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# **DECISION-MAKING AND THE CONSTITUTIONAL TREATY: WILL THE IGC DISCARD GISCARD?**

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# DECISION-MAKING AND THE CONSTITUTIONAL TREATY

## WILL THE IGC DISCARD GISCARD?

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### 1. Introduction

The EU's draft Constitutional Treaty proposes the most radical reform of EU institutions ever put forward – more radical than those in the Single European Act, the Maastricht and Nice Treaties combined. Many of the changes have been debated, but little notice has been paid to what is perhaps the most critical reform: the change in the EU's decision-making procedures.

Decision-making rules are the heart of any constitution and the EU is no exception. Most EU laws are adopted on the basis of majority voting. These laws are binding in all member states, including those that had opposed them. Consequently, nations should take great care when crafting such rules. Nations should also be very alert to changes in their power shares in the decision-making process, since this share has a big influence on how often they will end up having to adopt laws that they voted against in the EU institutions.

#### 1.1 Implications for decision-making efficiency and the power distribution

This policy brief shows that compared to the Treaty of Nice rules (due to take effect in 2004) the draft Constitution proposes a set of rules that is much simpler and more transparent. It has not been widely noticed that the draft Constitution's rules will:

- make it dramatically easier to pass EU legislation, thus strongly improving the EU's 'ability to act' or what has been called its 'decision-making efficiency'. The main change is that it will be far easier to find a winning majority the Council of Ministers; and
- shift a great deal of power to large member states.

#### 1.1 Implications for the institutional balance of power

The fact that it will be much easier to find a majority in the EU's prime decision-making body – the Council of Ministers – has important implications for the balance of power among EU institutions. The main implications are as follows:

1. *Parliament gains.* The boost to decision-making efficiency strengthens Parliament's power to shape EU legislation in two ways. As we explain later, the Parliament will have a broader scope for influencing legislation, as the greater ease of passing legislation in the Council will lead to a broader range of proposals being accepted by the Council. More directly, greater decision-making efficiency will increase the flow of legislation, making Parliament more influential simply because there will be more to influence.

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2. *Commission gains.* The Commission has a monopoly on the right to propose legislation under normal circumstances. This ‘first-mover advantage’ gives it influence over the shape of EU legislation, but the influence-value of this monopoly depends upon how easy it is to find a majority in the Council and the Parliament. Under the Treaty of Nice rules, it would be exceedingly difficult to find a qualified majority in the EU27 Council. This means that the Commission would have little scope for introducing its own preferences. Correspondingly, the draft Constitution’s rules would increase the Commission’s scope for influence. To put it colloquially, a rule that facilitates finding a winning coalition in the Council increases the Commission’s ability to play one coalition against another.
3. *Council loses.* As it becomes easier to find a winning coalition in the Council, the range of passable propositions expands. Since the Council does not get to decide which proposals are presented to it – that is the Commission’s job – the wider range of passable propositions reduces the Council influence on exactly what gets passed.

The rest of this policy brief is organised quite simply. The next section reviews the major decision-making changes in the draft Constitution. The subsequent section analyses the impact of these changes for EU decision-making efficiency and the distribution of power among member states. The last substantive section presents the details of our reasoning on the shift in the intuitional power balance. The final section contains our concluding remarks.

## **2. Major changes in the draft Constitution**

This section presents the main changes proposed by the draft treaty as far as EU decision-making is concerned. Note that most of the main decision-making changes are scheduled to take effect in 2009, when the EU is likely to have 27 members.

### **2.1 The Council of Ministers**

The biggest change by far is the radical overhaul of the Council’s voting procedure, but to understand this change it is useful to review the current rules. On most issues, the Council of Ministers (‘the Council’) decides on the basis of ‘qualified majority voting’ (QMV). The Council’s QMV rules are in flux at this moment, with plans to change them in 2004 and 2009. For the purpose of this review, we start with the procedure that is in place in 2003.

The basic QMV procedure has been unchanged since its origin in the 1958 Treaty of Rome. Each member’s minister casts a certain number of votes, with more populous members having more votes. The vote allocation, however, grants many fewer to large nations than pure population-proportionality would suggest (e.g. France with its 59 million citizens has ten votes while Denmark with its 5 million citizens has three votes). The total number of votes in the EU15 is 87. The threshold for a winning majority, the so-called ‘qualified majority’, is 62 votes. This means that a majority of about 71% of all votes is required to adopt a proposal.

Note that even though QMV is the basis of most Council decisions, the Council rarely votes – preferring instead to decide by ‘consensus’. This does not diminish the importance of the voting weights. If nations know that they will be outvoted if a vote is held, they usually join the consensus to be collegial and so a vote is not needed. Thus even without formal voting, nations go through a mental process of ‘shadow-voting’ before deciding whether to join the consensus or not.

#### **2.1.1 Treaty of Nice and Accession Treaty Reforms**

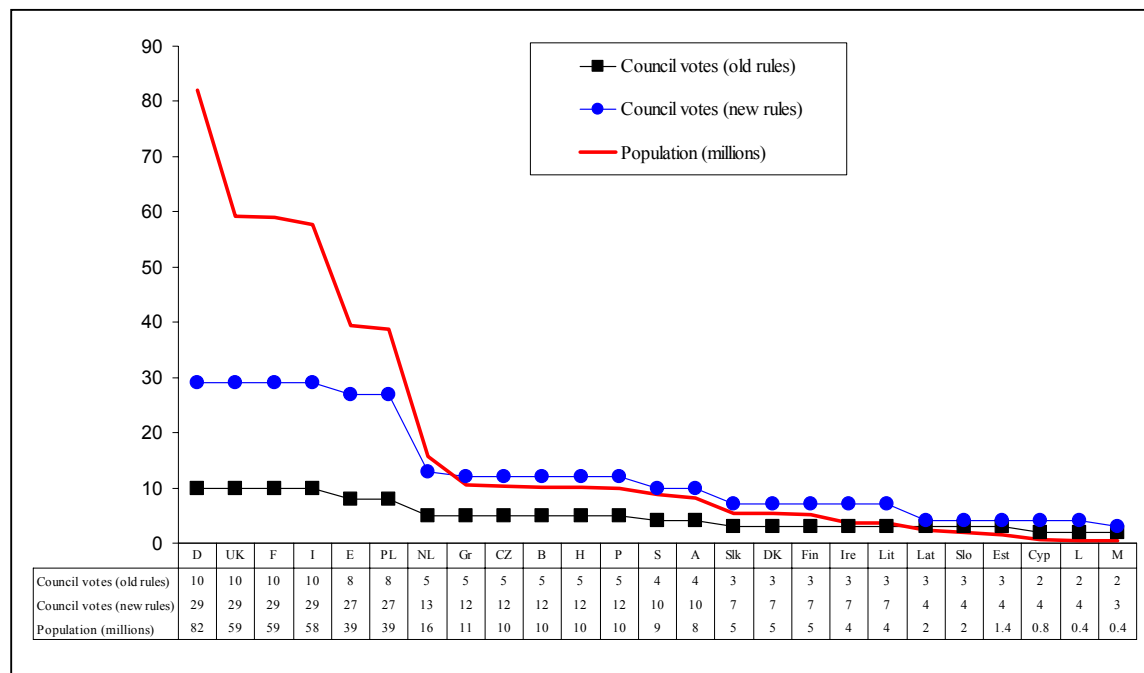
Enlargement of the EU was widely seen as requiring a reform of the QMV rules. The basic problem is that most of the ten newcomers are small or tiny. Because the vote share of small

