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Department of Political Science

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Tutor: Magnus Jerneck

Shedding light on the European social dialogue's "shadow of hierarchy"

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A proposal for a model explaining the shadow of hierarchy's influence on the content of Commission-initiated and Council-implemented collective agreements concluded by European social partners

Gerrit Krause
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Abstract

In scholarly literature, it is widely acknowledged that 'the shadow of hierarchy', hence the threat of disadvantageous Community legislation, is an important concept in European social dialogue (ESD), where European social partners – that is organised labour and management – are given the chance to negotiate binding agreements on some aspects of European labour and social policy. While the shadow of hierarchy's role for making social partners *enter* ESD ("negotiate or we legislate!") is widely acknowledged, this paper aims at presenting a theoretical model that can explain the hitherto omitted question of how the shadow of hierarchy influences ESD agreements' *content*.

The thesis proceeds in a three-steps-process: firstly, an initial model is developed deductively, based on theories about European governance, veto games and integrative bargaining. Secondly, structured and analysed by these theoretical considerations, an analytic narrative is conducted to test the model against the case study of the successful 1998/99 European social dialogue negotiations on fixed-term work contracts. Thirdly, based on the analytic narrative's findings, the initial model is refined.

This study suggests that there is not *the* shadow looming over ESD negotiations, but a multitude of different shadows that influence ESD outcomes by promoting the use of specific strategies to change contents in order to suspend the others' veto power. The shadow of hierarchy forms a reference point against which utility gains from proposals of the other side are measured and thus constitutes an important reference frame for utility calculations wherein the other shadows can operate.

Key words: shadow of hierarchy, shadow of the law, European social dialogue, veto games, consensus strategies
Words: 19,315

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1 Introduction

Social partners – that is the peak associations of management and labour (Keller, 2003, p. 411) – not only play an important role in many of the European Union (EU) member states' economic, labour and social policies, but also within the governance structure of the EU itself. Art. 152-155 of the Treaty on the Functioning of the EU (TFEU) explicitly mention the role of the social partners in the EU, more precisely, their role in European social dialogue (ESD).
At European level the most important social partners at intersectoral level are the European Trade Union Confederation (ETUC) on the employees' side and the Union of Industrial and Employers' Confederation of Europe (UNICE, since 2007 BusinessEurope) being the biggest organisation and the European Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) and since 1999 also the European Association of Craft, Small and Medium-Sized Enterprises (UEAPME) on the employers' side (Keller, 2003, p. 412).
Social dialogue is an integral part of the "European social model" of a socioeconomic system where economic and social progress are inseparable (Commission of the European Communities, 1994). Involving organised labour and management into all phases of policy-making is considered to be part of 'good governance' (Falkner, 2003, p. 26). Social dialogue is a unique European form of governance that is mostly unknown in other industrial relations systems outside the EU (Welz, 2008, p. 2; Bercusson, 1994, p. 20).

Under ESD, the European Commission (hereafter "the Commission") understands "discussions, consultations, negotiations and joint actions involving organisations representing the two sides of industry (employers and workers). It takes two main forms:

- a tripartite dialogue involving the public authorities,
- a bipartite dialogue between the European employers and trade union organisations. This takes please (sic!) at cross-industry level and within sectoral social dialogue committees." (European Commission, n.d.).

Cross-industry, (or also: cross-sectoral, intersectoral or interprofessional) social dialogue covers the whole economy and labour market and its purpose is to promote dialogue between trade unions and employers' organisations in key areas common to all fields of employment and social affairs (Eurofound, 2012), while sectoral social dialogue consists of negotiations between the European trade unions and employer organisations of a specific sector of the economy (Eurofound, 2012).

These interactions can lead to legally binding agreements (Eurofound, 2012). That is why some scholars speak of European collective bargaining as "negotiated legislation" or the "privatisation of the legislative process" (Welz, 2008, p. 302).

European collective agreements can be concluded through four procedures (Smismans, 2008, p. 161f.; Léonard, Erne, Marginson, Smismans, & Tilly, 2007, p. 15): Management and labour's collective bargaining can either be triggered by a Commission consultation or on the initiative of the social partners themselves. In both cases, if the European social partners reach an agreement, they can either request the Commission and the Council to adopt their agreement by a Council Directive that has the same effect as European law and is binding for all Member States, or the social partners can decide to implement agreements reached themselves by relying on means and instruments of industrial relations available to their member organisations at the national level. The latter kind of agreements do not form part of EU law.

The current ESD regime was established under the Maastricht Treaty in 1993 and the Protocol on Social Policy annexed to it. Impetus for the formalisation of ESD came in the 1980s: Due to constant vetoes by the United Kingdom's government, the European Community was caught in stalemate in social policies that required unanimity decisions at that time (Bercusson, 1992, p. 178). Together with the creation of the single European market, the so-called Val Duchesse dialogue was launched by the incoming Commission President Jacques Delors: Negotiations between workers' and employers' organisations at Community level should accompany economic market integration as a crucial pillar of the European social model (Bercusson, 1994, p. 20). Hence, the 1986 Single European Act's Article 118b stipulates that "[t]he Commission shall endeavour to develop the dialogue between management and labour at European level, which could, if the two sides consider it desirable, lead to relations based on agreement". However, this procedure's regulatory impact was modest as it only resulted in some non-binding joint opinions of management and labour (Léonard, Erne, Marginson, Smismans, & Tilly, 2007, p. 9). This "corporatist decision gap" (Streeck, 1995) ended after a "fundamental change in European labour law" (Bercusson, 1992, p. 177) that occurred in 1993 when the Agreement on Social Policy was annexed to the Maastricht Treaty (Leiber, 2005, p. 22f.). The Agreement was a result of European social partner negotiations and demands the Commission to obligatorily consult the European social partners regarding initiatives in the social policy field. The Agreement has further been institutionalised by incorporation into the Amsterdam (1999) and Nice (2001) Treaties (then Articles 137-139 of the former TEC) and the current Lisbon Treaty (Articles 153-155 TFEU, as well as a new Article 152 TFEU) (Clauwaert, 2011, p. 170).
Only after the institutionalisation of ESD under the Maastricht Treaty, the social partners managed to conclude agreements that became legally binding texts.

As early as in 1992, Bercusson (1992, p. 185) argued that the new provisions introduced under the Maastricht Treaty and its annex will lead to a greater willingness of the European social partners to enter negotiations at European level and to

conclude collective agreements in order to avoid legislation purely made by the European institutions that might "pre-empt their autonomy, and which may be also a less desirable result" (Bercusson, 1992, p. 185). This is what Bercusson (1992, p. 185) called negotiations in the "shadow of the law" and Smismans (2008) "shadow of hierarchy": The social partners only have an incentive to come to an agreement at European level when they have to fear an (unbeneficial) legislative intervention by the Commission and the subsequent Council implementation, following the motto: "negotiate or we legislate!" (Goetschy, 2005). After Maastricht, this threat became more realistic compared to the preceding years because the EU's new legal foundation provided for an expanded legal scope in the social policy realm and increased the ability of the Union to develop social law: Firstly, the Agreement on Social Policy introduced new areas where the Community could become active in this policy field. Secondly, it stipulated that in some fields of social policy, qualified majority voting will be introduced. And lastly, a protocol was attached to the Agreement on Social Policy, granting the integration-sceptical UK an opt-out in the field of European social policy (Bercusson, 1992, p. 182ff.; Bercusson, 1994, p. 1ff.).

A couple of years later, after some agreements have been concluded within the ESD, other scholars agreed that the "shadow of the law", or "shadow of hierarchy" was crucial in bringing both sides of industry together (Keller, 2008, p. 208; Smismans, 2008; European Social Observatory, 2011, pp. 16, 80; Keune & Marginson, 2012, p. 9f.). The shadow is considered to be the strongest in Commission-initiated and Council-implemented collective agreements (COCOCAs) as they result from a Commission initiative and are legally enforceable due to their incorporation into EU law through transposition into a Directive (see table 1) (Smismans, 2008, p. 161ff.).

Table 1. *Four procedural types of European collective agreements and degree of shadow of hierarchy (Smismans, 2008, p. 163)*

	Implementation by Council directive (statutory agreements)	Autonomous implementation (non-statutory agreements)
Commission-initiated	**COCOCA (Commission-initiated and Council-implemented CA)**	*COSICA (Commission-initiated but self-implemented CA)*
Self initiated	*SICOCA (self-initiated but Council-implemented CA)*	SISICA (self-initiated and self-implemented CA)

Strongest shadow of hierarchy (in bold); *weaker shadow (in italic)*, weakest shadow (in roman).

Consequently, the "shadow of hierarchy" is an important concept in ESD. While there seems to be consensus that the shadow is an important incentive for European social partners to *enter* ESD negotiations, it remains a theoretical puzzle how the shadow of hierarchy influences European social partners' collective agreements in ESDs *content-wise*.

The scholarly literature only shows tentative notions, but no coherent theoretical explanations. Keller and Sörries (1999, p. 121) note that the social partners' agreements were made on "some selected, consensual parts of the original package only", leaving the future of regulation of the more controversial, excluded components of the proposals open. Furthermore, provisions often are quite flexible because of the need to reconcile "existing and lasting (statutory) differences between member states including their 'customs and practices'" and because this flexibilisation provides for the opportunity for national social partners to lobby during the transposition phase (Keller, 2003, p. 416). Bercusson (1992, p. 185) predicts that ESD would result in agreements which allow for derogations from specified standards through flexibilisation of provisions. These observations hint at a predominance of what will later be called 'elimination strategy' under ESD negotiations. However, these studies do not clearly state *how* and *if* these outcomes can be connected to the shadow of hierarchy.

Thus, this study's purpose is to fill this gap by proposing a model that shall explain how the shadow of hierarchy influences European social dialogue agreements' content. The thesis proceeds in a three-steps-process of deductive theory-building, empirical theory-testing and finally refinement of the initial theory.

In the next chapter, I will describe the COCOCA procedure and the interests of the veto players involved in more detail in order to locate *where* the shadow of hierarchy operates in this process. Then, I will deductively theorise *how* the shadow of law affects COCOCAs' substance by drawing on rational choice institutionalism literature, namely on Tsebelis' (2000; 2002) veto player theory and Tsebelis' and Hahm's (2013) theory of consensus strategies.

Thereafter, the methods for data collection and data analysis will be explained in chapter three. Therefore, the analytic narrative approach and its relationship with game theory and causal mechanisms as well as the motivation for case selection will be pointed out. This chapter should not be seen in clear separation to the foregoing one. Rather, by laying down the mechanism-based approach, it also specifies the theoretical model.

Structured by and analysed through the theoretical considerations of the paper's first part, an analytic narrative of the 1998/99 ESD negotiations on fixed-term work contracts will be presented in chapter four that serves as a plausibility test of the deduced model and is the starting point for further refinement of the theory.

Finally, chapter five draws some conclusions by proposing refinements of the initial model, making suggestions for further research and discussing the study's internal and external validity.

2 Theorising about the shadow of hierarchy in European social dialogue

This chapter will describe the legal foundations and practices that lead from a Commission proposal to a Council Directive, as well as the general (non-)interests of the social partners in the Europeanisation of labour and social law. From this description, it becomes apparent that the shadow of hierarchy is necessary to make industry and labour *enter* ESD negotiations. Then, from veto player theory and the assumptions that policies are multidimensional and dividable, a model is deduced that explains how the shadow of hierarchy is supposed to affect the shape of ESD outcomes.

2.1 Procedures, social partners' interests and shadow of hierarchy as resilience breaker in COCOCAs

The procedure of Commission-initiated and Council-implemented collective agreements as enshrined in Art. 154-155 TFEU (formerly Art. 138-139 EC) is of a "double nature" (Schulz, 2003, pp. 164, as cited by Welz (2008, p. 289)): The process involves a dialogue between the Commission and the social partners and a dialogue between the social partners themselves.

According to Art. 154 TFEU, the Commission is obliged to consult the social partners twice on its policy proposals in the field of social policy.

In a first step, "the Commission shall consult management and labour on the possible direction of Union action" (Art. 154(2) TFEU). This consultation is thus about the "whether and how" (Welz, 2008, p. 290) of a possible EU action in this policy field.

In a second step, if the Commission considers Union action necessary after this consultation, it has to consult the social partners again, this time on the content of its action (Art. 154(3) TFEU). For that purpose, the Commission forwards concrete policy proposals or suggestions of principles to be negotiated to the social partners (Welz, 2008, p. 295).

The social partners then can inform the Commission of their mutual wish to initiate the process provided for in Art. 154(4) TFEU and 155(1) TFEU, which leads to bilateral negotiations between the social partners and can lead to an agreement that "shall be implemented […] at the joint request of the signatory parties, by a Council decision on a proposal from the Commission" (Art. 155(2) TFEU). In their bilateral negotiations based on the Commission proposal, management and

labour, while being bound to the subject of the draft, are free to change its content to a certain degree (Welz, 2008, p. 300).
The Commission is obliged to forward the social partners' agreement negotiated under Art. 154-155 TFEU to the Council (Welz, 2008, p. 317). The Commission committed itself not to change the content of the agreement when proposing it for implementation via Council Directive (Smismans, 2008, p. 168) after it has exercised its right and duty to check the agreements on grounds of representativeness of the negotiating parties, legality, impact on small and medium-sized enterprises and the appropriateness and necessity (Smismans, 2008, p. 168; Welz, 2008, p. 317ff.).
The Council, respecting the social partners' "contractual autonomy" (Léonard, Erne, Marginson, Smismans, & Tilly, 2007, p. 12), can only transpose the agreement into a legally binding and enforceable Directive without amending it. Should the Council intend to substantially change the collective agreement, the Commission will withdraw the proposal from the legislative process (Welz, 2008, p. 300; Smismans, 2008, p. 168). Thus, the Council's role – usually the centre of the Union polity – is reduced to one of an "*Erfüllungsgehilfe*" (servant) (Welz, 2008, p. 234).
The European Parliament is formally not involved in this procedure (Welz, 2008, p. 235).
During these social partners' negotiations which "shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it" (Art. 154(4) TFEU), the Commission has to refrain from any legislative action in that field (Welz, 2008, p. 298). If the social partners fail to conclude an agreement, however, the Commission can proceed via the normal legislative procedure with that matter (Welz, 2008, p. 300).
The procedure is depicted in figure 1.

