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The Flexibility of Constitutional Design
Enlargement and the Council of the European Union

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Abstract

The choice of a decision rule for the Council of the EU constitutes a trade-off in terms of decreased sovereignty for individual governments versus an increased 'capacity to act'. The provisions of the draft constitutional treaty would considerably increase constitutional flexibility regarding day-to-day decision-making in the EU, but without adequately protecting the interests of the citizens of smaller and medium-sized member states. By comparison, provisions foreseen in the Treaty of Nice, which essentially amount to the implementation of a 'triple-majority rule' in Council decision-making, would lower the Council's capacity to act, but would lead to a more moderate 're-balancing' in favor of larger EU states. Finally, the paper provides background calculations indicating that, with twenty-five member states, the EU risks being unable to reach intergovernmental agreement and hence, a challenging issue for the EU is to move towards provisions allowing for its own constitution, once adopted, to be amended.

Zusammenfassung

Bei der Festlegung von Abstimmungsregeln im Rat der Europäischen Union muss zwischen Souveränitätseinbußen einzelner Regierungen und einer erhöhten kollektiven ‚Handlungs-fähigkeit' abgewogen werden. Die Regelungen, die im Entwurf zum Europäischen Verfassungsvertrag vorgesehen sind, würden die grundlegende Flexibilität im politischen Alltag der EU wesentlich erhöhen, ohne jedoch die Interessen der Bürger von kleineren und mittleren Mitgliedstaaten angemessen zu schützen. Im Vergleich dazu würden die Regelungen, die im Vertrag von Nizza vorgesehen sind und im wesentlichen auf ein ‚Dreifach-Mehrheits-Prinzip' bei Ratsentscheidungen hinauslaufen, die Handlungsfähigkeit des Rates mindern, aber zu einer gemäßigteren ‚Gewichtung' zu Gunsten der großen EU-Staaten führen. Am Ende legt der Artikel Hintergrundberechnungen vor, die darlegen, dass in einer EU mit 25 Mitgliedstaaten die Gefahr besteht, keine intergouvernementale Einigungen mehr erzielen zu können. Es wird daher eine Herausforderung für die EU sein, Regelungen in die Verfassung einzubauen, die eine Ergänzung dieser ermöglichen.

Keywords

Schlagwörter

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1. Introduction

In June 2003, the 'Convention on the Future of Europe' came to a close. The challenge of institutional reform had been significant for several years, and progress, generally, was by incremental steps. 'Amsterdam leftovers' had partially turned into 'Nice leftovers', as the December 2000 Nice Summit meeting far from resolved all of the outstanding institutional challenges facing the EU. The Convention dealt with a vast range of issues in a novel fashion, involving a variety of societal actors. Institutional reform was just one element of the broad range of discussions that took place in the Convention, although a rather central one.[1]

Some crucial institutional issues, even after the conclusion of the Convention, remain unresolved. One of the most important stumbling blocks for the potential acceptance of the draft constitutional treaty in mid-December 2003 turned out to be the central issue of the allocation of voting weights in the Council of the EU. As the *Economist* claimed, even before the failure of the December EU summit meeting, "The single most controversial issue concerns the balance of power between EU countries in the Council of Ministers".[2]

At the earlier 2000 Nice summit meeting, a re-weighting of votes in the Council of the EU (sometimes still called the 'Council of Ministers') had been decided after lengthy negotiations on the issue. Cleavages were then especially evident between larger and smaller EU states about appropriate voting weights in the EU Council. Insiders have provided descriptions of the tedious bargaining processes that led to the outcomes of the Nice negotiations (e.g. Galloway, 2001; Moberg, 2002). The results in terms of vote allocations appeared to be determined by 'power politics' rather than any careful background reflection, however.

In view of the central importance of voting weights in the Council of the EU, this paper mainly deals with voting weights and modes of majority voting in view of forthcoming EU enlargement. The Nice re-weighting of votes had largely been triggered by a dissatisfaction among large EU states with what they perceived to be a considerable overweighing of the influence of small and medium-sized countries in EU decision-making (e.g. Moberg, 2002). The provisions agreed upon at Nice also foresaw a moderate increase in the voting threshold applicable in the framework of qualified majority votes (QMV), thereby enhancing the capacity of EU states to block decisions (e.g. Felsenthal and Machover, 2001; Leech, 2002). In percentage terms, the required share of votes needed for proposals to be accepted was increased from the present level of just over 71 percent to approximately 74 percent of the total, in a projection of enlargement to 27 member states. An important rationale for EU states in the respective intergovernmental negotiations had been the maintenance of their

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[1] For an elaborate overview of the institutional aspects dealt with by the Convention, see Dinan (2003).

[2] The Economist, 22 November 2003, p. 35.

