

The Treaty of Nice, the Convention Draft and the Constitution for Europe Under a Veto Players Analysis

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Triple majority for changing the status quo in Treaty of Nice (2001): qualified majority of weighted votes, majority of countries, qualified majority of the population. Convention proposal (2003): requirements from three to two by dropping the qualified majority of weighted votes and reducing the qualified majority threshold of the population from 62% to 60%. Important consequences for the political institutions of the Union: 1) facilitates political decision-making; 2) reduces relative weight of governments participating in the Council and increases the importance of the European Parliament; 3) reduces the role of the judiciary and bureaucracies in the Union in favor of the political process. Consequences of the Treaty establishing a Constitution for Europe signed in Rome 29 October 2004. Exactly in the middle between Nice and the European Convention.

The results of the referendums in France and the Netherlands have thrown the process of European integration into disarray. It is not at all clear what will happen. European elites try to minimise the importance of these outcomes¹ and continue the referendum process in other countries. If the results there are positive, the two 'nay-sayers' may be asked to reconsider? Or will the constitutional design process start from scratch and a new convention and constitution be produced? No matter what the answer to these questions will be, the European Union is not over. It will continue functioning on the basis of its existing constitution, lastly amended by the Nice Treaty. On the basis of our analysis in this article, we can see that, ironic as it may be, people who voted 'no' because they hated Brussels bureaucracy, brought more of it on everybody's head, or are going to keep it for a longer time.

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¹ See 'To leaders in Alice's magical land, it was a 'yes'', *The Times*, 3 June 2005, where the argument is made that among the 'no' voters a majority wanted faster integration, so their vote should count as a 'yes' vote.

The European Union has been in a process of continuous constitutional design (and redesign) for about 15 years.² After a period of constitutional and policy inertia, the European Union adopted new constitutional arrangements in 1986 (Single Act), 1992 (Maastricht), 1997 (Amsterdam), and 2001 (Nice), all before a European Convention under the Presidency of Valéry Giscard d'Estaing elaborated a draft Constitution, which was the basis of the Treaty establishing a Constitution for Europe, signed at Rome on 29 October 2004.³

What was the response of the institutional literature to all these changes? For a long period of time, these changes have been put aside because the literature (an off-shoot of the International Relations literature) was embroiled in a paradigmatic war that left the study of the European political institutions ignored: intergovernmentalists neglected the study of institutions in favor of major developments at intergovernmental conferences, and neofunctionalists ignored them altogether in favor of spill-over processes.⁴ The institutional descriptions of the European Union were based on neologisms like: It is 'neither a state nor an international organization';⁵ 'less than a Federation, more than a Regime';⁶ 'stuck between sovereignty and integration';⁷ 'institutionalized Intergovernmentalism

² B. de Witte 'Il processo semi-permanente di revisione dei trattati', *Quaderni Costituzionali* (2002) p. 499.

³ G. Marks, L. Hooghe, and K. Blank, 'European Integration since 1980s: State-Centric Versus Multi-Level Governance', *Journal of Common Market Studies* (1996) p. 341; M. Dony, 'De Rome à Rome: du Traité à la Constitution?', in M. Dony & E. Bribosia (eds.), *Commentaire de la Constitution de l'Union Européenne* (Bruxelles, ULB 2005); Anthony Coughlan, *A critical Analysis of the EU Draft Constitution*, <www.teameurope.info/wp-analysisconstitution.nr10.pdf> .

There is a debate between constitutional law specialists about the appropriate term. Apparently, the final text is a Constitutional treaty rather than a real Constitution, because it is submitted to ratification by all member states. Cf. J. Cl. Piris, 'Does the European Union have a Constitution? Does it need one?', *Jean Monnet Working Paper 5/2000*, <www.jeanmonnetprogram.org>; P. Craig, 'Constitution, Constitutionalism and the European Union', *European Law Journal* (2001) p. 125.

⁴ For a discussion, see G. Tsebelis and G. Garrett, 'The Institutional Determinants of Supranationalism in the EU', 55/2, *International Organization*, p. 357. See, however, interesting contributions by R.E. Baldwin and M. Widgrén, 'The Draft Constitutional Treaty Voting Reform Dilemma', *CEPS Policy Briefs No. 44* (November 2003), <http://shop.ceps.be/BookDetail.php?item_id=1075>; 'Winners and Losers Under Various Dual Majority Rules for the EU Council of Ministers', *CEPR Discussion Paper No 4450* (June 2004), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=569681>; 'Council Voting in the Constitutional Treaty: Devil in the Details', *CEPS Policy Briefs No. 53* (July 2004), <http://shop.ceps.be/BookDetail.php?item_id=1133>.

⁵ Alberta M. Sbragia (ed.), *Euro-Politics: institutions and policymaking in the 'new' European Community* (Washington D.C, The Brookings Institution 1992).

⁶ W. Wallace, 'Less than a Federation, More than a Regime: The Community as a Political System' in H. Wallace, W. Wallace and C. Webb (eds.), *Policy Making in the European Community*, 2nd edn. (New York, Wiley 1983).

⁷ W. Wallace, 'Europe as a Confederation: the Community and the Nation State', 21 *Journal of Common Market Studies* (1982) p. 57.

in a supranational organization';⁸ the 'middle ground between the cooperation of existing nations and the breaking of a new one'.⁹ Some scholars even took advantage of the lack of theoretical grounding, like Sbragia, who approvingly quotes Krislov, Ehlermann, and Weiler claiming: 'The absence of a clear model, for one thing, makes ad hoc analogies more appropriate and justifiable. If one may not specify what are clear analogies, less clear ones may be appropriate'.¹⁰

In this article, instead of using analogies (appropriate or inappropriate), we examine legislative procedures adopted at Nice in 2001, at the European Convention in 2003 and in Rome in 2004¹¹ in light of veto players theory.¹² We analyse the outcomes of decision-making generated by these procedures and discuss the policy, political and structural implications of the different arrangements. Our argument is that the procedures proposed in the Convention text resolved a series of problems facing the European Union, and the rejection of these proposals has unfortunate consequences.

More specifically, we argue that the European Union is characterized by a plethora of veto players, which makes decision-making very difficult. In addition, the Nice arrangements¹³ – which give most of the decision-making authority to the Council – have increased the powers of the judiciary and the bureaucracies. Giscard d'Estaing was able to reverse all these features with one stroke of the pen: supported by a Convention unique for its synthesis,¹⁴ he eliminated the triple qualified majority decision-making rule in the Council. As a result, he made political decisions easier to adopt, reduced the relative power of the member states, increased the role of the European Parliament, and decreased the importance of the bureaucracy and the judiciary. In the Treaty establishing a Constitution for Europe, a compromise (exactly in the middle of the way between Nice and the

⁸ D.R. Cameron, 'The 1992 Initiative: Causes and Consequences', in Sbragia, *supra* n. 5.

