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The Making of EU Institutions

George Tsebelis

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Editorial Note:

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During May and June 2009 Professor Tsebelis was invited as guest lecturer at the MZES. On that occasion he contributed to a three-day international conference "Reform processes and policy change: How do veto players determine decision-making in modern democracies" at the Mannheim Centre, organized by Prof. Thomas König and Dr. Marc Debus and sponsored by the Fritz Thyssen Stiftung.

Abstract

After the referendums in France and the Netherlands the European Union was in disarray. However, political elites in all countries were insisting in the adoption of the Treaty Establishing a Constitution for Europe, which in turn was a slight modification of the text adopted in the European Convention. The solution was found in the IGC of Brussels in 2007, where the substance of the Treaty was adopted, and symbolic details (flag, anthem) were dropped out. The article explains the impact of the institutions adopted in the Convention, and argues that these institutions would help political decision-making in the EU; it then explains how such significant results became possible (because of the important role of the Presidium in terms of agenda setting); finally it argues that the text of the Constitution became a focal point for all negotiating governments. This is why elites came back to it despite the public disapproval of the referendums.

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1 Introduction: Ratification Failure of the Constitution and a new round of IGCs

The European integration process seems to approach a point where we can see the light at the end of the tunnel: ratification of the proposed text by all countries is expected. However, not long ago it seemed that the process was in disarray following its derailment by two referendums in France and the Netherlands. The European Council agreed the European constitution in June 2004, and subsequently all 25 member states signed the document. In a declaration attached to the constitution, the EU allowed two years for the ratification process but did not introduce a new mechanism for its ratification. Instead, as with previous treaty revisions, the constitution needed to be ratified unanimously by all member states. In view of potential difficulties, the European Council simply stated that if only four-fifths of the member states (i.e. 20) had ratified the constitution by November 2006 and other countries had ratification problems, the issue would be referred back to the European Council.

Within just a few days French and Dutch citizens created a ratification crisis when they rejected the constitution in referendums and, subsequently, the European Council declared a reflection period in June 2005. Jean-Claude Juncker, then President of the European Council, noted that the fact of two rejections 'leads us to think that a period for reflection, clarification and discussion is called for both in the countries which have ratified the Treaty and in those which have still to do so'.¹ The purpose of this reflection period was to give the countries more time to debate and to ratify the constitution.

Some academics thought that the final outcome of this process - the survival of the institutions adopted in the Treaty of Nice - was an 'equilibrium' outcome, which did not need to be disturbed.² I have argued exactly the opposite. The creation of the EU convention was unique: despite the fact that the convention had a much more diversified composition than intergovernmental conferences which often fail to produce results, there was an outcome which was approved by all 25 EU country governments in Brussels. Referendum results notwithstanding, this constitutional document constitutes a focal point for projects of EU integration. Despite press analyses which focus upon the EU's failure to integrate, my belief is that as time goes by we will realize that what we had rejected in 2005 is worth our attention and our adoption (because there is no alternative). The constitution process as a procedural defeat but as a substantive victory.³

Subsequent events corroborated my expectations. Indeed, the Brussels IGC under the leadership of Angela Merkel elaborated a process according to which (at the sacrifice of a few symbols like the flag and the anthem) referendums would be avoided (except for Ireland where it is required by the constitution) and the same document would be ratified by the Parliaments of the remaining countries. With a

¹ Jean-Claude Juncker on 17 June 2005

² For instance: 'the failure of constitutional reform is, paradoxically, evidence of the success and stability of the existing 'European constitutional settlement'' (Moravcsik 2006)

³ What follows are excerpts from a book I am co-authoring with colleagues from Germany and Switzerland (Thomas Koenig and Simon Hug) where we treat the Convention and its outcomes as a substantive victory which needs study and not as a defeat which should be forgotten ('The Constitutional Choice for Europe: Agenda Setting in the Convention, Intergovernmental Bargains, and Ratification Outcomes').

small derailment of this process by a “no” referendum result in Ireland which the EU (like a godfather) refuses to understand and asks to be reconsidered, it seems that we are approaching the adoption of a new institutional structure for the EU.

2 Effects of Current Treaties on the Political System of the EU

The traditional way of revising the EU treaties was at Intergovernmental Conferences (IGCs) where each country was endowed with veto powers over the final product. However, this procedure had led to extreme outcomes in the Nice Treaty following the 2001 IGC. Intense disagreements between large and small states were resolved by including provisions to the liking of each group, resulting in the creation of an institutional framework that was difficult to work within (Tsebelis and Yatahanas 2002). For instance, the Council cannot now take decisions unless a very demanding triple majority requirement is met (qualified majority (QM) of weighted votes, majority of countries, and representation of 62% of EU population). The most frequent analysis of EU institutions is through the use of ‘power indices’ that assess the relative power of different countries in the Council. I have criticized this approach because of the lack of focus on the institutional structure of the EU (Garrett and Tsebelis 1999a, 1999b, 2001) and proposed a different analysis which takes into account the actual decision-making system of the EU – in other words the variable that is modified in each constitutional revision (Tsebelis 2002). According to this analysis, increasing the QM threshold in the Council (i) increases the policy stability of the system; (ii) shifts legislative outcomes towards the preferences of the Council; and (iii) increases the role of the judiciary and the bureaucracy.⁴ I argue that this is precisely what the Treaty of Nice does to an excessive degree, and this is what the European Convention (in the Draft Constitution) and the subsequent IGC (drafting the Treaty establishing a Constitution for Europe) tried to correct by eliminating this QM of weighted votes requirement.

Tsebelis and Yatahanas (2002, 283) have analyzed the dynamics of bargaining leading to the Nice Treaty, and argued that it was the first time that the three key EU institutional criteria (QM of weighted votes, majority of states, and QM of populations (62%)) 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 conferees 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 compromise (see also Galloway 2001).

Tsebelis (2006) used the number of winning coalitions in the Council to represent the different decision-making rules. The short-term effects of Nice were minor. Indeed, under the 62/87 QM rule which was in effect before the Treaty of Nice, the number of winning coalitions with the single QM criterion

⁴ The judges by interpretation of the existing law, and the bureaucracies by implementing the same legislative and regulatory texts (Tsebelis and Yatahanas 2002; Gormley 2003, 817; Metcalfe 2000).

was 2549/32768 (7.77%). This number would have been slightly restricted by the triple majority to 2513/32768 (7.67%)

The effects of the triple majority become even smaller in a European Union of 15 members with the weighting system adopted by the Nice Treaty itself. Now with the simple QM criterion (169/237) the number of winning coalitions is 2707/32768 (8.26%), while with the triple one, it is reduced to 2692/32768 (8.21%). With the expansion to 25 members, the difference between the simple QM criterion (255/345) and the triple majority criterion remains insignificant (the number of winning coalitions goes down from 1,204,448 to 1,203,736 - but what is significant is that these numbers identify 3.58% of winning majorities in the Council).

