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European University Institute
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Abstract

We examine the sources and processes of institutional change in one important aspect of EU politics—the legislative procedure of codecision and show how interstitial change of institutions emerges between formal Treaty revisions and under specific conditions may be formalized in subsequent formal Treaty reforms. We develop two related models of Treaty change. First, in a ‘simple’ model, we argue that informal rules will be formalized in the Treaty text where all member states are in agreement, and will be rolled back when all member states oppose them; otherwise they will continue in existence at the informal level. Second, in a more complex framework, we argue that actors who have effective veto powers in a related arena may make credible threats that allow them to press member states into formalizing informal rules, provided that member states are not unanimously opposed to this formalization. We empirically assess our claims in the light of several instances of informal rules applied in the codecision procedure.

Keywords: Democracy, EU institutions, European Parliament, Co-decision procedure

Introduction*

What are the sources of change in institutions? Are such changes to be accounted for by exogenous events or shocks, or are they driven by endogenous processes or a combination of both? This question is at the heart of important debates in international relations theory, comparative politics and in the study of the European Union. Recently, both international relations, comparative politics and EU studies have seen the advent of new forms of institutional analysis, most notably game theoretic techniques of institutional modelling that have been borrowed from the study of American politics. However, as we argue in this paper, these new approaches may systematically discount the extent to which change can—and does—occur in complex institutional systems such as the EU between formal treaty revisions, and, how change occurs endogenously once formal institutions have been established.

This article sets out to examine the sources and processes of institutional change in one important aspect of EU politics—the legislative procedure of codecision and show how interstitial change of institutions emerges between formal Treaty revisions and under which specific conditions they are formalized in subsequent formal Treaty reforms. The game-theoretic analysis of institutions suggest that institutions are the product of conscious choice by a small group of actors. Thus, in the European context, member states have complete control of institutions and shape them off-stage such that they produce exactly the desired outcomes. By relaxing one, manifestly unrealistic assumption of current game theoretic accounts of EU politics, that the member states are capable of crafting complete contracts that will cover all contingencies—one can show that there are predictable circumstances under which the member states will not be ‘masters of the Treaty’ but that institutional changes may emerge *after* the setting up of formal higher order institutional rules which subsequently may be accepted or rejected in a formal revision of the treaties. Under the unanimity rule governing Treaty change, member states may have difficulty in overturning existing practices.

Our argument has important implications not only for EU politics, but also for all types of institutions. It shows the limits of current game theoretic approaches to the analysis of international and national institutions, and points to the possibility of an alternative research programme, that would analyze more closely the relationship between the forces governing the day-to-day politics of institutions (informal bargaining processes) and those governing choice over the macro-institutional frameworks that shape behaviour. In earlier work,¹ we have argued that bargaining over the implementation of political procedures such as codecision may lead to the interstitial creation of informal institutions, and that these informal institutions may in turn affect future rounds of Treaty change. This article specifies more precisely how informal institutional changes may affect future rounds of Treaty bargaining.

It starts by providing an outline of the relationship between informal institutional change and formal institutional revision in the European Union. Next, it goes on to lay out two related models of Treaty Change. First, in a ‘simple’ model, the article argues that the combination of (a) a condition of an incomplete contract that would not cover all possible contingencies will lead to informal rules guiding the day-to-day application of the contract, and (b) the decision rules governing formal revision, will mean that it will sometimes be impossible for member states to reverse these informal institutional changes, and that indeed under certain circumstances they may wish to incorporate them into the treaty. Second, in a more complex model, the article hypothesizes that actors who are the beneficiaries of the informal rules with veto powers in related arenas and/or in an alliance with a formal veto-player may make credible threats that allow them to press member states into formalizing informal rules, provided that member states are not unanimously opposed to this formalization. It

* We would like to thank the Swedish Institute for European Policy Research in Stockholm for the generous funding of our research.

1 Farrell and Heritiér, 2003.

derives some initial hypotheses from these theoretical considerations. Next, it sets out an initial ‘plausibility probe’ of these hypotheses, examining how well it describes three recent cases of the formalization of an informal institutional rule. It concludes by considering the more general circumstances under which informal institutional change may have long lasting consequences for the shape of EU politics—and for the development of institutions more generally.

