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Veto Players and Decision-making in the EU After Nice: Policy Stability and Bureaucratic/ Judicial Discretion*

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Abstract

The Treaty of Nice introduced a triple majority requirement for Council decisions. In order to be valid, Council decisions require not only a qualified majority (slightly larger than before), but also an absolute majority of Member States and, at a country's request, a 62 per cent majority of the total population of EU countries. We explain why this significant modification of the rules occurred and what the likely consequences are. The triple majority requirement was introduced because the approaching enlargement of the EU differentiates for the first time between the three majoritarian criteria (weighted votes in the Council, majority of countries, and majority of the population). Different countries have insisted on each of these criteria and the final outcome is an explicit incorporation of all three. The likely outcomes of this change in rules are increased difficulty of legislative decisions, a shift of veto powers in favour of the Council, an increased role for the judiciary, and a further bureaucratization of the EU.

Introduction

The Treaty of Nice introduced a triple majority requirement for Council decisions. In order to be valid, Council decisions require not only a qualified majority (slightly larger than before), but also an absolute majority of Member States and, at a country's request, a 62 per cent majority of the total population of EU countries. It is the first time in the history of the EU that such requirements have been explicitly introduced. We argue that these modifications are likely to have serious implications for the politics of the EU.

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First, we explain why these serious modifications of decision-making were introduced, and then focus on the implications of the modifications. Our argument is that as decision-making becomes more cumbersome in the Council, two legislative results follow: first, new legislation becomes more difficult to produce, and second the importance of the Council increases. We argue that because of these modifications, the role of the judiciary and the bureaucracy is likely to increase. It is not clear to us whether these were the intended results of the contracting parties.

The article is organized into five sections. Section I describes the requirements for decision-making in the Council. We demonstrate that these requirements are often imprecise and sometimes contradictory. In order to understand why these requirements were adopted, one has to look at the preferences of the different countries, and the way these preferences were implemented by previous treaties. In section II we argue that, in the past, all requirements were achieved simultaneously, but it is the enlargement perspective that separated the effects of qualified majorities and majorities of Member States. In other words, enlargement created the necessary (but not sufficient) conditions for the adoption of multiple criteria. Section III presents the sufficient condition that led to the adoption of the new rules: all the countries insisted on the adoption of their own criteria leading to the inclusion of all possible requirements. In section IV, we analyse the legislative implications of the new rules, the increase of legislative inertia in the EU, and the shift of legislative powers towards the Council. Section V describes the implications for bureaucracies and the judiciary, and explains why politics will be more bureaucratic and the discretion of the judiciary will increase. In the conclusions, we argue that these results should lead to a re-evaluation of the Nice Treaty at the earliest opportunity.

I. Council Decisions under the Treaty of Nice

The Treaty of Nice (TN) encompasses one protocol and two declarations, which describe the new method to calculate the qualified majority (QM) in the Council. The protocol is legally binding; it has equal status with the provisions of the Treaty and enters into force after the ratification procedures, which become applicable on 1 January 2005. On the other hand, neither of the declarations is legally binding, but because they have been adopted by the intergovernmental conference (IGC), they are of outstanding political significance.

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– *The enlargement protocol* (EP) in art. 3 modifies art. 205 of the Treaty and actually fixes the QM. This new method will be introduced after 1 January 2005. The figures of the new art. 205 are given for 15 Member States.[1]

– *The enlargement declaration* (ED) provides the common position to be defended by the actual Member States during the future negotiation processes and is, in fact, a kind of gentlemen's agreement. It offers a complete table of the votes of 27 potential Member States (which exercise a total of 345 votes), and fixes the QM at 258, i.e. at a threshold of 74.78 per cent.

– *The threshold declaration (*TD) describes the evolution of the threshold during the enlargement process from 15 to 27 Member States and provides the relevant figures for the constitution of the blocking minority (BM).

From 1 January 2005 the system shall be a double majority assisted by a safety net. The double majority provided by the new decision-making mechanism stipulates that the decision is obtained if two conditions occur simultaneously: (1) the number of votes reaches the QM threshold, and (2) this represents a majority of Member States. The safety net consists of the possibility open to any Member States to ask for verification that the majority encompass at least 62 per cent of the total population of the EU. If this is not the case, the decision is not adopted. Despite the fact that this final condition is optional, and given that it provides an option to the loser of any particular vote, we can speak about the requirement for a real triple majority (Yataganas, 2001).

In detail:

– For the period until 31 December 2004: the TN remains silent. Negotiations will determine each new entrant. This is, apparently, an extrapolation of the current situation, as was the case with the previous accessions.

– After 2005: the QM, provided by the new art. 205 for 15 Member States**,** is 169 (out of 237), a threshold of 71.31 per cent.[2] This is slightly higher than the current level of 71.26 per cent, but a blocking minority is significantly easier to attain (68 votes, or 2 larger Member States +Austria, which is more than the three larger Member States needed now).

– After an EU of 27 Member States, the QM rises to 258 (out of 345) votes, or 74.78 per cent.[3] The blocking minority is 88 votes, and therefore more difficult to obtain than today. Four Member States are needed and from

[1] In gneral, when we speak of the new decision-making process, we mean the figures relating principally to 27 Member States as laid out in the enlargement declaration.

[2] In detail, Germany 29(10), United Kingdom 29(10), France 29(10), Italy 29(10), Spain 27(8), Netherlands 13(5), Belgium 12(5), Portugal 12(5), Sweden 10(4), Austria 10(4), Denmark 7(3), Finland 7(3), Ireland 7(3) and Luxembourg 4(2). Current numbers appear in brackets.

[3] Poland 27, Romania 14, Czech Republic and Hungary 12 each, Bulgaria 10, Slovakia and Lithuania 7 each, Latvia, Slovenia, Estonia and Cyprus 4 each and Malta 3.