countries is far bigger than their population share under the vote-allocation rules used in all previous enlargements, most observers predicted that decision-making would become extremely difficult in the enlarged EU. To redress this potential problem, leaders in the EU of 15 member states agreed that the Council’s voting rules should be reformed. Changing voting rights, however, is a highly political exercise that EU leaders attempted but failed in the intergovernmental conference (IGC) leading up to the Treaty of Amsterdam. Instead, they agree to disagree and deferred the voting problem to the next IGC.

The issue was next taken up in the IGC that led to the Treaty of Nice. Although voting reform was agreed, the reform is widely viewed as a botched attempt. It fails to keep EU decision-making efficient and legitimate (see Baldwin, Berglof, Giavazzi and Widgren, 2001). The political agreement on QMV reform was contained in a protocol to the Treaty of Nice, but it is the Treaty of Accession that makes the new rules binding. The Accession Treaty reforms – scheduled to take effect in November 2004 – change QMV in two main ways.

- First, it makes the system more complex. It keeps the basic shape of the current framework but adds new criteria that a winning majority must meet. After the enlargement, a proposition passes the Council only when the coalition of yes-voters meets three criteria: number of votes, number of members and population. Specifically, the triple criteria require that a winning coalition must have at least 72% of the Council votes (232 votes of the 321 Council votes in the EU25). It must also represent at least 50% of the EU member states and at least 62% of the EU population.
- Second, it reallocates the number of votes in a way that favours big nations (see Figure 1).

Figure 1. Treaty of Nice and Accession Treaty reweighing of Council votes



Notes: D = Germany, UK=United Kingdom, F = France, I = Italy, E = Spain, PL = Poland, NL = Netherlands, Gr = Greece, CZ = Czech Republic, B = Belgium, H = Hungary, P = Portugal, S = Sweden, A = Austria, Slk = Slovak Republic, DK = Denmark, Fin = Finland, Ire = Ireland, Lit = Lithuania, Lat = Latvia, Slo = Slovenia, Est = Estonia, Cyp = Cyprus, L = Luxembourg, M = Malta.

Sources: Accession Treaty, Act of Accession, Part Two, Title I for votes; Eurostat for populations.

### ***The de facto Nice rules***

As complex as they are on paper, the Treaty of Nice rules are quite simple in practice. The point is that the two new majority thresholds are basically irrelevant. In the EU27, there would be about 2.7 million possible ways to form a winning coalition under Nice's 'weighted vote' threshold, according to computer calculations. Of these, only 23 fail on the grounds that they missed the other two thresholds. In short, the Treaty of Nice rules, which are scheduled to take effect in November 2004, will almost always operate as if only the weighted vote threshold exists. This rock solid fact lets us focus solely on Nice's distribution of votes as shown in Figure 1.

#### **2.1.2 The draft treaty's changes in QMV rules**

The draft Constitution proposes a radical change in the QMV rules – weighted voting is out, double majority is in. That is, a winning coalition or 'qualified majority' must contain at least half the EU member states that represent at least 60% of the EU population.

Comparing this scheme with the vote weighting under the Treaty of Nice is a bit tricky since the draft treaty rule essentially assigns two different weights to each member's vote. On one count, its vote is weighted by the member state's population share. On a second count, its vote is weighted by its membership share (i.e. one twenty-seventh in the EU27). Then the two weighted votes are checked against two different thresholds: 60% of population and 50% of membership.

The difficulty in the comparison lies with the fact that one of the weighting schemes of the draft treaty – the population weight – increases the weight of large nations while the other – the membership weight – decreases it. For example, under the Nice rules, France with its 59 million citizens has 29 votes which amounts to a vote share in the EU27 of about 8%, even though its population share is about 12%. The 3.7 million Irish, which account for about seven-tenths of one percent of the EU27 population, are given seven votes (about 2%). Under the new scheme's population weighting, France will get about 12% of the votes, while Ireland will get 0.7%. Under the membership-share weighting, however, the votes of France and Ireland will have equal weights, namely one twenty-seventh each. A more formal method of comparison is outlined in Section 3 below, following the draft treaty's main changes.

## **2.2 The Commission**

The draft treaty limits the Commission's size to just 15 representatives, with the nationalities of these 15 rotating evenly among all member states. This is a radical change since it breaks the five-decade tradition of having at least one commissioner from each member state.

To mitigate the problem of non-representation, the draft treaty creates a lesser post, called a 'non-voting commissioner', allocating one of these to each nation that does not have a European commissioner.

The draft treaty also substantially strengthens the position of the Commission president. For example, the president can, under draft treaty rules, demand the resignation of individual commissioners. Also, the Commission president-elect has power over the choice of commissioners. Each member state with the right to have a European commissioner presents a list of three people; the president selects among these three national nominees. Moreover, the president-elect determines the internal structure of the Commission including, importantly, the allocation of portfolios among the commissioners.

There are other changes in the draft treaty – some of which were also in the Nice Treaty but were not scheduled to take effect until the 27th member state joins – but these are less important in terms of the power balance. We shall argue that the Commission’s power will greatly increase under the draft treaty rules, so this change could have a big impact on the perception of the EU’s legitimacy.

