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**Interests, Legitimacy, and Constitutional Choice:**

**The extension of the codecision procedure in Amsterdam**

by

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**Abstract.** In this paper we address the issue of the steady and significant increase in the scope of the codecision procedure and the motivation of the member states for increasing the power of the European Parliament. Using a rational choice framework we argue that the important variable in the assessment of the changes in the decision making procedures is the expected benefit from the various legislative procedures to political actors, since these procedures are used for a multitude of issues. Subsequently, we examine the issue areas to which codecision has been extended by the Amsterdam Treaty. We show why the member states changed legislative procedures in some issue areas, as embodied in the respective treaty articles, while in other areas they kept the procedure the same.

*Constitutional politics in the European Union: the extension of the codecision procedure*

## **1. Introduction**

The legislative decision making rules in the European Union have undergone a remarkable change in the last decade. In the Single European Act, which was ratified in 1987, the member states introduced the cooperation procedure, in which the European Parliament was provided with a suspensive veto on Council decisions. The Treaty on European Union, which came into effect in 1993, changed the suspensive veto of Parliament into an absolute veto in certain areas, and it introduced a conciliation effort for the occasions when Parliament disagrees with the Council's common position. This procedure, which is often referred to as the codecision procedure<sup>1</sup>, was meant to replace other decision making procedures for all legislative acts. It was originally proposed by the Parliament and the Commission to the 1990 Intergovernmental Conference and was finally adopted with a much more limited scope in the Treaty on European Union.

Despite the arguments made by the European Parliament and the Commission for an introduction of codecision on some kind of general basis, it was introduced on a case-by-case basis, mostly to the measures relating to the internal market and to certain policies with a societal impact such as education, health, consumer protection and culture. In its evaluation of the procedure for the 1996 Intergovernmental Conference, which prepared the Amsterdam Treaty, the Commission noted that 'the distribution of areas under codecision is ...fragmentary and arbitrary' (European Commission, 1996: 7). The course of negotiations during the last Intergovernmental Conference gave some hope that codecision would replace all other procedures, thus substantially increasing the role of the European Parliament. However, given the opposition of some member states to the extension, codecision was finally adopted in most areas where previously the cooperation procedure applied and a variety of other procedures remained.<sup>2</sup> Nevertheless, commentators have noted that 'the extension of the codecision procedure ...went further than many expected and will increase the role of the Parliament in a significant number of areas' (McDonagh, 1998: 193).

In this paper we address the issue of the steady and significant increase of the scope of the codecision procedure and the motivation of the member states for increasing the power of the European Parliament. This issue is particularly significant since the decisions on the increase of the scope of codecision are taken in the setting of an intergovernmental conference, in which the Parliament's involvement is minimal, in contrast to the Community method.<sup>3</sup> Within the intergovernmentalist approach, underpinned by rational choice assumptions which consider the possibly different and contrasting views of political actors, the conventional assumption about this change would be that the member states would only agree to reforms that suit

their interests. That they would agree to increase the scope of codecision seems paradoxical, since more parliamentary involvement does not necessarily improve the position of Council members. Using a spatial model of decision making, Tsebelis (1994) claims that parliamentary involvement under the cooperation procedure may move common policies away from the ideal points of Council members and in the direction of a majority in Parliament, because of Parliament's conditional agenda-setting power. Steunenberg (1994) and Crombez (1996) point to Parliament's potential blocking power under the cooperation and codecision procedures, which may prevent policy changes that are preferred by the Council (see also Moser, 1997). Finally, Schneider (1995) shows that Parliament and the Council may set a policy under the codecision procedure, which is inferior for all Council members. However, the Council is not able to attain this policy, since it would trigger a veto by Parliament.<sup>4</sup> On the basis of these analyses, it is not obvious why the member states would prefer more parliamentary involvement and introduce further reform of the Union's legislative procedures in favor of codecision.

There are at least two reasons why recent research is unable to present a satisfactory answer to this question. First, most analyses of European decision making only focus on specific policies and raise the question whether the application of another procedure would make a difference in terms of outcomes. In this way, preferences and the initial state of affairs—the current policy or the situation in which no policy has been defined yet—are held constant in order to make a comparison between different procedures. However, it is not clear why some combination of players' preferences and a *status quo* point has to be regarded as the benchmark for comparison. In a constitutional setting where a decision needs to be taken on rules, players do not know the future legislative issues and their preferences. Consequently, players are not interested in a *specific* outcome given some arbitrary preference configuration, but in the *expected* outcome that can be derived under reasonable assumptions about the distribution of their own preferences and the preferences of others. This shifts the focus of the analysis from the level of individual policies to the level of rules.

Furthermore, most studies of European Union decision making, including the ones cited above, neglect the general properties of the procedures that have to be used. These properties include the extent to which rules allow for policy change, as analyzed by König and Brauninger (1998), or the extent to which rules balance the 'power to change' and the 'power to block', as Berg and Lane (1999) point out in their analysis of the Council's voting rules. While the 'power to block' might be beneficial to a specific player aiming to avoid changes in a preferred policy, the 'power to change' allows a majority of players to move a policy to one they prefer more. The rule of unanimity, for instance, maximizes a player's 'power to block'. However, this does not necessarily mean that players will favor this rule: deciding on a multitude of issues, players may prefer to allow for some

change and thus may depart from the unanimity rule, since the average benefits of blocking—which only requires the support of one player—might be lower than the those of allowing for change.