The Convention and its leader Valéry Giscard d'Estaing must take the credit for correctly identifying the source of the high policy stability generated by the Nice Treaty: the QM requirement of weighted votes.⁵ As a result, the convention leadership introduced the much more permissive double criterion. The Praesidium proposal of QMV in the Council, put forward by Giscard, introduced a double majority principle to adopt legislation by QMV including 50% of member states and 60% of the population. The IGC initially failed to reach a compromise after opposition from Spain and Poland in December 2003 regarding the voting rule. Immediately after the failed summit, Giscard pointed out that he had initially proposed a threshold of 66%, but that a majority in the Praesidium chose to lower it to three-fifths (European Report 2003; Cameron 2004, p. 386). In 2004, the IGC could agree on a new definition of QMV. It preserved the double majority principle, thus abandoning the weighted vote scheme in the Council, but raised the majority threshold to 55% and the population threshold to 65%. As an additional criterion, at least four member states are necessary for a blocking minority.

Under the convention QMV proposal, the frequency of valid decisions would have increased by a factor of 6: from 3.58% to 22.5%. So, the frequency of valid decisions went from 8% in a Union of 15 (before or after Nice) to 3.58% in a Union of 25 (after Nice) to 22.5% under the Convention proposal, and back down to 10% under the Constitutional Treaty (the text rejected by the referendums).

However, Tsebelis' (2006) numbers can be challenged on the grounds that they do not incorporate the preferences of the actors. It is not always the case that more veto players lead to more policy stability; the policy distance between players matters too. Similarly, Tsebelis' (2006) results are based on the assumption that each potential coalition is equally probable. This is not necessarily the case: it is more likely that countries located closely in the policy making space will make coalitions more frequently. In addition, if countries enter into competition as to which one will be included into winning coalitions, then, the 'competitive' price for entering a coalition will be the same per unit of support (each vote, or the representation of each million voters depending on the decision-making rule in the Council).⁶

⁵ The other two decision-making requirements (majority of countries and qualified majority (60%) of the population) impose very few restrictions on the decision-making process.

⁶ For an analysis of this line of reasoning which provides a serious challenge to the 'power indices' methods of assessing power within a voting body, see Snyder et al. (2005).

An alternative way of calculating the size of the core of EU institutions is provided in König and Bräuninger (2004). They consider the positions of the different countries members on a two dimensional policy space. The first dimension is a general left right dimension and the per capita income of the different countries is used as a proxy for this variable. The second is policy positions on agricultural issues, and they are approximated by the percentage of agriculture into a country's GDP. Using both these indicators, they calculate the core of the Council presenting a comparison before and after the expansion (Figure 1, see page 22) as well as a comparison between Nice and the Convention (Figure 2, see page 23). In both cases, the core expands significantly with more countries, as well as with the Nice Treaty rules. This method has also its own drawbacks. The proxy variables may be considered objectionable. The new countries have not participated very much in voting either in the Council or in the European Parliament, so, one cannot use their record to establish their policy positions.

All these different methods come to very similar results: the core of the EU expands because of the rules introduced in Nice and because of the expansion to 25 countries, but is there any empirical evidence to support them? We have to point out that it is very early for empirical tests and that the evidence is going to be sparse, but there are some serious indications. I will start with a case study, and then make references to some aggregate data presented recently by the Commission.

2.1 Empirical study: the case of the working time directive

Passed in 1993 and amended in 2003, this directive is current EU law designed to protect workers from exploitation by employers. It lays down regulations on matters such as how long employees work, how many breaks they have, and how much holiday they are entitled to. One of its main goals is to ensure that no employee in the European Union is obliged to work more than an average of 48 hours a week.

Introduced as health and safety legislation in 1993, the directive became a 'pet hate' of the British government and business lobby, which resented the idea that the EU could set laws telling workers to down tools even if they wanted to put in extra hours. The current legislation in force therefore provides for a so-called 'opt-out' that allows the possibility of exceeding the maximum weekly working time (48 hours) if the worker gives her agreement to carry out such work. This 'opt-out' possibility was made specifically for the UK and is destined to be phased out (although no deadline for expiration was set).

The UK was the only Member State to apply the opt-out on a general basis but, following enlargement, two new Member States, Cyprus and Malta, are applying it on a general basis. Luxembourg applies the opt-out to its restaurant and catering sector in order to avoid more stringent national rules on reference periods for calculating working time so that it can cope with seasonal peaks. Although this 'opt-out' provision of the directive concerns only a few member states, it has attracted widespread public attention, as it is considered by many to be an exemplary issue in the ideological division be-

tween those member states insistent on flexible labour market standards and others that pursue a 'European social model' approach.

In several court rulings, the ECJ noted that the definition established by member states themselves in the Directive means those 'on-call duty' hours in the workplace should be regarded as working time. These rulings have significant implications for the health and emergency sectors. Following the European Court of Justice (ECJ) rulings in 2000 and 2003, which defined time spent on-call by health professionals as working time, France, Spain and Germany have applied the opt-out to their health sectors.

In September 2004, the Commission proposed an amendment to the directive, partly because the 1993 directive required its revision in 2003. The first issue of this new proposal is the reference period, i.e. the time over which the average 48-hour weekly limit on working time is calculated. The second issue concerns the application of the so-called 'opt-out' that allows member states to put in place measures to allow individuals to agree not to be subject to the 48-hour limit. Furthermore, the Commission decided to react to the ECJ ruling regarding the definition of working time spent on-call by health professionals.

The Commission proposed that Member States will only be able to apply the opt-out if it is explicitly allowed under a collective agreement **and** if the individual worker consents (the conditions attached to the worker's individual consent are tightened). Because of the major financial implications for many member states of the ECJ rulings, the Commission decided to propose to exclude on-call time from the working time definition.

While the UK fears it could lose the 'opt-out' exemption, other member states need a new deal on the directive because some are breaking the rules on the related matter of 'on-call' work and fear legal challenges from employees such as doctors.

The directive is subject to the co-decision procedure and QM voting in the Council. In May 2005, the European Parliament adopted far-reaching amendments to the Commission's original proposals. Parliament voted in favour of phasing out the opt-out within three years, and recognizing on-call time as working time, in line with the ECJ rulings. The Commission rejected the EP's amendments on these issues. However, the most significant developments of the directive occurred in the Council where the proposal is now pending.