While the Commission faces certain obligations in this procedure, the social partners' position is characterised by voluntarism: firstly, because management-labour negotiations cannot begin without mutual consent and, secondly, because "neither party is obliged to agree" on a final policy (Bercusson, 1992, p. 186). Any party can decide to defect from ESD at any time.

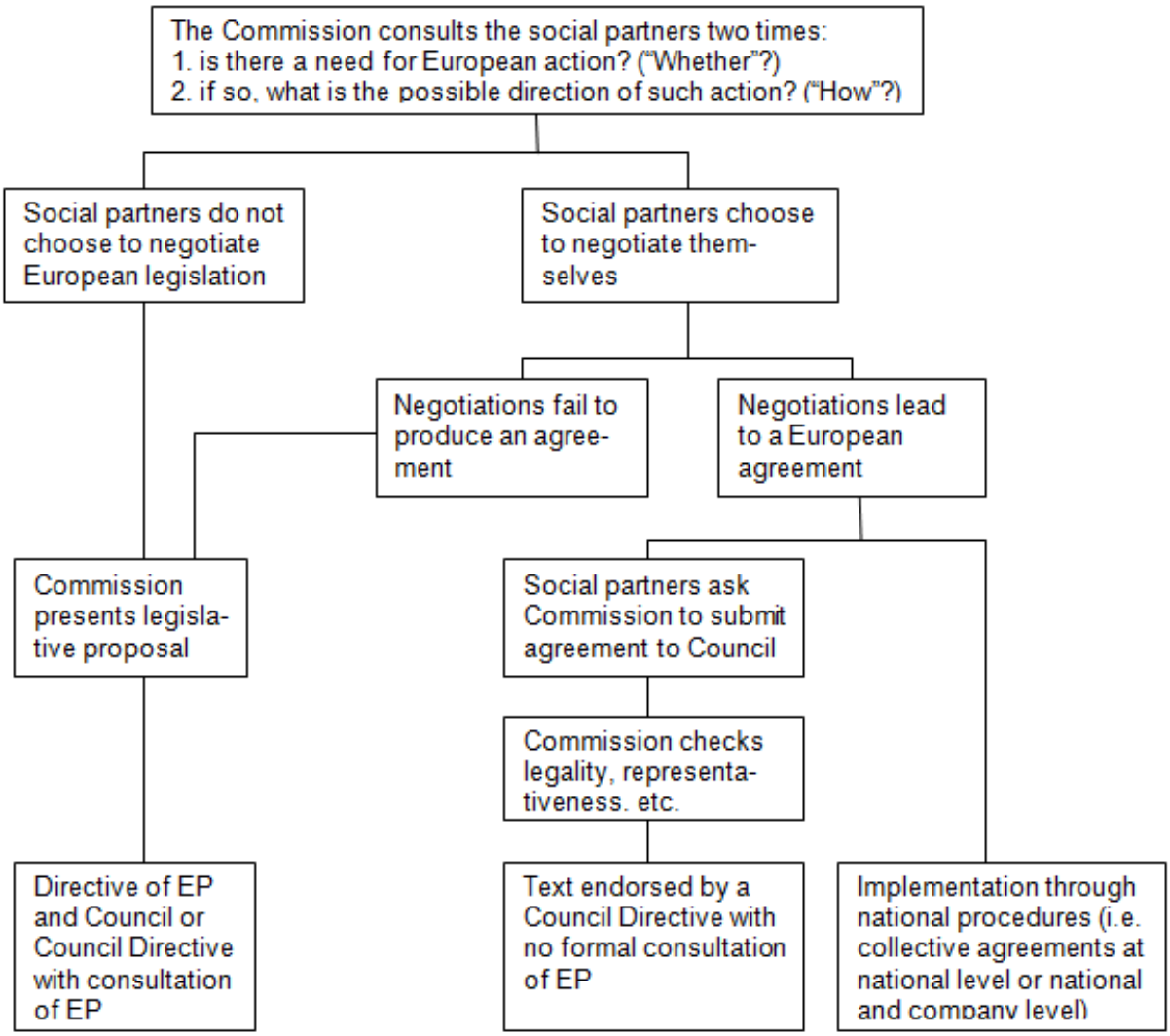
This voluntarism comes along with divergent interests of management and labour. The European Community's 1992 Single European Market program allowed enterprises heretofore operating in a national market to compete with others in other Member States. This possibility to compete Europe-wide more easily put the Member States' national systems of labour law and social protection under pressure: Enterprises could now easily relocate their production from one member state to another with lower direct (wages) and indirect (costs of complying with labour standards and of contributing to social protection schemes) labour costs. This "social regime competition" was threatening to cause "social dumping": Member States might be pressured to lower labour and social standards in order to decrease indirect labour costs and in order to attract business (Bercusson, 1996, p. 75).

Trade unions therefore strive for the introduction of Europe-wide labour and social standards in order to avoid a race to the bottom whose price workers had to pay (Bercusson, 1996, p. 77). The ETUC as the workers' representative body thus has a firm interest in European-level bargaining in order to develop the social dimension of the internal market (Welz, 2008, p. 146; Keller & Sörries, 1999, p. 115).
Employers on the other hand, favour inactivity of the European institutions regarding European labour and social policies. They thus pursue a deregulatory agenda where Community non-action would lead to a lowering of national labour and social standards due to regime competition, and where manufacturers could pick-and-choose those markets that were the cheapest for their production (Bercusson, 1996, p. 77; Dufresne, Degryse, & Pochet, 2006, p. 11; Keller & Sörries, 1999, p. 115).

On its own, however, the ETUC is unlikely to be able to force the employers' organisations to the negotiation table due to a lack of bargaining power: Because the feeling of "labour solidarity" is still not strongly developed among ETUC member organisations and due to the huge numbers of member organisations, "the basic instrument of class struggle, such as a strike, are particularly difficult to develop at the European level" (Smismans, 2008, p. 165).

Consequently, considering the ETUC's weak bargaining position together with the management associations' preference for European non-action and the voluntary nature of the Art. 154-155 TFEU procedure (hence the possibility to reject the entry into negotiations and also to reject the conclusion of an agreement), the shadow of hierarchy is necessary to get both sides of industry to sit together at the negotiation table: "European social dialogue is likely to lead to results only under the threat of legislative action. Only if management faces the risk of binding and more demanding provisions [note: in the sphere of labour and social standards] will it have an incentive to negotiate with labour" (Smismans, 2008, p. 165). Thus, the Commission's proposals for social legislation are the "stimulus" to break resilience in ESD (Bercusson, 1994, p. 22).

Figure 1. *The European Social Dialogue (adapted from Best (2003, p. 6))*



2.2 How does the shadow of hierarchy affect policy substance in European social dialogue?

After the shadow of hierarchy's influence on making social partners *enter* ESD negotiations was elucidated on the previous pages, a possible explanation for how the shadow of hierarchy influences the *content* of Commission-initiated and Council-implemented collective agreements will be developed in the following.

2.2.1 Governance structures and processes

Börzel (2010) places ESD's policy-making procedure within the discussion about European governance. Drawing on her use of the term "governance", it will be understood as "institutionalised modes of co-ordination through which collectively binding decisions are adopted and implemented" (Börzel, 2010, p. 194). From this definition it follows that "governance consists of both *structure and process* [own emphasis]. Governance structures relate to the institutions and actor constellations while governance processes are modes of social co-ordination by which actors adjust their behaviour" (Börzel, 2010, p. 194).
Structures and processes are "inherently interlinked" as "institutions constitute arenas for social coordination and regulate their access" and they also "promote specific modes of co-ordination. They provide a 'possibility frontier' (Möglichkeitsgrenze)" (Börzel, 2010, p. 196).

Ideal typically, governance *structures* can be divided into hierarchical and non-hierarchical (competition and negotiation) types (Börzel, 2010, p. 194).
In hierarchical governance, public authorities are the actors. On the other hand, non-hierarchical governance "brings together public actors with representatives of business and/or societal interests" or private actors alone (Börzel, 2010, p. 195).
While the hierarchical governance's *process* is characterised by the possibility that hierarchical actors can "force actors to act against their self-interest" (Börzel, 2010, p. 195), non-hierarchical social co-ordination can be described as "deliberate compliance" (Börzel, 2010, p. 196): The actors involved reach voluntary agreements that are the result of bargaining ("negotiating a compromise and granting mutual concessions […] on the basis of fixed preferences" (Börzel, 2010, p. 196)) or of arguing ("non-manipulative persuasion […] through which they develop common interests and change their preferences accordingly" (Börzel, 2010, p. 196).

In the EU however, these ideal types seldom show, rather, there are governance mixes where different rule structures are embedded into one polity (Börzel, 2010, p. 197). Thereby, one structure can dominate the other(s): "The dominant rule structure sets or changes the rules of the game for the subordinate rule structure and entitles actors to intervene in order to correct or substitute policy outcomes. As a result, the primary rule structure casts an institutional shadow which has a significant influence on the behaviour of actors in the secondary rule structure" (Börzel, 2010, p. 197).

In ESD, the Commission's and Council's possibility of going the 'ordinary' legislative route to pass social legislation is the primary, hierarchical rule structure that sheds the shadow of hierarchy, while the social partners' possibility for "private self-coordination" (Börzel, 2010, p. 201) forms the non-hierarchical secondary rule structure. Thus, Commission/Council intervention constitutes a "fall-back regulatory option" (Knill & Lenschow, 2003, p. 8).

Smismans (2008) explains the power relationship between these two structures in ESD through the application of principal-agent theory. In this theory, the Com-

mission is the principal that delegates the task of drafting social policy to an agent, namely European management and labour (Smismans, 2008, p. 163).

However, this delegation is unclear and rather implicit and the regulatory task is not well-defined: Accounting for their autonomy, the social partners are free to decide whether to take up negotiations and they are not bound on what they want to negotiate. Also, they are free to deviate from the initial Commission proposal. Furthermore, delegation is not simply directed towards one agent, but towards the two sides of industry with opposing interests. The success of delegation is thus dependent on whether the social partners can find consensual agreement among themselves (Smismans, 2008, p. 167).

The Commission possesses some means to control its agents and to counteract these ambiguities: The social partners only have time for nine months to come to an agreement (unless it is unanimously extended on the social partners' and the Commission's agreement) and moreover, the Commission has the right to check social partners' texts on grounds of some criteria listed above (Smismans, 2008, p. 167). These control mechanisms, however, are rather weak for political reasons. Firstly, the Commission committed itself not to change texts concluded by management and labour and to withdraw the initiative if the Council should intend to do so. Secondly, the social partners may lose the interest in using the ESD in the future should the Commission refuse to forward their agreement to the Council (Smismans, 2008, p. 169).

Consequently, "[t]he procedure to COCOCAs is […] characterised by an unclear, nearly implicit delegation to agents who have broad room for interpreting the delegated regulatory task but who have to come to a common agreement" (Smismans, 2008, p. 169).

Drawing an interim conclusion, one can say that, following Smisman's (2008) argument, after management and labour have once taken up bipartite negotiations on an initiative of the Commission, the Commission itself exerts no *direct* influence on the social partners' agreement's content but that the two sides of industry enjoy a considerable room for manoeuvre in their negotiations. Thus, more important is the social partners' ability to reach a common position on social policy matters in order *not to trigger* the "fall-back regulatory option" (Knill & Lenschow, 2003, p. 8) in the form of the primary institutional rule structure of hierarchical EU institutions' decision-making. The social partners' ability to reach a common position in turn, revolves around what the shadow of hierarchy looks like, hence what these actors expect the EU institutions to agree upon in case of management's and labour's failure to conclude a joint text.

In what follows, a model will be developed that aims at explaining this procedure. Therefore, firstly, the "governance structure" will be conceptualised by referring to Tsebelis' (2000; 2002) veto player theory. Thereafter, by drawing on Tsebelis' and Hahm's (2013) working paper on how to suspend vetoes, it will be described theoretically how this structure affects the "governance process" and consequentially the negotiation outcome.

2.2.2 Theorising about governance structure: ESDs as veto games

How can we understand the ESD governance structure, the "institutions and actor constellations" (Börzel, 2010, p. 194), in the shadow of hierarchy in COCOCAs? This paper will explain them by means of rational choice institutionalism.
Rational choice institutionalism is a sub-form of rational choice theories that emphasises the constraining and empowering role of institutions for explaining outcomes in individual or collective decision-making. It rests on a number of premises (Pollack, 2007, p. 32):

a) individuals are the basic unit of social analysis (methodological individualism): They have fixed and exogenously given preferences that they can rank transitively according to their desirability. Individual and collective outcomes mirror the actors' individual choices in an effort to

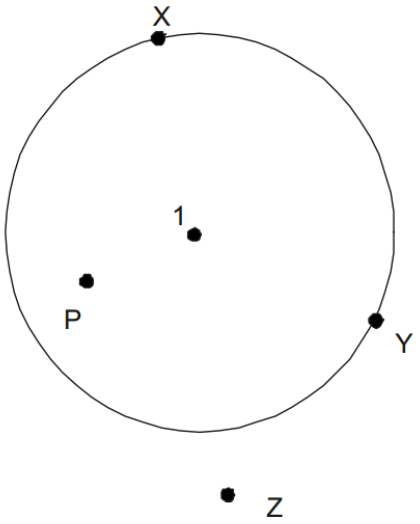
b) maximise their own expected utility ("the outcome for all depends on the choice of each" (Levi, 1997, p. 26). Following a "logic of consequentiality", rational actors estimate the expected utility of alternatives and chose the one that is most likely to maximise their utility in a situation where

c) constraints might make the most desirable preference unrealistic to achieve. Constraints consist of scarcity and – most interestingly for institutionalists – institutions. According to Levi (1997, p. 25), "institutions are sets of rules (and sanctions) that structure social interactions and whose existence and applicability are commonly known within the relevant community. Institutions, so defined, structure the individual choices of strategic actors so as to produce equilibrium outcomes, that is outcomes that no one has an incentive to alter".
Hence, institutions are an independent variable "that channel[s] individual choices into 'institutional equilibria'" (Pollack, 2007, p. 33).

For the analysis of political decision-making, some rational choice institutionalists have pointed out the role of unanimity rules that create 'veto players'. Tsebelis (2000, 2002) explains the capacity of a political system to change policies by the existence and constellation of veto players. According to him (2000, p. 442), "[v]eto players are individual or collective decisionmakers whose agreement is required for the change of the status quo." UNICE/BusinessEurope, CEEP and ETUC each are veto-players, as the refusal to negotiate of each of them would lead to a breakdown of social partners' involvement.