⁹ F.W. Scharpf, 'The Joint-Decision Trap: Lessons From German Federalism and European Integration', 66 *Public Administration* (1988) p. 239.

¹⁰ Sbragia, *supra* n. 5.

¹¹ P. Norman, *The Accidental Constitution. The Story of the European Convention* (Brussels, EuroComment 2003).

¹² G. Tsebelis, *Veto Players. How International Institutions Work* (New York, Russell Sage Foundation; Princeton NJ; Princeton University Press 2002).

¹³ G. Persson, 'The Treaty of Nice and the Debate on the Future of the EU', Speech at the Humboldt University, Berlin on 18 Oct. 2001, <http://europa.eu.int/constitution/futurum/documents/speech/sp181001_en.htm>; X. Yataganas, 'The Treaty of Nice: The Sharing of Power and the Institutional Balance in the EU- A Continental Perspective', *European Law Journal* (2001), p. 242; B. de Witte, 'The Nice Declaration: Time for a Constitutional Treaty of the EU', *The International Spectator* (2001), p. 21.

¹⁴ C. Closa, 'The Conventional Method and the Transformation of the EU Constitutional Politics', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds.), *Developing a Constitution for Europe* (London, Routledge 2004); P. Magnette, 'Le débat sur l'avenir de l'Europe: Processus et acteurs', in *Europe 2004: Le grand débat. Setting the Agenda and outlining the options* (Brussels: European Commission 2001), p. 22.

Convention proposal) was adopted. However, these latter provisions concerning a new voting system do not enter into force as planned due to the popular rejection of the Constitution in several member states (France, the Netherlands).

This article is organised into three sections. First, we introduce the elements of veto players theory that will be necessary for the analysis of European Union institutions.¹⁵ Second, we explain the differences between the decision-making proposals introduced at Nice and the Convention focusing on the elimination of qualified majority voting in the Council. Third, we discuss the implications of qualified majority voting in the Council for the difficulty of decision-making, for the weight of the Council v. the Parliament in decision-making, and for the importance of the judiciary and the bureaucracies in the European Union.

VETO PLAYERS AND THEIR POLICY AND INSTITUTIONAL IMPLICATIONS

Veto players are individual or collective decision-makers whose agreement is necessary for a change of the legislative status quo.¹⁶ From this definition follows that the higher the number of veto players, the more difficult it is to change the status quo.¹⁷ Tsebelis calls the 'difficulty of changing the status quo' *policy stability*. In addition to the effect of the number of veto players on policy stability he demonstrates that the larger the ideological distances among veto players, the higher policy stability is.

Here we will extract some ideas from his book that will help us understand the European Union institutions. First, we will present the two concepts that Tsebelis uses in order to operationalise policy stability (the core and the winset of the status quo). Second, we will explain the effect of increasing the required qualified majorities for a decision. Third, we will explain that increasing the qualified majority requirement in one chamber of a bicameral legislature shifts the policy outcome towards this chamber. Fourth, we will discuss the structural implications of increasing the number of (legislative) veto players: particularly, we will describe how more legislative veto players increase the importance and independence of the judiciary and the bureaucracy.

The core and the winset of the status quo of veto players as measures of policy stability

There are two concepts that can help us measure policy stability. The first is the *core* of a political system, which is the set of points that cannot be defeated by any

¹⁵ Tsebelis, *supra* n. 12.

¹⁶ *Ibid.*

¹⁷ Actually, increasing the number of veto players will *not decrease* the difficulty of changing the status quo, since as we will see the addition of some veto players may have no impact.

other point. If a policy outcome is in the core of a political system, it cannot be changed. However, the core does not always exist (for instance a parliament deciding by majority rule in a multidimensional policy space has no core), and even if it does, the status quo may be outside that area. In either of these cases, the status quo can be defeated, and the points that can defeat it are called the *winset of the status quo*. The smaller the winset of the status quo, the higher policy stability, because even if one replaces the status quo, the replacement will be in close proximity (since the winset is small). It is demonstrated that the two concepts – the size of the core and the smallness of the size of the winset of the status quo – lead to the same analytic results.¹⁸ In fact, the larger the size of the core, the smaller the winset of the status quo.¹⁹ The argument is best represented in Figure 1.

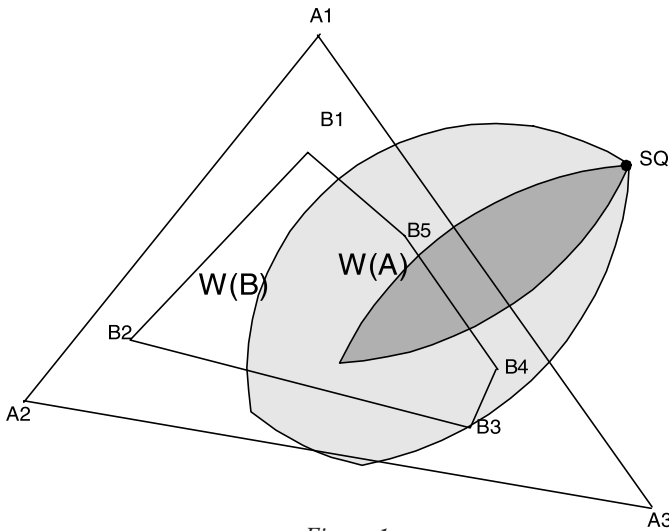


Figure 1

In Figure 1 there are two sets of veto players. The set A (A1 A2 A3) and the set B (B1...B5). Set B is contained within set A, that is the veto players of set B are closer to each other than the veto players in set A. As a result, the core of set A (the whole triangle A1 A2 A3) is larger than the core of set B (the pentagon B1...B5). Policy stability is larger with set A if we consider the core (the set of points that cannot be defeated by unanimity of the corresponding veto players). But the same result can be obtained by considering any point SQ and the winsets of this point

¹⁸ Tsebelis, *supra* n. 12.

¹⁹ The winset of the status quo is generated as follows. Each veto player prefers over the status quo points inside the circle centered in his own ideal point, and passing through the status quo (because these points are closer to him than the status quo). The intersection of all these circles is the winset of the status quo.

with respect to set A and set B. As the Figure demonstrates, the winset of veto players A is contained within the winset of veto players B, and consequently policy stability is greater with the set of veto players A. The results are the same, because when the core of one set contains the core of the other, the winset of the first set is contained within the winset of the other, no matter where the status quo is located. This relationship between the core and the winset of the status quo is called ‘quasi-equivalence’²⁰ because the two concepts express the same idea (except for the fact that when the core exists the winset of the status quo is empty [for the points of the core]). In the remainder of the article we will be focusing on the core of the European Union. The results we will report, will also hold for the winsets of the status quo, no matter where the status quo is located.

Changing the qualified majority requirements

Let us now consider a ‘collective veto player’ that decides by qualified majority rule, much like the Council of Ministers of the EU. In Figure 2, we present a seven-member Council that decides by a qualified majority of 5/7. This is approximately the same majority required in the weighted voting of the Council (around 70%), so we will be able to use the same figure to discuss the European Union in the third part of this article.

