Those interrelations offer as many channels for functional spillovers. They also offer ample opportunities for audacious stakeholders wishing to take advantage of potential issue linkages to create and exacerbate politicization and mobilization. Those cross-sectoral interconnections turn the liberalization of services into an inflammable issue, opening existential questions that might best be left in peace.

Compared to goods, the conditions of service operations do pack the rare potential for politicization and are eventually more likely to attract public interest. Goods can and do cross national borders independent of the producer, who can remain in his or her own home country. Therefore, the principle of mutual recognition may target the end product only – e.g. quality, safety or health standards. End products can easily be disconnected from the process standards under which goods are tailored – e.g. working conditions.

[34] For an analytical discussion, see Roth, 2002.

By contrast, pure services[35] are precisely defined by the simultaneity of production – performed by the provider – and consumption – by the recipient of given services. Therefore, in practical terms, either the producer must move to personally meet the recipient, or the latter must physically move to the provider's establishment site: "Services are in a certain sense invisible, which is why it is often difficult to separate their production from their consumption. This makes regulation much more constitutive for services than for goods" (Schmidt, 2009:851). Regulatory standards thus applied to operations in the market for services target the processes of production rather than the end product itself. While monitoring products is enough to ensure proper compliance with quality standards imposed on goods, it is hardly feasible when applied on services. Services are most often purely immaterial and will be immediately consumed at the time when they are produced. Hence, service regulations will target the conditions under which given services are produced rather than the services themselves. This is why service providers may be required to conform to intuitu personae authorization schemes, special qualification requirements, and membership to professional organization. A bus driver may be asked to produce evidence of qualifications, abide by set maximum working hours and be required to take regular rests while performing her tasks. That is why "there is a closer connection between services regulation and labour market regulation than in the case of goods" (Pelkmans and van Kessel 2007: 7).

- The Commission's evolving approach

The Commission has also changed its attitude toward national institutional diversity. It seems that it has come to consider obstacles to integration in an increasingly inclusive – perhaps more radical – way. National institutions and varieties in welfare regimes start to be seen as potential threats to an ever more open market. Arguably, there is a major difference in the underlying philosophy between past liberalization and more

[35] The denomination 'pure services' serves to secure a clear distinction with correspondence services like financial services, advisory services, and so on, which can be provided at a distance.

recent policy development advocated by the Commission and supported by the CJEU case law.

Traditionally, liberalization has been used to take advantage of member states comparative advantage, without putting pressure on existing varieties of market institutions and patterns of industrial relations across Europe. Yet, Höpner and Schäfer (2010) maintain that the Services Directive[36] is revealing of EU policy developments that increasingly promote the convergence of national institutional foundations and economic systems. That sort of pressure for change expectedly creates mounting political resistances. They further claim that EU integration is now about formatting the varieties of capitalism across Europe according to Anglo-Saxon standards: "Market-making no longer implies enforcement of non-discrimination but the abolition of potential institutional impediments to free market […] that threatens the diversity of 'institutional foundations of comparative advantage'" (Höpner and Schäfer, 2010:344). Arguably, the Services Directive in particular and services liberalization in general put national institutions under transformative pressure for change: "Supranational actors have reinterpreted the Common Market principle of non-discrimination to mean that any institutional difference that potentially hinders economic transactions shall be removed" (Höpner and Schäfer, 2010:349). Therefore, it comes as no surprise that the integration of the market for services raised so much resistance and politicization.

The Bolkestein approach to service liberalization may indeed have been interpreted as an attack on national institutional idiosyncrasies as presumed obstacles to European integration altogether. And indeed, the Country of Origin Principle (CoOP) has been interpreted as a radical version of mutual recognition intended to implement a quasi-presumption of illegality regarding remaining hindrances to internal markets freedom (Hatzopoulos, 2007; 2012). As Höpner and Schäfer note:

[36] Their analysis also includes the Takeover Directive and recent developments in company law.

> Of course, EU decisions had transformative influence on national economic systems and institutions in the past, as well. For example, the Commission and the ECJ regularly used EU competition policy to push for economic liberalisation whenever they were able to decide without the agreement of the Council of Ministers. However, these interventions still went under the heading of 'non-discrimination' […] Lately, the Commission's understanding of a level playing field has undergone significant reinterpretation. Institutional differences, as such, are increasingly viewed as unnecessary impediment to free competition. Liberal market economies and organised economies are no longer equally valid production regimes; rather, the institutions of the latter are seen as barriers to full economic union. (Höpner and Schäfer, 2013:351)

Similarly, Crespy (2011) argues that the liberalization of services is epitomic to the emergence of contentious politics in the EU. In support, he proposes an analysis of outsider actors' multilevel mobilization and the role that they played, with special attention to the Services Directive.

In summary, the politics of liberalizing services crystallizes three key dividing lines with respect to the general orientation that the EU should take. First, should integration be furthered, or not, by means of harmonization or mutual recognition? As a matter of course, both avenues might put pressure on national institutions in equally contentious manners. Second, how much margin of manoeuvre is left to the single market to deliver benefits for all members through liberalization as a means to foster productivity and innovation? Are we to expect that furthering the union is now more likely to leave an unacceptable number of losers on the sideway? In that event, shall EU integration be viewed increasingly as a zero-sum game? Third, is the EU able to propose a European-wide social model – if only to tame losers' understandable reluctance - or is it doomed to uniquely seek ever-increasing economic competition?

As Hymans (2005) argues, the liberalization of services crystalizes and caricaturizes the struggle between supporters of a European social model and the advocates of a single-mindedly open economic area.

Hymans (2005) further emphasizes that industrial relations result from a combination of market pressures, legislation embodying state choices in the form of intervention and collective bargaining between workers and businesses employing them, all of which are profoundly challenged by the liberalization of services. As he notes:

> Because industrial relations systems are nationally embedded, economic internationalization alters the preconditions for their functioning and perhaps survival […] such features of 'globalization' create inexorable pressures to eliminate labour market 'rigidities' by reducing or removing employment protection legislation and encouraging company-specific regulatory structures, and to 'modernize' welfare states… [the liberalization of services may] transform welfare states into workforce states, with "marketization" of citizenship and a recommodification of labour (Hymans, 2055:11-12).

The politics of liberalizing services in the EU is also intertwined with the politics of mutual recognition. As will be developed in detail later, mutual recognition has been a key feature to further European integration. It may variously balance deregulation and reregulation and has undergone major changes on the event of the Services Directive, particularly.

In that respect, Nicolaïdis and Schmidt (2007) formulate a threefold argument. First, there subsists an ambiguity about the particularly soft – managed – version of mutual recognition that has been utilized in the past to liberalize goods. The bolder version inserted in the Bolkestein proposal does not stand as an equivalent and was

therefore more prone to attract resistance and discontent. Second, Recent EU enlargements – leading to a 29-state union now – has caused a tremendous increase in economic and regulatory asymmetries between EU member states, thereby increasing the probability that member states' preferences would become more incompatible. In that regard, Kox and Lejour (2006) famously championed the idea that opening the market for services within Europe could immensely boost productivity and innovation. Yet, they too recognized that extending the Single Market Program to services at a time when ten new member states had joined in the Union could prove difficult, as this would inevitably contribute to spread worries about free-running migration flows from new (and poor) to old (and better-off) member states. The general perception that eastern workers would accept poorer working conditions led to a fear of a race-to-the-bottom across Europe (Sapir et al., 2004). Third, furthering integration in services has only been made possible because the final compromise rediscovered and reinvented the managed variation of mutual recognition that had underpinned liberalization in goods. As Nicolaïdis and Schmidt observe:

> The political context had changed significantly in the intervening years, with the politicization of the single market and greater differences between member state regulatory and economic development associated with eastern enlargement. Fears of regulatory competition and social dumping in the richer member states, which had previously been invoked only to 'manage' mutual recognition, now led to a political veto (Nicolaïdis and Schmidt, 2007:718).

Yet the political picture rendered by Nicolaïdis and Schmidt primarily focuses on member states' veto rights in the Council, therefore insisting on the divide between old versus new member states, on the one hand, and western versus eastern countries, on the other hand. As elaborated in the theory section, the conflicts may be

more complex and crosscutting when examining the multiple divides that also exist within and between economic stakeholders and social partners (see also Nicolaïdis 1993, 1996, 2004).

b) The path to services liberalization

Tracing the premises of recent developments in services liberalization, it is evident that its very idea was not born with the Bolkestein proposal. In fact, it had been integral to the vision of a united Europe since its inception. Freedom to provide services was already enshrined in the 1957 Treaty of Rome. Yet, at the time it was probably considered the least politically strategic of the four freedoms and the least urgent to implement from an economic viewpoint. Therefore, services were left outside the 1985 single market action program.

In line with the growing importance of services in the global economy (e.g. Daniels, 1991), It is only with the 1988 Cecchini Report that – for the first time – the need to fully implement the liberalization of services was forcefully stressed (European Commission, 1988). But the genuine call to opening the service market and deliver the full potential for growth that the member states were hoping for really emerged in the wake of the 2000 European Council in Lisbon. The approach at the time was far from what the Commission would later propose. Member states' initial impulse was geared towards sector-specific processes of incremental market integration. The more sweeping idea of a general and horizontal approach to the completion of the market for services only started to emerge in the December 2000 Commission Strategy Paper for services (European Commission, 2000), as a response to the request formulated by the member states in Lisbon. This is already quite surprising given the variety of economic activities that the concept of services can cover and the sheer diversity of national regulatory regimes across the EU (House of Lords, 2006).

Although dangerously broad in scope, many decision-makers would consider the strategy to be well thought and coherent at first (interview with former EU Presidency officials; Chang et al. 2010). At the outset, there was a shared level of confidence among the member states' representatives that the strategy would be conducive to policymaking success. This translated into the initially warm reception given to the Bolkestein proposal. Even beyond EU institution officials in both the Council and the EP, the 2004 proposal actually induced a surprisingly low level of reaction, awareness, and interest on the part of the social partners. Virtually no one in Brussels seemed to imagine that this policy could cause any kind of friction or incurs such high political costs.

Yet, several interviewees including national officials in Permanent Representations note that the background research behind the Commission impact assessment of the proposal was masterminded by Copenhagen Economics,[37] a research centre with no institutional ties to the EU and generally recognized as pro-market and economically liberal. Social partners, and among them ETUC standing pre-eminently, started to realize the risks that the proposal may incur for workers across Europe, and the potential for politicization that they could unleash. As a result, many stakeholders started denouncing an alleged ideological bias behind the claimed economic benefits of such a policy and the quite unusual policy instruments that the Commission had put on the table.

The CoOP especially started to crystalize all resistance. On the one hand, its promoters argued that this was nothing more than a polished wording for what would basically equate to classic mutual recognition, similar to the rationale applied to the liberalization of goods. Rivals, on the other hand, began arguing that such principle meant the end of any forms of control in principle and the triggering of a malicious race-to-the-bottom between regulatory regimes, one that would quickly lead to the

[37] Copenhagen Economics, "Economic Assessment of the Barriers to the Internal Market for Services. Final Report", 2005.

deterioration of working condition across Europe and the destruction of regulatory standards. They further argued that the proposed policy, if left unaltered, could eventually prove detrimental to all workers across Europe. Trade unions and opposing political figures depicted the policy as a Trojan horse (see Chang et al., 2010) designed by a distinctively neo-liberal Commission to implement an unstoppable chain-reaction of deregulation in the member states job markets. But, interestingly, Commissioner Fritz Bolkestein himself was far less politically committed to this policy than the opposition would like to depict.

To understand the fate of the Bolkestein proposal it is also important to picture the wider political context that incentivized a wide range of actors to mobilize on this issue: from national trade unions to European umbrella association, from NGOs' to advocacy associations like the international Attac network and even 'never-heard-of-before' individual characters (interview with Permanent Representation official; interview with former Commission official).

The timing of the Bolkestein proposal was probably unwisely thought out. Negotiations coincided with crucial public debates on the – much more decisive – Treaty establishing a Constitution for Europe (Crespy, 2011) leading up to popular rejection in the Netherlands and France (see Hooghe and Marks, 2006). This proved to be a major opportunity for the adversaries of economic liberalization to successfully use a framing strategy that tied one issue to the other to attract awareness and initiate a process of politicization. Indeed, Interviewees pointed out that many actors utilized the issue of services liberalization to raise public awareness about other issues, often misrepresenting the Bolkestein proposal (interview with business association official; interview with Ambassador to the EU).

Reflecting upon the policy negotiations at the time, former EU Presidency officials argued that the best way to describe negotiations leading up to the Services Directive was the word '*récupération*'. This has contributed markedly to precipitating the failure of the Commission's communication strategy. For some (Interviews with

former EU Presidency officials; interview with former Commission official) the initial Bolkestein proposal was nothing but an ordered codification of well-established CJEU case law. Adversaries, in contrast, systematically represented it as a new economic 'constitution' for the EU (Holmes and Roder, 2012). Yet, from a legal perspective, it is still unclear whether the Bolkestein proposal was in fact a mere operation of codification or a break through on a hastened path toward market liberalization.

2. Decision-making procedure

The initial project was designed by the Commission services of the DG Internal Market and Services and officially issued as a proposal on 14 January 2004 in the framework of the co-decision procedure. After much internal frictions and external pressures from social partners, the EP voted on a watered-down compromise in February 2006 and in April 2006 the Commission revised the proposal to include the amendments of the EP.

Although the legislation was only marginally altered, two notable modifications were incorporated. First, the scope was notably reduced to leave out certain sectors that had raised too much resistance and, second, additional safeguards were proposed. Notably, the Commission made it clear the Services Directive shall neither affect labour law nor national social regulations. In May 2006, the Council issued a common position, which further excluded regulated professions, notably rules governing notarial activities and bailiffs. The Council also eased the requirements regarding the implementation of the Point of Single Contact. In addition, it scraped the advisory comitology procedure and replaced it with the regulatory one. This effectively meant that the Council was securing a closer grip on the implementation phase. Finally, it postponed the implementation deadline by an additional year. In

November 2006, the EP adopted the common position in second reading and on 28 December 2006, the directive was published.[38]

3. The dependent variable: Policy alternatives and the status quo

In this section I review the key legal issues regarding the internal market for services. With the conceptualization of the dependent variable in mind, I assess how alternative policy measures may affect the stringency of the regulatory environment for economic operators' freedom to provide services across borders, and compare them against the backdrop of the legal status quo established by the court.

The status quo ante contributes in defining the initial set of winning actors as compared to alternative subsequent policy measures. In the case of service, this status quo is overwhelmingly determined by the CJEU case law. Expectedly, actors that benefit from existing deregulation will either defend the status quo ante or advocate an amplification of negative market integration. Those who lose as a result of the status quo will advocate positive integration in the form of harmonization, some restrictions on existing patterns of negative integration to a fewer range of sectors as well as greater leeway left to national authorities – particularly in host member states – in imposing more stringent barriers to market freedom. Therefore, the existing case law of the CJEU is key to comparatively assess the distance between the pre-existing regulatory environments, the original policy proposal issued by the Commission, the preferences stated by the actors, and the final outcome.

Yet, compared to the status quo, the draft directive and its subsequent amendments are not conducive to an easy understanding of the legal and political stakes. Some have pointed to various inconsistencies and even contradictions, not only between the convoluted preamble and the legislative corpus itself, but also between the pre-existing case law and the new legislation. Understandably, hard

[38] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27 December, 2006, 36–68.

compromises are often the result of delicate equilibria between conflicting preferences. They hardly ever translate into clear-cut rules. As Barnard once wrote, "directives drafted by tired politicians in the middle of the night rarely stand up to the harsh light of day" (2008:324). This means that the potential impact of alternative rules on the respective utility of the actors is often hard to evaluate, in reality. Therefore, in comparing different alternatives, I also take account of the actors' own assumptions about the likely effect of those alternatives on their general utility. Last, but not least, it is important to note that in those cases where legal developments only tend to maintain the status quo through codification, actors' utility may not thus necessarily remain constant. The codification of the case law often results in increased legal certainty and better implementation. Even unaltered rules are likely to produce greater effects because of codification, especially if they are accompanied by comprehensive review of national regulations.

First, I examine the boundaries between the freedom to provide services and the freedom of establishment. The criteria for certain operations to be qualified as temporary may be variously vague and exclusive, making it more likely that those operations will be regulated under free provision or establishment. This determines whether the home or host country's administrative requirements and standards will apply. Consequently, the easier it is to argue that an operation is carried out under the freedom to provide services the more lenient the regulatory environment is likely to be. This indeed determines whether the host state can apply its national legislation – under establishment – or is constrained to recognize the obligations already complied with in the home state – under the freedom to provide services. Then, I review the evolution of the material scope of application of the rules concerning services. The greater the material scope of application of liberalizing measures, the more lenient the rules applied to service providers are likely to be. Next, I assess the variance in the leniency of alternative liberalizing principle employed to further realize the freedom to provide services within the single market. The greater the freedom to

apply home country rather than host country rules, the more lenient the policy will be.

a) Freedom to provide services and freedom of establishment

The Bolkestein proposal and the final Services Directive cover both regimes regarding the right to provide services across borders and regimes regarding the right of establishment.[39] This is remarkable and poses two sorts of problems. Legally, service provision and establishment do not refer to the same Treaty provisions.[40] Politically, addressing those two distinct aspects within the same piece of legislation leaves considerable opportunities to amalgamate the liberalization of services with the posting of workers, for example. And yet, provision and posting have very different legal, political and social implications.

This alone, De Witte (2007) argues, caused widespread confusion about the general perception that the proposal generated. The CoOP was only intended to apply to free provision with the exception of rules enshrined in the 1996 Directive on Posted Workers. The targeted simplifications and liberalization, therefore, did not seem to concern standards applied to working conditions but mostly national authorization schemes and cumbersome registration obligations.[41] Yet, trade unions at the EU level expressed worries that this would launch a far-reaching impulse to intensify regulatory competition, notably because, in practice, those provision would undermine the ability of the host state to control and monitor the proper enforcement of the rules that remained applicable to posted workers. Judging by the

[39] This is legally surprising since freedom of establishment and freedom to provide services are based on two distinct Treaty provisions. This may have been the source of ambiguities in later policy discussion. De Witte (2007:6) finds such confusion legally inconsistent and politically ill-advised.

[40] Articles 56 to 62 TFEU concern the freedom to provide services. Articles 49 to 55 TFEU concern the right of establishment.

[41] Article 24 COM (2004) 2Final Proposal for a Directive of the European Parliament and of the Council on services in the internal market [SEC(2004) 21].

growing number of frauds reported across Europe in the immediate aftermaths, they might have had a fair point, though.

Freedom of establishment is addressed in Chapter III of the Services Directive. The directive defines it in Article 4(5) as "the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, by the provider for an indefinite period and through a stable infrastructure from where the business of providing services is actually carried out." Rules relating to freedom of establishment seem to apply to both establishment of businesses originating in foreign member states *and* to purely national operations (Barnard, 2008:351).

Chapter IV, on the other hand, covers the freedom to provide services and is more complex to interpret. Those provisions are also the most controversial. By contrast to freedom of establishment, freedom to provide services is intended to apply to activities that are provided on a temporary basis exclusively. Yet, the temporal component has posed some enormous interpretative difficulties to the Court, which is not to be understood in terms of time only but also "in the light of the duration, regularity, periodicity and continuity" of the activity.[42] This issue alone was responsible for much of the bewildering misperceptions as regard to the coexistence of the 1996 Posted Workers Directive and the Services Directive.

b) Material scope

Assuming that the Bolkestein proposal was mostly an exercise in codifying CJEU case law leaning toward negative integration, then the wider the scope the more lenient – i.e. deregulatory – the policy would have been and the narrower the scope, the wider the leeway would have been left to national authorities to adopt more stringent requirement to market entry. Therefore, prior to the Bolkestein proposal what exactly did the case law establish regarding the scope of application of the rules stemming

[42] See Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano (Case C-55/94).

from provisions on freedom to provide services under Article 56 TFEU? In what way would that scope have been affected by the Bolkestein proposal and in what way has it been eventually affected by the Services Directive?

(1) Status quo

As established in the case law and constantly reiterated thereafter, services are those economic activities provided in exchange of remuneration by *self-employed* workers. To avoid confusion, that does not mean that providers cannot perform services without their collaborators altogether. Rather, those collaborators that are tied by an employment relation with a provider are expected to comply with rules set out in the 1996 Posted Workers Directive.

The service sector is multi-faceted and covers an extensive range of products. Leaving aside some sector-specific directives in the 1980s and 1990s, the regulatory landscape has mostly been shaped by negative integration stemming from CJEU case law, especially since the end of the 1990s. It has been marked by three different developments. First, the Court has dramatically stretched the scope of application of Article 56 TFEU on free provision of services, while maintaining the residual exclusion of public goods from the Treaty rules. Then, it has put forward an increasingly broad understanding of mutual recognition, most often resulting in more lenient obligations to access foreign markets.

The first decision to hit the market for services was the 1974 Van Binsbergen case.[43] It held that restricting exercise of the profession of legal adviser in the Netherlands to Dutch nationals or residents was incompatible with Article 56 TFEU, provided that this restriction is not necessary to ensure the good administration of justice. This was the first time the CJEU applied a version of the principle of non-discrimination to the freedom to provide services. The next significant decision only

[43] Van Binsbergen v Bestuur van de Bedrijfvereniging voor de Metaalnijverheid (Case 33/74).

came with the 1991 Säger case,[44] which marked the genuine beginning of an uninterrupted stream of audacious decision-making in this area.

Because of the Alpine investment, Carpenter and Omega cases, the CJEU established that the present and future virtual possibility that cross-border recipients may purchase a service is enough to apply Article 56 TFEU on free provision of services. In line with case law on the free movement of workers,[45] the Court even decided that the rules stemming from the freedom to provide services should also apply in operations within which an extra-territorial element is not discernible. Incrementally, the Court has thus come to consider that certain services should be viewed as inherently traded in the European market as whole.[46]

The Court also included an ever-broader range of services that would not only fall into the ambit of the provisions included in the Treaty but were also regulated by other sector-specific secondary legislation. Those include transport services, maritime services, air-transport services[47] and public procurements. In those areas, the CJEU rationale has been to apply both sector-specific rules and Article 56 TFEU concurrently.[48] In doing so, the CJEU has been able to apply EU rules to areas that were not covered by any legislative text. That is especially the case for concession contracts.[49] Similarly, and arguably more contentiously, the Court has adopted several intensely commented-upon decisions in which it has extended the application of Article 56 TFEU to the areas of social security[50] and health services (Dawes, 2006;

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[44] Manfred Säger v. Dennemeyer & Co. Limited (Case C-76/90).
[45] Angonese v Cassa di Risparmio di Bolzano SpA (Case C-281/98).
[46] They notably include transport, as well as advertising – as a result of the Carpenter case and the Gourmet case – and broadcasting and television – as a result of the De Coster case (case C-17/2000) and the Mobistar case (case C-544/2003).
[47] Commission v. Italy, Embarkation Tax (Case 295/00).
[48] E.g. Commission v. France, Nord-Pas-de-Calais (Case C-225/98).
[49] Teleaustria case (Case C-324/98).
[50] In the 1997 Sodemare (Case C-70/905), the 1999 Albany (Case C-67/96), the 1999 Bretjens (C-157/97) and the 1999 Drijuvende (Case C-219/97) cases, the CJEU established a difference between market-funded social security schemes and

Hervey and McHall, 2004; Hatzopoulos, 2005; 2007). This is a prime example of the resolute stance adopted by the Court, which allowed it to vastly extend the reach of internal market rules in the absence of political initiative.

Yet the Court has generally admitted that certain services are not subject to EU rules regarding freedom to provide services, especially non-economic services of general interest. The conditions under which services can be qualified in this way overlap with the analytical definition of public goods. They are those products and services that are necessary for the good functioning of society. But private operators are not able to optimally provide them, because their consumption is non-rival and non-excludable. It is non-rival because their consumption does not affect the total amount of public goods available to other members of the community. And it is non-excludable because it is theoretically impossible to exclude consumers from benefiting from those services once they are provided. In the case law, non-economic services of general interest have been found to cover two different categories: social services and strategic services. Yet, the Court may not ignore the issue that "the distinction between services which do and those which do not have an economic nature depends on basic political and social choices concerning the role of the state" (Hatzopoulos, 2007:228).

(2) The Bolkestein proposal

The horizontal approach adopted in the Bolkestein proposal meant that it would have included a very wide range of services. However, the CoOP wouldn't have applied to most services of general economic interest. The final services directive is, however, more stringent regarding that exclusion. In addition, the CoOP would not have applied either to consumer contract,[51] in cases when contracting parties would have excluded

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solidarity funds so as to apply EU rules to the former and exclude the latter. However, the distinction is based on a complex array of evidence instead of a clear, mutually-exclusive distinction (Hatzopoulos, 2005).