In view of these drawbacks we propose a different approach to analyzing and explaining constitutional decision making in the European Union. Our approach is based on two important insights. First, decision making procedures differ with regard to deadlock, that is, cases in which players are not able to change a policy to a more preferred one. This may affect a player's preferences over decision making procedures. Crombez (1996), for example, analyzed the extent to which legislative procedures in the Union are vulnerable to deadlock. He does not take a constitutional stance on this in the sense that players may realize that a case of deadlock does not serve their interests. The more a procedure suffers from deadlock, the less players are able to adapt the current policy to a more preferred one, and the less players may prefer this procedure. Second, we do not focus on the benefits of individual policies, but on the expected benefits of a decision making procedure. Consequently, a player may win or lose in a specific case. However, in order to support and maintain a decision making procedure all relevant players should expect to do better on average than under another procedure. This average effect on players is important in our analysis, since it shapes players' expectations about future benefits, which can be obtained by using a procedure repeatedly to decide different legislative issues.

The extension of codecision under the Amsterdam Treaty provides an opportunity to test the implications based on our model of constitutional decision making. Since our model is based on the intergovernmentalist assumption about the primacy of the interests of the member states in constitutional decision making, the paper will also comment on the relevance of the intergovernmentalist approach to the extension of codecision. To this end, the next section compares the implications of intergovernmentalism for the extension of codecision with the alternative legal and normative political perspectives on the codecision procedure. The subsequent two sections present and elaborate our model, which aims to explain the choice of various decision making procedures based on their usefulness for the member states on average. The fifth section relates the results of this model to the actual outcome of the decision making, which led to the Amsterdam Treaty changes, and it examines the actual scope of the extension of codecision in more detail. Finally, in the last section of this paper we point to some exceptions where the average effect on players can be assumed to have been less important than the specific policy outcomes.

Before explaining our model of constitutional change in the European Union with regard to the codecision procedure, we will discuss briefly the different perspectives on codecision, which informed the negotiations for the Draft Treaty of

Amsterdam and their potential influence on the outcome of the treaty negotiations.

## **2. Approaches to the extension of codecision**

The Treaty on European Union, signed in Maastricht in 1991, not only introduced codecision but it also included explicit references to its future extension to other areas of decision making in the Union. Arguments and predictions regarding the extension have been made from various perspectives. We can distinguish between three different approaches to the extension of codecision, which appear to play a role in the policy debate leading to the broadened scope of this procedure.

The first perspective, which can be labeled the *legal approach*, seeks to extend codecision on the basis of a distinction between law and implementing legislation. Within this approach the extension of codecision is linked with the need to establish a hierarchy of norms within the Union, an objective discussed during the 1990 Intergovernmental Conference and included in the 'Declaration on Hierarchy of Community Acts' in the Maastricht Treaty. The proponents of this approach argued that '...a hierarchy of norms, already existing in the legal systems of most Member States must be introduced: Treaty, law, national implementing measures or Community regulations, and administrative implementing provisions' (European Commission, 1991: 121). Further it was argued that by introducing the hierarchy of norms and extending codecision to legislative acts only, it would be possible to give the European Parliament a greater part to play in legislative activities, while leaving technical or implementing questions to national bodies in accordance with the principle of subsidiarity. Finally, the advocates of this approach saw it as a way to place relations between the institutions on a more rational footing and increase the overall effectiveness of the decision making process (European Commission, 1991: 121). The legal approach with its features of assumed neutrality and formalism has traditionally been very strong as an authoritative source of ideas for the development of the Union (Weiler, 1994: 521), not least because of the increasing importance of the legal aspects of European integration achieved through the activism of the European Court of Justice. As Weiler has persuasively argued, even though the European Court of Justice has intervened little in the decisional process of the European Union, it has intervened 'rather boldly' in the post decisional phase by creating a legal apparatus which would make intergovernmental bargains stick (Weiler, 1994: 527). The Court has also made its direct contribution to changing the balance of the institutions with judgements such as decision in the 1980 *Isoglucose* case which ensured that the Council would not be able to adopt legislation under the consultation procedure if the Parliament had not given its opinion.

The second approach to the extension of codecision stems from the arguments of those who have argued from a

*normative political perspective* that the broader involvement of Parliament in the Union's decision making process is one of the main ways to address its 'democratic deficit'. This approach is based on the idea that by making Parliament a party to all decision making in the Union, the current democratic deficit would be reduced and the democratic legitimacy of the Union would be increased. The proponents of this approach argue that codecision should be extended to all areas so that the European Parliament would become in effect a first legislative chamber. In the words of Duff (1994: 31), '[i]t would be perverse were codecision not to be extended (and improved) eventually so that nothing becomes EC law unless passed by a majority of both houses.' In contrast to the previous approach, the advocates of this approach do not subscribe to the notion that codecision should be limited only to basic and general policy provisions. In fact some, like Corbett (1994: 209), have criticized such limitations in the application of codecision, for example in the area of research and technological development. The proponents of this approach have also argued that it would ensure a proper balance between the institutions and enhance the democratic legitimacy of the Union.

Ever since the extension of codecision was put on the agenda of the 1996 Intergovernmental Conference by the provisions of the Maastricht Treaty, it has been possible to observe how much influence these approaches have had on the actual treaty provisions which emerged in Amsterdam, or, how much explanatory power can be attributed to the legal and the normative political views underpinning them. The extension of codecision was the product of an *ad hoc* process, resulting in a 'fragmentary and arbitrary' distribution of codecision and involvement of the Parliament in decision making in various policy areas (European Commission, 1996: 7). The preferences of the various institutional actors were made clear during the negotiations of the 1996 Intergovernmental Conference. The Commission's preference was for an extension underpinned by the logic of the legal approach, reflecting both the Commission's desire to 'increase efficiency' and its unwillingness to give too much power to the European Parliament. Parliament's position was shaped, predictably, by the institution's preference for extending codecision to all areas based on the democratic legitimacy argument described above. What prevailed, however, was a third approach, based on *case-by-case bargaining* between the member states at the negotiating table. The member states balked at making a broad extension of codecision, nor did they agree on the introduction of a hierarchy of norms either in Maastricht or in Amsterdam. Instead of adopting the legal or political approaches, the member states increased the scope of codecision incrementally. Thus, as a result of the bargaining between the member states during the last two intergovernmental conferences, codecision has been adopted and extended on a case-by-case basis. This paper aims to go beyond the claim that there has been no discernible underlying principle to the extension and to explain the attraction of the codecision procedure by

referring to the model of constitutional decision making presented in the next section. Our explanation will be based on the rational choice approach to politics, which takes the interests of the political actors involved as a starting point for an analysis of the choice of different legislative procedures.