Institutional Change in the European Union

Two prominent perspectives dominate the study of EU politics. Scholars who believe that the integration process is driven by the choices of member states, focus on Intergovernmental Conferences (IGCs) as the key moments of institutional change, arguing that IGCs (and member state choice) is the fundamental engine of integration. Scholars who argue that the Commission, European Parliament and European Court of Justice (ECJ) play an important role in determining institutional choice, tend instead to focus on the everyday politics of the EU as the arena within which institutional change occurs. While some scholars clearly recognize that these two arenas of institutional choice—IGCs and everyday politics—are interconnected, there are few attempts to theorize these connections, and to produce hypotheses. This reflects a more general theoretical lacuna in the study of international institutions, and indeed of institutions more generally.

This article proposes that everyday politics and IGCs are indeed linked, and that the connection travels in both directions. Not only may formal institutional changes that are agreed at IGCs affect how everyday politics is carried out in future and lead to interstitial changes of institutions, but the latter may also affect future rounds of formal institutional creation. In order to test this claim, it is necessary to identify the different political processes through which institutional change occurs in both arenas.

First, one may examine decision making over constitutional change to the European Treaty texts. Since the Single European Act of 1987, the European Union has seen a new IGCs every few years, in which changes to the Treaty texts are negotiated. In a first analytical step the article claims that this process of institutional choice is dominated by the member states. The role other main organizational actors in the EU—the European Parliament and the European Commission which are consulted in the process—also plays an important indirect agenda setting role for IGCs (and, in a context of iterated exchange, may have some implicit bargaining weight), which is developed in a second analytical step. Indeed, the Commission has historically acted as an important interlocutor in the bargaining process among member states.² However, the final choice rests with the member states—each member state has a veto over future Treaty changes. Thus, changes to the fundamental constitutional texts of the EU require unanimity among the member states if they are to be carried.

Second, the article examines the ‘everyday politics’ that takes place in the EU between rounds of constitutional negotiation. As we have argued in previous work,³ the provisions of the Treaty texts that have been negotiated in past IGCs—which have properties of an incomplete contract—serve as a starting point for new negotiations and bargains among the main organizational actors within the EU legislative process *over competences*. The European Parliament, the Council and the Commission each seek to maximize their legislative competences through bargaining over how ambiguities in the Treaty texts ought to be interpreted and applied to the legislative process. Each organizational actor typically seeks to maximize its competences through such bargaining. The respective bargaining strengths of the actors involved will depend on the options given by the formal texts themselves, and the actors’ fall-back positions in the case of a failure of the bargaining process, as affected by their time horizons, and their particular sensitivity to outcomes. Given these factors, the predominance of the member states (as represented by the Council) is by no means a given—in many circumstances, other actors

2 Scholars disagree on the extent to which the Commission may have an independent influence on member state choice in IGCs.

3 Farrell and Héritier, 2003.

such as the Parliament, will have superior bargaining strength.⁴ Over time, given ambiguity of treaty provisions, these processes may lead to the creation of informal, and sometimes quasi-formal institutions that instantiate these differences in bargaining power, and provide actors with a reasonable degree of certainty when facing complex situations in the future. Thus, periods of everyday politics between Treaty changes will involve the creation of informal institutions that structure actors relations within the legislative process. These informal institutions may accommodate existing formal rules by specifying or complementing them. However, they may also transform them in the sense of becoming competing institutional rules shifting the relative decision-making weight of the involved actors. It is the latter that this article concentrates on.

How do these twin processes of institutional change—formal choice over institutions in IGCs, and informal bargaining in everyday legislative politics between IGCs—affect each other? As mentioned, scholars typically concentrate on the putatively determinate effects of formal institutions for everyday politics. Thus, for example, Garrett and Tsebelis contend that the Treaties will be ‘the basis for all actors’ behaviour,’⁵ with the implication that informal institutions, to the extent that they exist at all, are merely the contingent by-product of formal Treaty texts. In contrast, we argue that there is an iterated relationship between formal and informal institutions. Formal institutional changes at time t (an IGC) give rise to bargaining at time $t+1$ (everyday politics) about how these changes can be implemented, which in turn give rise to informal institutions that may affect negotiations in a new IGC at time $t+2$ and lead to revised formal rules.