[51] Article 17(21).

it explicitly,[52] extra-contractual liability rules[53] and, of course, posted workers, for which another directive applies.

The original Article 2 explicitly excluded financial services, electronic communications and transport services from the scope covered by the freedom to provide services across borders, mainly because other directives already targeted those activities.

(3) The Services Directive

The final Services Directive is much narrower in scope than its predecessor. Compared to the Bolkestein proposal the April 2006 version of the Services Directive removed eight additional sectors, effectively recognizing irreconcilable resistances.

In addition, the concept of remuneration posed the question as to whether certain publicly funded activities could be considered as economic ones, and therefore, whether remuneration is indeed traded in exchange of the provision of a service. Despite early worries, Recital 17 and Article 4(1) provide that so-called services of general interest are excluded from the definition of services within the meaning of the directive. Nonetheless, services of general economic interest within the meaning of Recital 17 are included.[54] According to Recital 17, these are services:

> provided in application of a special task in the public interest entrusted to the provider by the member states concerned. This assignment should be made by way of one or more acts, the form of which is determined by the member states concerned, and should specify the precise nature of the special task.

[52] Article 17(20).
[53] Article 17(23).
[54] "Services of general economic interest are services that are performed for an economic consideration and therefore do fall within the scope of this Directive."

Services within the scope of the directive still include those listed in Article 57 TFEU. They are industrial and commercial activities, craftsmen activities, business services including advertising and consultancy, business-to-business services and business-to-consumer services including legal advice and services provided by architects.

Yet, the scope of the directive is markedly reduced. The activities that were excluded in the final draft "range from services of general non-economic interest, social and healthcare services to transport and financial services and to gambling and private security activities. There is no apparent logical link underpinning the various excluded activities, other than the ones best represented in Brussels" (Hatzopoulos, 2007:244).

Besides already excluded financial services, electronic communications and transport, Article 2 now adds:

> services of temporary work agencies; healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private; audio-visual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting; gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries, gambling in casinos and betting transactions; activities which are connected with the exercise of official authority as set out in Article 45 of the Treaty; social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State; private security services; services provided by notaries and bailiffs, who are appointed by an official act of government.

Importantly, Article 1(6) provides that:

> this Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.

Even if it is unlikely that the initial proposal would have affected those areas, the amended version reflects the level of contention to which the directive has been exposed, notably regarding the effect of the directive on labour law. It may also highlight the significant impact that a winning coalition can have.

Thus, we naturally conclude that the final Directive – as compared to the Bolkestein proposal – leaves much more leeway for host states' intervention resulting in a potentially more stringent regulatory environment for service providers. While the status quo ante established by the case law will probably not be significantly altered as a result, this still represents a major leap compared to the original Commission's plan.

c) The CoOP: There and back again

(1) The status quo: Mutual recognition and home state control

The key point underlying the negotiations on the liberalization of services concerns the various versions of mutual recognition as led down in Article 16 of the proposal. In the Commission efforts to build a functioning single market, mutual recognition can be traced as far back as to the 1960s (Genschel, 2007). But it became a pivotal means

to further European integration with the so-called 1979 Cassis de Dijon[55] ruling. Expanding on 1974 Dassonville case,[56] the CJEU found that any good produced in conformity with any member states' regulatory standards could also be so in any other member state of the Union save for exceptional measures in sensitive areas under the condition of necessity, proportionality (Harbo, 2010), and non-discrimination (Prechal, 2004; Waddington, 1999).

Hatzopoulos (2007:238-240) notes that there have been three versions of mutual recognition since the Cassis de Dijon and Van Binsbergen cases. Those three versions show an evolution in the balance between positive integration and negative integration at the expense of the former. The first version of mutual recognition required that there exists a significant level of ex ante harmonization. In the second version, only minimum harmonization was necessary to implement the mutual recognition of standards between host and home states. A prime example can be found in the Electronic Signature Directive (1999/93/EC). The third more radical version is the CoOP that the Commission proposed in the Bolkestein Proposal.

Additionally, prior to Bolkestein the CJEU had already discovered a slightly different home-state-control principle. It imposed a rather strict obligation for the host state to take into account already existing financial requirements and guarantees for which an equivalent already existed and was effectively fulfilled in the home state[57]. Therefore, this obligation established an implicit obligation imposed on national authorities to cooperate. Taken together, this set the status quo prior to the Commission proposal to establish the CoOP.

[55] Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein (Case 120/78).
[56] Procureur du Roi v Benoît and Gustave Dassonville (Case 8/74).
[57] Commission v. Italy (transport consultant), Commission v. Italy (sanitation services) ; Commission v. the Netherlands (private security firms).

(2) There: The Bolkestein proposal and the CoOP

The single most important feature of the Bolkestein proposal was arguable the CoOP as drafted in the original Article 16(1): "member states shall ensure that providers are subject only to the national provisions of their member state of origin which fall within the coordinated field." It would also have put the responsibility of applying, monitoring and enforcing those rules on the home member state's shoulders. Hence, member states and stakeholders raised serious concerns insofar as the directive itself did not provided for much re-regulation and safeguards, except as regards to quality of services. (see Barnard, 2008:362).

Nevertheless, the CoOP and its potential legal consequences have generally led to certain misrepresentations. And those misrepresentations may have been used to instil misplaced worries and even fear. In contradiction to certain prejudiced claim, though, the CoOP would not have applied to posted workers and labour law, since other directives already cover those areas. Also, the fictional character of the Polish plumber coming to France to steal the jobs of good people in the old member states underpinned some veiled racist sentiments toward east European workers that would later assume unprecedented levels, especially in the so-called Brexit campaign. Yet, it did also reflect a more realistic concern as the ways to withstand foreign competition without the guarantees of a level playing field.

We cannot do justice to the rich and still ongoing academic discussions bearing on all the complex implications of the CoOP.[58] Nevertheless, since we measure the dependent variable in terms of the variation in regulatory leniency, we must answer the question how novel would the CoOP have been compared to the status quo ante. More specifically, we ask: where does the CoOP come from? How does it differ from already existing versions of mutual recognition and home state control? The rich literature that has developed about that question has no managed to provide a

[58] Academic discussions and research on this issue go far beyond one directive to inform European integration itself (e.g. Lopez-Garcia, 1996)

conclusive answer, though (Gürhan-Canli and Maheswaran 2000; Michaels 2006; Gareth T. Davies 2007; Hellner 2004; Davies et al. 2007, De Bruijn, Kox, and Lejour 2006). Finally, how would that affect actors assumed preferences over that particular policy alternative?

- Where does it come from and is it new?

The CoOP intended to allow businesses to provide services abroad without being established there or having to submit to host country rules. Instead, home country rules applied. Generally, restrictions imposed by other member states on such provisions would therefore have become unlawful. Furthermore, it would have implemented a sort of presumption that host country rules could not apply. Despite derogations and safeguards of both general and temporary nature, the CoOP inaugurated a stronger and seemingly new version of the concept of mutual recognition that had successfully rooted EU market integration to date (Barnard, 2008; Höpner and Schäffer, 2010; Nicolaïdis and Schmidt, 2007). Yet this must immediately be nuanced by the fact the previous case law had already had far reaching consequences in strengthening home states' grip over the rules governing the free provision of services prior to the Commission proposal (Hatzopoulos, 2007).

According to Hatzopoulos (2007), the CoOP embodied a more radical version of mutual recognition because it wouldn't have required a minimum level of harmonization prior to its implementation. It would also have covered both authorization schemes and the operation of service provision. In addition, the CoOP would have effectively implemented a principle to settle conflict of law between home and host states. Finally, it would have extended a strong version of mutual recognition to pure services.

The CoOP would thus have marked a clear step forward towards a more open market – resulting in a more lenient regulatory environment – in the area of free provision of services across borders as compared to both what had been done in

other directives and to case law. As a result, the winners of services liberalization – i.e. mostly those economic operators located in comparatively more lenient regulatory environments and enjoying lower production costs – expectedly supported the proposal. By contrast, the losers – i.e. mostly rent seekers operating in more highly regulated countries – are likely to have contested that change in favour of more stringent harmonization or, at the very least, the maintenance of status quo.

- What does it really mean?

Finally, Höpner and Schäffer (2010) and Barnard (2008) share the opinion that the original Bolkestein proposal – particularly the CoOP – promoted the adoption of the Anglo-Saxon economic model across Europe, while the final draft of the directive embodied an attempt to reconcile both Continental and Anglo-Saxon versions of economic liberalism. It thus seems that the model suggested in the Bolkestein proposal would have eventually promoted a more lenient and open regulatory environment compared to the status quo, since the UK services market is widely viewed as much less regulated than the rest of Europe.

(3) Back again: The Services Directive

The compromise hammered out in the EP removed the CoOP while keeping derogations. Article 16(1) now reads:

> member states shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory […] Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements.

Article 24 and 25 were also scrapped and additional safeguards were introduced against potential spillover with labour law and healthcare. In general, national

restrictions can be maintained if they are justified by public policy, security, safety and the protection of the environment. In any case, they shall always be non-discriminatory, necessary and proportionate.

In reiterating providers' fundamental right to supply their services across borders as enshrined in Article 56 TFEU, the directive largely repeats already existing treaty provisions. In that respect, the directive does not exactly increase legal certainty compared to the status quo. While, some still argue that this latter formulation does not necessarily implicate that the substance of the CoOP may still apply (Pellegrino, 2007), numerous research conclude that the new version mark a return of the milder case law regarding mutual recognition in the area of free provision of services (Wilderspin, 2007; Micossi, 2006; Nicolaïdis and Schmidt, 2007).

For example, Nicolaïdis and Schmidt (2007) find that the so-called managed version of mutual recognition that results from the new Article 16 embodies a return to a version of the concept as found in previous directive and continuously applied by the Court. This analysis concurs with Hatzopoulos' opinion (2007). Hence, compared to pre-existing regulatory environment as set by the CJEU case law, the directive may indeed be viewed as an instance of persisting status quo. However, compared to the CoOP proposed in the Bolkestein proposal, host states will certainly enjoy far greater leeway to impose restrictions on the free provision of services. This last remark has evident implications on the measurement of the preferences and potential success of competing coalitions along the negotiation process; although the operators who get a relatively greater benefit out of the status quo of negative integration may prefer and advocate the persistence of that state of affair, they would evidently be even more prone to support a policy alternative that improve their utility by exacerbating the effects of the status quo through even more negative integration. The Services Directive can indeed be viewed as maintaining the status quo. Yet, from the perspective of those advocating more regulation, the persistence of the status quo ante may be received as a better alternative when compared to the potential effects

on their utility that the Bolkestein proposal – including the CoOP – would have had. It is also likely that actors are more willing to mobilize against a loss in their *existing* utility than in favour of prospective additional benefits, because there is more certainty attached to already existing benefits than to prospective ones. Hence, in collective action terms, the actors favouring the CoOP may have been in a disadvantaged lobbying position compared to those fighting it.

In line with the case law, the Services Directive also specifies that home and host member states may still adopt restrictive measures under certain conditions only. Nonetheless, those conditions are presented in a manner that renders the assessment of the variation in policy stringency difficult. Whereas the case law refers to "overriding reasons related to the public interest," the Services Directive attempts to clarify the meaning and content of this concept. Yet it creates even more confusion. Recital 40 explicitly refers to the case law and suggest that it "may continue to evolve", suggesting that the directive does not intend to alter or intervene into the Court incremental refinement of the concept. However, it then provides a long non-exhaustive list of the kind of justifications that may qualify as overriding reasons related to the public interest. They relate to:

> public policy, public security and public health; […] the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social,

> cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy.

The Recital 41 then adds that "the concept of 'public policy' […] covers the protection against […] serious threat affecting one of the fundamental interests of society […] Similarly, the concept of public security includes issues of public safety." This seemingly provides a great deal of leeway for member states to justify potential restrictions so far as those measures are non-discriminatory, necessary and proportionate.

Does that mean that the list is only indicative, intended only to depict in a more illustrative fashion the situations in which restrictions are possible? Not quite so. Certain scholars suggest that the directive may in fact be more restrictive than the approach adopted by the Court (e.g. Hatzopoulos, 2007). Yet, others prefer to insist on the directive inconsistencies regarding that key issue (Barnard, 2008). Although the consequences are still legally unclear, Article 5(8) does provide a list of overriding reasons that is clearly non-exhaustive. That is the reason why the present research considers that the status quo is most likely to prevail on that particular issue.

d) The governance of services

Compared to the status quo, both the Bolkestein Proposal and the Services Directive introduce significant administrative innovations. Before these, "the Court, within the material limits of its capacity as an actor of negative integration [was], in some indirect and imperfect way, trying to foster positive cooperation obligation between member states' authorities" (Hatzopoulos, 2007). This touches upon the very essence of the JDT theory of negative integration. Besides the question of whether the Court

holds political preferences of its own[59] in prompting further integration, intervention through the case law is only possible based on the activation of the fundamental freedoms. Should the Court wish to instil positive integration, no Treaty provision could legitimize its endeavours in complementing the patterns of European integration that it has already stimulated with a more positive approach. This means that even the much needed administrative adaptations that negative integration would require cannot be addressed by the Court, besides implicitly suggesting that the member states and the Commission should take action. In that regards the provisions contained in the directive can be seen as a response to that calling.

On the one hand, the Bolkestein proposal complemented strict liberalizing measures with additional obligations to review all authorization schemes and carry out sweeping administrative simplification. Taken together, therefore, the Bolkestein proposal was indeed going further in designing a more open service market imposing more lenient rules on economic operators. Administrative simplification and the review of authorization scheme have survived in the final directive. Yet, dispossessed of the CoOP, their relevance and impact will lose significance. On the other hand, provisions included *along the negotiation process* with regards to consumer protection are of decisive political – if not legal – importance.

(1) Administrative simplification

Turning to procedural harmonization, both the Bolkestein proposal and the Services Directive aim to reduce disparities in administrative procedures and to make sure that providers are properly informed about administrative obligations in other member states to limit unnecessary financial burdens in their commercial activities abroad. Administrative simplification particularly targets authorization schemes as well as

[59] In that event, it is unclear whether the CJEU would prefer to foster deregulation or, alternatively, the construction of a high quality social and environmental regulatory space.

unjustified requirements, which must be reviewed comprehensively and repealed if they are not in line with the directive requirements by the implementation deadline.

Nevertheless, in both the Bolkestein proposal and Service Directive, the status quo established by case law has only been codified. Here again, codification coupled with a formal review of the existing national regulation by a strict deadline has the advantage of clarifying the obligations imposed on both economic operators wishing to establish abroad and national authorities across Europe. This is most likely to alter the actors' utility in ways that are exceedingly difficult to assess, yet most probably significant. In that sense, we may not be too quickly dismissive of the added value of the directive compared to the case law. The introduction of practical details regarding the implementation of the rules provides increased certainty for all actors and additional incentives to enhance compliance rates. In addition, member states are submitted to monitoring obligations and peer-reviewed mechanisms regarding the ways in which they comply with the codified rules. This is complemented by increased protections against unlawful behaviours. For example, Articles 19, 20 and 21 protect the rights of recipients against home and host states' discriminatory measures.

Finally, the final version of the directive introduces a new method of periodic assessment, allowing the Commission to foresee future revisions and further convergence, even in the spite of intense resistances sparked by the original proposal.

(2) Cooperation

The directive also supports the elimination of market barriers by introducing new and necessary cooperation between the member states. The Court had already sent clear messages that a functioning open market based on mutual recognition should be complemented by proper cooperation and mutual assistance between the competent national authorities across borders. The key objective is to ensure that providers' behaviour and compliance with national legislation is still properly monitored while preventing the creation of additional obstacles to the free provision of services.

This obligation is materially supported by an online system dedicated to the exchange of information, called the IMI system. It functions as an interface between national authorities working in their own language to communicate directly among themselves and to consolidate regulatory data in a single repository. The IMI platform is used in several areas besides services, including the posting of workers, patients' rights, e-commerce and public procurement. In services, national authorities can use the IMI system to request information about certain providers. They can also alert other authorities about the potentially damaging activities of certain providers. Finally, they can consult the providers' directory and inform about any change in national requirements and legislation.

Although administrative cooperation and mutual assistance do not clearly qualify as instances of positive integration in the form of regulatory harmonization, they do prompt additional efforts toward the better governance of mutual recognition. Mutual recognition without intense and effective exchange of information across borders may solely rely on blind trust between member state authorities. Although such trust may not necessarily be misplaced, the lack of information may well create regulatory caveats and loopholes that could be used by malevolent business operators.

(3) Consumer rights

The adjunction of provisions regarding consumer protection constitutes a politically remarkable evolution between the Bolkestein proposal and the Services Directive. They can therefore be viewed as a timid but noticeable step towards slightly more stringent approach to the integration of the common market for services.

There are now two types of measures regarding consumer protection in the Services Directive. They concern measures to ensure the quality of services, on the one hand, and measures to harmonize certain procedures, on the other. To ensure service quality, providers bear the obligation to make sure that recipients dispose of

extensive information regarding the service provider, the service itself, all contractual and liability obligations and necessary guarantees. The provider is encouraged to comply with additional measures likely to increase the quality and transparency of services including membership to labelling organization and abiding by other voluntary policy. The directive further encourages the self-regulation of service providers through the adoption of codes of conduct. Even though "those points do not go the core and only touch the periphery of service provision […] they focus on one of the main obstacles to the development of trans-border service flows: the lack of information and of confidence" (Hatzopoulos, 2007:256).

e) Paradoxical cases: variations in the dependent variable

From the Bolkestein proposal to the final Services Directive, one can draw conclusions about the variation in the dependent variable as well as important implications for the assessment of the hypotheses. First, the Bolkestein proposal planned a significant departure from the status quo in inaugurating a new and more deregulatory set of rules, which would have created a more open and negatively integrated market. That is especially true with regard to the freedom to provide services. This call for some specifications in the way we conceptualized the dependent variable. While the status quo was assumed to be one of negative integration, mainly triggered by the Court case law in the absence of political initiative, the Commission initiative fostered an amplification of that trend. The preferences of competing social partners must be assessed against this backdrop. Notably, we assumed that Commission's preference would lean towards positive integration. However, if we assume that the proposal can accurately reflect the true preferences of the Commission, then the proposal represents an instance in which its most preferred outcome is less resolute. Surely, the Commission most often prefers to see legislative proposals successfully negotiated to foster market integration while demonstrating its institutional relevance and renewed credibility. In many cases, though, the Commission may be somewhat insensitive to whether integration is achieved by means of negative integration or

positive harmonization, so long as it is achieved through successful negotiation, instead of non-negotiated avenues. Yet, negative integration and deregulation through mutual recognition and home country control also has the significant advantage of cutting the Commission's workload. Indeed, regardless of the Commission's ideological preferences for re-regulation or liberalization, harmonization remains a lengthy, technical and eventually costly endeavour for the Commission. If the Commission's inherently limited resources can be saved for other purposes, then it is understandably likely to engage in more economical approaches.

Second, from a policy-process perspective, the negotiations over the Bolkestein proposal ended up in failure. This is the outcome of the first case in the present research. Although the Council did not explicitly express an opinion on that version, we can safely consider that this case provides an instance of deadlock. Member state discord within the Council cast a shadow on the negotiations. Yet, the persistence of the status quo due to the shadow of deadlock can be viewed as maintaining a more stringent state of affairs compared to the regulatory environment that would have resulted from the Bolkestein proposal.

Third, the Services Directive clearly embodies a failure of the Commission original approach. But an accurate assessment of the variation in the dependent variable must be put in perspective depending on how the final outcome compares to the initial proposal *and* to the status quo ante. Compared to the status quo, the Services Directive reprises the classic version of managed mutual recognition as understood by Nicolaïdis and Schmidt (2007), a principle that is complemented by minimal harmonization – especially in consumer protection and information – and new mechanisms of governance. New institutional features will create the means for closer ties between national authorities. Relative to the Bolkestein proposal, the Services Directive leaves incomparably more leeway to the member states to maintain a more stringent regulatory environment. It confirms and reasserts a return to a more traditional approach. Thus, the proponents of a more regulated and harmonized

single market have better attained their preferences with the final version of the Services Directive. This does not prejudge, however, their strategies and actual success in mobilizing coalitions to put in place effective insider and outsider strategies. This is something that can only be tested through examining more detailed causal mechanisms like those proposed in the theoretical framework.

B. Analysis of Case I: 'Service I'

In Case I, we include the negotiation events and stakeholders' positions from the initial impact assessment carried out by the Commission, followed by the Commission proposal of 13 January 2014, until the revision of the original proposal after a compromise was reached in first reading in the Parliament. Although member states did not vote on this proposal, we can connect changes in member states attitudes to supranational institutions' policy alignment and social partners lobbying strategies. Empirically, we draw our observation from interviews with institutional decision-makers and social partners' representatives, a comprehensive qualitative analysis of 33 documents including positions papers and press releases as well as secondary sources including McKibben's dissertation chapter on member states' bargaining attitudes in the Council (2008).

1. Actors and preferences

The initial proposal was designed under the leadership of Commissioner Fritz Bolkestein, a notoriously pro-market former leader of the Dutch People's Party for Freedom and Democracy.

At first, the so-called Bolkestein proposal did not attract the interest of stakeholders in any usually intense way. Member states did not seem to be very concerned either. Therefore, it is puzzling that it ultimately crystalized so much attention from a wide range of organizations, whose intense lobbying targeted EU institutions, the media and the wider public. In this case, a narrow definition of interest groups helps ensure that the analysis is not overcrowded by one-time

organizations as well as certain 'extravagant characters' (interview with Permanent Representation officials). To the extent that their role seems anecdotal only, their actions and strategies are not part of the present research. We focus only on those organizations that are routinely involved in policymaking and represent – sector-specific as well as umbrella – trade unions and business associations at both the national and supranational level. They respectively represent the employees and the employers and, together, they form a special class of interest groups: the social partners.

As reflected in secondary sources, interviewees unanimously agree that those two main sides were invariably identified as the business associations, on the one hand, and the various trade unions federations, on the other hand. But as further expected, employers' side provides a significantly more contrasted picture. Although umbrella associations may be reluctant to admit it (interviews with EU business association), a great variety of employers' associations aggregated an incredible diversity of national actors, making up for a relatively heterogeneous constellation of preferences (Interview with EP official; interview with EU business association affiliates). SME-specific associations as well as regulated professions had good reasons to hold preferences that clearly contrasted with bold position of BusinessEurope, notably on the CoOP (interviews with EP officials; interview with business association; Document 27; 29; 30). It has been suggested that additional disagreements emerged from large western firms that had already gained access to foreign service markets across the EU by investing in new establishments. Those firms therefore had grounds to shield themselves from the extra competition coming from the free provision of services. Understanding that they might not automatically benefit from increased competition, they adjusted their preferences accordingly.

This contrasts with the picture that certain interviewees and position papers reflected about the organizational ecology prevailing on the employees' side. The preferences at the EU level seem to have been exceptionally homogeneous and well

aggregated. With one notable exception, every interviewee that reflected upon these negotiations expressed the view that the ETUC masterminded, centralized and coordinated the mobilization. Ironically, lobbying competitors branded that sort of effectiveness "ideological" and "authoritarian" (interview with Ambassador to the EU; interview with business association officials). Of course, there was still a variety of actors involved. The construction sector is consistently mentioned as particularly active on both the employees' and the employers' sides. Certain groups have been more active in maintaining insider contacts with decision-makers at EU level. Others tried to keep the pressure high through outsider mobilization on the EP's very doorstep.

Negotiations chronologically coincide with the Dutch, Austrian and Luxembourg Presidencies of the European Union. But certain member states insisted on this issue more than others. It has been possible to interview officials holding key positions regarding this dossier at the time. A good deal of information about the Council has been harvested through those contacts. In the Council, coalition leaders were the French, German, Polish delegations. The UK also played a key role. The 2004 enlargement of ten new members[60] considerably influenced the way member states determined their preferences, making old countries more reluctant to abolish barriers, while providing ample opportunities for pro-market promoters to strengthen their own position through broadened coalitions (Hagemann and De Clerck-Sachsse, 2007; for a differing opinion see Juncos et al., 2007).

1. H1: From preferences to lobbying intensity

H1 posits a link between relative preference homogeneity and lobbying intensity. Yet, certain organizations may announce preferences in position papers and interviews that may not accurately reflect their actual attitude and strategies regarding given policies. As one lobbying veteran emphasized, it is very different to simply state

[60] Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia.

preferences that are expected from you, as a member of a routinized coalition, and actually engage in more than superficial lobbying activities like requesting appointments with key decision-makers, actively participating in a coalition and producing alternative policy proposals with a view to effectively promote those positions (interview with former EU business association collaborator). In communications and interviews, umbrella associations also tend to overestimate the homogeneity of preferences among their members. It is precisely their job to make sure that they can devise common strategies that are shared by a pool of often-diverse affiliates. Therefore, they have every reason to insist on the high degree of internal agreement among affiliates regarding a particular position held by the association. The reality is often more complex, though.