These veto players are assumed to have Euclidian policy preferences with a circular indifference curve in an n-dimensional policy space, meaning that among any two points in a two- or more-dimensional policy space, they prefer the one which is the closest to their own ideal position (Tsebelis 2000, p. 443). If two alternatives have the same distance from her ideal point, the veto player is indifferent between these two (Tsebelis, 2002, p. 20). The veto player in figure 2 for example is indifferent between points X and Y because they are equally distant from its ideal, but it prefers them to point Z, while P is more desirable to it than any other proposal in the policy space. They hence have 'transitive preferences' (Tsebelis, 2002, p. 20).

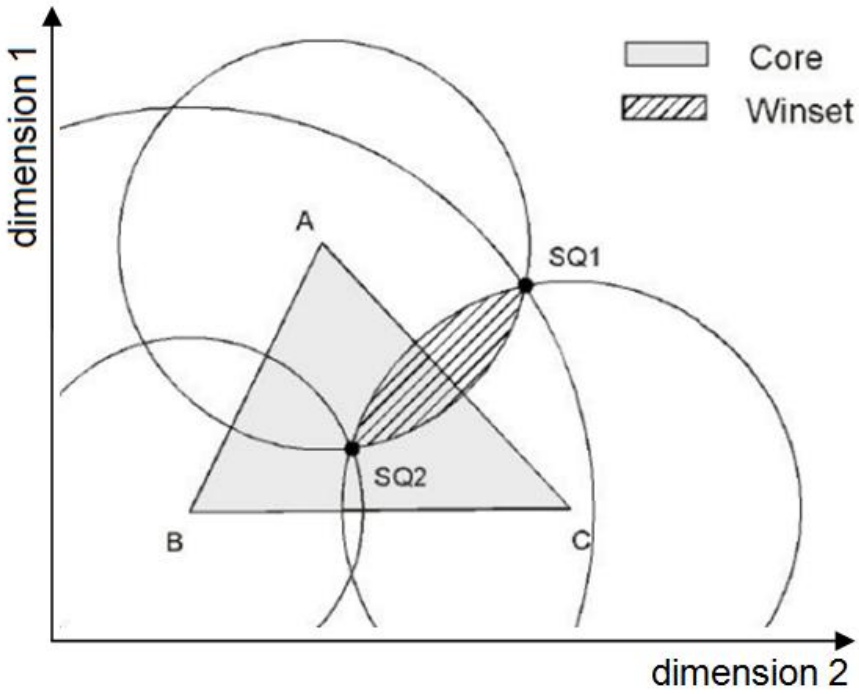
Figure 2. *Circular indifference curve for a veto player (Tsebelis, 2002, p. 20)*



From this follows that a status quo can only change when a new policy proposal is closer to the ideal positions of *all* veto players compared to the status quo, because one veto player can easily block any decision when the policy proposals at the table are less favourable to them then the status quo. All points that all veto players prefer over the status quo ("the set of outcomes that can defeat the status quo" (Tsebelis 2002, p. 21)) are called the "winset of the status quo" (Tsebelis, 2000, p. 444) (see figure 3). A status quo is undefeatable if it is located within the "core" which is "the set of points with empty winset" (Tsebelis, 2002, p. 21). In figure 3, no status quo that is located in the triangular between veto players A, B and C could be defeated. This area thus constitutes the unanimity core with undefeatable policies.

Consequently, the bigger the winset and the smaller the core – and hence the smaller the distances between the veto players – are, the more likely is a change of the status quo (Tsebelis, 2002, p. 25).

Figure 3. *Winset and core of a system with 3 veto players (Tsebelis, 2002, p. 22)*



The concept of status quo will not be suitable for the cases under investigation. Rather, it will be helpful to speak of the "default outcome". That is "the outcome when there is no agreement" by the veto players (Ostrom, 1986, p. 10). The default outcome in the case of COCOCAs is the initial Commission proposal and what management and labour expect the Council to make of it without social partners' input.

With this approach, it is not possible to predict *the one* outcome but to detect the *range of outcomes* that veto players could agree upon and hence the possibility and the likelihood to change a status quo (Dehling, 2012, p. 159). Tsebelis does this because in a multi-dimensional policy space, a single equilibrium point (*the one* outcome) rarely exists. As his veto player theory shows, the equilibrium point is either the status quo when positioned in the core, or many equilibrium points exist at the same time (all possible outcomes within the winset) (Tsebelis, 2002, p. 9; Dehling, 2012, p. 159).
Thus, Tsebelis' veto player theory helps to understand why social partners in COCOCAs can reach an agreement among themselves despite their diverse interests and the voluntary nature of the procedure: It is because there can be a proposal on the table that all players prefer more than the default outcome.

The next sub-chapter will illustrate how social partners can make the side being more disfavoured by a proposal than by the default outcome suspend its veto power: it is by drafting a new proposition in such a way that this player then prefers it over the default outcome.

2.2.3 Theorising about governance processes: suspending vetoes in ESD by manipulating a policy's dimensionality

The leeway to modify legislative proposals granted to the social partners by the European institutions and the possibility to retreat to the shadow outcome enables a specific style of negotiations: 'integrative' bargaining which results in win-win solutions by 'expansion of the pie'. The bargainers try to find common or complementary interests in order to reach jointly beneficial, often creative and innovative solutions. Negotiations are perceived as positive-sum games. By contrast, 'distributive bargaining' forms the other end of the bargaining continuum: In perceived zero-sum games where self-interest prevails over the search for common interests, the negotiators merely 'divide the pie', creating win-lose situations (Elgström & Jönsson, 2000, p. 685f.; Sannerstedt, 2005, p. 99). In ESD, according to Welz (2008, p. 373), integrative bargaining "clearly prevails" because no party would accept agreements that "bear negative effects for their affiliates" and thus "zero-sum or even negative-sum negotiations are not very likely". The prospect of an integrative solution helps upholding the dialogue: The side of industry being less satisfied with the default outcome "naturally has a stronger incentive to negotiate than the social partner, who sees its interests better safeguarded by the Commission proposal" (Welz, 2008, p. 298f.). But also the better-off side stays at the negotiation table hoping for an even more advantageous outcome (Welz, 2008, p. 299).

To increase a proposal's value for all parties involved and ultimately to suspend veto power for achieving an agreement among various actors with different preferences, Tsebelis and Hahm (2013) identified three strategies that negotiators can apply in bargaining processes that create win-win solutions: compromise, compensation and/or elimination.
These strategies are based on two major assumptions: Negotiations take place in a multi-dimensional policy space and policies are dividable.

Multidimensionality is assumed because the use of a single policy dimension might "not always be enough to convey even the big picture" (Benoit & Laver, 2006, p. 13). Rather, complicated issues would make the presumption of multiple underlying dimensions of contestation to show a "map of conflict" (Selck, 2004, p. 207) more realistic (Tsebelis, 2010, p. 8).

These policy dimensions are not about "absolute values" but are of a "dividable nature" which means that politics is not about "bipolar" yes or no decisions, but that a "more" or "less" on a policy dimension is possible (Nawrat, 2012, p. 129). Furthermore, veto players' policy positions are moveable. Thus, it is rather suitable to speak of *ideal* positions or *preferences* as understood as "the set of desires that motivate a given individual in a particular context" (Benoit & Laver, 2006, p. 15). If veto players were free from any restrictions, they would choose their ideal policy. But as they are involved in "social and political interactions with others" that restrict this possibility (in the case at hand they are involved in a veto game as described above), they have to adjust their behaviour within that context in order to reach an agreement as close as possible to their own ideal position (Benoit & Laver, 2006, p. 16).

One of Tsebelis and Hahm's (2013) consensus strategies aims at settling an agreement leaving the context unchanged. This is the *compromise* approach. Here, the final outcome is located in the space already determined by the pre-existing policy dimensions within which each actor has a different preference. Thus, the number of underlying dimensions is not altered (Tsebelis & Hahm, 2013, p. 19). This is only possible when a winset exists within which the compromise can be located.

The number of policy dimensions is not fixed however. As explained previously, the social partners enjoy considerable discretion to deviate from the initial Commission proposal. Hence, the ESD procedure allows for the addition and subtraction of policy issues. Mathematically, there can be an infinite number of dimensions (and Tsebelis emphasises that his veto player theory's "conclusions hold in any number of dimensions" (2002, p. 156)). It is only for practical reasons that mostly a maximum of three dimensions is used because this is what human beings can "easily visualize" (Benoit & Laver, 2006, p. 20).
Accordingly, the other two consensus approaches, compensation and elimination, aim at manipulating the context of the negotiations via increasing or decreasing the dimensionality of the dispute.

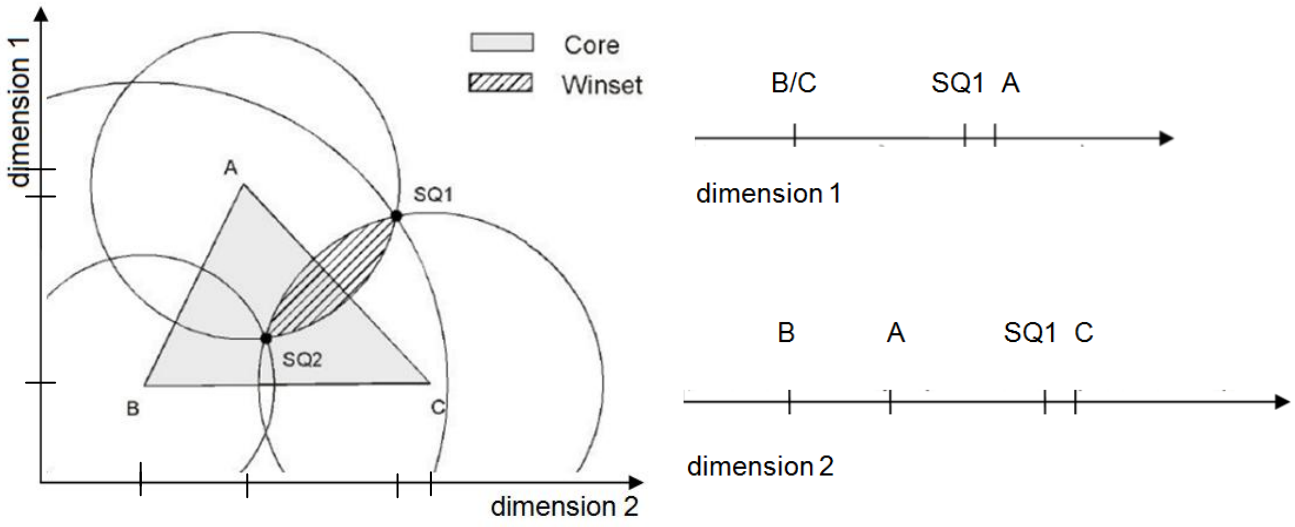
The *compensation* strategy entails an addition of dimensions to achieve agreement: "One actor in (some of) the existing dimensions gets compensated by the introduction of new dimensions. This satisfies the would-be losers, and entices

them to accept the deal." (Tsebelis & Hahm, 2013, p. 19). Through introducing favourable new items to an agreement or separating previously combined items, an actor gets compensated that would otherwise consider the outcome to be harmful to its self-interest (Tsebelis & Hahm, 2013, p. 13). For example, agreement on a defense budget can be facilitated by dividing it into sub-budgets for the army, navy, aviation, marines, etc. (Tsebelis & Hahm, 2013, p. 19).

Conversely, *elimination* strategy consists of decreasing the number of underlying policy dimensions to achieve agreement by eliminating dimensions of disagreement. This can happen by "removing something from the initial document" (Tsebelis & Hahm, 2013, p. 21) in two ways: On the one hand, ambiguity can be increased (decreasing precision) "so that different behaviours can be considered as consistent with the text" (Tsebelis & Hahm, 2013, p. 21). On the other hand, some of the debate's issues can be discarded altogether "in which case different behaviours are obviously permissible" (Tsebelis & Hahm, 2013, p. 21).

Compensation and elimination can create a winset or change the size of a winset and the core (Tsebelis & Hahm, 2013, p. 19), as can be seen in the SQ1 situation in figure 3. It shows a situation where veto players have to make a decision on a two-dimensional question. As the existence of a winset indicates, there is the possibility to reach unanimous agreement. But, had the veto players to decide on each of the two dimensions separately, the status quo would have survived in both dimensions because in both decisions, veto players' ideal position were located 'left' and 'right' of the status quo and thus at least one player always prefers the status quo to any other ideal position of the other actors located on the one dimension (see figure 4). Thus, the addition of a second issue helped making unanimity feasible.

Figure 4. *Defeating status quo 1 in a two-dimensional decision situation (Tsebelis, 2002, p. 22) vs. survival of status quo 1 when the same dimensions are decided separately (own depiction)*



2.2.4 Connecting structures, processes and outcomes in COCOCAs

Summing up, how is the shadow of hierarchy expected to affect the content of social partners' agreements in European social dialogue's COCOCAs? The previous sections demonstrated that the ESD's governance structure constitutes a *Möglichkeitsraum* (possibility room) for the actors involved in it: When entering the second stage of social partner consultation in ESD, the two sides of industry have to proof their ability to reach consensus. This crucially depends on what they expect the EU institutions to do in case of social partners' non-agreement. The Commission's labour and social law proposal and what the social partners expect to be made of it by the Council thus constitutes the shadow of hierarchy. It is the reference point to which labour and management compare proposals for agreement of the other side of industry with. They compare their potential utility gains from this proposal with the benefits they would attain from the default outcome. Hence, veto player theory helps to understand the institutionally-based possibility of ending the political labour-management process.

These structures "promote specific modes of coordination" (Börzel, 2010, p. 196): While the ESD institutions allow for a quick death of veto players' interaction, at the same time, the social partners are granted a room for manoeuvre. This opens the door to steer the negotiation process towards a successful route: Content-wise, the social partners are not strictly bound to the Commission proposal. While they can try to find a compromise amongst the issues introduced by the Commission, they are also free to add new ones (compensation strategy) or subtract items from the agenda (elimination strategy) in order to strike a joint-deal. This modification of the Commission text is not happening arbitrarily, but again derives from a comparison by management and labour of the default outcome with a newly introduced proposal by the respective other social partner.

Consequentially, structures and processes are "inherently interlinked" (Börzel, 2010, p. 196). That way, the default outcome, or as it was previously called in ESD literature, the shadow of hierarchy, significantly affects the final shape and thus the outcome of the EU's social and labour legislation in ESD.