own capacity to veto, or at least their ability to block decisions together with like-minded states. The collective effect of such an adapted decision quota, however, would have been a decrease in the Council's overall capacity to act (e.g. Paterson and Silárszky, 1999; Felsenthal and Machover, 2001; Leech, 2002; Hosli and Machover, 2004).[3] The lengthy nature of the bargaining process that characterized the Nice negotiations, as well as similar discussions in the framework of the Convention, reinforce conjectures that reaching intergovernmental agreement within the EU may, in the future, be a rather tedious endeavor indeed. Unanimous decision-making, as this paper demonstrates, is rendered significantly more difficult when membership is significantly expanded. Evidently, the calculations provided in this paper provide simple 'averages' that ignore other specific conditions – such as effects of collective 'learning' and the related possibility of governmental preference convergence (e.g. Golub, 1999; 2002). Such developments might facilitate rather than complicate collective decision-making in the EU, even with an expanded membership. This paper claims, however, that enlargement by ten new members in spring 2004 will make any kind of unanimous intergovernmental agreement rather difficult to reach and hence prolong respective negotiations, whether on day-to-day issues regarding taxation, for example, or in the 'broader' and more general context of treaty reform (what might in the medium-term be interpreted as 'constitutional amendment'). The paper contends that a 'status quo bias' is likely to result in all areas formally requiring unanimous decisions in the Council of the EU. In a normative sense, given the significance of the enlargement, it might indeed be important – despite critiques raised against this suggestion by several member state governments – not only to replace the unanimity requirement with QMV for various issues areas, but also to find ways to adapt the constitution itself on the basis of a decision threshold lower than unanimity. If not, it is likely that the new constitution will develop into a static construct, unable to respond to new demands and challenges over time. Evidently, any basic polity-building process involves decisions on how future reform of a constitution should be undertaken as well as agreement on the original make-up of the constitution.

In terms of 'day-to-day' decision-making, the suggestion inserted into the draft constitution to allow for a 'double-majority' system in which proposals in the Council can pass when they are supported by a majority of EU states, representing three-fifths of the EU's population, is rather surprising. Clearly, abolishing voting weights, in a radical departure from the voting system applied since the late 1950s, would not only considerably increase the relative influence of larger EU states,[4] but would also strongly enhance the capacity of the Council to act.[5] Intergovernmental acceptance of such a system would undoubtedly be astonishing since such a change would largely abolish EU states' potential to block decisions, an aspect that is, as some have pointed out (e.g. Johnston, 1995; Moberg, 2002), salient to individual

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3   Interestingly, applying spatial representations of decision-making in the EU Council, Tsebelis and Yataganas (2002) come to the same conclusions.
4   E.g. see Felderer, Paterson and Silárszky (2003); Felsenthal and Machover (2003).
5   E.g. Felsenthal and Machover (2003).

governments. Could governments of EU member states ever have accepted such a drastic change? Apparently, the adapted system was not necessarily based on broad support: it was "proposed by the Convention on the Future of Europe in June, which claimed to be an open and democratic exercise. But the new voting system was decided upon at the last minute by the convention's presidium (steering committee) [...]".[6] Whereas this comparatively straightforward decision rule – in contrast to the complex construct agreed upon at Nice – might be desirable in terms of transparency and an increased capacity of the Council to act, it was likely to be a political non-starter; it is hardly imaginable that governments would be willing to accept such a sharp decrease in their capacity to prevent EU decisions from being adopted. However, since the effects of the proposed 'double-majority' system were not easily discernible, it can also be interpreted as being somewhat 'opaque'.[7]

Evidently, any institutional design is faced with conflicting requirements. Generally, institutions need to offer an adequate reflection of citizens' interests in order to be perceived as 'legitimate' constructs. However, they also need to be 'efficient' in the sense of enabling majorities to reach decisions. Finally, institutions need to protect the interests of minorities – whether these are cultural, geographic or linguistic, for example. Clearly, all of these requirements are crucial for the future of the EU. However, they are partially conflicting: enhancing the degree to which minority interests are protected in EU decision-making, for example, is likely to decrease 'efficiency' (in the sense of enabling majorities to reach decisions). In addition, maintaining current veto rights in areas such as taxation, a position strongly defended by the UK government, will evidently, after enlargement, slow down the EU's capacity to act in this domain. A similar logic undoubtedly applies to decision-making in the challenging and developing field of the EU's Common Foreign and Security Policy (CFSP).

This article focuses on the Council of the EU and examines the effects of the current voting system, the provisions agreed upon at the Nice summit meeting and those of the 'double-majority clause' contained in the draft constitution on decision-making in the EU. The paper contends that the combined effect of unanimity and enlargement has been, and will be in the future, to decrease the 'efficiency' of decision-making in the Council, in the sense of lowering the *a priori* chances of legislative proposals to be adopted within this institution. This implies that the interests, and relative sovereignty, of individual member states are protected, but also that previous enlargements are likely to have counterbalanced decisional 'efficiency gains' generated by the extension of QMV to policy areas previously subjected to the unanimity rule. *Ceteris paribus*, the effect of this will be that, in future, it will be more difficult than it is now to change the *status quo* even in 'day-to-day' EU decision-making, due to the

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6   The Economist, November 29, 2003, p. 34.
7   E.g. Felderer, Paterson and Silárszky (2003).

lower probability that decisions will be supported by a required Council majority.[8] Given the importance of the voting threshold (e.g. Leech, 2002), it seems that discussions at the Nice summit meeting have somewhat overemphasized the issue of vote re-weighting. Little attention has been paid to the crucial issue of the actual level of the QMV threshold. In addition, the Nice summit did not generate clear allocation rules for actual vote distributions. Rather, the allocation of voting weights in the Council and the projected distribution of seats in the European Parliament appear to be the product of *ad hoc* political bargaining (e.g. Taagepera and Hosli, 2003).

In this paper, the 'flexibility of constitutional design' refers to both the capacity of the EU Council to act and the capacity of the EU to adapt its constitutional provisions in the future. In this sense, an examination of the effecths of the institutional provisions, in combination with enlargement, on both 'rules on decisions' and 'rules on rules' is offered below. Methodologically, the article departs from the assumption that future distributions of member state preferences in the EU are not known with any degree of accuracy today, as these distributions tend to vary according to the policy domain concerned as well as over time. Hence, the paper employs a simple 'baseline' model in order to assess the EU Council's capacity to act and the capacity of the EU to reform itself in the future.