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these three are larger Member States (3x29=87).[4] The safety net of 62 per cent of the population is calculated as having a marginal 'pro-German' effect in an EU of 27 Member States, which would be easily reached today (for example: D+UK+IRL=38.64 per cent). This means that Germany, together with a larger and a smaller Member State, can block any decision in the Council. In fact, the result is a blocking minority that is easier to attain than any other BM attained by a number of Member States not allowed to reach the QM threshold. In an EU of 27 Member State, the demographic clause can be enacted with about 180 million European citizens. It is interesting to note that only Germany can reach this number together with another large Member State (even Spain) and the Wisegrád countries (Poland, Czech Republic, Slovakia and Hungary).

But, according to the TD, the blocking minority must evolve from 88 to 91 after the accession of the 27th Member State (Turkey is never taken into account in these calculations). If this is the case, the QM moves to 255, or 73.91 per cent. The blocking minority could become more difficult, since it would need three greater Member States (not Spain) and at least Luxembourg instead of Malta. The TD shows another contradiction: it indicates that the QM will increase to a maximum of 73.4 per cent. If this is the case, the BM becomes 93 votes and it is more difficult to attain than in all other situations. As far as the safety net is concerned, we note that it is easier to block a decision in this way if Germany is against, rather than through a normal blocking minority. Let us now take a closer look at the three conditions required for the decision of the Council.

The Threshold of the Qualified Majority

After interpreting the declarations, we can say that the threshold will change depending on the pace of accession, starting at a percentage lower than the current threshold up to a maximum of 73.91 per cent (according to TD, 73.4 per cent) after the accession of the 27th Member State. In fact, this is the bottom line of three complicated and partially contradictory texts: after the achievement of the current enlargement process with 12 applicant countries, the threshold moves to a total of 345 votes in the Council (255 for the QM and 91 for the BM). The crucial importance of the BM was that the outcome came about as a result of an effort *not* to make the decision-making process extremely difficult; the fact that the main efforts were concentrated on the calculation of the BM also explains the contradictions about the exact level of the threshold of the QM. The BM, which is now possible with three larger Member States, or with two larger and two smaller, will be obtained in the

[4] Note that Spain has the same effective weight as the other larger Member States, because the fourth state with the smallest number of votes is Malta, with 3, enough for a blocking minority.

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future with a minimum of three larger and one smaller state. But the comparison of the requirements before and after enlargement is not straightforward: making a BM more difficult to obtain in an EU made up of 27 rather than 15 states does not mean that a QM becomes easier. And we have not yet included the results of the additional restrictions.

The Favourable Vote of a Majority of Member States

This condition did not exist until now in the Treaty because the QM with six, nine, ten, twelve or fifteen Member States led mathematically to a majority. By reweighing the votes in the Council to the advantage of the most populated Member States, this arithmetic consequence is no longer guaranteed. That is why all the other Member States, smaller and medium, asked and attained as counterpart the requirement that a decision is based on support by the majority of the Member States (which means 14 countries after enlargement). Since fewer than 14 large Member States can gather a QM of votes, it follows that a majority of small Member States can block decisions even if they do not have a BM. So this restriction invalidates many possible QM. We will return to this point in section IV.

The Demographic Clause

The demographic clause is useful only for Germany, since the Germans, in association with one other large Member State, comprise 38 per cent of the total population of the EU. Consequently, this condition increases the blocking potential of Germany over EU decisions. It seems that this is the price that Germany must pay to accept an equal number of votes with France and the other larger, but less populous Member States. The equivalence of this clause with a BM eliminates some of the arithmetically possible qualified majorities.

In conclusion, the Treaty of Nice incorporates two processes in its numerical calculations; first it reweighs the votes in favour of larger countries, and second it anticipates the effects of enlargement (that is, the accession of a series of smaller countries into the EU). The compromise achieved is plagued by a number of problems, including imprecise and contradictory decisions. The evolution of the compromise from the current state of affairs to the day that the Treaty comes into effect (1 January 2005) is not clear. In addition, what the exact numbers and percentages will be in 2005 is also not clear. Nevertheless, the ultimate results of the Nice compromise are that the qualified majority threshold will increase and, more importantly, that several of the numerically possible qualified majorities will be invalidated because of the additional restrictions (majority of countries and 62 per cent of the EU

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population). As a result of these changes, decision-making in the Council will become increasingly difficult. We have focused our discussion on the Council, and have ignored the fact that membership of the Commission and especially the EP is increasing, and that the preferences of these new actors (countries in the Council, or their representatives in the Commission and the EP) are more heterogeneous. These are also factors rendering the overall decision-making process in the EU much more difficult. For a better understanding of the above result, we will review the pre-history of the question and the positions of the actors (especially Member States) during the negotiations.

II. The Pre-history of Decision-making Requirements

The original Treaty of Rome provided that Germany, France and Italy – approximately of equal size – should each have four votes; Belgium and Netherlands each received two votes and Luxembourg one. The QM was fixed at 12 votes out of 17. Consequently, the BM was six votes. Any large country together with Luxembourg could not block a decision.

During the first enlargement, the number of votes was multiplied by 2.5 though only by 2 for Luxembourg, in order to bring the new Member States into the schedule. The evolution throughout the subsequent enlargements followed the same logic.

In each accession the larger Member States lost more than the smaller states. The weights used were not proportional to the population, but provided more votes to the less populous Member States. Accordingly, in 1957 the three larger Member States represented 90 per cent of the population and had 70 per cent of the votes in the Council. Today, they still represent almost 80 per cent of the population, but they only have 55 per cent of the votes. A simple extrapolation shows that in an EU of 27 Member States, the six larger states – representing almost 70 per cent of the total population – would have only 42 per cent of the votes in the Council.

The historical evolution of the QM in the Council is illustrated in table 1. From the evolution of the system, we note that:

– the founding fathers opted for weighted votes reflecting the population of the Member States, with a huge correction for the less populous ones in order to stress the individuality of each of them. The QM threshold was set at an intermediate level between simple majority and unanimity. It has always been just above 70 per cent.

– the effect of successive enlargements was to preserve, more or less, the original balance. The exception to this is with regard to the majority in terms of population that passed from almost 70 to 58 per cent and risks going under 50 per cent in an EU of 27 Member States.

