

# 1 The European Convention and the Rome and Brussels IGCs

## A veto players analysis

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The European Union (EU) is in the process of adopting a constitution. A European Convention under the Presidency of Valéry Giscard d'Estaing elaborated the document, which was presented at the Intergovernmental Conference of Rome at the end of 2003 and was rejected. The rejection led to a new text adopted at the Brussels IGC which from the point of view of this analysis is close to a 50–50 split between the Nice and the Convention texts.

This is not a new situation for the EU. After a period of constitutional and policy inertia, the EU adopted new constitutional arrangements in 1987, 1991, 1997, and 2001, all before the Convention. This means that each EU constitution has lasted for three to four years on average. Debate over the functioning of political institutions has preceded each new constitutional arrangement. In effect, the EU has been in a process of continuous constitutional design (and redesign) for about 15 years.

What was the response of the institutional literature to all these changes? For a long period of time, these changes were ignored because the literature (an off-shoot of the International Relations literature) was embroiled in a paradigmatic war that left the study of political institutions ignored: intergovernmentalists neglected the study of institutions because of major developments at intergovernmental conferences, and neofunctionalists ignored institutions altogether in favor of spillover processes (for a discussion see Garrett and Tsebelis 1996 and Tsebelis and Garrett 2001). The institutional descriptions of the EU were based on neologisms like: It is “neither a state nor an international organization” (Sbragia 1992: 257); “less than a Federation, more than a Regime” (Wallace 1983: 403); “stuck between sovereignty and integration” (Wallace 1982: 67); “institutionalized Intergovernmentalism in a supranational organization” (Cameron 1992: 66); the “middle ground between the cooperation of existing nations and the breaking of a new one” (Scharpf 1988: 242). Some scholars even took advantage of the lack of theoretical grounding: Sbragia (1992: 258) 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.”

Instead of using analogies (appropriate or inappropriate), I examine legislative procedures adopted at Nice in 2001 and at the European Convention in 2003 and in Brussels in 2004 in light of veto players theory (Tsebelis 2002). I analyze the outcomes of decision making generated by these procedures and discuss the policy, political and structural implications of the different arrangements. My argument is that the procedures proposed in the Convention text resolved a series of problems facing the EU, and the final compromise is exactly in the middle between Nice and the Convention.

More specifically, I argue that the EU was characterized by a plethora of veto players, which made decision making very difficult. In addition, the Nice arrangements – which gave most of the decision-making authority to the Council – had reduced the legislative powers of the Commission, and increased the powers of the judiciary and the bureaucracies.<sup>1</sup> Giscard was able to reverse all these features with one stroke of the pen: he had the power to eliminate the qualified majority decision-making rule in the Council. As a result, he could have made political decisions easier to adopt by reducing the power of the Council, increasing the legislative role of the Commission, and reducing the power of the bureaucracy and the judiciary. The final compromise is certainly better than Nice but not as good as the Convention solution particularly since the EU enlargement introduces increasingly politically heterogeneous players into the Union.

### **Veto players and their policy and institutional implications**

According to Tsebelis (2002), veto players are individual or collective decision makers whose agreement is necessary for a change of the legislative status quo. From this definition follows that the higher the number of veto players, the more difficult it is to change the status quo.<sup>2</sup> Tsebelis calls the “difficulty of changing the status quo” *policy stability* and 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 I will extract some ideas from the book that will help us understand the EU institutions.

*Changing the qualified majority requirements.* Tsebelis (2002) demonstrates that as the required majority for a decision increases, policy stability increases. This is the basic property that we will use in the article. I will argue that the Treaty of Nice produced institutions with exceptionally high policy stability, making political decision making practically impossible, while the agreements proposed at the Convention would have rectified the problem. Again, the final solution lies somewhere in between.

*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 EU? In particular, what are the effects of changing the

threshold of qualified majority decision making in one chamber? Tsebelis (2002) has identified two different effects of such a change. First, the power shifts in favor of the chamber whose threshold *increases*. Second, the overall policy stability of the system increases.