Employer associations at the EU level reflected that despite some disagreement on details, affiliates were generally pleased with the approach adopted by the Commission in the Bolkestein proposal (interviews with EU business associations officials). Yet, there is also evidence that business actors were faced with significant divisions between actors as diverse as large firms, 'rent-seekers', SMEs and regulated professions. Numerous publications from major organizations contribute to reinforce the credibility of that situation (e.g. Document 27; 28; 29; 30).

Umbrella business associations insisted that most actors commit to a long-term objective of promoting a business-friendly, EU-wide open market. But it seems that business actors concurrently promote a rational objective to individually maximize their utility in the short- to medium-term. This objective is conducive to different policy preferences depending on the particular market segment, the member state of the establishment, and firm size. There does not seem to be a widely share ideology or long-term vision of what the market should normatively look like.

In fact, on the employers' side preferences were relatively widely dispersed. Besides marginal concerns on the early version, BusinessEurope seems to have the most definite position in favour of Bolkestein's initial approach (Document 1; 2; 3; 4).

Yet, interviews among certain affiliates as well as EU officials suggest a higher level of heterogeneity. The horizontal approach adopted in the Commission's original proposal also means that it targeted providers operating in vastly different markets calling for different business models. Some had much more ground to worry about unfair competition than others (e.g. Document 27; 28). In that regard, the CoOP's undifferentiated and sweeping method was not properly designed to deal with such ubiquitous disparities. This is also reflected in some major EU employers associations' position papers. For example, the UEAPME

> vigorously criticised the way the Commission's proposal intended to achieve this objective. UEAPME was indeed concerned that the original text would have played into the hands of opportunists seeking to undercut standards of service provision. If the original proposal had been accepted, the advantages would have been completely overshadowed by the disadvantages (Document 33:1).

Similarly, EuroCommerce and Uni-Europa Commerce issued a joint statement warning about uncertain boundaries between the proposed legislation and the rules applicable to posted workers. They further insisted that "a directive should not open the doors to socially unfair competition" (Document 27:1).

Nevertheless, dissenting voices and lobbying action came late in the process. Various interviewees reflected upon the mood that dominated Brussels at the time the proposal was issued to explain this initially lethargic state (interview with Permanent Representation official; interview with European Economic and Social Committee official). Some suggested that the "thought matrix was in favour of neo-liberal ideas" (interview with Permanent Representation official). They insisted that the proposal was backed up by research carried out by organizations, such as the Copenhagen Economics institute, that are generally considered to favour neo-classic economics. "Neo-classic thinking was generally more directly available" (interview with European Economic and Social Committee official). But later in the process, they

noticed growing disagreements among various employers' organization, notably between rent-seeking large firms (interview with Permanent Representation official; interview with MEP) and small businesses, on the one hand, and eastern companies versus businesses established in older member states (interview with MEP; interview with Ambassador to the EU).

By contrast, all interviewees except one (interview with Ambassador to the EU) consider the trade union camp to be extremely united around a small core of simple – even simplistic – ideas. A negotiator from Hungary stresses that, back home, trade unions were not unhappy with the prospect of opening new job opportunities due to an enhanced competitive position. This line of argument was allegedly brought to Brussels. Yet, other supranational trade union representatives were not able – or were unwilling – to confirm such internal dissention. Therefore, the position held by EU-level organized labour groups could be considered particularly homogeneous. Rival groups and certain EU officials often defined such positioning as simplistic, dogmatic and ideological (interviews with EU Presidency officials; interview with Ambassador to the EU; interviews with EU business association officials). This was recurrently linked to intense mobilization that eventually proved very efficient in getting their voice heard and preferences included into the negotiations: "At some point no one really knew what was in the proposal any more […] but everyone was against it" (interview with former EU presidency officials).

Already, the status quo ante did not particularly please supranational confederations. But the Bolkestein proposal's lack of any significant attempt at building a regulatory level playing field across Europe coupled with a particularly radical version of mutual recognition, quickly saw a consensus against it emerge. The potential impact on national labour law, public services, and health services were not sufficiently clarified. The scope was deemed far too broad and lacking in preciseness. ETUC officials claimed that affiliates never needed to call a vote among affiliates because there was

such a level of agreement internally (interviews with ETUC officials). Eastern affiliates were generally opposed in the same way as western affiliates.

From an institutional perspective, organizations representing trade unions remained "very ideological" and "they stayed at the level of big principles" (interview with former Commission official). It was also felt in the Commission that trade unions tended to misrepresent the directive, notably by claiming that the Commission was attempting to pass a directive entirely based on a one-size-fits-all approach to market liberalization, whereas leading negotiators were in the opinion that "there was very few absolute obligation in the directive apart from Article 14 which only provided for non-discrimination on the basis of nationality, which is a basic" (interview with former EU Presidency official). In fact, for the proponents of the proposal it was felt that the proposal was only providing with a framework for negotiation. To illustrate this point, at a key sectoral negotiation meeting organizations representing trade unions simply refused to discuss any specific aspects of the Bolkestein proposal on a technical level. One interviewee noted that: "There were never any technically relevant comments by any worker organizations on the legislative text itself," adding that remaining at the level of principles has probably helped keeping trade union lobbyists united across organizations and NGOs as well (former Commission official).

Therefore, various organizations representing organized labour were able to use the full array of lobbying strategies that were available to them. Such intense lobbying endeavours at virtually every possible institutional level, be it supranational or national, is remarkable. They seem to have been finely orchestrated to create synergetic lobbying efforts that were made possible because of a *homogeneously shared aversion to the Bolkestein proposal*.

There are various and tangled explanations of trade unions' ability to present such a united front. Competing groups insisted on trade unions' alleged dogmatic rigidities as an explanation. They also pointed to workers' organizations from old member states underhandedly monopolizing power within EU trade union

confederations (interview with Ambassador to the EU; interview with business association official). Trade unions insist that their shared position reflects the same concern to defend all workers' interests regardless of country of origin. One can identify three alternative explanations for trade unions' preference homogeneity: 1) a constructivist explanation; 2) a rationalist explanation, and 3) an explanation based on the asymmetric distribution of power among associations' affiliates. Again, trade unions and their EU confederations usually insist on a shared rationalist reasoning.

First, trade union affiliates may indeed be bound by a common ideational understanding of the policy objectives they want to achieve in the long run, despite the short-term potential benefits individual members may gain from liberalization. Many interviewees' interpretations relied on this kind of reasoning. Trade unions congratulate themselves for being united around a core bundle of ideas beyond short-term venal benefits for individual affiliates. Generalist business associations as well as political opponents – i.e. representatives of member states governments that defended a deregulatory position, as well as certain MEPs – blamed trade unions for their dogmatism and apparent bad faith. At the same time, they recognize the profound efficacy of such a cohesive positioning.

Second, it also seems that trade unions rationally value long-term costs better than short-term benefits. Organizations from relatively less regulated job markets understand that, despite the immediate gains they could harvest from liberalization, there is always – somewhere inside or outside the Union – a job market that is even less regulated and where labour costs are even lower than their own. Both supranational umbrella associations and their affiliates argue that there is internal consensus because national trade unions from less regulated countries understand that, should they go down the path of increased competition between workers in an open job market, they might well benefit in the short-term. Yet, sooner or later, the time will come when they too will lose out to even cheaper workforces. That is surely

a more rationalist approach to why trade unions remained exemplarily united against the proposal.

Third, interviewees suggested that EU employees' associations were unfairly dominated by major historical affiliates from old member states (interview with Ambassador to the EU; interview with business association officials). Affiliates from newer member states are deemed unable to make their voice heard within EU confederations. This is a common criticism heard from rival organizations. EU confederations, the ETUC in particular, are often accused of favouring old member states' affiliates who seek to protect themselves from the competition created by the cheaper workforce sent from the newer member states. That claim is unevenly supported by evidence, though. Most interviewees insisted that EU organized labour could maintain internal discipline thanks to a widely-shared negative opinion about the original proposal, resulting in an exceptionally united front. In sum, trade unions from both old and new member states: (1) share a long-term policy commitment against so-called race-to-the-bottom and unfair competition, and; (2) may not overrate short-term benefits relative to long-term costs. Therefore, employee organizations benefited from a high degree of preference homogeneity.

To summarize the analysis on the relative patterns of preference aggregation among competing social partners, the empirical material tends to reveal that both employers' and employees' associations mostly rely on rational cost-benefits analysis to decide policy positions. No conclusive evidence leads us to believe in the role of large internal power asymmetries among EU associations' affiliates. Instead, what seems to produce a relative difference in the degree of preference homogeneity in favour of employee associations is the *time perspective* within which the assessments of respective utilities are based. On the one hand, employee association members seem to be more concerned with long-term costs than short-term benefits. On the other hand, EU business associations' members may discount long-term utility in favour of short- to medium-term pay-offs. True, EU business associations generally

maintained that the approach promoted in the Bolkestein proposal was right, and that it may eventually be conducive to EU-wide Pareto improvements. Nonetheless, they simultaneously agree that detailed and technical negotiations were undertaken internally, since the paybacks were obviously unequally distributed among the actors depending on the nature of their businesses, their size and their economic and territorial implantation.

In terms of lobbying activities, EU officials reflect that business representatives maintained a "constructive position" from an early stage (interview with former Commission official) but one that is described as "timid" and "faint-hearted" (interview with former EU Presidency officials). They also report that large French firms (in particular) were not whole-heartedly in favour of opening the market in services of general interest, despite already being in a strong position across Europe. Yet, they transformed what might have been a protectionist attitude into a discourse infused with social-minded concerns. This allowed them to successfully side-campaign their government at home (interview with Permanent Representation official). Both points are clearly in line with the theoretical argument that: (1) relatively more heterogeneous preferences held by one camp may translate into more timorous or even countervailing lobbying efforts, and; (2) rent-seeking businesses may side-line to place their immediate personal interest beyond the interest of the group. For example, a negotiator reflected upon a consultation meeting with a business representative from the health sector, who – after reading the provisions included in the initial version of Article 15 – straightforwardly positioned against the proposal. The text aimed at abolishing rules of establishment, which submitted authorizations to the decision of already-established national competitors.

This illustrates how certain operators can behave as rent-seekers in an attempt to preserve their market advantages against additional competitive pressures. Therefore, in some sectors, there is evidence that organizations representing business interests adopted a protectionist position against the initial 'Service I' proposal. While

business organizations agreed that the European market should be integrated further, negotiations were intricate because it was an 'important text'. Permanent Representation and former Commission officials stress that there were contrasting positions across sectors and countries. They suggested that at later stages the table-turning position of President Chirac of France was motivated not only by his weakened position on the Constitutional referendum and national trade unions' pressure, but also by earlier – under-water – efforts of 'national champions', which were decided to defend their turf at home. Hence, business organizations display more heterogeneous preferences depending on variations in immediate economic interest. And that translated into timid and countervailing lobbying efforts, relative to competing groups.

Thus, with regards to the independent variable, we establish that the employees' side was in remarkably homogeneous agreement against the Bolkestein proposal, while we gathered enough evidence to confirm that the employers' side seemed increasingly divided. According to H1, this translated into more coherent and intense lobbying strategies of trade unions. We are able to explain relative disparities in preference homogeneity and establish a link with the intensity and efficiency of lobbying activities. Not only did interviewees admit the success of the strategies deployed by trade unions' representation, they also reflected consistently on the intensity and variety of organized labour lobbying activities.

Trade unions' umbrella associations, notably the ETUC, held special meetings with key decision-makers in the EP to make their voice heard. They also simultaneously kept their affiliates mobilized in the street, organizing memorable protests. They, in a word, managed to maintain a great deal of pressure on decision-makers. In parallel, they orchestrated an intense and highly coordinated multi-level strategy, notably to bring key member states on board to reduce the margin of manoeuvre in the Council. As McKibben notes:

> Demonstrations by trade unions, accompanied by support from a broad range of NGOs and political parties, took place in multiple member states including Belgium, France, and Sweden. In addition, the European Trade Union Confederation (ETUC) organized a protest demonstration with attendance estimated between 30,000 and 50,000 in Strasbourg where the European Parliament was meeting to discuss the Services Directive (McKibben, 2008:173).

France's shifting position, for example, surely represented a major gain for the stakeholders that were actively lobbying against the Bolkestein Directive. For all the criticisms directed at alleged trade union dogmatism and inflexible attitudes, it seems to have fuelled a deep sense of frustration on the part of those who, faced with such a solid front, were left with no choice but to surrender.

In line with H1, business qualms recounted earlier surely projected a simultaneously pale light on their lobbying endeavours. For all the efforts of certain major actors to render a picture of efficiency and decisive positioning, decision-makers – in the EP as well as in the Commission – did observe and recall several side campaigns that successfully targeted EPP group members and beyond. Some SMEs' groups seemed to express after-thoughts about the potential benefits of service liberalization in the terms suggested in 'Service I'. Thus, they seem to have at least refrained from actively supporting the proposal. In some cases, they even appear to have actively lobbied against the original version of the proposal.

2. H2: From coalition to policy output

H2 posits that a successfully-mobilized coalition of social partners – trade union organizations in this case – is likely to build up a de facto winning coalition to support supranational institutions – the Commission and the EP – against the Council, if they can agree on a common goal to further positive integration despite the JDT. In the

present case it is embodied in policy preferences that deviate from the status quo of negative integration.

In the present case, trade unions and several business associations were able to coordinate various lobbying strategies at different institutional levels to *create* a JDT that had not seemed so entrenched before. First, that strong coalition destroyed an existing coalition in favour of the Bolkestein version, and left a relatively blank slate available for the emergence of a new coalition, far stronger politically, in favour of a rebooted directive.

At the outset, there was a significant level of consensus within the Council in favour of completing the market for services. The goodwill of the member states was reflected in the initially unanimous call to act as part of the Lisbon Strategy. Yet, the actual policy instruments, scope and method were left to the Commission. In addition, the Lisbon Strategy was adopted at a time when economic, social and regulatory asymmetries between member states were significantly low. Naturally, the 2004 wave of enlargement increased those asymmetries and exacerbated the fear of a race-to-the-bottom. Yet, those asymmetries were easy to foresee and eastern countries were evidently welcoming extra access to the European market. The transformative element indeed appears to be the inability of business actors to gather enough support to prevent rent-seeking businesses from lobbying at the national level. Compounded with efficient and coordinated multilevel strategies from trade unions, Council members' agreement started to scramble.

Progressively, the Council lost its unity and became deeply divided and dangerously destabilized by the French government and, to a lesser extent, by the Belgian and German positions. This translated into shifting positions, rendering intergovernmental bargaining virtually impossible. As a result, the policy leverage of the Council was severely weakened, while it was unintentionally dragged into an inter-institutional battle for power.

There were two main groups battling over 'Service I'. In line with assumptions, a liberal group included most of the new member states from the 2004 enlargement. Both interviews and secondary sources (McKibben, 2008) reveal that Finland, Ireland, Italy, Luxembourg, the Netherlands, Spain and the UK were also attracted by the prospect of opening new market outlets for their services. This rather large group in favour of a liberal version conflicted with a smaller coalition that included Austria, Belgium, Denmark, France, Germany, Greece, Portugal and Sweden. Reflecting patterns of lobbying reported in those member states, "their main interest was in insulating their social labour market models and preventing an influx of service providers from other member states" (McKibben, 2008:180).

The Belgian position provides a good example of a shifting position toward less liberal preferences. At the time, the situation was complicated by the fact that the Belgian coalition government consisted in both liberal parties (the VLD and the MR) and both socialist parties (the SP and the PS). The two sides of the coalitions were in clear conflict over the initial version of Article 16 including the CoOP. While both liberal parties – the VLD especially – were in favour, the socialists were opposed to it. An insider joke used to describe the Belgian position as follows: "Belgium is neither for nor against, quite the contrary" (interview with permanent representative official). This has rendered negotiations particularly uncomfortable for Belgium in the Council. The pressure from national trade unions on the government seems to have been palpable, so that the Permanent Representation attempted to "build a firewall between trade unions and negotiators" (interview with permanent representative official). This illustrates the potentially destabilizing power social partners had been progressively gaining along negotiations.

Interviewees report that the Commission eventually gave up on promoting and defending its pro-market policy instrument. The explanation behind this behaviour is relatively unclear though. Some point to the lack of political commitment of Bolkestein, coupled with relative lack of experience regarding politicization within the

Commission. Others believe that the Commission simply acknowledged that both the Council and the Parliament were no longer prepared to defend the initial proposal, given the lack of support on the business side and intense resistance from trade union. Yet, interviewees in Permanent Representations also suggest that the Council margin of manoeuvre was significantly reduced because of the Commission giving up on the proposal far too quickly. This lack of political will then became more apparent when the new Commissioner McCreevy bluntly stated that the strong version of mutual recognition promoted in the initial proposal couple with a broad scope of application 'would not fly'.

Trade unions' strong mobilization relative to business's more ambiguous position played as a destabilizing factor. But this did not instantly break a deadlock in the Council, as the theory would expect. Instead, it created one that later set the stage for a progressive collapse of the obstacles to policy alternatives leaning towards more positive re-regulatory integration. Strong and efficient multilevel lobbying on the part of trade unions, rent-seeking businesses and SMEs, critically contributed to shift the position of the Council and eventually sabotaged the Bolkestein proposal. The resulting shift in the French position epitomizes this phenomenon.

However, robust causal links are still hard to trace, given the shadow of secrecy that surrounds both informal intra-institutional negotiations within the Council and inter-institutional interactions. It is notably difficult to precisely identify social partners' lobbying patterns that influenced the Council, because there is contradictory evidence as to the level of access to member states' negotiators. In some cases, interviewees in Permanent Representations claim that they did shield themselves against social partners' pressure while many other Permanent Representations point at successful side campaigning and multilevel strategy to alter member states' policy positions.

Nevertheless, there is a clear congruence between the emergence of a new strong coalition backed up by social partners' massive political capital and the

weakening of the Council's intergovernmental political position. And it does seem that EU trade union federations strategically used their preference homogeneity to pilot and orchestrate multiple campaigns so as to maximize access at every level. Therefore, the evidence clearly suggests that H2 is confirmed in the sense that a winning coalition not only helps to build a coalition but also to destroying existing equilibria so as to pave the way for a new constellation of interest based on revamped proposals.

What remains unclear is whether the EP took over leadership on its own initiative, or whether it was the result of a call from the Council and the Commission, given their apparent inability to either agree on the existing proposal or find alternatives.

3. Interim conclusion

The Bolkestein proposal emerged as a sweeping response to early calls from the member states themselves to further integrate the market for services, in the hope to deliver growth and improve competitiveness.

On the dependent variable, the CoOP was identified as a feature that would surely have created a less restricted regulatory environment across Europe. Therefore, the initial proposal would most probably have exacerbated the effect of negative integration that the status quo – under the shadow of the Court activism – had set without securing a minimum degree of harmonization. Empirical evidence shows that the pervasive effects of regulatory competition proved to raise worries and resistance, not only on the trade union side, but on the business side also. Certain business operators expressed legitimate worries that the new legislation could further the risk of unfair competition, given the large economic, social and regulatory asymmetries that now existed between national environments.

The link between homogeneity of preferences and intensity of mobilization of rival interest groups can be established. While trade unions across the EU agreed on a

solid common position leading to strong and coherent mobilization overall, business actors faired comparatively less successfully in that game. It seems that both SMEs and various quasi-monopolistic businesses, particularly in old member states, started having after-thoughts about the risk of facing new competitive pressures. In addition, certain sectors – particularly the health and construction sectors – seemed to be less riddled with conflicts between workers and businesses.

Considerable tension and resistance triggered by union representations both at supranational level and at home helped destabilize the balance of power in the Council. A coalition of interest groups progressively formed against it, putting insurmountable obstacle to an inter-institutional agreement. Remarkably, this resulted in shifting power from the Council to the Parliament to solve the conflict, opening the way for a new, largely amended, directive. This new cycle is now taken up as the second case.

C. Analysis of Case II: 'Services II'

Despite contradicting evidence, an analysis of the negotiation events within the so-called Bolkestein case shows how a combination of trade union multilevel strategies and businesses indecisive and countervailing lobbying endeavours led to weaken preference homogeneity among Council members. It further pushed the Commission to give up on promoting the Bolkestein proposal. Consequently, the policy outcome was an institutional deadlock that could have opened up on a mere withdrawal, as is sometimes the case in that sort of situation. Nevertheless, there was an agreement that dropping policy plans altogether would have resulted in a weaker, less credible union (interview with former EU Presidency officials). Instead, a new round of negotiation was attempted on the basis of the Parliament compromise.

This second round is analysed following the exact same steps. Coalitions on both sides of the battle between competing social partners is evaluated so as to assess their relative degree of preference homogeneity and the possible link to

lobbying endeavours are examined. The consequences for inter-institutional power struggle and, therefore, for the fate of the latter policy output is then examined.

The variation in the dependent variable has been assessed against a twofold backdrop: (1) the status quo ante established by the case law, and; (2) the original Bolkestein proposal. The Services Directive scraped the CoOP in favour of a comparatively far less deregulatory formulation. Hence, we established that it does mark a return to a traditional version of mutual recognition that can be labelled as either "managed mutual recognition" (Nicolaïdis and Schmidt, 2007) or "second-generation mutual recognition" (Hatzopoulos, 2007). Compared to the Bolkestein proposal, the final version leaves host member states and national authorities more leeway to implement reasonably stringent rules.

The final Services Directive also introduced timid but noticeable harmonizing measures, and maintain the provisions on administrative cooperation. The Services Directive codifies important elements of the case law as regards to the definition of services, the distinction between establishment and provision. In that regard, it is an attempt to consolidate the status quo ante. The renewed insistence on administrative simplification through comprehensive reviews of administrative schemes and requirements together with a significant reduction of the scope of the directive are linked to the emergence of winning strategies supported by a strong coalition of social partners and MEPs in favour of positive integration. Consequently, the Service Directive is conducive to a noticeably more stringent regulatory environment for service operators than the Bolkestein proposal. Compared to the status quo, it is a mildly lenient piece of legislation that does not significantly exacerbate negative integration. For the adversaries of deregulation, its adoption can be viewed as a huge success insofar as it defeated the Bolkestein proposal and, with it, the promoters of even more negative integration.

An analysis of this cycle of negotiation tends to provide additional evidence in support of both H1 and H2. It notably shed light on how the trade unionist side

consolidated its stance over time, building ever-closer ties with the EP, which had itself took over as the decisive institutional player. This contributed to leave the business front relatively more fragmented. A particularly interesting aspect is how such struggle translated into a surprising equilibrium both within the EP and with regards to the inter-institutional interaction with the Commission and the Council. The findings also suggest additional avenues for theoretical expansions about the reasons why interest groups select specific strategies.

Forces united against trade liberalization managed to put enough pressure on the EP to damage EPP cohesiveness – which would have naturally been expected to be in favour of the Bolkestein proposal. That left a clean slate more amenable to the emergence of a more compromising coalition of supranational institutions, backed up by a group of social partners, including certain business organization. In line with H2, the Commission and the Parliament changed their attitude in reaction to social partners' influence. Therefore, the Council's margin of manoeuvre was critically reduced.

1. Actors and preferences

Naturally, the same stakeholders that mobilized on the Bolkestein proposal also did in this second sequence of negotiation. Besides EU institutions, those include trade unions, business associations, large firms and SMEs.

Regulated professions intensely and successfully lobbied the member states and the Commission to ensure that they would be excluded from the scope of the final directive. Notaries, pharmacologist and bailiffs are among those. The Directorate-General for Internal Market and Services played an active role in, first, supporting the EP as a key intermediary and, second, reviewing the proposal before it was sent to the Council. That attitude drastically narrowed down the ability of member states' to strike compromises among themselves. Its preference clearly shifted under the pressure of the EP and outsider strategies implemented by trade unions and

coordinated by the ETUC. The latter implemented a remarkably efficient double strategy that consisted in maintaining close contacts with key MEPs while keeping the pressure high both in the street and on national representatives through the active backup provided by its affiliates. The Commission, through the voice of appointed Commissioner McCreevy, gave up on promoting its original proposal. Therefore, the proponents of a more deregulatory directive in the Council clearly lost leverage (interview with Permanent Representation officials).