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Table 1: The historical evolution of QM in the Council

Year	*Total No. of MS*	*Total Votes*	*QM: Votes and %*	*Min. MS Forming QM*	*Min. Population Forming QM*	*Min. No. of MS Forming a BM*	*% of Population Needed for the Smallest BM*
1958	6	17	12 (70.59%)	3	67.70%	2	34.83%
1973	9	58	42 (72.41%)	5	70.62%	2	12.31%
1981	10	63	45 (71.43%)	5	70.13%	2	13.85%
1986	12	76	54 (71.05%)	7	63.29%	3	12.12%
1995	15	87	62 (71.26%)	8	58.16%	3	12.05%

Source: Opinion of the Commission, 'Adapting the institutions to make a success of enlargement' delivered on 26 January 2000, *COM* (2000) 34.

– regarding the BM, a QM Council decision can be blocked either by the three most populous Member States acting together, or by a group of less populated Member States representing, since 1973, between 12 and 13 per cent of the total population of the EU.

– up until now, the system has proved sufficiently representative and balanced: the size of the qualified majority has varied from 67 per cent (with the six founding Member States), to 70 per cent (with ten Member States), to 71.26 per cent currently. Decisions have always had to gain the support of a large majority in terms of population and at least half of the Member States, while the blocking minority could be obtained with only the three Member States with the largest population or by a larger group of smaller Member States.

During the last enlargement, the system to calculate the QM did not change, but a procedure was established that is able to modify the threshold in an ad hoc fashion. According to this text, known as the 'Ioannina Compromise' when a number of Member States is close to a BM by 1–3 votes, and these Member States mark their intention to block a decision, the Council must use all means in its possession in order to arrive – in a reasonable time period – at

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a satisfactory conclusion for those Member States representing a number of votes which are three units under the ceiling of the BM.[5]

Here we identify the origins of the problem relating to the constant erosion of the proportional weight of the larger Member States in the decision-making process. The Treaty of Amsterdam, not being capable of resolving this question (in spite of very long discussions known as Amsterdam's leftovers) stated in institutional declaration no. 50 that the compromise of Ioannina should be valid until a final resolution following enlargement.

III. The Evolution of the Negotiation Procedure

The protocol annexed to the Treaty of Amsterdam envisages revising the qualified majority either by reweighing it (i.e. by adapting the present system) or by creating a dual majority on votes and populations. Both points of view were supported in Nice. The dual majority (Member States + population) proposal was backed primarily by the small countries, and supported by Germany and Italy; the second modification of the current system was backed by the three other large countries plus Sweden, with the Netherlands receptive to any realistic and effective proposal. In terms of thresholds, the larger Member States requested higher levels (around 70 per cent), while the smaller countries preferred lower levels (around 50 per cent).

The Commission proposed concurrent majorities of the Member States and their populations as a decision-making rule. According to Romano Prodi and Michel Barnier, it secured the legitimacy of the Council's decisions while at the same time facilitating the decision making-process. Additionally, it was transparent and easily readable by citizens, and would necessitate further revision after the subsequent enlargements. Finally, it also had the advantage of addressing the problems of the cluster countries (small groups of countries with similar interests, especially the Benelux countries), and the equilibrium between larger and smaller Member States.[6]

One of the major reasons that the Commission wanted to facilitate the decision-making process in the EU was that, according to all legislative procedures, deliberations would start on the basis of a proposal presented by the Commission. In this sense the Commission plays an important agenda-set-

[5] Decision of the Council of 29 March 1994, *OJ* 1994, C105 as modified by the decision of 1 January 1995 following Norway's decision not to join the EU (*OJ* 1995, C 1).

[6] In our opinion the Commission was the only body to have a global and broad interest appreciation of the question of the QM. In an extensive document of its secretariat general dated 28 May 2000, the Commission establishes the limits of the exercise, putting down three principles and examining all the possible outputs according to them. These principles are: no decision by QM against a majority of Member States, no decision against the majority of the population of the EU, and no solution rendering the decision-making process more difficult. Its proposal remains the most credible *vis-à-vis* the above criteria.

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ting role for the EU. However, if the other legislative actors were not able to agree on many alternatives to the status quo, the importance of agenda-setting would be reduced (Tsebelis, 2002). The Commission, as an agenda setter, finds it more important to search out new compromises on the basis of its proposal rather than managing existing legislation as a simple executive agency, subsequent to gridlock at the Council and Parliament levels.[7]

Other proposals put forward were the Italian proposal for a scale from 3 to 33 votes, the Swedish system for calculating the votes of each Member State according to the square root of a state's population, and the Greek proposal which provided for a double majority: 60 per cent of the Member States and 60 per cent of the total population of the EU. Table 2 provides more details on the positions of different countries.[8]

The Commission proposal was not seriously taken into account and never extensively discussed because both large and small Member States believed that their interests were not sufficiently addressed. The larger ones feared a coalition of the smaller states and the latter a directoire of the great powers (Van Nüffel, 2001).

Variants with real figures were discussed only on the last day, and the final result was a real horse-trading agreement: the demographic clause was compensation for Germany for accepting the same number of votes as France, the same change for Spain (from 10/8 to 29/27) was to preserve her status of intermediary power, and 13 to Netherlands instead of 12 was to preserve for the Benelux countries collectively the status of a larger Member State. Finally, the relative empowerment of the larger Member States was compensation for losing one Commissioner after 2004.

However, none of the proposals on the table provided the same combination of Council votes, country majorities and population support that table 1 demonstrates existed in the past. Despite the quantity of proposals, the question of the QM was never seriously and extensively discussed until the Nice summit itself. The delegations were unanimous about the extreme sensitivity of the issue, and as a result opted to address it at the very end of the negotiations on the basis of the final/global package deal. It is symptomatic that the presidency never put figures into the different scenarios, so the discussions remained vague exchanges of intentions or principles. Only at Nice, during the four last dramatic days, were concrete proposals distributed in restricted

[7] As we will see in section V, the role of the Commission as head of the EU bureaucracy is enhanced by the Nice Treaty.