The Council has started discussions on the directive in October 2004, but has failed to reach a common position since. The UK is so far confident it has assembled sufficient support to block moves to end its 'long hours' work culture. Britain's defence of its flexible labour rules is seen as an attempt to convince Europe - and particularly France - of the need to adapt to globalization. France, which has a 35-hour working week, has led demands for UK workers to be brought into line.

It is difficult to determine the coalitions in the Council at various points in time because in each Council meeting there are new proposals that ministers discuss about. European news reports suggest, how-

ever, that agreement on the proposal could have been reached in late 2005 under the UK Council Presidency. In an attempt to avoid fixing a date to end the opt-out, the UK attempted to appease those in favour of its gradual phase-out by suggesting this could still be considered later in the game in a Council statement attached to the revised proposal. The proposal divided the Council into a pro- and an anti-UK coalition (European Report, 2005). The Pro-UK coalition included Poland, Lithuania, Ireland, Italy, Malta, the Netherlands, Germany, Austria, the Czech Republic, Slovakia, Finland, Latvia, Estonia, Slovenia, Denmark and Sweden. The Anti-UK coalition was composed of France, Belgium, Spain, Greece, Cyprus, Portugal and Hungary, Luxembourg. The pro UK camp only satisfied two out of the three criteria prescribed by the Nice Treaty. As Table 1 demonstrates, the pro-UK coalition could not get enough weighted votes.

Table 1. Working Time Directive (voting intentions for 2005 UK compromise proposal)

QMV criterion	Treaty of Nice		Constitution	
	<i>Required</i>	<i>Actual</i>	<i>Required</i>	<i>Actual</i>
<i>Member states majority</i>				
50%	13	17		
55% (at least 15)			15	17
<i>Weighted Votes</i>	232	209		
<i>Population majority</i>				
62%	283.216	311.4		
65%			296.92	311.4
	Measure would not pass		Measure would pass	

Source of member state coalitions: European Report 2005.

Had the voting rule of EU constitution applied, the Council would have been able to reach an agreement. According to the EU constitution, a QM is reached if 55% of the member states (but at least 15) represent 65% of the population. The pro-UK coalition would have satisfied both criteria.

This shows agreement over the directive in the Council could have been achieved in late 2005. As it stands now, the pro-UK coalition has lost a significant number of supporters. As of summer 2006, it looks like the UK is in a blocking coalition (together with Germany, Poland, Malta, Estonia, and Slovakia). The coalition that would like to phase out the 'opt-out' does not have enough votes right now (nor would it reach a QM under the EU constitution rules). The discussions in the Council continue.

While this case is not an example of legislative failure (it is after all possible that an agreement will be reached some day!), it shows that the institutions of the Nice Treaty do slow down decision making (increase policy stability) and that the EU constitution would have accelerated decision making (increase policy change).

2.2 Lawmaking in the EU after Nice

Let me now present the aggregate evidence proposed recently by the Commission. In the *Better Lawmaking Report for 2005* the Commission finds that legislative proposals have significantly declined during the first year of the application of the Nice rules along with the enlargement. It notes that 'the number of legislative proposals fell in 2005 by 17.5 percent compared to 2004 and by 10.5 percent compared to the 2003-2004 average. That decrease applies for all types of proposal: regulations (-21), directives (-24), decisions (-46) and recommendations (-2). The biggest relative drop is in the number of directives which fell by 47 percent compared to 2004' (European Commission 2006).

Of course, the case study may be an isolated event, and the Commission data refer to a very recent and limited time period. But both are completely consistent with the arguments I present. So, having established that the difference between the Convention decisions and the Nice Treaty prescriptions is significant, let us now go back to the political implications for the EU.

2.3 Effects of Council QMV Voting Rule

What are the political (or redistributive) consequences of changing the QM threshold in one of the chambers? As Tsebelis and Money (1997) demonstrate, this shifts the policy outcomes *towards* the chamber where decision-making becomes more difficult. Figure 3 (see page 24) shows the winset of the status quo of a bicameral legislature composed of three members for each chamber. In the first case the decision is made by congruent majorities in both chambers; in the second, unanimity in the Council is required (along with a majority in the Parliament). The lightly shaded area indicates the winset of the status quo by congruent majorities, while the heavily shaded area indicates the winset of the status quo when unanimity is required. The reader can verify the outcome shifts in favour of the Council in the second case. The reason is that an additional member (whose preferences were ignored in the case of congruent majorities) is now taken into account. This member has the most 'stringent' preferences since his location was so close to the status quo that the other members preferred to ignore him. Now that his agreement is required he restricts the winset of the status quo towards his preference and towards the location of the Council.

The bureaucracy and the judiciary are involved with legislatures in a sequential game. They interpret the law and then the legislature can decide to overrule their statutory interpretation or not (Tsebelis 2002). Let us assume that there are three legislative veto players. Figure 4 (see page 25) demonstrates such a case, and the triangle 1-2-3 is defined as their core, the set of points that they cannot agree to change. Consequently, if the first mover selects one of the points of the core, there

will be no legislative overrule. Figure 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 veto players are incapable of changing either of them. In the third case, the first mover is located inside the legislative core but changes her mind and moves from point L1 to point L2. Since the first mover is inside the core she can select her own ideal point.

If the courts are rendering constitutional interpretations, then it is difficult to almost impossible for the legislature to overrule the courts' interpretation. However, different constitutions specify conditions for constitutional amendments, and the courts have to take into account this possibility in their interpretations. For instance, Santoni and Zucchini found that the Italian Constitutional Court becomes more proactive the greater the ideological distance of the government parties from the Communists in the period 1956-1992 (the government along with the Communists together formed a majority that could modify the Italian Constitution) (Santoni and Zucchini 2004).

There is one additional point concerning the above simple game-theoretic account raised in the literature. Given that the first movers in the game presented above will be able to select a policy close or identical to their own ideal point, what will the legislative branch do to prevent this event from materializing? There is an extensive literature which argues that legislation will be more restrictive when there are many veto players (Huber and Shipan 2002; McCubbins et al. 1987, 243; McCubbins et al. 1989, 430; Moe 1990, 213; Moe and Caldwell 1994, 171). This is a valid point, and if the legislature can come to an agreement they will restrict both bureaucrats and judges. Consequently, multiple veto payers will lead to more lengthy and bureaucratic legislation.

Increasing the QM threshold in the Council has a multitude of results. It increases the policy stability of the system; it shifts legislative outcomes towards the preferences of the Council; it increases the role of the judiciary and the bureaucracy.⁷ I will now argue that this is precisely what the Treaty of Nice does to an excessive degree, and this is what the European Convention in the Draft Constitution and the IGC in the Treaty establishing a Constitution for Europe tried to correct by eliminating the QM of weighted votes requirement.

