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## « The EU legislation game: the case of asylum law »

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# The EU legislation game: the case of asylum law\*

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## Abstract

The newly introduced codecision procedure in asylum lawmaking at the EU level is analyzed through the lens of bargaining theory. We find a substantial institutional status quo bias, which can contribute to explain the current delays in asylum lawmaking. When a policy is agreed on, codecision increases the European Parliament's influence, although the bargaining outcome is biased towards the Council of Ministers. It can nonetheless improve asylum seekers' welfare. The Commission retains an agenda setting power.

**Key words:** Asylum policy, Public choice, Codecision, EU institutions, Human rights

**JEL classification:** D72, D78, F22, K42, H53

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Fundamental differences exist between national asylum systems in the European Union: in 2009, Afghan asylum seekers were given refugee status in 0% of cases in Greece and in 2% of cases in Denmark, compared to 33% in France and 41% in Germany.<sup>1</sup> As a consequence, the asylum system has been compared to a “lottery” for refugees.<sup>2</sup> Despite the introduction of minimum standards in terms of reception conditions, procedures and the eligibility of refugees at the European level, defined in the first phase of the Common European Asylum System (CEAS) (1999 - 2005), national standards in the Member States have been found to remain very divergent.<sup>3</sup> This discrepancy can lead to secondary flows of asylum seekers towards countries with more generous legislation.<sup>4</sup>

The EU has decided to replace the minimum standards by harmonized EU asylum law in the second phase of the CEAS. The CEAS aims to "establish uniform statuses for asylum and for subsidiary protection", while "ensur[ing] access for those in need of protection: asylum in the EU must remain accessible".<sup>5</sup> However, the desirability of harmonization compared to minimum standards for member states and refugees is not clear, as discussed in Monheim Helstroffer and Obidzinski (2010). Minimum standards allow some discretion to member states who decide to adopt more generous standards.

In its “Action Plan Implementing the Stockholm Program”, the Commission writes that “(t)he establishment of the Common European Asylum System [...] should ensure uniform status (and) high common standards of protection in the EU”<sup>6</sup>. However, in spite of an initial deadline in 2010, the only step that has been made towards introducing a CEAS is the establishment of the European Asylum Support Office, whose task it is to collect, manage

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<sup>1</sup>Figures from UNHCR (2010), Annex, Table 12. Numbers of applications of Afghan asylum seekers in 2009: 1510 in Greece, 1059 in Denmark, 688 in France and 3375 in Germany.

<sup>2</sup>ECRE (2010).

<sup>3</sup>See COM (2010b) on the implementation of the qualification directive. Also, the European Commission initiated procedures against Belgium and Ireland before the European Court of Justice for not having fully implemented the procedures directive by its December 2007 deadline.

<sup>4</sup>See Monheim Helstroffer and Obidzinski (2010).

<sup>5</sup>See COM (2008).

<sup>6</sup>See COM (2010a), p. 10.

and analyze information.<sup>7</sup> No directive concerning the actual treatment of asylum requests has yet been agreed on.<sup>8</sup> It is highly questionable whether the extended deadline of 2012 for the establishment of the CEAS can be respected in these conditions.

A second development in asylum law at the European Union (EU) level is taking place simultaneously. It involves defining the "ordinary legislative procedure", i.e. codecision, as the decision making procedure for asylum law. This procedure has replaced Council decision making with simple consultation of the European Parliament in 2009. The aim of this reform is to set the European Parliament on an equal footing with the Council.

This paper addresses two questions: are these two developments compatible, and what is their impact on asylum lawmaking: will codecision lead to fairer and harmonized standards of asylum law?

Several authors have studied the general implications of the codecision procedure, including Steunenberg and Dimitrova (1999), Crombez (2000), Tsebelis and Garrett (2000), Farrell and Héritier (2003, 2007) and Napel and Widgrén (2006).

Tsebelis and Garrett (2000) and Crombez (2000) find that the codecision procedure succeeds in increasing the European Parliament's influence and in turning it into a co-legislator equal to the Council. Farrell and Héritier (2003) find that in the setting of a repeated game with informal institutions the European Parliament has increased its influence with codecision. Steunenberg and Dimitrova (1999) measure the power index of the institutions

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<sup>7</sup>Regulation (EC) No 439/2010 of May 2010.

<sup>8</sup>COM (2008) 815 "Proposal for a directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers" is still awaiting the Council's Common position, after having been amended by the European Parliament in its first reading in May 2009.

COM (2009) 551 "Proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted" is awaiting the opinion of the European Parliament in its first reading.

COM (2009) 554 "Proposal for a directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)" is also awaiting the opinion of the European Parliament in its first reading.

developed in Steunenberg, Koboldt and Schmidtchen (1996) and find that the European Parliament's power under codecision is higher than that of the Council. In its activity report, the European Parliament (2009) agrees that the Parliament benefits from the conciliation procedure: it gains bargaining power because it has a stable leadership, whereas the Council delegation's leadership rotates.

However, Napel and Widgrén (2006) do not find a substantial influence of the European Parliament. They argue that the Council has a higher influence on the outcome of codecision than the European Parliament because it requires a qualified majority vote as opposed to simple majority in the European Parliament. This makes the Council more conservative than the European Parliament. As a consequence, the status quo bias in the codecision procedure confers it a strategic advantage.

While our analysis of the codecision procedure is close to that in Napel and Widgrén (2006), we do not impose identical utility functions for the EU institutions. As a consequence, we can derive our results from the calculation of the institutions' ideal points.

Our analysis differs from this existing literature by focussing on a specific policy domain, i.e. asylum law, which has some unusual characteristics. Firstly, EU asylum law has the political specificity of being the figurehead of human rights for the European Union: here human rights are not only applied to its own citizens, but universally.<sup>9</sup> Second, asylum is a highly political policy domain, often mixed up with a wider migration debate, opposing parties for and against immigration for reasons that are not limited to economic arguments. Both because of its political role inside the EU and because of its capital importance for the future and even the survival of many fleeing persecution outside the EU, we consider it important to study the conditions for the future development of asylum law in the framework of the codecision procedure.

Further, since asylum seekers are not permitted to hold paid employment on their arrival in the European Union, the economic consequences of their arrival are limited to costs for

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<sup>9</sup>"Everyone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, Art. 14(1).

the host countries in the short term.<sup>10</sup> For the same reasons, the motives for migrating and subsequently applying for asylum are not purely economic, but are mainly determined by push factors and non-economic pull factors.

To the best of our knowledge, an analysis of the codecision procedure has so far not been applied to asylum law making. An exception is Steunenberg and Dimitrova (1999), who mention that the fact that asylum and immigration were initially not included in the areas to which codecision was applied can be explained by players rejecting the anticipated outcome of codecision. Asylum lawmaking in the EU framework has been studied by the political scientists Guiraudon (2000) and Lavenex (2001). They focus on the historical development of the European Commission and find it highly influenced by “security clubs”, setting the agenda of asylum and migration as a security issue.

The law and economics literature has made some related contributions. Bubb, Kremer and Levine (2008) model regulatory competition of refugee protection between states in the presence of a screening problem. They point out the existence of a “race to the bottom” of asylum between countries, but they do not analyze the interinstitutional aspect of asylum lawmaking. Cox and Posner (2007, 2009) address the specific nature of giving rights to migrants. In their paper, states want to encourage migrants to enter the country, but they also want to be able to remove them if conditions change. The framework in the present paper differs in that it focuses on a specific group of migrants, refugees, who do not make an economic contribution to the host state in the short run. Here, states gain benefits from accepting asylum seekers in terms of reputation, but they do not actively encourage their immigration.

Finally, Monheim Helstroffer and Obidzinski (2010) study asylum lawmaking at the na-

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<sup>10</sup>See Stevenson (2005). Note that it is for this reason that we limit our analysis to asylum seekers and do not include persons who have been granted the refugee status. Indeed, whether the economic impact of the latter group is positive, negative or zero is the subject of debate in the literature (for a review of the literature, see Stevenson 2005). If it was positive, this would constitute a reason for countries to attract asylum seekers (see for example Cox and Posner 2007), whereas we want to concentrate purely on the benefits derived from the human rights aspect of asylum.

tional and the EU level, comparing outcomes for Member countries and refugees under minimum and fixed standards. Here, we build on this model in order to incorporate the decision making process in the EU, while focussing on the current issue of harmonization. Instead of Member countries, we distinguish between the objectives of the European Parliament and the Council to see under which conditions codecision can work to further the aims of the CEAS. We focus on the access of refugees to asylum, which is presented as the predominant criterion by the Commission.<sup>11</sup>

We find that codecision can lead to a higher standard because of the European Parliament's influence. However, this result is tempered by three observations. Indeed, we find an institutional status quo bias: the European Commission, the European Parliament and the Council of Ministers must agree on increasing the standard for it to be changed. In all other configurations, the status quo persists. Further, we find a bargaining bias in favor of the Council of Ministers: if the standard is raised, the bargaining solution is always closer to the ideal point of the Council of Ministers than to the ideal point of the European Parliament. This means that it is biased towards a lower level. Thirdly, an increase in the standard may not benefit asylum seekers: given that the status quo levels currently diverge between countries, and that a change in the standard implies a harmonisation, some asylum seekers will no longer qualify for asylum.