[8] This table and the detailed positions of the Member States are a compilation of different working documents of the secretariat general (task force for the IGC) from May to November 2000. For a summary of the situation, see the Communication of Romano Prodi and Michel Barnier of 31 October 2000, *SEC* (2000) 1834/2.

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Table 2: Positions of different countries on QM voting

	QM Threshold	*Countries' Majority*	*% Population*
Germany	71%	Not necessary	60% minimum
UK	71%	Not necessary	Not less than today (58%)
Italy	71%	Not necessary	60%
France	71%	Not necessary, but if majority of MS, will weigh down system from below. Means that smaller MS should lose proportionally more votes	Did not want it
Spain	c. 71%	No clear position	System based on grouping countries
Netherlands	c. 71%	Yes, but balance between them will be very important. Means that NL wants more votes than Belgium and Greece	Can discuss it
Greece	Prefers double majority	60%	60%
Belgium	Double majority	Could be variable	More than 50%
Portugal	71%	At least 50%	58% could be acceptable
Sweden	Revision of the current system with weights proportional to the square root of the population		
Austria	71%	At least 50%	58% acceptable
Denmark	c. 70%	At least 50%	58–60%, but lower if simple reweighting. Means that if the system finally chosen does not take into account the majority of MS, population criterion should be around 50%
Finland	71%	At least 50%	60% maximum
Ireland	71%	At least 50%	60%
Luxembourg	Prefers double majority. Otherwise, keep existing weights and add criterion of majority of population	50%	50%

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versions. The final compromise emerged only during the last hours of the summit.[9]

In discussions, Germany demonstrated a desire to ensure preponderance over the other large countries to reflect the outcome of unification; Spain and the Netherlands aspired to improve their respective positions between larger and smaller countries; the large countries wanted to offset the possible loss of a Commissioner through better representation in the Council; the small countries wanted to safeguard influence in the decision-making process.

The simple dual majority proposed by the Commission and supported by the smaller Member States, a plan to adapt the present system – with a significant change of balance in favour of the larger Member States – and three intermediate presidency proposals were all rejected. Several Member States (Belgium, Sweden, Italy, Greece, the Netherlands, Portugal and Finland) tabled specific proposals, but the situation remained deadlocked until Sunday evening. When France tried to leverage its position in the presidency to conclude a deal that favoured large countries, France's proposal was strongly rejected by some of the smaller Member States: the Portuguese Prime Minister António Guterres called it an institutional *coup d'état*, and Belgium went as far as to threaten to veto the entire final package.

It is clear that different countries insisted on different criteria for the adoption of legitimate decisions. The large countries preferred the qualified majority system, while the small countries insisted on a majority (or qualified majority) of Member States. The result was the inclusion of all possible criteria in the decision-making process in order to save the summit (which was politically unaffordable before enlargement and the imminent introduction of the euro in the 12 Member States). This also explains the poor quality of the drafted provisions and the small contradictions between the protocol and the relevant declarations.

Since Nice the EU's decision-making process has become more complex, opaque and difficult. This conclusion seems to enjoy the unanimous support of experts (Petite, 2000; De La Serre 2001). In addition, it seems that this situation will be much more characteristic during the interim period until the termination of the current enlargement process, because of the increasing facility to gather a BM.

Similarly, the representatives of the EP in the CIG, Elmar Brok and Dimitris Tsatsos, severely criticized Nice's outcome for the decision-making process, as did a number of individual MEPs from all political groups. The EP during the IGC pleaded for a workable system and stressed that it would not support a model which made the present situation worse. The EP also argued that the

[9] All participants in the IGC we questioned are unanimous on the lack of extensive discussion on the final compromise.

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threshold of the QM should be lower than 71 per cent and that the overall system must more accurately reflect the population of the EU. In spite of the vague terms of the EP's proposal, it is clear that its general preference was in favour of a transparent system facilitating the decisions of the Council.

What we will demonstrate now is that this compromise, in addition to inhibiting political decisions, has unfortunate implications for politics and policies in the EU. In particular, it shifts the balance of legislative power in favour of the Council, and makes policies more bureaucratic. We use veto players' theory (Tsebelis, 1995, 1999, 2000, 2002) to explain these consequences in the remainder of this article.

IV. Legislative Consequences of the Treaty of Nice

The Treaty of Nice did not alter the decision-making procedures of the EU.[10] In this respect it was an exception to a series of treaties occurring on average every three to four years which introduced new or altered previous decision-making rules: co-operation, co-decision I, and co-decision II. Nice not only preserved the dominant co-decision II procedure adopted by the Treaty of Amsterdam, but expanded the use of it in a number of areas,[11] the only modification being the change in decision-making in the Council (the triple majority discussed in section I). In fact, the differences analysed below occur mainly as a consequence of enlargement because, as explained earlier, all three decision-making requirements are simultaneously met in the EU of 15 members.

This section will use veto players' theory to demonstrate that the introduction of three distinct criteria for decision-making has two important consequences for EU legislation. First, it makes changes of the status quo significantly more difficult not only for the Council, but for the whole EU. We call this difficulty of significant departures from previous policies 'policy stability' and we demonstrate that it increases under Nice. Second, the treaty empowers the Council in decision-making, so that final decisions more closely approximate preferences of the Council.

[10] For theoretical analyses of EU decision-making, see Tsebelis and Garrett (2000); for the empirical side see Tsebelis *et al. (*2001). Both articles include extensive references.

[11] Nice was able to remove from unanimity to QMV only 27 (and not the most important) of the 75 remaining items. The co-decision procedure became applicable for only seven provisions that change over from unanimity to QMV (arts. 13, 62, 63, 65, 157, 159 and 191). The IGC was unable to extend the co-decision procedure to legislative measures, which already come under the qualified majority rule, like agriculture and trade policies (Yataganas, 2001).