### **3. A rational choice perspective on the choice of procedures**

To evaluate the various legislative decision making procedures that are used in the European Union we start with the assumption that players have Euclidean preferences. This assumption is common to all (non-cooperative) game-theoretic models of the Union's decision making process. It implies that, first of all, each player prefers one policy to all other possible policies as the outcome of the decision making process. This most preferred policy is represented by a player's *ideal point*. In addition, a player's preference for an alternative policy depends on the distance from its ideal point. The farther away an alternative policy is from a player's ideal point, the less preferred this policy is. Based on these preferences, players also value equilibrium policies according to distance: the larger the distance between a player's ideal point and the equilibrium outcome that is found for some decision making procedure, the smaller are the benefits or payoffs to a player, and the less preferred this outcome is. Based on their policy preferences, players also have preferences over decision making procedures.

However, at least in the context of the European Union, decision making procedures are used for a large number of different policy issues. Players may have different preferences for each of these issues, and the state of affairs before the start of each decision making process will not be the same. Following Steunenberg (1998), we will call these two elements—players' preferences and the *status quo* point—the *policy state* of a decision making process. An important insight from the formal analysis of political decision making is that the contents of an equilibrium policy, if it can be identified, strongly depends on the policy state. A minor change in either players' preferences or the *status quo* point may have a substantial impact on the position of the equilibrium policy in the outcome space. For this reason, it is not very useful to compare different decision making procedures for a given policy state, since such a state may easily change. Moreover, comparing different procedures for different policy states is not very fruitful because it remains unclear whether differences in outcome are the result of different policy states, or the procedure, or both.

Since political actors may encounter a multitude of policy states, we assume that a player does not know *ex ante* their own specific preferences and those of the other players in a game, nor does a player know the state of affairs before the start of the decision making process. This is not to say that players are uncertain about their preferences and those of others in a specific

game. The point is that players may envision a large number of different games for which it is not yet clear which one will be played. Moreover, since there is no reason to expect in advance that some policy preferences are more likely than others, or that some initial state of affairs will occur more frequently, we assume that all possible policy states are equally probable. Based on this uniform distribution, the *mean* or *expected* distance between the equilibrium outcome and a player's ideal point can be computed for a specific decision making procedure.<sup>5</sup> This value indicates a player's *a priori* prospects of playing a game, that is, the benefits a player can expect to receive before knowing the preferences of all players and the initial state of affairs. By comparing the expected distances for different decision making procedures, a player can evaluate its position under these procedures: the smaller this distance, the more beneficial a procedure is.

Steunenberg, Schmidtchen and Koboldt (1999) employ expected distances to derive an index, which they label the *strategic power index*. This index is based on a standardization of players' abilities with reference to an external observer, that is, a player whose preferences vary over the same range as the preferences of the actual players, but that has no decision making rights in the game. Since the external observer is, by definition, a powerless player, this allows us to indicate the absolute positions of players in a policy game. Let  $d_i$  be the expected distance between player  $i$ 's ideal point and the equilibrium outcome of a particular game based on procedure  $p$ . Then the index reflecting the power of player  $i$  can be defined as  $PSI_i^p = 1 - \frac{d_i}{d_e}$ , with  $e$  as the external observer. This index lies in the interval  $[0,1]$  and increases with the power of player  $i$ . The expected distance for a player that is 'powerful' enough to dictate the outcome of a game under any preference configuration would be zero, leading to a corresponding value for the index of one. By contrast, if a player has a similar effect on the outcome of a game as the external observer, the expected distance for this player is the same as for the external observer, leading to a corresponding value for the index of zero.

Based on the proposed index, there is a natural way to approach the extent to which a decision making process is affected by an inability to change the current policy or *status quo* due to cases of deadlock. For a specific procedure, this inability bias can be measured by the mean distance between the equilibrium outcome and the *status quo*, which is defined as  $d_q$ .

Substituting this value for the expected distance found for a player in the strategic power index, we get  $PSI_q^p = 1 - \frac{d_q}{d_e}$ , which Steunenberg, Schmidtchen and Koboldt (1999) label the *inertia index*. A value of one for this index means that under some procedure the *status quo* always prevails. The smaller the value for the index, the more players are able to move the equilibrium policy away from the *status quo*.

#### **4. Making a policy choice: modeling legislative procedures**

The choice of a policy will be analyzed as a game in which players have *specific* preferences and for which a *specific* initial state of affairs exists. The game form, that is, the structure of the game, is a stylized representation of the processes that may take place under the Union's legislative procedures. Here we deal with the four main decision making procedures: the consultation, assent, cooperation and the codecision procedure.

The consultation procedure is one of the oldest decision making procedures, which only allows Parliament to present an opinion to the Council on the new policy proposed by the Commission. The cooperation and the assent procedures, both introduced by the Single European Act, allow for more parliamentary involvement. The assent procedure requires Parliament to approve or reject Council decisions, while the cooperation procedure also allows Parliament to make amendments to the Council proposal. Under the Single European Act, the assent procedure only applied to association agreements with third countries and the accession of new member states. The Treaty on European Union extended the scope of this procedure to issues related to Structural Funds, the Cohesion Fund, European elections, freedom of movement, and the European System of Central Banks and the ECB. At the same time, the Treaty on European Union introduced the codecision procedure, which, as mentioned above, adds the possibility of conciliation when the Council and Parliament hold divergent views.<sup>6</sup> In the Maastricht Treaty, the codecision procedure applies to most areas which were previously decided under the cooperation procedure, such as internal market legislation, public health and consumer protection. As we shall show in section six of this paper, the Draft Treaty of Amsterdam extended the scope of the codecision procedure further.