Some background information on the development of asylum law and decision making in Europe is summarized in section 1 along with the presentation of the objectives of the EU institutional bodies. It is followed by the model (section 2), the discussion (section 3) and concluding remarks in section 4.

## **1 Background**

### **1.1 The development of asylum law in the EU**

When the Treaty of Amsterdam came into force in 1999, asylum became competency of the EU. During the first phase of what was to be called the Common European Asylum

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<sup>11</sup>See COM (2008).

System (CEAS, 1999 - 2005), minimum standards in the following fields were adopted: the reception of asylum seekers, the qualification of third country nationals as refugees and beneficiaries of subsidiary protection, the procedures for granting and withdrawing refugee status, and temporary protection in the aim of harmonizing asylum policies. Decisions were taken unanimously by the Council of the EU, which is composed of national ministers. The European Parliament, which is composed of elected delegates representing the EU citizens, was consulted, but its position was not binding.<sup>12</sup>

Further harmonization of asylum law is regarded as necessary because host countries diverge greatly in the application of the EU minimum standards directives. Reasons are, among others, a lack of common practice, different traditions and diverse country of origin information sources.<sup>13</sup> The Commission therefore aims to establish a single, common procedure in order to increase efficiency, speed, quality and fairness of decisions.<sup>14</sup> The European Parliament supports the establishment of a single procedure for the European asylum system.<sup>15</sup> This harmonization is due to take place in the second phase of the Common European Asylum System. It can only lead to an increase of protection standards with regards to the status quo.<sup>16</sup>

Another innovation of this second phase of the CEAS is that codecision is applied in the area of asylum.<sup>17</sup> Since the Lisbon Treaty came into force on 1 December 2009, decisions on asylum require a qualified majority vote and no longer unanimity in the Council. 255 out of 345 votes are required for a qualified majority, i.e. 73.91%, on the condition that at least 14 states vote yes and that at least 62 % of the population of the European Union is represented in the qualified majority. An exception to this rule is the case in which the Commission rejects the amendments made by the European Parliament in its second reading. For the

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<sup>12</sup>For example, its position on the procedures directive was ignored in the vote of the Council. See ECRE (2006).

<sup>13</sup>See the Commission's Policy Plan on Asylum, COM (2008).

<sup>14</sup>See COM (2008).

<sup>15</sup>*ibid.*, European Parliament (2005b) and Council of the European Union (2010).

<sup>16</sup>SEC (2009) 1373 final, p. 10.

<sup>17</sup>Codecision has since been renamed ordinary legislative procedure. As a matter of clarity, we will continue to speak of codecision.

text to be adopted nonetheless, the Council of Minister must vote unanimously in favour. In the European Parliament, an absolute majority is necessary to adopt a text (369 out of a total of 736, i.e. 50.13%).<sup>18</sup> Moreover, the European Parliament's position has become binding.

## 1.2 Codecision

Codecision requires that both the European Parliament and the Council of the European Union agree on a text.<sup>19</sup> Figure 1 presents the codecision procedure. First, the Commission (EC) makes a proposal. The phase called "first reading" commences. The European Parliament (EP) is the first to give an opinion. It can accept or amend the proposal. The Council of Ministers (CM) can accept the text adopted by the European Parliament. In this case, the document is adopted. Otherwise, it defines what is called its "common position" and a second reading takes place. The EP now can adopt, reject or amend the CM's common position. In the first two cases, the procedure is over. If the common position is not adopted, the status quo holds. If however the common position is amended, the CM either approves or rejects the amendment. In the case that the EP and the CM have still not reached an agreement, a Conciliation Committee is formed. This Committee is constituted of 50 % members of the EP and 50 % members of the CM. The Conciliation Committee attempts to propose a common project. If it fails, no document is adopted and the status quo holds. If it succeeds, this common project must be adopted by both the CM and the EP in a third reading, else it fails.

## 2 The Model

### 2.1 The framework

The framework is the following. The European institutions (we note the European Parliament *EP*, the Council of Ministers *CM* and the Commission *EC*) bargain over a harmonized standard of asylum reception. European institutions are due to set a standard  $x$  to grant

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<sup>18</sup>Official Journal of the European Union (2008), Art. 78.2

<sup>19</sup>See Official Journal (2007).

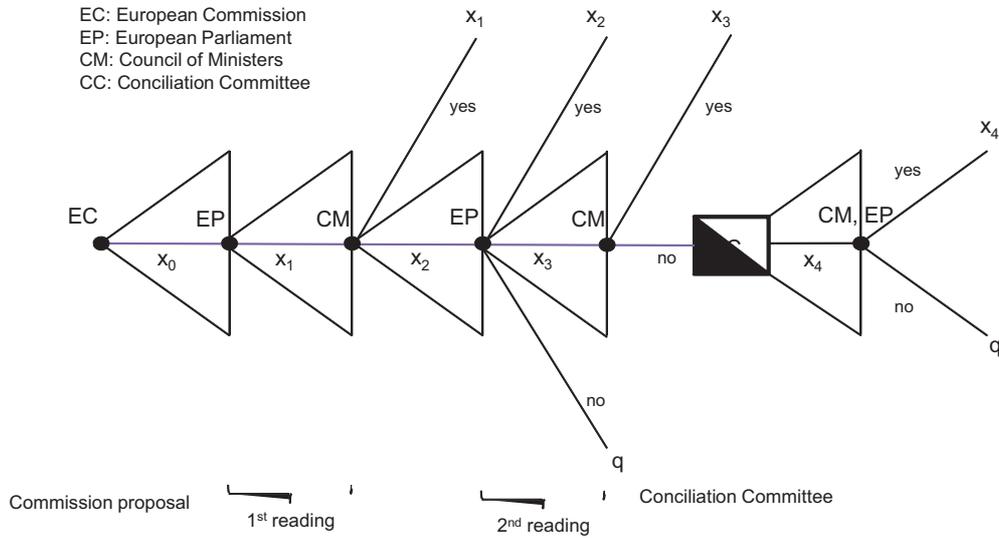


Figure 1: The codecision procedure game

asylum seekers refugee protection in the European Union. This standard corresponds to the level of gravity of a refugee’s personal situation that is required to be granted a protection status (asylum).<sup>2021</sup>  $x$  can be seen as as a reflection of different types of refugees.  $x$  close to 0 is the lowest possible standard; it means that asylum law is very restrictive: it is very hard for anybody to be recognized as a refugee. Only persons who clearly fulfill the Convention definition of refugee are granted asylum. As  $x$  rises, more and more types of persecution are recognized. For example, persecution on the grounds of gender, which was not explicitly included in the Geneva Convention, is recognized in the "Qualification Directive".<sup>22</sup> At  $x = 1$ ,

<sup>20</sup>The asylum standard differs from the standard of proof, defined as the amount of evidence required to convince a court, or the “minimum likelihood threshold for proving a claim” (Fluet and Demougin, 2006) in the literature. The purpose here is slightly different. The aim is to characterize how much persecution a victim has to suffer in order to get the refugee status. However, the standard of proof framework would be appealing to understand different processes of truth finding when European Institutions care about error.

<sup>21</sup>For our purpose it is not necessary to differentiate between the protection statuses.

<sup>22</sup>Council Directive 2004/83/EC, article 9, paras. 2(a) and (f). Another example is the extension of the protection to persons who suffer non-state persecution in the same directive. Note however that the mandate of the UNHCR has developed to englobe many more categories of refugees than are currently recognized by the EU. There is therefore space for the EU to increase its standard (see Bouteillet-Paquet, 2001, chapter 2).

asylum law is very generous: virtually every person who claims asylum is granted it. The refugee knows the standard  $x$  and knows whether he is eligible or not.<sup>23</sup> The distribution of types is assumed to be uniform<sup>24</sup>; therefore, the level of the standard determines the share of refugees who can apply for asylum.