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Push for Policy Stability

Let us first focus on decision-making inside the Council and identify the changes that the triple majority rule introduces compared to the qualified majority requirements featured in previous treaties. For the analysis that follows, we will use the concept of the core, that is, the set of points that cannot be defeated through the application of the decision-making rule. This is the simplest possible presentation of the argument.[12]

Consider a seven-member Council composed of members C1,…C7. A qualified majority decision by five out of seven members of this Council is very close to the approximately 70 per cent qualified majority required by the different EU treaties. It is possible that for certain positions of the legislative status quo this Council cannot select any policy alternative. Let us identify these points.

Consider the line C1C5. It divides the seven members of the Council into three groups: countries C2, C3, C4 on one side of the line, countries C6 and C7 on the other side, and countries C1 and C5 on the line. The line C1C5 has

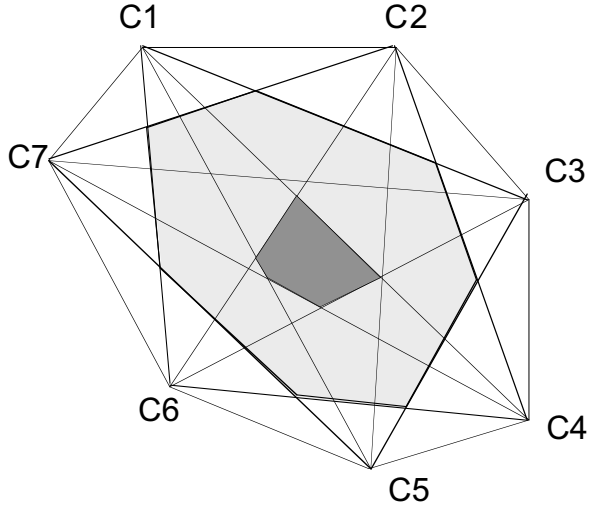

Figure 1: 5/7 and 6/7 majority cores in two dimensions

[12] This presentation may generate one serious objection: as the number of dimensions of the policy space increases the core ceases to exist, that is, any point can be defeated by some other point (see Tsebelis and Money, 1997, for a discussion of this problem). However, even in the case that every possible status quo can be defeated by some other point it can be shown that such points will be concentrated in a small segment of the area of the status quo, which means that changes will be only incremental. Tsebelis (2002, ch. 1) has demonstrated the quasi-equivalence of the two criteria. So, our argument holds qualitatively even in the case that there is no core. We thank one of the referees for raising this point.

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a qualified majority of the Council (C1,…C5) on one side of it. Are there any locations of the status quo (SQ) that these five countries would not find in their common interest to modify? The answer is affirmative. Any SQ located among C1,…C5 cannot be changed by these five actors unanimously (which would provide the required 5/7 majority of the Council). On the other hand, if the SQ is located on the same side of C1C5 as points C6 and C7, then all countries C1,…C5 can agree to replace it by (say) its projection on the line C1C5. So the points that cannot be upset by an agreement of C1,…C5 are located on the same side of C1C5 as points C2, C3, and C4.

Let us replicate the same argument with respect to the line C2C6, which also has a qualified majority C2,…,C6 on one side of it. For similar reasons as laid out before, some of the points located on the same side of C2C6 as the members C3, C4, and C5 cannot be upset by a unanimous agreement of C2,…C6.

Figure 1 replicates the above arguments with all the possible lines that separate a 5/7 qualified majority on one side of them, and identifies the points that cannot be upset by *any* 5/7 majority inside the Council, that is, 'the 5/7 core' of the Council. These points are located inside the heavily shaded area in Figure 1.[13]

What happens if one increases the qualified majority requirement inside the Council? Figure 1 considers also the 6/7 qualified majority core (the lightly shaded area in the figure) and shows that the core increases when the required qualified majority increases.

Obviously the change from the Amsterdam qualified majorities of 71.26 per cent to the Nice qualified majorities of 73.91 per cent are not as extensive as the move from 5/7 to 6/7, so figure 1 exaggerates the impact of the modification of the qualified majority requirement.[14] However, this is only part of the story.

The major modification that Nice introduced is the two additional criteria of valid qualified majorities. It is possible that a 5/7 qualified majority is not valid because certain combinations of countries produce the 73.91 per cent threshold but fail to meet the absolute majority of countries' requirement, or

[13] Here we simplify again. We assume that every country has the same weight in the Council. However other studies have calculated the exact location of the core in multidimensional spaces with the real voting weights of country members given the preferences of each country (König and Bräuninger, 2001). We thank one of the referees for raising this question.

[14] In addition, Nice provides different weights for each country, a point that we do not address directly, but consider indirectly when we argue that some qualified majorities are invalidated because they do not fulfil other requirements.

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the 62 per cent population requirement.[15] In these cases, the core of the qualified majority required by Nice expands, and policy stability of the Council expands.

And we still have not exhausted the sources of increased policy stability in the Council. The new countries that will be included in the EU are likely to have different preferences from the current 15 members on several dimensions. As a result, the ideal points of the EU countries are likely to be more distant in the future than they are today. The reader can perform the following mental experiment to see the consequences of this preference divergence: if the points C1,…,C7 in figure 1 are moved further apart from each other, it is more likely that the 5/7 core will expand.[16]

While in the above discussion we have identified only the points of a qualified majority core of the Council, the argument is general: the additional restrictions increase policy stability for decision-making in the Council. But what are the consequences for legislation in the EU as a whole? In order to examine this question we will refer to the analysis of Tsebelis and Garrett (2001) who have identified the core of the co-decision II procedure (under the Treaty of Amsterdam).

According to Tsebelis and Garret (2001) co-decision II specifies that at the end of the legislative game, an agreement by a qualified majority of the Council and an absolute majority of the EP can overrule other actors. Tsebelis and Garrett (2001) consider the absolute majority required for EP decisions the *de facto* equivalent to a qualified majority requirement (Tsebelis, 2002 ch. 6). Here we will consider EP decisions under simple majority, so that it becomes clear that our argument does not depend on qualified majorities in the EP.