3 Methodology: or how to tell a convincing story

In the previous chapter, a game theoretical model that aims at explaining how the shadow of hierarchy in ESD influences the content of European social partners' collective agreements was deductively formulated. This model is "a schematic statement of a theoretical argument, a hypothesized parsimonious abstraction or simplification of "reality" that depicts a deductively sound, systematic, regular relationship between specified aspects of reality and helps to explain that relationship" (Büthe, 2002, p. 482). As will be pointed out in this chapter, this thesis' data collection and data analysis is based on causal mechanisms that in combination with the rational choice approach promise to offer valuable insights into political processes. Because the role of rational choice theory in mechanism-based research will be explained in more detail, this chapter should not be seen as a clear cut from the previous 'theory' chapter, rather, it helps specifying the model.
In the next chapter, this model will be exposed to empirical material of actual social partners' negotiations. This chapter explains how this will be done. The aim is not to reject the model if it does not fit the data, hence *falsification*, but rather *reformulation* of the theoretical considerations that help to explain how Commission proposals influence COCOCAs' substance (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 16). This empirical test will be conducted through a case study.

A case study, according to Gerring (2004, p. 342) can be described as an "intensive study of a single unit for the purpose of understanding a larger class of units." Case studies cannot reveal "true causal effects" but can "shed light on causal mechanisms" (Gerring, 2004, p. 349). Only experimental designs can reveal causal inferences as they can control for causal effects of variables other than the one of interest (Shadish, Cook, & Campbell, 2002). By the intensive study of one case however (with its "characteristic style of evidence-gathering – over-time and within-unit variation" (Gerring, 2004, p. 349)), causal mechanisms that link the dependent and the independent variable should be identified. "Case studies [...] allow one to peer into the black box of causality to the intermediate causes lying between some cause and its purported effect. Ideally, they allow one to "see" *X* and *Y* interact" (Gerring, 2004, p. 348).

3.1 Measuring changes in dimensionality and the need for process-tracing

As was shown previously, influence on COCOCA outcomes can be characterised by changes in the proposal's dimensionality. How, then, can changes in dimensionality be measured? Tsebelis and Hahm (2013) and Tsebelis (2013) present a method that is based on the assumption that agreements need to be reached among multiple dimensions of an underlying policy space. Within each dimension one of the three strategies of compromise (preservation of dimensionality), compensation (addition of dimensionality) or elimination (subtraction of dimensionality) can be applied "as a measurable variable which helps us [to see] how agreement was achieved" (Tsebelis and Hahm, 2013, p. 24).

Very close attention needs to be paid to the meaning of words as the use of language is supposed to be chosen deliberately by the negotiation parties. A change of words in different drafts of the agreement compared to the content of the default outcome that would most probably not find unanimity if it remained unchanged implies a change of dimensions in order to make the proposal mutually agreeable (Tsebelis & Hahm, 2013, p. 44).

In the *compromise* strategy, words are simply replaced by others that can be located on an issue continuum of the positions held by the negotiators (Tseblis & Hahm, 2013, p. 45).

Compensation can be detected by the introduction of new concepts and new goals (Tsebelis & Hahm, 2013, p. 45, 48). When an "and" is replaced by an "or" compensation takes place because the text is "moving from an intersection to a union of content of the words involved" (Tsebelis & Hahm, 2013, p. 46).

In the reversed form, the same is true for the *elimination* strategy (Tsebelis & Hahm, 2013, p. 46). According to Tsebelis (2013), elimination which aims at either reducing precision (increasing ambiguity) or restriction of scope (Tsebelis & Hahm, 2013, p. 45) is the most common strategy in EU politics to reach unanimous decisions. More detailed explanations of existing concepts hint at reduction of scope (Tsebelis & Hahm, 2013, p. 45). Specificity is reduced when words like "shall" or "always" are replaced with "may" or "most of the time", or by replacing high standards with lower ones (Tsebelis, 2013, p. 1091). Furthermore, a text becomes less specific when

"- the list of conditions increases (since the rule will be applied less often);
- the number of goals is reduced (since the rule becomes less ambitious: if the bill is presented in positive mode, adding goals increases specificity; if it is worded in a negative way (specifying the exceptions), then adding exceptions decreases specificity);
- the number of means is reduced (the bill becomes less effective);
- the time of implementation is moved to the future." (Tsebelis, 2013, p. 1092)

This method entails two potential biases: Firstly, it might miss "hidden compensation" which are compromises that took place before the first draft or compromises across bills (Tsebelis & Hahm, 2013, p. 57).

Secondly, compromises might be underreported because the other two strategies (elimination and compensation) may also include compromises. However, in these cases, elimination and compensation will be seen as the "major strategic device to reach agreement" (Tsebelis & Hahm, 2013, p. 58).

If it can be observed that the negotiation parties have diverging ideal positions and that the final agreement shows a change in dimensionality compared to the Commission proposal, some rational choice theorists would probably consider this congruence of theoretical expectations and outcomes as being sufficient to claim causality because "a causal mechanism is implicit in the internal logic of [their] deductive theories and needs no further explication or demonstration if the theory generates successful predictions" (George & Bennett, 2005, p. 203). However, congruency does not "constitute acceptable causal explanation" unless the causal effects of independent variables and causal mechanisms are proofed (George & Bennett, 2005, p. 208).
As this thesis' aim is to better understand the shadow of hierarchy's impact on the negotiators, explicit reference will be made to causal mechanisms of ESD negotiations by opening the "black box" of decision-making through the application of the process-tracing method – or, as will later be pointed out, a specific form of process-tracing that emphasises its theory-development component: analytic narrative.

3.2 Process-tracing through analytic narratives

3.2.1 Game theory and causal mechanism

Whereas correlations state that "if X, then Y", causal mechanisms "provide for a more detailed and in a sense more fundamental explanation" by describing a "process ("X leads to Y through steps A, B, C")" (George & Bennett, 2005, p. 141). The study at hand thus asks which steps (A, B, C) connect the Commission's announcement to start the second stage of ESD negotiations (X) with the unanimous adoption of a final text that is mutually acceptable to both sides of industry (Y). Causal mechanisms combine three different types of social mechanisms at different levels: situational mechanisms, action-formation mechanisms, and transformational mechanisms (Blatter & Haverland, 2012, p. 95).

The *situational mechanism* describes who the actors are in the game and what their positions are (Petersen, 1999; Blatter & Haverland, 2012, p. 96). The *action-formation mechanism* is about "theoretical micro-foundations, general assumptions about the behavior of individuals" (Blatter & Haverland, 2012, p. 95). The *transformational mechanism* finally outlines the institutional environment (Blatter & Haverland, 2012, p. 97), which in this paper was conceptualised as a veto game with the possibility of changing a policy proposal in order to reach consensus.

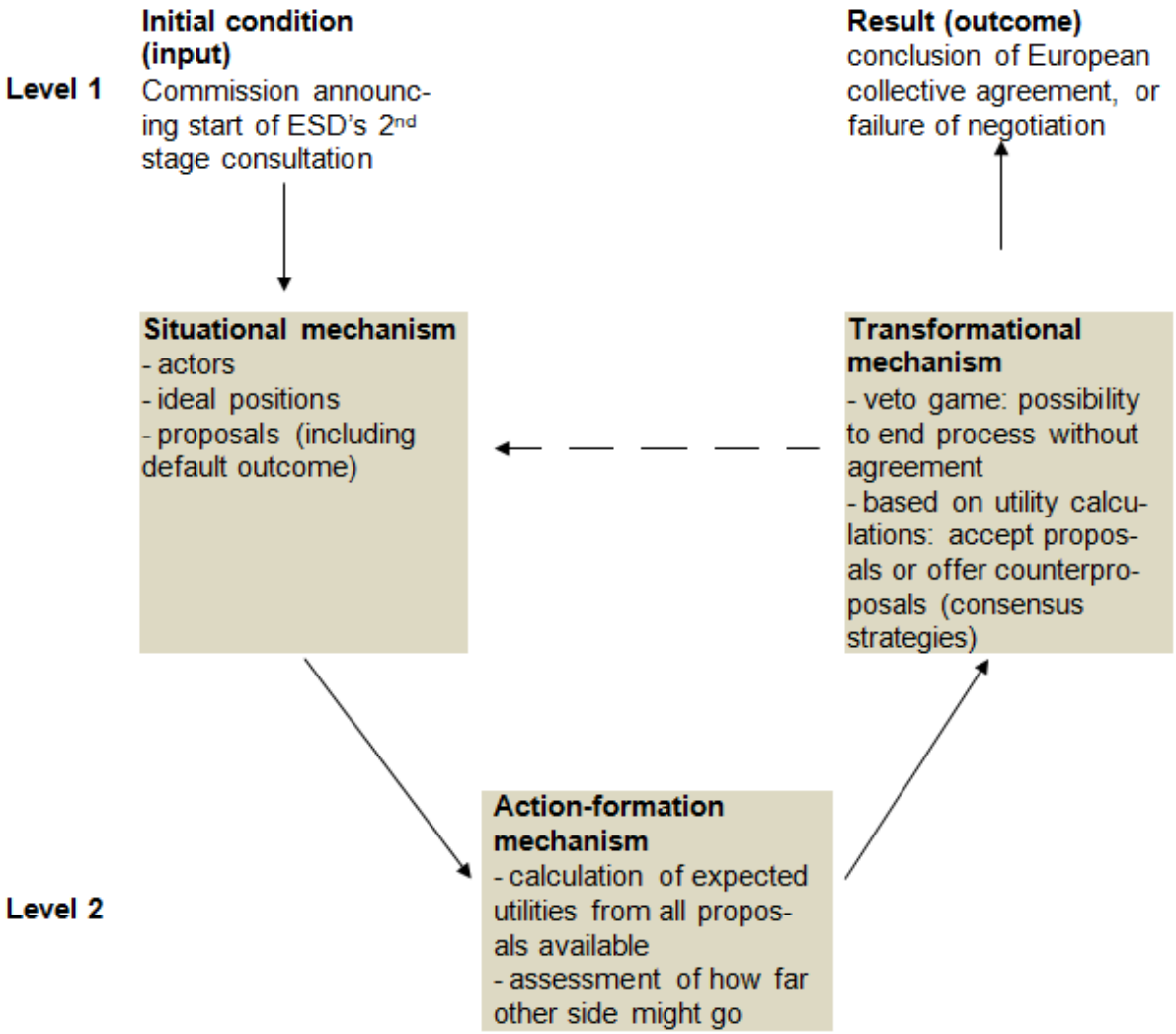
Ideally, these mechanisms should be meaningfully elucidated and connected to each other: „A full-fledged mechanism-based explanation comprises a multilevel model based on generic social mechanisms at the micro level [note: action-formation mechanism] and the links between the micro and macro levels [note: situational mechanism, transformational mechanism and output] of analysis and the specification of these three types of social mechanisms for the cases under investigation. Within such a multilevel model, each specified social mechanism has the status of a necessary condition for the outcome, and the combination of the different mechanisms is viewed as a sufficient condition for the outcome" (Blatter & Haverland, 2012, p. 97).
Necessary condition means that "the outcome would not have occurred without this condition. Nevertheless, other factors have to be added to make the outcome actually occur. In other words, the existence of a necessary condition makes the outcome or the next step in a causal chain possible, but complementary or contextual conditions must be included to explain why it actually occurred" (Blatter & Haverland, 2012, p. 120).
A factor is a sufficient condition if it "has been able to produce the next step in a causal chain or the final outcome without further causal factors. Therefore, the causal strength of a sufficient condition is higher than the causal strength of a necessary condition within a causal chain" (Blatter & Haverland, 2012, p. 120).

Therefore, game theory is a good means to „explain how changes in some macro-level phenomenon […] led to changes in some other macro-level phenomenon […]" (Eriksson, 2011, p. 40) because it "requires a specification of actors [note: situational mechanism], choices [note: transformational mechanism], and constraints/incentives [note: action-formation mechanism]" (Petersen, 1999, p. 65). It does so by providing a micro-level mechanism that makes assumptions about how rational actors would react upon changes in one macro-level phenomenon and how their change in behaviour thereby results in changes in social outcomes (Eriksson, 2011, p. 40). The rational choice theory's micro-level thus step-by-step links causes to effects (Eriksson, 2011, p. 227).
Consequentially, in game theory, the micro-level or action-formation mechanism comprises the concept of actors being *homines oeconomici*: They have "consistent preference rankings and aim at maximizing utility – and often that their utility consists of what is in their self-interest and/or that they calculate costs and benefits carefully when making decisions" (Eriksson, 2011, p. 5).

The shadow of hierarchy is to be placed within the situational mechanism. From there, it glares into all other following mechanisms of the causal chain: After the input (initial condition) of the Commission declaring its intention to become active legislatively in a specific policy, this Commission's initiative and what the social partners expect the Council to make of it (default outcome) forms an alternative outcome within the situational mechanism among all the proposals made by the social partners. In the action-formation mechanism, the social partners calculate the expected utility of each proposal on the table, hence the Commission initiative as well as suggestions for amendments made by each side of industry,

and they rank them according to their respective preferences. Based on these assessments, the transformational mechanism then results in the social partners' moves to either accept or block proposals of one another and even to decide to stop negotiations or to offer counterproposals in the form of one of the three consensus strategies identified earlier. Counterproposals then create feedback loops: They form new alternatives that become part of the situational mechanism, being again assessed in terms of utility maximisation compared to other alternatives and potentially leading to new proposals or rejection. These processes can result in the outcome of the adoption of a European collective agreement, or the failure of social partners' dialogue on that policy. Figure 5 provides a schematic depiction of these hypothesised causal paths.

Figure 5. *Different types of social mechanisms that together form a causal mechanism (adapted from Blatter & Haverland (2012, p. 95))*



3.2.2 Analytic narrative

One method to identify and explore mechanisms behind observed social phenomena is process-tracing (George & Bennett, 2005, p. 147). It does so by employing "multiple types of evidence […] for the verification of a single inference – bits and pieces of evidence that embody different units of analysis […]" (Gerring, 2007, p. 173). With the help of these materials, the researcher seeks to create a dense description of the processes under investigation: "By reading documents, laboring through archives, interviewing, and surveying the secondary literature, we seek to understand the actors' preferences, their perceptions, their evaluation of alternatives, the information they possess, the expectations they form, the strategies they adopt, and the constraints that limit their actions. We then seek to piece together the story that accounts for the outcome of interest" (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 12).

The data collected is thus qualitative, which is especially well-suited to follow theoretical chains of reasoning and for "locating and tracing unexpected deviations" (Weiss, 1998, p. 86).