By presenting these calculations, the paper emphasizes that the ability of the Council to act is not solely determined on the basis of whether decisions are made according to the unanimity or QMV rule, but that this institution[9] is also affected by other important factors: notably voting weights, the level of the QMV threshold and the number of EU states.[10] In order to present and discuss these respective effects, the paper is structured as follows: section two focuses on the challenges of constitutional design, highlighting trade-offs regarding decision-making efficiency, flexibility and protection of minority rights, since they are certainly important to the EU's current plans for institutional change; section three describes ways to measure decision-making 'efficiency' by employing the concept of 'decision probability'; section four illustrates how different options regarding decision thresholds affect the Council's overall 'capacity to act' and demonstrates these effects in terms of decision probability and the relative distribution of influence among EU states resulting from both the Nice and Convention proposals; section five summarizes the main findings of this paper and concludes.

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8   Of course, depending on the constellation of preferences of EU member states in the Council, the European Parliament and the European Commission, for example, it may still be true that some issues are accepted rather swiftly, also in the framework of an EU of 25 members. On average, however, this paper claims that it will be more difficult to reach the required threshold after enlargement.

9   Although the term 'Council' is used here, the same logic, of course, applies to deliberations within the Committee of Permanent Representatives (COREPER) or working groups linked to the Council, for example.

10   These aspects are also emphasized by Leech (2002).

2. The Flexibility of Constitutional Design

Changing the EU's 'rules', through processes of treaty reform, currently still requires agreement among all EU governments, and subsequent domestic ratification. Clearly, the Convention constituted a novel way of adapting the EU's rules, but governments in the subsequent Intergovernmental Conference (IGC) were still able to 'open up' the entire negotiation package and approve, or avoid, insertion even of specific elements into the draft constitutional treaty. Hence, 'constitutional rules' presently need to be agreed upon unanimously. Evidently, this will be increasingly difficult in the future in view of the substantial expansion of EU membership. In this sense, 'rules on rules' for the EU will be difficult to adapt if respective provisions are not changed – including decisions on the choice of EU decision rules themselves.

As outlined above, ideally, constitutions are designed to meet various, partially contradicting, requirements. Most importantly, they need, on the one hand, to represent the interests of a majority of the constituents and, on the other hand, to protect the wishes of minorities (such as different language, cultural or religious groups), while still remaining flexible in terms of their capacity to make decisions, reform themselves, and adapt to new circumstances and challenges.

In federal as well as 'quasi-federal' political systems,[11] such trade-offs among different objectives tend to be both crucial and politically salient, since the overall constitutional design needs to protect the interests of individual system components in order to provide them with incentives to remain within the structure. As is well known, the United States, based on a federal setup, has its member states represented on an equal basis in the Senate, the parliament's 'upper house', in spite of the fact that their population sizes vary considerably. Accordingly, representation in the Senate is on the basis of territory rather than population. By comparison, in the U.S. Congress, states are represented according to population, with smaller states being represented more favorably.[12] Other federal systems are based on similar patterns of representation. This is true for Australia, Canada, Germany and Switzerland. A challenge for such systems is to protect the rights of their constituent units – states, provinces, cantons, or *Länder* – while still allowing for sufficient efficiency in federal decision-making. Moreover, the inclusion of provisions for constitutional amendment and reform presents a particular conundrum for these systems.

Challenges to the federal system's 'capacity to act' are extensive, for example, in the case of Switzerland, a small advanced industrialized democracy encompassing several language groups. Swiss double-majority referenda – such as those required for decisions on potential

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11   In a not overly bold assessment, we might classify the current EU into the latter category.
12   For an early analysis of this issue, see Robert Dahl (1956).

membership of supranational organizations, including the EU, and for constitutional amendment more generally – protect the rights of the Swiss *cantons* to a considerable extent: in order to pass, referenda need to be supported by a majority of votes cast by Swiss voters and a majority of votes in a majority of the 23 cantons. This institutional hurdle is rather difficult to take, as the large share of non-accepted proposals illustrates.[13]

Canada's Constitution Act, proclaimed on 17 April 1982, provided a formula regarding procedures for its own amendment. The compromise reached among the Canadian provinces is contained in section 38 of the Act, stating that amendments require "[...] resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty percent of the population of all the provinces" (38(1)(b)).[14] The effects of this provision in terms of the balance of influence among Canadian provinces, and the inherent flexibility of the system, have been analyzed extensively by D. Marc Kilgour and Terrence Levesque (1984). Despite the current widespread opposition of member state governments to this suggestion, it seems highly likely that, in view of its future size, the EU will need a similar provision regarding amendments of its own constitution if it is to avoid gridlock.

In James Buchanan and Gordon Tullock's seminal work, *The Calculus of Consent* (1962), decision-making costs, generally, are assumed to increase with the number of players involved. According to the authors, a reduction in the relevant requirement for making decisions – a decrease in the 'decision threshold' – enhances the capacity of an institution to act. This approach resembles Coleman's analysis of the 'power of a collectivity to act' (Coleman 1971), to be discussed and applied in more detail below. Unanimity rules ensure that all voters endorse a specific issue and no one gets outvoted,[15] as Buchanan and Tullock emphasize, but they imply relatively high costs regarding the process of reaching agreement (e.g. negotiation and transaction costs). From the perspective of individual voters, in the framework of majority votes, the risk of being adversely affected by a collective decision contradicting one's own preferences is most extensive under the simple majority rule (i.e. 50 percent of the total plus 1 vote). The higher the decision threshold, the better is the protection of individual interests, but the lower is the capacity of the collectivity to act.