An important element of procedure, which has been neglected by formal models, is the role of the Presidency in the Union's decision making process.<sup>7</sup> Analysts such as Wessels (1991) have noted that the role of the Presidency has become more important over the years. According to Wessels, the Presidency has developed 'quite Byzantine ways' of finding a compromise by contacting '...each government bilaterally to confidentially get a final negotiation position', so that it '...can then roughly identify the space of compromise where decisions can be made' (Wessels, 1991: 147). Furthermore, McDonagh has noted that, 'unlike normal Community business, in relation to which the Commission holds the sole right of initiative, at an IGC it is only the Presidency that can serve as a motor for advancing the work and ensure the coherence of negotiations.' McDonagh (1998: 206) especially notes the agenda setting power of the Presidency during the last Intergovernmental Conference. The country holding the Presidency can thus be regarded as a player with agenda power, which may shape the final proposal that will be presented to the other members. We therefore approach decision making between Council members as a process in which the

Presidency selects the final policy conditional on the agreement of the other members.

We model the Union's legislative procedures as sequential games of complete and perfect information. The sequential nature of the game is based on stylized representation of the sequence mentioned in the treaties. The information assumption is related to our choice to take account of relevant institutional features of the legislative procedures. In regard to this choice, two different lines of research can be distinguished. The first line, which is found in a large number of studies, explores the effects of information asymmetry on decision making (see, for instance, Matthews, 1989; Banks and Weingast, 1992). A second line examines the effects of different institutions on the outcomes of decision making within a framework in which players are assumed to have complete and perfect information. Naturally, a general model of decision making should incorporate both lines of research. Nevertheless, the incorporation of information asymmetries will increase mathematical complexity and require a reduction of institutional features. In view of this tradeoff, we prefer to maintain the complex sequence of moves, which characterizes the Union's decision making process, and thus follow the second line of research.

The members of the Council, the Commission, and the European Parliament are the players in the game. To keep the analysis as simple as possible, we take the Commission and the European Parliament, which decides by simple majority, as unitary actors. Players have Euclidean preferences and decide on a policy issue that can be represented by a two-dimensional outcome space. In addition, we assume that players behave in a politically sophisticated way, that is, in making a decision they take account of the actions of others in subsequent stages of the game.

[Diagram 1 about here]

A legislative process that follows the *consultation procedure* starts with a proposal by the Commission. This proposal is submitted to the Council, which makes a decision. At this point two variations of the consultation procedure can be distinguished. The first version, which will be called the '*unanimity*' version, always requires a unanimous vote of the Council to adopt or amend the Commission proposal.<sup>8</sup> The second version allows the Council to approve the initial Commission proposal by a qualified majority. This procedure will be called the '*majority*' version.<sup>9</sup> However, if the Council decides to amend the Commission's proposal, a unanimous vote is required, as under the unanimity version. The consultation procedure is modeled as a sequential game with three stages: the Commission decides first whether or not to initiate legislation; the Presidency considers and possibly amends the Commission proposal, which will finally be presented to all Council members for approval. The sequence of this procedure is presented in Diagram 1.

The *assent procedure*, as introduced by the Single European Act, requires the approval or rejection of a Council proposal

by Parliament.<sup>10</sup> The European Parliament is not allowed to put forward amendments to the proposal, which implies that its power in this case is limited to a veto. The assent procedure adds a fourth stage after the three stages of the unanimity version of the consultation procedure: after a Council decision in the third stage, the European Parliament decides whether or not it will veto this proposal. The involvement of Parliament is further increased under the *cooperation procedure*. This procedure allows Parliament to present amendments to the Council proposal and eventually to reject the Council proposal. The Council, however, has the possibility to override a veto by Parliament, which requires unanimous consent among its members. Adding two new stages to the consultation procedure, the cooperation procedure is modeled in the following way:<sup>11</sup> after the Council has set its common position in the *third* stage, Parliament decides whether or not it will veto the common position in the *fourth* stage. If Parliament rejects the common position, the Council may override the veto by unanimity in the *fifth* stage. If the Council succeeds, its proposal can be enacted as law. Otherwise, the *status quo* will prevail.

Finally, the codecision procedure allows for the greatest impact of the European Parliament, since it may negotiate with the Council on the final proposal in the conciliation committee. A conciliation committee is formed when the Council and Parliament hold different views on a proposal and thus are not able to approve a new measure. Based on this feature, we model the codecision procedure as a three-stage game in which the Presidency makes a proposal in the *first* stage. This decision is based on some empirical evidence of the way conciliation committees meetings run, in which the Council has to present a new version of the legislation rejected by the Parliament at the start of the meeting. In the *second* and *third* stage Council members and Parliament decide whether they agree to the proposal. The sequences of the assent, the cooperation and the codecision procedure are presented in Diagram 1.<sup>12</sup>

## **5. Comparative analysis of the different legislative procedures**

The expected distance between the outcomes and the ideal points of the players under the four discussed decision making procedures have been calculated using the following assumptions.

(1) Both policy dimensions are reduced to a finite number of possible policy positions, which are distributed at the same minimum distance of one. The total number of positions for each dimension is set to 100 in the analysis.

(2) Based on  $100 \times 100$  possible positions, the total number of different policy states is  $10^4$ , given five different Council members, including the Presidency, Parliament, the Commission, and the *status quo*.<sup>13</sup> From this total, we have taken a random sample of *1,000,000 different policy states*, which are used to estimate the distance between a player's ideal point

and the equilibrium outcome for each procedure.<sup>14</sup> Finally,

(3) For the policy states, the ideal points of all players may, but need not, differ from each other and, for some players, from the *status quo*.

Based on the randomly selected policy states, the values for the strategic power index have been computed, which are summarized in Table 1.