3 Rejection of the Constitution: Policy implications, the 'Democratic Deficit', and the Power of Bureaucrats and Judges

3.1 Policy implications

Previously, I demonstrated that imposing constraints on the decision-making of the Council (or EP) leads to further difficulties in Union decision-making since when the core of the Council increases the

⁷ The judges by interpretation of the existing law, and the bureaucracies by implementing the same legislative and regulatory texts (Gormley 2003, 817; Metcalfe 2000).

core of the Union either increases or remains the same. Furthermore, I explained that the restrictions imposed by the Nice Treaty are very significant, and that the proposals made at the Convention would have resulted in dropping one of the requirements, increasing by a factor of 6 the number of decisive coalitions in the Council (according to Tsebelis 2006), or, significantly decreasing the size of the policy core (according to König and Bräuninger 2004). In both cases, changes of the status quo are much easier under the Convention document, or the IGC compromise, than under the status quo (Nice Treaty). These are quantitatively significant differences, but why should one care whether the Union is able to make political decisions or not? Could we perhaps say that a Union which is unable to decide politically is a better institution than a politically active Union? After all, decisions will be made at the national level and maybe the people of Europe will have this way more control over the decisions affecting them.

In fact, the whole debate about political versus 'other' issues in the Union is based on whether it is better for the Union to be able to make decisions that overrule the positions of any individual member country or not. Originally only economic matters fell in the competence of the Union (or better: the Community) and it used to be that all decisions needed unanimity in the Council (Luxemburg compromise). Over the years, more competences have been added and a certain amount of QM voting was applied. Currently only the issues of taxation and foreign policy remain exclusively in the hands of the member countries (Moravcsik 2002, 603).

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

Policy stability in any political system enables the citizens to know the rules of the game and to undertake initiatives that will be beneficial to them on the basis of these rules. On the other hand, the ability to make changes to policy enables a political system to adapt to a changing environment. Let us use two examples to make the point clear. Having a taxation system that remains stable will enable people to make investment decisions that are as profitable as possible and therefore, lead to higher levels of growth. This is a standard economic argument (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 varied responses, like increased taxation on oil in order to reduce consumption, or decreased taxation in order to keep prices stable in other areas, or the study or exploration of alternative energy resources.

Is it better for a political system to have more or less policy stability? There is no general answer, unless a political system occupies some kind of extreme position (if, for example, unanimity is required for decision-making in a parliament like the Polish *Sejm*, or decisions on human rights are made by simple majority in which case a majority can decide to oppress the human rights of a minority) (Tsebelis 2002).

Obviously the European Union does not fall into an extreme category like the ones described. However, will it be facing an economic and political environment with lots of shocks (and therefore, high variance of external conditions?). The developments of terrorism, potential trade conflict with the United States, globalization and the opening of new markets, new environmental challenges like climate change are all external shocks that may be too big for individual European countries to respond, and therefore require a coordinated adjustment. In this case, decisions by the European Union will become more necessary, not less. So, restricting the Council's decision-making capabilities undermines the Union today more than it did in the past. This is the crux of the federalist debate today as it was when the Union started in the 60s: is coordination among the individual countries necessary in order to create an entity able to negotiate with superpowers like the US and the Soviet Union (in the past) or China (in the future) and influence decisions worldwide, or will individual countries have to negotiate on their own (with a high probability of becoming 'price takers')?

As a result of this analysis, I am arguing that the steps taken in the Treaty of Nice are negative, and the failure to adopt the text of the European Convention has been a further unfortunate development. Now, after the negative referenda in France and the Netherlands, the Nice rules risk to be permanent. The insistence of countries on their own rights and the lack of focus to the collective consequences will inevitably lead to an inability of the Union to address new issues. Ultimately, this will leave each country to make its own decisions, but with only its own forces, facing situations where its own weight may not be enough to confront difficult conditions.

3.2 Democratic Deficit

Scholars continue to discuss the issue of a 'democratic deficit' connected with European Union institutions. It is not clear what this discussion is about. It may be that political decisions do not reflect the wishes of the public. Or, it may be that information about the decisions made by the political system is not disseminated to the public. According to Follesdal and Hix (2006), the 'standard version of the 'democratic deficit' debate centers on five issues: first, the increase in executive power and decrease in national parliamentary control; second, a weak EP; third, despite increasing powers of the Parliament in recent years, the absence of a 'European element' in European elections; fourth, the distance between the European Union and voters due to the complicated institutional framework; and fifth, neo-liberal EU policies that are not supported by a majority of voters in many member states. Recently, some scholars have argued against the existence of a 'democratic deficit'. According to Majone, the EU is predominantly a regulatory state and has simply a 'credibility crises. If the EU were democratized through an increase of its majoritarian institutions, this development would lead to a politicization of regulatory policy-making and more redistribution than Pareto-efficient outcomes (Majone 1998, 2000). Another critique comes from Moravcsik whose intergovernmentalist view implies that the EU is unlikely to adopt policies that negatively affect a national interest and that there are no unintended consequences of the intergovernmental bargains and hence no 'democratic deficit' (Moravcsik 2002). In the latest contribution on the subject, Follesdal and Hix (2006) reject both Majone and Moravcsik's

critique and claim that the most fundamental 'democratic deficit' in the EU is the absence of electoral contest for political leadership at the European level or the basic direction of the EU policy agenda. 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 to all political systems. Consider the issue of war in Iraq: are the US, the UK, Poland and other Eastern European countries suffering a democratic deficit because their governments are deviating from the clear preferences of public opinion? If the answer is 'yes' would one want to add these countries to the list of 'democratic deficit'? And will all deviations from public opinion count as 'deficit'? If the answer is 'no' why is Europe considered to be suffering?⁸

If 'democratic deficit' implies the ignorance of the public about decision-making at the EU level then it is a factually correct characterization - the average European is disinterested in European decision-making, and is irritated by specific decisions (whenever he or she hears about them).⁹ 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 Union population. When it becomes clearer that Union's decisions are transposed to the national level, and a series of national decisions are taken unanimously *because* they reflect European legislation, and as a result individual countries have to adopt the specific policies, the attention of the public may increase.

In addition, the lack of information on the part of the public is a widespread phenomenon. The Swiss do not know the name of their President (the person rotates annually), and public opinion experts in each country always find surprising results (like American public opinion does not know whether the US government is in favour or against the government in countries with civil wars) etc. No matter what the definition of 'democratic deficit' it is not a particularly European concept. The reduced role of the EP is an inaccurate perception (Pinelli 2004, 83). One would expect a difference in the role and importance of parliaments in presidential and parliamentary systems: but the titles of these systems are misleading (Tsebelis 2002). It is parliaments in Europe that complain that they are little more than a rubberstamp for government decisions, and it is the President of the United States that complains that he cannot restrict the initiatives undertaken by Congress. The reason for this discrepancy between titles and reality is that parliament makes proposals to the executive in presidential systems, while the government makes proposals to the parliament in parliamentary ones. The institution that makes the proposal enjoys greater discretion than the one that accepts or rejects the proposal.