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13   For an analysis of the 'stability' of Swiss politics more generally, using spatial models of decision-making, see Moser (1995).

14   Evidently, this formula resembles the 'double-majority' clause envisaged by the EU draft constitution as regards 'day-to-day' decision-making, but with reversed decision thresholds regarding population and number of provinces.

15   However, members may receive 'side-payments' in order to induce them to support a proposal. Moreover, they may 'log-roll', i.e. trade their votes, obtaining support on an issue crucial to them in exchange for a vote on an issue they consider to be of lesser importance. On effects of log-rolling more generally, e.g. see Tullock (1976).

In federal systems, the attribution of a relatively favorable pattern of representation to smaller units may generally increase the sense of the 'legitimacy' the system generates amongst its citizens (as long as it is not perceived by citizens of larger states as tilting the balance of influence towards smaller entities). In such systems, smaller groups – characterized by specific cultural or linguistic ties for example – are able to block decisions they consider to be detrimental to their own interests. Accordingly, such groups may choose the option of 'voice' rather than 'exit'[16] within the federal structure. However, it seems likely that the protection of the interests of individual components in a system has an optimum beyond which the flexibility of the system decreases, leading ultimately to a situation in which the system is no longer capable of generating decisions (or of reforming itself).[17]

Similarly, in the EU, smaller states may need to have a certain minimum clout in the decision-making process in order to enable their citizens to feel content with the overall system. The risk of feeling dominated by larger states is ever present in smaller EU states and appears to constitute a realistic threat to the perceived legitimacy of the EU's institutional setup. Indeed, negotiations leading to the Treaty of Nice illustrated the extent to which smaller and medium-sized EU states were willing to defend their voting weights, fearing 'marginalization' in the EU's decision-making process, and voicing concern about possible increases in the relative power of the largest states (e.g. Moberg, 2002). Larger EU states, in turn, felt there was an increasing domination of the large by the small, presenting this finding as a rationale for why their citizens considered the extant system to be lacking 'legitimacy'. It is, in fact, this discussion that spurred the debate on the need to re-weight votes in the Council.[18]

A considerable range of recent studies has assessed the relative 'swiftness' of EU decision-making, employing various methodological tools, and providing some empirical evidence. For example, Golub (1999; 2002) finds, analyzing EU directives, that the introduction of QMV, combined with enlargement, has not caused a slow-down in EU decision-making over time. But could the effects be more pronounced when more members join? König and Bräuninger (2002), in their analysis of regulations in addition to directives, contend that, in cases in which QMV applies, the relative swiftness of decision-making does indeed slow down with enlargement. A similar finding is provided in Schulz and König (2000).

In terms of increased 'legitimacy' and 'democratic accountability', most studies agree that the enhanced role of the EP in EU decision-making procedures is likely to have increased democratic 'legitimacy'. But, evidently, it may also have slowed down the swiftness of EU

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16   For a succinct distinction between 'voice' and 'exit', and on the importance of the concept of loyalty, see Hirschman (1970).
17   For an analysis of the trade-off between different principles of representation in the EU, and consequences in terms of the balance of influence among actors, see Laruelle and Widgrén (1998).
18   See Best (2000).

decision-making. This is a significant trade-off, highlighted, for example, in Golub (1999), Schulz and König (2000) and König and Bräuninger (2002). If the capacity of the EU to act is to remain constant over time, increasing powers for the EP – desirable in terms of strengthening the EU's democratic foundations – may need to be counterbalanced by decreasing decision-making costs in the Council (i.e. by lowering the threshold in Council decision-making rather than increasing it). In this sense, the suggestion contained in the draft constitution could provide a helpful remedy to past trends.

Similarly, in some work applying the spatial theory of voting to the analysis of EU decision-making, the decision quota is found to be of crucial importance. For example, Christophe Crombez (1996) highlighted various institutional provisions leading to relative 'indecision' in EU decision-making and maintaining a 'status quo bias'. The author suggested adopting the simple majority rule in Council decision-making, in order to alleviate the inherent inflexibility of the EU's decision procedures. Similarly, using other analytical techniques, Lane and Maeland (1995) and Peters (1996) have advocated the introduction of a simple majority rule for EU Council decision-making.

A somewhat more radical option would be the introduction of a 'one state, one vote' rule – without a second quotum regarding population size – in the Council, similar to the model of the U.S. Senate. Whereas such a provision would certainly enhance decision efficiency in the EU, it appears to be impossible to implement politically (e.g. see Baldwin et al., 2001). The recent Convention suggestion, however, amounts to almost such a simple majority clause, by abolishing the voting weights of individual EU states and allocating one vote to each state (while providing for a second quotum, the 60 percent of population provision).

However, a simple majority rule would significantly reduce the 'blocking capacity' of EU governments in the Council. Similarly, if not paralleled by a second population quotum, it would lower the influence of larger states in EU decision-making. If, against what appears to be politically feasible at present, the option of simple majority votes becomes, in the long run, a politically acceptable solution, the power of member states to block collective decisions, and hence the protection of their sovereignty, would also decrease.

How can the likelihood that decisions are taken in the Council be assessed in a way that provides a 'baseline' scenario? One possibility might be to use spatial models of decision-making (as was presented by Steunenberg et al., 1999) in an assessment of the probability that, with different preference constellations, a required majority can be reached in the Council. However, another possibility consists of using the decision threshold in order to assess the likelihood that winning coalitions form *ceteris paribus*, ignoring other possible influences.