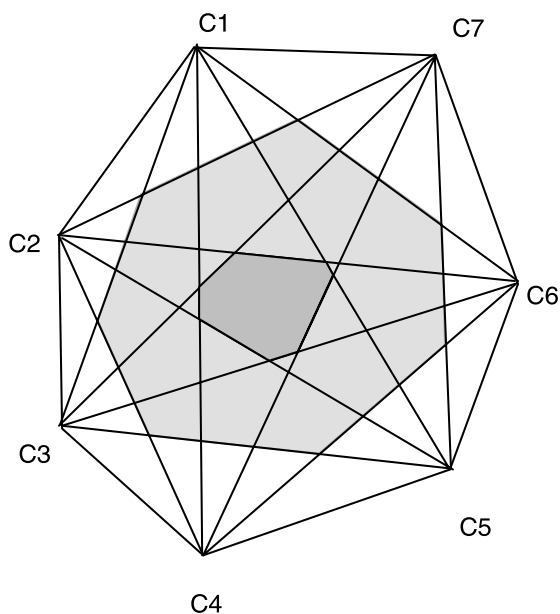


Figure 2

²⁰ Ibid.

We can divide this collective veto player several times in the following way: we can select any five points, (say 1, ..., 5), and then consider the pentagon composed of these five points (the unanimity core of these 5 players). Any point included in this pentagon cannot be defeated by a unanimous agreement of the five selected players. If now we select all possible such combinations of five players, and there is an intersection of their unanimity cores, it means that any point in this area cannot be defeated by any 5/7 qualified majority. This intersection is the heavily shaded area in Figure 2. This area is the 5/7 core of the collective veto player.²¹

One can repeat the exercise with 6 out of the seven members, and find the 6/7 core of the Council. The 6/7 core is represented by the lightly shaded area in Figure 2. One can see that the core expands when the required majority for a decision increases. This is the basic property that we will use in the article. We will argue that the Treaty of Nice produced institutions with an exceptionally large core, making political decision-making practically impossible, while the agreements proposed at the European Convention in 2003 would have rectified the problem.

Bicameralism and changing qualified majorities

What happens if decisions are made by the congruent position of two distinct chambers, as is the case in the European Union? In particular, what are the effects of changing the threshold of qualified majority decision-making in one chamber? Two different effects of such a change have been identified.²² First, the power shifts in favor of the chamber whose threshold *increases*. Second, the overall policy stability of the system increases. Let us examine each one of these effects separately.

Figure 3 shows the winset of the status quo of a bicameral legislature composed of three members for each chamber. In the first case, the decision is made by congruent majorities in both chambers; in the second, unanimity in the Council is required (along with a majority in the Parliament). The lightly shaded area indicates the winset of the status quo by congruent majorities, while the heavily shaded area indicates the winset of the status quo when unanimity is required in the Council. The reader can verify the outcome shifts in favor of the Council in the second case. The reason is that an additional member (whose preferences were ignored in the case of congruent majorities) is now taken into account. This member has the most 'stringent' preferences since his location was so close to the status

²¹ Such a core does not always exist. Joseph Greenberg has shown that such a core always exists if $q > n/(n+1)$ where q is the required majority and n is the dimensionality of the policy space, see, J. Greenberg, 'Consistent Majority Rule over Compact Sets of Alternatives', 47 *Econometrica* (1979) p. 627.

²² Tsebelis, *supra* n. 12.

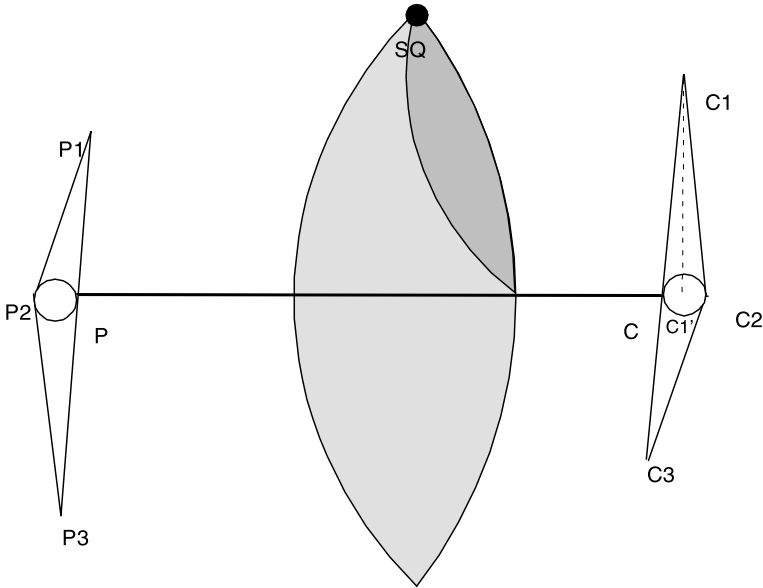


Figure 3

quo that the other members preferred to ignore him. Now that his agreement is required he restricts the winset of the status quo towards his preference and towards the location of the Council.

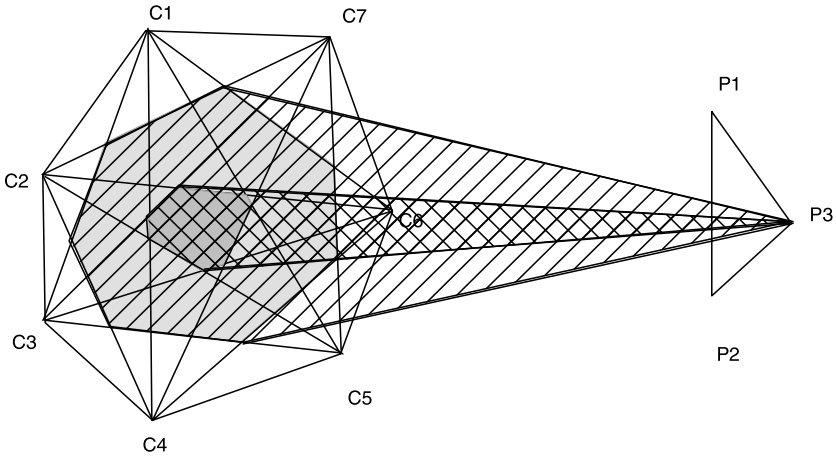


Figure 4

What happens to the overall policy stability of the system? Figure 4 replicates the Council we presented in Figure 2, and adds a three-member parliament. The core of the system includes the core of the Council. The reader can verify that as the

core of the Council increases from a 5/7 to a 6/7 qualified majority threshold, so does the overall core as indicated by the double hatched to the single hatched area.

So, increasing the required majority in the Council from a 5/7 to a 6/7 qualified majority has two consequences. The first is distributive: it makes agreement in the Council more important and restricts the outcomes of a compromise towards the preferences of the Council. Second, it increases the overall policy stability of the system, and makes changes to the status quo more difficult.