[Table 1 about here]

A comparison of the power scores of Council members for the different legislative procedures shows that both versions of the consultation procedure do not yield substantial different outcomes in terms of the index we use. Furthermore, the codecision procedure appears to be superior to all other procedures: all Council members prefer a change to this procedure, as they will gain in power if they were to shift to codecision from either the cooperation, the assent, or the consultation procedure. This result for the codecision procedure contrasts to the cooperation procedure, since this procedure appears to be inferior. Based on our results, all Council members would prefer to change the cooperation procedures into any of the other existing alternatives. Furthermore, the consultation procedure and the assent procedure are of interest since they allow for a partial change. From the consultation procedure Council members only prefer a change to the codecision procedure; from the assent procedure only changes to either the consultation procedure or the codecision procedure are feasible. This suggests a kind of path dependency in the way in which Council members are able to agree on institutional change.

The results also indicate that the Commission is expected to block most changes that are preferred by the Council members. Especially a movement to the codecision procedure is not in the interest of the Commission. The Commission, however, could not completely prevent such a change, since it, like the Parliament, did not have a formal veto at the Intergovernmental Conference.<sup>15</sup> The European Parliament, on the other hand, benefits from movements to codecision, as the table indicates. It perceives an increase of its power when decisions have to be taken under this procedure. Finally, the results in Table 1 show that the Presidency is important in the Union's decision making process. However, since this position rotates between the different member states, no member state is able to exploit the advantages of this position in a permanent way. Moreover, the Presidency may support the changes preferred by the other Council members, despite its different preference based on our power scores, as it is well aware that it will hold this position only for a limited period. The presiding country will soon be a 'regular' Council member while another Council member will fill the post. Nevertheless the Presidency may turn into an important player in terms of its power to arbitrate and set out its specific agenda especially for intergovernmental

conference negotiations.

We have also computed the inertia index for the different procedures. The results, which are presented in Table 2, help to explain why a procedural change, such as a shift from the unanimity version of the consultation procedure to the codecision procedure, may give more power to players. If a procedure always (or almost always) ends in deadlock, then none of the players has the ability to affect the outcome. Procedures that reduce the chance of gridlock may open up the scope for shaping a proposal that is more preferred than the *status quo*, which will make all or most players more powerful.

[Table 2 about here]

The value of the inertia index is highest for the assent procedure, where all Council members, the Commission, and Parliament have to support a policy change. This suggests that this procedure is most sensitive to legislative deadlock. The lowest value is found for the codecision procedure, where a qualified majority in the Council and approval of Parliament is sufficient for the passing of a proposal. The cooperation procedure and the qualified majority version of the consultation procedure have intermediate values, as they only allow the Council and the Commission to block legislation. Although Parliament has a veto right under the cooperation procedure, its veto can be overruled by a unanimous Council.

Based on the results presented in Table 1, we have summarized our main hypotheses on the change of legislative procedures in Table 3. For each decision making procedure, this table lists the expected change with regard to the other four procedures of the European Union. Restricting our attention to codecision, we advance the following research: *the Council members will agree to changing legislative procedures to codecision, since all members will benefit from such a movement.*

## **6. The outcomes of Amsterdam: empirical analysis**

Turning to the empirical analysis of the movements from one to another form of legislative decision making, we have examined the changes introduced by the Draft Treaty of Amsterdam signed in June 1997. Table 4 summarizes the total number of articles in the Maastricht Treaty which specify decision making under consultation, cooperation, codecision and assent (information, the budgetary procedure and other forms of decision making have not been taken into account here) and the changes introduced in Amsterdam. For the sake of measuring the frequency of procedures more precisely, we have taken into account the actual treaty articles and not the general policy areas, which is why our general results on the frequency of codecision are different from other sources specifying which treaty areas fall under certain procedures (Nugent, 1994; Corbett,

1995). Further we have noted the percentage changes from assent, consultation and cooperation in relation to the total number of articles under these procedures in the Treaty.

As the table shows, most articles were moved to codecision from cooperation (11), some were moved from consultation to codecision (4), and one was moved from assent to codecision. The total direction of change seems to confirm our hypothesis and also to indicate that the process of increasing the Parliament's involvement is irreversible and path dependent: there has never been any reduction of the European Parliament's involvement. There have been no changes from cooperation to consultation, or from codecision to cooperation, or from codecision to assent.

The comparison of the results of our simulation with the outcome of the 1996-1997 Intergovernmental Conference negotiations in terms of changes in legislative procedure reveals some unexpected results, which seem to shed new light on the debate between intergovernmentalists and those who argue that the European Union can only function as a legitimate institution if the power of national governments is reduced and the power of the supranational institutions increased. Those who make the democratic legitimacy argument often assume that the Parliament has managed to increase its power despite opposition from the member states. While this may have been the case on other occasions, our results suggest that in the case of constitutional decision making and the increase scope of codecision both the European Parliament and the member states stand to benefit.<sup>16</sup>

The question, however, remains: if codecision satisfies both the Council members and the European Parliament, why not follow the normative political or even the legal approach as outlined in the second section of this paper and extend codecision to all areas of legislative activity, with or without implementing legislation? As mentioned earlier and shown in Table 4, the member states did not take such a step. Instead, assent and consultation have been preserved for a number of important areas and even introduced in new areas and policies. Assent still applies to international agreements, accession of new member states and the important areas of structural and cohesion funds.<sup>17</sup> Remarkably, the intention during the Intergovernmental Conference negotiations seems to have been to move the decision making on structural and cohesion funds to codecision, but at the last moment it was put back to assent.<sup>18</sup> Consultation will still be in force for the adoption of regulations, decisions and common market organization arrangements in agriculture<sup>19</sup>, for the new arrangements for flexibility or closer cooperation<sup>20</sup>, some of the provisions on citizenship and the right to vote, for some of the decision making in the areas of social policy, and most of the provisions for uniform visa and asylum policies, immigration and the provisions for police and judicial cooperation.