### **2.3 The European Council**

The big change here is the appointment of a president to chair the European Council meetings for a term of two and a half years. The importance given to this change has often been exaggerated. The European Council president will still have to get things approved by a ‘consensus’ of all member states, where the voice of each member state counts equally, at least in principle. Moreover, the European Council has no direct role in the standard legislative procedures (to be called the ‘ordinary legislative procedure’). With minor exceptions, the Commission has a monopoly on drafting and proposing new legislative acts that must then be approved by the Council and by the Parliament (as with most legislation). The European Council will continue to provide political coordination and political drive, but the un-elected president will have little direct power when faced with national leaders, all of whom are democratically elected.

What all this means is that the presidency of the European Council could become little more than a bully pulpit. While this is probably good for ensuring the consistency and the continuance of major EU initiatives, the role is probably not directly powerful.

### **2.4 The European Parliament**

The draft treaty proposes very few substantive changes to the European Parliament’s decision-making procedures. A majority of 50% remains the standard threshold for a winning coalition. The draft treaty confirms the limit of the Nice Treaty on the number of MEPs. The draft treaty does not impose a rule allocating the seats among nations.

The major changes in the draft treaty concern the range of issues over which the Parliament has power. The first big change concerns the extension of the Parliament’s ‘veto’ to most legislative acts. Basically, whenever the Council votes on a QMV basis, the Parliament must also approve the measures by a simple majority. The second change is that the draft treaty shifts many issues that are currently decided under a unanimity rule in the Council to majority voting. The proposed extension of this ‘ordinary legislative procedure’ to most EU decisions gives the Parliament approval-power over an even wider range of issues.

## **3. Efficiency and power in the Council of Ministers**

A key goal of the draft treaty is to ensure that the EU’s decision-making mechanism remains efficient and legitimate despite a near-doubling of its membership. In economics, ‘efficiency’ usually means an absence of waste. In the EU decision-making context, the word has come to mean the ‘ability to act’.

While the ‘ability to act’ is more concrete than ‘efficiency’, it is still a long way from operational. For instance, on some issues the EU finds it very easy to make decisions, yet on other issues it finds it impossible. The perfect measure of efficiency would somehow predict all possible issues and develop an average measure of how easy it is to get things done in the EU. Such predictions are impossible given the uncertain and ever-changing nature of the challenges facing the EU. Moreover, if the rules of the draft Constitutional Treaty last 50

years as Convention Chairman Valéry Giscard d'Estaing suggests, the rules will have an affect upon issues that cannot possibly be foreseen today.

### 3.1 A quantitative measure of efficiency: Passage probability

An alternative approach that we take here may sound strange at first, but is actually the best way to think systematically about the issue. Rather than try to predict the details of decision-making on particular topics, we adopt a 'veil of ignorance'. That is, we focus on a randomly selected issue – random in the sense that no EU member would know in advance whether it would be for or against the proposition. The specific measure of efficiency we focus on is called the 'passage probability'. It measures how difficult it would be to find a winning coalition for the randomly selected issue. It works in the following manner.

First of all, we have to be very specific about decision-making rules, so we focus exclusively on the QMV rule in the Council (see Box 1 for why we ignore the Parliament). Secondly, we have to be very specific about voting behaviour. As part of our simplification, we assume that nations are the only players in the EU's decision-making process.

#### *Box 1. The (non-)impact of the passage probability measure in Parliament*

Although Parliament's size and national composition have changed over time, this does not affect passage probability in Parliament because it uses the simple majority rule. When a body makes its decisions by simple majority, an increase in the number of voters increases the number of ways to win exactly in line with the increase in the number of ways to block. To see this, note that under the 50% rule any coalition that could block by voting 'no,' could win by voting 'yes.' (Some reflection reveals that the same does not hold true for any other threshold.) As a consequence, the passage probability is always 50%. This fact reveals the simplicity of our efficiency measure.

Given these simplifications, calculation of the passage probability is straightforward. A computer calculates all the possible coalitions among EU members. That is to say, it looks at every possible combination of 'yes' and 'no' voting by EU member states. Since one can combine the 15 different member states in many different ways, there are quite a few possible coalitions. In the EU15, there are 32,768 possible coalitions, in the EU27 there are over 134 million! Next, the computer uses each member's vote-weighting and the corresponding majority thresholds to determine how many of these coalitions are 'qualified majorities', i.e. winning coalitions.

The best way to think of the passage probability is as a very crude measure of how difficult it will be to find a qualified majority in the Council. For example, if the decision rule is unanimity, only one of the 134 million possible coalitions is a winning coalition and meets the unanimous criteria of 100%. This would make it hard to pass proposals. As the majority threshold falls from 100%, an ever-widening range of coalitions would count as a qualified majority. Generally speaking, without focussing on any particular issue, a wider range of winning coalitions will make it easier to find a proposal that will pass.

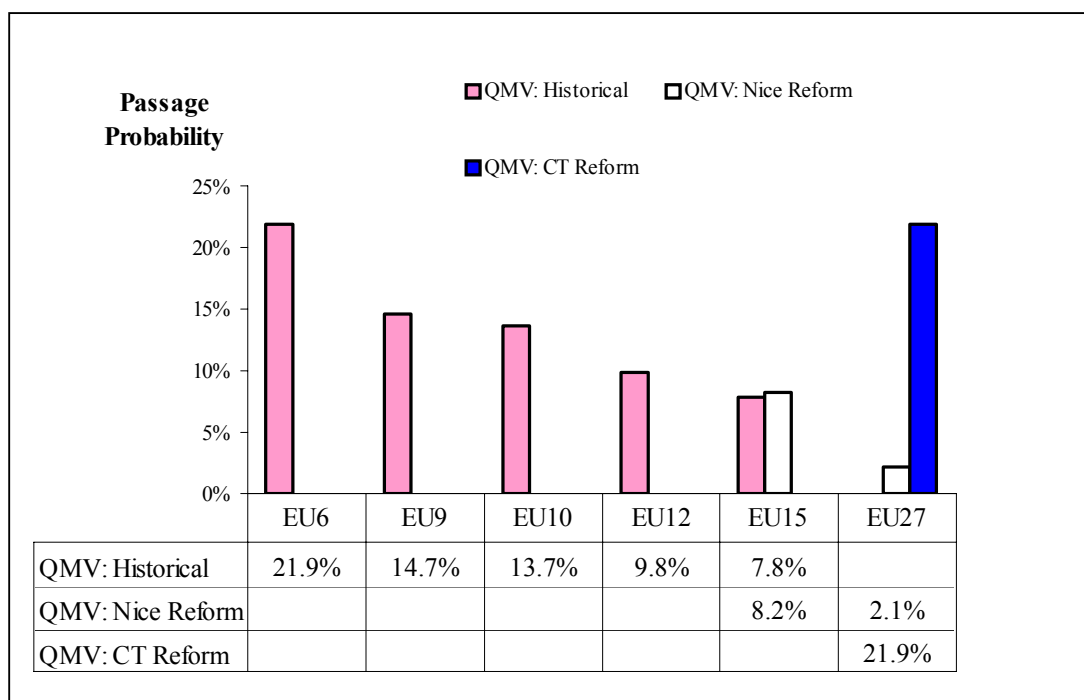
More formally, if all coalitions are equally plausible for a randomly chosen proposal, the ratio of winning coalitions to total coalitions provides a measure of how likely a randomly chosen issue will pass. That is why it is called the passage 'probability'. In any case, it is the ratio of the number of winning coalitions in the Council to all possible coalitions. The level of the passage probability is affected by the number of members, the distribution of votes and above all, the majority threshold.