3. Voting Weights, Winning Coalitions and 'Efficiency' in Council Decision-Making

How will 'efficiency' of decision-making be measured in this article? The main focus of the analysis is on the probability that, within a committee, winning coalitions can be formed. Accordingly, the following sections analyze 'efficiency' by calculating the probability that a randomly selected coalition among EU member states can meet the required decision quota (here the majority requirement in the Council's voting procedures). The approach essentially provides figures on the proportion of winning coalitions in all possible coalitions among EU member states, using Coleman's measure of the 'power of a collectivity to act' (Coleman, 1971). For similar approaches, see Buchanan and Tullock (1962), Kilgour and Levesque (1984), Peters (1996), König and Bräuninger (1998; 2002), Baldwin et al. (2000; 2001), Paterson and Silàrszky (2003), Felsenthal and Machover (2001; 2003) or Hosli and van Deemen (2002). The measure provided in this article thus largely neglects political variables and the resulting estimates on the likelihood that specific coalitions form among members on the basis of particular preference configurations.[19] The approach aims to provide measures of 'constitutional flexibility', valid over longer time spans and for a broad variety of issue areas.

The technique focuses on the concept of 'winning coalitions'. Formally, the existence of a winning coalition can best be conceptualized in the framework of the theory of simple games.[20] A simple game is an ordered pair of sets G=(N,W), where N denotes the full player set and W is a set of coalitions (or subsets of N). An element of W is termed a winning coalition (correspondingly, the set of losing coalitions is generally denoted by L).[21]

A weighted threshold game is a simple game in which a voting weight is assigned to each player. In such a game, a coalition is winning when the sum of the voting weights of the coalition members is larger than, or equal to, the decision threshold (the 'quota' of the game).

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19   In this sense, the calculations provide 'baseline' estimates – almost to be compared to a regression line in regression analysis; see Leech (2002).

20   On the following, e.g. see van Deemen (1997).

21   The following axioms apply with respect to winning coalitions: (1) any coalition which contains a winning sub-coalition is itself winning; formally, if $S \in W$ and $S \subseteq T$, then $T \in W$ (monotonicity requirement); (2) there are winning coalitions: $W \neq \varnothing$; (3) the empty coalition is not winning ($\varnothing \neq W$). Axioms (2) and (3) ensure that trivial games are excluded (see van Deemen, 1997). On legislatures and simple games also see Rapoport (1970: 207–21).

A weighted threshold game G is represented by G = [q; w_1, w_2, ..., w_n], with q denoting the decision quota and w_i player i's voting weight. Formally, in a weighted threshold game, a winning coalition satisfies the condition

$$S \in W \, if \, and \, only \, if \sum_{i \in S} w_i \geq q \qquad (1)$$

In words, coalition S is winning if and only if the sum of the weights of the players in the respective coalition equals or exceeds the decision threshold.

In a committee of size n, the total number of possible coalitions (combinations) among members, including the 'grand coalition' and the empty coalition, is 2^n. Subsequently, the number of winning coalitions – for the EU Council in our case – will be denoted by |W|. When no restrictions on coalition-formation are introduced, the measure for relative 'efficiency', λ, can simply be calculated with Coleman's index of the power of a collectivity to act (Coleman 1971):[22]

$$I = \frac{|W|}{2^n} \qquad (2).$$

Some easy examples can illustrate how values for λ are generated. In the voting game G = [4; 1, 2, 3], for example, the total number of coalitions is 2^3 = 8. The following non-empty coalitions can be formed among actors: [1], [2], [3], [1, 2], [1, 3], [2, 3], [1, 2, 3]. However, clearly only 3 out of these coalitions are winning: [1, 3], [2, 3] and [1, 2, 3], since the sum of the voting weights of their elements exceeds, or is equal to, four. Therefore, the figure on relative 'efficiency' for this example is three-eighths (37.5 percent). If the quota were to be increased to 5, the decision probability would decrease to one-quarter (25 percent).

The analysis needs to be adapted, however, when a double-majority clause applies. Formally, as an extension of equation (1), the double-majority requirement is given by

$$S \in W \; iff \; \sum_{i \in S} w_i \geq q_1 \; \cup \; \sum_{i \in S} p_i \geq q_2 \qquad (3).$$

Applied to the EU, q_1 may denote the voting weight threshold, w_i the voting weight of Council member i,[23] p_i member i's share in the EU population total, and q_2 the second decision

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22   In the computer program provided by Bräuninger and König (2001), this index is aptly referred to as 'decision probability'.

23   Note, however, that according to the draft constitutional treaty, votes of EU states would be non-weighted.

quotum (the threshold in terms of the required share in total EU population). Winning coalitions in the Council under the double-majority clause, according to equation (3), require that both decision quotas be met simultaneously.

In order to further clarify effects, assume that a double-majority rule holds in a committee in which the 'one member, one vote' rule applies and in addition, that proposals can be accepted when they are supported by a predetermined majority of the population as represented by the committee members. Let player A's population be 20 percent of the total, B's 30 percent and C's 50 percent, and the required (second) decision threshold (q_2) 60 percent of the population total. While the example simplifies the decision-making process in terms of the number of committee members, it clearly simulates the 'double-majority' clause foreseen in the EU draft constitutional treaty.

The following winning coalitions among committee members simultaneously meet both decision thresholds: {A,C}, {B,C}, and {A,B,C}. These coalitions are winning because they meet both the first threshold (majority of members) and the second one (majority of population). Other coalitions are not successful with regard to at least one of the two requirements (a majority of votes or of population as represented by the players), however. More specifically, coalition {A,B} meets the requirement with respect to the first quotum (as two out of three members are needed to support a proposal), but it fails to meet the second requirement.