Besides official documents like consultation papers, agreements and treaties, the data for this thesis will mostly stem from written internal ETUC communication: reports on negotiation rounds, email responses of national affiliates on new proposals and propositions about how to react to the other camp's moves. Interviews were not feasible, because the negotiations to be analysed took place in the late 1990s and people's memories usually are "surprisingly unreliable" (Weiss, 1998, p. 192). In order to meet the danger of a trade union bias of the material, secondary literature on the chosen case will also be taken into consideration. However, with the exception of Ahlberg (2000), scholars (Falkner, 2011; Welz, 2008; Hartenberger, 2001; Léonard, Erne, Marginson, Smismans, & Tilly, 2007; Degryse, 2000; Keller & Bansbach, 2001; Falkner, 2003) have not gone deep into the negotiation process, but have described it rather anecdotally. Still, their accounts provide a background understanding of the processes and the ETUC communication available does not contradict these depictions, thus limiting the danger of a trade union bias.

This approach is *narrative* because "it pays close attention to stories, accounts, and context" (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 10). But it is also *analytic* in "extracting explicit and formal lines of reasoning, which facilitate both exposition and explanation" (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 10). In this paper, the narrative is structured by and interpreted through game theoretical considerations that propose mechanisms explaining how structures create incentives that shape individual choices and thus collective outcomes. It is thus an analytic narrative.

Through its analytic narrative, process-tracing tests can help to establish that "(1) a specific event or process took place, (2) a different event or process occurred *after* the initial event or process, and (3) the former was a cause of the latter" (Mahoney, 2012, p. 571). They can hence proof causal relationships: A causal relationship can only be established if a) X precedes Y, b) X correlates

with Y, and 3) the relationship between X and Y cannot be explained in terms of some third variable (Shadish, Cook, & Campbell, 2002, p. 6).

In order to do so, process-tracing embodies different kinds of approaches: a) *hoop tests* whereby it must be shown that the hypothesised cause and outcome (here divergent interests, a shadow of hierarchy and the use of one or more of the consensus strategies) occurred in order to warrant the model further consideration (Mahoney, 2012, p. 574f.), b) *comprehensive storylines* that present the "big picture" of the major steps and sequences of the overall process, c) *smoking gun observations* that "provide detailed descriptions of important moments and reveal close spatio-temporal connections between causes and effects" (Blatter & Haverland, 2012, p. 143), and d) *confessions* which are statements revealing the perceptions, motivations and anticipations of major actors (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, pp. 119, 143).

However, game theory will not be a strict guide on the application of these four process-tracing approaches. Rather, it serves as a theoretical anchor point (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 692), a heuristic device that structures the narrative (Büthe, 2002, p. 487; Petersen, 1999, p. 61). Thus, the analytic narrative is an iterative approach that engages a dialogue between theory and data: "We begin all of our research with some basic information and some theoretical priors, then we accumulate new information and formulate new models" (Bates, Greif, Levi, Rosenthal, & Weingast, 1998, p. 694). Thereby, the method is also open for detecting alternative explanations that were not theorised a priori and that can enhance the models validity: "If the narrative cannot be written in terms of the model, something is wrong with the model" (Büthe, 2002, p. 487). Furthermore, it can help to avoid the aforementioned two biases of measuring changes in dimensionality.

The quality of conclusions drawn from process-tracing is highly dependent on the availability and accessibility of case material. With a lack of empirical material, a dense description of the case's processes – the very core of the process-tracing method – is not possible and causal inferences become "provisional" (George & Bennett, 2005, p. 222; Blatter & Haverland, 2012, p. 25).

3.3 Case selection

The process-tracing method has implications for the case selection: Providing convincing narratives demands the collection of empirical material stemming from diverse sources and space to lay down the history of the case. Hence, for the sake of the narrative approach, I will not analyse all COCOCA negotiations (Blatter & Haverland, 2012, p. 100). Furthermore, accessibility of sources of information is a crucial criterion for case selection in process-tracing (Blatter & Haverland, 2012, p. 102). Also, the case shall be a positive one, hence where social partners were able to reach consensus, because the causal mechanism cannot be present in cases with a negative outcome, and hence these cases are not relevant for theory-testing process-tracing (Beach & Pedersen, 2012, p. 14).

Considering that this paper only provides space for one process-tracing analysis of a COCOCA negotiation and that selection is based on the dependent variable, it will be opted for a least-likely case, a case where the outcome is positive even though the independent variables' values would only "weakly predict an outcome or predict a low-magnitude outcome" (George & Bennett, 2005, p. 121). This approach allows to draw "Sinatra inferences" (Levy (2005, p. 144) as cited by Bennett & Elman (2006, p. 462)) that provide for a generalisability of the study's findings: "If the theory can make it here, it can make it anywhere" (Bennett & Elman, 2006, p. 462). Thus, one successful COCOCA negotiation will be chosen, where the initial constellation of social partners' ideal positions and the Commission proposal would have suggested highest likelihood of failure of reaching unanimous agreement because one of the parties would have had a big incentive to defect from the negotiation. Or, in Tsebelis' veto player terminology, the case where either no winset was existent or where the winset was the smallest. So far, three COCOCAs have been concluded at cross-sectoral and six at secotral level ((ETUI, 2013) and own counting based on Commission online data base). Of these successful cases, tensest negotiations have taken place in the 1998/99 intersectoral negotiations on fixed-term work contracts (Welz, 2008; Falkner, 2003; Falkner, 2011). The social partners had very opposing stances on the Commission initiative and negotiations were about to break down twice due to these differences. Prospects for success were thus put into doubt at some points. However, after an extension of the negotiation deadline, the social partners reached an agreement. ESD on fixed-term work contracts hence constitutes a good example for a least-likely case.

One might wonder about the practical relevance of analysing an instance of *cross*-sectoral social dialogue, considering the facts that the case to be analysed was the last successful one of this kind and that the cross-sectoral social dialogue lies idle since the early 2000s. However, many scholars are of the opinion that European cross-sectoral dialogue is not dead but waits for a revitalisation by a Commission that is more European labour law-friendly than were the ones since the early 2000s (Keller, 2003, p. 426; Dufresne, Degryse, & Pochet, 2006, p. 11; Clauwaert, 2011, p. 174).

This case is furthermore interesting because it puts issues of flexibility for employers versus security for employees centre-stage. As the Commission (2006) notes, these two principles constitute the main principles of contestation between labour and capital in most of ESD negotiations and thus offers insights being relevant beyond the fixed-term work case: Employers, in order to remain competitive in the globalised economy, favour the development of flexible labour markets with its increasingly diverse contractual forms of employment in order to be able to swiftly adapt to consumer demands and to avoid costs of compliance with direct and indirect employment costs, while this faces employees with employment and income insecurity and thus affects "the relative stability of the associated working and living conditions" (European Commission, 2006, p. 3ff.). Due to this important management-labour cleavage, an analysis of the fixed-term work contract negotiations should therefore provide for a broader generalisability of findings.

Moreover, for methodological reasons, these negotiations are well-suited to test and refine the model, because knowledge about the shadow of hierarchy is relatively concrete: the Commission has tried to regulate this policy since the beginning of the 1980s. In 1994, the German Council Presidency made a last attempt to pass legislation on that matter in the Council, but failed due to the UK's veto. As will be shown, during the 1998/99 ESD negotiations, this German 1994 draft proposal was perceived as a possible re-starting point for new Council negotiations should the social partners' talks fail. It thus constitutes the shadow of law.

To sum up, this study conducts an analytic narrative of a least-likely case of COCOCA negotiations. It is thereby guided by causal mechanisms that are supposed to show a link between some macro phenomena and their micro foundations. It should thus reveal the link between ideal positions, the default outcome and strategic choices of the social partners that lead to the conclusion of a European collective agreement.
The aim is to gain insights into these processes in order to prove and/or refine the causal chain of the hypothised connection between mechanisms.

4 Theory asks data: a case study of ESD negotiations on fixed-term work

In this chapter the ESD negotiations on fixed-term work contracts will be analysed in order to test and refine the veto game theoretical model developed in the first part of this paper.

Therefore, first the road to the ESD on fixed-term work will be described. It will provide information about why the dialogue was started, the fundamentally divergent interests of both sides of industry on that matter as well as what formed the shadow of hierarchy in these negotiations, namely the German Presidency proposal on fixed-term work contracts from November 1994 and in parts the social partners' agreement on part-time work from 1997 (initiating condition [input]).

Thereafter, the most controversial points of the negotiations will be analysed, that is the regulation of fixed-term contracts, non-discrimination of fixed-term workers, information and consultation rights of employees' representative bodies and temporary agency work. For each of these issues the ideal positions of management and labour will be outlined as well as what the respective shadow of these provisions looked like (situational mechanism).

Then the negotiation process of each of these topics will be delineated looking at which proposals were put forward and how they were evaluated by each side, especially compared to the 1994 and 1997 texts (action-formation mechanism) and in the adoption of which consensus strategy this resulted (transformational mechanism) that finally made the agreement adoptable for both sides of industry (result [outcome]).

After that, an interim-conclusion follows with an assessment whether an influence of the shadow on the agreement's content was detectable during the negotiation process by emphasising connecting lines between the different mechanisms.

4.1 The road to ESD on fixed-term work

Community-wide regulation of "atypical" work contracts, that is work that deviates from full-time contracts with permanent duration – was on the European Commission's agenda since the early 1980s. Its first proposal for a Council Directive including the issue of fixed-term work originates from 1982 (Ahlberg, 2000, p. 46; Welz, 2008, p. 404). However, when the Council could not reach unanimous agreement on this proposal, the Commission withdrew its initiative in 1990

and introduced three new proposals the same year (Ahlberg, 2000, p. 46), on "certain employment relationships with regard to working conditions" (90/C 224/04), on "certain relationships with regard to distortions of competition" (90/C 224/05) where fixed-duration contracts were dealt with as one form of atypical work alongside with part-time work and temporary agency work, and on "measures to encourage improvements in the safety and health at work of temporary workers" (90/C 224/06). Only on the last one the Council could reach an agreement, transposing it into a Council Directive (Ahlberg, 2000, p. 46).

In November 1994, the then-German Council Presidency tabled a last compromise proposal for a Directive on fixed-term contracts. When it became clear, that this proposal would not gain unanimity among the national ministers, the General Secretary recommended to trigger the European social dialogue according to Art. 138 and 139 TEC (today Art. 154 and 155 TFEU) (Hartenberger, 2001, p. 126).

The Commission followed this recommendation and started its first round of consultation in September 1995 on the possible direction of Community action in that field, based on Art. 3 of the Social Protocol (European Commission, 1995, p. 5) that together with the Maastricht Treaty entered into force in 1993.

Thereby, the Commission invited the social partners to express their views on *inter alia*, whether they "share the Commission's view that European regulation of the conditions governing part-time, fixed-term and temporary work is necessary" (European Commission, 1995, p. 6). The Commission furthermore asked what kind of European regulation would be desirable and whether "such action" should "simultaneously cover part-time, fixed-term and temporary workers or should there be individual action for each of these categories". Moreover, the Commission inquired whether the social partners favoured a "comparable treatment between permanent, full-time employees and part-time, fixed-term and temporary workers" in the field of "working conditions, social security and complementary social security provision" (European Commission, 1995, p. 6).

In a second consultation round, in April 1996, the Commission summed up the social partners' responses. Generally, social partners showed to be supportive of the Commission's initiative. While the trade unions "expressed their strong support" (European Commission , 1996, p. 2), the employers were more reserved. Though doubting the need for EU legislative action, they were also of the opinion that "common arrangements" should be in line with the Essen conclusions, namely that efforts should be undertaken aiming at "increasing the employment-intensiveness of growth, in particular by more flexible organisation of work in a way which fulfils both the wishes of employees and the requirements of competition" (European Commission , 1996, p. 2f.). Based on this positive feedback, the Commission affirmed that it intended to propose Community legislation and laid down its views on the content of a "Community initiative on flexibility in working time and security for employees" (European Commission , 1996, p. 4). Instead of providing a first draft proposal, the Commission set out a list of principles it considered important for the regulation of that issue (European Commission , 1996, p. 4ff.).

UNICE, CEEP and the ETUC agreed to take up negotiations with each other on atypical work. However, they wanted to negotiate each form of atypical employment in separate agreements (Hartenberger, 2001, p. 126). In 1997, they reached an agreement on part-time work (European Communities, 1997). In its preamble the social partners stressed their will to conclude another agreement dealing with fixed-term work. The European Commission officially accepted ESD negotiations on fixed-term work on 20 March 1998 (Welz, 2008, p. 404).

Both camps nominated spokespersons. CEEP and UNICE formed a joint negotiation team. Their speaker was Dan McCauley from the Irish Business and Employers Confederation (Ahlberg, 2000, p. 53). The ETUC chose Jean Lapeyre, then-deputy general secretary, as its spokesperson (Ahlberg, 2000, p. 54). Both sides agreed on Jean Degimbe, former Director General of the DG for Employment, Industrial Relations and Social Affairs (DG V), to chair the negotiations as a neutral person. He limited his role to "calling persons to speak, to answer questions directed to him and to occasionally give his view on the interpretation of provisions or concepts of EU law" (Ahlberg, 2000, p. 49). All texts were exclusively drafted by the negotiation parties' representatives (Ahlberg, 2000, p. 49). The chair hence does not need further attention in the following analysis.
At the tenth round of negotiations and after two almost-breakdowns of the dialogue and after the nine month deadline for ESD negotiations which was about to expire the day before Christmas was extended for another three months, management and labour reached an agreement on 14 January 1999 (Welz, 2008, p. 404). On 28 June 1999 the social partners' agreement was adopted by the Council and transformed into Council Directive 1999/70/EC concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP (Welz, 2008, p. 405).

4.2 Management's and labour's general stances on fixed-term work contracts

As management's and labour's mandates for negotiations on fixed-term work were based on different "logics" (ETUC, 1998a), they had opposing ideal positions from the start:
For the UNICE, rules on the *abuse* of fixed-term contracts by negotiating a non-discrimination clause – whereby "the necessity to apply a different treatment because of the temporary nature of the work relation is fully taken into account, and that comparable situations are compared" (UNICE mandate, point 4c (UNICE, 1997)) – would be sufficient because fair conditions of employment would render the need of regulating the *use* of fixed-term contracts unnecessary (ETUC, 1998a; Ahlberg, 2000, p. 55). UNICE's mandate states that its "*only* [own emphasis] objective […] shall be to improve employment perspectives by promoting flexibility in the labour market and reducing obstacles to the development of fixed-term

work, thereby helping the competitiveness of European companies while taking into account the position of the workers concerned." (UNICE mandate, point 3). Obstacles were for example seen in "restrictions regarding the conditions under which a fixed-term contract may be concluded or ended before the term foreseen, etc." (UNICE mandate, point 4b)). Negotiations shall be restricted to "questions which require qualified majority voting under article 2 of the social policy agreement" (UNICE mandate, point 4 e)).