### 3.2 Historical efficiency, Nice Treaty and draft treaty reforms

It is interesting to see how the EU's efficiency has changed over time. But it is even more interesting to consider how the 2004 enlargement will affect the EU's decision-making efficiency under the Treaty of Nice rules and under the draft treaty rules.

The five leftmost bars in Figure 2 show the passage probability for qualified majority voting in the current and historical EUs, using the actual vote allocations and threshold enforced at the time. These indicate that although efficiency has been declining, past enlargements have only moderately hindered decision-making efficiency. The Iberian expansion lowered it from 14% to 10%. The last enlargement lowered the probability only slightly, from 10% to 8%. The figures also hide the fact that the Single European Act, which took effect in 1987, greatly boosted efficiency by shifting many more decisions from unanimity to qualified majority voting. The reforms of the Nice and Accession treaties, combined with enlargement, substantially reduced efficiency, at least according to the passage probability.

Figure 2. Decision-making and the EU's ability to act



Sources: Baldwin et al. (2001) and authors' calculations.

Notes: The figures show the 'passage probability' that measures the likelihood that a randomly selected issue would pass in the Council of Ministers. Historical voting weights are used for the EU15 and earlier EUs. The enlargement evaluated is the EU27 (EU15 plus the ten central and eastern European applicants, Cyprus and Malta) using the voting weights specified under the Treaty of Nice 'protocol on enlargement'. Looking further ahead, consider the efficiency of decision-making in a EU36.

### 3.3 Why are the voting rules of the draft treaty so much more efficient?

The truly remarkable thing about the numbers in Figure 2 is the great increase in efficiency implied by the draft Constitution's rules. The reason for this is twofold.

- The first and by far most important source of improved efficiency is the lowering of the majority threshold. Under the de facto rules of the Nice and Accession Treaties, the



threshold was 72%. Under the draft treaty it will be 60% using population weights and 50% using membership weights. The point is that a lower threshold makes it a great deal harder to block a proposal.

- The second source of efficiency comes from the fact that the draft treaty reforms concentrate power in the hands of just a few nations. As we shall see below, under the draft treaty rules, about 40% of the voting power is concentrated in the hands of the four largest nations: Germany, Britain, Italy and France.

### **3.4 Power redistribution: nations' muscles in Brussels**

Next we turn to the most political aspect of the draft treaty reforms – the implications for the power of member states. As with efficiency, there is no perfect measure of power. The tactic we take is to rely on the Law of Large Numbers. We look to see how likely it is that each member's vote is crucial on a randomly drawn issue. First however, we clarify our specific definition of power.

For this purpose, we define power as influence or more precisely the ability to influence EU decisions by being in a position to make or break a winning coalition in the Council of Ministers. Of course no one has absolute power in the EU, so we focus on the likelihood that a particular member state will be influential. On some issues, Germany's vote will be crucial, whereas on others it will be irrelevant. The same idea applies to all the other members. What factors determine how likely it is that a particular nation will be influential on a given issue?

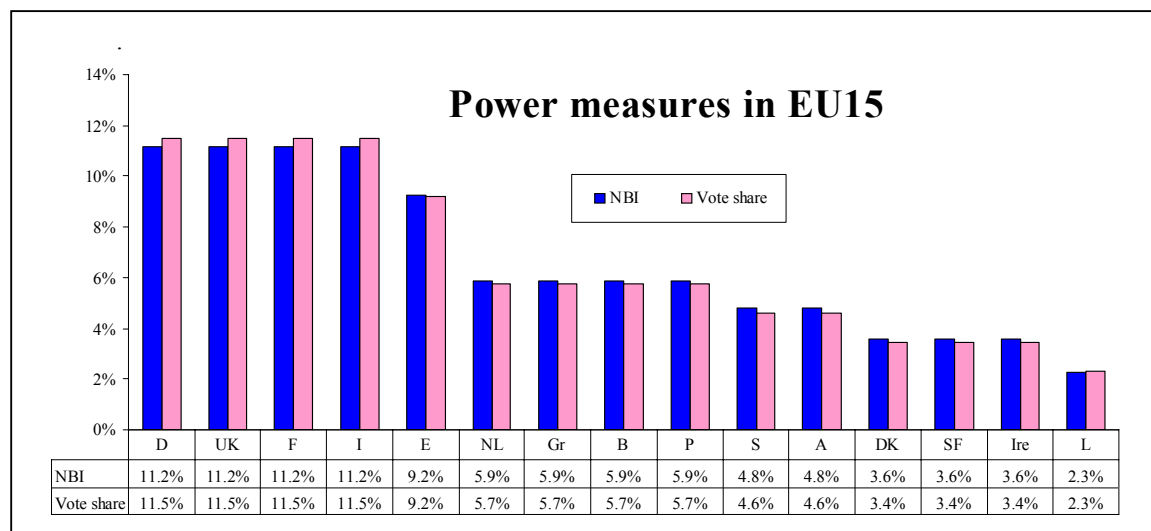
The most direct and intuitive measure of political power is national voting shares in the Council of Ministers. Unfortunately we cannot rely on this to evaluate the draft treaty reforms because of the twofold nature of the draft treaty's weighting. Each nation's vote is weighted by both its population share and its membership share. This leads us to the mathematics of voting, in particular the 'Normalised Banzhaf Index' (NBI) that was invented by Penrose (1946) but named when it was re-invented by Banzhaf (1965).