By comparison, the Treaty of Nice has stipulated a 'triple majority clause':[24] it required a qualified majority of voting weights and, generally, a simple majority of the EU states for decisions to pass. In addition to this, verification could be requested that the votes represent at least 62 percent of the EU population total. Effects of this rule have been analyzed extensively in Felsenthal and Machover (2001), for example, who demonstrate, *inter alia,* that the requirement regarding a majority of member states was superfluous, since there is no winning coalition that satisfies the first two requirements while not being composed of a majority of member states.

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24   See Treaty of Nice (2001); Felsenthal and Machover (2001).

4. The Nice and Convention Proposals: A Comparison with EU Council Decision-Making in the Past and Present

Evidently, QMV, as compared to the unanimity rule, tends to increase the Council's 'capacity to act' – a point often emphasized by practitioners (e.g. Moberg, 2002). Using the method of assessment applied above, how 'flexible'would decision-making in the Council be if either the provisions foreseen by the Treaty of Nice or the new suggestions contained in the draft constitution were to be implemented?

In order to allow for a comparison over time, the distribution of votes among the EU states and the QMV threshold are shown in table 1 for the various stages in the EU's history,[25] and include the Nice and draft constitution proposals. As can be seen, the Nice re-weighting of votes was the first instance of an increase in the voting weights of larger EU states since the re-weighting of votes that accompanied the 1973 enlargement.

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25   See Hosli (1993), Paterson (1997), Felsenthal and Machover (1998; 2001). Note, however, that the use of
      QMV was limited in practice because of the 'Luxembourg compromise'. This compromise was resorted to in
      the 1960s after the French 'policy of the empty chair'. The compromise led to the requirement of unanimity
      whenever a member state's 'crucial national interests' were considered to be at stake.

Table 1: The Distribution of Votes and the QMV Threshold in the Council of the EU

Member States	1958–1972	1973–1980	1981–1985	1986–1994	Since 1995	Nice Treaty[1] (Triple Majority)	Draft Constitution (Double Majority)
Germany	4	10	10	10	10	29	1
France	-	10	10	10	10	29	1
UK	4	10	10	10	10	29	1
Italy	4	10	10	10	10	29	1
Spain	-	-	-	8	8	27	1
Poland	-	--	--	5	-	27	1
Netherlands	2	5	5	5	5	13	1
Greece	-	-	5	5	5	12	1
Belgium	2	5	5	5	5	12	1
Czech Republic	-	-	-	-	-	12	1
Portugal	-	-	-	-	5	12	1
Hungary	-	-	-	-	-	12	1
Sweden	-	-	-	-	4	10	1
Austria	-	-	-	-	4	10	1
Slovakia	--	-	-	-	-	7	1
Denmark	-	3	3	3	3	7	1
Finland	-	-	-	-	3	7	1
Ireland	-	3	3	3	3	7	1
Lithuania	-	-	-	-	-	7	1
Latvia	-	-	-	-	-	4	1
Slovenia	-	-	-	-	-	4	1
Estonia	-	-	-	-	-	4	1
Cyprus	-	-	-	-	-	4	1
Luxembourg	1	2	2	2	2	4	1
Malta	-	-	-	-	-	3	1
QMV Threshold							
a) voting weights	12	41	45	54	62	232 [1]	13
b) population	--	--	--	--	--	282.7 mio (62 %)	273.5 mio (60 %)
c) member states	--	--	--	--	--	13	13
Total							
a) voting weights	17	58	63	76	87	321	25
b) population	--	--	--	--	--	455.9 mio	455.9 mio
c) member states	--	--	--	--	--	25	25

1) Transitional arrangement envisaged for 1 May 2004 through 1 November 2004;
see http://europa.eu.int/institutions/council/index_en.htm).

In a surprisingly regular pattern, moreover, the voting threshold for QMV, since the end of the 1950's, has stayed constant at about 71 percent of the weighted vote total.[26] By comparison, the convention proposal, would constitute a radical departure from the traditional pattern by allocating one vote to each member state. An additional population criterion (62 percent) was first introduced by the Treaty of Nice and modified (to 60 percent) in the Convention proposal.

Applying the methodology described above, table 2 gives an overview of the proportion of winning coalitions in the Council that can form when coalition-formation is non-restricted, for each stage in the EU's history. In addition, it shows the consequences of the provisions contained in the Nice Treaty and the draft constitution, respectively. To allow for comparison, table 2 also provides the respective number of possible winning coalitions under the unanimity requirement.

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26   Hosli (1993).

Table 2: The Capacity of the Council to Act under QMV and Unanimity (Coleman's Measure of the Power of a Collectivity to Act)

	1958–1972	1973–1980	1981–1985	1986–1994	Since 1995	Nice (Triple Majority)	Draft Constitution (Double Majority)
Number of member states	6	9	10	12	15	25	25
Number of possible coalitions (combinations) among member states	2^6	2^9	2^{10}	2^{12}	2^{15}	2^{25}	2^{25}
QMV							
Number of possible winning coalitions	14	75	140	402	2'549	1'203'784	7'548'821
"Decision probability": share of winning coalitions in total (in percent)	21.88	14.65	13.67	9.81	7.78	3.59	22.50
Betting odds against passing	3.57:1	5.83:1	6.32:1	9.19:1	11.85:1	26.86:1	3.44:1
Unanimity							
Number of winning coalitions	1	1	1	1	1	1	1
"Decision probability": share of winning coalitions in total (in percent)	1.5625	0.1953	0.0977	0.0244	0.0031	0.00000298	0.00000298
Betting odds against passing	63:1	511:1	1'024:1	4'097:1	32'257:1	33'557'046:1	33'557'046:1