On contrary, for the ETUC, regulating the *use* of fixed-term contracts and non-discrimination were two separate and necessary features for an agreement on fixed-term work (ETUC, 1998a). By putting fixed-term workers on equal footing with open-ended contract workers, employers should be prevented from using the former in order to avoid obligations they have towards workers of the latter group (Ahlberg, 2000, p. 52). Thus, the ETUC's negotiation mandate entailed a non-discrimination clause *and* conditions for the *use* of fixed-term contracts that should lead to a limitation of their conclusion.

Furthermore, the ETUC demanded the introduction of consultation and information rights of employees' representation bodies – that should also include fixed-term workers – on the use and development of fixed-term contracts in the company (ETUC mandate, point 8 (ETUC, 1998)), whereas the UNICE mandate instructs its negotiators to avoid the adoption of consultation obligations towards employees' representatives (UNICE mandate, point 4g).

Moreover, the UNICE's mandate emphasised the principle of subsidiarity: social partners at national level should be granted a role in the implementation of principles agreed upon at European level (UNICE mandate, point 4d,h).

4.3 The negotiation process

Despite their seemingly irreconcilable initial positions and management's preference for Community inactivity in this field of atypical work, how did the social partners reach an agreement? In the matters of highest contestation, did they adopt one or several of the consensus strategies to do so? And if so, did the shadow of hierarchy play a role?

4.3.1 Regulation of fixed-term work

By far the biggest stumbling block was the question of whether and how to limit the use or abuse of fixed-term contracts. The ETUC saw an urgent need to regulate the use of fixed-term work relationships as they were discriminatory "by its nature" ("e.g., it affected access to bank loans") (ETUC, 1998j). Thus, the ETUC's negotiation mandate required clauses on limitation of fixed-term work.

Each fixed-term work contract should be subject to "[r]easons, justification and limits (according to Directive 91/383, replacement for holidays, sabbaticals, maternity leave, parental leave, dependence on external funding…) on the use of this

form of contract" (ETUC mandate, point 8). The use of fixed-term contracts should be limited to a maximum period of 3 years (ETUC mandate, point 8) and fixed-term contracts may only be renewed twice (ETUC mandate, point 8). In an early draft of this clause, the employees made clear that member states shall be *obliged* to make all these three conditions (objective reasons from the first contract on, maximum total duration (3 years), limited total number of renewals (2 renewals)) binding and cumulative (ETUC, 1998e).

With these demands, labour's proposal was quite similar to the 1994 German Presidency text. Differences were that according to the German text, member states had to ensure at least one of the three conditions but would be free to make them cumulative. The 1994 text furthermore stipulated no concrete maximum duration for successive fixed-term employment contracts but left this period to be determined by the member state. Moreover, only the conclusion of successive contracts but not the first fixed-term relationship required objective reasons. Hence, the ETUC's proposal was of higher regulatory nature.

On contrary, for the employers, the 1994 texts' provisions and thus also the ETUC's proposal went too far. They consequentially rejected the German Presidency proposal (ETUC, 1998j). By negotiation mandate, management was instructed to "promote flexibility in the labour market and reduc[e] obstacles to the development of fixed-term work" (UNICE mandate, point 3). Dan McCauley argued that European regulation in this area was inacceptable because "any quantification would be arbitrary" and because the "Council would never agree" (ETUC, 1998k).

By the end of May, the employers showed some degree of reconcilability. For the first time they acknowledged that permanent employment contract were, and should remain, the normal standard of the labour market as a whole, while considering it a necessary feature of employment in certain sectors and/or occupations (ETUC, 1998k). At the same time, on 27 May 1998, they drafted a clause on the regulation of fixed-term contracts that was comparably vague: member states should have the *option* to impose a maximum duration of successive fixed-term work contracts "and the conditions under which they may be renewed" (Employers' proposal, 27 May). First time fixed-term contracts would thus remain unregulated. In the employees' view, this was "very unsatisfactory" (ETUC, 1998k).
Simultaneously, the employers offered formulations on all other elements of an agreement (i.e. definitions, scope, equal treatment/non-discrimination) (ETUC, 1998d). The ETUC considered this move as an attempt to "sidetrack" the trade unions from the issue of regulation (ETUC, 1998k). In response, the ETUC tried to "concentrate the employers' minds further on the question of regulation" and drafted new texts focusing on the regulation question and linked to this the purpose of the agreement (ETUC, 1998k).

Then, by mid-June, the employees showed some willingness to compromise. If the employers accepted the principle of regulation at European level, leaving the precise modalities of application to the national and sectoral level could be acceptable (ETUC, 1998d). Management reacted to this offer by referring once more to their proposal of 27 May. Still, this proposition was regarded as

insufficient and while referring to its own earlier drafts, the ETUC doubted the employers' willingness to reach a European agreement at all (DGB, 1998). Jean Lapeyre repeated the ETUC's stance that the principle of making fixed-term work conditional and introducing limits would be "nonnegotiable". Solely the way *how* to do it could be discussed. He pointed out that management's unwillingness to compromise would lead to an end of the negotiations (DGB, 1998), and reminded the employers on the strengthened role of the European Parliament in social policy matters since the entry into force of the Amsterdam Treaty: The European Parliament would only await an opportunity to "do something better" than the social partners (DGB, 1998).

The following months, the negotiations made no progress. By late September an ETUC document even remarked that "the actual negotiations had not yet really begun" (ETUC, 1998d). When the employers internally debated a change to the initial negotiation mandate in order to be able to make advances, the majority rejected that idea. Rather, the ETUC should continue to pursue its strategy of proposing European principles of regulation that shall be specified at national level. This strategy however, would have to go along with the principle of equal treatment and a non-regression clause, stipulating that a European agreement would not require the lowering of existing higher standards in member states (ETUC, 1998d). Recourse to the legislator was seen critically. The ETUC's General Secretary "warned against placing too high expectations in the possibilities of the European Parliament", the Commission and the Council: the Parliament would be occupied with election preparations, the Commission's "power to act would decrease still further bearing in mind that its mandate expired the following year" and even though the majority of the Member States were meanwhile led by social democrats, it would "in no way mean that the will of the trade unions would become reality in the wink of an eye" (ETUC, 1998d). Rather, instead of stopping dialogue or widening the mandate, the November 1994 German Presidency text should be aimed at as a possible compromise by the ETUC (ETUC, 1998d).

During a meeting on 27 and 28 October 1998, the employers made a new proposal that "represented a move in the right direction" for the trade unions, but was not acceptable anyway (ETUC, 1998m). Management insisted on the mere *option* for Member States to regulate the use of fixed-term work relationships. First time contracts should not need objective grounds, while renewals (that are not restricted in number) might. But when member states "have objective reasons for fixed-term work, there is no need for any other regulation" (ETUC, 1998m). Furthermore, the employers demanded for the introduction of a new bone of contention: company-level derogations by so-called "workforce agreements" (ETUC, 1998m). These derogations would have disempowered national trade unions at sectoral and intersectoral level by exemption clauses hitherto made by collective agreements being replaced by individual contracts with non-unionised workers. It was thus completely unacceptable for the ETUC (ETUC, 1998a; ETUC, 1998l).

During the negotiation round on 12 and 13 November 1998 the ESD on fixed-term work was close to its first breakdown. The ETUC made a new proposal on the issue of regulation, going down with its demands so that it almost "risked un-

derbidding even the last proposal of the German presidency of 1994" (Ahlberg, 2000, p. 57) that was regarded as the minimum: Not all fixed-term contracts would have to be based on objective grounds, but only renewals. Furthermore, it no more demanded specific quantifications for the number of renewals and the total duration of fixed-term work. The cumulative nature of the conditions should be upheld in a way that objective grounds and at least one more condition must be fulfilled (Ahlberg, 2000, p. 57). Moreover, the possibility for derogations negotiated by the social partners for sectors particularly concerned by specific and cyclical work patterns were offered (ETUC, 1998a).

The employers stipulated that member states should only be obliged to one of the conditions restricting the use of fixed-term contracts and it should be provided for the possibility of workforce agreements (ETUC, 1998n). While the ETUC considered its own proposal to be "a little better than the Council text [of 1994] and would represent added-value", the employers' suggestions were evaluated as "well inferior to the Council text of November 1994" (ETUC, 1998n).

Seeing no common ground for agreement, the labour unionists doubted the employers' willingness to compromise and announced that they would ask the ETUC Steering Committee on 19 November whether negotiations should continue (Ahlberg, 2000, p. 58).

During the Steering Committee it was expressed that "given the deregulation which has occurred since [1994] in numerous countries" the standards of the then-German Presidency proposal "would not necessarily be maintained" (ETUC, 1998a). Consequentially, the dialogue should be upheld with the 1994 Council text constituting "an acceptable minimum basis" (ETUC, 1998i).

Only some days later, at the next negotiation round on 26 and 27 November 1998, dialogue was about to collapse again. The ETUC conceded to management's demands by dropping its own request to make the conditions for fixed-term work contracts cumulative. Management's insistence upon the inclusion of company-level derogations was unbroken (Ahlberg, 2000, p. 58). Again, the trade union representatives saw now common ground for agreement and announced that they would recommend the ETUC's Executive Committee that was about to meet on 14 and 15 December 1998 that the legislator should take over, if employers did not change their position until then (Ahlberg, 2000, p. 58).

On 4 December 1998, the presidents and the general secretary of UNICE, CEEP and ETUC met during a "social dialogue mini-summit" which had nothing to do with the negotiations on fixed-term work. However, these persons agreed that further efforts should be undertaken in order to reach an agreement on that issue and urged the spokespersons to talk to each other. Jean Lapeyre and Dan McCauley met on 10 December 1998 and drafted a new regulation clause that contained no reference to the first contract, leaves no room for company-level derogations and makes the introduction of "one or more" conditions for fixed-term contracts obligatory (Ahlberg, 2000, p. 58f.; ETUC, 1998h; ETUC, 1998l).

Both spokespersons had to present this proposal to their respective organisations and get approval of the result. When no response had reached the ETUC until 14 December 1998, the Executive Committee debated the prospects of Community legislation in case that dialogue fails if the employers do not signal their agree-

ment in principle until noon the next day. The assembly had "no great optimism" about an initiative by the legislator, "since the Commission was clearly not inclined to take action in such a matter" (ETUC, 1998a). But even if it should trigger the legislative process, the 1994 text was not expected to be the starting point. Rather, the Committee estimated that "[t]his situation was likely to deteriorate" (ETUC, 1998a).
However, the next day, the employers responded with a revised text, including some words whose interpretation puzzled the ETUC. In the trade unionists opinion these changes of words might allow again for workforce agreements. In the employers view, the newly introduced words were "neutral phraseology" (ETUC, 1998l). Despite this conundrum, the Executive Committee considered that the employers' position had changed sufficiently in order to take this proposal as a restarting point and to resume ESD (ETUC, 1998l). As the negotiation deadline was about to expire, both parties requested the Commission to extend the deadline for another three months. The final negotiation round should take place from 11 to 15 January 1999. The social partners, however, already came to an agreement by 14 January 1999 (Ahlberg, 2000, p. 59).

The final agreement pretty much looks like the text agreed on 10 December 1998. Member States shall only be obliged to regulate *successive* fixed-term work contracts (clause 5.1). First time contracts of this kind thus remain unregulated. The three conditions as demanded by the ETUC are enlisted in the final agreement. Member States have to put in place "one or more" of them (clause 5.1). Thus, cumulating conditions for successive fixed-term work contracts is possible. Only renewal(s) of these contracts requires objective reasons (clause 5.1a)). The maximum total duration and the number of renewals of fixed-term work contracts are not specified by the agreement but to be decided by the member states themselves (clause 5.1b) and c)). The text does not provide for workforce agreements.

Comparing the final agreement on this clause and the negotiators' reference text, the German Presidency proposal of November 1994, the consensus strategy of elimination clearly prevailed.

First of all, the scope of the provision was reduced by including an objective for this clause: "to prevent abuse arising from the use of successive fixed-term employment contracts or relationships" (clause 5.1 of Council Directive 1999/70/EC (European Communities, 1999)). The 1994 text did not provide any specific objective in that clause.

The scope was further limited by adding some conditions to be met before member states and/or social partners shall impose regulation on successive contracts. Firstly, this shall only happen "where there are no equivalent legal measures to prevent abuse" (clause 5.1). Secondly, measures shall be introduced "in a manner which takes account of the needs of specific sectors and/or categories of workers" (clause 5.1).
While the final agreement upholds the three possible restrictions already proposed by the 1994 text, objective grounds, maximum total duration and maximum number of renewals, it makes the latter two less specific by not providing any quanti-

fication but leaving this to member states and/or social partners (clause 5.1 a)-c)). The strategy of elimination through imprecision was thus applied.

A remarkable change to the reference text is the addition of the role played by the social partners in the implementation of this clause: The German Presidency's regulation clause did not mention the social partners. In the final agreement however, member states shall regulate conditions for the successive use of fixed-term contracts, but only "after consultation with social partners in accordance with national law, collective agreement or practice". But also the social partners themselves shall be able to regulate in this field as stipulated by the agreement (clause 5.1). The special role of the social partners in the implementation and application of the agreement is furthermore emphasised in point 12 of the non-binding general considerations of the agreement. The addition of this element accounts again for the elimination strategy, this time by increasing ambiguity, because the enhanced role of social partners increases the discretion of implementation at national level. While the trade unions hope to use their negotiation power at national and sectoral level to "actively make use of the agreement in order to valorize its contents to the greatest extent possible" (ETUC, 1999), the employers expected a "hopefully liberal interpretation" for the implementation at national level (Clauwaert, 2001, p. 380).

Some compensation strategy can be found: While clause 5 only aims at regulating successive fixed-term contracts, point seven of the general considerations states that "the use of fixed-term contracts based on objective reasons is a way to prevent abuse". According to the ETUC, objective reasons thus also have to be provided for the first fixed-term contract (ETUC, 1998f). But as the general considerations do not have legally binding character, the value of this notion is questionable.