#### **3.4.1 The power to break a winning coalition: The Normalised Banzhaf Index**

The NBI gauges how likely it is that a nation finds itself in a position to 'break' a winning coalition on a randomly selected issue. By way of criticism, note that the set-up behind the NBI provides only a shallow depiction of a real-world voting process. For instance, the questions of who sets the voting agenda, how coalitions are formed and how intensively each country holds its various positions are not considered. In a sense, the equal probability of each coalition occurring and each country switching its vote is meant to deal with this shallowness. The idea is that all of these factors would average out over a large number of votes on a broad range of issues. Thus, this measure of power is a very long-term concept. Another way of looking at it is as a measure of power in the abstract sense. It tells us how powerful a country is likely to be on a randomly chosen issue. Of course on particular issues, various countries may be much more or much less powerful (for further discussion of the NBI, see Box 2).

For the EU15, it turns out that the NBI is not very different from the rough-and-ready national vote-share measure (see Figure 3). The measures are also quite similar for EU27. Readers who mistrust either sophisticated concepts or rough-and-ready measures should find their confidence in the Banzhaf measure bolstered by this similarity.

Figure 3. Comparing EU15 power measures: NBI and vote shares



Sources: Baldwin et al. (2001); all power index calculations were done by Mika Widgren using the Indices of Power IOP 2.0 programme developed by Thomas Bräuninger and Thomas König (2001). The programme can be retrieved from <http://www.uni-konstanz.de/FuF/Verwiss/koenig/IOP.html>.

**Box 2. Calculating the Normalised Banzhaf Index**

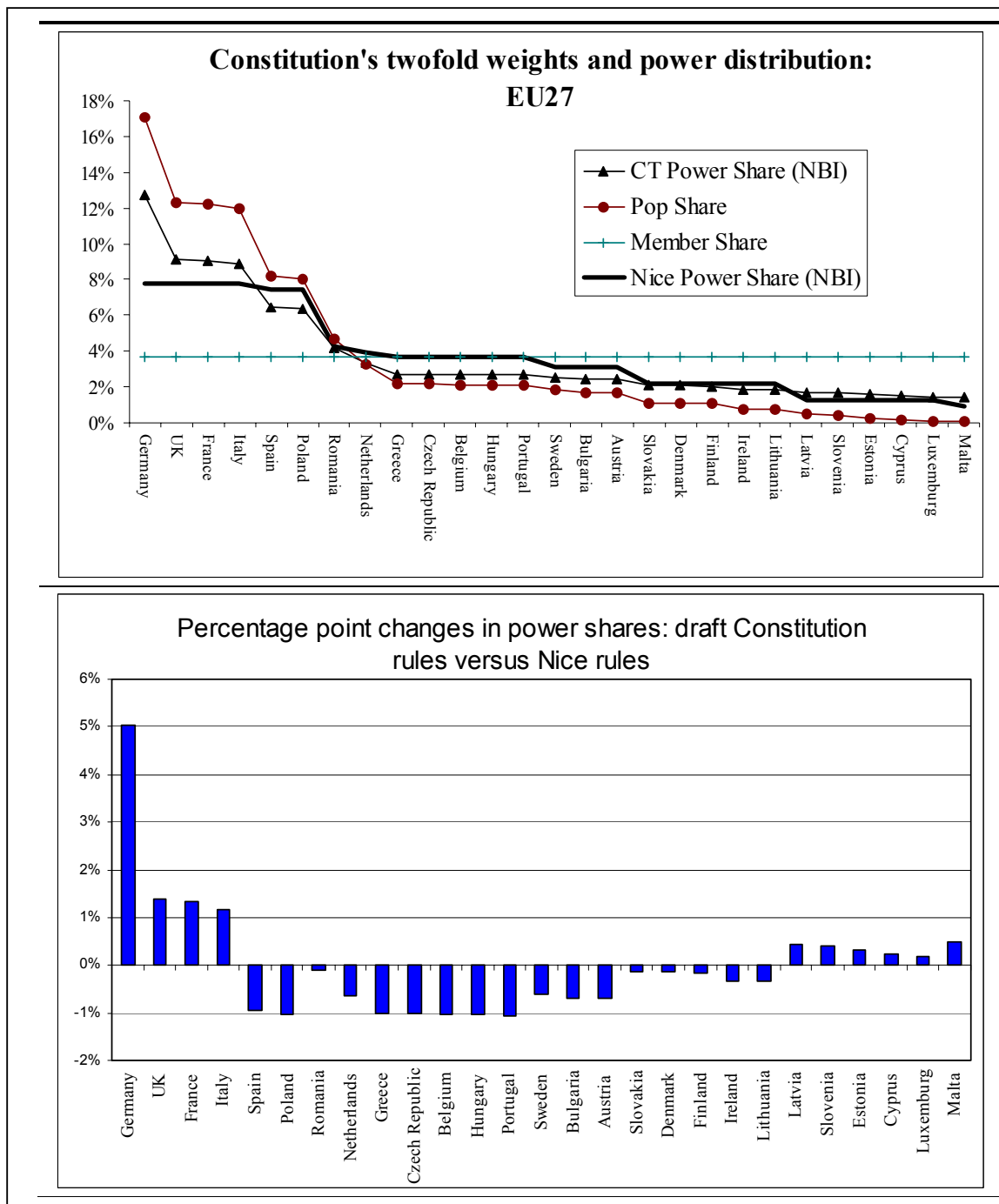
The mechanical calculation of the NBI is easy to describe and requires nothing more than some patience and a PC with lots of horsepower. To work it out, we use a computer to look at all the possible coalitions (there are 32,768 in the EU15 and over 134 million in the EU27) and identify the winning coalitions. Then, focusing only on the winning coalitions, the computer works out all of the ways that each winning coalition could be turned into a losing one by the defection of a single nation. Finally, the computer calculates the number of times each nation could be a ‘deal-breaker’ as a fraction of the number of times that any country could have this role. The theory behind this is that the Council decides on a vast array of issues, so the NBI tells us how likely it is that a particular nation will be critical to a randomly selected issue.

**3.4.2 How does the draft treaty affect the power distribution?**

Using the draft treaty weightings and thresholds, we calculate the distribution of power and plot it in Figure 4. The top panel plots the draft treaty’s two weighting schemes and the NBI as well as the NBI for the Nice Treaty voting rules. To highlight the way in which the draft treaty changes the power distribution, the bottom panel plots the percentage point differences between the rules of the draft treaty and the Treaty of Nice.

To understand the impact on power – and get beyond the maths – it helps to take a very informal approach to the draft treaty’s dual-majority scheme. It seems intuitively plausible that a nation’s share of power is a weighted average of the nation’s two weighting schemes.

Figure 4. NBI under the draft Constitution



Source: Authors' calculations.