Looking at 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 policymaking institutions

⁸ 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.

(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 of 15 December 1994, quoted in Earnshaw and Judge 1996). So, the term 'democratic deficit' is not an accurate characterization if it is meant to reflect the lack of power of the European Parliament.

But what is most important in this discussion is the following: the application of the Nice Treaty reduces the role of the EP in the decision-making process. If there is already a democratic deficit in the EU, it is going to increase, and if there is not, it may be generated by the application of this Treaty. The reason is simple: the constraints on the decision-making abilities of the Council increase significantly, and as a result, only a few alternatives to the status quo will be acceptable to the required majorities in the Council.

3.3 Power of judges and bureaucrats

Another consequence of the failure of accepting the Convention text (and the Treaty establishing a Constitution for Europe) is the increased role of bureaucrats and judges. While most analyses 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 (Smismans 2004).

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

The question may seem provocative and the answer obvious: elected representatives. I just want to clarify that I do not share this belief. There are decisions that are better to be left to judges than to elected representatives: for example issues of human rights are better left to courts. Similarly, there are decisions that are better left to independent agencies (like an ombudsman) than to governments. 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. This is an important point: reducing the capacities of elected representatives of the EU does not necessarily increase the power of national governments. In issues of EU jurisdiction (decided by the treaties) the power reverts to non-elected

⁹ It is also truth that the five most interesting political items for the public opinion of the member states (taxation, education, health care, pension systems and revenue policy) do not fall under European jurisdiction.

representatives. I am not sure that this is the goal of national governments or people when they vote 'no' in referendums.

4 Designing new institutions in the Convention

When a text is composed, the person holding the 'pen' usually has a significant impact on the content of the document. In the last of an extended series of constitutional drafts composed by the Single European Act, the Maastricht, the Amsterdam and the Nice Treaties, Valéry Giscard D'Estaing was nominated President of the EU Convention which prepared a draft of the EU constitution. He delivered a document which was approved by the Convention, rejected by the Intergovernmental Conference of Rome, and approved (slightly modified) by the Intergovernmental Conference of Brussels.

Giscard made use of essentially all possible institutional means of agenda control. First and foremost, he controlled the process of drafting the rules of procedure for the Convention itself. Table 2 lists the key elements of these rules and how they were used and interpreted by Giscard during the Convention.¹⁰

¹⁰ Rules of Procedure of the Convention (Convention document CONV 9/02, available at the Convention website, <http://european-convention.eu.int>).

Table 2. Institutional Means of Agenda Control in the European Convention

Means	Examples
Time constraints	<ul style="list-style-type: none"> • President controlled the number of meetings. "The Convention shall be convened by its Chairman with the agreement of the Praesidium or following a written request by a significant number of members of the Convention", Rules of Procedure (CONV 9/02), Art. 1. • President chaired all meetings. "Meetings of the Convention shall be chaired by the Chairman of the Convention or in his absence by one of the two Vice-Chairmen.", Art. 6(1). • President controlled allocation of time. "Taking account of views expressed by members of the Convention, the Chairman shall ensure the proper conduct of discussions, including by arranging as far as possible that the diversity of the Convention's views is reflected in the debates. He may propose to limit interventions in the interest of the efficient conduct of debates.[...]", Rules of Procedure (CONV 9/02), Art. 6(7).
Closed or restrictive rules, and expansive rules ("last offer authority")	<ul style="list-style-type: none"> • Praesidium drew up the agenda. "The Praesidium shall draw up the provisional calendar and agendas for meetings of the Convention and shall submit them to the Convention for approval. [...]", Art. 2. • Praesidium controlled the meetings of the working groups. "The Praesidium agreed that in order to allow for real work to be done in working groups, their mandate should focus on specific questions which could not be examined in depth in the plenary, and their duration should be limited. It was suggested that they should be chaired by a member of the Praesidium with a view to ensuring the consistency of their work.", Summary of the Praesidium meeting on 15/04/2002. • Formulation of a single document instead of several proposals. "However, there is no doubt that [...] our recommendation would carry considerable weight and authority if we could manage to achieve broad consensus on a single proposal which we could all present. If we were to reach consensus on this point, we would thus open the way towards a Constitution for Europe.", Giscard d'Estaing's introductory speech in the Convention, 26/02/2002, p.11.
Sequencing rules and Gatekeeping	<ul style="list-style-type: none"> • Praesidium controlled the process of amending the agenda. "[...] Any member of the Convention may ask the Praesidium in writing to add agenda points to the draft agenda of a Convention session. The Praesidium shall in any case add a subject to the draft agenda when the request is made by writing one week before the scheduled session of the Convention by a significant number of members. At the beginning of a meeting, the Convention may decide by consensus on a proposal of its Praesidium to add other items to the agenda.", Rules of Procedure (CONV 9/02), Art. 2. • Praesidium controlled the process of drafting articles and postponed discussion on institutional questions . "It was confirmed that from the beginning of 2003, in the light of the outcome of the debate in plenary on the Working Groups' recommendations, the Praesidium would draft sections of the treaty to be put forward to the Convention. It was also confirmed that institutional questions would be discussed in Plenary, not in working groups, and that the discussion should be initiated on the basis of a paper prepared by the Praesidium, with the support of the Secretariat, aimed at structuring the debate.", Summary of the Praesidium meeting on 6/11/2002. • Written contributions had to be sent to the Praesidium before consideration. "Any member (full or alternate), and observer of the Convention may address a written contribution to the Praesidium. The contributions may be individual or collective. Such written contributions shall be forwarded to the members (full and alternate), and observers of the Convention by the Secretariat [...]", Rules of Procedure (CONV 9/02), Art. 4(1-2). • Distinction between a "listening", "study", and "recommendation" phase, Giscard d'Estaing's introductory speech in the Convention, 26/02/2002, p.8 ff.
Voting	<ul style="list-style-type: none"> • No open voting in the Convention. President determined consensus. "The recommendations of the Convention shall be adopted by consensus, without the representatives of candidate states being able to prevent it. When the deliberations of the Convention result in several different options, the support obtained by each option may be indicated.", Rules of Procedure (CONV 9/02), Art. 6(4).