In the Council, Luxembourg was among the leaders of a pro-market position together with Poland and a few other eastern member states (interviews with Permanent Representation officials; interview with Commission official) plus the UK. Under considerable pressure at home (Grossman and Woll, 2011), France, Germany and Italy started to follow a more market-correcting stance to compromise with both national champions and trade unions. Finally, the EP emerged as the key supranational actor, and to a large extent the main intermediary between competing social partners. Crucially for the purpose of the present research, traditional political lines were broken to find a compromise, at any cost.

2. H1: From preferences to lobbying intensity

Social partners' preferences did not undergo significant change from the first to this second case. However, mobilization and lobbying activities became more visibly influential during this second phase. This naturally contributed to reveal certain actors' preferences in a brighter light.

In the first case, we analyse the multilevel mobilization strategy leading to destabilize some member states preferences in a way that undermined the negotiating position of the Council as whole. Concerning H2, we concluded that the consequence of mobilization was not so much, in a first phase, to build a coalition aiming at defending a particular policy preference, but to severely undermine the

previously existing one, so that new margin of manoeuvre could be created for a redesigned compromise.

The link between homogeneity of preferences and mobilization is clearer in the second case. Interviewees all noticed a steep increase in awareness about on-going policy negotiations. Media attention dramatically intensified and the link between the Constitutional Treaty and services liberalization emerged as an inescapable feature of the public debate. Both phenomena can be characterized as evidence of politicization. For trade unions and other actors battling against the risk of unfair competition and reinforcing patterns of regulatory competition, it opened new opportunities for strong outsider strategy, translating in media coverage as well as crowded demonstrations in Brussels and across Europe (Grossman and Woll, 2011). The ever-larger coalition in favour of a clear alternative to the Bolkestein proposal was cleverly complemented with insider influence in the EP. It helped secure the compromised reached in first reading and obtain further concessions in both the Commission and the Council.

Outsider strategies seem to have been especially successful in persuading Commissioner McCreevy to inform the Council that the Commission was no longer willing to spend more political capital in support of the original proposal (interviews with former Commission official; interview with Permanent Representation officials). The Commission, in signalling to the EP that it would look favourably at any meaningful compromise solution (interviews with former commission official; interview with MEPs), also made sure that further negotiations would certainly shut the previous proposal down and cover a new set of issues. Therefore, on its way out of 'Service I' the EP was effectively given an implicit carte blanche to rework the proposal to tame a strong opposition from a large coalition of social partners. At this point, the ETUC insider strategy eventually reached its full potential. It is only natural that a much less controversial set of issues within 'Service II' was met with less opposition.

We now analyse how relative preference homogeneity translated into a mobilization differential between workers' associations and employers' organizations. Social partners played a major role in setting the negotiation stage within the EP in favour of a compromise that left slightly more room for regulation and harmonization than the Bolkestein proposal had initially ambitioned. From then on, and given the already exceedingly high political costs induced by the conflict, an inter-institutional coalition emerged that isolated the Council and those that promoted more liberalization. But the ETUC did not seem to release the pressure, though.

The EP itself was still divided, not only across political groups but also within groups. Increasing saliency due to politicization fomented by trade-union groups' coupled with heterogeneous business preferences and countervailing influence seemed to translate into more effective strategy – compounding media attention, institutional access and street protests – to force MEPs to re-align their positions outside parties' classic platforms.

On the left side of the political spectrum, numerous centre-left MEPs were originally in favour of more market integration in the service sector, even by way of negative integration (interview with MEP). Yet, traditional constituencies and ideological bundle of ideas were cohesively against the status quo or its reinforcement, notably through the CoOP. This probably helped resolve internal disputes. On the right side of the political spectrum, in contrast, the situation looked more intricate. Interviewees in the EP reported that the PPE underwent some division due to many MEPs side-lining away from the mainstream opinion. A particularly knowledgeable MEP suggested that this just might have been the consequence of side-campaigns led by business actors to promote a more cautious approach. This can be considered as further evidence in support of H1. Yet, there was a bottom-line consensus regarding the necessity to arrive at a supranational policy compromise

across the political spectrum[61] – with the notable exception of the Greens/EFA and GUE/NGL (Euractiv report of November 16, 2006). This is again in line with our assumptions. Interviews with key insiders reveal that the EP majority started to be divided, a situation that the opposition, backed up by social partners, did not wait to use to its advantage.

In the end, a few (albeit controversial) articles were altered in such a way as to reach a relatively acceptable version for trade unions. But several regulated professions were also excluded from the scope of the directive to bypass fierce opposition, notably from pharmacologists and notaries (interview with the EP Rapporteur). In terms of mobilization, several interviews confirmed that the homogeneity of preferences *against* the proposal started to scramble on the organized labour side as the wording of the proposal was turned around. Interviews also indicated a clear link between the new text attracting less resistance on one side and more acceptance on the other. As a result, the EP was able to reclaim some badly needed margin of manoeuvre to reach a compromise. As a result, we will see that this lays fertile ground for the testing of H2.

3. H2: From coalition to policy output

Arguments advanced by Dølvik and Ødegaard (2010) are largely supported by the findings of the present research. In contrast though, their approach is largely inductive. The empirical findings gathered in the present research show that the Council, the Commission and the EPP majority in the parliament had to shift their position and give in to the socialist minority, intensely energized by the support of the ETUC acting on clear mandate – and with the direct support – of its affiliates.

Dølvik and Ødegaard (2010:3) explain this apparently puzzling shift in inter-institutional balance of power as "contingent dynamics of inter-institutional

[61] http://www.euractiv.com/socialeurope/parliament-concurs-council-services-directive/article-159730

negotiations". By contrast, the theory put forward in the present dissertation insists on the way solid interest groups' coalitions led to bend policy choices in the spite of the aggregated positions of apparently more powerful actors.

The grand compromise eventually reached in the EP, served different purposes: by changing the wording of Article 16, the most radical voices among the workers lines could be reassured while the most enthusiastic promoters of negative integration within the business community were left wondering about the uncertain legal consequences of the new formulations. Indeed, the deliberately weaker formulation was vague enough so that almost everyone could feel reasonably content about the compromise without quite knowing what it meant in practice. This is evidenced by contradictory statement among interviewees.

Other institutions saw their margin of manoeuvre reduced while the ability of the EP to act as an intermediary between social partners increased. In the EP, the game played by the socialists was also highly strategic. Certain interviewees suggested that MEPs used 'informants' in competing political groups in an attempt to split the EPP, so as to increase their ability to destroy the cohesion of the centre-right majority in a manner that alleviated the continuous pressure applied by trade unions.

This case is most illustrative of H2. The EP reached a compromise that left enough regulatory space to the member states to attract the approval of divergent business interest and the MEPs that appear to have relayed their positions within the PPE. The Commission, eager to reach a compromise, reprised all the amendments proposed by the Parliament. And it seems that many of the agreements reached under the lead of the Luxembourg presidency negotiations were lost (interviews with Permanent Representation officials). In a word, interviewees from the Commission and certain Permanent Representations suggested that the Commission eventually gave in to the opponents of the Bolkestein directive and re-joined the Parliament in a way conducive to "isolate the Council" (interviews with Permanent Representation officials; interview with former Commission official). As a result, Article 23 and 24

were entirely modified (*in French:* 'tombent intégralement') and the wording of Article 16 was severely watered down. The new formulation was sold to those favouring the CoOP by arguing that nothing changed in practice, when actually it did (interview with MEP). Yet, there was a shared feeling among the adversaries of the CoOP that the Bolkestein proposal was lost and replaced with an entirely different text promoted by a radically different constellation of interests.

In the inter-institutional struggle for power, did a coalition of supranational institutions won against the Council? Several interviews point to the fact that the Council was also severely divided with France playing a destructive role. Consequently, it lost its inter-institutional power to the Parliament backed up by the Commission. The multilevel lobbying strategies used by trade union organizations, unanimously against the text across Europe, joined by rent-seeking businesses and various small businesses interest fearing unfair competition, momentously contributed to complicate the ability of member states to come to a compromising solutions among them. They brought additional political leverage to the supranational institutions at EU level.

H2 points to a theoretically complex situation in which the Council can effectively be isolated and constrained to vote in one way or another against its will. This was more difficult to see in the first case but more evident in the second. Many powerful actors in both the Council and the Commission felt that the "political haemorrhage" had to be stopped at all cost (interviews with former EU Presidency officials). Interestingly, many negotiators within the Council felt that the compromise ended up far off from what member states may have collectively negotiated behind closed doors. Nonetheless, it was now time to obtain a tolerable text as soon as possible so as to return to the political comfort zone. The agreement reached in the Parliament during the night of the vote on Article 16 was presented as a great compromise between the left and the right and was dramatically proclaimed a 'grand rassemblement du peuple Européen' (*English:* a great rally of the people of Europe).

But in fact, “the Council perceived it as an affront” (interview with former EU Presidency officials). The supranational coalition, backed up by interest groups, “completely isolated the Council”. Eventually, even reluctant member states voted in favour of a version that was now far from the original project. Therefore, there is evidence to support the validity of H2.

4. Interim conclusion

The analysis of this case provided evidence in support of H1 and H2. A winning coalition clearly, armed with strong homogeneity of preferences was fortified. It intensely lobbied EU institutions relative to rival organizations, which were riddled with division and countervailing lobbying. This added leverage in shifting the balance of power between EU institutions in favour of the Parliament. This phenomenon, alone, was already tentatively identified as “an instance of (inverse) asymmetric exchange power that rarely occurs in the relationship between the European Parliament and its counterpart institutions.” (Dølvik and Ødegaard, 2009:22; see also Coleman, 1966; Hernes, 1975). The impact on the eventual policy output – the dependent variable – is visible.

Importantly, the findings also show that both trade union and business association devised policy positions based on a rational cost-benefit analysis. But trade unions generally seem to care more about long-term costs than short-term benefits, whereas businesses seem to have the opposite reasoning. This contributes to explain the puzzling question as to why trade unions were better able to secure homogeneity of preferences against the Bolkestein proposal despite the potential benefits of a cheaper workforce, notably based in the new member states.

The empirical material also provides more information about the mechanisms that link lobbying strategies and shifting balance of power between EU institutions. It appears that the winning coalitions can decisively help empower an institution at the expense of another. This is what has emerged from interviews reflecting on the

Council being isolated. Secondary sources had already shed light on the remarkably successful lobbying strategy implemented by the ETUC re-allied with other interest groups. The ingredients consisted in a smart mix of both outsider and insider strategies. But the present research also suggests additional avenues for more elaborate explanations. More precisely, we used the distinction between an outsider's strategy and an insider's strategy, implying that some interest groups selectively choose among these depending on the kind of resources and institutional access points that are available. But in the cases we have examined, both strategies were used simultaneously. Outsider strategies have seemingly been utilized to obstruct certain channels of influence open to competing interest groups and to boost the potential influence of contacts established in other institutions. Therefore, a tentative explanation of the ETUC's double strategy is that the outsider element was used to put pressure on the Commission and the Council so that those channels would no longer be accessible to rival groups. Such a strategy induced the Commission to abandon the campaign in support of its own proposal, thereby isolating the Council. The ETUC's proactive insider strategy within the EP could thus gain its full impact. This seems to add interesting explanatory elements to such unusual increase in the EP leverage within the EU decision-making process.

These two cases also provide counter-examples to the claim that "if the differences between the Council and the Parliament concern regulation issues on a traditional left-right axis, the Commission is more likely to be the ally of the Council than the Parliament" (Tsebelis and Garrett, 2000:9).

VI. Case III: The Monti II Proposal on the right to strike

A. Creeping case law and unsettling alternatives

1. A non-negotiated status quo

Until recently, the Commission had remained vigilant in keeping a safe distance from particularly contentious issues as regard to national industrial relations, including the right to take collective action. Historically though, the EU had already been constrained to clarify the relations between market integration and workers' rights. Article 13 of the Community Charter on Fundamental Social Rights of Workers adopted of 9 December 1989 reads:

> The right to resort to collective action in the event of a conflict interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements. To facilitate the settlement of industrial disputes the establishment and utilization at the appropriate levels of conciliation, mediation and arbitration procedures should be encouraged in accordance with national practice.

And the 1997 Amsterdam treaty inserted an Article 137(5) TEC,[62] which guarantees 'that the right of association, the right to strike and the right to impose lockouts' remain outside EU competences. Not so long ago, the CJEU itself had still remained quite watchful in staying afar from issues linked to the right to take collective action. For example, in the Albany case, the CJEU found that "agreements concluded in the context of collective negotiations between management and labour, in pursuit of social policy objectives such as the improvement of conditions of work and employment, must… be regarded as falling outside the scope of Article 85(1) (Article

[62] Now Article 153(5) TFEU

101 TFEU) of the Treaty". In other words, industrial and collective agreements could not be considered as prohibited restrictions on free competition.[63]

An additional safeguard was enshrined in Article 28 of the 2000 Charter on Fundamental Rights, which reads:

> Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

In the absence of any clear definition of what may be regarded as 'collective action', we may understand the concept as covering secondary as well as primary acts of collection action. According to Clauwaert:

> Industrial action is primary if in different countries a collective action takes place at the same time […] The action is, on the other hand, to be regarded as secondary if, in one or more countries, action – referred to as sympathy or solidarity action – is taken in support of initial primary action in another country (Clauwaert, 2002:625).

However, Article 52 of the Charter specifies that public authorities may limit the right to take collective action if restrictive measures comply with the principle of proportionality and necessity. The Charter became binding with the adoption of the Lisbon Treaty on 1 December 2009.

In recent years, however, key legal developments have resulted in classic patterns of spillover, initiating a seemingly inexorable phenomenon of increasing interferences into member states' exclusive competences, among which stand

[63] AlbanyInternational BV v Stichting Bedrijfspensioenfonds Textielindustrie (Case C-67/96).

industrial relations. From a unionist point of view, interferences with workers' fundamental rights momentously escalated with the joint Viking[64] and Laval[65] cases, immediately followed by the Rüffert[66] and Luxemburg[67] cases in 2007–2008. Those cases directed the spotlight towards the potential dangers of unleashing unpredictable spillover effects in complex cases involving industrial relations disputes due to the posting of workers across borders.

In Viking, the CJEU took a two-fold position. First, the Court found that the right to take collective action was covered by provisions concerning the free movement of workers and it must, henceforth, be understood as a fundamental right. Second, the judges added that, as a fundamental right, the right to take collective action should not interfere with other fundamental rights, including the freedom of establishment, except on grounds of overriding reasons related to the public interest insofar as those actions are proportionate. Consequently, the CJEU decided that, in exercising the right to take collective action, trade unions might indeed have disproportionately restricted the freedom of establishment recognized in Article 49 TFEU.[68] Therefore, the Court instructed the national court to review whether trade unions had not exhausted all other means of action that were available to them before going on strike.

In the Laval case, a Latvian company posted workers on a construction site located in Stockholm. As a result, the company initiated talks with the relevant Swedish trade union. But the social partners were unable to find a collective agreement regarding posted workers' hiring conditions, which led the firm to negotiate an agreement with the Latvian trade union, instead. In response, the Swedish union blocked all the firm's construction sites in Sweden. Based on Article 3 of the 1996 Posted Worker Directive, the CJEU took the view that such collective

[64] International Transport Workers Federation v Viking Line ABP (C-438/05).
[65] Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet (C-341/05).
[66] Dirk Rüffert v Land Niedersachsen (C-446/06).
[67] Case C-319/06, Commission v. Luxembourg, [2008] ECR I-4323.
[68] (§72)

action impeded the exercise of the freedom to provide services because it intended to impose conditions that were beyond the minimum standards provided by law or universally applicable collective agreements. The CJEU confirmed its approach in the Rüffert case. The Court decided that social clauses included in public procurement agreements may not impose hiring and working conditions beyond the minimum standards imposed by law or universal collective agreements.

Those decisions effectively turned the right of trade unions to take collective action into a means of last resort, the exercise of which should depend on how it infringes on other fundamental freedoms, especially the right to provide services across borders. In addition, the Rüffert case shows that procurement authorities also have a declining ability to use public procurement as a policy tool to steer social conditions beyond the minimum standards provided by law and universal collective agreements.

Unsurprisingly, trade unions – as well as a number of observers – came to believe that the CJEU decisions have annihilated workers' fundamental rights across Europe – an area in which the EU was never supposed to intervene in the first place. Although the CJEU acknowledges that workers' right to take collection action in asserting their collective claims is indeed a fundamental right, the judges also imply that, confronted with other market freedoms, it cannot be considered as an absolute right. In an effort to clarify the coexistence of two potentially conflicting rights of equal value, the judges might have decided that economic rights should not disproportionately interfere with the fundamental social rights of the workers as well. But they did not. Therefore, some voiced concerns about a case law that effectively suggests a hierarchy of fundamental right in favour of market freedoms. Trade unions, in particular, expressed deep worries[69] (Malemberg, 2010; Bücker and Warneck,

[69] See, for example, EFBWW's preliminary analysis European implications of the Laval case – European implications of the Laval Case judgment, online: http://www.efbww.org/pdfs/European%20implications%20of%20the%20Laval%20Case%20judgment%20080709.pdf

2010) about the seemingly eroding legal value of the right to take collective action as compared to market freedoms. It is unclear whether the decision will result in cutting pre-existing national standards on the practical exercise of the right to take collective action. While those concerns have not been fully realized so far, it is indeed highly plausible that the threat to take collective action may lose credibility as a deterrent. In that sense, the decision contributes to re-balance the distribution of power between social partners in favour of employers. For collective action to be effective, it must have the potential to seriously disrupt the normal state of business affairs. Hence it is in the nature of the right to strike to disproportionately affect market freedoms. There is a relative risk that the right to take collective action progressively becomes something of a virtual right only, the exercise of which might be practically problematic. Novitz insists that,

> in neither Viking nor Laval did the ECJ formulate a right to collective action in a manner likely to provide effective legal protection of its exercise. Indeed, it could be said that other aspects of the Viking and Laval judgments render judicial recognition of such a right negligible in terms of its practical effects (2008:541-542).

The subsequent judicial developments at national level suggest that these concerns are not misplaced. In the so-called BALPA case in the UK, it was not clear whether Viking and Laval could result in actions for damages undertaken by employers against trade unions. The British Airline Pilots' Association (BALPA) went on strike in response to British Airways' plans to open subsidiaries in other member states. British Airways requested an injunction, arguing that the strike impeded on the freedom to provide services. British Airways further informed that it was prepared to claim damages up to £100 million a day. As a result, BALPA was exposed to disproportionately serious financial risks and was forced to step back. In reaction, the International Labour Organization's Committee on Freedom of Association observed,

> with *serious concern* the practical limitations on the effective exercise of the right to strike of the BALPA workers in this case. The Committee takes the view that the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements, creates a situation where the rights under the Convention cannot be exercised (International Labour Organization, 2010a; 2010b).

2. Monti II: From bad to worse?

The Monti II Proposal was designed as an instrument to address the problematic balance between the freedom to trade services across the EU and fundamental social rights. It is loosely inspired by a special clause included in the 1998 Monti Regulation,[70] which addressed a similar problem in the area of goods. At the outset, the Monti Regulation aimed to engage the member states to take necessary measures to remove existing obstacles to free provision of goods across borders. But, some days after the proposal was issued, the CJEU condemned France for not preventing protesting farmers from impeding the free movement of goods.[71] In reaction, the Commission proposed the so-called 'Monti Regulation' that included the following Article 2:

> This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.

[70] Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.
[71] Commission v. France, Case C-265/95.

Article 2 implicates a hierarchical subordination of the free movement of goods to the right to take collective action. The Council successfully adopted the proposal and, thus, overturned the Court position.

Following a highly similar pattern, the Laval, Viking and Rüffert cases in the area of free provision of services led the Commission to plan a legal response (Commission, 2010:7). To do so, José Manuel Barroso requested a report on this question from the Commissioner in charge of DG Competition, Mario Monti. In his May 2010 report, Monti acknowledged that the recent CJEU case law risked "alienat[ing] from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration" (Monti, 2010:68). In order to strike a better balance between seemingly conflicting rights, the report suggested the right to take collective action be re-asserted and further proposed a mechanism to settle disputes between social partners in cases that involve the posting of workers in the framework of the 1996 Posted Workers Directive (Monti, 2010:70-72). Yet, the Monti II proposal did not eventually project to assert workers' rights as forcefully as Monti I.

Eventually, the Commission proposal raises three types of questions. First, there were considerable doubts regarding the Treaty's legal basis as claimed by the Commission and the underlying argument to bypass Article 153(5) TFEU.[72] Second, the actual aptitude of the proposal to alter the CJEU case law has been questioned. Third, the conditions of implementation of an essentially supranational non-judicial dispute settlement system raised some quite understandable worries.

The first legal issue posed by the proposal is whether or not the Commission had in fact been driven into designing a proposal that, due to its very subject matter,

[72] Article 153(1) provides that: "with a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States" in a number of fields. However, Article 153(5) immediately specifies "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs."

would unavoidably lead to intervene outside the EU limitedly defined competences. Yet, the Commission may not be held responsible for a move that was originally initiated by the CJEU. The legal basis used by the Commission to justify intervention was article 352 TFEU so-called '"flexibility clause'.[73] The clause allows action to be taken at supranational level if such action should prove necessary to solve problems that, despite being foreign to EU jurisdiction, emerged within the framework of the limited areas defined in the treaties, or so as to attain one of the objectives set out in the Treaties. In other words, in the event that the Treaties did not grant the necessary powers because a situation emerged that was simply unforeseeable in advance, then the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the Parliament, shall adopt the appropriate measures. The Commission decided to act on this ground and also argued that this was to be understood as a restriction in the ability of the EU to harmonize national legislation by way of a directive.

Nonetheless, there is widespread belief that the Commission may have put itself at serious risk of interfering within member states' exclusive areas of competence (Barnard and De Baere, 2014:12; De Baere, 2014; UK Foreign and

[73] Article 352 TFEU reads: "(1) If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
(2) Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
(3) Measures based on this Article shall not entail harmonization of Member States' laws or regulations in cases where the Treaties exclude such harmonization. 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union."

Commonwealth Office, 2014: 22-28; Jacqué, 2013). However, this is still open to discussions since the regulation explicitly limits itself to exclusively solving legal disputes in which a transnational component can clearly be identified. Indeed, Article 1(2) states that the proposed regulation shall not affect national rules in the absence of such transnational relations. Yet, critics also have a fair point in warning that the CJEU[74] has frequently suggested that EU legislation on market freedom could legitimately be applied to situation in which evidence of transnational component are thin (Barnard, 2014).

There already is a dense literature that furthers the debate on the legal reasoning behind the possibility for the EU to legislate in those areas (Novitz, 2008; Fabbrini and Granat, 2013). Yet interviews and position papers (e.g. European Conservatives and Reformists Group, 2012) from both workers (ETUC, 2012) and business associations (BusinessEurope, 2012) across various sectors as well as national parliaments (Cooper, 2015; EUobserver, 2012) and academic analyses (Goldoni, 2014) show that, from a political point of view, the conditions were not met for such action to be undertaken.

Turning to the legislative content of the proposal itself, the key provision is found is Article 2, which restates that the right to take collective action and the right to provide services should *both* be considered as fundamental rights, and are therefore granted equal value. This position simply, and perhaps disappointingly, reprises the CJEU interpretation detailed above. Thus, in practical terms, the proposal does not seem to solve the issue raised by social partners – trade unions in particular (ETUC, 2012b). Instead of clarifying the way possibly conflictual freedoms must coexist, the directive simply reaffirms the standard principle of proportionality:

> the exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental

[74] See, for example, the CJEU Carpenter decision (C–60/00)

> right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collection action, including the right or freedom to strike, shall respect these economic freedoms.

The wording does not seem to favour one fundamental right at the expense of the other, as some organizations argued. It does not seem to bring much added value to the existing Viking and Laval case law either (Bruun and Bücker, 2012; Novitz, 2008). Thus, the right to take collective action has been durably and worryingly undermined. The proposal also introduces several mechanisms to settle potential conflicts between parties. Article 3(1) and 3(2) foresaw the possibility of extra-judicial conflict settlement at the supranational level, notably when the right to strike and the freedom to provide services seem irreconcilable. This mechanism crystalized unusually unanimous opposition from both social partners and EU institutions. If trade unions and business associations may have had doubts about the ability of Article 2 to impact on existing CJEU case law, they seemed to be unanimously ready to resist those procedural provisions. Articles 3(1) and 3(2) suggest non-judicial resolution of cross-border conflicts on the right to take collective action:

> Member states which, in accordance with their national law, tradition or practice, provide for alternative, non-judicial mechanism to resolve labour disputes […] Management and labour at European level may, acting within the scope of their rights, competences and roles established by the Treaty, conclude agreements at Union level or establish guidelines with respect to the modalities and procedures for mediation, conciliation or other mechanisms for the extrajudicial or out-of-court settlement of disputes […] with a cross-border character.