The shaded area of figure 2 that connects the median lines of the EP with the 5/7ths Council core represents the core of co-decision II. Indeed any point inside this area cannot be changed by an agreement of a majority of MEPs and a qualified majority in the Council. The greater the policy differences between the Council and the EP (and the greater the preference dispersion inside these institutions), the greater the size of the core. Figure 2 presents the effect of the change of the qualified majority requirement on EU decision-

[15] It is interesting to note that a coalition of Member States made up of the smallest countries could block any decision, despite the fact that they represent just 13.7 per cent of the EU population. On the other hand, a coalition made up of the four biggest Member States, representing only 14.8 per cent of the total number of members, could block any proposal on the basis of Council votes. Furthermore, the 14 smallest countries in an EU composed of 27 Member States could block any decision even though they account for about a ninth of EU citizens!

[16] This is, for example, the outcome of enlargement in the study of König and Bräuninger (2001), although an expansion of the core is not necessary since the size of the core depends on the relative positions of all points.

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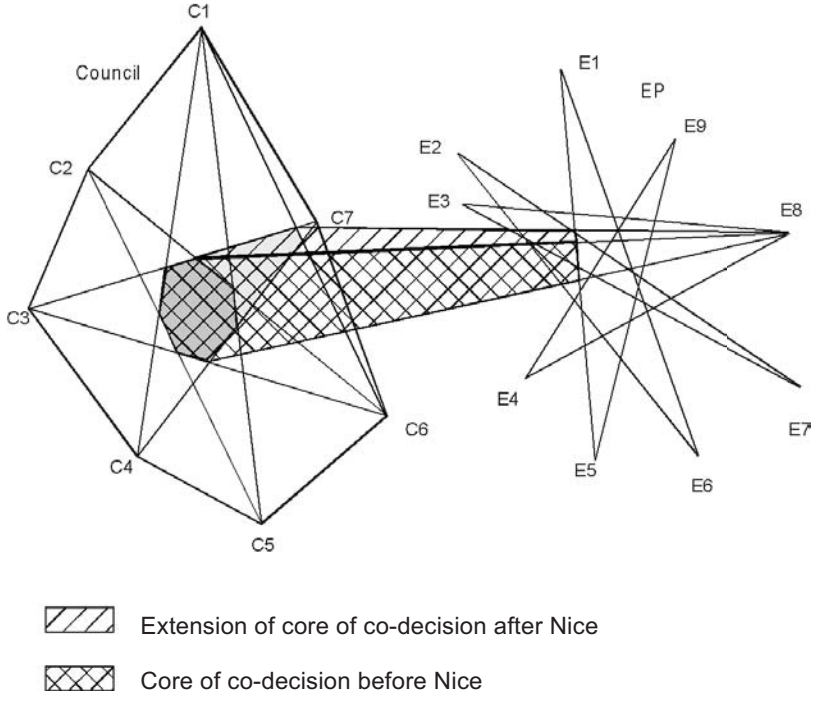

Figure 2: The core of EU legislative procedures

making. For example, let us assume that C2C6 in figure 2 does not fulfil one of the two additional requirements. In order to calculate the qualified majority core of the Council, this line has to be replaced by the actual qualified majority dividers. Let us consider such a line is C2C7, and C1C6. Recalculating the core of the Council under these assumptions suggests that it expands as indicated by figure 2. As a result, the core of the EU legislative procedures also expands.

The above analysis suggests that policy stability in Europe is likely to increase significantly as a result of enlargement and of the Nice Treaty. The preferences of the members of the Council become more diversified; the preferences of the MEPs become more diversified as well. The qualified majority requirements become more stringent as the result of the triple majority requirement of Nice. Each one of these changes implies higher policy stability, but their combination will make passage of EU legislation very difficult indeed.

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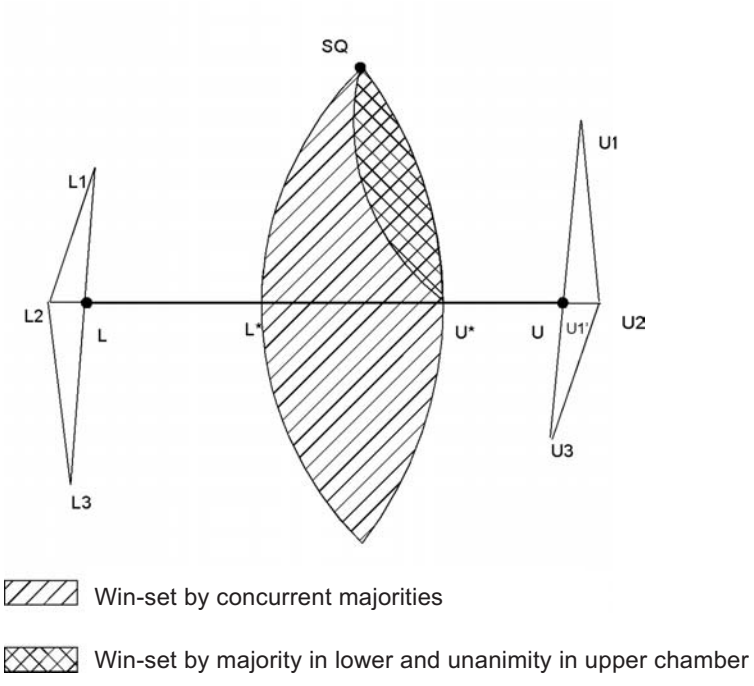

Figure 3: Win-set by concurent majorities, and by unanimity in the upper chamber

Shift of Outcomes in Favour of the Council

However, increasing policy stability is not the only clearly predictable outcome of the Nice Treaty. There is a second policy implication from increasing the difficulty of adopting new legislation in the Council: the Council becomes more important in EU decision-making, because its power to veto changes from the status quo increases.

Tsebelis (2002, ch. 6) makes this point with respect to bicameral institutions in general. He presents a bicameral legislature that makes decisions based on concurrent majorities of both chambers. In figure 3 we present a bicameral legislature composed of two chambers the upper (U1, U2, U3) and the lower (L1, L2, L3), and the status quo (SQ). Decisions are made by concurrent majorities of the two chambers.