*Policy stability and role of agenda setter.* The player who makes a legislative proposal to the others for their discussion and adoption has a significant power: it can select among all the possible outcomes the one that (s)he prefers. Tsebelis (2002) studies the advantages of agenda setting which stem from the fact that an astute selection of the proposal may lead to its adoption without any modifications. The Commission plays the institutional role of the agenda setter in the co-decision procedure (called “ordinary legislative procedure” in the draft constitution). This implies two things, first, that the composition of the Commission (selection of its president, role of this president in the selection of commissioners, size of the institution) is significant; second that the significance increases when there are many possible compromises among the other institutions, because the choice set for the Commission proposal expands. In other words, the Commission plays an important legislative role in the EU, but this role is inversely related to policy stability.

*Effects on judiciary and bureaucracies.* Tsebelis (2002) argues that bureaucracies and the judiciary are involved with legislatures in a sequential game: Bureaucracies and the judiciary interpret the law and then the legislature can decide to overrule their statutory interpretation or not. This is a standard argument in the literature on judges and bureaucrats. The implication is that as policy stability increases the role of judges and bureaucrats increases, because they can make decisions without concern of being overruled.

### **Qualified majority in the Council: to what extent does it impede decision making?**

In the previous section I 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. In this paper, I will argue quite the opposite: the differences between the proposals put forth at Nice and the Convention are significant and consequential. The Brussels IGC adopted an intermediate solution.

Tsebelis and Yataganas (2002) analyzed the dynamics of bargaining in 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 percent)) did not coincide, and that different countries were attached to different principles. 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 in 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.

In the remainder of this section I 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 EU institutions in order to infer the "power" of different countries.<sup>3</sup> I have argued against this methodology (see Garrett and Tsebelis 1996, Tsebelis and Garrett 2001) because it ignores both the preferences of the different actors, as well as the institutions of the EU. Here I use this method for two reasons: First, I cannot take into account the actors' preferences. It is impossible to know the preferences of actors who have thus far not participated in the EU, 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. However, numerical comparisons are the only feasible strategy at this point. Second, I am not interested in the "power" of different actors, which is a function of votes in the Council as well as preference configurations, but rather on what the Council can or cannot do on the basis of its decision-making rule. However, the analysis that follows can be criticized since it does not take into account the preferences of the different actors; I would love to be able to do so, but will have to wait until more data is available on coalition formation in the 25 member EU.

As Table 1.1 demonstrates, the short-term effects of Nice were minor. Indeed, under the 62/87 qualified majority rule in effect before the Treaty of Nice the number of winning coalitions with the single qualified majority criterion before Nice was 2,549 out of 32,768 possible coalitions, resulting in a decision frequency of 7.78 percent. Had the weighting of the votes been preserved, this number would have been slightly restricted by the triple majority principle to 2,513 out of 32,768 coalitions (the table indicates that the first three decimal points of the decision frequencies are practically the same).

The effects of the triple majority become even smaller in an EU 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 2,707 out of 32,768, while with the triple one, it is reduced to 2,692 out of 32,768 (now the first three decimal points are identical). In short, the decision frequency increased only slightly from 7.78 percent to 8.22 percent with the Nice triple majority principle.

Table 1.3 indicates that after the expansion to 25 members the difference between the simple qualified majority criterion (232/321) and the triple majority criterion remains insignificant (the number of winning coalitions

Table 1.1 Effects of the Nice Treaty for EU-15 with old weighting system

<i>EU15/Pre-NICE</i>	<i>Votes</i>	<i>Qualified majority voting (62/87)</i>	<i>QMV + Majority of MS + 62%</i>
		<i>winsets</i>	<i>winsets</i>
Germany	10	2,199	2,199
UK	10	2,199	2,175
France	10	2,199	2,175
Italy	10	2,199	2,175
Spain	8	2,040	2,004
Netherlands	5	1,761	1,728
Greece	5	1,761	1,728
Belgium	5	1,761	1,728
Portugal	5	1,761	1,728
Sweden	4	1,671	1,638
Austria	4	1,671	1,638
Denmark	3	1,572	1,542
Finland	3	1,572	1,542
Ireland	3	1,572	1,542
Luxembourg	2	1,462	1,435
Winning coalitions	–	2,549	2,513
Decision frequency	–	0.0778	0.0767