Concretely, labour disputes could have been settled at the EU level using an alert mechanism, by which member states would have informed each other in the event of an emerging industrial conflict between workers' organizations and managers.

3. Procedure: Deadlock rising

In response, organized labour across Europe started to formulate demands to both national governments and their umbrella associations in Brussels. These labour petitions were aimed at persuading the authorities to shift the regulatory structure in a way that would better balance and protect the right to strike vis-à-vis market freedoms.

Yet, trade unions' strategies have also been difficult to comprehend. For example, they expressly demanded that issues of collective action be excluded from the so-called Monti (I) clause (Clauwaert, 2002). From early on, important inter-industrial consultations showed that there was relative agreement between business and workers associations on the need to adapt the EU regulatory framework in light of CJEU case law. Yet intense disagreement on the way forward persisted.[75]

Because of the frictions produced by judicial decisions between supranational spillovers and member states' exclusive competences, 12 priorities were outlined in the Single Market Act. Consequently, DG Employment started working on different policy scenarios to resolve the conflict over industrial collective action when there is a transnational component. The Commission's objective was to settle the "tensions between the freedoms to provide services and of establishment, and the exercise of fundamental rights such as the right of collective bargaining and the rights to industrial action."[76] President Barroso entrusted Mario Monti with the mission to work on a 'New Strategy for the Single Market,' resulting in a proposal inspired by the 1998 so-called Monti Regulation.[77]

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[75] Report on Joint Work of the European Social Partners on the ECJ Rulings in the Viking, Laval, Rüffert and Luxembourg Cases, 19 March 2010.
[76] Commission Explanatory Memorandum, p. 8
[77] Article 2 reads: "the Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States."

The Commission went on to consult social partners within the framework of an impact assessment,[78] which unsurprisingly revealed major points of uncertainties. At least three issues stand out. First, how to clearly and adequately balance the right to take collective action, the freedom to provide services and the freedom to establish in another member state? Second, how to judicially resolve conflicts regarding the right to strike when there is a transnational component to the conflict. Third, how to interpret and clarify key rules about the posting of workers. Consulted by the Commission, the ETUC proposed that the 1996 Posted Worker Directive should be amended to strictly implement the principle of equal pay for equal work across the EU. It was further argued that a clause should be introduced that would confirm the EU commitment to promoting social progress across Europe. That clause would borrow from the spirit of the original Monti clause. Two alternatives were foreseen. Either it could have been inserted as an amendment to the existing 1996 Posted Workers Directive.[79] Or, preferably, it could have been inserted into the primary law of the EU in the form of a 'Social Progress Protocol'.

By contrast, BusinessEurope insisted that recent Court rulings were very welcome in further clarifying the balance between fundamental market freedom and the right to take collective action. Yet, the possibility of further clarification was welcomed by the business community on the proviso that the right to freely provide services would not be overly restricted. At the same time, BusinessEurope insisted that the right to strike should remain unambiguously outside EU competences and jurisdiction.

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[78] (SWD(2012)63final). See also the 2012 Preparatory study for an Impact Assessment concerning the possible revision of the legislative framework on the posting of workers in the context of the provision of services, online: http://ec.europa.eu/social/BlobServlet?docId=7511&langId=en.

[79] That is probably one of the main reasons why, initially, the proposal for a Directive on the Enforcement of the 1996 Posted Workers Directive and the proposed Regulation on the Right to Take Collective Action were puzzlingly presented within a unique legislative package.

It is interesting to note that the 2012 Commission consultation reflected the fact that until recently no member state – except Luxembourg in 2008 – had expressed the need for substantial modifications of posted worker rules as enshrined in the 1996 Posted Worker Directive. Yet, the Commission's final approach, timing and legislative strategy are surprising. In retrospect, it should not have been difficult to see that the policy foreseen by the Commission proposal had every chance of failing. The Commission seems to have pushed for a solution even though all actors and observers had made it clear that sufficient support could not be found for a policy such as the Monti II Proposal.

This begs the question: why did the Commission decide to go ahead anyway? Was it the result of a major political miscalculation, or rather, quite the opposite, the strategic product of a calculated risk? One interviewee suggested that proposing such a policy might have in fact been an ingenious way to demonstrate that, despite high demands, the Commission was willing but unable to act in response to non-negotiated decisions designed by judges (interview with Commission official).

In fact, the Commission was busy fighting various battles. First, as a condition of re-election, President Barroso made a clear political commitment before the EP that his Commission would tackle the problems raised by recent CJEU case law. Second, inside the Commission, there were concerns that in the absence of positive legislative action stakeholders' and citizens' "confidence in the ability of the single market to deliver" would be gradually eroded. Third, this particular issue seemed to pose overwhelming political difficulty as regards the reconciliation of conflictual interests between competing trade associations and power-maximizing member states.

Hence, the political background of the Monti II clause presents particularly interesting features for the purpose of the present research. From its inception, the Commission faced clear deregulatory pressures stemming from patterns of negative integration initiated by the CJEU, compounded by increasing risks of uncontrolled

spillovers. Simultaneously, the lack of a solid treaty basis coupled with decision-making rigidities put the Commission in an uncomfortable position. Not only did the Commission proposal raise general suspicion, worries and criticism, but it also attracted the attention of a number a national parliaments, leading them to issue a reasoned opinion based on the Subsidiarity Protocol.[80] This was the first time the so-called Yellow Card procedure introduced in the Lisbon Treaty was activated by one-third of the national parliaments of the member states, forcing the Commission to review the draft.

However, the legality of the Yellow Card procedure also prompted discussion. In principle, the Yellow Card can only be activated to review the legality of given proposals with regards to the principle of subsidiarity. In that case, however, national parliaments also appeared to be animated by more political motivations. Hence, the wording of the report partly reflects the general sense of discomfort raised by the spilling of internal market rules over social rights and national patterns of industrial relations. In addition, the notion that future industrial conflicts over the exercise of fundamental freedoms, including the right to strike, could be arbitrated at the supranational level was not welcomed. Overall, national parliaments not only acted to prevent a potential violation of the principle of subsidiarity, but also "reacted to an issue of great political saliency" (Fabbrini and Granat, 2013:11).[81]

Stakeholders critical of the proposal immediately pointed to the possibility of significant interference in member states' sovereignty and exclusive competences. The ETUC considered it as a restrictive backlash against the fundamental right to strike and freedom to take collective action across Europe. And BusinessEurope equally welcomed the Commission decision to withdraw its Monti II Proposal, arguing that

[80] Protocol on the application of the principles of subsidiarity and proportionality

[81] Fabbrini and Granat further claim that "national parliaments were unable to identify any fault in the Commission proposal relating to subsidiarity" (2013:11). Nonetheless, the fact that the Commission proposal used Article 101 TFEU as a legal basis provides ample opportunities to question its conformity with the subsidiarity principle.

"the diversity of national industrial relations systems and practices […] must be respected" (Document 54).

Based on Mario Monti's report published in May 2010,[82] on 21 March 2012 the Commission officially issued its proposal for a Council regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services. The proposal was legally based on Article 352 TFEU requiring Council unanimity as well as consent from the European Parliament. In addition, and in line with Article 5(3) TFEU, the Commission informed national parliaments of the proposal and their rights and authority in ensuring proper monitoring of EU compliance with the subsidiarity principle. The Council swiftly expressed doubts about both the added value of the proposal and its practical implementation.[83]

By the 22 May deadline for national parliament consultation, 12 national parliaments/chambers had addressed a reasoned opinion to the Commission, warning that the proposal might infringe the subsidiarity principle. The parliaments of Belgium, Denmark, Finland, France, Latvia, Luxembourg, Malta, the Netherlands, Poland, Portugal, Sweden and the United Kingdom issued a 'yellow card.' As a result, the Commission expressed its decision through the voice of "Laszlo Andor, EU Employment commissioner, [who] announced the decision to abandon the proposal

[82] On the basis of the Monti report, the Commission, in a Communication of 27 Oct. 2010, Towards a Single Market Act For a Highly Competitive Social Market Economy, COM(2010)623, advanced a series of proposals for legislative action. See "Proposal No 30: In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market." The Commission then held a public consultation on its proposals, collecting the opinions of the social partners.

[83] Press Release, Council of the EU, 3177th Council meeting Employment, Social Policy, Health and Consumer Affairs.

to the members of the European Parliament's Employment Committee on Wednesday 12 September 2012."[84]

B. Analysis: Neither for nor against, quite the contrary

1. Actors and preferences

On 21 March 2012, the Commission – under the lead of Commissioner for Employment, Social Affairs and Inclusion László Andor – issued its proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.[85] DG Employment was responsible for designing the policy, carrying out consultation and issuing the final proposal on the 21 March 2012. The preferences of the Commission remain a conundrum. The initial letter addressed by President Barroso to Mario Monti is not very clear regarding the objectives to be attained. The letter requested that the Commissioner look at how the market and the social dimensions of an integrated European economy can be mutually strengthened. At the same time, both case law and social partners' positions clearly show that the two aspects are potentially in conflict. The letter avoided dealing directly with that problem. Interviews with a relevant DG official and with a member of the Impact Assessment Board seem to suggest that the Commission understood that adopting such a regulation would be a political hurdle. Commission staff reflected upon the unnecessarily high pressure maintained by trade unions. The decision to push the legislation forward at this time seemed to be almost exclusively justified by the political commitment that President Barroso expressed to the Parliament at the time of its re-election.

In the Council, member states initial preferences on the proposal are quite difficult to establish because the policy was withdrawn fairly early. But the member

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[84] March. 2012. "Brussels Drops Plans for EU Law Limiting Right to Strike." Text. EurActiv | EU News & Policy Debates, across Languages. September 14. http://www.euractiv.com/socialeurope/ec-drops-regulation-right-strike-news-514793

[85] COM(2012) 130 final.

states were reportedly very divided on the issue. Their preferences differed widely depending on the impact that the Viking, Laval and Rüffert cases were deemed likely to have on their respective patterns of industrial relations. In certain countries, particularly in Nordic member states, there was a significant misfit between national systems and the implications of the case law that increase the costs of compliance. Those countries are assumed to advocate EU-level reforms more actively. Generally, the member states that held the most clear-cut views seem to have been France, Germany, Sweden, Denmark, Hungary and Poland. There was a general consensus against the provision on an arbitral conflict settlement mechanism.

Two key pieces of research have been published on this topic. One was commissioned by the ETUI. It reviews the implications of case law on a selection of member states that are representative of the various systems of industrial relations found across Europe: the Anglo-Saxon, the German, the Nordic and the Romanic models (Bücker and Warneck, 2010). The new member states are presented as sui generis instances. In addition, the EP published a study (Malmberg, 2010), which focuses on the implications of the case law on the existing EU legal apparatus. But it also provides analysis on the national effects of the CJEU decisions, particularly in Denmark and Sweden.

The specific patterns of industrial relations in the Nordic countries are heavily dependent on mass membership of trade organizations.[86] Social partners enjoy an exceptionally high degree of freedom vis-à-vis the state in governing themselves and negotiating collective agreements: "Generally all significant political parties in the Nordic countries, whether on the left and right, support the concept of self-regulation on the labour market" (Bruun and Jonnson, 2010:23).

Sweden and Denmark in particular have been hit hard by the new case law. In

[86] There is an average of 70 per cent employee membership in trade unions across the Nordic countries. Moreover, 90 per cent of Icelandic workers are affiliated with a trade union (Bruun and Jonnson, 2010:15).

both countries, working conditions and wages rely heavily on self-regulation and social partners' negotiations. Unfortunately – and contrary to the Finish, Norwegian and Icelandic models – there is no mechanism to declare collective agreements that are produced through negotiation universally binding. This exposed both industrial relation systems to the CJEU decisions, leading them to investigate various legal changes that ought to be put forward to shield both countries from unwelcome regulatory pressures as a result of the new interpretation provided by the Court. This generally led to restrictions on the fundamental right to take collective action in Sweden. Despite a shared consensus among Swedish social partners in favour of self-regulation, the Swedish Employers' Confederation has used the recent development in EU legislation to further employers' interests in limiting union power, to the detriment of the national industrial system. By contrast, Danish social partners place their cooperative relations above the immediate opportunities that may result from the implications of case law: "The Danish social partners negotiating on the impact of the Laval judgment seem to have had a joint agenda on diminishing the consequences and influence of EU law within their autonomous collective bargaining model." (Bruun and Jonnson, 2010:24).

The consequences of CJEU case law on the German legal apparatus (Bücker, 2010; Walter, 2010) largely explains why Germany has positioned itself in favour of a reformation of recent developments in EU law. Indeed, Germany was directly targeted by the Rüffert case law, which failed to take account of Germany's distinctly federal and decentralized national legal and institutional arrangements (Bücker, 2010:39). The German political reaction is illustrative of how destabilizing CJEU case law can be in terms of politicization. In the same way negotiations over the Services Directive contributed to sabotage the Constitutional treaty, the CJEU case law on collective action and posted workers undermined the EU's institutional arrangement and the integration process itself. Certain members of the German Parliament even suggested that the Lisbon treaty should not be ratified as a consequence.

In the academic community, the Laval and Viking cases did not receive a warm welcome either (e.g. Bücker, 2010:31). There was a perceived lack of balance between EU fundamental rights and market freedoms. In addition, the application of the principle of proportionality in favour of economic rights is deemed unclear practically and may eventually be conducive to extend the ability of the Court to impose substantial policy orientations beyond its legal mandate. The Rüffert case attracted particularly harsh criticism for failing to comply with the International Labour Organization Convention 94 and for undermining the authority of the social partners in industrial negotiation. Finally, the German consensus was that the case law seriously disregarded the principle of subsidiarity. In a pattern that goes beyond the JDT, it seems that the Court may infringe basic principles governing the distribution of competences within the EU, while decision makers are left unable to reform those decisions precisely because that would infringe upon those very principles.

Most exceptionally, national parliaments played a key role in the policy process leading to the eventual withdrawal of the Monti II proposal. The newly introduced Yellow Card procedure allows them to express themselves collectively as protector of the subsidiarity principle. They may also become important intermediaries of national social partners' preferences. National parliaments may therefore become a privileged channel to implement a multilevel lobbying strategy, next to national governments. In the event of the Monti II Proposal, the new Yellow Card procedure indeed demonstrated that a major new lobbying opportunity had been opened.

Admittedly, national parliaments have not been identified as a chief actor to be analysed in the theoretical framework. Rather they are but one of the channels of national preference aggregation. Besides, the Commission has denied the existence of a causal link between the Yellow Card and the withdrawal of the policy. Yet, national parliaments may be viewed as additional channels to aggregate national interests, next to member states' governments within the Council – adding a potential factor to

increase the likelihood of deadlock due to the Joint-Decision Trap. In that regard, the assumptions formulated on the preferences over outcomes that are attributed to member state governments should be similar to national parliaments. Collectively, national parliaments should express a preference towards the persistence of the status quo ante against the adoption of a variably stringent market-correcting policy instrument. In other words, the occurrence of a Yellow Card does not presage anything good regarding the fate of a proposal once it reaches the Council. That may have been the reasoning behind the Commission decision to eventually withdraw the proposal altogether. In addition, the proposal examined in that case would have had to gather a *de jure* unanimity in the Council to be successfully adopted.

All Interviews have confirmed that the two most active and influential lobbying actors were collective organizations representing social partners – employers, on the one hand, and employees, on the other. In line with a repeated pattern, BusinessEurope and the ETUC played a leading role. Other organization also expressed their views and lobbied actively. However, the documents and press releases that reflect their policy positions are scarcer than in the other cases analysed in the thesis. This is probably due to the fact that all significant organizations were against the proposal, regardless of their views about other policy alternatives. Interviewees did not report any substantial interaction with individual firms. In the Parliament, interactions with social partners were marginal due to the withdrawal of the policy.

In the light of the assumption about actors' preferences, trade unions were generally expected to be in favour of amending the status quo to put in place a more stringent environment for business. Business operators, in contrast, were expected to be broadly in favour of more lenient regulatory environment. The case law offered just that, since it effectively reduces the ability of the unions to demand more enhanced social standards.

In March 2010, a selection of major social partners at the EU level – BusinessEurope, UEAPME, CEEP and ETUC – published a collective report on the CJEU

case law. The document shows that the employer and the employee sides both admit that a policy response ought to be negotiated. This meant a slight shift compared to BusinessEurope's initial opinion in full support of the CJEU rulings. BusinessEurope was of the view that national legislation was indeed in breach of EU law, that social dumping would be highly unlikely or anecdotal, and that the new interpretation did not necessitate a revision of the Posted Worker Directive (Document 65; Walter, 2010). Although that position was nuanced later on, EU social partners still disagreed on the opportunity to amend the legal framework provided by the 1996 Posted Worker Directive. It is surprising, however, that both employees and employers agreed that the Monti Report was a welcome initiative, whereas the subsequent Monti II Proposal was unanimously rejected by the social partners.

Based on an analysis of published documents issued by the main organizations representing the construction sector, the European Federation of Building and Woodworkers (EFBWW) – the employees' organization at EU level – and the European Construction Industry Federation (FIEC) – the employers' counterpart, seemed much less active regarding the enforcement directive than they would be two years later. But interviews show that their attention on unfolding policy developments was high. It is probable that the EFBWW simply left the ETUC in charge of that dossier without seeing the need for further investment. However the construction sector is a key target of posted workers policies. Therefore, the costs and benefits incurred by the CJEU case law induced them to maintain a high level of awareness. Interviews revealed that staff members on both the employer and employee sides are particularly skilled, knowledgeable and experienced in both the legislative substance and the decision-making process. It is not surprising that there is a generally higher level of technical expertise in sector specific organizations than in umbrella associations, whose main function is to maximize representativeness.

2. H1: Preferences and lobbying intensity

H1 hypothesizes a causal link between relative preference homogeneity among competing social partners and lobbying intensity. Lobbying intensity varies according to the resources invested in producing press release and position papers, seeking direct contact with policy makers – in the form of appointment and conferences – and organizing outsider lobbying actions including protests.

Interviews and content analysis draw a reasonably clear picture of the decision-making and lobbying patterns that took place during the inception and early negotiations of that policy. Yet, the case displays some unusual features in terms of preference homogeneity, mobilization, and lobbying strategies.

The evolution of the positions of both employers and employees are puzzling at first. There was a certain level of initial backing in favour of the 2010 Monti Report. This probably induced the Commission to believe that there was enough political support for a proposal. However, in many respects the Monti Report remained vague and ambiguous. It is not impossible that a certain level of misunderstanding fed early discussions, leading to unsettling shifts in policy positions at later stages.

The 2011 Commission impact assessment reveals that BusinessEurope was initially open-minded about the idea of the would-be Monti II clause, which prompts one to believe that either the assessment misrepresented social partner preferences, or the social partners modified their position at a later stage. Indeed, BusinessEurope's later publications express scepticism about the proposal (Document 54). The ETUC also was in favour of the Monti II proposal, which stood in stark contrast with its later position. Yet, the ETUC was probably led to believe that the Commission would try to clearly settle the conflict between EU market freedoms and other fundamental rights, notably in favour of workers' collective rights. Given that the 1998 Monti clause had achieved just that with regards to trade in goods, the ETUC

indeed had reason to be hopeful. Nonetheless, the final proposal frustrated social partners' expectations.

In the end, there was a shared opinion – on both sides – that the policy was not optimally framed from the outset. Therefore, it is difficult to clearly identify a winner. Yet, the persisting status quo means that workers and trade unions fundamental rights are still significantly restricted. National industrial relations systems are still gravely disrupted in certain countries. From the perspective of the power struggle between employers and employees in collective bargaining, employers emerge as winners. However, preference attainment and lobbying intensity may correlate without being clearly causally linked in that case.

Trade unions constitute the pool of actors that pressured the Commission for legal clarification and additional safeguards to protect the right to strike at the EU level. In 2008, the ETUC launched a strategy to fight recent CJEU case law on collective action. In March 2008 it issued a detailed memorandum arguing against the rationale set by the CJEU in the Viking and Laval decisions (Document 57). And on 9 October 2008, John Monk, the then ETUC Secretary General gave a speech at the Commission's Forum on Workers' Rights and Economic Freedom in which he argued that the Viking and Laval decisions carried the real risk that market freedom would be accorded superior value over social rights. Furthermore, he argued that there was a risk that trade unions would be deprived of the legal ability to effectively protect workers and thwart member states efforts to steer social standards through procurement conditions (Document 56). In his intervention, Mr Monk developed a perspective on the single market as a means to achieve an enhanced social union rather than a free market area only. He further insisted that the Commission should take action to ensure that social rights be shielded from the effects of market freedoms.

Then, in March 2010 the ETUC issued a detailed proposal for a revision of the PWD. In the documents, the ETUC warns that open borders, which are not

questioned, require a better-implemented level playing field. The ETUC already called for equal pay for equal work in the same work place, a principle that is currently being negotiated as part of the new 2016 package of reform on posted workers. It further demanded that the new initiative would ensure respect for collective bargaining and national industrial relation systems, fair access to social benefits for all workers, and improved monitoring and enforcement mechanisms. Therefore, and in the light of the damaging effect of recent CJEU case law, the ETUC called for the adoption of a Social Progress Protocol to be attached to the Treaties. The ETUC insisted that this would be consistent with the spirit of the TFEU whose Article 3(3), §3 reads: "*The Union shall work for […] a highly competitive social market economy, aiming at full employment and social progress*". According to the ETUC the adoption of such a protocol would serve to clarify the balance between market freedoms and workers' collective social rights. In the same document, the ETUC suggested the adoption of the "equivalent of the Monti-clause" (Document 58). In addition, the ETUC warned that public procurement contractors should be able to legally include social clauses if they wish. The ETUC executive committee unanimously adopted the resolution (Document 59; Interview with ETUC representatives).

However, trade unions quickly turned against the policy proposal designed by the Commission. The ambiguity about this policy amounts to whether the proposal was in fact re-regulatory. In addition, trade unions – and business organizations for that matter – unanimously felt that the policy still created major legal uncertainties because the practical consequences would have all depended on subsequent decisions produced by a new supranational arbitral mechanism. That would have increased, rather than decreased, legal uncertainty. That is why trade unions responded very negatively and unanimously to the policy proposal as designed by the Commission.

Interviews with social partners reveal that various trade union organizations were generally united *in favour* of the adoption of a market correcting regulation, one

that would reassert the absolute legal character of the right to take collective action across the EU. Given the specific role played by Latvian trade unions in the Laval case, we might have expected a certain level of heterogeneity in that case. Yet, no conclusive evidence was found to support that expectation.

In December 2011, the ETUC renewed its call for more stringent regulation, insisting that a Monti II clause as foreseen by the Commission would strengthen rather than reform CJEU case law, leading to the reinforcement of a more lenient regulatory environment for employers hiring posted workers. In addition, the ETUC worried that a Social Protocol did not appear to be on the Commission's agenda (Document 60). And in April 2012, the organization once again expressed its opposition to the Monti II proposal. Whereas the confederation previously called for a Monti-clause similar to the one adopted in 1998, it acknowledged that the proposal fell short of creating the same legal consequences. Indeed, the Monti II clause would confirm that fundamental social rights should undergo a proportionality test, which is precisely what trade unions wanted to avoid.

In the construction sector, there was a certain level of coordination between the EFBWW and the FIEC. They identified the need to fight against unfair competition and ensure that there would be a level playing field between industries established in different member states (European Commission, 2012a). In addition, the EFBWW has been particularly active in fighting social dumping and illegal establishment in the following years. This is highly consistent with expectations laid out in H1.

In addition, the European Federation of Food, Agriculture and Tourism Trade Unions (EFATT), the EFBWW, and the European Transport Workers' Federation have launched coordinated campaigns to fight social dumping culminating in protests in front of the Commission doorstep (Document 68). Finally, the European Transport Workers' Federation and the International Transport Workers' Federation jointly launched a European Citizens' Initiative in 2016 in the framework of a broader

campaign against unfair competition and social dumping. The problem of posted workers and letterbox establishment raises especially serious concerns and has even attracted mainstream media interest, notably in France.[87] Therefore, homogeneous preferences among trade unions – across various sectors – is naturally correlated with long-term lobbying commitment.

On the other hand, employers' organizations shifted their positions. Most of them hold preferences in favour of the CJEU case law status quo. BusinessEurope ultimately positioned itself against the proposal. However, it did not directly oppose trade unions in questioning the legitimacy of the right to strike but insisted that the proposal did not comply with the subsidiarity principle and did take account of the variations in industrial relations systems across Europe. Business organizations did not seem mobilized to an exceptionally intense degree (interview with Commission official). Commission officials even claimed that the business community was actually quite insensitive to the outcome (*ibid*). That hints at a lack of mobilization on the employers' side.