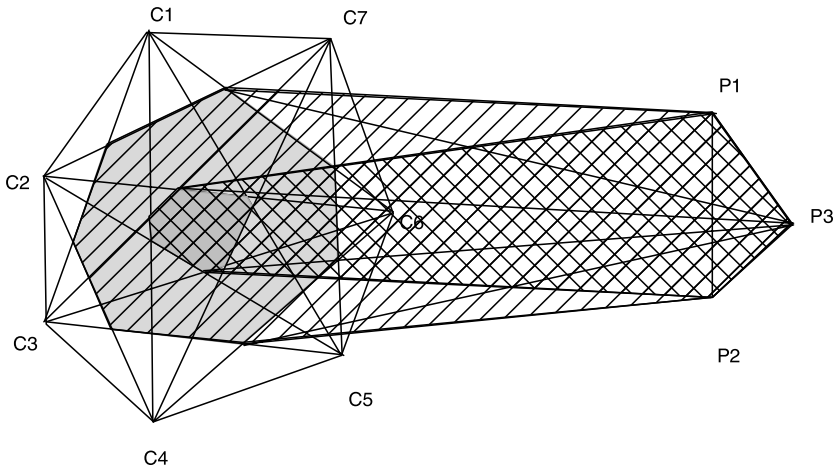


Figure 5

Figure 5 makes the same point about the European Parliament. If a constitutional convention decided to increase the required majority threshold of the parliament, the result would be an increase of the Union core. The figure presents a three-member Parliament that decides by unanimity (3 of its members) instead of majority (2 of them). The reader can verify that the core increases significantly.

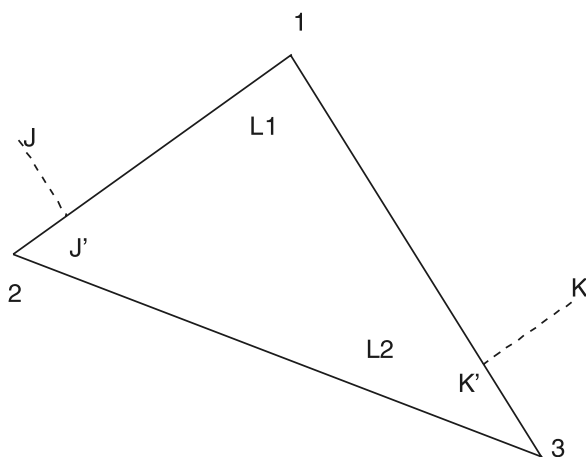
Effects on the judiciary and the bureaucracy

The bureaucracy and the judiciary are involved with legislatures in a sequential game.²³ They interpret the law and then the legislature can decide to overrule their statutory interpretation or not.²⁴ Let us assume that there are three legislative veto players. The triangle 1-2-3 is defined as their core, the set of points that they cannot agree to change. Consequently, if the first mover selects one of the points of the core, there will be no legislative overrule. Figure 6 presents three different possibilities. In the first two cases, the first movers' ideal points J and K

²³ Ibid.

²⁴ Ibid.

are outside the legislative core and they select the closest core point to them (J' and K' respectively). Despite the fact that these two choices are significantly different from each other, the veto players are incapable of changing either of them. In the third case, the first mover is located inside the legislative core but changes her mind and moves from point L1 to point L2. Since the first mover is inside the core, she can select her own ideal point.



First mover outside core (J or K) selects
closest point inside core (J' or K');
First mover inside core (L1 or L2) selects
own ideal point.

Figure 6

If the courts are rendering constitutional interpretations, then it is difficult to almost impossible for the legislature to overrule the courts' interpretation. However, different constitutions specify conditions for constitutional amendments, and the courts have to take into account this possibility in their interpretations. In a recent analysis, Santoni and Zucchini found that the Italian Constitutional Court becomes more proactive the greater the ideological distance of the government parties from the Communists in the period 1956-1992 (the government along with the Communists together formed a majority that could modify the Italian Constitution).²⁵

There is one additional point concerning the above simple game-theoretic account raised in the literature. Given that the first movers in the game presented above will be able to select a policy close or identical to their own ideal point, what

²⁵ M. Santoni, F. Zucchini, 'Does policy stability increase the Constitutional Court's independence? The case of Italy during the First Republic (1956-1992)', 120 *Public Choice* (2004) p. 439.

will the legislative branch do to prevent this event from materialising? There is an extensive literature, which argues that legislation will be more restrictive when there are many veto players.²⁶ This is a valid point, and if the legislature can come to an agreement they will restrict both bureaucrats and judges. Consequently, multiple veto players will lead to more lengthy and bureaucratic legislation.

Increasing the qualified majority threshold in the Council has a multitude of results. It increases the policy stability of the system; it shifts legislative outcomes towards the preferences of the Council; it increases the role of the judiciary and the bureaucracy.²⁷ We will now argue that this is precisely what the Treaty of Nice does to an excessive degree, and this is what the European Convention in the Draft Constitution and the Intergovernmental Conference in the Treaty establishing a Constitution for Europe tried to correct by eliminating the qualified majority of weighted votes requirement.

QUALIFIED MAJORITY IN THE COUNCIL: TO WHAT EXTENT DOES IT IMPEDE DECISION-MAKING?

In the previous section we argued that, in principle, increasing the qualified majority threshold makes decisions more difficult. The argument is simple and straightforward, but the actual differences between the sets of procedures introduced at Nice in 2001 and at the Convention in 2003 may have been inconsequential. Here, we will argue quite the opposite: the differences between the proposals put forth at Nice and the Convention are significant and consequential. The failure to adopt these proposals will have deleterious effects.

In another paper we have analysed the dynamics of bargaining at Nice, and argued that it was the first time that the three criteria (qualified majority of weighted votes, majority of states, and qualified majority of populations (62%)) did not

²⁶ McCubbins et al., 'Administrative Procedures as Instruments of Political Control', 3 *Journal of Law Economics and Organization* (1987) p. 243; McCubbins et al., 'Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies', 75 *Virginia Law Review* (1989) p. 430; T.M. Moe, 'Political Institutions: The Neglected Side of the Story', 6 *Journal of Law, Economics and Organization* (1990) p. 213; T.M. Moe and M. Caldwell, 'The Institutional Foundations of Democratic Government', 150 *Journal of Institutional and Theoretical Economics* (1994) p. 171; D. Epstein and Sh. O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (Cambridge University Press 1999); J.D. Huber and Ch. Shipan, *Laws and Bureaucratic Autonomy in Modern Democracies: Wise and Salutary Neglect* (Cambridge University Press 2002).