4.1 Time constraints

Giscard controlled the process of convening the Convention meetings. Either he convened the meetings himself or on the written request by a significant number of members of the Convention, with Giscard determining what 'a significant number' would consist of. He also chaired all meetings and could limit interventions. Giscard's efficient use of time is considered important for the outcome of the Convention (Deloche-Gaudez 2004, p. 60 and Norman 2003, p. 324).

4.2 Closed or restrictive rules and expansive rules ('last offer authority')

The Praesidium of the Convention drew up the agendas of the Convention. Although individual members of the Convention were allowed to ask the Praesidium in writing to add agenda points, the Praesidium only had to do this when the request was made by 'a significant number of members'. Again, this was up for interpretation by the President. Working groups were set up during the course of the Convention to focus on specific aspects. The Praesidium controlled this process by chairing all working groups. Finally, Giscard made it clear in the very beginning of the Convention that he wanted to produce a single document instead of several proposals. Because the rules of procedure stipulated that all amendments had to be proposed to the Praesidium, it was up for the Praesidium to present revised articles, either incorporating the changes or sticking with the original proposals. This gave the Praesidium essentially 'last offer authority'.

4.3 Sequencing Rules and Gatekeeping

The Praesidium controlled the amending process and, together with the Secretariat, acted as a gatekeeper. After the initial proposals were submitted by the Praesidium, the amendments to the proposals had to be made in writing to the Praesidium in a short time period. According to Norman, the Secretariat played an important supporting role in controlling the agenda process by 'holding back documents, never letting opposition groups consolidate, and creating a climate in which the most enthusiastic partisan among the [members of the Convention] would eventually settle for a compromise' (Norman 2003, p. 337). Giscard's decision to distinguish between a 'listening', a 'study', and a 'recommendation' phase further allowed him to neglect initial amendments from the floor and to pick them up (or not) at a later stage. An important decision of Giscard was to avoid discussion on institutional questions in working groups and to postpone the discussion until the very end of the Convention, thus giving him full control of the final and most controversial proposals.

4.4 Voting

In the beginning of the work of the Convention, the Praesidium decided that voting would not be a working method: 'Members of the Praesidium recognized that, given the non-homogenous character of the composition of the Convention, it was not appropriate to resort to a vote. The Convention should

aim at achieving consensus or, at least, a substantial majority.' (Praesidium meeting conclusions, 26/2/2002). The decision of Giscard not to allow open voting in the Convention was an important means to control the agenda and the drafting process. The rules of procedure stipulated for the outcome to be adopted by consensus, without the possibility of indicative votes. It was up for the President of the Convention to determine what consensus meant. In practice, a typical Convention day proceeded as follows: the members of the Convention would put their names on the list of speakers and would thus be able to speak for a few minutes in the plenary on the subject matter on the agenda. Giscard would conclude the session pointing out those points that according to his view were accepted by consensus (Deloche-Gaudez 2003, p.394). As for the final session of the Convention, Giscard did not use the word 'consensus', but later said that support for the draft constitution was 'virtually unanimous' (Norman 2003, p. 337).

In short, Giscard used every trick in the book, and was very influential in shaping the EU constitution. How did he do it? He expanded the authority of the convention, and shaped the document that it produced. By eliminating votes, he enabled the presidium and the secretariat to summarize the debates. He used time limits to stop possible opponents from making proposals; he selected the staff members himself and took away possible sources of opposition. In this way he was able to shape the document in a very efficient way.

Tsebelis and Proksch (2007) expand on the analysis of agenda-setting in the Convention. They show that Giscard shaped particular tools that enabled him to manipulate the Convention and extract from it everything that this collective player was willing and able to provide. The body Giscard was presiding over was significantly more extreme in its composition than intergovernmental conferences. Indeed besides governments, it included EU institutions like the EP and the Commission, as well as representatives of national parliaments who were less in favour of European integration than their own governments. Given that even intergovernmental conferences, despite months of preparations, sometimes fail to produce any results, the failure of any agreement in the Convention was a distinct possibility. Another serious possibility would have been an 'anarchic' document, in which different parts would have reflected the prevalence of different majorities. Giscard was able to avoid both of these possibilities. Tsebelis and Proksch (2007) argue that he was able to produce these results through the astute use of three significant tools that he developed. First, he limited the number of amendments that could be proposed by Convention delegates by imposing timing to the whole process. Second, he created an iterated agenda setting process in order to modify amendments once they had been proposed. Third, he prohibited voting, and produced results 'by consensus', where he reserved the right to define the meaning of the term.

There has been an institutional ping-pong game between two presidents of France. Under the Presidency of Jacques Chirac the EU adopted the Nice Treaty and instituted the triple majority requirement that seriously undermines the decision-making abilities of the Council. Valéry Giscard d'Estaing (ex-President of France) was the President of the Convention, which repealed the most restrictive clause of a QM of weighted votes in the Council, a proposal which would have unblocked the Council and

enabled it to make more political decisions. A compromise solution (without the weighted majority voting) was adopted during the IGC, and accepted by Chirac along with all the other European leaders. This compromise was rejected by the French voters. The result – for the time being – was the return to the Nice Treaty.

5. The final response of EU governments to the impasse

The referendums were followed by a long reflexion period, where political elites in the EU were thinking of finding a solution to the institutional impasse generated by the two referendums. The solution was adopted in the Brussels summit under the German Presidency. Angela Merkel, the German Chancellor was able to forge a compromise among the EU countries that essentially preserved the text adopted in Brussels in 2004 precisely because of its focal point qualities (all the accounts indicate that she knew that any modification would open an unending discussion about the other points requiring change). In addition, educated from the French and Dutch referendum experience, she produced a strategy for adoption which avoids referendums as much as possible.

In her efforts to have the same text accepted, she entered into serious conflict with the Polish leadership who wanted to preserve the voting rules of Nice, and in the absence of these rules the ‘square root’ rule produced by the power index literature and supported by lots of academics (e.g. Hosli and Machover 2004, Kauppi and Widgrén 2004), some of whom in an open letter even urged EU member states in 2004 to adopt the proposal (Open Letter 2004). The essence of this government conflict is captured by Figure 5.

In this figure, I present the population size of the EU countries, their voting weight according to the Nice Treaty, as well as the approximation of these weights by a linear and a square root function. It is clear that for Poland (as well as Spain) the Nice rules produce significantly better results than the square root, which is better than the linear function, while for Germany it is exactly the opposite: the linear function is the best, seconded by the square root, and followed by the Nice Treaty. The conflict between Germany and Poland is obvious on the basis of this figure.

What requires additional discussion is the attachment of part of the academic community to the ‘square root rule’ generated by the power index literature. We need to have a short discussion on the matter, so that the reader is not left with the impression that an ‘unfair’ rule was adopted for no other reason except that it happened to be adopted in Brussels in 2004, or, before that in the Convention.