### 2.1.1 The costs and benefits from asylum policy

The EU derives some benefits from an increase in the standard: it raises the “moral” benefits derived from the valuation of the protection of a large number of refugees.<sup>25</sup> Let us define  $b(\cdot)$  the benefit function of the standard. The benefit function  $b(\cdot)$  is strictly concave, strictly increasing and satisfies the Inada endpoints conditions. Benefits vary from 0 at an extremely strict standard that does not fulfill the constitutional guarantees to an upper limit. An increase from a low standard leads to higher marginal benefits than an equivalent increase in already high standards.

However, the benefits are valued differently by the different EU institutions. Indeed, Guiraudon (2000) shows that the "European Parliament has long been a friend of third country nationals"<sup>26</sup>, in contrast to the "social construction of the notion of a 'European security space' to legitimize the presence of police and interior ministries personnel at the supranational level"<sup>27</sup>. The Commission is shown to be split.<sup>28</sup>

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<sup>23</sup>A refugee will only file an asylum claim if he considers that he has reasonable chances of it being accepted. If his personal situation is not very serious, he will only apply for asylum if the standard is very generous, i.e. close to  $x = 1$ . On the contrary, if his situation is extremely serious, even a relatively restrictive standard is sufficient for him to apply. It is assumed that the refugee anticipates correctly whether he will be granted asylum or not. He does therefore not face uncertainty if he applies.

<sup>24</sup>The density function  $u(x)$  is equal to 1 over  $[0, 1]$  and equal to 0 over  $]-\infty, 0[ \cup ]1, \infty[$ .

<sup>25</sup>See the analysis of asylum law as a public good by Barbou des Places and Deffains (2004). We do not take refugees' skills into account as refugees are initially not permitted to work.

<sup>26</sup>Guiraudon (2000), p. 264.

<sup>27</sup>Guiraudon (2000), p. 261.

<sup>28</sup>Our own analysis of available sources validates this assessment of the institutions' objectives. Parliamentary debates show the valuation of the protection of a large number of refugees. Adopting a generous and humanitarian standard is an objective particularly emphasized (European Parliament 2005a). We deduce from this that there are benefits derived from adopting higher standards. On the other hand, no benefits are evoked by the ministers of the interior and of justice who make up the Council (see for example dpa 2006).

We deduce that  $CM$  weights the benefits of a generous asylum law less than  $EP$  ( $\lambda_{CM} < \lambda_{EP}$ , with  $\lambda_j \in [0, 1]$  the weighting of the benefits of asylum by institution  $j \in EP, CM, EC$ ). Regarding the Commission, we assume that its valuation of the benefits  $\lambda_{EC}$  derived from asylum policy relative to that of the other institutions is not defined *a priori*.

For all types of institutions, hosting asylum seekers and determining their status requires resources from the host country. The more asylum applications there are, the longer it takes to decide each individual case, and the longer asylum seekers must be hosted. As a consequence, marginal hosting costs  $c(\cdot)$  rise with the asylum law standard.<sup>29</sup> We assume that  $c$  is convex, strictly increasing and homogenous to degree 1. We also suppose that  $c(0) = 0$ . The Council, the European Parliament as well as the Commission take the hosting costs into account.<sup>30</sup> There is no reason to believe that the Council weights the costs substantially differently to the European Parliament. For our results it is therefore sufficient to differentiate their weighting of the benefits, and to assume an equal weighting of the costs.<sup>31</sup>

We assume that the  $EP$ ,  $CM$  and  $EC$  utility functions are composed of the simple sum of costs and benefits:<sup>32</sup>

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It seems that they do not aim at the protection of the highest number of refugees, but rather at limiting the number of refugees.

<sup>29</sup>Strictly speaking, the costs rise with the number of asylum applications. Since in this framework the number of asylum applications increases in  $x$ , it is not necessary to make the distinction. For an analysis linking the number of applications, the asylum law standard and the costs see Monheim Helstroffer and Obidzinski (2010).

<sup>30</sup>See Parliamentary debates, dpa (2006) and COM (2009).

<sup>31</sup>In an alternative version of the model, benefits can be held to be the same for all institutions, whereas the weighting of the costs would depend on the voting procedure. The  $CM$  would take the budgetary concerns of governments into account, while the  $EP$  does not bear the costs of asylum directly. Therefore, the  $CM$  would give costs more weight in its utility function than the  $EP$ . This alternative model would yield the same result as the current model (for proof see appendix A).

<sup>32</sup>Note that in the literature (see for example Napel and Widgrén (2006)), the positions of  $EP$  and  $CM$  are defined as that of their pivotal voters, the position of whom in turn depends on the voting mechanism. This type of modelling presents no contradiction with our optimisation approach. Indeed, suppose that the qualified majority vote in the Council as opposed to the simple majority in the  $EP$  implies that the  $CM$  favours a less generous asylum law. This corresponds to a lower weighting  $\lambda_{CM}$  of the benefits derived from

$$U_{EP}(x) = \lambda_{EP}b(x) - c(x) \quad (1)$$

$$U_{CM}(x) = \lambda_{CM}b(x) - c(x) \quad (2)$$

$$U_{EC}(x) = \lambda_{EC}b(x) - c(x) \quad (3)$$

### 2.1.2 The optimal standards of the European Institutions

Under these assumptions, we can easily show that  $x_{CM}^* < x_{EP}^*$ , with  $x_{CM}^*$  and  $x_{EP}^*$  the optimal levels of asylum standards of *CM* and *EP* (for proof see appendix B).

**Lemma 1** *According to the preferences of EP and CM, the optimal standard  $x_{CM}^*$  of CM remains strictly lower than EP's optimal standard  $x_{EP}^*$  for any  $\lambda_{CM} < \lambda_{EP}$ . If  $\lambda_{CM} = 0$ ,  $x_{CM}^* = 0$ .*

**Remark 1** *The optimal standard  $x_{CM}^*$  of CM corresponds to the standard adopted by the Council under the decision making procedure prior to the codecision procedure.*

The valuation of the benefits derived from asylum policy by *EC* relative to the other institutions is not defined *a priori*. Under the assumptions regarding the utility function of *EC*, there exists a unique standard  $x_{EC}^*$  which maximizes the Commission's welfare function. Depending on the relative value of  $\lambda_{EC}$ , the ideal point of the Commission  $x_{EC}^*$  varies over  $[0, 1]$ .

### 2.1.3 Timing of the procedure/decision making

The European Institutions do not bargain from scratch. There already exists an asylum standard  $q$  which corresponds to minimum standards decided in the first phase of the CEAS. If they find no agreement, this status quo  $q$  prevails. Note that the status quo standard can not be diminished.

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hosting asylum seekers in our model. The pivotal voter model acts therefore as an additional explanation of our assumptions.

The codecision procedure is described in Figure 1. It is composed of two rounds of proposals and counterproposals and a subsequent round of compromise finding. From the point of view of game theory, the relevant step is the conciliation stage.

In the conciliation stage, institutions can make offers and counter offers. This structure corresponds to the bargaining procedure *à la* Rubinstein, which can be approximated by the Nash bargaining solution.<sup>33</sup>

We can therefore reduce the different steps of the codecision procedure to a single step in which the Nash bargaining solution is found.

Let us assume that the timing of the legislative procedure is the following:

1. The Commission proposal. The Commission decides whether to make a proposal  $x_{EC}$  or not. If it does, the codecision procedure begins. If it makes no proposal, the game ends and the status quo  $q$  prevails.
2. The codecision stage. Following the Commission proposal, the *EP* and *CM* bargain over the asylum standard  $x$  given the status quo  $q$ . The first and second reading as well as the conciliation procedure are treated in this step.

We proceed by backward induction.

## 2.2 The codecision stage

Here, the Commission's proposal has been made, starting the codecision procedure. *EP* and *CM* try to reach a mutually beneficial agreement.

Regarding the position of the status quo asylum law  $q$  relative to the Council and EP ideal points, two cases can be distinguished:

1.  $x_{CM}^* \leq q$ : The Council's position is below the status quo. It has no interest in increasing the standard. Since a decrease is not possible, no solution other than the status quo can result.

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<sup>33</sup>See Muthoo (1999), p. 52.

2.  $q < x_{CM}^*$ : Here,  $q < x_{CM}^* < x_{EP}^*$  and the two players share a common interest in cooperation. The status quo is relatively low.

**The first case** can be divided into two subcases. When  $x_{CM}^* \leq q \leq x_{EP}^*$ , *CM* prefers to adopt a standard lower than  $q$  and *EP* prefers to adopt a higher standard. The two players have no common interest to cooperate because the changes they want to make to the status quo have opposite signs. In this case, the codecision procedure will fail to change the status quo. When  $x_{EP}^* \leq q$ , both institutions agree to maintain the status quo and not to raise it. Lowering it below the current status quo is however not an option and the status quo prevails.