As the top panel of Figure 4 shows, the NBIs for the draft treaty rules do lie between the population shares and the membership shares. Indeed, each nation's NBI is approximately two-thirds of the way between its population share and its membership share. The fact that it lies between the two is not unexpected, but where did the one-third and two-thirds weights come from? The full answer involves all the complexities of the NBI calculations, but roughly

speaking, the population share is more important since the population threshold is higher. That is, the higher threshold makes it easier to block a proposal on population grounds, so the population share is more important.

Plainly the four big members – Italy, France, Britain and Germany – gain a great deal, with Germany’s share of power rising 65% from roughly 8% to 13%. The sum of the power share of these ‘big four’ increases from 31% under the Nice rules to 40% under the draft Constitution rules.<sup>1</sup> Our calculations show that 17 of the EU27 member states would lose power – all the nations with populations between 3 and 40 million. Somewhat unexpectedly, the tiny members also gain from the draft Constitution’s rule changes.

### ***Why do small nations also gain power under the draft treaty?***

To understand the odd result that the tiny members also gain power under the rules of the draft treaty, we have to step back and review what is really going on. As argued above, the Treaty of Nice rules are, de facto, a weighted voting scheme where big nations have more votes than small nations, but far fewer votes than would be suggested by their proportion of EU population. The draft Constitution’s dual-weighting scheme shifts voting weights in two opposing directions. Under the population weighting, the vote-weight of the large nations increases a lot, but under the membership weighting, the vote weight of the large nations falls a lot. The effective power share of each nation will be some sort of average of its two weights, but how important is population share versus the membership share?

For the biggest nations, the membership share is almost irrelevant to their power, so the big increase in population weight matters a lot. For the smallest nations, the population share is almost irrelevant, so the big increase in their membership share is what matters. Because power shares must sum up to 100%, the in-between nations lose. They see only mild differences between their weighted vote share under the Treaty of Nice and their population and membership shares under the draft Constitution.

## **4. Implications for the influence of EU institutions**

As argued above, the efficiency of the enlarged Council’s decision-making process will increase dramatically under the draft Constitution’s reforms. The result will be an important shift in the balance of power among EU institutions. The basic point is simple. Legislating under the draft treaty rules will be easier than legislating has been in the EU for the past several decades and drastically easier than it would be if the Nice rules are implemented. Those institutions that rely on the flow of legislation for their power will, correspondingly, find their power de facto enhanced. As we shall see below, this means that the Commission (which is the agenda-setter in EU decision-making) and the Parliament (whose main direct influence stems from its threat to veto legislation) will see their power rise relative to that of the Council of Ministers.

The institutional balance of power is an elusive concept, so we begin the chapter with a framework for thinking about the power balance. The thinking is inspired by Garrett and Tsebelis (2000, 2001).

### **4.1 A framework for thinking about institutional power**

This section presents a framework for thinking about the balance of power among the EU’s four key institutions when it comes to legislation – the Council of Ministers, the European

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<sup>1</sup> On the difficulties of such across-members sums, see Felsenthal and Machover (2001).

Commission, the European Parliament and the European Court of Justice.<sup>2</sup> These bodies carry out three functions:

- 1) adopt legislation;
- 2) administer and implement the legislation; and
- 3) adjudicate disputes concerning the application of legislation and settle inconsistencies among various bits of legislation.

We begin with the first of these functions.

#### **4.1.1 The power of agenda-setting**

Legislating in the EU is now a complex process. To present the basic issues with a minimum of clutter, we start simply and progressively add in complexities. Specifically, we suppose a scenario where only the Commission and the Council are involved so that we can highlight the power of an agenda-setter and how it is related to decision-making efficiency.

To avoid wasting time, the Commission usually only proposes legislation that it believes has a good chance of passing. This constrains what it can propose, but only partially. Typically, there is not only one precise proposal that could win Council acceptance. There is a whole range of passable proposals. This is why an agenda-setter has power. Since the Commission determines what is put before the Council, the Commission gets to choose its favourite among all the passable proposals. This gives it influence on the shape of the final legislation.

One way to think of this agenda-setting power is as a sort of ‘pre-veto’. That is, the Council only gets to vote on what the Commission proposes, so the Commission can use its influence – in a sense – to pre-veto a whole range of proposals that might pass in the Council.

How much influence does it have? The answer depends upon how easy it is to get a proposal accepted by the Council. Here is the logic. Generally speaking, the easier it is to pass a proposal in the Council, the wider is the range of passable proposals. The wider the range of passable proposals is, the more influence the Commission has (a wider range means greater leverage in shaping the resulting legislation). For instance, when the EU had six members, a qualified majority required the consent of only three nations, so a passable proposal had only to please three members. When the same six decided by unanimity, a passable proposal had to please six members. Plainly, the range of passable proposals on any given issue should be wider under QMV than under unanimity. Thus the Commission has more power and influence on issues decided by QMV than on those decided by unanimity.

Moreover, we can measure ease-of-passage – and thus indirectly the width of the range of passable propositions – using the passage probability described above. Following the logic in this simplified legislative process, we see that the higher the passage probability, the more powerful the Commission is relative to the Council. To put it differently, the Commission’s pre-veto is a very powerful tool when many variants of a given proposal can get through the Council because it is the Commission that decides which variant the Council votes on.

There is a refinement to be added here. The relative power of the Commission versus the Council is also influenced by the extent to which members think alike. For example, in the extremely unlikely case that all member states are of one mind on a particular issue, the Commission will have little leeway. Pleasing one member state is the same as pleasing them all. Extending this logic we see that the range of passable proposals tends to widen as

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<sup>2</sup> This section is based heavily on Baldwin et al. (2001).

members' preferences become more diverse. This widens the scope of issues that the Commission can use to win the requisite votes in the Council. In short, the agenda-setter's power tends to increase as the membership becomes more diverse, as it will do in 2004.

Finally, we note that as the Commission becomes more powerful, it becomes much more important that it is viewed by all members as representative. That is, to be sure that the Commission's pre-veto is not being misused, all member states should have a representative in the Commission (see the excellent piece on this by John Temple-Lang, 2003). The draft treaty's reform here is probably a mistake. The Commission should be streamlined by having voting commissioners without a director-general, rather than having non-voting commissioners. The point is that the Commission's general decision-making rule of 50% majority means that its efficiency does not decline with numbers.<sup>3</sup>

### ***Adding in the European Parliament: The 'squeaky wheel' principle***

Ever since the Maastricht and Amsterdam Treaties, the European Parliament plays a large role in EU legislation and the draft Constitutional Treaty is set to increase its role even further, so it is important to take this into account.