The ‘square root’ argument is presented in the power index literature as the fair rule to represent populations: ‘Although using a square rooted population as the basis for a voting scheme might sound mysterious, it can also be justified from the point of view of fairness. It can be shown that in a two-tier decision-making system (e.g. the Member States at the lower level and the EU at the upper) the square-root rule guarantees under *certain circumstances* that each citizen is equally represented in the Council regardless of his/her home country.’ (Widgrén, M. (1994), emphasis added). The ‘certain

circumstances' of the text, is the assumption that every coalition is equally likely. This assumption produces higher 'power index' for larger countries, which has to be compensated by providing to them less votes through the square root function. It may seem reasonable to adopt a probabilistic view of reality (an equal probability of all coalitions assumption), particularly if an academic comes from mathematics or statistics.¹¹ However, the social sciences more often adopt strategic assumptions. More recent arguments in the literature (Snyder et al 2005) make the point that if different coalitions have different 'values' the ones that are cheaper will be selected. Consequently, in equilibrium, all votes will have the same value. This means that if a country X is twice as large as a country Y, it should have twice the 'price' of Y, because if this were not the case, the cheaper one would be selected in a competitive environment. This simple argument produces linear outcomes: a large country with two times the votes of two small ones has exactly the same power as the two small ones put together, not more; therefore there is no reason to provide less votes to larger countries (the square root proposal). The normative implication of this argument is that the solution adopted by the Convention, and in subsequently institutionalized by the Brussels summit, cannot be criticized on the grounds of fairness.

Conclusions

The rollercoaster that the EU went through for the adoption of its institutions was extraordinary: the process has lasted close to a decade (from the realization of the institutional blunder of Nice to the Brussels and Lisbon IGCs and the process they created (which is not over yet). We are about to ratify a text adopted long ago, by leaders who have already been replaced by their people. Yet, EU elites insisted on this text (because of its extraordinary properties) and prevailed despite objections and popular mobilizations against it. It is ironic that the people who wanted to open the EU institutions to the people of Europe in order to have them participate and ratify the big institutional change decided to avoid referendums when they saw their results. On the other hand, one should not believe that a referendum is necessarily a more democratic solution than a parliamentary decision. While it is true that a referendum is a direct response of the people, the question asked is crucial, and the information of the people on the relevant issues a necessary condition for a democratic solution. I have argued in other occasions that we cannot make such claims for the French and Dutch referendums. As a result, we have to be gratified that a solution to the institutional impasse has been found and is progressing.

¹¹ The argument was presented in the mathematical literature by Penrose (1946)

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Appendix

**Figure 1: Core of 15 and 25 member EU on agricultural issues after Nice
(From König and Bräuninger, 2004)**

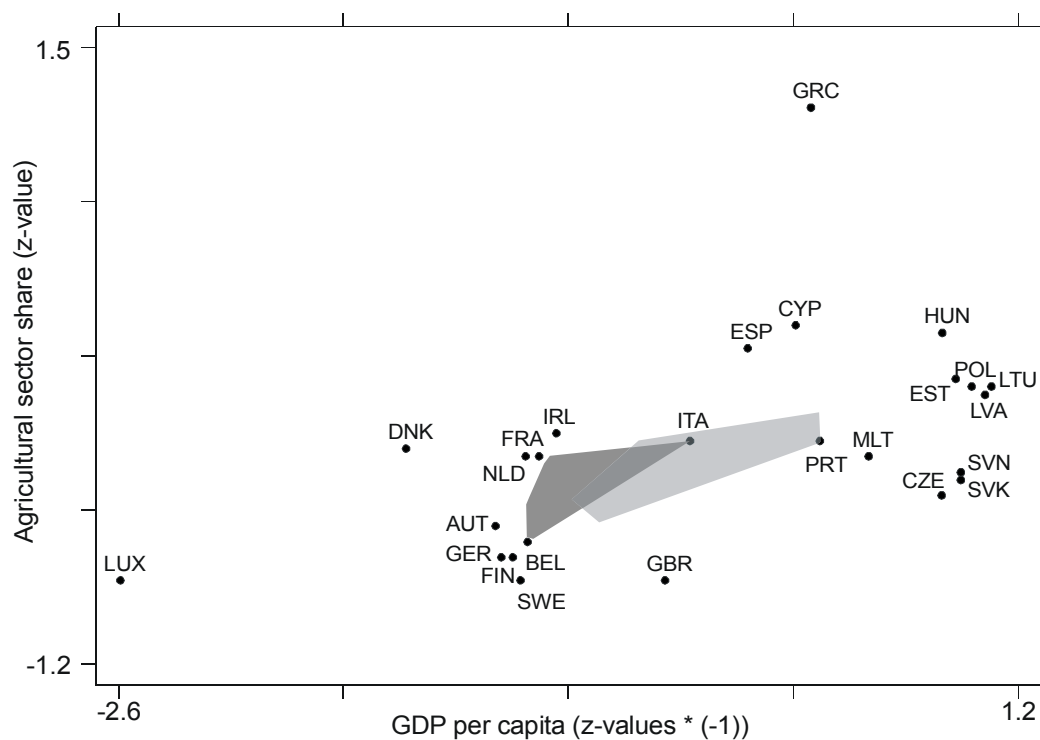


Figure 2: Core of EU agricultural policies with Nice and Convention rules
 (From König and Bräuninger, 2004)