**In the second case** ( $q < x_{CM}^*$ ), we are in a bargaining situation since the two players have a common interest to cooperate (both prefer a higher standard than  $q$ ) but have conflicting interests over exactly how to cooperate.<sup>34</sup> There exists an  $\bar{x} \in X$  such that:

$$\begin{cases} U_{EP}(\bar{x}) \geq U_{EP}(q) \\ U_{CM}(\bar{x}) \geq U_{CM}(q) \end{cases}$$

$\bar{x}$  is the standard upon which *EP* and *CM* agree in the conciliation procedure. Call the utility pair that corresponds to the status quo the disagreement point  $d = (U_{EP}(q), U_{CM}(q))$ . We adopt the Nash bargaining solution (NBS) to describe the outcome of the negotiations during the conciliation procedure in the second (bargaining) case ( $q < x_{CM}^*$ ).

Different hypotheses on the relative bargaining power are implicitly defended in the literature. Thus, Farrel and H eritier (2003) argue that the *CM* has a shorter time horizon than the *EP* due to the rotation of its chair every six months. This would increase the Council's discount rate. Other arguments by the same authors also indicate that the *EP* has higher bargaining power: due to second order elections, they claim that the *EP* is less vulnerable to policy failures than are member states and the *CM*. Also, the *CM* does not have the resources for long, drawn-out negotiations. On the other hand, Napel and Widgr en (2006) argue that

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<sup>34</sup>See Muthoo (1999), p. 9.

the difference in voting procedure gives a bargaining advantage to the CM. Indeed, the CM requires a qualified majority (and in one case even unanimity), whereas the EP can adopt a proposal with a simple majority. Therefore, given the lack of a decisive argument in favor of a bargaining advantage of one of the institutions, we apply the symmetric Nash bargaining solution. In doing so, we assume that no institution is more impatient than the other, nor does it have any other bargaining advantage.

The Nash bargaining solution is found solving the following problem:<sup>35</sup>

$$\bar{x} = \arg_x \max[U_{EP}(\bar{x}) - U_{EP}(q)][U_{CM}(\bar{x}) - U_{CM}(q)]$$

We apply the following split-the-difference rule: each party's Nash bargained utility payoff equals its disagreement payoff plus one-half of the aggregate surplus (Muthoo, 1999).

$$U_{EP}^N(\bar{x}) = U_{EP}(q) + \frac{1}{2}[U_{EP}(\bar{x}) + U_{CM}(\bar{x}) - U_{EP}(q) - U_{CM}(q)]$$

$$U_{CM}^N(\bar{x}) = U_{CM}(q) + \frac{1}{2}[U_{EP}(\bar{x}) + U_{CM}(\bar{x}) - U_{EP}(q) - U_{CM}(q)]$$

*EP* and *CM* agree to give the player ( $i = EP, CM$ ) what he would receive from not reaching an agreement (payoff derived from the status quo) and then to split the remaining surplus.

After rearranging the terms, the Nash bargained utility payoffs to *EP* and *CM* are respectively

$$U_{EP}^N(\bar{x}) = \frac{1}{2}(\lambda_{EP} - \lambda_{CM})b(q) + \frac{1}{2}(\lambda_{EP} + \lambda_{CM})b(\bar{x}) - c(\bar{x}) \quad (4)$$

$$= \lambda_{EP} \frac{b(\bar{x}) + b(q)}{2} + \lambda_{CM} \frac{b(\bar{x}) - b(q)}{2} - c(\bar{x})$$

$$U_{CM}^N(\bar{x}) = \frac{1}{2}(\lambda_{EP} + \lambda_{CM})b(\bar{x}) - \frac{1}{2}(\lambda_{EP} - \lambda_{CM})b(q) - c(\bar{x}) \quad (5)$$

$$= \lambda_{EP} \frac{b(\bar{x}) - b(q)}{2} + \lambda_{CM} \frac{b(\bar{x}) + b(q)}{2} - c(\bar{x})$$

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<sup>35</sup>See Binmore et al. (1986), p. 183.

The bargaining surplus is entirely shared between  $EP$  and  $CM$ . Both players are better off (or at least not worse off) by comparison with the status quo.<sup>36</sup>

The Nash equilibrium standard level, denoted  $\bar{x}$ , is chosen to maximize  $U_{EP}^N$  and  $U_{CM}^N$ . The first order conditions on  $U_{EP}^N$  and  $U_{CM}^N$  are the same and are given by

$$b'(\bar{x}) = \frac{2}{\lambda_{EP} + \lambda_{CM}} [c'(\bar{x})] \quad (6)$$

The Nash equilibrium standard corresponds to the first best standard.<sup>37</sup>

**Lemma 2** *The conciliation procedure is Pareto efficient for the European Parliament and the Council.*

We easily show that  $x_{CM}^* < \bar{x} < x_{EP}^*$ . For proof see appendixes C and D.

**Proposition 1** *The Nash equilibrium level standard is strictly higher than  $x_{CM}^*$  and strictly lower than  $x_{EP}^*$ .*

Note that  $\frac{dU_{EP}^N(\bar{x})}{dq} > 0$  and  $\frac{dU_{CM}^N(\bar{x})}{dq} < 0$ . The higher the status quo, the higher is the utility level associated with the Nash bargaining solution  $\bar{x}$  for  $EP$ , and the lower it is for  $CM$ . The explanation is simple: the split-the-difference rule leads to utilities equal to the utility of the disagreement point, plus an equal share of the surplus of the negotiation ( $[U_{EP}(\bar{x}) - U_{EP}(q)] = [U_{CM}(\bar{x}) - U_{CM}(q)]$ ). The final level of utility thus depends on the initial level of utility. Not only is the  $EP$ 's utility higher in each point than that of  $CM$  (because  $\lambda_{EP} > \lambda_{CM}$ ), but the higher the status quo, the higher the difference between their initial utility, since the slope of  $U_{EP}(x)$  is steeper than that of  $U_{CM}(x)$ . For an illustration, see Figure 2.

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<sup>36</sup>Proof:  $U_{EP}^N(\bar{x}) \geq U_{EP}(q)$  if and only if  $U_{EP}(\bar{x}) - U_{EP}(q) + U_{CM}(\bar{x}) - U_{CM}(q) \geq 0$ . We have defined  $\bar{x}$  such that  $U_{EP}(\bar{x}) \geq U_{EP}(q)$  and  $U_{CM}(\bar{x}) \geq U_{CM}(q)$ . The reasoning is similar for  $U_{CM}^N(\bar{x}) \geq U_{CM}(q)$ .

<sup>37</sup>The first best standard is defined as the one that maximizes the aggregate surplus which is given by  $U_{EP} + U_{CM} = (\lambda_{EP} + \lambda_{CM})b(x) - 2c(x)$ . The first best standard is the solution to the first order condition (7).

In the bargaining case  $q \in [0; x_{CM}^*]$   $EP$  always has more to gain from negotiation than  $CM$  because even for  $CM$ 's ideal point its gain in utility is higher than  $CM$ 's:  $[U_{EP}(x_{CM}^*) - U_{EP}(q)] - [U_{CM}(x_{CM}^*) - U_{CM}(q)] = (\lambda_{EP} - \lambda_{CM})b(x_{CM}^*) > 0$

The disagreement point is clearly Pareto inefficient since the sum of the players' disagreement payoffs ( $U_{EP}(q) + U_{CM}(q)$ ) is strictly lower than the aggregate surplus from an agreement during the conciliation procedure:

$$U_{EP}(\bar{x}) + U_{CM}(\bar{x}) > U_{EP}(q) + U_{CM}(q)$$

The Nash equilibrium standard level, denoted  $\bar{x}$ , is chosen to maximize  $U_{EP}^N$  and  $U_{CM}^N$ . The first order conditions on  $U_{EP}^N$  and  $U_{CM}^N$  are the same and are given by :

$$b'(\bar{x}) = \frac{2}{\lambda_{EP} + \lambda_{CM}} [c'(\bar{x})] \quad (7)$$

The Nash equilibrium standard corresponds to the first best standard<sup>38</sup>.

Let us illustrate this discussion with a numerical example. Assume that the payoff functions of the EP and the CM are such that:

$$U_i(x) = \lambda_i \sqrt{x} - x$$

Assume that  $\lambda_{EP} = 1$  and  $\lambda_{CM} = 0.8$ .<sup>39</sup> As a consequence  $\mathbf{x}_{EP}^* = 0.25$  and  $\mathbf{x}_{CM}^* = 0.16$ .