Table 1.2 Effects of the Nice Treaty for EU-15 with new weighting system

<i>EU 15/NICE</i>	<i>Votes Nice</i>	<i>Qualified majority voting (169/237)</i>	<i>QMV + Majority of MS + 62%</i>
		<i>winsets</i>	<i>winsets</i>
Germany	29	2,348	2,348
UK	29	2,348	2,338
France	29	2,348	2,338
Italy	29	2,348	2,338
Spain	27	2,280	2,265
Netherlands	13	1,816	1,801
Greece	12	1,788	1,773
Belgium	12	1,788	1,773
Portugal	12	1,788	1,773
Sweden	10	1,714	1,702
Austria	10	1,714	1,702
Denmark	7	1,614	1,602
Finland	7	1,614	1,602
Ireland	7	1,614	1,602
Luxembourg	4	1,523	1,508
Winning coalitions	–	2,707	2,692
Decision frequency	–	0.0826	0.0822

Table 1.3 Effects of different QMV thresholds for EU-25

EU25	Votes	Pre-Nice:	Treaty of Nice:	Convention:	Constitution:
		QMV (232/321)	QMV + Majority of MS + 62% pop.	Majority of MS + 60%	55% of MS + at least 15 MS + 65% pop. + 4 MS in block. minority
		winsets	winsets	winsets	winsets
Germany	29	1,064,341	1,063,676	6,358,510	3,023,749
UK	29	1,064,341	1,063,648	5,616,196	2,667,807
France	29	1,064,341	1,063,646	5,611,025	2,665,472
Italy	29	1,064,341	1,063,646	5,573,809	2,650,049
Spain	27	1,040,713	1,040,022	5,099,561	2,419,575
Poland	27	1,040,713	1,040,022	5,089,235	2,411,881
Netherlands	13	830,464	829,972	4,468,862	2,171,443
Greece	12	813,299	812,813	4,338,580	2,117,939
Czech Republic	12	813,299	812,813	4,333,723	2,115,828
Belgium	12	813,299	812,813	4,331,262	2,114,753
Hungary	12	813,299	812,813	4,328,804	2,113,666
Portugal	12	813,299	812,813	4,326,393	2,112,605
Sweden	10	778,735	778,408	4,299,335	2,100,886
Austria	10	778,735	778,406	4,279,914	2,092,228
Slovak Republic	7	726,659	726,496	4,212,480	2,063,573
Denmark	7	726,659	726,496	4,210,034	2,062,482
Finland	7	726,659	726,495	4,207,565	2,061,446
Ireland	7	726,659	726,495	4,170,431	2,045,426
Lithuania	7	726,659	726,495	4,170,431	2,045,426
Latvia	4	673,651	673,573	4,137,357	2,031,764
Slovenia	4	673,651	673,573	4,127,676	2,027,612
Estonia	4	673,651	673,573	4,112,608	2,021,275
Cyprus	4	673,651	673,573	4,097,781	2,015,011
Luxembourg	4	673,651	673,573	4,087,618	2,010,689
Malta	3	655,519	655,451	4,087,618	2,010,689
Winning coalitions	-	1,204,448	1,203,736	7,543,799	3,393,499
Decision frequency	-	0.0359	0.0359	0.2248	0.1011

Note

The weighting of the votes for the EU with 25 member states (first two columns) is based upon the provisions of the Accession treaty (Official Journal L 236 of 23 September 2003).

tions goes down from 1,204,448 to 1,203,736, but what is significant is that these numbers identify 3.6 percent of winning majorities in the Council).

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 percent) of population) impose fewer 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 3.6 percent to over 22 percent.

So, the frequency of valid decisions went from 8 percent in an EU of 15 (before or after Nice) to 3.6 percent in an EU of 25 (after Nice) to 22.5 percent under the Convention proposal. After the failure of the Rome summit, this number drops back down to 3.6 percent. These numbers have significant implications on the legislative powers of the Commission. Under the Giscard proposal the Commission had a wide range of options to propose, while the Nice Treaty significantly reduces its legislative impact. Why did the Rome IGC reject the Giscard proposal?