All in all, this clause in the social partners' agreement is quite similar to the German Presidency text of 1994. Through its reduced specificity however, its regulatory nature can be seen as being slightly below the German proposal.

4.3.2 Non-discrimination of fixed-term workers

The second biggest obstacle was the question of a non-discrimination clause, or quality of fixed-term work, as it was also called. This issue relates to the question to what extend fixed-term workers should enjoy certain rights as permanent workers.

In contrast to the regulation negotiations, the point of orientation was not the 1994 German Presidency text but the clause on non-discrimination from the European part-time work agreement concluded by the social partners the year before. Early on, Jean Lapeyre pointed out that there could be no agreement with equal treatment standards below the one agreed upon during the part-time work negotiations (ETUC, 1998c).

Yet the ETUC was aiming at reaching an even higher level of equal treatment. For the trade union representatives it was clear that fixed-timers should not be treated less favourable than permanent workers related to "supplementary

benefits such as complementary social protection schemes and continuing vocational training" (ETUC mandate, point 8). Only on objective grounds, meaning "grounds allowing different treatment, where such treatment corresponds to the real need to achieve a stated objective and is necessary for and appropriate to the achievement of that objective", different treatment was justified (ETUC proposal, 30 June).
Management opted for a more open and less stricter clause, because "the necessity to apply a different treatment because of the temporary nature of the work relation" must be fully taken into account (UNICE mandate, point 4c). However, by tabling a proposal that equals the 1997 text's clause, the employers signalled that they could live with the part-time agreement's clause. It allows for derogations on "objective grounds", without specifying what these are (employers' proposal, 27 May). Member States should be allowed to make "access to particular conditions of employment" dependent on a number of requirements: "period of service, time worked or earnings qualification" (employers' proposal, 27 May).
Furthermore, the principle of pro rata temporis should apply (employers' proposal, 27 May), meaning that certain dividable rights such as pay and duration of holiday have to be granted proportionally to the length of employment in relation to the period of assessment (Riesenhuber, 2009, p. 16).

As described earlier, the principle of non-discrimination originally was regarded as a sufficient regulatory feature by the employers to prevent abuse of fixed-term work contracts. However, the ETUC managed to focus the early negotiations on the question of regulation.
But by the second half of the negotiation period, the non-discrimination principle came back on the agenda more prominently when the employees recognised that they have to be more flexible on the question of the regulation clause (proposing a mere principle of regulation that will have to be specified at national level by member states and social partners). This flexibility in the regulation issue should be counterbalanced by a non-discrimination clause (ETUC, 1998a; ETUC, 1998d).

The final result was clause 4 that almost equalled the one of the 1997 part-time work agreement in that different treatment of permanent and fixed-term workers can only be justified on objective grounds and that the pro rata temporis principle shall apply. The specific application of the measures shall be defined by the member states and/or the social partners. Compared to the 1997 agreement, however, the principle of non-discrimination was strengthened by removing some conditionality for the access to certain rights. In the fixed-term work agreement, it was acknowledged, that period of service qualifications shall be the same for fixed-term workers as for permanent workers. Only on objective grounds this principle should not apply. Thus, restrictions to access of certain rights on grounds of period of service, seniority or earnings qualifications as stipulated in the part-time work agreement were abandoned (ETUC, 1998g).

Quality of fixed-term work was further moved in the directions of ETUC's demands by clause 6 "which opens up possibilities of continuing vocational train-

ing, career development and access by fixed-term workers to permanent positions" (ETUC, 1998g).

The employers however could make a point in preventing the inclusion of complementary social protection schemes into the agreement – a discriminatory element of high importance to the ETUC. During the last negotiation round, the social partners acknowledged that occupational pension schemes shall not form part of this agreement but shall be subject of subsequent ESD negotiations for a framework promoting the transferability of such schemes in an increasingly more fragmented labour market (Ahlberg, 2000, p. 56; ETUC, 1998g; ETUC, 1999b).

Regarding the classification of consensus strategies applied in this question, a combination of elimination and compensation is visible. On the one hand, the grounds for restricting access to certain rights are eliminated compared to the 1997 text. At the same time, this elimination is substituted by the recognition that period of service qualifications necessary to claim certain rights shall be the same for fixed-term workers as for permanent workers, only to be restricted on objective grounds. Thereby, a new concept was introduced that weighs heavier than the elimination, thus characterising this modification as *compensation*.

Compensation furthermore was applied in the agreement's purpose clause by explicitly emphasising the objective of the agreement to ensure non-discrimination of fixed-term workers. Whereas the 1994 text broadly and inspecifically formulates that the purpose „is to protect fixed-term employees", the social partners' agreement lists two separate purposes: improvement of "the quality of fixed-term work by ensuring the application of the principle of non-discrimination" and the prevention of "abuse arising from the use of successive fixed-term employment contracts or relationships".

4.3.3 Other issues

Similarly as with the matter of supplementary pension schemes, the negotiators proceeded with issues on information and consultation of worker representatives and on temporary agency work.

On the former topic the ETUC initially took the stance that worker representative bodies shall be "informed and consulted by employers in advance of any planned use of fixed-term contracts or relations in the undertaking and the justifications for such use and/or renewal" (ETUC proposal, 11 June) and that worker representative bodies shall get an annual report of the development of all forms of work contracts in the undertaking (ETUC proposal, 11 June). The employers opposed this position. Their negotiation team was instructed to "not impose obligations, or new obligations, on employers as regards the consultation of employee representatives" (UNICE mandate, point 4g). The German Presidency proposal would have been on the employees' side: it stipulated for an obligation to provide workers' representative bodies with an annual report of the development of fixed-term work in the undertaking and the possibility to provide for provisions of workers'

representative bodies' involvement before a fixed-term employee is taken on (German Presidency Proposal, clause 6).

However, as there was a separate proposal on a Directive on information and consultation before the Council, the social partners agreed to "put aside many of the aspects" concerned with it (ETUC, 1999c; ETUC, 1999b). Consequentially the result of the final agreement on that clause is only of recommendatory character and reads very vague and imprecise: "As far as possible, employers should give consideration to the provision of appropriate information to existing workers' representative bodies about fixed-term work in the undertaking" (clause 6.2).
Hence, the consensus strategy of elimination by increasing ambiguity was applied.

The issue of temporary agency work was not an affair too important for neither camp. UNICE's mandate only provided for the negotiation of fixed-term work. ETUC's definition of fixed-term work indirectly excluded temporary agency work. Nevertheless, some sections within the ETUC wanted to negotiate the matter within the fixed-term work dialogue. However, when sectoral labour unions and sectoral employers' organisations mostly affected by temporary agency work sent a joint-letter to the negotiation spokesperson arguing for an exclusion of this topic because it required specific rules and should thus be dealt with in a separate agreement, the item was dropped from the agenda (Ahlberg, 2000, p. 55).

4.3.4 Assessment of the final agreement by the social partners

In general, the negotiating parties were satisfied with the final result. There were some voices within the ETUC claiming that the difference between the negotiation mandate and the final agreement's clause on regulation was too large and that the agreement was below the 1994 text. Nevertheless, the majority within the ETUC acknowledged that the "current political context" would not make it "realistic to expect 'maximalist' agreements or legislation" (ETUC, 1999a). Thus, following the maxim 'you can't always get what you want, but you get what you need', the main line was that, all in all, the final result was close to the last German Presidency proposal – an evaluation that is supported by Hartenberger's (2001, p. 126) assessment of the regulatory intensiveness of both texts – and must be seen "as a victory for the ETUC", especially considering the reluctant initial mandate of the employers (ETUC, 1998g). Even though it was only "minimum social regulation" it would help to limit social dumping and protect standards in more advanced countries (ETUC, 1999a) and that the agreement meant "in several ways a big improvement for [fixed-term] workers" (ETUC, 1999c).
Furthermore, by both sides the agreement was seen as an important step in developing the European social dialogue as a whole: it contributed towards "creating a European negotiation area" (ETUC, 1999a) while failure could have meant "the possible end of interprofessional European negotiations" (ETUC, 1998g).

4.4 The influence of the shadow of hierarchy on the fixed-term work agreement's content

So, what does this narrative of the fixed-term work negotiations reveal about the hypothesised link between the shadow of hierarchy and the final agreement's content?

It becomes clear that a shadow was cast on the dialogue, mostly during the negotiations on the regulation clause. At some points the employers argued that the Council would not accept Europe-set quantifications of fixed-term work restrictions; the employees reminded management to recall the European Parliament's role in social policy decision-making if social partner negotiations failed and they openly threatened to take recourse to the ordinary legislative route if employers would not show willingness to compromise.

The shadow also manifested in the expectations about what a Council Directive might look like if social partners failed to agree. For the regulation clause this was the last German Presidency proposal of 1994. There is clear evidence that the utility gains of all proposals put forward by the negotiation parties were consciously measured against this text.

Still, even though the 1994 text was the reference point, and despite it having been declared the acceptable minimum by the ETUC, the final regulation standards of clause 5 were slightly below that of the German proposal, resulting from an application of the elimination strategy. There were processes that contributed to this outcome and that hint at the necessity to adjust the model deduced in this paper's first part: a lack of faith in the legislator if dialogue collapses, a still comparably good end result due to some compromise in other parts of the agreement and flexibility in the provisions' national implementation. Apparently, on the ETUC's side, there was some degree of uncertainty regarding the assessment of the shadow of hierarchy: firstly, there were doubts if the Commission will really initiate Council negotiations on that matter in case the social partners failed, and secondly, there was scepticism about whether the standards of 1994 would be upheld in re-started Council negotiations. Taking these uncertainties into account, it required the labour unions to make concessions towards management: For the employers, this outcome was made agreeable by increasing the ambiguity of the provision's implementation prospects via strengthening the social partners' role at national and sectoral level in this process and by leaving quantifications of limitations to the discretion of the member states. For the ETUC, not knowing precisely what Community legislation would look like, increasing imprecision of the regulation clause (thus using elimination) was acceptable and making it a good result anyway, especially when also comparing it with the employers' mandate that originally urged for the exclusion of that question during the negotiations.

Moreover, despite the low regulation standard compared to the 1994 proposal, the agreement was made bearable for the ETUC by strengthening the non-discrimination clause.

In that case not the 1994 text, but the provision on non-discrimination from the 1997 social partners' agreement on part-time work was the reference point. The ETUC, while opting for a higher standard, made clear that it would not go below that level. The employers early signalled their readiness to accept the 1997 standards. When the negotiations were widened by the second half of the negotiation period, and other questions than the regulation clause were accepted on the agenda by both sides, more flexibility in the regulation clause (making concessions to the employers) was traded for strengthening the 1997 standards on non-discrimination (making concessions to the employees). This was done by introducing the concept of same period of work qualifications for fixed-term as for permanent workers and by making the principle of non-discrimination, as well as of regulation, more explicit in the agreement's purpose clause than it was in the German Presidency proposal. Thus, intra-agreement compensation took place through a package deal.

Apart from the recognition of same period of service qualifications, other efforts to add new concepts to the 1994 text (compensation strategy) were blocked by the respective other side. Management's demand for workforce agreements was neglected by labour right away. Initiatives for including the issues of complementary social protection schemes, information and consolation of workers' representatives and temporary agency work were put off by opening the perspective to start separate negotiations on these matters. This move in turn, increased the incentive to conclude an agreement on fixed-term work contracts because it would increase the legislator's faith in the ability of the social partners to reach agreements also on these discarded questions and it would, in the words of the ETUC, force the employers to acknowledge their own responsibility as a social partner.

5 The data answer: refining the initial model

Concluding, the purpose of this study and its placement in the scholarly literature will briefly be recapitulated. Enabling a dialogue between theory and data, refinements of the initial model will be proposed based on the empirical analysis' findings. Finally, an assessment of the study's validity of the claimed cause-effect relationship and its generalisability, especially taking the model's refinements into account, will be made.

5.1 The initial model

While it was widely acknowledged that the shadow of hierarchy, that is the threat of unbeneficial Community legislation, is important for making social partners *enter* the European social dialogue, this paper aimed at presenting a theoretical concept to understand the hitherto omitted question of how the 'shadow of hierarchy' in European social dialogue influences the *content* of European social partners' collective agreements. Therefore, a game theoretical model of European labour and management interaction in Commission-initiated and Council-implemented collective agreements (COCOCAs) based on the assumption of actors reacting rationally within institutional constraints to their opponents' moves was deduced from literature on European governance and rational choice. It was argued that European social dialogue consists of governance structures and governance processes that are inextricably interlinked, whereas the former influences the latter and consequentially the content of social partners' negotiations in ESD.

Governance *structures* were specified with the help of rational choice institutionalism: ESD negotiations were conceptualised as *veto games*, where the ETUC, UNICE and CEEP can break down the negotiations at any time if they perceive themselves to be better-off with the Commission proposal and what they expect the Council to make of it than with what the other side of industry offers. This is what was previously called the shadow of hierarchy, or the shadow of the law. For veto games, this concept was re-named 'default outcome' in this paper. The social partners thus have to reach unanimity to adopt a collective agreement. Hence, the veto game approach points out that the social partners would only reach an agreement when a new proposal is more utility maximising for both sides of industry than the default outcome. Hence, a 'winset' must be existent.

At the same time, the ESD rules and practices delineate the governance *processes* that allow the social partners some leeway to modify the proposals to a

certain degree so as to make it agreeable – hence more utility maximising than the default outcome – for both sides. From integrative bargaining theory and based on the assumption that most policies are dividable and that most political disputes consist of multiple underlying policy dimensions, three *consensus strategies* were identified that can be applied in order to make a proposal more utility maximising than the default outcome for both sides and thus mutually agreeable by creating or increasing a winset for the veto players: compromise, compensation and elimination. Integrative bargaining theory hence helps to explain how an agreement can be reached while taking into account vastly opposing preferences of the social partners in the beginning of negotiations and the institution-induced omnipresent possibility of negotiation failure that goes along with these differences.

The application of these consensus strategies does not happen arbitrarily but is influenced by the shadow of hierarchy that looms over the negotiations. A causal chain of mechanisms was identified that says that social partners compare their potential utility gains from the default outcome with the benefits they would obtain from the respective other side of industry's proposals. The shadow therefore is the reference point for utility calculations and consequentially impacts social partners' decision whether to uphold the dialogue or whether to defect. Through the mechanism-based approach, the model thus connects structure with strategies by arguing that social partners chose (a mix of) consensus strategies in such a way that the final text on the table is more utility maximising for both sides than the default outcome and thus makes adoption of a negotiated agreement more desirable for management and labour than resorting to the fall-back regulatory option of Community legislation.