Theory and Hypotheses

In order to show that previous rounds of informal institutionalization may affect bargaining in IGCs we employ three major assumptions. First, we assume that the meta-institutions governing choice count.⁶ In particular, we assume that the unanimity requirement fundamentally constrains member state choice over new constitutional changes at IGCs. In order to successfully change the Treaty texts, it is necessary to persuade all member states that this change is necessary.

Second,⁷ we assume that the EU Treaties are not complete contracts, rather that they contain provisions that are ambiguous. In other words, when member states negotiate changes to the Treaty texts *ex ante*, they cannot be certain of how these changes will be implemented *ex post*. There may be inconsistencies or ambiguities within the contracts as they are negotiated by actors with diverse preferences with bounded rationality under serious time constraints.⁸ Furthermore, even when actors are perfectly rational, there are likely to be limits to their foresight—they will be unable fully to fully anticipate *ex ante* how the institutions that they negotiate may be applied in novel and unanticipated circumstances *ex post*. Thus, even where member states negotiate institutions that seek to ‘control’ organizational actors such as the Commission and Parliament through appropriate mechanisms, they will be unable to do so perfectly—the contracts that they create will be incomplete, and vulnerable to reinterpretation *ex post* in circumstances that were not initially foreseen. It is precisely because of the member states’ inability to negotiate complete contracts that bargaining may arise over the practical interpretation of Treaty texts, i.e. conflict over competences that give rise in turn to informal institutions.⁹

4 Farrell and Héritier 2003, although see also Farrell and Héritier 2004.

5 Garrett and Tsebelis, p. 356.

6 And that they count in many of the same ways that one-shot game theorists presume they do.

7 And in contrast to most scholars who use one-shot games to model EU institutions.

8 There is ample anecdotal evidence to suggest that IGCs – where the major concessions are often made only at the last possible moment – very often produce ambiguous, or even partly incoherent texts.

9 Farrell and Héritier, 2003.

Finally, we assume that actors are interested in maximizing their own influence on policy outcomes through increasing their effective competences.

These assumptions, when taken together, lead to two important conclusions. First, in every instance of IGC negotiation except the negotiation of the initial Treaty of Rome, member states will be faced with an existing panoply of institutions that does not precisely match their preferences. Each IGC gives rise to formal institutional changes, which in turn give rise to bargaining among legislative actors over ambiguous higher order institutional rules that produce informal institutional rules that instantiate the results of these episodes of bargaining. At any point in time, these informal institutions mean that the existing Treaty texts may be interpreted and applied in a manner that deviates substantially from member state preferences. Had member states known *ex ante* how the rules that they created were going to be applied *ex post*, they might very well have chosen a different set of rules.

However, and this is the second conclusion, member states are fundamentally constrained in their ability to correct previous institutional changes that have had consequences that were unanticipated *ex-ante*, so that these institutions better reflect their *ex-post* preferences. At any given IGC, many member states may wish to change institutions that were created in previous IGCs, and that have been interpreted in unexpected (and unwanted) ways. However, the unanimity rule presents a fundamental limit to their ability to make such changes—because the agreement of all member states is required, it may prove impossible to create the necessary consensus for change, even if a majority of member states favour it. In situations where informal institutional change has pushed the integration process further than most member states want it to go, or where the Commission or Parliament have accrued more power than the member states would like them to have accrued, change will only be possible if the most pro-integration member state (or, as appropriate, the member state that most favours the Commission or Parliament) agrees to it. The unanimity rule is two-edged—even as it sometimes brakes the ambitions of pro-integrationist member states (who would prefer institutional changes increasing the power of Commission or Parliament), it equally may hinder states who wish to roll back the powers of Commission or Parliament, when these powers have developed in unexpected ways through informal institutional change.

Thus, we argue—in a first step—that the inability of member states to create complete contracts *ex ante*, combined with the restrictions that unanimity imposes on member states' ability appropriately to revise contracts *ex-post* will affect the extent to which informal institutions may survive—even when a majority of member states oppose them. Under our, admittedly simplified argument, there are three possible constellations of member state preferences regarding a given informal institution that has arisen through bargaining in everyday politics. First, all member states may be in agreement that the survival of a particular informal institution is not in their interests. Second, all member states may be in agreement that the survival of a particular informal institution is in their interests. Finally, member states may disagree on whether the survival of a particular informal institution is in their interests, under unanimity, the obdurate dissent of one member state from the majority position is enough to prevent change. Each of these constellations of preference, in combination with the unanimity rule of decision-making, will lead to determinate outcomes, as shown in the hypotheses below.