The feasible set of potential outcomes under concurrent majorities is the diagonally striped area. This area is generated by the intersection of two circles, both of which pass through the SQ, one with centre L2 and one with centre U2. Indeed, L2 and U2 are the decisive members of the upper and

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lower chamber in the figure (L3 and U3 have even more points of agreement and L1 and U1 have fewer points of agreement). Agreement of L2 and U2 guarantees concurrent majorities in both chambers.

If, however, unanimity is required for a valid decision in the upper house, the set of potential outcomes shrinks dramatically and moves towards the chamber that has greater difficulty deciding (the chequered area in the figure). The reason is that it is more difficult to satisfy preferences in the upper house (that of member U1), which has to be included in the winning bicameral coalition. The point made in figure 3 does not depend on the number of members of each chamber, or on the specific requirements of valid decisions in each chamber. Making a decision more difficult in one chamber shifts the outcomes toward the additional members of the chamber that have to be taken into account.

This shift of outcomes in favour of the Council may not be significant if the preferences of the EP and the Council coincide or overlap. For example, if both institutions are dominated by a centrist coalition, shifting outcomes in favour of the Council or the EP cannot even be defined. If, however, the preferences of the two institutional actors diverge, then the shift described above may have political consequences.

This second scenario is quite likely, according to the prevailing wisdom of EU elections as second-order national elections (Reif, 1984). According to this thesis, the people of European countries do not pay attention to EU issues, but in EU elections vote to reward or punish their own government for its previous performance. If this is the case, and the popularity of governments over time decreases as the electoral honeymoon is over and voters disagree with specific political decisions, the MEPs of a country are more likely to represent a higher proportion of opposition parties. So far, the political composition of both the Council and the EP have been on opposite sides of the political spectrum (either a combination of a right-wing Council with a left-wing EP previously elected, or the current combination reversed). Consequently, the combination of both factors (increased difficulty of decision-making in the Council, and political differences between the Council and the EP) leads to a shift of outcomes in favour of the Council.

V. Bureaucratic and Judicial Consequences of the Treaty of Nice

Nice's consequences expand beyond the legislative politics of the EU. Our argument is that the increase of the core of the EU will expand the discretion of the judiciary and bureaucratize the Union. In order to make these two points, we will use a very simple model describing the implications of legislative decision-making on bureaucracies and the judiciary.

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The reasoning of our argument is this: both the judiciary (when making statutory interpretations) and bureaucracies can be legislatively overruled if they make choices with which the legislature disagrees. As a result, both the judiciary and the bureaucracy will try to interpret the law according to their point of view while guarding themselves from the possibility of being overruled. Therefore, if legislative decision-making is characterized by high levels of policy stability, bureaucrats and judges will have a lot of discretion (since they cannot be easily overruled). In other words, as the core of the EU legislature expands, bureaucrats and judges become more independent.

In game theoretic terms, we describe a sequential game where the bureaucrats or judges make the first move (interpret the existing laws) and the legislature makes the second (decides to overrule or not, and how). This description is frequently found in the literature.[17]

Consider the core of the EU legislature (we simplify the actual core calculated in figure 2 by presenting a triangle). The interior points of this triangle cannot be changed legislatively. Consequently, if the first mover (bureauc-

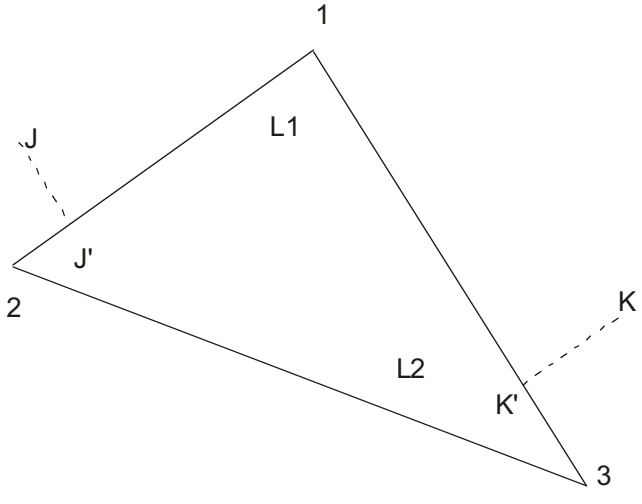

Figure 4: Selection of a policy within the core by first mover (bureaucracy or judiciary)

[17] Gely and Spiller (1990), Ferejohn and Weingast (1992a, b), Eskridge (1991), Cooter and Drexl (1994) and Bednar *et al.* (1996) on judges; McCubbins *et al.* (1987, 1989) and Hammond (1996) on bureaucrats.

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racy or judiciary) selects one of the points inside the triangle, there will be no legislative overrule. Figure 4 presents three different possibilities. In the first two cases, the first movers' ideal points, J and K, 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 legislative branch is incapable of changing 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.

However, the model we present here is very simple, and the theoretical argument needs to be buttressed. The first question is what happens if the veto players are not individual but collective actors, the dimensionality of the policy space is high and, as a consequence, there is no core, as in figure 4. Then, no point is invulnerable to legislative overrule. Does this mean that the first mover (judiciary or bureaucracy) has no agenda-setting power? Not exactly.

In the case of the absence of a legislative core, the winset of the status quo is not empty, but it can be quite small for certain positions of the status quo. A bureaucratic or judicial decision that has such a small winset may not be worth the effort of legislative overrule. Indeed, there are serious transaction costs for every legislative decision: take the initiative to present a bill, put together a coalition to support it, eliminate opponents who may have a different opinion by buying them out, or by solidifying your allies, etc.

One more question is raised in the literature concerning this simple game theoretic account. 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 preventive actions will the legislative branch take? There is an extensive literature arguing that legislation will be more restrictive when there are many veto players (McCubbins *et al.*, 1987, 1989; Moe, 1990; Moe and Caldwell, 1994; Epstein and O'Halloran, 1999, etc.).