$q$	0	0.05	0.1	0.15
$\bar{x}$	0.19	0.18	0.17	0.16
$ \bar{x} - \mathbf{x}_{EP}^* $	0.06	0.07	0.08	0.09
$ \bar{x} - \mathbf{x}_{CM}^* $	0.3	0.2	0.1	0

Table 1: Numerical example

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<sup>38</sup>The first best standard is defined as the one that maximizes the aggregate surplus which is given by  $U_{EP} + U_{CM} = (\lambda_{EP} + \lambda_{CM})b(x) - 2c(x)$ .

<sup>39</sup>The results are true for all  $\lambda_{CM} = \lambda_{EP} - \mu$ , with  $\mu \in [0, 1[$  and  $\lambda_{EP} - \mu \geq 0$ .

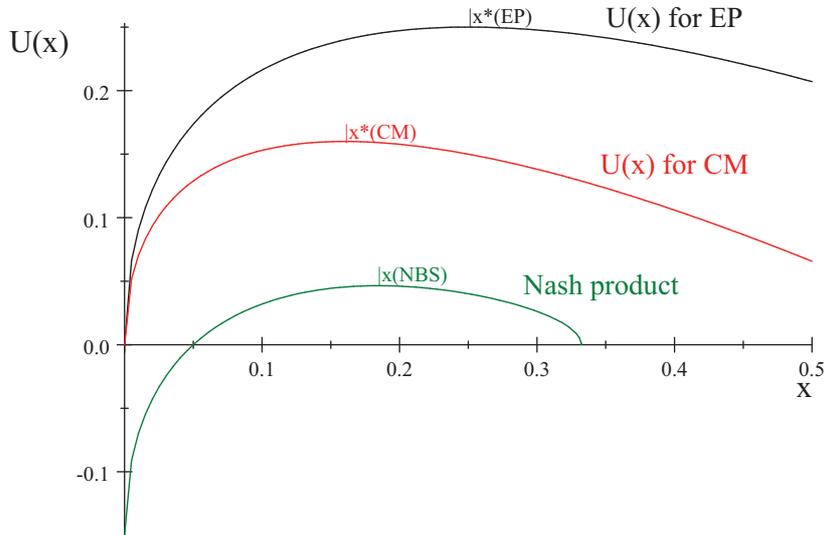


Figure 2: Numerical example with  $\lambda_{EP} = 1$ ,  $\lambda_{CM} = 0.8$  and  $q = 0.05$ .

Figure 2 shows the utility functions and ideal points for  $EP$  and  $CM$  over the interval  $x = [0, 0.5]$ , as well as the Nash product  $[U_{EP}(x) - U_{EP}(q)][U_{CM}(x) - U_{CM}(q)]$ . The maximum of this Nash product function corresponds to the Nash bargaining solution  $\bar{x}$ . Note that while  $\bar{x}$  is clearly comprised between the ideal points of  $EP$  and  $CM$ , it is closer to that of  $CM$ . This result is confirmed in Table 1: indeed the distance between  $\bar{x}$  and  $x_{CM}^*$  is always smaller than the distance between  $\bar{x}$  and  $x_{EP}^*$ , and it increases in  $q$ . This is evidence of a bargaining bias in favor of the institution whose ideal point is closest to the status quo, that increases with decreasing distance of this institution to the status quo.<sup>40</sup>

### 2.3 The Commission's proposal

The Commission anticipates the outcome  $\bar{x}$  of the codecision procedure. It makes a proposal if and only if

$$U_{EC}(\bar{x}) > U_{EC}(q) \quad (8)$$

If condition (8) is not fulfilled, the Commission does not make a proposal and the code-

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<sup>40</sup>This bargaining bias effect is in line with the results of Napel and Widgrén (2006).

cision procedure does not take place.

**Proposition 2** *The codecision procedure takes place only if the Commission anticipates an increase in its utility from the expected outcome  $\bar{x}$ .*

Indeed, the Commission only has agenda setting power. The proposal  $x_{EC}$  of  $EC$  has no impact on the bargaining between  $EP$  and  $CM$ .

### 3 Discussion

#### 3.1 General results

The Commission launches the procedure if and only if the anticipated result of the bargaining between  $EP$  and  $C$  increases its utility. The results of the asylum lawmaking process are summarized in table 1.

$\lambda_{EC}$	$x_{EC}^*$	(A) $x_{CM}^* \leq q \leq x_{EP}^*$	(B) $q < x_{CM}^*$	(C) $x_{EP}^* < q$
$\lambda_{CM} < \lambda_{EP} \leq \lambda_{EC}$	$x_{CM}^* < x_{EP}^* \leq x_{EC}^*$	$q$	$\bar{x}$	$q$
$\lambda_{CM} \leq \lambda_{EC} < \lambda_{EP}$	$x_{CM}^* \leq x_{EC}^* < x_{EP}^*$	$q$	$\bar{x}$	$q$
$\lambda_{EC} < \lambda_{CM} < \lambda_{EP}$	$x_{EC}^* < x_{CM}^* < x_{EP}^*$	$q$	indeterminate	$q$

Table 1: Results of the codecision procedure according to the relative preferences of  $EC$ ,  $EP$  and  $CM$ .

We find that the outcome of the codecision procedure depends on the location of the status quo relative to the ideal points of the European Parliament and the Council:

- If it is located in between the ideal points (case A) or above them (case C), there is no bargaining outcome, since the  $CM$  and the  $EP$  do not agree on raising the standard. Therefore, the status quo prevails: it is not possible to reach any other outcome.
- In the other case (case B) the Pareto efficient conciliation outcome  $\bar{x}$  is chosen.<sup>41</sup> The pre-conciliation periods (readings 1 and 2) of the codecision procedure have no impact on this outcome.

<sup>41</sup>Note that  $q$  is also Pareto efficient when  $x_{CM}^* \leq q \leq x_{EP}^*$  since it is impossible to improve the welfare of one without decreasing the welfare of the other. Case C is not Pareto efficient.

In cases (A) and (C), since the anticipated outcome of the codecision procedure is the status quo, the Commission is indifferent between launching the procedure (and obtaining  $q$ ) or not launching it and remaining at  $q$ . Assuming it is costly to launch the procedure, the Commission would prefer not to. On the other hand, if it gains from initiating the procedure (for reputation reasons for example), the Commission can do so (knowing that it would result in the status quo).

In case (B), all three institutions agree on the direction of the change, except when  $EC$  derives the least benefits from asylum law ( $\lambda_{EC} < \lambda_{CM}$ ). In this particular case, the ideal standard of  $EC$  is tougher than those of the other institutions, and  $EC$  decides to start the procedure if and only if its ideal point  $x_{EC}^*$  is closer to  $\bar{x}$  than to  $q$ . In line with the general results of Napel and Widgrén (2006), the simulation (1) illustrates the tendency of  $\bar{x}$  to be closer to  $x_{CM}^*$  than to  $x_{EP}^*$  when  $q < x_{CM}^*$ .

**Remark 2** *For asylum legislation to be changed, all three institutions must agree on raising the standard. Since the Council has a lower ideal point, its position is of particular importance.*

We now discuss the impact of the codecision procedure and harmonization on asylum law, on asylum seekers and on the EU institutions.

### 3.2 The impact of codecision on the EU institutions

We have shown that the bargaining outcome of codecision  $\bar{x}$  is Pareto efficient, i.e. overall utility of the two institutions is maximized in  $\bar{x}$ . The codecision procedure furthermore ensures that none of the two institutions is worse off than at the status quo. Indeed, a solution that would procure an institution less utility than the status quo would be blocked, resulting in the persistence of the status quo.  $\bar{x}$  thus makes both institutions better off than the status quo. The codecision procedure does not however lead to their institutional optima.

The Commission can anticipate the outcome of the conciliation procedure. There is no rational reason to make a proposition different from this outcome, since it cannot change the outcome. The only power the Commission retains is to anticipate an outcome that it opposes

and therefore to refuse to make a proposal.

Remarks 3 and 4 summarize these results.

**Remark 3** *The codecision procedure ensures that neither the Council nor the European Parliament are worse off than in the status quo.*

**Remark 4** *The result of the codecision procedure depends entirely on the outcome of conciliation. The formal influence of the Commission is therefore nil once it has made its proposal.*

Before the current codecision procedure, the Council decided on asylum law. It is therefore obvious that by giving the European Parliament a say, its power is reduced, and the European Parliament's power is increased. However, a number of comments can be made:

1. The Council still detains some power in the case of an agreement. The simulation (1) illustrates the fact that the bargaining outcome  $\bar{x}$  is closer to its ideal point  $x_{CM}^*$  by comparison with the optimal value for the European Parliament, i.e.  $x_{EP}^*$ .
2. The Council retains a *de facto* veto against a rise of the standard.