Hypothesis One: When all member states agree that the survival of a particular informal institution is not in their interests, they will introduce formal institutional changes that are intended to undercut the relevant informal institution.

When all member states are unanimous that the survival of a particular informal institutional change disadvantages them, then—assuming that there is a clearly superior alternative—they may introduce appropriate formal institutional changes at the next IGC, that eliminate the relevant loophole, and thus render the informal institution moot. The requirements for this action are relatively stringent—all member states must be in agreement that the continuation of a particular informal institution goes against their interests. Nonetheless, it presents a clear—and important—limit on the ability of Commission and Parliament to use informal institutionalization as a means of accruing power.

Hypothesis Two: When all member states agree that the survival of a particular informal institution is in their interests, they will not try to undercut it; indeed they will seek to strengthen it through providing formal supports in subsequent changes to the Treaty.

One might reasonably contend that there are many circumstances where member states will be in agreement that the continuation of an informal institution is to their advantage or at least is better than the other obvious alternatives, but see no need for further formal developments. Still, there is good reason to believe that where member states are convinced of the advantages of an informal institution, they will seek to build on it through formalization. First, as Carey (2000) argues, ‘parchment’ may very substantially increase the coordination effect of institutions, allowing actors to establish mutual expectations about behaviour more easily than with many informal institutions. Thus, member states will very often wish to ‘cement’ informal institutions that they consider to work to their advantage through building them into the formal institutional framework of the Treaty. Second, even where member states do not wish to formalize informal institutions in order to preserve some degree of flexibility, they may wish to use existing informal institutions as an initial starting point for future trajectories of formal institutional change, which do not so much formalize the institutions in question, as build ancillary formal institutions that have an existing set of informal institutions as their *sine qua non* and necessary foundation.

Hypothesis Three: When member states are in disagreement over whether the survival of a particular informal institution is in their interests, they will not be able to reach the necessary consensus either to undercut it, or to formalize it. Accordingly, they will leave it alone.

Finally, hypothesis three predicts that where member states are unable to agree over whether the continuation of an informal institution is in their interests, they will be stalemated. Because of the unanimity rule, neither those who disfavour the informal institution and would like to undermine it or those who favour the institution and would perhaps like to formalize it, may introduce Treaty changes. Thus, under these circumstances, informal institutions will persist without any interference, positive or negative, from member states at the IGC. Given the stringent conditions required to achieve unanimity, this is probably by far the most common of the three possible constellations when politically interesting issues are at stake.

Thus, in a first analytical step, the combination of (a) the inability of member states to create complete contracts, (b) the unanimity rule that applies at IGCs, and (c) actors wish to increase their own institutional power, mean that Treaty texts may have unexpected results, such as the creation of informal institutions, and that member states will have difficulty in reversing these results. Under our argument, specific constellations of member state interests will be associated with specific outcomes in terms of the undermining, formalization or survival of informal institutions at the IGC stage.

In a second analytical step a more complicated model is presented, which includes the possibility that other actors than the formal decision-makers in a treaty change can affect such a change. How is this possible? In the European Union, as in other complex setting, actors interact across a variety of arenas of policy making and institutional design. This means that—under specific circumstances—actors who are not involved directly in Treaty negotiations can seek to link outcomes in these negotiations to outcomes in other arenas where they are directly involved, thus leveraging their bargaining power in the arena in which they are not formally involved to press for Treaty changes.

This model starts from the same basic assumptions as in the ‘simple’ model—that is, that the unanimity rule counts, and that member states (or other actors) cannot draft complete contracts. However, it is complicated by adding the assumption that other arenas of policymaking and institutional design exist, perhaps creating ‘nested games’ (Tsebelis 1990); but nested games in which the outcomes are institutions and policies. Actors will be able to link these arenas together under two conditions. First, it is necessary that interested actors who are not veto players in the formal process of Treaty negotiation do have veto power in a second arena of policymaking or institutional change, and can thus make credible threats. By ‘interested’ actors, we mean actors who have clear preferences over

the various possible Treaty outcomes (in this case the formalization of an informal rule favourable to these actors) which diverge from those of the member states, and who thus have an incentive to make credible threats if they are able to do so. Second, it is necessary that the member states, the actors who are directly responsible for Treaty reform are vulnerable to credible threats that are made in the second arena. Thus, they have an incentive to respond to these threats, by responding to the demands of the relevant actors without a formal role in Treaty revision. In our case member states would be vulnerable to such threats because they need a unanimous vote to bring a treaty change.