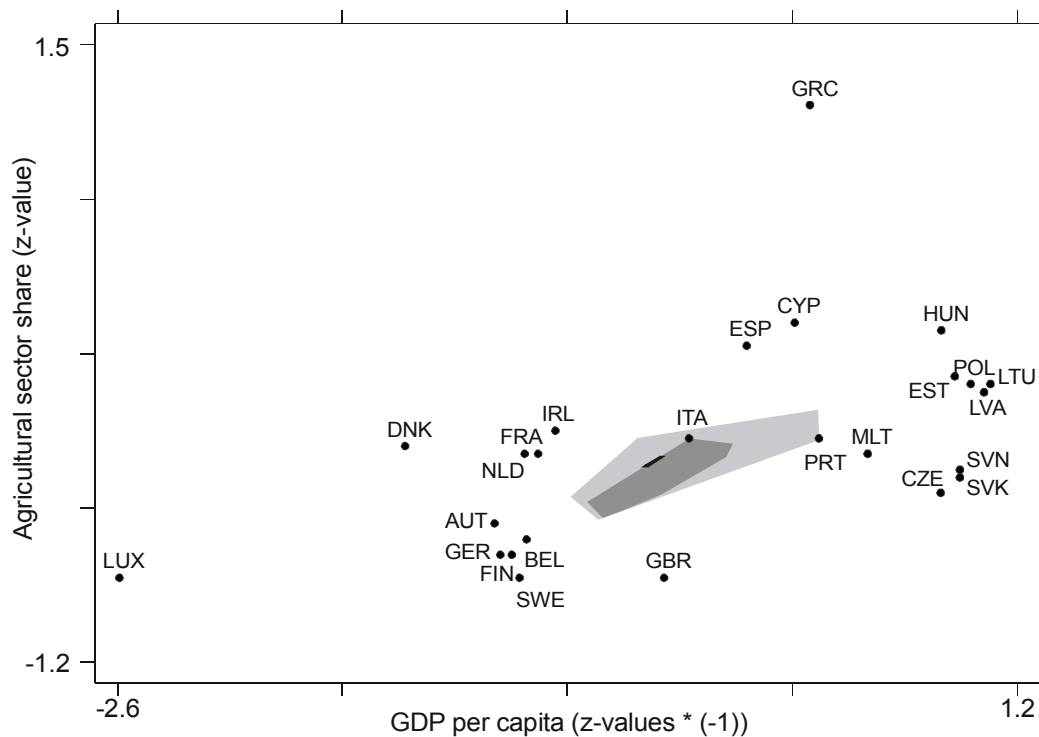


Figure 3

Winset by concurrent majorities, and by unanimity in the Council

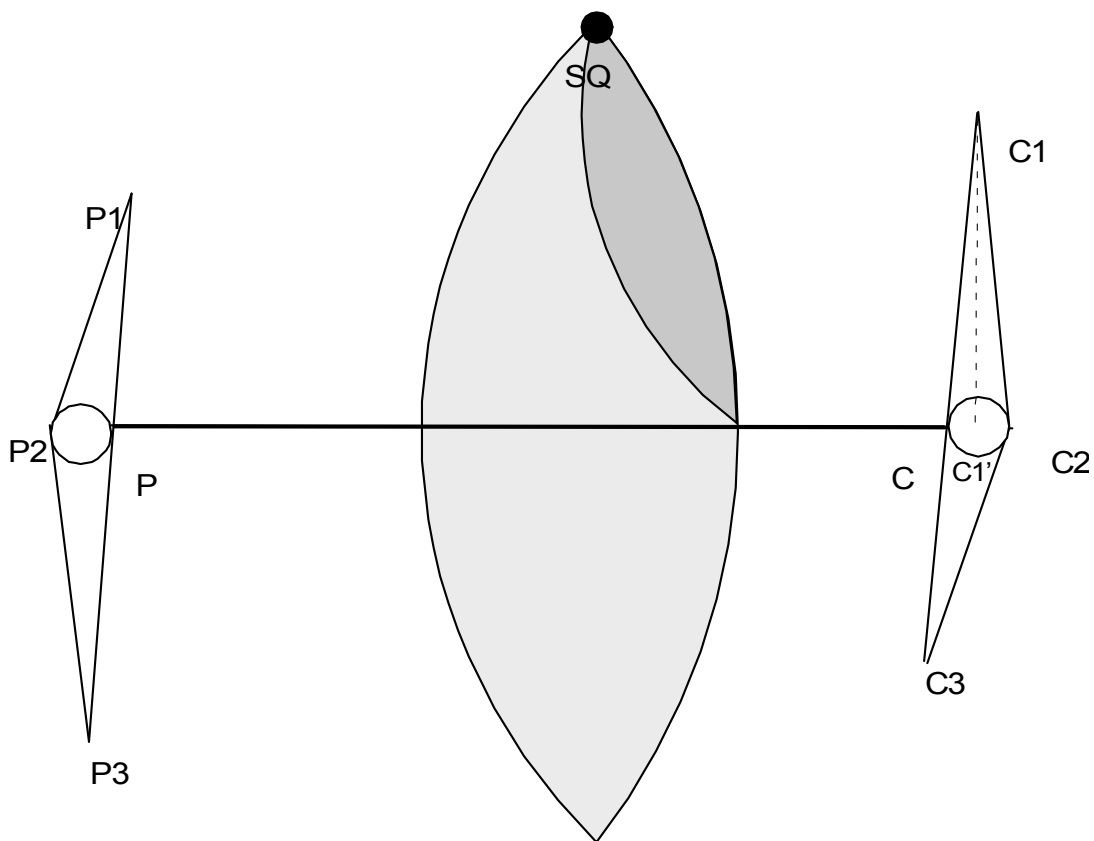
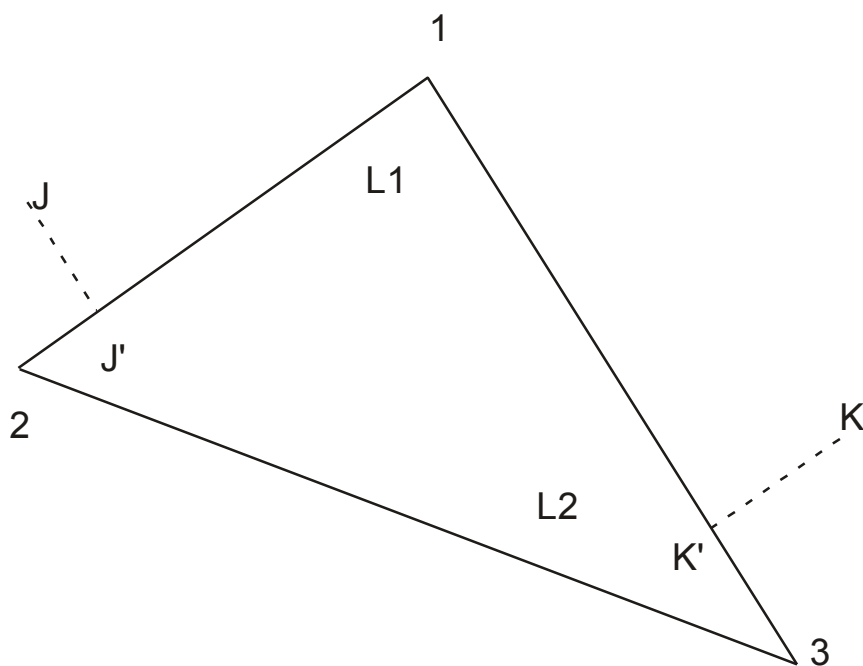


Figure 4

SELECTION OF A POLICY WITHIN THE CORE
BY FIRST MOVER (BUREUCRACY OR JUDICIARY)



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

Figure 5: Population and voting power of EU countries. Linear, and square root approximations