**Remark 5** *By comparison with the former situation in which the Council decided alone on the minimum standard, the influence of the Council is reduced by codecision. The influence of the European Parliament is increased, except that the bargaining outcome is closer to the Council's ideal point. The Commission retains its agenda setting influence.*

### 3.3 The impact of codecision on asylum law

When the status quo is inferior to the ideal points of the Council and the European Parliament ( $q < x_{CM}^* < x_{EP}^*$ ), codecision increases the protection level provided in the EU. It increases it more than the Council would have done if codecision had not been introduced. However, the Commission might prefer not to initiate the procedure if its weighting of the benefits from asylum is lower than that of the other institutions ( $\lambda_{EC} < \lambda_{CM}$ ) and if  $x_{EC}^*$  is closer to  $q$  than to  $\bar{x}$ .

When the status quo is superior to the ideal points of the Parliament or the Commission, codecision maintains the status quo.

Finally, when the status quo is comprised between the ideal points ( $x_{CM}^* \leq q \leq x_{EP}^*$ ), the status quo also prevails. No harmonization of asylum law can take place because the two institutions cannot agree. In both cases codecision has no impact, because the Council on its own would also have maintained the status quo.

Remark 6 summarizes these outcomes.

**Remark 6** *If the status quo is relatively low, codecision always increases the asylum law standard compared to leaving the decision on a harmonized standard to the Council. However, codecision only leads to a rise of the standard if this is in the interest of the Council.*

### 3.4 The impact of codecision on asylum seekers

Asylum seekers benefit from the generosity of asylum standards. The status quo is a minimum standard that is meant to constrain the countries to respect a minimal level of generosity (first phase of the CEAS). Assume two extreme scenarios: first, asylum law is applied identically in all Member countries in the status quo, and second, there is great divergence in its application.

#### 3.4.1 Identical status quo

In case (B), where the status quo was initially relatively low, i.e. below the ideal point of the European Parliament, the Commission and the Council, asylum seekers' welfare is increased with codecision, because  $q < \bar{x}$ .

In cases (A) and (C), where the status quo is above that of the Council, no decision is reached, and asylum seekers' welfare does not change.

#### 3.4.2 Divergent status quo

In this scenario, asylum law differs in the EU Member countries.  $q$  is an average of these widely different standards. As we have shown in Monheim Helstroffer and Obidzinski (2010), the consequence of applying different standards of asylum law makes the country with the higher standard more attractive to asylum seekers, some of which can hope to be recognized

as refugees only in a high standard setting. Therefore, asylum seekers are less interested in the average level of asylum law than in the highest one. If both countries adopt the high standard, asylum seekers derive additional utility from the choice of destination country. Countries that face lower hosting costs (or higher hosting benefits) than others may indeed want to adopt more generous standards.<sup>42</sup> An agreement between CM and EP implies harmonization, and refugees can no longer benefit from divergent standards.

In case (B), where the status quo was initially relatively low, asylum seekers may lose in spite of a raised standard. Indeed,  $\bar{x}$  is higher than the average  $q$ , but if this harmonized standard is lower than the highest standard of the member countries, there will be asylum seekers who would have been offered protection in the status quo who are now no longer protected. On the other hand, more asylum seekers will have a choice of destination country.

In case A and C, where the status quo is above the Council's ideal point, no decision is reached, and asylum seekers' welfare does not change.

Remark 7 summarizes the impact of codecision on asylum seekers.

**Remark 7** *Codecision does not necessarily increase the welfare of refugees compared to the status quo, even when it raises the standard. If the status quo contains divergent standards, codecision may harm asylum seekers compared to the status quo.*

### 3.5 Position of the status quo

The model shows that the outcome of the codecision procedure depends on the position and the distribution of the status quo  $q$  relative to the preferred points of the institutions  $x_{EP}^*$  and  $x_{CM}^*$ . So where does  $q$  lie in reality, and how wide is the dispersal of standards in reality?

In Monheim Helstroffer and Obidzinski (2010), we define the minimum standard determined in the first phase of the CEAS. The position of this minimum standard relative to the institutions' ideal points depends on the externality effect and can therefore not be determined *a priori*.

However, we can derive the *de facto* position of the status quo and the ideal points. Indeed, the recast of the qualification directive COM (2009) 551 of October 2009 aims at

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<sup>42</sup>See Monheim Helstroffer and Obidzinski (2010) on inter-country competition in terms of asylum law.

an improvement of refugee protection, i.e. higher protection standards.<sup>43</sup> The draft report of the European Parliament welcomes the Commission's text, while making some marginal amendments reinforcing refugees' rights.<sup>44</sup> The Council worked on the recast under the Spanish and Belgian presidencies in 2010, but has not yet published its position. Despite the announcement of a swift agreement in first reading<sup>45</sup>, the directive is still awaiting its first reading at the time of writing, nearly two years after the begin of the codecision procedure.

Therefore we can deduce that the Commission and the Parliament agree on an increase of the standard, with the ideal point of the EP lying slightly above that of the Commission. And we can guess where the Council's ideal point lies: given that the codecision procedure has ground to a halt, one can only assume that the Parliament and the Council do not expect to agree and are therefore in no hurry to continue the procedure. This would mean that the Council is not in favor of increasing the status quo. If this is the case, there is no reason to assume that the status quo will be changed any time soon.

The complex reality of the transposition of the directives into national law confounds the uncertainty over the relative composition of  $q$ . Indeed, the Commission<sup>46</sup> notes that the qualification directive has actually been successfully transposed by all Member States. However, its interpretation is very divergent.<sup>47</sup> For example, the provision requiring a causal link between the reasons for persecution listed in Article 10(1) and the acts of persecution was not transposed in several Member States, resulting in a standard more favorable to refugees than is required by the qualification directive. On the other hand, a few Member States have excluded gender-related aspects as reason for persecution, although they are explicitly mentioned in the last clause of Article 10(1)d. The main conclusion of COM (2010b) is that national asylum laws remain divergent with respect to the qualification directive, i.e. that

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<sup>43</sup>See for example SEC (2009) 1373 final.

<sup>44</sup>European Parliament (2010).

<sup>45</sup>See summary of Council's activities of 08/11/2010, available on <http://ec.europa.eu/prelex>.

<sup>46</sup>See COM (2010b).

<sup>47</sup>See also SEC (2009) 1373 final (p.11): "... the cumulative effect of [...] restrictive provisions, ambiguities, deliberate "gaps" and derogation possibilities is that the current Directive *does not guarantee the full compatibility of national implementation measures with these standards and allows for wide divergences amongst national decision-making practices*" (emphasis in the original).

there is a large the distribution of national standards. With its recast of the directive, the Commission aims to provide the basis for a correct and consistent implementation of the substantive criteria<sup>48</sup>, i.e., real harmonization.

This discussion indicates that in reality there may be a wide distribution of national standards. As we have seen in section 3.4, this configuration, while possibly giving some asylum seekers a greater choice of destination countries, leads to a reduction of their welfare. The harmonization of asylum law using codecision thus succeeds in reducing secondary asylum flows between countries (“asylum shopping”), but even if it increases the standard compared to the status quo, it reduces overall protection because countries that offered higher protection rates can no longer do so.

#### 4 Concluding remarks

In this paper, the outcomes of the codecision procedure on harmonized asylum law at the EU level are analyzed. Our model shows that codecision increases the asylum law standard compared to harmonization undertaken by the Council alone. However, it implies a strong status quo bias, because the codecision procedure will only result in a change of the asylum standard if all three institutions agree that the standard should be raised.

Codecision increases the welfare of asylum seekers compared to a harmonization of asylum law by the Council. However, asylum seekers’ welfare is not necessarily improved compared to the status quo. Indeed, if the status quo is composed of very divergent standards, as seems to be the case, then codecision may harm asylum seekers’ welfare by preventing countries from hosting categories of persons they would have hosted without harmonization.

Finally, we find that while neither the Council nor the European Parliament stand to lose from the outcome of the codecision procedure compared to the status quo, the influence of the Commission is limited because the outcome depends only on the result of the conciliation between the European Parliament and the Council.

A limitation of our result is that it focusses on isolated bargaining and therefore ignores log rolling and repeated interaction. Since the persons in the Conciliation Committee change,

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<sup>48</sup>See SEC (2009) 1373 final.

it can be argued that interaction is limited to the discussion in question.<sup>49</sup> In contrast to Napel et Widgrén (2006), we do not take intra-institutional voting into account. However, Napel and Widgrén (2006) show that the voting rules induce a bargaining bias in favor of the Council, a mechanism that would only reinforce our result.