There is an obvious limitation to the ability of outside actors to make credible threats to member states, which flows from some of our arguments in the ‘simple’ model. Outside actors, even if they have veto power in a different arena, will only be able to make credible threats where the member states have divergent preferences. Where member states have unanimous preferences—i.e. they are all vigorously opposed to a proposed institutional change—they will be able successfully to resist pressure because they can make a credible counter-threat—to eliminate the veto powers of the outside actors in question through appropriate Treaty revisions.

Thus, our more complex model will make the same predictions as our simple model in those areas where member states have unanimous preferences. Where it differs from the simple model is in those situations where member states have *divergent* preferences. Rather than simply predicting that informal institutions will persist, it predicts that under specific conditions, outside actors might well succeed in pressing member states to formalize an informal institution from which those actors benefit.

Thus Hypothesis Four is an alternative to Hypothesis Three.

Hypothesis Four: Outside actors may successfully press for Treaty change that formalizes informal rules where (a) they have the power to make credible threats in other linked arenas, (b) where the actors deciding over Treaty change (the member states) are vulnerable (due to unanimity rule) to those threats, and (c) the member states have divergent rather than unanimous preferences.

Methodology

We specify our hypotheses as follows

Variables Hypotheses	Independent Variable/indicators	Dependent Variable/indicators	Standards falsification
<i>H1</i>	All member states yes; Stated positions	Formalization of informal rule; new formal rule	No formalization of informal rule
<i>H2</i>	All member states no; Stated positions	No formalization of informal rule; informal rule dropped	Formalization of informal rule
<i>H3</i>	Member states disagree; Stated positions	Informal rule remains valid	Informal rule dropped
<i>H4</i>	Arena linkage; Stated positions	Informal rule formalized	Informal rule not formalized

In order to empirically explore the indicators of the independent and dependent variables we use the following *data sources*: Information has been collected in half-structured, intensive interviews with the concerned formal players from the Council, the European Parliament and the Commission. Moreover, archival documents on the negotiation processes of the Amsterdam and Nice Treaties, internal documents of the European Parliament, the Council of Ministers and the Commission have been systematically analyzed.

In order to conduct an initial plausibility probe of our four hypotheses we choose the following *cases*. To empirically assess Hypotheses One and Two (member states unanimously in favour or against formalization) we choose a case with unanimous support for the informal rule having emerged under codecision, i.e. the *formalization of early agreement* (Hypothesis one) and compare it to the

outcome of a case with a unanimous rejection of an informal rule by member states (Hypothesis two), i.e. *the Ken Collins amendment*. To probe the plausibility of Hypothesis three and four ('Member states disagree') we investigate the case of the *abolishing of the third reading*. We stress that we do not undertake to test our hypotheses in a rigorous fashion which would require a relatively large *n* of cases.

Case one: The Institutionalization of the 'early agreements' provision

The empirical exploration of the case of the formal institutionalization of the early agreement relates to *Hypothesis One* stating that if all member states favour an informal rule, it will be formalized.

The introduction of the codecision procedure or procedure under Art. 189 A, as it was expressly called in the Maastricht Treaty¹⁰ led to a series of institutional battles between the European Parliament, and the Council over how codecision should be implemented.¹¹ Ambiguities in the Treaty text led Parliament and Council to adopt differing interpretations. While the Parliament maintained that the codecision procedure effectively gave it equality with Council in the process of debating and deciding legislation, the Council initially maintained that it did not need to bargain with the Parliament, and would merely indicate those pieces of legislation that it was prepared to accept or reject, on a 'take it or leave it' basis (Corbett et al 2000). Neither side was initially prepared to back down—the Parliament went so far as to threaten to block or slow legislation in order to increase its negotiating power. After a series of hard-fought legislative battles, the Council gradually came to accept that it did indeed need to negotiate with the Parliament over legislative items that came under the codecision procedure. COREPER and Council had to recognize that Parliament had the role of a copartner in legislation. The confidence building really started with the introduction of the informal trialogues. The latter enabled both sides to speak more frankly, and to explain more in detail what the underlying reasons are for the positions that they adopted.¹²