²⁷ The judges by interpretation of the existing law, and the bureaucracies by implementing the same legislative and regulatory texts; L.W. Gormley, 'The Judicial Architecture of the EU after Nice', in A. Arnul and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002); L. Metcalfe, 'Reforming the Commission', *Journal of Common Market Studies* (2001) p. 817.

coincide, and that different countries were attached to different principles.²⁸ As a result, the conferees in Nice adopted the detrimental strategy of including all three criteria for valid decision-making. In other words, the countries bargaining at Nice were involved in a collective prisoners' dilemma game and it was individually rational to insist on their own preferred criterion. As a result, they became collectively worse off by their inability to strike a compromise.²⁹

In the remainder of this section we will use the number of winning coalitions in the Council to represent the different decision-making rules. This methodology has been used by power index analysis of Union institutions.³⁰ One of us has argued against this methodology because it ignores both the preferences of the different actors, as well as the institutions of the European Union.³¹ Here we use this method for three reasons. First, we have discussed the institutional structure in the first section and demonstrated that if the core of the Council expands, so does the core of the Union (or, more accurately the core of the Union does not shrink). Second, we cannot take into account the actors' preferences. It is impossible to know the preferences of actors who have thus far not participated in the Union, or to consider the coalitions they would be willing to form. It is theoretically possible that winning coalitions are a very small percentage of the overall number of coalitions, and, yet, these coalitions form with extremely high frequency because a certain number of countries have almost identical preferences. As we have shown in Figure 1, five veto players *may* induce less policy stability than three. However, numerical comparisons are the only feasible strategy at this point. Third, we are not interested in the 'power' of different actors, which is a function of votes in the Council as well as preference configurations, but rather in what the Council can or cannot do on the basis of its decision-making rules. However, the analysis that follows can be criticized since it does not take into account the preferences of the different actors; we would love to be able to do so, but will have to wait until different coalitions start forming in the 25 member Union.³²

²⁸ G. Tsebelis and X. Yataganas 'Veto players and Decisionmaking In the EU after Nice: Legislative Gridlock and Bureaucratic/Judicial Discretion', *Journal of Common Market Studies* (2002) p. 283.

²⁹ See also D. Galloway, *The Treaty of Nice and Beyond: Realities and Illusions of Power in the EU* (Sheffield Academic Press 2001).

³⁰ Th. Bräuninger and Th. König, 'Indices of Power IOP 2.0' (computer program), <www.tbraeuninger.de/iop.html> (University of Konstanz, 2001).

³¹ G. Garrett and G. Tsebelis, 'An Institutional Critique of Intergovernmentalism', 50 *International Organization* (1996) p. 269.

³² D.S. Felsenthal and M. Machover, 'Population and Votes in the Council of Ministers: Squaring the Circle', *The European Policy Centre Working Paper 10*, Jan. 2004, <www.theepc.net>.

The short-term effects of Nice were minor.³³ Indeed, under the 62/87 qualified majority rule, which was in effect before the Treaty of Nice, the number of winning coalitions with the single qualified majority criterion was 2549/32768 (7.77%). This number would have slightly been restricted by the triple majority to 2513/32768 (7.67%)

The effects of the triple majority become even smaller in a European Union of 15 members with the weighting system adopted by the Nice Treaty itself. Now with the simple qualified majority criterion (169/237) the number of winning coalitions is 2707/32768 (8.26%), while with the triple one, it is reduced to 2692/32768 (8.21%).³⁴

With the expansion to 25 members, the difference between the simple qualified majority criterion (255/345) and the triple majority criterion remains insignificant (the number of winning coalitions goes down from 1,204,448 to 1,203,736) – but what is significant is that these numbers identify 3.5% of winning majorities in the Council (more precisely 3.58%).

It is to the great credit of the Convention and its leader Valéry Giscard d'Estaing that they correctly identified the source of the high policy stability generated by the Nice Treaty: two of the decision-making requirements (majority of countries and qualified majority (60%) of the population) impose very few restrictions on the decision-making process. The key restriction comes from the qualified majority requirement of weighted votes. As a result, the convention leadership introduced the much more permissive double criterion. The frequency of valid decisions increases by a factor of 6: from 3.58% to 22.5%. So, the frequency of valid decisions went from 8% in an Union of 15 (before or after Nice) to 3.58% in an Union of 25 (after Nice) to 22.5% under the Convention proposal. In the Treaty establishing a Constitution for Europe, this number drops back down to 3.58%. Why was the Giscard proposal rejected?³⁵ Let us proceed to a historical summary.

Historical Summary

The weighting of votes in the Council of Ministers was, from the beginning, the traditional mode of decision-making process of the Union. The problem of the revision of the system was described for the first time in the mid-1990s on the occasion of the enlargement with Austria, Finland and Sweden. It was clear that

³³ For the calculations see G. Tsebelis, 'The European Convention and the Rome and Brussels IGCs: A Veto Players analysis' in T. König and S. Hug (eds.), *Preference Formation and European Constitution-building. A Comparative Study in Member States and Accession Countries* (ECPR/Routledge, forthcoming).

³⁴ Ibid.

³⁵ K. Hughes, 'Will the Summit Agree the Constitutional Treaty? Assessing the EU Draft Constitution', <www.ceps.be/Article.php?article_id=224> (Dec. 2003).

the mechanical extrapolation of the current system could strengthen enormously the relative weight of smaller countries to the detriment of larger countries representing the majority of the population in the Union. The so-called 'Ioannina compromise' provided that if members of the Council representing 23 to 26 votes would express their intention to block a decision, the presidency should make all necessary efforts to reach at least 68 positive votes.³⁶

After that date, this issue was continuously on the agenda of the Union, and it seems that it will continue to be for a long time. Apparently, the controversy has a lot to do with the equilibrium of forces among member states in the Council and much less with the efficiency of the overall decision-making process.

The problem of the weighting of votes was first on the official agenda of the Amsterdam Summit.³⁷ The report of the think-tank especially devoted to the problem explored two main solutions: the determination of a new weighting system, or a radical modification of the system providing a majority of states representing a majority of the population of the Union. From the beginning, it was obvious that neither of these proposals met the preference of a large majority of member states, and the consensus on the percentages was even more ambiguous.

The smaller states were in favor of the majority of states because this clause, together with the necessity of the Council deciding against a Commission proposal only by unanimity, constituted a comfortable safety net for them. The problem was not only between the groups of the smaller and larger states, but also inside the groups of equivalent states. France was absolutely firm on its equality with Germany, and Belgium on its equality with the Netherlands. In spite of the fact that the problem had never emerged in the decision-making process until that date, it was a net anxiety about the next phase of enlargements and their possible effects. The problem was also linked by the larger member states with the perspective of abandoning their second seat in the Commission. Further, demographic differences threatened to change the number of votes of member states that were previously on an equal basis. Here lay the causes of the extremely complicated system adopted at Nice, which had the ultimate consequence of privileging medium-size member states like Poland and Spain. And, to give some compensation to Germany, the population net was added to the majority of states and the weighting ceiling, in order to be able to block a decision to be taken with a quasi-minority of the population of the Union.³⁸

³⁶ *OJ*, C 105, 13 April 1994, p. 1 and modification *OJ*, C 1, 10 Jan. 1995, p. 1. This compromise was not applied and definitely abandoned by the Nice Treaty, but it is curiously reintroduced by the recent IGC in another way.