The road to achieving the Stockholm Action Plan goals of harmonization and simultaneous raising of asylum standards is stony: not only is it possible that no harmonization can be agreed on, but if harmonization there is, it does not necessarily offer high protection standards: it never reaches the level of protection standards that the European Parliament aims for.

Can the codecision procedure and harmonization increase the fairness of decisions, as the Commission intends?<sup>50</sup> Assume that fairness is meant to mean equality of treatment. We find that only harmonization increases inter-country fairness by excluding the possibility of “asylum shopping”. Harmonization increases fairness in the sense that asylum seekers are treated equally in all EU countries. Codecision corrects fairness between institutions, in that the European Parliament now also influences the decision, though it suffers from the bargaining bias against it. However, some asylum seekers may be excluded from being recognized in the EU who would formally have been recognized, even if the standard is raised.

The harmonized Common European Asylum system was due to be in place in 2010. This deadline has been postponed. So far, only the European Asylum Support Office has been established. Our model can contribute to explain why more has not been done: the conditions for a common agreement are not united, i.e. the Council is not in favor of a rise in the standard.

Only a significant adjustment in the ideal points of the institutions or an alteration of the status quo can enable new legislation. A modification in ideal points can be brought along by a change in the composition of the institutions (for example through elections) or by a correction in the costs or perceived benefits of hosting asylum seekers, for example through public opinion. The status quo can be adjusted through a change in national legislation, for

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<sup>49</sup>See Napel and Widgrén (2006).

<sup>50</sup>See COM (2008).

example brought about by an enforcement of the minimum standards. All of these alterations are feasible, but none are in the power of one or even all three institutions of the EU: their hands may be tied until external modifications are brought upon them. As the Commission notes<sup>51</sup>, the recent recession has led to national pressures to lower the standard rather to increase it. As a consequence, the CEAS may not become reality any time soon.

## References

- [1] Barbou des Places, S., Deffains, B., (2004) ‘Cooperation in the Shadow of Regulatory Competition: the Case of Asylum Legislation in Europe’. *International Review of Law and Economics*, Vol. 23, No. 4, pp. 345-364.
- [2] Binmore, K., Rubinstein, A., Wolinsky, A. (1986) ‘The Nash Bargaining Solution in Economic Modelling’. *The RAND Journal of Economics*, Vol. 17, No. 2, pp. 176-188.
- [3] Böcker, A., Havinga, T. (1997) *Asylum migration in the European Union : Patterns of origin and destination*, (Nijmegen: Institute for the Sociology of Law).
- [4] Bouteillet-Paquet, D. (2001) *L’Europe et le droit d’asile*, (Paris: L’Harmattan).
- [5] Bubb, R., Kremer, M., Levine, D., (2008) ‘The Economics of International Refugee Law’. Working Paper 2008 Weatherhead Center for International Affairs. Available at <<http://www.wcfia.harvard.edu/node/2741>>.
- [6] COM (2008) *Policy Plan on Asylum: An Integrated Approach to Protection across the EU*. European Commission, COM (2008)360 final. Available at <<http://eur-lex.europa.eu/>>.
- [7] COM (2009) *Proposal for a directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, COM (2009)551 final. Available at <<http://eur-lex.europa.eu/>>.
- [8] COM (2010a) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Delivering an area of freedom, security and justice for Europe’s citi-*

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<sup>51</sup>SEC(2009) 1373 final.

- zens : Action Plan Implementing the Stockholm Programme*. European Commission, COM(2010)171final. Available at [«http://eur-lex.europa.eu»](http://eur-lex.europa.eu).
- [9] COM (2010b) *Report from the Commission to the European Parliament and the Council on the Application of Directive 2001/83/EC of April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals of Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of Protection*. European Commission, COM(2010)314 final. Available at [«http://eur-lex.europa.eu»](http://eur-lex.europa.eu).
- [10] Council of the European Union (2004) *Council Directive 2004/83/EC on minimum standards for the qualification and the status of third country nationals or stateless persons as refugees and persons otherwise in need of international protection (29 April 2004)*. Official Journal L 304/12. Available at [«http://eur-lex.europa.eu»](http://eur-lex.europa.eu).
- [11] Council of the European Union (2010) *Council conclusions on the follow-up of the European Act on Immigration and Asylum*. 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010. Available at [«http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/jha/114881.pdf»](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/114881.pdf).
- [12] Cox, A.B., Posner, E.A. (2007) ‘The Second-Order Structure of Immigration Law’. *Stanford Law Review*, Vol. 59, No. 4, pp. 809-856.
- [13] Cox, A.B., Posner, E.A. (2009) ‘The Rights of Migrants: An Optimal Contract Framework’. *New York University Law Review*, Vol. 84, pp. 1403-1463.
- [14] Crombez, C. (2000) ‘Institutional Reform and Codecision in the European Union’. *Constitutional Political Economy*, Vol. 11, No. 1, pp. 41-57.
- [15] dpa (2006) *Deutsch-Französische Initiative für eine neue Migrationspolitik*. dpa-News. Available at [«http://www-eu-info.de/dpa.php?id=43557»](http://www-eu-info.de/dpa.php?id=43557).
- [16] ECRE (2006) *ECRE Information Note on the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, IN1/10/2006/EXT/JJ. Available at [«www.ecre.org»](http://www.ecre.org).
- [17] ECRE (2010) *Asylum in the EU*. European Council on Refugees and Exiles. Available at [«http://www.ecre.org/topics/asylum\\_in\\_EU»](http://www.ecre.org/topics/asylum_in_EU).
- [18] Efonyi-Mäder, D., Chimienti, M., Dahinden, J., Piguet, E. (2001) *Asyldestination*

*Europa: Eine Geographie des Asylbewegungen*, (Zürich: Seismo Verlag).

- [19] European Parliament (2005a) ‘Report on the amended proposal for a Council directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238(CNS))’. *Official Journal* A6-0222/2005. Available at «<http://www.europarl.europa.eu/omk/sipade3?OBJID=99038&L=EN&NAV=X&LSTDOC=N#title2>».
- [20] European Parliament (2005b) *Asylum, Refugees and Temporary Protection*. Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, 17 August 2005. Available at «[http://www.europarl.europa.eu/comparl/libe/elsj/zoom\\_in/06\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/zoom_in/06_en.htm)».
- [21] European Parliament (2009) *Activity Report 1 May to 13 July 2009 (6<sup>th</sup> parliamentary term) of the delegations to the Conciliation Committee*. Available at «[www.europarl.europa.eu](http://www.europarl.europa.eu)».
- [22] European Parliament (2010) *Draft Report on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*. 2009/0164(COD). Available at «<http://ec.europa.eu/prelex/>».
- [23] Farrel, H., Héritier, A. (2003) ‘Codecision and Institutional Change’. *West European Politics*, Vol. 30, No. 2, pp. 285-300.
- [24] Farrel, H., Héritier, A. (2007) ‘Formal and Informal Institutions Under Codecision: Continuous Constitution-Building in Europe’. *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 16, No. 4, pp. 577-600.
- [25] Demougin, D., Fluet, C. (2006) ‘Preponderance of Evidence’. *European Economic Review*, Vol. 50, No.4, pp.963-76.
- [26] Guiraudon, V. (2000) ‘European Integration and Migration Policy: Vertical Policy-making as Venue Shopping’. *Journal of Common Market Studies*, Vol. 38, No. 2, pp. 251-71.
- [27] Lavenex, S. (2001) ‘The Europeanisation of Refugee Policies: Normative Challenges and Institutional Legacies’. *Journal of Common Market Studies*, Vol. 39, No. 5, pp. 851-74.
- [28] Monheim Helstroffer, J., Obidzinski, M. (2010) ‘Optimal discretion in asylum lawmak-

- ing'. *International Review of Law and Economics*, Vol. 30, No. 1, pp. 86-97.
- [29] Muthoo, A. (1999) *Bargaining Theory with Applications*, (Cambridge: Cambridge University Press).
- [30] Napel, S., Widgrén, M. (2006) 'The Inter-Institutional Distribution of Power in EU Codecision'. *Social Choice and Welfare*, Vol. 27, No. 1, pp. 129-154.
- [31] Official Journal of the European Union (2007) 'Joint declaration on practical arrangements for the codecision procedure (Article 251 of the EC Treaty)'. *Official Journal of the European Union* 2008/C 115/47, 09.05.2008.
- [32] Official Journal of the European Union (2008) 'Consolidated Version of the Treaty on the Functioning of the European Union'. *Official Journal of the European Union* 2007/C 145/02, 30.06.2007.
- [33] Official Journal of the European Union (2010) 'Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office'. *Official Journal of the European Union* 2010/L 132/11, 29.05.2010.
- [34] Robinson, V., Segrott, J. (2002) 'Understanding the Decision Making of Asylum Seekers', Home Office Research Study, No. 243. Available at «[www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)».
- [35] Stevenson, R. (2005) 'Refugees and Economic Contributions'. Background Paper, Hopes Fulfilled or Dreams Shattered? From resettlement to settlement Conference 23rd- 28th November. Available at «[http://www.crr.unsw.edu.au/media/File/Refugees\\_and\\_Economic\\_Contributions.pdf](http://www.crr.unsw.edu.au/media/File/Refugees_and_Economic_Contributions.pdf)».
- [36] Steunenberg, B., Dimitrova, A. (1999) 'Interests, Legitimacy, and Constitutional Choice: The extension of the codecision procedure in Amsterdam'. Mimeo. Available at «<http://www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/mannheim/w27/Steunenberg.PDF>».
- [37] SEC (2009) 1373 final, *Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*. Available at «<http://ec.europa.eu/prelex>».