The balance of power between the agenda-setter and the deciding bodies follows the logic described above; anything that decreases the passage probability in the Council or in the Parliament lowers the Commission's power *vis-à-vis* the deciding bodies.

The Council-vs-Parliament power balance is governed by a principle that is similar to the one discussed above for interactions between the Commission and Council. The threat of a Parliament veto influences the shape of the final legislation since it constrains the range of passable proposals. Nevertheless, the threat of a veto has less effect as the range of passable proposals in the Council narrows. The point is that the Parliament can use its veto power to alter the shape of a proposal much in the same way the Commission can use its pre-veto power. But since any altered proposal must also pass the Council, the Parliament's influence is limited to selecting among the range of proposals that are passable in the Council. As a result, changes that make Council decision-making more efficient increases the Parliament's influence by widening the range of Council-passable proposals. This might be called the 'squeaky wheel' principle since the most difficult player in the system tends to have the more influence.

We should note here that the effect is symmetric. Anything that made Parliament's decision-making less efficient would strengthen its hand *vis-à-vis* the Council. The fact is, however, that the Parliament's simple majority rule is radically more efficient than the Council's current QMV rule. Indeed, with a 50% majority rule, half of all possible coalitions in the Parliament are winning coalitions. While not everything passes the Parliament, it is easier to find something that 50% of the MEPs will vote for than it is to find something that nations representing 60% of the population will vote for.

### ***Conciliation Council and agenda-setting confusion***

With these basic concepts in hand, we turn to the mainstream EU legislative practice – the co-decision procedure – what is known as the 'ordinary legislative procedure' if the draft

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<sup>3</sup> This is why large bodies such as Parliaments have 50% rules. Anything more restrictive would lead to paralysis. To see that efficiency is unrelated to numbers with the 50% rule, note that for every winning coalition of 'yes' voters, there is a blocking coalition of 'no' voters, so the number of winning coalitions rises in line with the number of total coalitions.

treaty is adopted. Under this procedure, which will covers most proposals under the draft treaty, the Commission makes a proposal that the Council and the Parliament decide on, but (and here is the big change) the Council and Parliament can amend the Commission's original proposal. The details are complex, but one way to amend proposals is through the so-called conciliation committee. This committee consists of representatives of the Council, Parliament and Commission who strive to amend the text in a way that can pass the Council (by qualified majority) and the Parliament (by simple majority). The Commission's formal approval is not necessary but the proposal is killed if either Council or Parliament rejects the text.

In this procedure the role of agenda-setter is blurred and political scientists have not yet converged on a clear characterisation of the process.<sup>4</sup> In a few cases, the Commission's proposals have been adopted without amendment and here the Commission is the sole agenda-setter. In most cases, however, Parliament has proposed amendments and about half of these ended up as law.<sup>5</sup> When the process leads to a conciliation committee, the proposal can be completely redrafted by Council and Parliament representatives without the Commission having a veto. In these cases, the Council and the Parliament are co-setters of the agenda. Although the role of the Commission is greatly reduced, its first-mover advantage probably still matters.

What should we make of all this?

First of all, the impact of higher decision-making efficiency in the Council on the institutional balance of power is difficult to predict. Nevertheless, compared to the Nice Treaty rules, where getting anything through the Council would be extremely difficult, the draft treaty rules will increase the flow of legislation and thus increase the Parliament's chances for having influence. The impact on the Commission is somewhat less predictable, but the basic logic underpinning an agenda-setter's power suggests that the improved efficiency will help the Commission get its way more frequently than it would under the highly immovable Nice Treaty rules.

Legislation, however, is not the only means of influence in the EU. When Council decision-making efficiency drops sufficiently low – as it did in the 1970s after the Luxembourg compromise – efforts to advance European integration via legislation are stymied, but it may advance via other channels.

#### **4.1.2 Commission and Court versus Council and Parliament**

The treaties allow for two ways of making EU policy outside of the legislative route – the implementation of existing legislation and the application of judicial decisions. Owing to these possibilities, the European Court of Justice (via judicial review) and the Commission (via administrative implementation and enforcement of existing legislation) can have some

<sup>4</sup> See Tsebelis (1994), Steunenberg (1994), Crombez (1997), Crombez (2000), Steunenberg & Dimitrova (1999) and Steunenberg (2000).

<sup>5</sup> According to a study of the 82 co-decision procedures completed from 1994 to mid-1997, "the Parliament proposed no amendments in eight cases. In 24 cases, the Parliament proposed no second reading amendments and the measure was adopted on the basis of the common position. In 22 cases, the Parliament proposed amendments at first and second readings, and the Council accepted all second reading amendments. Only in 28 cases (34% of the total) was recourse to the full conciliation procedure necessary. In one case (application of Open Network Provision to voice telephony) no agreement could be reached and the proposal was deemed not to have been adopted (19 July 1994). The Commission submitted a new proposal, which was later adopted." (Bainbridge, T. (1998), "The Impact of the European Parliament on EU Legislation: Cooperation, Co-decision, Conciliation", Infodoc Paper, EPP Group, Brussels, July, retrieved from [epp-ed.europarl.eu.int/Activities/pinfor/in33\\_en.asp](http://epp-ed.europarl.eu.int/Activities/pinfor/in33_en.asp).)

policy-making power that is independent of the Council and Parliament. These powers have been used to different extents in the past. We now consider when such powers become important.

### ***The non-legislative power of the Court and the Commission***

When it is relatively easy to pass legislation, the Commission tends to pursue its integration initiatives via the legislative route. Nevertheless, when the legislative route is very difficult, the Commission or the Court or both may take up the integration baton directly by using their administrative and judicial powers.

A natural question at this point is why the Court and Commission have a major influence over policy when their powers are limited to interpreting existing EU law and settling disputes? The answer has two parts. First of all, the treaties have the force of law in all member nations and the Court is the ultimate interpreter of the treaties. Secondly, the EU's founders put some deep notions of integration into the Treaty of Rome and although various EU governments subsequently tried to ignore or delay some of this integration (especially in the 1970s), the European Court of Justice (ECJ) and Commission can – and, on occasion, have – enforce the original ambitions written into the Treaty of Rome. A prime example can be found in the internal market field where the Court ruling in Case 120/78 *Cassis de Dijon* (1979) unblocked the log jam that had hindered non-tariff barrier liberalisation for a decade.