In the words of an official from the European Parliament,

this institutional innovation has ... served to generate a variety of procedural norms and shared beliefs about how the parties should behave which can only be described as 'rules of engagement.' By the end of the Maastricht era, they had become so self-evident that no one contested them.¹³

This in turn gave rise to a series of informal institutions, which instantiated the expectations of both Council and Parliament over how negotiations should proceed, and reduced transaction costs by creating a set of shared expectations among all actors in the legislative process regarding appropriate procedures.

The most important of these institutions involved the process of early agreements resulting from 'trialogues' (sometimes called 'trilogues').¹⁴ Early agreements rapidly became perceived as essential, not only by the European Parliament, but also by important officials within the Council, who directly represented member states. Clearly, they represented an important concession to the European Parliament—they allowed the Parliament to exert an influence on legislation that it would not otherwise have had. Equally clearly, in a world where the Parliament was willing and able to block legislation, the Council had a strong interest in ensuring that discussions with Parliament began at an early stage, and were conducted reasonably smoothly. This was especially so as the Council was relatively understaffed, and had difficulty in dealing with a large volume of contentious legislation.

10 Part of the compromise among governments was to avoid calling the new provisions 'codecision procedure', in particular to meet the concerns of the UK government.

11 The informal institutional changes described in this section are discussed at greater length in Farrell and Héritier, 2003.

12 Interview with Council Official B.

13 Shackleton, 2000.

14 See Shackleton, 2000.

Trialogues and the ensuing early agreements after first reading provided the Council with an important means of limiting its own workload to manageable proportions.

As discussions began about the next round of Treaty changes after Maastricht, it was the Parliament which in its resolutions about codecision¹⁵ proposed to formally simplify the procedure under Art. 189A by allowing agreement after the first reading when there is an agreement between the Council and the Parliament.¹⁶ The Council Secretariat, too, proposed an effective extension of the triilogue procedures, so that it would cover earlier parts of the codecision process. The Parliament with its two representatives proposed it again in the Reflection Group¹⁷ which had been formed to prepare the negotiations of foreign ministers in the IGC. Taking part in the so-called Westendorp Group ‘for the first time allowed the EP to play a formal co-agenda setting role’ (Devuyst 1998:618).¹⁸ The Commission did not support this proposal of coming to an agreement at first reading. However, the Irish presidency included the provision proposing that the Council had the possibility to approve the text amended by the Parliament at first reading, but that the Council could only unanimously adopt a modified Commission proposal. The Dutch presidency proposed the same provision as the Irish presidency tabling a proposal under which the Council could adopt an act at first reading—provided that it decided on the basis of unanimity if the Commission had given a negative opinion. In the course of the negotiations a consensus emerged among all member states to formalize the possibility of accepting an act after the first reading. The Amsterdam Treaty issued in August 1997 in Art. 251A (old 189A) included the provision that it is now possible to adopt a text at first reading if the Parliament does not propose any amendments or if the Council agrees with the Parliament’s first reading amendments. The treaty does not explicitly mention the obligation for the Council to vote at unanimity on the amendments with which the Commission did not agree. ‘The Council, acting by qualified majority, after obtaining the opinion of the European Parliament, if it approves all the amendments contained in the European Parliament’s opinion, may adopt the proposed act thus amended’.¹⁹ This formulation is different from the wording of the adoption at second reading which provides that the Council shall act unanimously on the amendments on which the Commission has delivered a negative opinion.

As a result, the Treaty of Amsterdam has formalized the informal practice that had emerged during the application of Art. 189A TEU and allows the Council and the Parliament to begin negotiating and conclude negotiations at a much earlier stage. Under our argument, the early agreements and subsequently the formalized adoption at first reading can clearly be seen as an unexpected informal institutional innovation—they were in no sense anticipated in the Maastricht provisions that introduced the codecision procedure. However, once they had been introduced, they rapidly proved

15 Committee on Institutional Affairs, Bourlanges/Martin report adopted on 17th May 1995, Dury/Maij-Weggen Report adopted 13 March 1996.