³⁷ M. Petite, 'Le Traité d'Amsterdam : Ambition et réalisme', *Revue du Marché Commun et de l'Union Européenne* (1997) p. 17.

³⁸ With the Nice system, Germany can block a decision with two other large member states, while the other larger states need one more state to reach the same result.

Other considerations entered into account: for example, the Mediterranean states had all together 39.4% of the population and could therefore block any decision, one more reason explaining the attachment of Spain to the Nice system. On the other hand, the so-called states of cohesion (the beneficiaries of the structural funds), had only 32% of the population, but the future entry of Bulgaria and Romania could give them the same power. Finally, the net-contributor states had also the capacity to block the decision-making process. This sophisticated balance of power between member states would be disturbed with any further enlargement and would be completely dismantled with the possible future entry of Turkey. The above considerations constituted the main argument of a stable, simple voting system combining a majority of states with a majority of the population in the Convention text, which could survive the consecutive enlargements of the European Union without long and complicated discussions. But, the balance of power is a very sensible matter to be left as an automatically functioning system.

After difficult and laborious negotiations, the bar in the Treaty establishing a Constitution for Europe was fixed at 55% of the member states (with a minimum of 15) and at 65% of the population. So, one decision to be taken must be supported by 15 member states having 65% of the total population of the EU, but the minimum-blocking minority is of at least four member states (Article I-25). This was a guarantee for the smaller countries and means in fact, that the threshold of the population *de facto* diminished when there are three large member states opposing one decision. In that way the weight of the most populous countries (France, Germany and the United Kingdom) was limited.

We must refer finally to the Draft European Decision of the Council relating to the Implementation of Article I-25 annexed to the Constitutional Treaty, which will be adopted on the day the Treaty enters into force. It will introduce a procedure inspired by the Ioannina compromise. If $\frac{3}{4}$ of the blocking minority in terms both of population (27%) and member states (9 states) are against a draft decision, the Council must, with reasonable delay, take the necessary steps to find a satisfactory solution. It means that, after the eventual failure of the attempt, voting is inescapable. Fortunately, there is no extension of the normal delays provided by the Treaty, nor is there an exception to the provisions allowing a majority of member states to ask for the vote. Consequently, this formula differs a lot from the Luxembourg compromise and does not constitute a blocking procedure as demonstrated also by the Ioannina experience. This decision persists until 2014, when the Council can abandon it by qualified majority. We must also add, that, if the Council decides without the proposal of the Commission, the qualified majority passes to 72% of the member states representing at least 65% of the total population (Article I-25(2)).

The same system, in an analogically adapted version, is valid for the decisions concerning reinforced co-operation. In these cases, the qualified majority is 55% of the participating states and 65% of their population with the blocking minority being composed of the number of states representing 35% of the population plus one (Article I-44(3)). It is regrettable that this arrangement remains slightly less flexible than the previous Nice system.³⁹

We see that in the new system the net contributors to the community budget conserve their blocking minority, and this is also the case for the Mediterranean countries, given the fact that France is voting with them. On the contrary, it will be difficult (but not impossible) for the cohesion states to gather a blocking minority. The overall system is based again on equilibrium between larger and smaller member states, the majority of them playing in favor of the latter, and the majority of the population playing in favor of the first ones.⁴⁰

Most of the negotiations were shrouded in secrecy,⁴¹ but some accounts were published in the press, and we will try to focus on these reports. From these accounts we know that Poland and Spain⁴² vetoed the Convention proposal, because of the shifts to a different system of qualified majority voting, which would lessen the influence of these states. The reason for the Polish and Spanish rejection was that the weighted voting scheme, where they were overrepresented, was abandoned by the Convention.⁴³

But Poland and Spain were not able to turn back the clock to Nice for a long time. The Treaty establishing a Constitution for Europe abandons the weighted voting scheme of Nice but at the price of adopting a decision-making scheme that is located exactly between Nice and the Convention: a 65% majority of the population of the European Union, a 55% majority of the countries, and the requirement that in order to block a decision 4 countries are required (in order to eliminate the possibility of 3 major countries blocking EU decision-making). This system provides that the overall frequency of winning coalitions is around 10%. Compare this number to the 3.6% of the Nice Treaty and the 22.5% of the Giscard proposal. The final solution adopted is about a 50-50 split between the two previous proposals. In the next section we will compare the two extreme solutions, and

³⁹ The Nice Treaty permitted eight states to go ahead.

⁴⁰ See Arts., I-25 and I-45 of the Constitution for Europe.

⁴¹ On the contrary of the deliberations of the Convention which were public providing, for the first time, a great transparency to the institutional procedure of the EU.

⁴² 'Machtkampf in der EU gefährdet Verfassung', *Süddeutsche Zeitung*, 12 Dec. 2003. L. Kirk and M. Frydrych, 'Spain and Poland to Reopen Voting Debate', <www.euobserver.com> (13 June 2003); B. Plechanovova, 'Poles and Spaniards would accept national concessions for EU Constitution', *EurArchiv* 18 Feb. 2004.

⁴³ G. Tsebelis, 'Agenda Setting in the EU Constitution: from the Giscard Plan to the Pros Ratification Document', Paper presented in the DOSEI conference (Brussels 2005). See <<http://www.polisci.ucla.edu/tsebelis/>>.

the reader should keep in mind that the outcome of the Treaty establishing a Constitution for Europe is located in the middle.

THE EFFECTS ON POLICY-MAKING, THE DEMOCRATIC DEFICIT, AND THE IMPACT ON THE JUDICIARY AND THE BUREAUCRACY

As demonstrated in the first part of this article, introducing greater constraints on decision-making in the Council is not a simple inconvenience. It has profound policy, political, and structural implications. We will discuss each of these issues in turn.

Policy implications

In the first part of this section, we demonstrated that imposing constraints on the decision-making of the Council (or the Parliament) leads to further difficulties in Union decision-making since when the core of the Council increases, the core of the Union either increases or remains the same. In the second part we explained that the restrictions imposed by the Nice Treaty are very significant, and that the proposals made at the Convention would have resulted in dropping one of the requirements, increasing by a factor of 10 the number of decisive coalitions in the Council, thus making changes to the status quo ten times easier than before. This is a numerically significant difference, but why should one care whether the Union is able to make political decisions or not? Could we perhaps say that an Union which is unable to decide politically is a better institution than a politically active Union?