- [38] Steunenberg, B., Schmidtchen, D., Koboldt, C. (1999) 'Strategic Power in the European Union: Evaluation the distribution of power in policy games'. *Journal of Theoretical Politics*, Vol. 11, No. 3, pp. 339-366.
- [39] Steunenberg, Bernard and Dimitrova, Antoaneta (2007) 'Constitutional change in the wake of enlargement'. In Hoen H.W. and Selck T.J. (eds) *Europa: Charming Zeus... and numerous others! International Political Economy of EU Accession*, (Leuven/Paris/Dudley, MA: Peeters), pp. 161-178.
- [40] Tsebelis, G., Garrett, G. (2000) 'Legislative Politics in the European Union'. *European Union Politics*, Vol. 1, No. 1, pp. 9-36.
- [41] UNHCR (2010) *2009 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*. Available at «<http://www.unhcr.org/>».

## A Proof: Equivalence of reasoning in terms of benefits or costs

**Proof.** Suppose that the benefits are weighted the same for all institutions ( $\lambda_i = 1$ ), but that the costs are different. The Council of Ministers gives the costs of asylum more weight than the European Parliament, because it is made up of members of the governments who face the budgetary consequences of these costs directly. The utility functions have the following form:

$U_{EP} = b(x) - \phi_{EP}c(x)$ ,  $U_{CM} = b(x) - \phi_{CM}c(x)$  and  $U_{EC} = b(x) - \phi_{EC}c(x)$  with  $\phi_{EP} < \phi_{CM}$ , and the position of  $\phi_{EC}$  not predefined. It is easy to see that  $U_{EP} > U_{CM}$  and that the utility functions are concave. Also,  $x_{EP}^* > x_{CM}^*$ . Indeed, suppose that  $x_{CM}^* \geq x_{EP}^*$ . The first order condition for  $x_{CM}^*$  is  $b'(x_{CM}^*) = \phi_{CM}c'(x_{CM}^*)$  while the first order condition  $x_{EP}^*$  for is  $b'(x_{EP}^*) = \phi_{EP}c'(x_{EP}^*)$ . We know from the specification of the  $b(\cdot)$  function that if  $x_{CM}^* \geq x_{EP}^*$ , then  $b'(x_{CM}^*) \leq b'(x_{EP}^*)$ . We know from the specification of the  $c(\cdot)$  function that if  $x_{CM}^* \geq x_{EP}^*$ , then  $c'(x_{CM}^*) \geq c'(x_{EP}^*)$  and  $\phi_{CM}c'(x_{CM}^*) > \phi_{EP}c'(x_{EP}^*)$  as  $\phi_{EP} < \phi_{CM}$ . Therefore,  $x_{CM}^* \geq x_{EP}^*$  is impossible. The defining features of the utility functions are thus identical in both versions of the model. ■

## B Proof: $x_{CM}^* < x_{EP}^*$

**Proof.** We will proceed by a *reductio ad absurdum*. Suppose that  $x_{CM}^* \geq x_{EP}^*$ . The first order condition for  $x_{CM}^*$  is  $b'(x_{CM}^*) = \frac{1}{\lambda_{CM}}c'(x_{CM}^*)$  while the first order condition  $x_{EP}^*$  for is  $b'(x_{EP}^*) = \frac{1}{\lambda_{EP}}c'(x_{EP}^*)$ . We know from the specification of the  $b(\cdot)$  function that if  $x_{CM}^* \geq x_{EP}^*$ , then  $b'(x_{CM}^*) \leq b'(x_{EP}^*)$ . We know from the specification of the  $c(\cdot)$  function that if  $x_{CM}^* \geq x_{EP}^*$ , then  $c'(x_{CM}^*) \geq c'(x_{EP}^*)$  and  $\frac{1}{\lambda_{CM}}c'(x_{CM}^*) > \frac{1}{\lambda_{EP}}c'(x_{EP}^*)$  as  $\lambda_{EP} > \lambda_{CM}$ . Therefore,  $x_{CM}^* \geq x_{EP}^*$  is impossible. ■

## C Proof: $\bar{x} \leq x_{EP}^*$

**Proof.** We will proceed by a *reductio ad absurdum*. Suppose that  $\bar{x} > x_{EP}^*$ . The first order condition for  $\bar{x}$  is  $b'(\bar{x}) = \frac{2}{\lambda_{EP} + \lambda_{CM}}[c'(\bar{x})]$  while the first order condition for  $x_{EP}^*$  is  $b'(x_{EP}^*) = \frac{1}{\lambda_{EP}}c'(x_{EP}^*)$ . We know from the specification of the  $b$  function that if  $\bar{x} > x_{EP}^*$ , then  $b'(\bar{x}) < b'(x_{EP}^*)$ . We know from the specification of the  $c$  function that if  $\bar{x} > x_{EP}^*$ , then  $c'(\bar{x}) > c'(x_{EP}^*)$ . Therefore,  $\frac{2}{\lambda_{EP} + \lambda_{CM}}c'(\bar{x}) > \frac{1}{\lambda_{EP}}c'(x_{EP}^*)$ . So we necessarily have  $\bar{x} \leq x_{EP}^*$ .

Suppose that  $\bar{x} = x_{EP}^*$ . Then  $b'(\bar{x}) = b'(x_{EP}^*)$  and  $c'(x_{EP}^*) = \frac{2}{\lambda_{EP} + \lambda_{CM}}[c'(\bar{x})]$ . However,  $\frac{2}{\lambda_{EP} + \lambda_{CM}} > \frac{1}{\lambda_{EP}}$ . So we necessarily have  $\bar{x} \neq x_{EP}^*$ . ■

**D Proof:**  $x_{CM}^* \leq \bar{x}$

**Proof.** We will proceed by a *reductio ad absurdum*. Suppose that:  $x_{CM}^* > \bar{x}$ . The first order condition for  $\bar{x}$  is  $b'(\bar{x}) = \frac{2}{\lambda_{EP} + \lambda_{CM}}[c'(\bar{x})]$  while the first order condition for  $x_{CM}^*$  is  $b'(x_{CM}^*) = \frac{1}{\lambda_{CM}}c'(x_{CM}^*)$ . We know from the specification of the  $b$  function that if  $x_{CM}^* > \bar{x}$ , then  $b'(x_{CM}^*) < b'(\bar{x})$ . We know from the specification of the  $c$  function that if  $x_{CM}^* > \bar{x}$ , then  $c'(x_{CM}^*) > c'(\bar{x})$ . Therefore,  $\frac{1}{\lambda_{CM}}c'(x_{CM}^*) > \frac{2}{\lambda_{EP} + \lambda_{CM}}c'(\bar{x})$  as  $\frac{1}{\lambda_{CM}} > \frac{2}{\lambda_{EP} + \lambda_{CM}}$ . Thus, we necessarily have  $x_{CM}^* \leq \bar{x}$ .

Suppose that:  $\bar{x} = x_{CM}^*$ . Then  $b'(\bar{x}) = b'(x_{CM}^*)$  and  $\frac{1}{\lambda_{CM}}c'(x_{CM}^*) = \frac{2}{\lambda_{EP} + \lambda_{CM}}c'(\bar{x})$ . However,  $\frac{1}{\lambda_{CM}} = \frac{2}{\lambda_{EP} + \lambda_{CM}}$ . So, we necessarily have  $\bar{x} \neq x_{CM}^*$ . ■

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