Most of the negotiations were shrouded in secrecy, but some accounts were published in the press, and I will try to focus on these reports. First, we know that Poland and Spain vetoed the Convention proposal, leading to the failure of the summit. Official statements (particularly the one by former German chancellor Schröder criticizing Poland – which began its participation to the EU with a veto) made that point amply clear. Second, while we do not know for certain, there is some information regarding the counter proposal put forth by these countries. Here is a quote from the *Süddeutsche Zeitung*:

According to many EU diplomats, there is evidence that Rome is seeking a solution on the basis of the double majority principle. As a concession to Poland and Spain, Prime Minister Silvio Berlusconi could make the offer to have the reform take effect in 2014 instead of 2009. It would also be possible to increase the population threshold of 60 per cent. It is said that Spanish delegates had floated the idea of 66 per cent, since Madrid would then have similar chances of building blocking coalitions in the Council as in the present situation. Berlin and Paris seem to be ready to go along only with 62 per cent though.

(*Süddeutsche Zeitung*, 12 December 2003, own translation)

This quotation clearly demonstrates the effect of the delay: it keeps the Nice Treaty in place. The effects of different majorities, however, are less obvious. The only thing we know on the basis of the previous analysis is that increasing the required majorities makes decisions more difficult, and consequently shifts powers to the Council, and increases the role of

bureaucracies and the judiciary. The question remains: by how much? What difference will it make for the EU if the required majority is 60, or 65 as in the final document adopted in Brussels? And what if a simple majority of countries is required (as Giscard suggested) or 55 percent is necessary as Brussels decided? We now turn to this issue.

The last column of Table 1.3 presents the outcomes of the decision-making rule adopted in Brussels: a 65 percent majority of the population of the EU, a 55 percent majority of the countries, and the requirement that in order to block a decision four countries are required (in order to eliminate the possibility of three major countries blocking EU decision making).

As the last column indicates the overall frequency of winning coalitions is around 10 percent. Compare this number to the 3.6 percent of the Nice Treaty and the 22.5 percent of the Giscard proposal. The final solution adopted is about 50–50 split between the two previous proposals. Why did Spain and Poland fight so hard in Rome, and is the solution adopted to their satisfaction?

The Spanish proposal (and I repeat here the confidentiality of negotiations makes it impossible to assert that this proposal was made) is similar to the results of the Nice Treaty: it makes Spain and Poland participate in most winning coalitions, or to put it differently it made participation of Spain or Poland a necessary condition for most coalitions to succeed. Spain and Poland pushed the outcome back to Nice. But what was so attractive about that treaty for these two countries?

Figure 1.1 provides the answer. The figure depicts the population and the number of votes that each country received in the Nice Treaty. I have fitted these points with a linear and a square root curve. According to different theories these two curves provide the “best” way of representation of different countries.

There are five countries that are outliers with respect to both curves: Italy, France, the UK, Spain and Poland. It is well known that the French presidency in Nice did not want France to have fewer votes in the Council than a unified Germany (Tsebelis and Yataganas 2002). In fact, Germany introduced the 62 percent of population clause in order to get some advantage over the other three large countries (France, Italy and the UK). Yet, Germany has a population of 80 million while the other three countries have approximately 60 million each. Given this French position, it was difficult to deny Spain and Poland (with around 40 million each) an advantage similar to the other large countries. If 20 million people do not count for a difference in representation between France and Germany, why should they count for a difference in representation between France and Poland?