To summarize, social partners' preferences and lobbying undertakings reveal that trade unions organizations were very united against the *status quo* set by CJEU case law. In that respect, the initiative of the Commission was originally welcomed. Yet, they ultimately unanimously turned against the eventual proposal. Employer associations' homogeneity of preferences seems to be less solid. While BusinessEurope welcomed CJEU case law, employer organizations in the construction sector, the FIEC in particular, did not seem to share such a clear opinion. BusinessEurope then welcomed the Commission initiative but opposed the eventual proposal. Employers' preferences *in favour* of the *status quo* were not widely shared, therefore. Looking at the scant publications of BusinessEurope on that particular

[87] E.g. France 2, 2016, Cash Investigation, "Salariés à prix cassé: le grand scandale".

proposal, the differential in preference homogeneity among social partners can be associated with relatively milder mobilization.

Indeed, trade unions' homogeneity of preferences against the Monti II proposal was reflected in the intensity of both insiders' and outsiders' lobbying campaigns, not only in the short term but also in the longer term. Interviews reveal that the ETUC and the EFBWW exerted continuous pressure on the Commission, although the ETUC was noticeably more active. Simultaneously, outsiders' strategies like petitions and public campaigns were also launched. In the context of the financial crisis, the ETUC also adopted the so-called Athens Manifesto, which was overwhelmingly endorsed by trade unions across Europe in a demonstration of consensus and agreement among workers' organizations. This was followed by an 'Action Day' to 'promote' the ETUC political agenda (Document 63).

Regarding the fight over the reassertion of trade unions' collective rights in the EU, some patterns may be surprising. First, trade unions seem to clearly agree that the Monti II clause was not acceptable. And relative lobbying efforts are consistently higher than on the business side. Again, H1 can be validated accordingly. However, judging by the number of position papers, press release and demonstrations, the level of mobilization was nowhere near what could be observed with regard to the Services Directive and the Revision of the Posted Workers Directive. This might simply be explained by the fact that the policy proposal did not live long enough for the various organizations to fully implement their respective lobbying actions. In addition, after the proposal was issued, social partners quickly identified that they were all – in various degrees – against the proposal, which nuanced the need the invest supplementary resources.

However, there is a corresponding lack of communication on the business side also. And in any case, BusinessEurope was also fighting the adoption of a Monti II clause. This created a surprising situation in which BusinessEurope and ETUC were defending opposite policy preferences, leading them to position themselves similarly

regarding the Commission proposal. Indeed, the trade unions were in an awkward position because they demanded the adoption of the Monti-Like clause in the area of services and actually obtained it. Only the content of it was the opposite of what they were demanding. Hence, they were obliged to fight against something they had apparently demanded, but in fact did not. This led to the perception that the ETUC position had become self-contradictory when in fact it was not.

It is difficult to know exactly whether trade unions in fact played a significant role in raising awareness among national parliaments. There was a clear effort to implement multilevel lobbying strategies, notably in the Nordic countries and France, Germany and Belgium. But whether those strategies particularly focused on the national parliaments with the specific aim of triggering the Yellow Card is much more doubtful. However, the continuous multilevel lobbying endeavours of the trade unions most probably contributed to the eventual success of the Yellow Card proposal.

Due to inconsistencies in the position of business, and the particular content of the Monti II proposal, H1 can only be partially confirmed.

3. H2: Inter-institutional negotiations and policy output

Given assumed theoretical premises about the EU institutions' preferences, H2 lays out expectations regarding the effect of lobbying on inter-institutional negotiation. Given its members' structural heterogeneity, the Council is recurrently trapped in a decision-making deadlock that generally favours the persistence of the *status quo*. The Commission and the Parliament, on the other hand, should more often lean toward the adoption of supranational policy instruments insofar as those policies tend to increase their power compared with the member states. This, of course, must be nuanced by the possibility that some MEPs can also respond to the influence of their home government, especially if they hold similar party affiliation. Additionally, MEPs hold ideological preferences independent of the institutional interest of the

Parliament as whole. Despite those limitations, one can argue that a Commission and a Parliament that generally favour the adoption of supranational instruments may rely on some social partners' additional political resources to disrupt the state of affairs in the Council.

Although the case provides solid material to put H1 to the test, H2 assessment is more arduous simply because the Commission withdrew its policy proposal before a vote could take place in either the Parliament or the Council. In the Council, member states seemed initially opposed to new EU legislation. That has already been established. Preference heterogeneities did not exclusively emerge between new and old member states, or eastern and western countries. In fact, several member states affected by CJEU rulings had already adapted their legislation, including Denmark, Sweden, Luxembourg and several of the German *Länder*. But, according to the Commission Consultation of 2012[88], "several member states [...] support[ed] the Commission's approach on the Directive, except UK (against any new legislation); the UK, Czech Republic and Lithuania were also against the proposal." (p. 15). According to that consultation, among the member states that supported the initial Commission approach were Finland, France, Germany, Sweden, Portugal, Poland, Lithuania, Ireland and Austria. Therefore, either there was an obvious shift in member states' preferences, or the Commission misinterpreted them from the outset.

The Council was the first actor to express its reservations and even discontent with the proposal. However, the later Commission withdrawal makes it impossible to precisely reconstruct the causal link between, on the one hand, overwhelming objection from trade unions as well as various members of the business community and, on the other hand, opposition in the Council and the Parliament.

[88] Commission preparatory research and consultation was complemented by a conference on Fundamental Social Rights and Posted Workers: see http://ec.europa.eu/social/main.jsp?catId=471&langId=en&eventsId=347&moreDocuments=yes&tableName=events

It is still open for speculation whether the Commission took this decision in reaction to the national parliaments raising the Yellow Card, or because – as the Commission argued – the political conditions for successful negotiations were not met. Assuming that the Commission told it as it was, the case provides a strong instance of persisting *status quo* under the conditions expected as part of the JDT theory. And, in line with H2, one should also observe a lack of social partners' commitment to escape the *status quo*. That is definitely the case. Therefore, we can establish a very clear congruence between the independent and dependent variables as expected in H2. Establishing a causal link is a lot trickier, however. This is due to several observed covariations in that case. The relatively unanimous opposition of rival social partners, albeit for different reasons and to different extent, was compounded by national institutions' opposition. Empirical findings suggest that mobilization success on the employees' side translated into the strengthening of a very broad coalition against the proposal, forcing the Commission to give up and withdraw it. But national parliaments also played a key independent role. There is no conclusive evidence showing social partners playing a crucial role in supporting national parliaments initiative. Therefore, the Yellow Card came as an additional evidence of institutional opposition against the proposal.

Politically, the Yellow Card abruptly and massively strengthened the institutional coalition that viewed the Commission final approach as suspicious. It effectively changed the nature and political leverage of the coalition against the proposal. The Commission became so isolated that it was ultimately forced to step back. This contrasts with the Services Directive case in which the Council was eventually isolated by a strong 'coalition of the willing'. In that case, it is the Commission that was eventually isolated.

Yet, empirical elements support H2 while others disconfirm it. The coalition formed against the proposal does not gather supranational forces against the Council. Instead, national institutions, social partners, the Parliament and the Council

collectively – and in in a coordinated manner – stand against the Commission. Those various actors held a wide but ultimately compatible range of preferences with regards to the proposal. In fact, an analysis of H2 in that case is contingent on whether we identify the proposal as regulatory or re-regulatory in the first place. And this particularly point is difficult to assess, because the proposal introduced a very high degree of uncertainty regarding the consequences of the Monti II Proposal, particularly the extra-judiciary conflict settlement instrument, on the *status quo*.

C. Interim conclusion: A new lock on the JDT

Compromises rarely fully satisfy everyone but they are usually designed to be minimally acceptable to all. The second version of the Services Directive and the Enforcement Directive on Posted Workers provide striking examples of such compromises. In both cases, the provisions were designed in such subtle ways that stakeholders and analysts have difficulty in accurately assessing actual consequences. For example, some believe that the CoOP is gone for good, while others maintain that it is still there. On the other hand, the Monti II Proposal has managed to turn everyone against it. There are many reasons to explain the failures of the Monti II Proposal. But such failure cannot be entirely attributed to the Commission's mishandling of the policy problem or misunderstandings of stakeholders' preferences. In and of itself, the case presents some empirical limits that prevent the drawing of clear-cut conclusions. The withdrawal came too soon to properly observe and analyse a stable aggregation of interest constellations. And the complex legal issues underlying the conflict between fundamental freedoms and the way to disentangle jurisdictional issues are still far from clarified.

Nevertheless, the Monti II episode suggests interesting implications. In this case, member states, the Parliament and key interest groups – besides BusinessEurope – called, in a general sense, for action without finding any common ground about the precise type of action needed. The difficult and possibly unattainable goal the Commission set for itself lies in striving to solve a problem

without any satisfying – or acceptable – policy solution in sight. An exact restatement of the 1998 Monti Clause would have been unacceptable to the Council and to certain business groups. The status quo was not acceptable either. A middle ground barely existed, besides some kind of new conflict settlement mechanism that no one was ready to accept either. Presented this way, the situation appears like an inevitably irreconcilable disagreement between winners and losers.

Crucially, this case suggests that new actors need to be added to the JDT theory. While the Yellow Card was supposed to create new opportunities for enhanced democratic legitimacy, it may well emerge as a new *trap*, preventing necessary decisions from being taken and contributing even more to protecting the status quo. When the member states, the social partners and eventually national parliaments started to question the Commission's very jurisdiction to act in response to case law, another lock was put on the JDT. The JDT originally posits that non-negotiated policymaking modes can lead to decisions that are difficult to correct within a negotiated mode because voting rules are unreasonably demanding. Preference heterogeneity and suboptimal decision-making rules are the central issue here. But the present case is much more worrying. In reality, the EU is faced with the situation in which the CJEU now has the de facto jurisdiction to settle conflicts and adopt decisions to which other – democratic – institutions are simply unable to *legally* respond. Therefore, the CJEU's de facto jurisdiction to take decisions is broader that the rest of the EU institutions. In all truth, the CJEU may have gone too far in such a contentious policy area, such that no negotiating space was left for other institutions to respond in a satisfactory way. Indeed, with the JDT theory as a point of departure, Fritz Scharpf had already warned against the almost unchecked power of judges within the current institutional make-up of the European Union (Scharpf, 2006:860). In that sense, the Monti II episode provides a very special – and worrying – instance of deadlock due to the JDT.

VII. Case IV: The 2014 Enforcement Directive on Posted Workers

A. The dependent variable in context

1. Political and legal status quo

There are approximately 1.2 million posted workers in the EU accounting for less than one per cent of the total EU population of working age. Twenty-five per cent of these work in the construction sector. Among businesses, SMEs are on the first line (Document 70; 74; 75; 97; 100; 101). Beside the construction sector, other particularly concerned sectors are financial and business-to-business services, transport and communication (e.g. Document 102). It is difficult, however, to evaluate precisely the magnitude of the population of posted workers in the EU (Commission, 2012c).

The most reliable figures available are the number of social security certificates issued for postings, i.e. the number of so-called 'portable document A1' (PDA1) issued.[89] Although they provide useful information, they are most likely to provide a distorted measurement of the posting phenomenon. On the one hand, these documents estimate the numbers of individual workers sent, not the total number of worker postings, given that one worker can be sent more than once. Hence, this method of measurement is likely to over-estimate the phenomenon if one wrongly understands it as an indication of the population of posted workers moving across EU borders. On the other hand, there are many situations in which portable documents are not issued. Workers sent for a short period are not required to possess those documents, for example. Hence, the indicator is also likely to under-estimate the posting phenomenon. With those limitations in mind, the number of social certificates issued indicates that the primary host countries are Germany (311,000) and France (162,000) followed by Belgium (311,000) and the Netherlands (106,000). Spain, Italy, Austria, Switzerland, UK and Norway follow behind (30,000-80,000 each). The top

[89] Those documents were previously denominated E101 and E103.

sending countries are Poland (228,000), Germany (227,000) and France (144,000),[90] with Poland being the biggest net sender member state.

In recent years, businesses have increasingly resorted to posting to externalize labour costs in service-intensive industries. Practically, firms are increasingly using the 'services' of businesses located in other member states to compress costs. In so doing, supply chains have tended to extend considerably, causing a very significant increase in the number of operators involved in single operations. Chains of contracts have tended to both extend and become more complex accordingly. Consequently, quality control and the monitoring of production processes are becoming more difficult and costly. The cost reductions achieved by such externalization are not necessarily re-invested into quality control and monitoring of working conditions of posted workers. Expectedly, instances of posting misuse, fraudulent practices and illegal establishment – the so-called practices of 'letterboxing' businesses in other member states – and provision have proliferated. Yet again, a precise evaluation of the ubiquity of the phenomenon remains difficult to establish. One interviewee even described the situation of intra-European flows of workers in a rather pessimistic way: "at the moment, everyone is at some level in an illegal situation".

Article 56 TFEU provides the legal basis of freedom to provide services across borders. It is in this legal framework that workers are temporarily posted to other countries. In an attempt to set the rules for posting, the Posting of Workers Directive 96/71/EC was adopted in 1996 with a deadline for implementation of December 1999. The main objectives were to enhance the legal framework to improve the conditions of service provision across borders, protect workers' social rights across Europe, and prevent social dumping.

[90] Source: Administrative data from EU Member States, IS, LI and NO on PD A1 issued according to Council Regulation (EC) No 883/2004 on the coordination of social security systems.

The Directive defines a posted worker explicitly as an employee (in contrast to service provision as understood in the framework of the Services Directive) – i.e. a member of a company's personnel in a position of subordination vis-à-vis her employer – sent for a temporary period to work on the territory of a member states foreign to the one in which her employer is established.

The 1996 Posted Workers Directive requires that the workers that are posted to other member states are in compliance with host country legislation regarding maximum work and minimum rest periods, minimum paid holidays, minimum rates of pay, minimum overtime rates of pay, conditions of hiring out workers and temporary employment undertakings, standards regarding health, safety and hygiene in the workplace, conditions regarding pregnancy and post-natal working conditions, and gender equality.

In the construction sector, in which conditions of employment are laid down by collective agreements or arbitration awards that are universally applicable, member states must ensure equal application to posted workers.[91] The rules set out in the directive apply to:

- posting contracts that are passed between a hiring company that performs the act of posting workers and a service recipient;
- 'Intra-corporate transfers' in which postings take place between companies that belong to the same group of holding but art established in different member states, and;
- postings operated by temporary employment agencies or placement agencies to user businesses established in other member states.

[91] "Collective agreements or arbitration awards which have been declared universally applicable must be observed by all undertakings in the geographical area and in the profession or industry concerned" http://europa.eu/rapid/press-release_MEMO-14-344_en.htm

The directive applies only if two cumulative conditions are met. First, at all time, the relation that unite the employer and the employee must remain with the sending business. Second, the act of posting a worker to perform a service for the recipient company must remain strictly limited in time.

The obligations set out in the 1996 Posted Workers Directive, with notable regard to minimum rate of pay, do not create an obligation for the member states to introduce a minimum wage if such is not already the case. Recently, the Commission found that the rules enshrined in the 1996 Posted Workers Directive were not always equally and properly implemented, applied, and enforced within all the member states. There was, in fact, increasing difficulty to guarantee implementation (Commission, 2012c).

In practice, the use of posted workers has also dramatically evolved, so that the initial idea to help companies that are truly established in on member state to access foreign markets while improving workforce allocation across Europe has given way to the misuse of posting practices, including so-called letterbox establishments. Again, many companies have turned to this legal framework to falsely establish their company on the member states' territories offering the most advantageous regulatory environment without any genuine economic activities performed there and with the sole purpose of sending workers to the location where the actual economic activity takes place. This allows firms to take advantage of more favourable regulatory conditions than those offered in the country of destination (Countouris and Engblom, 2014). It provides worryingly perfect conditions for initiating textbook instances of unfair regulatory competition between the member states of the EU, in the way described in the theoretical chapter of the present dissertation.

Hence, the member states themselves – particularly a core group spearheaded by France and Germany – initiated demands for renewed action to make sure that reported illegal practices would be eliminated and that legal certainty and a unified interpretation of the legislation would be significantly improved. In France, the

additional challenge posed by the rise of the populist far-right Front National induced supplementary incentives to act quickly and in ways that would be perceived as efficient in voters' eyes. In several other countries, including Germany and Netherlands, mainstream media also covered outrageous cases of abuse perpetrated by rogue businesses, notably in the meat industry. In France, the media has also devoted significant attention to abuse in worker posting and unfair competition, notably in the transport haulage industry. Business associations and trade unions in the transport business had already exposed cases of blatantly illegal posting and outrageously unfair competition. The main media networks started to take interest in the subject in France. One major investigative documentary – 'The New Road-Slaves' – was broadcast in 2011. And another – 'Discounted Workers: The Great Scandal' – was broadcast by the highly popular show, Cash Investigation, in 2016. In the latter, journalists notably exposed a possible major case of a fake letterbox establishment established by a Romanian subsidiary of the French public transport company, SNCF. Those press reports featured in mainstream media demonstrate how politicized and sensitive the issue has become.

In 2013, in the context of the negotiations over the Enforcement Directive, it emerged that Belgium was itself fighting against letterbox establishments at home. But, unable to obtain the revocation of A1 forms obtained from workers sent under suspicious conditions by recently relocated businesses, the Belgium government decided to grant national authorities the legal instruments to repeal especially suspicious authorization forms issued in sending member states. This decision triggered an infringement procedure against Belgium. The case shows just how difficult fighting the fraudulent use of posting can be under current EU legislation and how badly-needed new enforcement mechanisms are. The EFBWW – the European workers' organization in the construction sector – supported Belgian actions against the Commission decision to trigger an infringement procedure in the particular context of ongoing policy negotiations about the very same issue (Document 77).

The Commission also found that the situation of posted workers contract chains was posing acute legal problems. There were numerous cases in which posted workers were indeed exploited or not paid, without the ability to effectively claim their rights (Lillie and Wagner, 2015). The Commission found that in several situations companies operating within contract chains had disappeared, even defaulting from their obligation to pay posted workers' salaries. In those cases, the so-called Joint and Several Liability (JSL) of multiple operators involved in contracting chains may considerably increase the guarantees of posted workers. Practically, JSL means that several contractors within a contract chain can be held jointly responsible for other contractors' wrongdoings. Evidence of posting misuse, contractors' default and worker abuse were mostly found in the construction (Houwerzijl and Peters, 2008) and the meat processing sectors.

In addition, the Commission found a proliferation of cases of false self-employment in which workers are in a practical position of submission to an employer so that the contract under which they provide their services would normally be qualified as posting – regulated under the 1996 Posted Workers Directive – and not self-employment – regulated under the Services Directive. This is one of the multiple links that exist between posting and self-employment provisions, making the Posted Workers Directive and the Services Directive highly relevant to each other.

Germany also has been under acute pressure to stop the worrying emergence of a growing number of cases of 'shocking exploitation of migrant workers', especially in the meat processing industry (Wagner and Hassel, 2015). Therefore, it is not surprising that Germany, along with France, has pushed for significant legal clarifications to ensure that EU rules are properly implemented and enforced. Among EU member states, France and Germany are also the top senders and host countries of posted workers, in absolute terms.

In reaction to those difficulties, the goal that the Commission set in designing the Enforcement Directive was to clarify the obligations set out in the 1996 Posted

Workers Directive, to better protect workers' rights, to ensure fair competition between service providers, to prevent the hazardous consequences of contractors default, and to protect against illegal abuse.

However, even after the negotiations trade unions still argue that the adopted Enforcement Directive is unlikely to solve the various problems that posting practices create within the internal market. This is notably because those problems have been caused by the evolution of the interpretation of the original Posted Worker Directive in the first place (Countouris and Engblom, 2014). Therefore, a more stringent directive is needed, but seems to be politically unfeasible. In view of this gap, the Commission has proposed yet another revision, which is currently being negotiated (at the time of writing in 2015–2016).

2. Procedure

The main negotiation events regarding the Enforcement Directive unfolded as follows. On 21 March 2012, the Commission issued its proposal for a Directive of the Council and the European Parliament[92] aimed at improving the implementation of the rules laid out in the 1996 Directive on Posted Workers. The Commissioner responsible was Laszlo Andor, supported by the services of the Directorate-General for Employment, Social Affairs and Inclusion. The legislation was to be negotiated in the framework of the ordinary legislative procedure.[93] The European Economic and Social Committee (EESC) issued its opinion[94] (European Economic and Social Committee, 2012) on 9 September,2012 and the Committee of the Regions (CoR) issued its own[95] on 29 November (Committee of the Regions, 2012). The Council preparatory discussions took place on 6 December 2012, 14 October 2013 and 9 December 2013.

[92] COM/2012/131/FINAL.
[93] 2012/0061/COD.
[94] CESE/2012/1387.
[95] CESE/2012/1387.

In the Parliament, the Rapporteur in the Employment and Social affairs Committee was Ms. Danuta Jazłowiecka (EPP). The Shadow Rapporteurs were Stephen Hughes (S&D), Phil Bennion (ALDE), Nadja Hirsch (ALDE), Elisabeth Schroedter, (Verts/ALE), Milan Cabrnoch (ECR), Thomas Händel (GUE/NGL), Tadeusz Cymanski (EFD).

The first reading in the EP resulted in an approval with amendments issued on 16 April 2013, which was approved by the Council on 13 May 2014, voting under QMV. Under QMV, a proposal must gather the approval of at least 15 member states representing 260 votes. The proposal gathered 332 votes from 25 countries in favour, with 16 against and 4 abstentions. The two countries that opposed the directive were Hungary and Latvia, which issued a joint explanatory statement. Estonia abstained. The Parliament granted its approval in a plenary session in Strasbourg in first reading on 16 April 2014. The Council adopted the proposal on 13 May 2014. The President of the Council and the President of the EP signed the new Directive on 15 May 2014.

3. Dependent variable: Lenient is the new stringent

The Enforcement Directive notably aimed to increase legal certainty for both businesses and posted workers. It intended to clarify the definition of posted workers, which many actors perceived to pose significant problems. It was particularly felt that the existing definition might not have been sufficiently precise to efficiently fight the phenomenon of letterbox companies.

We examine the key issues that were discussed regarding the proposal and assess the level of stringency for each. The negotiations have crystalized on several specific aspects that all revolve around the question of how the Enforcement Directive would improve the state of affairs in comparison to the 1996 Posted Workers Directive and subsequent case law. With the conceptualization of the dependent variable in mind, a more precise – and possibly stricter – definition of 'posting' and 'worker' would mean a reduction of opportunities to interpret posted workers in ways

that would extend its scope of application. Therefore, this must be interpreted as a departure from the *status quo ante* toward more stringent market correcting policy. Similarly, more severe obligations about cross-border cooperation, monitoring and enforcement mechanisms may be more dissuasive. Therefore, this must also be interpreted as a departure from the *status quo ante* toward more stringent market correcting policy.

The proposal suggested that businesses could become jointly responsible to monitor chain contractors' compliance with posted workers' rules and that they could be held jointly responsible for the behaviours of other contractors through the JSL. Those measures would lean toward increased stringency. But in general, the monitoring role would fall on the shoulders of the member states. This generated some debate, since in some countries – notably those belonging to the so-called 'Nordic system' – social partners may also exercise this responsibility. The instauration of JSL between subcontracting partners stands out as a key feature. Its most fiercely supportive promoters advocated a universal version according to which any subcontractor in a given subcontracting chain could be found liable for the fraudulent wrongdoings of any other subcontractor. Most business representatives were generally against the idea and certainly against its universal version. Officials within the Commission mostly shared this position. JSL indeed poses various problems in terms of legal consistency and fairness, as well as implementation. The major difficulty is that there already exists a large – if relatively ill-assorted – variety of systems across member states. Some of them already have included a universal version in their existing juridical arsenal, while others implemented a more limited version. Others still do not feature enforcement instruments. Member states that already have a system of JSL, in one form or another, are Austria, Germany, Spain, Finland, France, Italy, the Netherlands and Belgium.

JSL is considered highly effective in enforcing workers' rights, primarily because it increases the chances that workers will be compensated in the event that the hiring

company defaults from its obligations. But it is also viewed as a serious disincentive for businesses to knowingly benefit from misbehaving companies in other countries. On the other hand, it is also a way to force businesses to bear the actual cost of enforcement by obliging them to intensify the monitoring efforts that they exercise on other companies' behaviour, sometimes with potentially disproportionate costs attached to such activity. Therefore, certain companies expressed strong discontent with the generalization of JSL.

Eventually, the system adopted in the directive "oblige[s] member states to ensure effective and proportionate measures against contractors in the construction sector as a safeguard against fraud and abuse in the form of subcontracting liability or other appropriate measures."[96] How does that inform the measurement of the dependent variable? The most stringent alternative can evidently be identified as a universal version. A more limited version would be more lenient. The absence of such form of guarantee could be regarded as evidence of the persistence of the *status quo*.