It is interesting to note that this objection has been raised only about bureaucrats and not about judges. Indeed, many researchers have made the argument that more detailed legislation is made to restrict the role of bureaucrats, but to the best of our knowledge, the same argument about judges has been made only once (Scharpf, 1970). Given that our presentations of the bureaucracy and the judiciary were symmetric, we do not know the reason for this differential treatment in the literature. However, we will respect it, and address these points as they apply to bureaucracies only.

Mathew McCubbins, Roger Noll and Barry Weingast have written a series of articles that probably compose the most influential study of administrative law. In two of the most important of them (McCubbins *et al.*, 1987, 1989) the

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authors focus predominately on how legislatures create administrative law that effectively constrains the bureaucracy to performing the duties prescribed by the enacting coalition. The basic problem according to them is *moral hazard*; that is, the possibility that bureaucracies will choose policies that differ from the preferences of the enacting coalition.

In order to avoid moral hazard, legislatures can create administrative law, which has three major characteristics: first, the enacting coalition should create an environment for the bureaucracy that mirrors the politics at the time of enactment; second, legislatures should stack the deck in favour of the groups that are most affected and most favoured by the coalition; and third, agency policies should exhibit an autopilot characteristic. That is, legislation should enable policy changes as the preferences of the interested groups change.

This analysis has certain consequences for the model we have presented: given that the first movers in the game will be able to select a policy close to or identical to their own ideal point, the legislative branch will stack the deck to avoid this possibility. McCubbins *et al*. (1987, 1989) argue that no political actor will enter an agreement unless their interests are protected and, as a result, legislators will seek to create such protection for themselves when they write administrative law.

On the basis of the arguments and findings of this literature, Moe (1990) and Epstein and O'Halloran (1999) have argued that legislation will be more cumbersome when the legislative body is more divided as legislators try to lock into the intent of the coalition that produced it. This in turn leads to a reduction of the independence of bureaucracies. Francino (2000), applying these ideas to the EU, has found evidence that unanimous Council decisions restrict the Commission more than qualified majority decisions.

These arguments seem to contradict our account; Francino presents his findings as indirect evidence against Tsebelis and Garrett (2001), who make the same argument. We need to address the seemingly conflicting evidence. Our argument here is based on what may happen *after* the bureaucratic decision (*ex post*), while the arguments of McCubbins *et al*. are based on what the legislature will do *before* (*ex ante*). We expect that keeping legislation constant, bureaucrats and judges will be more independent from government when the core of the legislature expands. The deck-stacking argument of McCubbins *et al.* does not keep legislation constant; in fact, the essence of this argument is to compare the different kinds of legislation produced under different legislative conditions.

Given the freedom of courts and bureaucrats to interpret legislation freely when the legislative core is large, the legislators will prefer to restrict them *ex ante;* that is, they would like to include procedural restrictions inside the leg-

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islation itself (exactly as McCubbins *et al.* argue). Will they be able to do so? It depends on their preferences for this kind of legislation. If their preferences are similar, then they will be able to do so. If, however, the Council and the EP have different preferences for how to tie the hands of the Commission, there may be no agreement, and the monitoring part may be dropped from the legislation and moved toward the European Court of Justice. This argument expects cumbersome bureaucratic legislation to be sometimes the outcome of a large legislative core, while simple legislation will always be the outcome of a legislative branch that can make decisions easily.

In conclusion, greater judicial discretion will certainly be the outcome of Nice. With respect to the Commission as head of the EU bureaucracy, we make two predictions: First, *ex post*, for any particular piece of legislation (that is, keeping legislation constant), the discretion of the Commission will be higher. Second, *ex ante* legislation produced under the Treaty of Nice is likely to include more restrictions. This means that legislation will take longer, as it tries to anticipate various possibilities and to provide procedures that have to be followed under different conditions. Whether we focus on the first or the second outcome of the relationship between bureaucracies and the legislature, the shorthand expectation of Nice is that decisions in the EU will be significantly more bureaucratic; either the result of bureaucrats or the automatic pilot procedures devised to prevent bureaucrats from making decisions.

Conclusions

Our approach has been positive, not normative. We have tried to understand the reasons that the Nice Treaty produced the institutional outcome it did, and to predict the consequences of this institutional design. We carefully avoided enumerating our own preferences about what ought to have been done, or our preferred institutional design.

Our analysis indicates that for the first time the enlargement process generated the perspective of divergence of rules that existed throughout the history of the EU: the qualified majority of weighted votes, the majority of Member States, and the majority of the population. Nice produced a legislative system with high viscosity because different countries insisted on each of these criteria, believing that it would increase their weight in the decision-making process. Instead of reaching a compromise that would guarantee the EU the capacity of legislative decision-making, the Member States piled up all three institutional constraints. As a result, as the core of the EU expands, it will be almost impossible to alter the legislative status quo. Besides the expansion of the legislative core, the new rules of decision-making shift outcomes in favour of the Council (since it is an institution which, because of the

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triple majority rule, experiences greater difficulty making decisions). Finally, Nice is likely to produce an increase in the role of the non-elected institutions of the EU: the judiciary and the Commission as head of the bureaucracy.

In this context, it is perhaps significant to point out that the Commission lost significant powers as a legislative agenda-setter, but gained power as head of the bureaucracy. The Council increases its role in the legislative process, but in a questionable way: it is empowered to veto many more alternatives to the status quo than before. The results for the EP are similar, but not as pronounced: the MEPs that join after the enlargement will make decision-making inside the EP more difficult (because they are likely to have different preferences from the current MEPs). The only institution that comes out relatively empowered from Nice is the European judiciary (Court of Justice and Tribunal of First Instance). We do not know if all these consequences were anticipated by the contracting parties of the Nice Treaty. They may have preferred institutional difficulties to a political failure of the negotiating process. They may have included the institutional re-evaluation of 2004 as a precaution precisely because of the possibility of unanticipated consequences of the new institutional design. We believe that such a re-evaluation has to start early, and negotiations of the institutional rules planned in advance rather than being left to the last moment.

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