Increased membership, as table 2 illustrates, appears to have considerably reduced the Council's capacity to act under the unanimity requirement – as it applied with respect to decisions taken either on the basis of the 'Luxembourg compromise' or decisions formally

requiring unanimity (such as taxation). Under the unanimity rule, one in 64 coalitions (1.56 percent) is winning in the framework of a six-member committee, whereas this proportion decreases to one in 32'768 (or 0.0031 percent) in an institution encompassing fifteen members, implying a significant change in the 'betting odds against passing'[27] from 63:1 to 32'257: 1. With twenty-five members, decision probability decreases to one in 2^{25}, implying that obviously, the betting odds against passing are considerable indeed.

These figures appear to be rather abstract. However, intuitively, it appears to be plausible that it is easier to reach agreement among three players than among ten, for example, although situations can of course be imagined in which the reverse holds true (depending on the specific distribution of players' preferences). In this sense, the above figures provide simple 'averages', indicating the *a priori* chances of forming various winning coalitions, based on the decision weights and thresholds, ignoring any other information (such as specific preference constellations). They give simple trend lines regarding the extent to which decision-making may become more tedious with enlargement.

How has decision probability changed in the framework of QMV over time? Since the QMV threshold remained at about 71 percent with each enlargement, one would expect that 'decision probability' – measured as the share of winning coalitions in all possible coalitions among members – would have remained largely constant over time (a piece making this claim is Moberg, 2002). However, this intuition is misleading, as table 2 illustrates. The overview shows that a decrease in the Council's capacity to act under QMV should be expected to have occurred between 1958 and the present, as the share of winning coalitions in the total that could be formed among member states was more than one in five (21.9 percent) in the first phase of the Community's existence, 14.7 percent after the 1973 enlargement and lower ever since: between 1981 and 1985, the share was 13.7 percent, with a subsequent drop to 9.8 percent (1986–94). In the current constellation of EU membership, the ratio of winning coalitions to all coalitions that can be formed under QMV among the 15 member states is 7.8 percent. Accordingly, the betting odds against passing within the EU Council have dropped from about 3.57:1 to 11.85:1 between 1958 and the present. The change, as compared to unanimity, is less dramatic, but significant nonetheless.

Of course, decision-making could still be swift if enlargement is paralleled by a convergence of preferences, thus maintaining the ability of the Council to act. This claim would be in agreement with Golub's empirical analysis (Golub, 1999; 2002). Accordingly, when members' preferences are relatively close to each other, it may be possible that it is rather easier to agree, even when the group size expands.

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27   This measure is adopted from Hosli and Machover (2004).

Under the provisions of the Nice treaty and with 25 members, the Council's decision probability under QMV would decrease to 3.6 percent. By comparison, under the provisions foreseen by the draft constitution, it would remain remarkably flexible at 22.5 percent,[28] reaching a decision probability that is even slightly higher than that attained in the 1958–1973 phase.

Certainly, resorting to more QMV decisions in the framework of the 1987 Single European Act (SEA) may have facilitated EU decision-making. However, analyzed with the tools described above, this change may have been counterbalanced to a certain extent by the loss in flexibility induced by increased EU membership. In this sense, moving from unanimity to QMV is not the only remedy against low decision capacity: the decision threshold plays an imminently important role regarding the Council's 'capacity to act' (Leech, 2002; Hosli and Machover, 2004).

Effects on decision probability are not the only consequences of the recent suggestions for voting weight adaptations, however. Clearly, distributional effects also materialize. Much of the recent discussion has focused on the effects that the provisions of the Treaty of Nice and those of the draft constitution would generate regarding the balance of influence among EU states in the Council of the EU. Since these respective calculations use similar tools to those applied above, table 3 applies two prominent power indices in order to indicate the current distribution of *a priori* influence among EU states in the Council and the effects generated by the Nice and Convention proposals on this distribution.[29]

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28 Another method has recently been applied for measuring decision probability, based on the Shapley-Shubik approach. This approach finds a more moderate decrease in the Council's capacity to act according to the Nice provisions, but similarly, a lower figure for decision efficiency in the Council under the Convention proposal (oral communication with Iain Paterson, December 2003).

29 For helpful information on the characteristics of various power indices, e.g. see Pajala et al. (2002).

Table 3: Relative Voting Power of EU States in the Council: The Nice and Convention Proposals (Normalized Banzhaf and Shapley-Shubik Index)