The persistence of the member states in keeping consultation in some areas despite the democratic legitimacy argument, or even the constitutional argument, needs an explanation. In light of our hypothesis that the member states have found that they are on average better off under the codecision procedure, this seems to be an inconsistency. An explanation for this pattern can be found in the formation of the member states' preferences. The above mentioned areas of decision making are areas which for one or more of the negotiating governments are so politicized domestically that they cannot be regarded by these governments as long term constitutional issues on which they can decide on the basis of future efficiency. To refer to our initial assumption underpinning the model tested earlier, in contrast to most of the areas of the treaty, we would argue that the areas left to consultation and assent are areas in which players *are* interested in a *specific* outcome and not in the *average* outcome.

The substantive character of these issues and the governments' preferences are clearly of major importance here. Issue areas such as agriculture, structural funds, taxation and visa and asylum policies are high risk issues for the current member states governments. As Moravcsik (1993: 487) has argued, when the costs and benefits of policies are certain, significant and risky, individual citizens have a strong incentive to mobilize politically and impose constraints on the bargaining of governments. Thus we argue that the issues which have been introduced in the Amsterdam Treaty under consultation or assent are issues regarding which the governments would like to have control at present, either because they suspect that their preferences are seriously at odds with other member governments, or because they are subject to severe internal pressure and their bargaining space in the current stage of the negotiations is constrained.<sup>21</sup>

This is for example the case of visa and asylum policies, an area in which the member states have agreed on a five year transition period during which the European Parliament is only consulted, before switching to codecision. Another case in point is the pattern of legislating under Article 118 EC on social policy.<sup>22</sup> Under Article 118(1), the Council is empowered to pass legislation for the attainment of the Union's declared objectives in the field of social policy, named in Article 117 EC: promotion of employment, improvement of living and working conditions, social protection, dialogue between management and labor. Article 118(2) stipulates that directives to fulfil these objectives will be adopted by codecision. Article 118(3), however, makes a list of exceptions where legislation will be made by the member states by unanimous agreement and under the *consultation* procedure. These areas are: social security and social protection of workers, protection of workers when their employment contract is terminated, the collective defense of workers' rights and their representation, and the employment of third country nationals. The governments wish to control these areas is consistent with liberal

intergovernmentalism and especially with Moravcsik's (1993: 494) argument that when the consequences of institutional decisions are politically risky, calculable and concrete, national positions will be 'instrumental', reflecting the expected influence of institutional reforms on the realization of substantive interests.

## **7. Conclusions**

In this paper we have presented a constitutional perspective on the choice between different legislative procedures in the European Union. Based on the assumption that member states do not know the political issues they will encounter in the near future, we presented a model of choice in which actors focus on the benefits they expect to receive from using different decision making procedures. Comparing both versions of the consultation procedure, the cooperation and assent procedure, and the codecision procedure, the model predicts that the member states will agree on changing these legislative procedures to codecision. The reason for this is that all member states will benefit from such a change in procedure: on average all will receive more benefits from the codecision procedure than from any of the other existing alternatives.

An important caveat is that our model of constitutional choice focuses on the choice *between* different procedures. Given a number of pre-existing procedures, our model allows us to explain why political actors prefer one procedure over another. It addresses the question of why Council members prefer the unanimity version of the consultation procedure to the assent procedure. However, the model does not allow us to address the question of how these procedures evolved. These questions focus on the choice *of* procedures, which differs from the issues that are central to this paper. What is not made clear by our model is why the European Parliament has been involved in the Union's legislative process.

Our model predicts the direction of changes in legislative procedures in Amsterdam and explains the general move to codecision. It also provides an insight into the process of legislative change which appears to observers like the Commission fragmentary and arbitrary. According to our model, the outcome in Amsterdam is the result of bargaining between the member states. More specifically, we regard it as a case of constitutional decision making and our analysis of this process shows that the interests of the member states and the European Parliament have coincided. Nevertheless, the question remains why the member states have not decided to move all current articles to the codecision procedure. Moreover, it is also puzzling that some new articles have been introduced at Amsterdam for which consultation or assent rather than codecision have been adopted.

Regarding these specific cases, we feel that the assumption that players do not know the future legislative issues and their

preferences may not be always appropriate. Especially when players do perceive some clearly defined political issues on which they have to make a decision, they will not be interested in an expected outcome. Instead they will prefer to reach a *specific outcome*, which may be better than some of the possible outcomes under another procedure. Here the distinction between constitutional decision making and policy making is blurred, and players may respond in ways described by current spatial models of decision making as developed by Tsebelis (1994), Steunenberg (1994), Schneider (1995), Crombez (1996), and Moser (1997). This view is supported by the fact that several treaty articles under the new treaty title related to the free movement of persons, asylum and immigration, allow for a transition period of five years after which the current procedure (consultation) will be reviewed and possibly replaced by codecision. Thus, not all institutional changes that are proposed within the context of the European Union can be explained using a constitutional perspective. Since 'the ship has to be rebuilt at sea' and players know each others' positions, the process of institutional change in the Union mingles the characteristics of both policy making and constitutional choice.