In fact, the whole debate about political versus 'other' issues in the Union is based on whether it is better for the Union to be able to make decisions that overrule the positions of any individual member country or not. Originally only economic matters fell in the competence of the Union (or better: the Community) and it used to be that all decisions needed unanimity in the Council (Luxembourg compromise). Over the years, more competences have been added and a certain amount of qualified majority voting was applied. Currently only the issues of taxation and foreign policy remain exclusively in the hands of the member countries.⁴⁴

⁴⁴ For more details, I. Pernice, 'Rethinking the methods of dividing and controlling the competencies of the EU', <www.ecsanet.org/post_nice/contributions/pernice.doc>; G. Grevi, 'Beyond the Delimitation of Competencies: Implementing Subsidiarity', *Working Paper European Policy Centre* ('the Europe we need' Series), 15 Oct. 2001; A. Moravcsik, 'In Defense of the Democratic Deficit: Reassessing Legitimacy in the EU', *40/4 Journal of Common Market Studies* (2002) p. 603.

While there is no general 'philosophy' about which issues should or should not be in what jurisdiction (why is it better for countries to have fiscal but not monetary discretion as determined by the Maastricht Treaty), the Union's ability to make political decisions is directly linked to which decisions will be made, *de facto*, by the political institutions of the Union and which will be made by other institutions (national or supranational). We will focus on the national ones here.

Policy stability in any political system enables the citizens to know the rules of the game and to undertake initiatives that will be beneficial to them on the basis of these rules. On the other hand, the ability to make changes to policy enables a political system as a whole to adapt to a changing environment. Let us use two examples to make the point clear. Having a taxation system that remains stable will enable people to make investment decisions that are as profitable as possible and, therefore, lead to higher levels of growth. This is a standard economic argument⁴⁵ and empirical analyses have corroborated this line of reasoning.⁴⁶ On the other hand, an exogenous shock (like an increase in the price of oil) may lead different political systems to adopt some kind of response, like increased taxation on oil in order to reduce consumption, or decreased taxation in order to keep prices stable in other areas, or the study or exploration of alternative energy resources.

Is it better for a political system to have more or less policy stability? There is no general answer, unless a political system occupies some kind of extreme position (if, for example, unanimity is required for decision-making in a parliament like the Polish *Sejm*, or decisions on human rights are made by simple majority in which case a majority can decide to oppress the human rights of a minority).⁴⁷

Obviously the European Union does not fall into an extreme category like the ones described. However, will it be facing an economic and political environment with lots of shocks (and therefore, high variance of external conditions)? The developments of terrorism, potential trade conflict with the United States, globalisation and the opening of new markets are all external shocks that may leave the European nation states ill-equipped to confront problems. Consequently decisions by the European Union will become more necessary, not less. So, restricting the Council's decision-making capabilities undermines the Union today more than it did in the past.

As a result of this analysis, we have argued that the steps taken in Nice were negative, and the failure to adopt the text of the European Convention has been a further unfortunate development. Now, after the negative referenda in France

⁴⁵ F.E. Kydland, and E.C. Prescott, 'Rules Rather than Discretion: The Inconsistency of Optimal Plans', 85 *Journal of Political Economy* (1977) p. 473.

⁴⁶ W. Henisz, 'The Institutional Environment for Economic Growth', 12/1 *Economics & Politics* (2000) p. 1.

⁴⁷ G. Tsebelis, *supra* n. 12.

and the Netherlands, the Nice rules risk to be permanent. The insistence of countries on their own rights and the lack of focus to the collective consequences will inevitably lead to an inability of the Union to address new issues. Ultimately, this will leave each country to make its own decisions, but with only its own forces, facing situations where its own weight may not be enough to confront difficult conditions.

Democratic Deficit

Scholars continue to discuss the issue of a 'democratic deficit' connected with European Union institutions. It is not clear what this discussion is about. It may be that political decisions do not reflect the wishes of the public. Or, it may be that information about the decisions made by the political system is not disseminated to the public. In all cases, there is a belief that the European Parliament plays a reduced role in political decision-making, meaning – in more legal terms – the lack of democratic control over political decisions and legislative production taken by the European institutions.⁴⁸ Let us analyse these issues separately.

If one uses the term 'democratic deficit' to describe a discrepancy between public opinion and decisions made by the political system, this is a feature common to all political systems. Given the volatility of public opinion it is not possible to have measures reflecting public opinion all the time. In fact, it is not clear that we should, and probably mediated democracy is adopting a different model where important decisions are delegated to political elites who will be accountable in the subsequent election, when the consequences of the decisions will be more clear.

If 'democratic deficit' implies the ignorance of the public about decision-making 'in Brussels', then it is a factually correct characterisation, although it covers decision-making in Strasbourg (the location of the plenary sessions of the European Parliament) as well as decision-making in Luxembourg (the location of the European Court of Justice). In fact, the average European is disinterested in European decision-making, and is irritated by specific decisions (whenever he or she hears about them).⁴⁹ This phenomenon does not reflect the intention of supranational elites (the European Parliament is always trying to communicate its decisions to national parliaments and the public) but rather the predisposition of the

⁴⁸ E.O. Eriksen, J.E. Fossum and A.J. Menéndez, 'Constitution Making and Democratic Legitimacy', *ARENA Report*, 02/5, Nov. 2004; G. de Búrca, 'The Quest for Legitimacy in the EU', *Modern Law Review* (1996), p. 768; A. Manzella, 'The Convention as a way of Bridging the EU's Democratic Deficit', *The International Spectator*, XXXVII/1, Istituto Affari Internazionali, Jan.-March 2002, p. 47.

⁴⁹ It is also true that the five most interesting political items for the public opinion of the member states (taxation, education, health care, pension systems and revenue policy) do not fall under European jurisdiction.

Union population. When it becomes clearer that Union's decisions are transposed to the national level, and a series of national decisions are taken unanimously *because* they reflect European legislation, and as a result individual countries have to adopt the specific policies, the attention of the public may increase.

The reduced role of the European Parliament is an inaccurate perception.⁵⁰ One would expect a difference in the role and importance of parliaments in presidential and parliamentary systems, but the titles of these systems are misleading.⁵¹ It is parliaments in Europe that complain that they are little more than a rubberstamp for government decisions, and it is the President of the United States that complains that he cannot restrict the initiatives undertaken by Congress. The reason for this discrepancy between titles and reality is that parliament makes proposals to the executive in presidential systems, while the government makes proposals to the parliament in parliamentary ones. The institution that makes the proposal enjoys greater discretion than the one that accepts or rejects the proposal.

Looking at European Union institutions, the European Parliament is able to make its own proposals to the Council, and according to the rules currently in place it shares agenda setting powers with the other policy-making institutions (Commission and Council). In fact, the Commission has stated that 'Since the Single European Act came into force on 1 July 1987, over 50% of Parliament's amendments have been accepted by the Commission and carried by the Council. No national Parliament has a comparable success rate in bending the executive to its will'.⁵² So, the term 'democratic deficit' is not an accurate characterisation if it is meant to reflect the lack of power of the European Parliament. It is also inaccurate in terms of absence of democratic control, because similar situations exist in all member states and in the totality of modern democracies. However, as we demonstrated in the first section of this paper, this influence declines when one imposes decision-making constraints on the Council as the Nice Treaty did.