Member State	Population 2003 (in million)	15 EU States (Since 1995)		Nice (25 Members)		Convention (25 Members)	
		Normalized Banzhaf Index	Shapley-Shubik Index	Normalized Banzhaf Index[1]	Shapley-Shubik Index[1]	Normali-zed Banzhaf Index[1]	Shapley-Shubik Index[1]
Germany	82.4	11.16	11.67	8.56	9.49	13.25	16.38
France	60.2	11.16	11.67	8.56	9.37	9.57	11.33
UK	60.1	11.16	11.67	8.56	9.37	9.56	11.31
Italy	58.0	11.16	11.67	8.56	9.37	9.27	10.88
Spain	40.2	9.24	9.55	8.12	8.67	6.87	7.78
Poland	38.6	--	--	8.12	8.67	6.75	7.53
Netherlands	16.2	5.87	5.52	4.23	3.95	3.63	3.40
Greece	10.7	5.87	5.52	3.91	3.61	2.93	2.52
Belgium	10.3	5.87	5.52	3.91	3.61	2.88	2.46
Czech Republic	10.2	--	--	3.91	3.61	2.87	2.44
Portugal	10.1	5.87	5.52	3.91	3.61	2.86	2.43
Hungary	10.0	--	--	3.91	3.61	2.85	2.41
Sweden	9.9	4.79	4.54	3.27	2.99	2.83	2.40
Austria	8.2	4.79	4.54	3.27	2.99	2.62	2.14
Slovakia	5.4	--	--	2.31	2.07	2.26	1.72
Denmark	5.4	3.59	3.53	2.31	2.07	2.26	1.72
Finland	5.2	3.59	3.53	2.31	2.07	2.24	1.69
Ireland	3.9	3.59	3.53	2.31	2.07	2.07	1.50
Lithuania	3.6	--	--	2.31	2.07	2.04	1.45
Latvia	2.3	--	--	1.33	1.17	1.87	1.25
Slovenia	1.9	--	--	1.33	1.17	1.82	1.19
Estonia	1.4	--	--	1.33	1.17	1.75	1.11
Cyprus	0.8	--	--	1.33	1.17	1.68	1.02
Luxembourg	0.5	2.26	2.07	1.33	1.17	1.64	0.98
Malta	0.4	--	--	0.99	0.87	1.63	0.96
Total	455.9	100.0	100.1	100.0	100.0	100.0	100.0

[1] Results generated with König and Bräuninger (2001).

Clearly, the suggestion of the draft convention is 'radical' in terms of its distributional consequences, allocating more *a priori* power to larger EU states.[30] Even though the Council proposal could have increased the decision probability within the Council, this 'balancing' may have been a major rationale for why the EU summit meeting in December 2003 on the draft constitution failed: the relative influence of member states in the Council, on the basis of the distribution of voting weights, is indeed central to states' interests.

Hence, the Convention succeeded in formulating provisions to enhance the capacity of the Council to act. With this, however, it lowered the ability of individual governments to block collective EU decisions and suggested a re-balancing of influence within the Council in favor of the larger EU states.

5. Conclusions

This paper shows that the choice of a decision rule for the Council of the EU constitutes a trade-off in terms of decreased sovereignty for individual governments versus an increased 'capacity to act'. This trade-off is well known from the various debates about moving from the unanimity rule to QMV in some important policy fields, including foreign and security policy, and taxation.

The relevant decision rules will not only matter regarding 'day-to-day' decisions in the EU Council, however. Supporting general intuition, this paper provides background calculations which indicate that, with a significantly expanded membership, the EU will indeed risk being unable to reach intergovernmental agreement. Accordingly, a challenging issue for the EU is to move towards provisions allowing for its own constitution, once adopted, to be amended: again, the trade-off between state sovereignty and the EU's capacity to act is at the core of this dilemma.

In view of enlargement to 25 members in spring 2004, the EU risks paralysis of its own decision-making capacity. The European Convention has come up with an ingenious design that would, as this paper demonstrates, indeed enhance the capacity of the EU Council to act. However, this change would also strongly increase the relative influence of larger states in EU decision-making. Accordingly, it would lower the protection of the interests of smaller and medium-sized EU states. By contrast, the provisions foreseen in the Treaty of Nice, which essentially amount to the implementation of a 'triple-majority rule' in Council decision-

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30 In interpreting the results of table 3, it has to be kept in mind that each enlargement usually generates a relative decrease in the power of current EU states. In this sense, an increase in the relative power of Germany from currently 11.16 percent to 13.25 percent (Banzhaf index) and from 11.67 percent to 16.38 percent (Shapley-Shubik index) is considerable indeed.

making, would lead to a more moderate 're-balancing' in favor of larger EU states, but would lower the Council's capacity to act.

Such findings are not necessarily intuitively plausible. Background calculations are needed in order to discern the effects not only of different vote allocation schemes, but also of various other elements needed to form winning coalitions in the Council (such as the number of EU states, the required population threshold and a qualified majority of voting weights). The findings of this paper have profited from the fact that programs readily available on the internet, especially 'Indices of Power' (König and Bräuninger, 2001) and 'Powerslave' (Pajala et al., 2002), make calculations, even for twenty-five member states, relatively simple exercises to undertake. The results presented in this paper corroborate similar findings presented elsewhere (e.g. Federer et al., 2003; Felsenthal and Machover, 2003). In spite of a number of critiques that have been made against techniques which analyze voting power and decision probability (e.g. Albert, 2003), such techniques may indeed still be useful (e.g. Baldwin et al., 2001; Felsenthal et al., 2003) in assessing the central institutional challenges facing the EU in view of the forthcoming enlargement.

Reflecting on the results presented in this paper, it is far from astonishing that intergovernmental agreement on the EU draft constitutional treaty may largely have failed due to the salient issue of the relative influence of EU states in EU Council decision-making. Not only would the proposals of the draft constitution have increased the Council's capacity to act, leading to respective decreases in governments' blocking power, but it would also have significantly enhanced the influence of larger states in EU decision-making. In this sense, it would have considerably increased constitutional flexibility regarding EU day-to-day decision-making, but without adequately protecting the interests of the citizens of smaller and medium-sized EU states. In spite of its considerable achievements, including an increased capacity of the Council to act, the draft constitution may have paid too little attention to the 'legitimacy' concerns of smaller entities. In addition, the draft constitution was not successful in establishing new procedures for the EU's capacity to adapt its 'rules on rules' – thereby deteriorating the EU's overall flexibility of constitutional design.

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