The proposal also foresaw the introduction of an *open* list of measures that member states may implement to ensure proper control and monitoring compliance with the posted workers' rules. To the extent that an open list implies that member states have the freedom to use any non-listed measures that they find necessary, an open list creates the potential for a more stringent regulatory environment than a closed list. The final directive maintained the open character of the list of possible control measures that member states could adopt. Another parameter must be considered to assess stringency with regard to control measures: whether those measures could be justified or not. The final directive provides that those measures must be notified to the Commission and must be necessary and proportionate in view of the objective pursued. These are constraints that must be interpreted as limiting stringency. If member states had been free to implement dissuasive measures – i.e.

[96] http://europa.eu/rapid/press-release_MEMO-14-344_en.htm

relatively disproportionate ones – the directive would have created the possibility for a more stringent regulatory environment.

The Enforcement Directive further requires that sending companies:

- declare their identity, number of posted workers as well as specific period of sending (dates and duration), the specific location of sending and the nature of the service provided on site, and;
- keep authorizations documents and administrative archives in order at all times.

Member states and companies, together with effective support from trade unions, must ensure that workers are at all times in a position to assert their rights and are free to effectively formulate potential complaints if need be. The directive also promotes variously soft instruments like increasing cooperation between member states' administrations. Those measures are not likely to increase the general degree of stringency of the European regulatory environment and must be considered as lenient.

To summarize, the dependent variable provides a case of successful adoption of a lenient instrument of enforcement. However, it goes beyond soft rules of coordination and mutual assistance between member states' authorities. Several trade unions and member states surely favoured a version that would have been conducive to create a more stringent regulatory environment. Nevertheless, the distinctly difficult political context must be taken into consideration. Additionally, some unexpected efforts to turn the Enforcement Directive into an instrument of de-regulation in the Parliament, notably by unsuccessfully attempting to resurrect the Country of Origin Principle (CoOP),[97] must be taken into consideration. Indeed, in an unexpected turn of events the EP Employment and Social Affairs Committee inserted an amendment dealing with the law to be applied to situations of identified cases of

[97] The CoOP is reminiscent of the Bolkestein Proposal for a Services Directive analysed in Chapter 5.

fake posting. Surprisingly, the amendment referred to the so-called 'Rome I Regulation' of 2008, implying that the host states' standard and minimum wage could not apply in those cases. The amendments did not survive in the final text.

In view of those dimensions, the adopted directive has alternatively been viewed as either unacceptably stringent, as some business associations argued (interview with Business Europe collaborators) or downright lenient (interview with ETUC collaborators; interview with senior EP assistant). But given the political context and the various alternatives proposed along the negotiations, one could objectively consider the final directive to be a reasonably stringent piece of legislation.

B. Analysis: The clash of countervailing powers

1. The Actors

In the Commission, DG EMPL oversaw design of the proposal. As such it established a first diagnosis and consultation to assess alternative legal solutions to effectively improve compliance rate with posted workers' rules while gaining the agreement of the stakeholders. However, in a move reminiscent of the Bolkestein episode, the proposal quickly raised worries that it may quickly become over-politicized. Thus, more senior staff members took charge of negotiations, revealing potential contention between various actors in both the Council and the Parliament as well as between social partners at early stage.

In the Parliament, the Committee on Employment and Social affairs oversaw review of the Commission proposal. The Shadow Rapporteur was Labour MEP Stephen Hughes, a senior, high-profile member, particularly noted for his proximity to trade unions. The Rapporteur was Polish MEP, Danuta Jazłowiecka, member of the EPP group. In the Council, France and Germany were leading a group of countries in favour of the adoption of a stringent legal instrument that would reinforce posted workers' rules and create a level playing field. Hungary, Poland and the UK (as well as the Czech Republic, Estonia, Latvia, Romania, Slovenia and Slovakia) felt that such

instrument might not have been necessary since – as they argued – the 1996 Posted Workers Directive and the ECJ interpretation were sufficient in ensuring the smooth implementation of posted workers' rules across the EU. Together these countries represent 113 votes under QMV.[98] As we argued in the theoretical section of the dissertation, it is highly unlikely that the Council would have found it politically sustainable to adopt the policy against such strong opposition. It is also important to mention that under the new QMV system introduced in November 2014, such a coalition would easily reach the conditions for a blocking minority.[99]

Most of the member states that initially opposed the directive are equipped with lenient regulatory environment in which employers pay low wages and enjoy low labour costs and standards at home. Therefore, they are net senders of posted workers and benefit quite substantially from the status quo. In addition, debates over the JSL as well as the new role attributed to social partners raised fears among northern member states that the level of misfit between the directive and their existing industrial relation systems and labour law would hardly be sustainable, adding to an acute initial risk of decision-making deadlock.

The 2012 impact assessment considers that certain "member states seem to be 'specialized' in sending (PL, SI, SK, HU, EE, PT, LU), some in receiving (CY, MT, EL, SE, FI, NL, BE, DK, IT, AT, IE, ES) and others seem to be equally sending and receiving countries and therefore 'not specialized' (DE, FR, UK, BG, CZ, LT, LV, RO)" (European Commission, 2012d:14). Therefore, the initial distribution of preferences seems to closely match assumptions.

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[98] Those Council members dispose of the following number of votes: Czech Republic has 12 votes, Estonia has 4, Hungary has 12, Latvia has 4, Poland has 27, Romania has 14, Slovenia has 4, Slovakia has 7, and the UK has 29. However, this is a crude indicator of the potential level of opposition within the Council. Other members, including Sweden and Denmark, may have also joined this group given serious worries about the lack of fitness between the existing national industrial relation systems and some elements of the foreseen directive.

[99] Under the new system, a blocking minority consists of at least four member states representing 35 per cent of the EU population.

Social partners were active at both supranational level and national level. On the trade union side, ETUC acted as the encompassing representative of employers' interests. Its efforts were crucially complemented by and coordinated with intense lobbying efforts invested by EFBWW – the association in the construction sector – UNI-Europa, and various national trade unions. The Belgian unions in particular joined in the implementation of outsider strategies. On the business side, BusinessEurope seemed to be quite intensely mobilized. FIEC – the business association in the construction sector – played an key role. Its efforts were coordinated with its parent trade union counterpart, EFBWW. EuroCommerce, the representative association in the retail sector was also active. Finally, UEAPME – the European representative association of SMEs – also voiced various opinions.

The opinions expressed are variously nuanced and detailed. In certain instances, business and union actors coordinated to lobby on different aspects of the directive. Compounded with the ambiguous level of stringency that shows through the final text, the proper assessment of the validity of the theory was complicated. The position papers and press release issued by those associations were systematically and exhaustively organized chronologically and then ordered according to the two categories of businesses, on the one hand, and trade unions, on the other. They were then qualitatively analysed. As detailed in the section devoted to H1, there were signs of internal heterogeneity in both camps, albeit to varying degrees. The pool of actors that presented the most interesting traits to be examined is once again to be found within the construction sector. It seems that both business and trade-union associations, although by no means in complete agreement, were able to share a common foundational approach on crucial points, which may have proven key in attaining a final compromise.

2. H1: Social partner's preferences and lobbying intensity

H1 posits a causal link between social partners' relative preference homogeneity and relative lobbying intensity (including both insider and outsider strategies) and

instances of coordination among social partners' actions at the EU level. This expectedly leads to greater chances of success expressed in terms of influence on inter-institutional influence, as theorized in H2.

The empirical analysis relies on two main empirical sources. A systematic analysis of position papers and press releases issued by the major social partners has been conducted. This was cross-referenced with information and analysis collected in interviews. The present section examines trade union organizations, firstly, and business associations, secondly, to draw conclusions regarding the validity of H1.

Regarding trade unions, already in 2006 – running parallel to negotiations on the Services Directive – ETUC addressed a message to the Commission (Document 82; 84). The Confederation was calling for much better enforcement of the rules enshrined in the 1996 Posted Workers Directive. In the light of the EU enlargement to eastern European countries and a slow but steady increase in intra-European trade in services, the ETUC rightly observed that posted workers' protection and, more generally, the EU's collective ability to secure a level playing field was highly dependent on national regimes and generally applicable legislation. Yet, the variety of industrial systems across the EU – including some highly decentralized national regimes, notably among Northern European countries as well as Germany – meant that those objectives were increasingly difficult to achieve. Therefore, the ETUC argued that "the European Commission should much more actively promote that Member States that have not yet done so take initiatives to introduce so called systems of 'client liability', 'chain responsibility' or 'joint and several liability'" (Document 82). In 2009, ETUC reformulated the urgent need to make sure that the increasingly ubiquitous use of chain contracting in the externalization of workforce through the posting of workers was no longer used to evade social security contributions (Document 86).

In 2010, the EFBWW – the European trade union representation in the construction sector – took a strong stance against false self-employment and accused

the Enterprise Europe Network – a service of the Commission – of promoting such practices through advisory services delivered to reduce posting costs in German and Austrian markets. The EFBWW took the opportunity to remind the relevant actors that, the FIEC – the employer association in the sector – had also condemned the practice of false self-employment (Document 73). The FIEC and the EFBWW would later increase coordination of the messages they sent to European institutions.

At the Tripartite Social Summit of 14 March 2013, the EFBWW reformulated its argument against the phenomenon of social dumping created by unjustified posting practices. EFBWW General Secretary, Sam Hägglund, pointed out that this phenomenon not only reduces job opportunities available to local workers but also generates safety and health issues and incurs significant losses in tax income for host member states. He further criticized recent developments regarding the Enforcement Directive. When the Council took a stand against Article 9 and the EP Rapporteur attacked Article 12, the EFBWW stated that "that a worker must never lose his or her protection based on the host country conditions and legislation, and that host member states and trade unions must be able to continue to conduct all required checks and inspections that are necessary to prevent, control and sanction cross-border exploitation" (Document 74).

The EFBWW further insisted that the Enforcement Directive "should improve the information to cross border posted workers and strengthen the control mechanisms and sanctions" (Document 75). Interestingly, the EFBWW worried that the Enforcement Directive could eventually be turned into a 'Trojan horse' to reintroduce a version of the Bolkestein Proposal CoOP and accelerate social dumping, rather than contain it. Although this statement may have seemed slightly far-fetched at the time, it fits Hatzopoulos' category of 'home-country rule' and 'third-generation mutual recognition' (2007) without minimal harmonization. Indeed, BusinessEurope's stand against the provision on promoting the standardization of official documents – introduce in Article 9 of the Commission proposal and Article 24 of the final

Enforcement Directive – is reminiscent of the Bolkestein Proposal. Developments regarding the rules to be applied in case of false posting (Article 3), which were proposed in the EP, validated trade unions' worries even more straightforwardly. In view of those arguments, the EFBWW supported national protests organized by several of its affiliates, demonstrating both preference homogeneity and the implementation of coordinated multilevel outsider strategies. This contributes to validate H1.

The EFBWW then denounced (Document 76) the emergence of a relatively strong coalition against enhanced enforcement mechanisms and improved protection of posted workers in the Council. This coalition favouring the status quo included the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovenia, Slovakia and the United Kingdom. Consequently, the EFBWW capitalized on the homogeneity of preferences that existed among sectoral associations in the hope to re-adjust the proposal. To this end, several organizations supported a 'European alarm action' protest, which took place in October 2013 in Luxembourg. It was officially sponsored by the ETUC, demonstrating not only preference homogeneity but also a certain level of coordinated mobilization between the two organizations (Document 92). This is again in line with H1.

Later, the ETUC (Document 86), the EFBWW (Document 78) and their respective affiliates reacted with equal discontent at Ms Jazłowiecka's draft report on the proposed Enforcement Directive. For Veronica Nilsson, ETUC Confederal Secretary: "The report shows a lack of understanding of the situation of posted workers." Hence, she engaged "all Members of the European Parliament to reject the report and reflect on how to combat exploitation and social dumping at EU level and to initiate meaningful dialogue with trade unions and labour inspectors in order to find sustainable solutions" (Document 88). Consequently, a protest was organized in Strasbourg to demand – unsuccessfully – that the Employment Committee reject the compromise and work instead on a more stringent version. In an additional

demonstration of cohesiveness, the ETUC explicitly supported the EFBWW's outsider mobilization (Document 92). Therefore, the expectations formulated in H1 are confirmed. There was a high and increasing level of consensus among trade unions that very clearly translated into intense mobilization and lobbying efforts. In addition, the analysis of the evolution of the position of the business associations also confirmed that employers' associations agreed very homogeneously on those issues, leading certain sector specific associations to partner up with their trade unions counterparts.

In the Council, the EPSCO adopted the compromise without addressing fake self-employment and letterbox establishments. Based on the written reactions issued by various trade unions, the compromise was a great disappointment for the EFBWW (Document 77), the ETUC and other associations (Document 89). Interviews confirmed that the same opinion was shared by all affiliates across Europe. Apparently, a few reservations were expressed by one single affiliate – representing Hungarian workers – regarding the strong wording adopted by the ETUC (Interview with ETUC official). European federations collectively denounced what they viewed as a clear instance of "window-dressing" (Document 82). The compromise reached on Article 9 and 12 seemed to satisfy labour ministers, despite the vagueness and leniency of the provisions. But, again, given the initial distance that existed between member states' preferences, this easily qualifies as an instance of negotiation success. Trade unions could, at least, be satisfied to see the open version of the list of control measured rescued in Article 9. The fight against CoOP and the mention of minimal administrative standardization was thus a success. Even the very fact that Article 12 survived can be considered a success.

On December 9, 2013, the main employees' associations joined forces. The high level of homogeneity displayed by unionist actors was complemented by the support of Belgian unions.

On the business side, BusinessEurope was symmetrically opposed to trade unions' demands. In 2009, the association formulated an early demand (Document 68) to the Commission to make sure that the Posted Workers Directive would not be revised and that host member states would no longer be free to impose working conditions beyond the minimum national rules recognize by law. However, BusinessEurope recognized the need for a collective analysis of the implications of the CJEU case law in Laval and others. In this analysis, BusinessEurope insisted that transnational issues should remain distinct from purely national ones. Yet, the association wished to reassure the President of the Commission that its "commitment is serious" (Document 68).

However, some business associations representing very different constellations of actors already held radically different opinions. For example, at a conference organized by the EESC and attended by Commission officials, the UETR (Document 102) – the business association representing SME haulers – expressed deep worries concerning the lack of a level playing field in the sector and underlined a need to fight fraudulent activities. This adds up to early heterogeneity of preferences on the business side.

When the proposal was finally issued, BusinessEurope (Document 69) opposed the proposed Enforcement Directive, especially the aspects concerning JSL on wages, social security contributions, and taxes. Therefore, BusinessEurope argued that Article 12 should be deleted altogether. BusinessEurope believed that administrative cooperation and enhanced information for workers and businesses were key to securing the proper implementation of posted workers' rules. However, BusinessEurope also insisted that member states should not be allowed to fully apply their national labour law regimes to posted workers. The association used an argumentative strategy based on the idea that if the proposed treaty basis related to the single market, then it should aim at facilitating cross border trade instead of promoting social policy. BusinessEurope proposed certain alternatives to JSL, including

the implementation of national systems of JSL at member states' discretion, other forms of liability, the introduction of a Finnish reliability check and the instauration of a helpline through which posted workers could directly alert national authorities.

In addition, BusinessEurope stood for the introduction of closed lists of measures that member states could adopt as control measures (Article 9) but acknowledged that this might be difficult given the sheer diversity of national systems. It is surprising that BusinessEurope would defend diversity regarding JSL systems but wish to limit it when it comes to control measures. BusinessEurope also disapproved of the Commission attempt to promote the development of more uniform standardized documents and common standards of inspection across Europe. This was referred to in Article 9(3) of the original proposal and kept in the adopted directive. The association did not provide a constructed argument in support of its stance against minimal harmonization, however.

BusinessEurope also opposed the philosophy of Article 11 on the 'defence of right', notably because it ensures that trade unions can engage in support or on behalf of posted workers in judicial and administrative proceedings. However, the provision remained in the final directive. Given the relative homogeneity of preferences of business actors regarding this particular issue, the proponents of more stringency did win a battle. Most importantly, the association fiercely opposed Article 12 on JSL in the construction sector and demanded its complete deletion. The association argued that JSL equated to shifting the responsibility – and, thus, the costs – of monitoring and enforcing obligations from public authorities to businesses. The evident problem of feasibility was also raised in the particular context of cross-border subcontracting. Further, BusinessEurope put forward arguments based on the hazardous incentives created by JSL. For example, contractors may be hesitant to report subcontractor's abusive behaviour because they would fear to engage their responsibility. Consequently, BusinessEurope (Document 70) welcomed the EP Employment Committee draft report suggesting a severely watered down version of the proposal

and especially pointed out that the Polish Rapporteur, Ms Jazłowiecka, opposed Article 12 on JSL.

Among business associations, EuroCommerce (Document 96) expressed an opinion that partially echoes BusinessEurope position. However, the two organizations also differed in the views they provided on the proposal. With regards to commonalities, EuroCommerce also expressed worries about the JSL. The association warned that a partly harmonized system of JSL at the European level might not fit well with the diversity of national labour regimes. Therefore, member states should be free to select the best instruments to enforce posted workers' rules. In that regard, business preferences are homogeneous.

The difference between BusinessEurope and EuroCommerce positions emerged on whether the Directive should only suggest certain types of control measures and leave national authorities with the ability to choose additional ones where justified and proportionate or, alternatively, to impose a closed list of the measures that could lawfully be adopted. EuroCommerce insisted that those measures are important in securing proper enforcement of posted workers' rules, and that national authorities should be free to select the most suitable instruments insofar as they are necessary and proportionate (Document 93). This is a balanced and contrasted position. In that regard, decision makers have probably heard two different stories (interview with Commission officials) because of partly heterogeneous preferences between various business associations. Remarkably, EuroCommerce has not mobilized particularly intensely to advance its stated preferences regarding the Enforcement Directive. True, the proposed policy may not interfere with retail activities in such a crucial way (Interview with business association official). Yet, the policy had enough political significance to warrant the investment of resources on the issue. Therefore, those elements fit with H1.

As the business association representing SMEs' interests at large in Europe, the UEAPME expressed contentment at the Commission initiative to enhance the

enforcement mechanisms regarding posted workers (Document 100). However, the UEAPME warned about the introduction of JSL, which it felt should remain in member states competences to decide the nature and scope of such systems, if need be. The association praised Article 3 on the prevention of abuse and fraudulent letterbox establishments. Crucially, the UEAPME insisted that the list of national control measures of Article 9 should remain non-exhaustive and protect national authorities' ability to adopt whatever necessary and proportionate measures to secure the proper enforcement of posted workers' rules. (Document 96) Compared to the BusinessEurope position, the UEAPME joined the group of business associations defending stringent enforcement mechanisms. This adds up to the observation that business associations held homogeneous preferences against JSL, and heterogeneous preferences regarding both Article 3 and Article 9. Both interviews and position papers demonstrate a relative and correlated variation in lobbying intensity and mobilization, with certain associations (e.g. the FIEC) openly partnering up with their trade unions counterparts. In that regards, H1 is once again validated.

The FIEC – the employer association in the construction sector – provides the most interesting behaviour to observe with regards to the evaluation of H1. It held very contrasting and balanced opinions, initially. In addition, the FIEC is a remarkable association in view of the privileged relation it maintains with its sector-specific union counterpart, the EFBWW. With regard to the Commission proposal, the FIEC stated very clearly that it was committed to promote a level playing field and the proper protection of workers' social rights and conditions (Document 97). Yet, the FIEC – like BusinessEurope and EuroCommerce – rejected the idea of a harmonized system of JSL. Hence it demanded that Article 12 be 'deleted'. Once again, there is a significant and consistent level of preference homogeneity regarding this particular issue on the business side. This translated into a very clear messaged addressed to decision makers. It is rather interesting to point out that the demand for a so-called universal version of the JLS was not consistently reprised with the same resoluteness among trade unions. In general, this is consistent with H1. Simultaneously, it seems also

surprising that Article 12 could survive the negotiations and still be included in the final Directive. Yet, the version that was adopted is extremely lenient and limited. It is thus difficult to draw any conclusive remarks on the validity of H2 regarding Article 12.

Despite the reservation expressed by the FIEC regarding the JSL, the association very clearly supported the idea that an Enforcement Directive should logically strengthen the enforcement mechanisms. In that regard, the FIEC was disappointed with the proposal:

> A proper application and enforcement of the Posting Directive can only be ensured if appropriate control measures can effectively take place. The current proposal would limit such possibilities of controls and would therefore be counterproductive (Document 97).

In the same position paper, the association put forward a rather stringent instrument: "FIEC considers that the proposed Directive should explicitly indicate that in cases of 'false posting' (i.e. the listed criteria are not fulfilled) the whole working conditions of the host country must be applied to the concerned workers" (Document 97). This position clearly addresses the resurging risks of introducing a version of the CoOP. In that regard, not only did the FIEC stand far from BusinessEurope opinion, it actually perfectly echoed trade unions' preferences.

The FIEC further criticized the limitations that the draft would place on competent national authorities in carrying out inspections. At this stage, it is already clear that the FIEC was much closer to the EFBWW and ETUC positions than it was to BusinessEurope. There is also a correlation between that relative heterogeneity of preference on the business side and the degree of lobbying intensity as felt by decision makers (interview with Commission officials).

Later, the FIEC and EFBWW coordinated efforts – and institutional investment into further lobbying efforts – became more visible with the signature of a joint statement (Document 98) in reaction to the proposed compromise to be voted in the

EP Employment Committee on 20 June 2013. Both organizations expressed worries about the amendments proposed in Article 3 and Article 9 of the proposal. In Article 3, amendment DD seemed to re-introduce the CoOP. Concerning Article 3, both organizations explained that in case of fake posting, it should be made clear that the host state's legislation should fully apply, instead of Rome I regulation – home-country rule. In Article 9 on control measures, both organizations reiterated that a mixed approach should be adopted, which would include a set of minimum mandatory measures like posting notification, coupled with a non-exhaustive list of supplementary measures that national authorities might decide to utilize.

This pattern of coordinated lobbying action was confirmed in the wake of the EPSCO meeting in the Council. The FIEC and the EFBWW joined forces again (Document 99) to warn about the risk of resurgence of the CoOP as once suggested in the Bolkestein proposal:

> At the moment, in the case of fake posting it is not clear whether it is the Posting of Workers Directive or the Rome I Regulation that should define the applicable wages and working conditions, thereby creating a dangerous legal uncertainty. The choice of leaving it up to the CJEU to resolve the question of which legislation will be applicable in the case of fake posting is not acceptable. The EFBWW and FIEC consider that this issue should be resolved within the framework of the "Enforcement" Directive. Under no circumstances can we accept that the proposed "Enforcement" Directive directly or indirectly re-introduces the country-of-origin-principle (Document 99).

Both organizations also reiterated their position on the need for the directive to promote the proper conduction of inspections by national authorities instead of hinder them. They also clarified that a non-exhaustive list of control measures, not a closed one, should be adopted in Article 9.

The magnitude of the coordination between those organizations is exceptional for competing social partners. This demonstrates their outstanding ability to identify common interests translating into intense mobilization. This evidently confirms H1.

3. H2: Inter-institutional negotiations and policy output

H1 posited a causal link between social partners' relative preference homogeneity and relative lobbying intensity (including both insider and outsider strategies) and level of coordination among social partners' actions at the EU level. Winning social partners are therefore able to provide decision makers with additional political leverage, which can then be invested in inter-institutional coalition building among EU institutions. In turn, it is naturally linked to variation in policy attainment, as theorized in H2. Put differently, H2 posits that social partners' actions may help unlock expectedly entrenched instances of JDT in the Council.

First, institutional deadlock was indeed very likely in the Council from the outset (Interview with Commission officials; interviews with EP assistants; interview with trade union officials). The Council was broadly divided between net senders and net receivers of posted workers. As mentioned, the top net destination countries of posted workers among EU member states are France and Germany. In line with deductively established preferences, they were positioned as the leaders of a coalition favouring the adoption of additional enforcement measures to pre-existing posted worker rules. They, together with Italy, also possess the most significant pool of leadership and power resources available among EU member states.