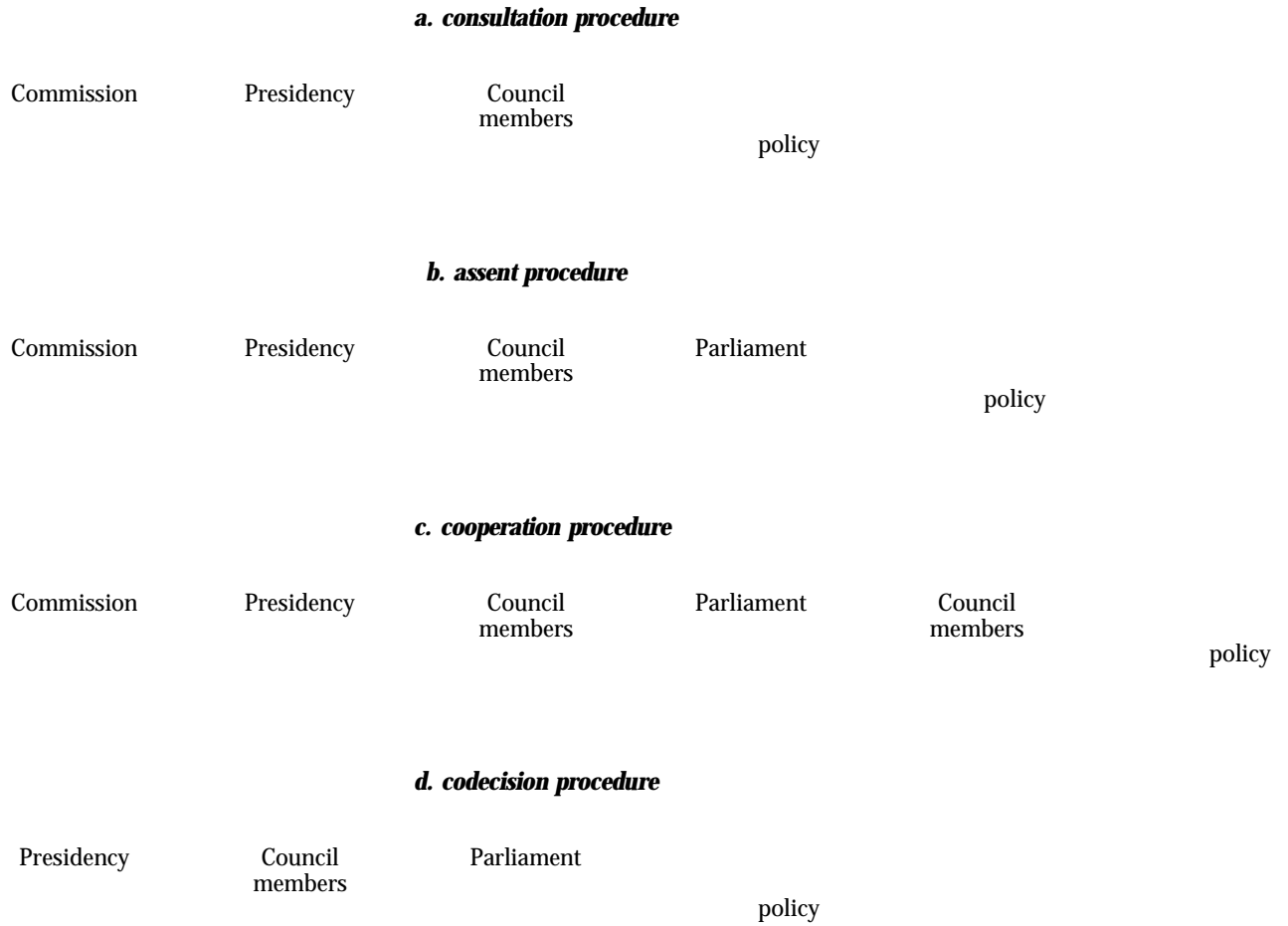
The tendency of the member states to mix short term policy decisions and constitutional decisions when making treaty changes in an intergovernmental conference will be worth watching in the future. It can be argued, for example, that the other major process of constitutional change—enlargement—is adversely affected by the member states' attempts to strike short term policy bargains as part of the trade-offs involved in the accession of the new member states. A final point to be made is that there appears to be less tension between the democratic legitimacy argument in favor of extending codecision and the interests of the member states than previously assumed. The real challenge for future constitutional changes may lie elsewhere, namely in the inability of governments to separate short term policy decisions from long term constitutional change.

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**Diagram 1: The stylized sequence of the legislative decision making procedures**



**Table 1: The distribution of power between the Council, the Commission, and Parliament\_\_**

player:	Presidency	Council members	Commission	Parliament	external observer
procedure:					
consultation: unanimity	0.19	0.05	0.10	0	0
consultation: majority	0.19	0.05	0.10	0	0
assent	0.16	0.04	0.09	0.04	0
cooperation	0.29	0.03	0.15	0.04	0
codecision	0.50	0.06	0	0.14	0

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**Table 2: Inertia under different legislative procedures**

procedure:	
consultation: unanimity	0.65
consultation: majority	0.65
assent	0.69
cooperation	0.55
codecision	0.28

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**Table 3: Hypotheses on constitutional change in the European Union:  
the path dependency of legislative procedures**

<b>Change</b>	<b>To:</b>	consultation unanimity	consultation majority	assent	cooperation	codecision
<b>From:</b> consultation: unanimity			indifferent	no	no	yes
consultation: majority	indifferent			yes	no	yes
assent	yes	no			no	yes
cooperation	yes	yes	yes			yes
codecision	no	no	no	no	no	

**Table 4: Changes in legislative procedures as proposed in the Amsterdam Treaty (in the number of Articles)**

<b>Change To:</b>	consultation unanimity	consultation majority	assent	cooperation	codecision
<b>From:</b>	29	17	5	6	39
consultation: unanimity 26	6	0	0	0	3 (12%)
consultation: majority 15	0	3	0	0	1 (6%)
assent 5	0	0	1	0	1 (20%)
cooperation 17	0	0	0	0	11 (65%)
codecision 15	0	0	0	0	8

Comments:

the number of new articles under a procedure is given at the diagonal (grey boxes);  
the total number of articles under a procedure after the introduction of the Maastricht Treaty is given in the first column;  
the total number after the Amsterdam Treaty is given in the top row;  
the number of articles under codecision include the few under which the Council has to decide by unanimity: two for the Maastricht Treaty, and three for the Amsterdam Treaty;  
the percentage of articles transferred from a procedure to the codecision procedure is given between parentheses;  
the table is compiled on the basis of the text of the Maastricht Treaty and a comprehensive guide to the changes in the Amsterdam Treaty (<http://europa.eu.int/scadplus/leg/en/lvb/a29000.htm>).