Power of judges and bureaucrats

Another consequence of the failure to accept the Convention text (and the Treaty establishing a Constitution for Europe) is the increased role of bureaucrats and judges. While most analysts think that increasing the power of bureaucrats is a nightmare, the same assessment is not made with respect to judges. The latter

⁵⁰ C. Pinelli, 'The Powers of the European Parliament in the New Constitutional Treaty', *The International Spectator* (2004), p. 83.

⁵¹ Tsebelis, *supra* n. 43.

⁵² Commission Press release of 15 December 1994, quoted in D. Earnshaw and D. Judge, 'From co-operation to co-decision: The European Parliament's path to legislative power' in J.J. Richardson (ed.), *European Union: Power and Policy-Making* (London, Routledge 1996).

are supposed to have the welfare of citizens in mind while the former are not.⁵³

It is not clear why judges are considered under a different lens than bureaucrats by the literature: they both interpret legislation, and there is no compelling analysis that tells us that they have different goals from each other (neither the arguments that the judges care for the 'common good' are compelling, nor has any argument been made that bureaucrats do *not* care). But no matter what the interests and or preferences of these institutions, the real question is: should political decisions be made by the elected representatives of the people of the Union, or should these decisions be left to non-elected agents?

The question may seem provocative and the answer obvious. We just want to clarify that we do not share this belief. There are decisions that are better left to judges than to elected representatives: for example issues of human rights are better left to courts. Similarly, there are decisions that are better left to independent agencies (like an ombudsman) than to governments.⁵⁴ However, these arguments cannot be made for the majority of political decisions, and reducing the capacity of a political body to make these decisions increases the likelihood that these decisions will be made by non-elected (and non-politically accountable) agents. We are not sure that this is the intention of national governments, including the ones of Spain and Poland. This is particularly the case since it is well known that these reticent member states have more problems with the appointed and politically irresponsible civil servants of the Commission⁵⁵ than with the Council as a common deliberative institution of the Union.

The legal weight of qualified majority voting

In spite of the fact that all of the above arrangements have apparently a more political and much less legal nature, the main legal issue is whether they constitute a *common law norm* of the Union's legal order or not. In simple words, is the qualified majority voting the rule or the exception for the Union's decision-making process?

Here is another specificity of Europe's institutional framework: the Treaty establishing a Constitution for Europe makes the qualified majority voting the common law norm for the decision-making process, but with a great number of exceptions. With the practice of the Council aiming always to reach a consensus,

⁵³ S. Smismans, 'The Constitutional Labeling of the 'Democratic Life of the EU': Representative and 'Participatory' Democracy', in L. Dobson and A. Føllesdal (eds.), *Political Theory and the European Constitution* (London, Routledge 2004).

⁵⁴ X. Yataganas, 'Delegation of Regulatory Authority in the EU. The Relevance of the American Model', *Jean Monnet Working Paper 3/2001*, <www.jeanmonnetprogram.org>.

⁵⁵ Even if the Santer experience already demonstrated that the Commission, duly reformed, could be also a politically responsible executive body.

their application is actually quite exceptional. Furthermore, there are still more than twenty important areas where unanimity is applied.

Nevertheless the road to a gradual passage to the qualified majority voting with the Single Act has continued subsequently.⁵⁶ For instance, judicial co-operation on penal matters has been transferred to the category of community issues decided by qualified majority, with the exception of the European Prosecuting Authority and police operational co-operation.⁵⁷ In sum, 25 new areas have been transferred from unanimity to the qualified majority voting.

Moreover, there are some clauses that in the future facilitate the use of qualified majority voting in certain areas initially remaining under unanimity vote. For instance, in the area of external policy, a *passerelle* authorises the European Council to decide by unanimity which decisions can be taken by qualified majority voting (this possibility does not apply to security and defence issues).⁵⁸ Similar *passerelles* have been introduced on, for instance, some social issues and environmental matters.⁵⁹ It is also worth mentioning that the Treaty establishing a Constitution for Europe also introduces a simplified revision procedure for the entire third part – defence not included – for the passage to the qualified majority voting. The relevant decision is taken by the European Council if no national Parliament opposes within a period of six months.⁶⁰

There is some skepticism about the real applicability of the above-mentioned clauses, but the positive precedent of Title IV of the European Community Treaty (Article 67) on immigration and asylum issues demonstrates that, when a real necessity to act appears, these methods are effectively used.

For all these reasons, we can argue that the Treaty establishing a Constitution for Europe continues in the tradition of treaties enlarging the qualified majority voting, providing more or less flexible clauses in order to facilitate these changes in the future. So, the proposals of the Convention were more advanced than the Intergovernmental Conference's proposals. But it is natural: all national governments logically consider that the composition of the institution they participate in is of a particular concern, if not a matter of their exclusive competence. Fur-

⁵⁶ There are essentially the external affairs and common security policy, the matters considered of quasi-constitutional nature, like the composition of the European Parliament, the fiscal status of his members, and the uniform electoral system, the linguistic regime of the EU, the treatment of the eventual heavy violations of the Constitution by the member states, the budgetary and financial decisions, the matters related to the non-discrimination and the citizenship of the Union, the fiscal questions, the social security and labor policy, the external status of the Euro. For a complete list, see J.P. Jacqué, 'Le Conseil des Ministres, La conclusion d'une réforme déjà entreprise', in Dony & Bribosia *supra* n. 3, at p. 158.

⁵⁷ Art. III-374 and Art. III-275(3).

⁵⁸ Arts. III-300 (3).

⁵⁹ Respectively Art. III-210 (3) and Art. III-234(2).

⁶⁰ Art. IV-444 (1).

thermore, after the Nice failure, they were very well prepared for this exercise and had very concrete positions to defend. And, last but not least, given the intense controversies about reform of the Council, it was obvious that the adoption of the whole Constitution depended on a positive solution for that problem. In this context, the final compromise seems to be the best exit from this difficult situation.

CONCLUSIONS

It is ironic that what happened under the Presidency of one President of France was repealed under the Presidency of another: Jacques Chirac was the President of the European Union in 2001 when the Nice Treaty was accepted and as such was responsible for the acceptance of the triple majority requirement that seriously undermines the decision-making abilities of the Council. Valéry Giscard d'Estaing (ex-President of France) was the President of the Convention, which repealed the most restrictive clause of a qualified majority of weighted votes in the Council, a proposal that would have unblocked the Council and enabled it to make more political decisions.

This decision to decrease policy stability in the European Union was an important one, because under the Nice rules the European Union will be unable to function. As we demonstrated, the difference between the two sets of rules on policy stability is overwhelming, and policy stability (or in the case of Europe, political immobilism) affects not only policies, but also the democratic deficit and the roles of the judiciary and bureaucracy. Let us hope that the final intermediary solution contained in the Treaty establishing a Constitution for Europe will ultimately be adopted in order not to fall again into the Nice deadlock.