5.2 Refining the model and suggestions for further research

Guided by and analysed through this deductively formulated game theoretical model, an analytic narrative of the processes of the 1998/99 ESD negotiations on fixed-term work contracts, leading to the adoption of a Council Directive on that matter, was provided.

The narrative offered clear evidence that the social partners perceived a shadow of hierarchy and that they made assessments of what a default outcome in this shadow might look like. The default outcome constituted the reference point for the negotiators. Thus, by and large, the model's assumptions about how mechanisms of expected utility for the social partners in COCOCAs influence the agreements' content were confirmed. However, as the intention was to enable a "dialogue between theory and data" (Bates, Greif, Levi, Rosenthal, & Weingast, 1998), the fixed-term work negotiation's analysis revealed that the initial model must be refined.

Firstly, it appears that there is not *the* shadow of law looming over ESD negotiations. Rather, a multitude of shadows are operating simultaneously in different sections of one agreement, influencing the actors' utility calculations and thus which consensus strategies to adopt. The notion of 'shadow of hierarchy' used in this paper so far can be divided in two analytically distinguishable shadows: a) a '*shadow of initiative*' making the social partners wonder whether the legislator, hence the Commission and the Council, *really* intends to become active in case their negotiations fail; and b) a proper '*shadow of the law*' posing the question what social partners expect the legislator to do with the policy content-wise if labour and management dialogue collapses.

The shadow of initiative is to be placed in the action-formation mechanism where the social partners evaluate how realistic the emergence of the default outcome is at all. If its emergence is evaluated as being sufficiently realistic, the shadow of the law looms over the situational mechanism, where the default outcome forms one alternative proposal to the other social partners' propositions. These two shadows always have to be present in all COCOCAs that were concluded by the social partners.

As the social partners' reference to parts of the 1997 part-time work agreement has shown, the ESD can additionally operate in a '*shadow of previous similar agreements*'. If there had been previous agreements by the social partners for the regulation of similar policies, these agreements cast their shadow on the situational mechanism because they show an alternative, namely what has previously been *minimally* possible to agree upon by the social partners on similar topics. Current proposals are then assessed against this shadow.

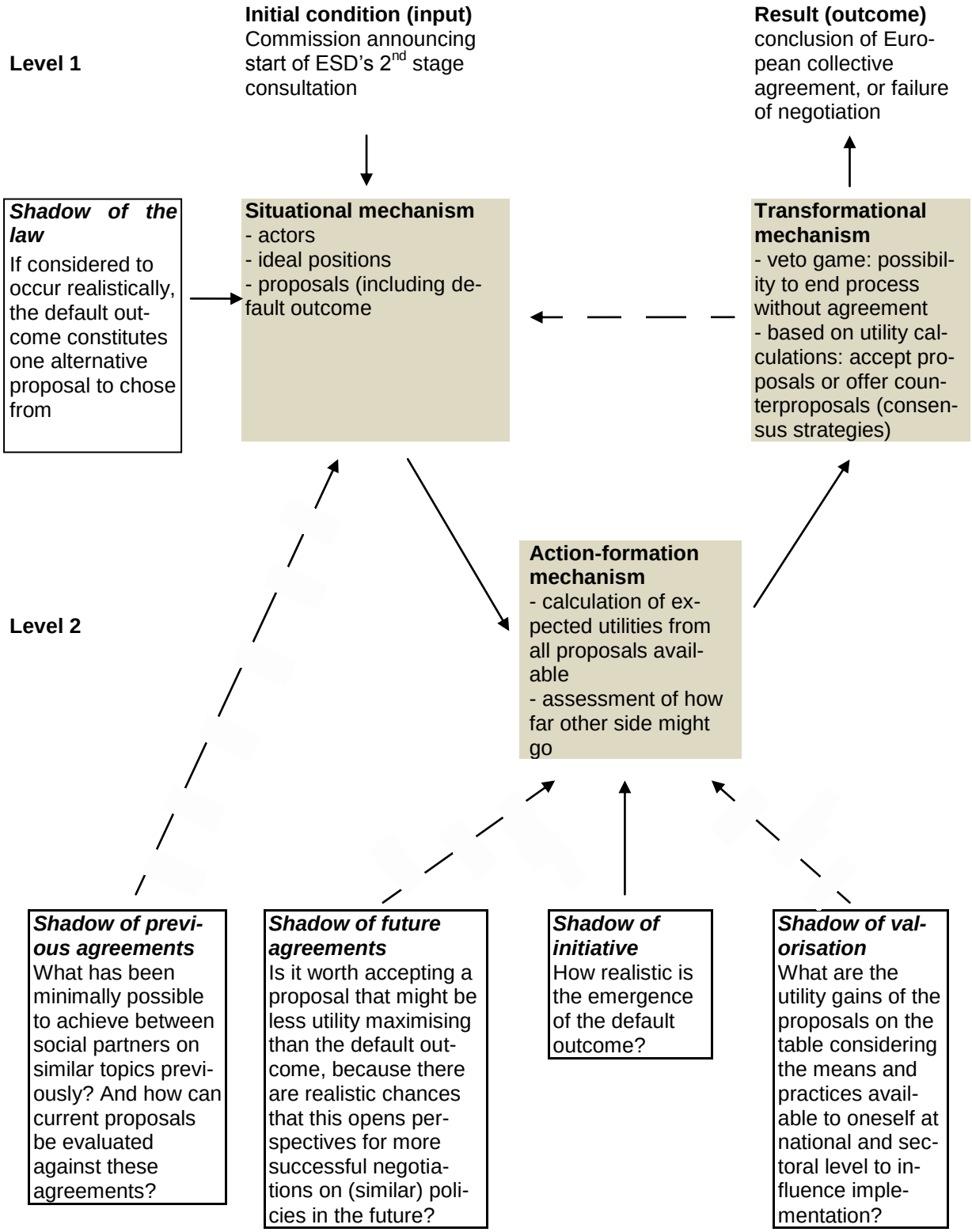
But there can also be a '*shadow of future agreements*', or "industrial relation considerations" (Falkner, 2003): firstly, labour and management want to prove their ability to conclude agreements in order to legitimise their privileged involvement in European social and labour law in general. Secondly, concluding an agreement on one issue raises the hope to start negotiations on similar topics or items that were discarded from the successful agreement's agenda during the negotiation process.

This shadow lays over the action-formation mechanism as it makes the negotiation parties wonder whether accepting a proposal by the other side that is less utility maximising than the default outcome can be outweighed by a realistic perspective for more successful negotiations on (similar) policies in the future. In that sense, ESD negotiations can be part of "nested games" (Tsebelis, 1990) where suboptimal outcomes in an agreement are accepted when there is the perspective of more successful subsequent negotiations.

Finally, a '*shadow of valorisation*' can be cast on ESD negotiations: Rather disadvantaging European provisions can be acceptable when their implementation grants discretion to member states and/or social partners at national or sectoral level and if the disadvantaged European federation believes it can influence the implementation process because it possess more negotiation and implementation strength at those levels to do so. It thus operates in the action-formation mechanisms because it makes the social partners evaluate the utility gains of the proposals on the table in the light of the means and practices available to them at

national and sectoral level for implementing the agreement in a way more favourable to oneself.
A schematic depiction of the refined model can be found in figure 6.

Figure 6. *Social mechanisms and shadows in European Social Dialogue's Commission-initiated and Council-implemented Collective Agreements*



Secondly, the factor of *uncertainty* was unduly neglected in the initial model and should be integrated in the micro level action-formation mechanism where it affects the evaluation of utility gains of alternative proposals. This factor features most prominently under the 'shadow of initiative' and the 'shadow of law'. It determines these shadows intensity: Not being exactly sure about whether the legislator would become active and what it would do with a policy in case of ESD breakdown requires the party that has more interests in striking an ESD deal – usually the employees – to take a more flexible stance because its option to take recourse to the legislator becomes less threatening to the less-inclined side. Uncertainty might even gain more analytic importance for ESD negotiations that took place after the fixed-term work dialogue because after these negotiations, policies were not any more previously discussed in the Social Affairs Council, which makes "the 'shadow of the law' [...] less easily visible" (Falkner, 2003, p. 25).

The third refinement concerns the use of veto suspension strategies and thus what influences the shape of the final agreement. Knowledge about which shadow dominates in which section of the agreement to be negotiated helps explaining why the one or the other consensus strategy was chosen.
The shadow of hierarchy, hence 'the shadow of initiative' and the 'shadow of law' taken together, does not forecast the choice of consensus strategies. This study supports previous findings that the shadow of hierarchy's existence is necessary to make the social partners enter and stay in social dialogue. They only do so if the threat of legislation (shadow of initiative) is credible enough, and if each side of industry believes that they can achieve something better than the default outcome (shadow of the law). The shadow of hierarchy hence forms a reference frame within which additional shadows *can* operate and it provides orientation for utility gain calculations in the diverse shadows.

Apparently, elimination, more precisely elimination through imprecision or increasing ambiguity, is the most dominantly used strategy. The conclusion that elimination strategy by increased ambiguity, or flexibility, is paramount fits the observations made by Bercusson (1992), Keller and Sörries (1999) and Keller (2003) as described in the introduction. This paper contributed to specify *why*.
The 'shadow of future agreements' and the 'shadow of valorisation' are preventing compensation and are obviously promoting the utilisation of increasing ambiguity. Elimination by discarding issues altogether did not take place.

Compensation was most remarkably used through inter-agreement trade, whereby concessions in one clause were redressed by compromises in others. It took place in the 'shadow of previous similar agreements', as this shadow presented what once constituted the mutually acceptable minimum standard and thus builds a barrier against the use of the elimination strategy that would lower these standards and apparently can even work as a spring board for issue expansion by compensation.
Large-scale compensation in the form of including new items into the agreement did not happen. On the contrary, efforts to add new concepts were regularly blocked by one side of industry or the other. That the compensation strategy is unlikely to be widely used appears plausible, taking the social partners' divergent

approaches towards the ESD into account: why should employers permit the employees to add issues to European agreements when their primary goal is to totally prevent European regulation? Also, when employers are against European regulation in general, extra items that they want to add to the negotiation agenda and to get enshrined in Community law are probably rather rare.

More research should be spent on developing clearer methods for the identification of the consensus strategies: During the analysis, the methodological danger of missing the compromise strategy was evident. It was most difficult to distinguish between compromise strategy and elimination strategy by increasing imprecision. Alternatively, the findings suggest, that compromise as a specific consensus strategy might even be discarded altogether. Instead, one might discuss whether 'compromise' might rather be a generic term, being a result of a mix of elimination and compensation strategies.
Moreover, further research should scrutinise whether these observations of which strategy is used under which circumstances, were only singular phenomena in this specific case or whether they are part of a more general trend. Therefore, more case studies of successful COCOCA negotiations entailing different combinations of shadows could be conducted.

5.3 Internal and external validity

These considerations pose the question of generalisability of this study's findings. However, first they need to be assessed in terms of validity of the claimed cause-effect relationship because it does not make sense to ask whether the results hold for cases outside the one examined, "unless we are confident that it does therein" (Guala, 2003, p. 1198).

According to Shadish *et al.* (2002, p. 53), "the term internal validity [refers] to inferences about whether observed covariation between A and B reflects a causal relationship from A to B in the form in which the variables were manipulated or measured." A causal relationship can only be established if a) X precedes Y, b) X correlates with Y, and 3) the relationship between X and Y cannot be explained in terms of some third variable (Shadish, Cook, & Campbell, 2002, p. 6). Through process-tracing, a comprehensive storyline was told wherein the model passed hoop tests and whereby smoking guns, confessions and additional causal factors were identified. These process-tracing techniques provided a dense description of the connection between X and Y with its intervening steps. Thus, as the analytical narrative enhanced the faith that processes were at work as hypothesised in the model, the internal validity of this study is high.

Obtaining a high degree of internal validity through a single case study goes at the expense of external validity, concerning the question whether findings can be generalised to a larger population that was not examined (Ondercin, 2004). How-

ever, the aim was not to make propositions about *all* ESD negotiations, but only about the fairly specific ESD procedures leading to Commission-initiated and Council-implemented collective agreements at European level. In order to provide for a broader generalisability to these negotiations, the case under investigation was carefully selected: firstly, the selection of a least-likely case enables 'Sinatra inferences' and secondly were the negotiations on fixed-term work based on the most essential cleavage of labour and capital conflict, namely flexibility versus security. It can thus be expected that many other negotiations revolve around these lines of conflict and make findings from the fixed-term work negotiations valuable for the analysis of other dialogues, also at sectoral level.

However, the identification of additional shadows demonstrates that COCOCA results can be influenced by rather case-specific factors: While the shadow of hierarchy, composed of the 'shadow of initiative' and the 'shadow of law', is always present in COCOCAs (though their intensity can vary, as the factor of 'uncertainty' described above indicates), the presence and intensity of the 'shadow of previous similar agreements', the 'shadow of future agreements' and the 'shadow of valorisation' are very case specific.

The question of generalisability should hence be seen from a 'realistic evaluation' point of view in taking the role of varying contexts and its impact on outcomes into consideration (Pawson & Tilley, 1997). Consequentially, because the possibility of the existence of different combinations of mechanisms must be taken into account, the process-tracing results allow drawing '*possibilistic generalisations*' for middle-range theorising (George & Bennett, 2005, p. 22): "knowledge about causal configurations (*combinations* [own emphasis] of causal conditions or social mechanisms) that make specific outcomes possible" (Blatter & Haverland, 2012, p. 31).

The refined model is hence based on the assumed existence of 'causal complexity' entailing equifinality (there can be more than one sufficient condition for an outcome), conjunctural causation (taken solely, a condition might not have an effect on an outcome but only if taken in combination with one or more other conditions) and asymmetric causality (the absence of a condition that led to a specific outcome in one case does not automatically mean the non-existence of the outcome in the other case) (Wagemann & Schneider, 2010, p. 384f.).

Accepting the theory's middle-range nature, one can meet Green's and Shapiro's (1994, p. 41) claim that rational choice – and hence the model developed in this paper as rational choice micro-mechanisms are key here – is lacking in making good predictions. Rather, this paper claims, one should use rational choice theories and consequentially the model developed in this thesis to "explain even if they cannot predict" (Hindmoor, 2006, p. 212).[1]

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