The result of this logic was that these five countries are way above the curves that the others form. In fact, Poland and Spain are even more obvious outliers than the other large countries. The implication is that no



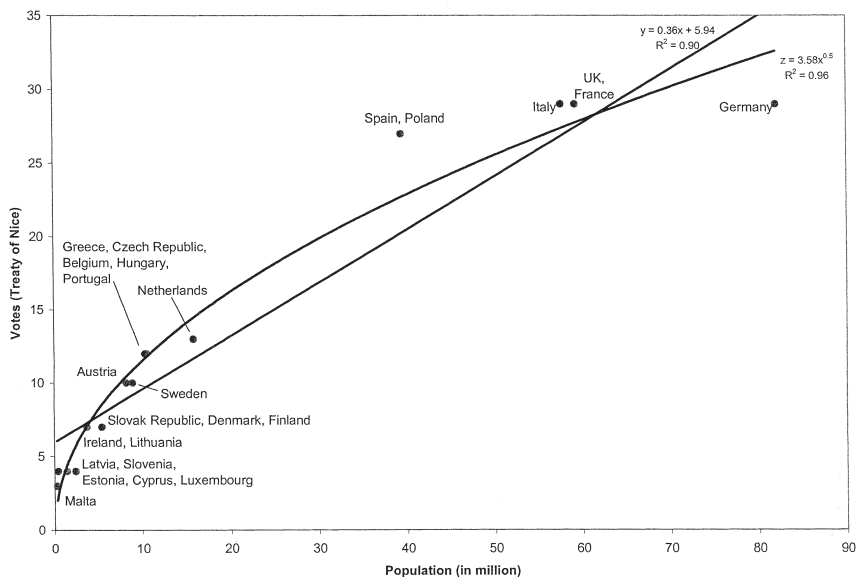


Figure 1.1 Population and number of votes (according to the Nice Treaty).

voting scheme based on population can ever provide Spain and Poland the same advantages that they had under Nice.

There may be additional reasons for Spain and Poland to have this intransigent position. Elections were upcoming more (in Spain) or less (in Poland) and it would be difficult to explain why the representatives of these countries gave up the advantages they enjoyed under Nice. Statements were made by the American administration implying that France and Germany are the “old Europe,” implying that the “new Europe” (Poland and Spain, both American allies in the Iraqi war) have moral justification to block the other EU countries.

But Poland and Spain were not able to turn back the clock to Nice for a long time. The IGC in Brussels abandoned the weighted voting scheme of Nice but at the price of adopting a decision-making scheme that is located exactly in the middle between Nice and the Convention. This was a strategic choice, because it involved the second issue of contention, the composition of the Commission as well. Regarding the Commission there were three different decisions, two of which were contentious. The first was the size of the institution, that is, whether the member states would have one commissioner each (as the small and new countries wanted) or, whether it would be a smaller and more flexible body (as the larger and older countries wanted). The status quo was in the position the small countries liked it, the Giscard proposal adopted a smaller commission, and the final

outcome was a 27 member Commission the first time, to be reduced to 18 members subsequently (unless there is a unanimous decision of member states otherwise).<sup>4</sup> The second was the appointment of the Commission president which remained the same (proposal by the Council to the Parliament by qualified majority, adoption by the Parliament), despite some alternative proposals giving more powers to the Parliament that were proposed by the Commission, and some smaller countries. The third was whether the composition of the Commission, would be selected by the member states (*status quo*), or the Commission president (Giscard proposal). The final outcome was again in the middle, the composition of the Commission would be decided by the Council in agreement with the president-elect of the Commission, and would be approved by the EP.

### **The effects on policy making, democratic deficit, and impact of the judiciary and bureaucracies**

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

#### *Policy implications*

In the first part of this section I demonstrated that imposing constraints on the decision making of the Council (or the Parliament) leads to further difficulties in EU decision making since when the core of the Council increases the core of the EU either increases or remains the same. In the second part I explained that the restrictions imposed by the Nice Treaty were very significant, and that the proposals made at the Convention would have resulted in dropping one of the requirements, increasing by a factor of 6 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 EU is able to make political decisions or not? Could we say that an EU which is unable to decide politically is a better institution than a politically active EU?

In fact, the whole debate about political versus “other” issues in the EU is based on whether it is better for the EU to be able to make decisions that overrule the positions of any individual member country or not. It used to be that all decisions needed unanimity in the Council (Luxembourg compromise). Then, economic issues became part of the EU jurisdiction (Single European Act). Over the years, the environment was added to the areas of European jurisdiction, then issues of security introduced immigration and the free movement of people in the EU and currently only the issues of taxation and foreign policy remain exclusively in the hands of the member countries.