The major constraint on judicial power is the ability of the Commission, the Council and Parliament to pass new laws. If the Court rules in a way that does not suit the trio, they can overrule it by passing new legislation.

## **4.2 Summary of the institutional power-balance shift**

The impact of the draft Constitution on the balance of power will stem from two features of the decision-making changes.

- As shown above, the reforms will sharply raise the Council's decision-making efficiency.
- This efficiency gain will substantially broaden the range of propositions that can pass in the Council and naturally, increase the flow of EU legislation.

Consider the implications.

### ***The power of the European Parliament***

The gain of efficiency strengthens the power of the European Parliament or at least one aspect of it, namely the Parliament's power to shape EU legislation. The Parliament's ability to veto legislation allows it to exercise positive power when its veto-threat forces a modification that is subsequently adopted by the Council or the anticipation of its veto forces the Commission to modify the original proposal. When only a very narrow range of proposals can win in the Council, the Parliament faces something close to a 'take-it-or-leave-it' proposition. Parliament can still veto the legislation, but this is not a great source of power. Under the Nice Treaty rules, propositions that could pass the three QMV criteria – especially the threshold of 72% of the votes – were likely to appeal to at least 50% of MEPs on a 'take-it-or-leave-it' basis. After all, the MEPs represent approximately the same constituencies as the ministers in the Council (of course, the ebb and flow of political parties' popularity implies that the make-up of a nation's government and its MEP delegation differ).

Parliament's power is increased in a second, more direct way. The massive increase in Council efficiency will surely raise the flow of legislation. This is what happened the last time



efficiency rose, namely when QMV became the rule for Single Market measures after the 1986 Single European Act. Parliament becomes more influential because there will be more to influence.

### ***The power of the Council of Ministers***

The Council will have less influence since it will be much easier to find a winning coalition. In other words, each member in the Council will have particular concerns about any specific law. The proposal that passes does not have to address all of these concerns, only the concerns of countries representing 50% of the members and 60% of the population. Because something like one-fifth of all of the 134 million possible coalitions in the EU27 will satisfy the 50% and 60% rules, the Commission will have a great deal of choice when deciding upon those concerns to which it pays attention. One hopes, however, that the Commission will act in the best interest of Europe, but this policy brief does not concern hopes, it is about power.

### ***The power of the Commission***

The Commission's power as an agenda-setter in EU legislation will rise (perhaps substantially) since the greater ease of finding a winning coalition of member states gives the Commission more scope. Because the Commission president will also become more powerful, the Commission president will be one of the big power-winners from the rules of the draft Constitution.

The Commission's added power makes it even more important than before that the Commission is viewed as a 'fair broker', rather than the pawn of a particular set of countries. For this reason, the non-voting commissioner proposal in the draft treaty could reduce its democratic legitimacy.

### ***The power of the Court***

The Court's influence may fade in the face greater legislative efficiency. The point is that EU leaders will find it easier to pass legislation that 'overrules' particular Court decisions by changing the law.

This loss of power is countered by the widening of the Court's power to include what are now called second- and third-pillar issues. Under the draft treaty, the distinction between EC law and EU law disappears with the pillar structure. The Court will surely be asked to rule on things such as what the 'equal rights' of EU citizens means in the face of different social welfare systems. And the Court's decisions will have the effect of law in all member states in second-and third-pillar issues. In the past, this Court-Commission mechanism led to a 'competency-creep' in the old EU. Indeed, the federalist founders of the EU might well have designed the system to encourage this type of creeping influence towards an ever closer union. The Maastricht Treaty's three-pillar system was a way of stopping this. By removing the three-pillar structure and giving the Court the ultimate say on all matters, the draft treaty may restart the 'competency-creep'. This change is good news for federalists but bad news for anti-federalists.

## **5. Concluding remarks**

The draft Constitution is not a "tidying-up" exercise as British MP Peter Hain claimed. It is a radical reshaping of the EU in many dimensions. The dimension we consider here concerns decision-making – an area that has received very little attention so far.

This lack of attention is astounding. The draft Constitution embraces institutional reforms that were rejected as too controversial by two intergovernmental conferences. The IGC leading up to the Treaty of Amsterdam was supposed to reform EU institutions in a way that would allow the EU to continue to act efficiently and legitimately despite a near-doubling of its members. The main topics were reform of the Council of Ministers' voting rules and a streamlining of the Commission. The EU15 members failed to agree such reforms in the Treaty of Amsterdam. Instead, they defined a list of 'Amsterdam leftovers' that had to be settled before enlargement: the size and composition of the Commission; the extension of qualified majority voting in the EU's Council of Ministers; and, the reform of the Council's voting rules.

The IGC2000, which led to the highly contentious December 1999 summit in Nice, also failed. On the issue of Commission reform, the Nice summit adopted a makeshift, temporary reform since the 15 national leaders could not agree (the main fight was between large and small nations). On the extension of qualified majority voting, the Nice summit was little more than a house-cleaning exercise with little or no change in sensitive areas (the main argument here was between federally minded nations and reluctant integrators like Denmark and Britain). Concerning the reform of Council decision-making, the Nice Treaty actually made things worse since the Nice reforms made it more difficult to find a majority in the Council.

Importantly, the draft treaty reforms were among the many reforms considered in the IGC2000. The Commission pushed the double majority system, tried to expand the range of issues covered by QMV and tried to make the Parliament an equal to the Council on all QMV issues. Several reforms for streamlining the Commission were also discussed. In 1997 and 1999, the EU15 could not agree on any of these issues. How is it that they agreed upon these reforms in the European Convention?

The likely answer is that they did not.

Giscard d'Estaing seems to have created a mood where reluctant nations were characterised as selfish troublemakers. Once it became clear that there would be a draft Constitutional Treaty, member states may have decided that the Convention – with its wildly undemocratic structure – was not the place to fight over the important details. The whole thing has to be reconsidered at this year's IGC where the member states are in charge. The analysis in this policy brief suggests that many of the fights that arose in the last two IGCs will re-emerge in the next one.

The draft Constitution is a great document overall. The European Union definitely needed tidying up since its main principles have been accumulated in an ad hoc fashion over five decades. Europe also needs serious institutional reform if it is to continue to operate efficiently and legitimately after the 2004 enlargement and the Treaty of Nice did not accomplish that task. So it seems almost certain that some Constitutional Treaty will emerge from the IGC. The nature of the institutional reform it contains, however, is very unlikely to resemble the reforms in the June 2003 draft. In short, the IGC that starts this autumn may "discard Giscard" or at least many of the key reforms he put in the draft Constitution.

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