Poland, on the other hand, is the member state responsible for the largest population of posted workers sent abroad. Moreover, in accordance with pre-determined assumptions, the Polish government – together with the UK – led a strong coalition defending the persistence of the status quo. The member states that joined Poland and the UK included the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovenia, and Slovakia. At first glance, that coalition was strong enough to

defeat most re-regulatory efforts. However, homogeneous social partners' preferences and intense lobbying on the part of trade unions – coordinated with willing business associations – provided additional political resources to support the production of additional enforcement measures against the will of more reticent Council members (Interview with MEP assistant; interview with Commission official; interview with Permanent Representation official). However, given trade unions' eventual discontent at the final directive, it is *seemingly* unclear whether H2 carries significant explanatory power. According to the theoretical framework, H1 has been largely confirmed in favour of stringent re-regulation. Therefore, in line with H2, one would expect that initial disagreement within the Council would eventually give way to a positive policy solution. To be sure, had negotiations failed completely, one could have immediately dismissed H2. However, we can already observe that a compromise was indeed adopted. Despite strong initial opposition in the Council, a positive policy outcome was eventually adopted with only two members – Hungary and Latvia – voting against and one member – Estonia – abstaining.

It remains to evaluate whether this final compromise is stringent enough in view of the significant political resources made available by winning social partners in favouring the adoption of significant additional enforcement measures. As expected, there was a visible commitment on the part of the Commission. Even if Commission officials were well aware of the political hurdle that passing such legislation would present in practice (interview with Commission official). The Commission recognized the great distance that existed between member states preferences within the Council. But it seems that decision makers believed that there were enough political resources to overcome those obstacles. The Commission was clearly willing to propose a policy that would update the 1996 Posted Worker Directive and pack renewed enforcement capabilities. The growing phenomenon of letterbox establishments and fake self-employment compounded with the proliferation of outrageous cases of worker exploitation and abuse was – and still is – taken seriously by the Commission.

However, the universal version of JSL defended by the ETUC, for example, was never an option. First, such a stringent instrument was deemed legally unrealistic given the variety of national systems across Europe. Second, in practice it would have also meant that any business in a chain of contract could be liable for the behaviour of others but without the practical means and resources to monitor that conduct. Third, that version was unanimously and consistently rejected by business associations and would have inflated the likelihood of deadlock within the Council. In view of those constellations of preferences within EU institutions, one can perceive that the political context was not exactly optimal to negotiate stringent enforcement measures. The remainder of the section examines the perceptible effects of social partners' positions and action in influencing inter-institutional negotiations.

On the trade union side, after the adoption of the final compromise of the 5 March 2014 European Council, trade unions unanimously expressed their disappointment (Document 95; Euractiv, 2014). They persisted – with relative success – in calling upon the EP and the Commission to swiftly demonstrate renewed efforts in protect workers' collective rights and prevent illegal behaviour. The EFBWW, in particular, issued a document detailing 26 additional policy proposals to the newly elected EP for the period 2014–2019. The EFBWW and other trade unions were, therefore, very critical of the final proposal. In the light of those positions, one could quickly jump to the conclusion that despite social partners' preference homogeneity and active mobilization to support the adoption of stringent policy measures, the final output was still very close to the status quo and could, thus, be viewed as a failure. As already argued, that neither takes account of the political context, nor reflects the actual content of the directive.

Trade unions may have adopted this attitude to secure a better bargaining position regarding an additional prospective policy proposal. Yet, two major factors may explain why mobilization did not translate into more striking leverage on inter-institutional negotiations and more visible preference attainment. First, early in the

Council a strong coalition of member states emerged in favour of the status quo. Second, the EP Rapporteur's preferences were closer to BusinessEurope preferences. She is also of Polish nationality. And Poland just happened to be one the key leaders of the aforementioned coalition in the Council. What is more, she is a member of the EPP group in the EP and a member of the Civic Platform party at home, which was in power at the time. Most importantly she had, and could have had even more, significant influence on the final outcome when she hammered out an extremely beneficial deal with the upcoming Lithuanian Presidency of the EU (interview with trade union official). She also managed to build an unexpected coalition within the EP that, crucially, left the S&D and GUE aside. Her actual influence was important, but her potential influence even more so; indeed, it could hardly be overstated (Interview with EP senior assistant; Document 90; 91).

This seems to contradict H2 directly since very intense and coordinated lobbying undertakings and mobilizations of the trade unions compared to relatively more muted efforts invested by business associations were not able to counteract the proponents of the status quo. Yet, given the broad coalition against stringent policies in the Council and an unexpected coalition in the EP, we can plausibly argue that the Enforcement Directive might as well have been abandoned altogether. It could also have become a new 'Frankenstein Directive', in view of the EP Rapporteur's efforts to resurrect the CoOP. To put it differently, this could well have ended up in a sort of neo-liberal policy hijacking. Yet, countervailing forces managed to avoid that outcome, while rescuing some important elements of the directive and prompting the Commission to advance yet another proposal in the future. That may not qualify as unparalleled success for the enemies of social dumping. But it is certainly not a failure either.

To summarize, considering the high degree of homogeneity displayed by trade unions relative to business organizations, we observe an intense level of mobilization and the implementation of multiple lobbying strategies. And, in view of the very

inhospitable political context within both the EP and the Council, as well as the efforts within the EP to reintroduce a version of the – highly de-regulatory – CoOP, one can observe the successful influence of the proponents of stringent measures showing through in the final Directive. This also happens to transpire in some interviews. While pointing at the many deficits of the directive, trade unions also acknowledge that, given the political context, the outcome may have been a lot worse (interviews with trade union officials).

What can be said about the actual influence of businesses on inter-institutional negotiations? They surely could count on mighty allies in both the Council and the EP. Yet, compared to the crosscutting and concerted efforts of certain social partners, BusinessEurope seemed rather isolated indeed on certain issues. In its letter (Document 70; 71) addressed to the EP Employment and Social Affairs Committee, BusinessEurope reiterated its radical opposition to Article 12 on JSL. Nevertheless, the association had every reason to be pleased that many MEPs agreed on this position. In an echo of the conclusions of the European Council of March 2013, Article 9 on control measures was also subject to criticisms. In particular, BusinessEurope worried that if control measures were to be interpreted as mandatory, the administrative costs would become unsustainable for small businesses.

However, after the EP vote even the UEAPME, which was admittedly broadly content with the compromise, expressed visible reservations. The association joined the fight against the resurgence of the CoOP inserted in Article 3a (Document 101). It further insisted that the ability of host-country authorities to control the conditions under which workers are posted should be protected. In that regard, the UEAPME position once again contrasted with BusinessEurope, adding to the relative heterogeneity of preferences on the business side.

In this regard, it is almost surprising that Ms Jazłowiecka could present a draft report that was so far away from social partners' preferences – besides BusinessEurope. It is also surprising that she could create a party coalition in her

favour that excluded the S&D and GUE, and further managed to obtain a negotiation mandate from the upcoming Lithuanian Presidency. Indeed, this would contribute to disconfirm H2, would it not have been for the marginal policy changed obtained in the Council.

Unfortunately, empirical investigations could not establish more precisely the direct effect of the concerted efforts of the ETUC, EFBWW and FIEC on patterns of negotiation and member states' preferences inside the Council. Neither could it trace the precise points of contacts and insider lobbying efforts of BusinessEurope. However, we can safely argue that, under the worst possible conditions, the concerted and intense efforts provided by the proponent of stringent policy instrument played a crucial role as countervailing forces. In that perspective, the empirical evidence does dismiss H2.

Finally, the dissonant position of BusinessEurope is not necessarily tenable in the long run. In its October 2015 letter addressed to Commissioner Marian Thyssen, the association retrospectively shifted its overall attitude on the Enforcement Directive (Document 73), acknowledging that the original Posted Worker Directive of 1996 did require additional enforcement mechanisms, which the 2014 directive contributed to providing. This is rather inconsistent with the position held prior to the adoption of the directive. BusinessEurope, however, argued that the process of negotiating another revision would stop the implementation of the 2014 Directive. However, the measures proposed by the Commission address different issues – such as a potential maximum duration of posting and the principle of 'same pay for same work in the same place' –both of which were also opposed by BusinessEurope.

The heterogeneity of preferences that exist between BusinessEurope, on the one hand, and the UEAPME, EuroCommerce and – most importantly – the FIEC, on the other, is again confirmed regarding this new proposal on the enforcement of the Posted Workers Directive. In essence, BusinessEurope constantly reaffirms that the Posted Worker Directive does not need to be complemented, whereas all other

associations welcome the Commission initiatives while criticizing the lack of consultation.

It is important to point to these more recent developments because ambiguous final compromises do not facilitate the task of assessing the validity of H2. Surely, a strong coalition of social partners, reaching beyond traditional boundaries, may not have produced so clear-cut results in terms of stringency. However, it did manage to re-launch negotiation on yet another – seemingly more potent – proposal, immediately after the adoption of the Enforcement Directive.

C. Interim conclusion: A tortious path out of the JDT

On 19 March 2014, the Trade Union Summit reflected upon the 2009–2014 policy making period at the EU level. Their diagnosis highlights the paradoxical patterns that took place through those years. On the one hand, the various problems stemming from the distinctly inadequate enforcement of posted workers' rules is the subject of an ever-broader consensus, not only among trade unions but – as the empirical analysis showed – on the business side also. Not only workers are threatened by the recurrent misuse of posting practices – eastern workers and western workers alike – but small businesses as well. The search for satisfactory instruments to prevent a fiasco proved to be a truly daunting task given the sheer variety of industrial relation systems across the EU and the necessity not to suffocate SMEs under unsustainably costly responsibilities. This relative consensus has translated into joint communications and coordinated lobbying strategies, overlapping policy demands and momentous outsider mobilizations. H1 is, therefore, unequivocally confirmed.

The decision-making deadlock, however, emerged as a very serious concern. Paradoxically, the struggle for influence in both the EP and in the Council has been rather difficult. The theoretical framework maintained that the introduction of QMV in the Council, far from facilitating the adoption of policy solutions, is still overshadowed by the persistence of de facto quasi-unanimity and the increasing power of a coalition of mostly new member states in favour of the status quo. The

sturdiness of the JDT in the Council showed that this perspective is plausible. And, indeed, even intense mobilization did not translate into clear success, to say the least. Uni-Europe expressed a shared feeling of disappointment regarding the period 2009–2014 as follows:

> the last 4 years have been trying for us trade unionists that have had a positive approach to European integration. One could easily get the impression that the decision makers in the EU are doing all they can to undermine the confidence of the European citizens in the European project. Two general trends can be identified in EU policies the last 4 years, both of them connected to the economic crisis, but mostly governed by neoliberal ideas about economic performance. The irony of these policies is that they will not only undermine the social foundations of Europe but also undermine the competitiveness of the European economy (Document 105).

Those considerations should lead to dismissing H2, while re-affirming the validity of the JDT theoretical intuition. However, in this particular case an exceptionally strong coalition of social partners demonstrated its ability to mobilize and project forces. It translated into various and intense lobbying actions. Yet it was not enough to obtain more than a mild compromise. Nonetheless, a reticent coalition within the Council (including the Czech Republic, Estonia, Hungary, Latvia, Poland, Romania, Slovenia, Slovakia and the United Kingdom), the emergence of an unexpected alliance in the EP (excluding both the S&D and the GUE group), and all the efforts of a Rapporteur devoted to thwart the Enforcement Directive, should certainly have thrown the proposal into a JDT more or less permanently.

And yet again, the resurgence of the CoOP through the reference to the Rome I Regulation was successfully counteracted (Article 3). Article 9 left the necessary space for action that national authorities should possess. Even Article 12 on JSL was not completely deleted, despite being the unique point of clear consensus among

business actors. In that regard, the directive embodies an instance of minimal success for the proponent of more stringent enforcement mechanisms. The final directive is mild and lenient, indeed. But it is safe to say that a great majority of social partners successfully acted as prime countervailing forces to prevent an even worse outcome. In that perspective, H2 can safely be validated.

Conclusion

The dissertation has investigated the ability of winning social-partner coalitions to affect the intergovernmental JDT due to regulatory competitive games, theorized as an initial prisoner's dilemma among member states. We insisted that intergovernmental cooperative negotiations could be unlocked if supranational institutions could tap into additional political resources made available by social partners.

To test that broad argument, we put forward the two following hypotheses:

Hypothesis 1 (H1): The more homogeneous the preferences of a category of social partners are relative to a competing category, the more intense its collective lobbying efforts relative to the competition.

Hypothesis 2 (H2): The more homogeneous the preferences of supranational institutions and interest groups are, the greater supranational institutions' bargaining power relatively to the Council will be. Therefore, policy outputs are more likely to deviate from the Council's initial preferences toward the Commission's and the European Parliament's preference for more stringently restrictive policy output.

The empirical analysis exposed relatively consistent patterns of preference heterogeneity among business stakeholders at the supranational level. Heterogeneities emerged between different types of businesses – e.g. large companies and SMEs – and different degrees of encompassing representativeness – e.g. general associations and sector-specific associations. By contrast, trade unions held relatively homogeneous preferences. General confederations' affiliates from across the EU were in relative agreement across cases. Sector-specific associations also largely shared their views. In addition, we observed that various trade-union

organizations successfully coordinated with their business counterparts, notably in the construction sector. The empirical material suggested a generalizable rationalist explanation of the relative difference in preference homogeneity between business and trade unions actors. Whereas one might be tempted to explain high degrees of homogeneity through the strong dominance of fuzzy ideological beliefs, the empirical study shows that workers associations generally seem more ready to discount short-term benefits to prevent long-term costs. When they emerged, coalitions of trade associations translated their common preferences into intense and various lobbying undertakings that correlate with deviations in inter-institutional negotiation patterns.

In Case I, The Bolkestein Proposal initially attempted to liberalize the service market through the CoOP, a legal provision that would have introduced a radical version of mutual recognition without harmonization. This would have been a recipe for intensified regulatory competition. The analysis revealed a particularly clear congruence between homogeneity of preference in favour of more stringently restrictive instruments than the CoOP proposed by the Commission in the Bolkestein proposal. The excessively broad scope of the proposal and the absence of harmonizing measures contributed to reinforce that trend. Some business associations also re-joined a very united trade-union front. They undertook intense and successful lobbying as expected in H1 and contributed to raising deep political concerns on the part of key member states, eroding the balance of power at the expense of the Council. This pattern validates H2. Social partners, ranged against regulatory competition, gained momentous leverage inside the Parliaments and successfully sent messages to the Commission and the Council through street protests. This double strategy influenced the Commission to abandon its initial position. As a result, a new institutional coalition emerged in which an isolated Council had no other recourse but to surrender to the Parliament compromise.

This trend was extended and fortified in Case II. A winning coalition of social partners spearheaded by the ETUC used a mixed lobbying strategy involving both

enhanced insider access to the Parliament and constant pressure in the street. There is evidence that the forces that rose against regulatory competition could tighten their grip on the proposal even in the second phase. In reaction to the Parliament compromise, the Commission and the Council clarified and rectified the relations between the new proposal and social rights. They also reduced the scope even further, to the satisfaction of the supporters of more restrictive policy alternatives.

Those two cases also suggested that interest groups do not necessarily use outsider strategy as a lesser effective strategy when insider access is lacking. Rather both strategies can be used in a mutually reinforcing fashion to directly pressure one institution while keeping another at bay. In a lobbying plan that spread across the whole negotiations over the Services Directive, this is what the ETUC and its allies seemed to be doing. Trade unions and other defenders of more restrictive regulation had gained considerable leverage inside the Parliament. Simultaneously, the influence accumulated through institutional access was complemented and reinforced by an outsider presence in the street. Maintaining a sense of politicization and flammability probably played a role in ring-fencing insider lobbying efforts against the intervention of the Commission and the Council. Finally, the mechanisms revealed in the cases suggest disconfirming evidence regarding the claim that "if the differences between the Council and the Parliament concern regulatory issues on a traditional left-right axis, the Commission is more likely to be the ally of the Council than the Parliament" (Tsebelis and Garrett, 2000:9)

Case III, on the other hand, presents complex and partial empirical material. Regarding the status quo, it certainly provides the most illustrative case of a prisoner's dilemma. That prisoner's dilemma was clearly created by a prior instance of Court activism. The JDT seemed to be exceptionally entrenched in the Council. And this was indeed the product of daring CJEU case law undermining the fundamental right to take collective action in the face of market freedoms. The Commission was not able to strike a compromise in favour of a feasible cooperative policy alternative. The

proposal did not clearly opt in favour of either fundamental freedom, and suggested an arbitral conflict settlement mechanism that would have only increased legal uncertainty. Consequently, the Monti II Proposal attracted the opposition of every actor across the board, and the Commission seized the opportunity of the Yellow Card to withdraw the proposal.

Regarding the theoretical framework, this case thus provides inconclusive evidence. Within H1, the independent variable does not vary in ways that allow for accurate theory testing. All social partners were, to varying degrees, opposed to the proposal. Thus, clear victors could not be identified. In addition, the early withdrawal means that the empirical material is not sufficient to conclusively test H2. Yet, the case clearly shows that, without the backing of social partners, cooperation is barely feasible at the European level. It also serves to illustrate how the JDT still accounts for important negotiation outcomes at the EU level, namely the persistence of the status quo. This is particularly true when policy negotiations are taking place in the shadow or in reaction to daring supranational-hierarchical policies unilaterally imposed by the Court.

In addition, Case III confirms the need to build more inclusive explanatory models of decision-making in the EU. This remark is further supported by the fact that recent treaty reforms on decision-making procedures seem to be having unintended and surprising implications. The Yellow Card procedure, in particular, grants greater power to the national parliaments in protecting the subsidiarity principle, while fuelling EU policies with additional input legitimacy. Nonetheless, so long as the principle of subsidiarity does not equally apply to the Court's decision in the same way as it does to other policy modes, it will lead to the creation of even more opportunities for institutional deadlock. The situation is such that the Court can now interfere in issues that carry great sovereignty costs, while other institutions – those that are the guarantors of democratic legitimacy – cannot.

Case IV on the Enforcement Directive is particularly telling regarding H1. The proponents of more stringently restrictive regulation were able to effectively coordinate, crossing boundaries between heterogeneous business associations and highly united trade unions. The JDT theory accurately predicted that there would be entrenched disagreements within the Council. But in this case the Parliament was also reluctant to act. And some key political figures even attempted to seize the opportunity to propose even greater liberalization, creating the risk to see the resurrection of the CoOP. However, against the odds a coalition of social partners acted as a highly effective countervailing force. Against strong institutional opposition, a lenient but substantial directive was adopted in what seems to be the first step toward more stringent protection of workers' rights and enforcement of posted workers' rules across the EU. In addition, a recent Commission proposal suggests that the struggle for tougher rules against regulatory competition is not over, despite the subsistence of a highly reluctant coalition of member states in the Council.

In sum, in Case II and Case IV we observed the emergence of more cooperative attitudes leading to the successful adoption of regulatory policies. When those conditions are not garnered, on the other hand, policy negotiations fail. In Case I and III, social partners crucially helped obstructing policies that would have exacerbated the status quo of regulatory competition. They also proved able to block similar policy initiatives in the Parliament along negotiations over the Enforcement Directive (i.e. Case IV).

Finally, research conducted in this dissertation also suggests avenues for future investigations. First, the policy issues examined in this dissertation attracted even greater attention over the past years as compared to the time when I initiated the research. There are now the subject of weekly news reports and policy developments beyond the scope of a single dissertation. For instance, the defenders of greater stringency in the enforcement of the rules applicable to posted workers did not stop their effort with the adoption of the 2014 compromise on posted workers. They

eventually obtained a new proposal from the Commission. This proposal revises yet again the legal regime applicable to posted workers within the EU. However, it goes much further. It also includes new rules to ensure that service providers would comply with universally guaranteed remuneration terms and conditions set in the host country, instead of minimum rate of pay. BusinessEurope (2016a) evidently positioned against the new proposal from the outset. It notably argued that the notion of "remuneration has many different components. It is a complex notion […] Far from clarifying the situation compared with the existing EU directives, the proposed revision adds to the complexity" (BusinessEurope, 2016a:1).

In an additional and surprising turn of events, 14 parliamentary chambers from 11 EU countries raised the Yellow Card again in May 2016. In a manner similar to the response it gave to the Yellow Card triggered against the Monti II proposal, the Commission did not find any breach of the subsidiarity principle. This time, however, the Commission was not impressed politically either. And, in an echo to social partners' demands, decided to push forward. Although the present analysis was limited to the adoption of the Enforcement Directive in 2014, the reality of policy negotiations as a continuous stream of events cannot be ignored. In that light, the most recent developments also hint at a renewed relevance of Hypothesis 2. Thus, the findings of this dissertation could be followed by additional research that would adopt a longer time perspective – i.e. including interest group strategies spread over several years and various policy negotiations. Their impact on inter-institutional balance of power and policy outputs should be examined in a more longitudinal manner.

Second, the aim of the present dissertation was to examine the effect of actors' preferences and strategies when the strategic setting was kept relatively constant across cases. This approach was conducive to a rigorous evaluation of the theoretical framework. But, it limited the findings to one policy issue. Therefore, the hypotheses should be tested across several policy areas. To that end, a Wilson matrix

could serve to cluster policy cases into four categories depending on the pay-offs they are likely to create for interest group: entrepreneurial, interest groups, client and majoritarian politics. One could, thus, examine variations in interest group preference homogeneity and strategies and their consequences for policy outputs expressed in terms on stringency and restrictiveness.

Third, although the selection of a narrow policy area is inherently limited, the dissertation does provide partial avenues to reflect upon the likely future of the EU. Here, again, a far broader perspective is needed. Through the empirical research, it became clear that issues of service liberalization and posted workers couldn't be considered as mere accessories in building and understanding the future of the EU. The migration crisis and the so-called 'Brexit' have revealed a spreading fear of the foreigner, especially when that foreigner is a potential worker. This fear has been condemned as ignorant and illogical. There is a seemingly unanimous outcry against the supposed childishness of voters who, as a result, decided that Britain's destiny could be brighter outside the EU – if only because it seemed more free to adopt more restrictive policies independently. The dissertation shows that the sense of anger and injustice springing from undemocratic decisions that are almost certainly impossible to overturn in practice constitute a fertile terrain for that disunion. When remote decisions cannot be altered despite a majority rising against them, opting out does not necessarily seem so irrational, especially when it is presented as a means of last resort. At any rate, the institutional contradictions that have slowly but surely materialized in the EU may continue to feed the underlying ground of that disunion. This may continue to be true so long as the Court can extensively interpret vague treaty provisions in ways that throw democratic institutions into the powerlessness of prisoner's dilemmas.

Nevertheless, the dissertation counsels a certain level of optimism. Under certain circumstances, the social partners could help to break deadlocks so that a more appealing level playing field could be implemented. But this sort of

compromising outcome is often too weak and limited in comparison to the Court's firepower. It might thus be necessary to review the functioning of the EU so that its institutions are better able to negotiate fair regulatory environments. The losers of European integration may now feel frustrated, powerless, and vilified. But their ballot still has the power to put the EU down in national elections. In that light, a relative loss of competitiveness might be a fair price to pay in exchange for a fairer, more democratic and more stable Union.

Annex I. List of Interviews

Organization	Type	Period
1. European Commission	European institution	September 2014
2. European Commission	European institution	October 2014
3. European Commission	European institution	October 2014
4. European Commission	European institution	March 2015
5. European Commission	European institution	March 2015
6. European Parliament	European institution	January 2015
7. European Parliament	European institution	January 2015
8. European Parliament	European institution	January 2015
9. European Parliament	European institution	January 2015
10. European Parliament	European institution	February 2015
11. European Parliament	European institution	February 2015
12. European Parliament	European institution	February 2015
13. European Social and Economic Committee	European institution	October 2014
14. Permanent Representation	European institution	September 2014
15. Permanent Representation	European institution	October 2014
16. Permanent Representation	European institution	March 2015
17. Permanent Representation	European institution	January 2015
18. Permanent Representation	European institution	January 2015

19. Permanent Representation	European institution	January 2015
20. Permanent Representation	European institution	January 2015
21. Permanent Representation	European institution	February 2015
22. Permanent Representation	European institution	February 2015
23. OHIM / EUIPO	EU agency	November 2014
24. BusinessEurope	Social partner	November 2014
25. BusinessEurope	Social partner	November 2014
26. BusinessEurope	Social partner	November 2014
27. BusinessEurope Affiliate	Social partner	October 2014
28. BusinessEurope Affiliate	Social partner	October 2014
29. EuroCommerce	Social partner	May 2016
30. EuroCommerce	Social partner	May 2016
31. EuroCommerce	Social partner	May 2016
32. EFBWW	Social partner	October 2014
33. EFBWW	Social partner	January 2015
34. ETUC	Social partner	November 2014
35. ETUC	Social partner	November 2014
36. ETUC	Social partner	November 2014
37. ETUC affiliate	Social partner	November 2014
38. FIEC	Social partner	September 2014
39. HOSPEEM	Social partner	February 2015

40. UNIeuropa	Social partner	February 2015
41. EFFAT	Social partner	November 20014

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