16 Whereas the Commission in its position for the revision of the Maastricht Treaty did not propose it (Moravcsik and Nicolaidis 1999).

17 The Reflection group consisted of representatives of each member state, two representatives of the Parliament and one representative of the Commission.

18 Contrary to 1990 when the Parliament had reassembled the national parliaments of member states in an Assizes in order to muster support for the introduction of codecision in the Maastricht Treaty, the Parliament did not organize an Assize to prepare the negotiations for the revision of the Maastricht Treaty. Although the President of the Parliament, Klaus Haensch, had called on national parliaments to hold another conference of parliaments, only the Belgian parliament supported the initiative. According to Judge (1995) this was mainly due to the (mistaken) impression in the public from the final declaration of the Rome Assizes in ...that the national parliaments would relinquish further powers without demanding additional rights of control over their governments. However, the two representatives of the Parliament in the reflection group met the representatives of each parliament in order to collect information regarding their positions with respect to the negotiations (EP Etat de la reflection des parlements nationaux sur la IGC de 1996, 14.2.1996)

19 This ambiguity has given rise to some legal dispute. While some argued that the Commission has lost its possibility to force Council to unanimity, the converging view is that the obligation for the Council to decide on the basis of unanimity is maintained for the first reading.

essential to the Parliament and the Council—the organization that seeks to implement the preferences of member states over items of legislation. Given the potential veto power of the Parliament over important items of legislation, the Council, and the member states had some considerable incentive to reach an appropriate *modus operandi*. Early agreements provided just this, and demonstrably eased transaction costs—thus, member states were easily able to reach consensus on further formal Treaty reforms that were intended to extend informal dialogues to other parts of the legislative process. Thus, the empirical evidence of the early agreement case supports our first claim that if all member states agree to formalize an informal rule, this formalization will happen.

Case two: ‘The Ken Collins Amendment’

Case two is relevant to *Hypothesis Two* which argues that if all member-states are in favour of the rejection of an informal rule, the informal rule will not be formalized or formally outruled. In the application of the conciliation provision of the Maastricht Treaty the long-time chair of the Environment Committee, Ken Collins, in the negotiation of environmental legislation repeatedly introduced new amendments at the stage of conciliation, ‘to use them as bargaining chips or to change the dimensionality of negotiations. Collins pointed out there was nothing in the Treaty to prevent this interpretation of the rules’ (Hix 2002:276). In the negotiation of the revision of the Maastricht Treaty the drafts submitted to the Conciliation committee were an object of intensive discussion. Member states were unanimous in trying to fill this loophole and to prevent this exercise of discretion by members of Parliament by specifying the provisions governing the conciliation procedure. Several possibilities were discussed. ‘By specifying that conciliation negotiations are restricted to the EP and Council positions at second reading, the governments restricted any further EP interpretation of the rules to its advantage on this issue’ (Hix 2002:276).

Thus the second case—the formalization of the Ken Collins amendment—supports our second claim arguing that if member states agree to abolish an informal rule, they will proceed to do so. In this particular case by specifying the formal rules the application of the informal rule (introduction of new amendments during the conciliation procedure) became impossible.

Case three: The Abolishing of the Third Reading

Case three, in a first step, addresses Hypothesis Three which claims that if member states have diverse preferences, an informal rule will be maintained and no formal change will be brought about. The empirical case we investigate to probe the plausibility of this claim is the discussion around the abolishing of the third reading. The provision of the Maastricht Treaty that allowed the Council to reintroduce its common position in the case of a failure of the conciliation procedure unless an absolute majority of the Parliament could be mustered to reject it, was a thorn in the Parliament’s flesh because it felt that this introduced a bias in the relative power of the Council and the Parliament in the codecision procedure. It therefore early on issued a new internal rule regarding the third reading to the effect that:

1. Where no agreement is reached on a joint text within the Conciliation Committee, the President ((of the EP)) shall invite the Commission to withdraw its proposal, and invite the Council not to adopt under any circumstances a position pursuant to Art 189b(6) of the EC Treaty. Should the Council nonetheless confirm its common position, the President of the Council shall be invited to justify the decision before the Parliament in plenary sitting. The matter shall automatically be placed on the agenda of the last part-session to fall within six or, if extended, eight weeks of the confirmation by the Council... 3. No amendments shall be tabled to the Council text. 4. The Council text as a whole shall be the subject of a single vote. Parliament shall vote on a motion to reject the Council text. If this motion receives the votes of a majority of the competent Members of the Parliament, the ((EP)) President shall declare the proposed act not adopted. (Internal Rule of the EP, quoted after Hix 2002:273)

When the Council for the first time reintroduced its common position, the Parliament proceeded to action. In an open conflict with the Council²⁰ the Parliament rejected in 1994 a proposal which the Council had reintroduced after a failed conciliation procedure, the proposal for a directive on voice telephony. Following the vote on the Open Telephony Directive the Council did not reintroduce its common position anymore but came to a compromise with the Parliament during the conciliation procedure (Hix 2002:275).

In the course of the preparation of the negotiations of the Amsterdam Treaty the Parliament proposed in its position to drop the third reading altogether. The Commission in its position supported the abolishing of the third reading as well. Member states, by contrast, had mixed preferences. As it emerged under the negotiations led by the Italian, and the Irish Presidencies, Germany, Italy and Greece proposed the abolition of the third reading, whereas a majority insisted on keeping it.

These divergent preferences of member states according to our hypothesis would lead to the maintaining of the existing informal rule, i.e. the Parliament's practice of voting down any common position reintroduced by the Council after the failure of the conciliation process and the subsistence of the Maastricht formal provision. This, however, is not what happened. Rather at the end of the negotiations the member states accepted the abolition of the third reading. Hence, our third claim is disconfirmed.

How can one account for the fact that—in spite of a majority of member states being opposed to the elimination of the third reading—member states in the end agreed to *de facto* formalize the informal rule which had been applied by the Parliament to keep the Council from using its right of reintroducing its common position?

This question leads us to our fourth hypothesis on linked arenas claiming that an actor without a formal say in one arena A (i.e. Treaty revision) may use pressure by establishing a link to its formal veto power in linked arena B (i.e. legislation, or enlargement in the case of the Parliament) in order to achieve its institutional objectives in arena A. This is exactly what happened in the case of the abolishing of the third reading in the Amsterdam Treaty. The Parliament threatened that if the procedure were not be amended as it had proposed, it would—under the old procedure—continue to reject any common position so confirmed.

Thus, case three shows that absence of unanimity of member states does not necessarily lead to the maintaining of the informal rule, but that—given divergent preferences of member states- member states are susceptible to pressure from other actors. An actor which gains from an informal rule, but does not have a formal role in treaty revisions, can exert pressure on others to formalize this rule by using its veto power in other, linked, arenas, in which it plays a role.

Conclusions

This article sets out initial arguments about the relationship between informal and formal institutions, focusing on the question of when informal institutions are likely to lead to formal institutional change, and when not. Our argument presents an alternative to a dominant strain in the existing literature on EU institutions, which posits that they are the product of member state choice, and will act to constrain organizational actors such as Parliament and Commission in an effective fashion. Our argument provides the beginnings of a useful alternative approach, that would examine how the intersection between rules of choice and incompleteness of contracts leads to change over time, and, more specifically, affects the ways in which informal institutional change may have formal consequences.

We have argued that an informal rule will be formalized if member states in the Treaty revision unanimously support the formalization. If they unanimously reject the informal rule, it will be

20 Concerning the right of controlling the implementation power of the Commission.

removed. These two claims are borne out by preliminary explorations of empirical cases. The third claim is that if member states have divergent preferences, the informal rule should be upheld. The empirical case studies do not support this claim, but suggest the importance additional factors as formulated in our fourth hypotheses. This suggests that in cases where the member states have diverse preferences, the beneficiary of the informal rule, even when it is not present at the formal treaty revision, will indirectly be able to exert pressure on member states by establishing a link to another arena where she has a formal say, or by mustering the support of another veto-player. This more complex framework, as we present it, is still quite preliminary—much more work is needed to specify the precise conditions under which outside actors will, or will not be able to make credible threats. Nonetheless, together with the more simple model, it provides strong reason to believe that institutional change is not solely a function of member state preferences, even at IGCs, and is driven by an *iterated* process of successive formal institutional change and informal institutional development.

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