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<sup>1</sup>Also sometimes called the conciliation procedure and referred to in the Treaties as 'the procedure under Article 189b.'

<sup>2</sup>Namely, the assent, the consultation and the budgetary procedure.

<sup>3</sup>Despite its repeated efforts to participate on an equal footing in the 1996 Intergovernmental Conference, the European Parliament only achieved the status of being 'closely associated with the work of the conference to enable it to have regular and detailed information on the progress of discussions and to make known its point of view on any matter discussed whenever it feels this to be necessary' (McDonagh, 1998: 58). Devuyt, however, takes the view that the Parliament's ability to influence reforms in the 1996 - 1997 institutional reform process has been somewhat increased by its participation in the Reflection Group and the link made by the Belgian and Italian Parliaments between the Parliament's approval and their own ratification of the Treaty changes. Nevertheless, he also acknowledges that the Intergovernmental Conference itself was dominated by the member states' (domestic) preferences (Devuyt, 1998: 615-616).

<sup>4</sup>According to Schneider (1995: 52), the codecision procedure is 'constitutionally unstable'. Council members may raise an issue in the European Council, which could decide to overturn the earlier agreement with Parliament. Technically, an outcome under the codecision procedure need not to be located in the Council's unanimity set (the set of points for which no other points exist that are preferred by a unanimity of members), since it is the result of bargaining between the Council (based on a qualified majority) and Parliament (based on absolute majority). A point that is set outside the Council's unanimity set is 'unstable', since other proposals exist, which are unanimously preferred by Council members.

<sup>5</sup>If the game does not have a unique equilibrium, but multiple equilibria, the simple Euclidean distance can be replaced by the average Euclidean distance, i.e. the sum of the Euclidean distances between each equilibrium outcome and the player's ideal point for all equilibria in a particular policy state, divided by the number of equilibria.

<sup>6</sup>Note that a conciliation procedure was already instituted in 1975 to avoid conflict between the Council's legislative power and Parliament's budgetary power. In a joint declaration, the Council and Parliament agreed to follow this procedure on legislative matters that 'have appreciable financial implications, and of which the adoption is not required by virtue of acts already in existence'. This procedure, which allows the Council to move on after consulting the parliamentary delegation since it possesses the ultimate power to legislate, is not strictly the same as the conciliation attempt under the codecision procedure (see Corbett *et al.*, 1995: 193-195).

<sup>7</sup>The member states hold the chair in the Council on the basis of six months rotation.

<sup>8</sup>See, for instance, Articles 109(1) and 109f(7) EC, which concern monetary policy (EMU).

<sup>9</sup>See, for instance, Article 94 EC, which concerns the regulation of state aids.

<sup>10</sup>It must be noted that there are different versions of the assent procedure, including one in which the Council acts on a proposal of Parliament with regard to a uniform procedure for European elections (Article 138 EC).

<sup>11</sup>Tsebelis (1994) shows that the European Parliament may have 'conditional agenda setting' power under the cooperation procedure. However, the Commission does not play a role in Tsebelis' formal model (see his appendix). For this reason, Moser (1996) criticized Tsebelis' analysis and shows how the results may change when the Commission takes the lead in shaping the common position. He concludes that Parliament only has conditional veto rights. The core of their dispute is about the

Commission's role in the first reading of the procedure (see Tsebelis, 1996, for his response).

<sup>12</sup>Equilibrium outcomes and the simulations that will be discussed in Section 5 have been computed by a computer program called 'WinsetXD'. This program has been developed for extensive form games of perfect and complete information for which solutions can be determined by backward induction.

<sup>13</sup>Five Council members is sufficient to distinguish between the voting rules that are used by the Council. We regard a proposal to be adopted by the Council if all five members agree in case of unanimity rule, and the approval of four out of five members in case of qualified majority voting. The analysis can be further extended by assuming unequal voting weights for the various Council members, which would allow us to differentiate in power positions between different Council members.

<sup>14</sup>This sample size is based on the decision to estimate the expected distance for each player within an accuracy of at least  $\pm 0.1$  distance-units and to make use of a 99% confidence interval. In addition, if both the outcome and the ideal point of a player were randomly determined, the expected standard deviation would be 25 (with an expected mean of 50). Using the formula for a confidence interval (see Blalock, 1972: 213-215), the minimum sample size in that case is  $N = (2.58 \times 25)/0.1 = 645$ , or  $N = 416,025$ . Smaller standard deviations, which can be associated with players that have some impact on the outcome of a game, imply a smaller minimum sample size. A sample of 1,000,000 observations, which is above the required minimum, is sufficiently large to get an accurate impression about the mean values.

<sup>15</sup>It must also be noted that the Commission has argued in favor of simplification of decision making in general and of codecision in particular, but has advocated the legal approach to the extension of codecision rather than its full adoption for all legislation across the board. See 'Intergovernmental Conference 1996: Commission Report for the Reflection Group' (European Commission, 1995).

<sup>16</sup>It must be noted, however, that it is not clear yet what the position of the Commission is.

<sup>17</sup>Article 130(d) EC, as amended by the Treaty of Amsterdam (new Article 161).

<sup>18</sup>See the analysis in 'The European Parliament as it would be affected by the Draft Treaty of Amsterdam of 19 June 1997' European Parliament, Committee on Institutional Affairs at <http://www.europarl.eu.int/dg7/treaty/analysis/en/epchange.htm>.

<sup>19</sup>Article 37(2) EC, as amended by the Treaty of Amsterdam (new Article 31).

<sup>20</sup>Article 5a, new Article 11(2) of the Treaty of Amsterdam, first sub-paragraph.

<sup>21</sup>Such as the structural funds and agriculture, subject to the current Agenda 2000 negotiations.

<sup>22</sup>New Article 137.