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 ability of political decision making by the EU is directly linked to which decisions will be made, de facto, by the political institutions of the EU 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 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 me 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 argument (“rules rather than discretion,” Kydland and Prescott 1977) and empirical analyses have corroborated this line of reasoning (Henisz 2000). 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? As I have argued elsewhere 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*,<sup>5</sup> 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).

Obviously the EU 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 US, globalization 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 EU will become more necessary not less. So, restricting the Council’s decision-making capabilities undermines the EU today more than it did in the past.

As a result of this analysis, I have argued that the steps taken in Nice were negative, and the failure of the IGC in Rome (which preserves the Nice rules) had been a further unfortunate development. The insistence of countries on their own rights and the lack of focus to the collective consequences would have inevitably led to an inability of the EU to address new issues; ultimately, this would have left 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 EU institutions. It is not clear what the 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 statement about the reduced role that the Parliament plays in political decision making. Let us analyze 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 in 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 clearer.

If “democratic deficit” implies the ignorance of the public about decision making “in Brussels,” then it is a factually correct characterization, 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). This phenomenon does not reflect the intention of supranational elites (the EP is always trying to communicate its decisions to national parliaments and the public) but rather the predisposition of the EU population. When it becomes clearer that EU 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. As I have argued elsewhere, there is a difference in the role and importance of parliament greater than one would expect from presidential and parliamentary systems: the titles of these systems are misleading. 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 who complains that he cannot restrict the initiatives undertaken by the US Congress. The reason for this discrepancy between titles and reality is that the 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 EU institutions, the EP 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 July 1 1987, over 50 percent 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.

(Commission Press release, 15 December 1994, quoted in Earnshaw and Judge 1996: 96)

So, the term "democratic deficit" is not an accurate characterization if it is meant to reflect the power of the European Parliament. However, as I demonstrated in the first section of this chapter, 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 of Rome would have been 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 are supposed to have the welfare of citizens in mind while the former are not.

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 any argument has 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 EU, or should these decisions be left to non-elected agents?

The question may seem provocative and the answer obvious. I just want to clarify that I 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 the courts. Similarly, there are decisions that are better left to independent agencies (like an ombudsman) than to governments. 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. I am not sure that this was the intention of national governments (including the ones of Spain and Poland) at the IGC in Rome, but it would have been the consequence of the Treaty of Nice if the IGC in Brussels had not partially rectified the failure of the Rome meetings.

## Conclusion

It is ironic that what happened under the presidency of one President of France was repealed under the presidency of another President of France: Jacques Chirac was the President of the EU 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 (and 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 which would have unblocked the Council and enabled it to make political decisions.

This decision to decrease policy stability in the EU was an important one, because under the Nice rules the EU would be unable to function. As I 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 role of the judiciary and bureaucracies as well. The final outcome was a Solomonic judgment: select a decision-making scheme that was located midway between the two. So, the EU will be able to make some decisions, not as few as under Nice and not as many as under the Convention proposal. The Commission will have more legislative (and less bureaucratic) powers under the final outcome than under Nice and less legislative (more bureaucratic) powers than under the Convention proposal. The Parliament will be more powerful under the compromise than under Nice, but less than under the Convention proposal. The judiciary will see more power under the compromise than under the Convention, but less than under Nice. If one believes in some intrinsic value of compromise, this person should be happy with the outcome of EU institutional design.

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## Notes

- 1 In this respect, the Commission saw its legislative role reduced, but its role as head of EU bureaucracy increased. I explain below how these effects were produced.
- 2 Actually, increasing the number of veto players will *not decrease* the difficulty of changing the status quo, since as we shall see the addition of some veto players may have no impact.
- 3 Estimation based on Bräuninger and König's (2001) computer program IOP.
- 4 This assumes that Romania and Bulgaria join the EU before the constitution enters into force.
- 5 This refers to the tradition of *liberum veto* in Poland.