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Designing Democratic Institutions: Legitimacy and the Reform of the Council of the European Union in the Lisbon Treaty¹

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1. Introduction

The widely perceived ‘democratic deficit’ of the European Union has spawned a major debate among scholars and politicians with featured prominently in the discussions leading to the Lisbon treaty. Even though at first glance the European Union’s (EU) institutional set-up is in line with democratic practice at the national level, its policies do not seem to enjoy the same level of legitimacy as those in national political systems. Because the EU has a growing influence on the lives of European citizens, increasing the legitimacy of its policies has assumed high priority on the agenda of European political elites. One of the explicit goals of the treaty reform process leading to the Lisbon treaty was to address this shortcoming of the Union. The envisaged reform was meant to take up the ‘democratic challenge’ and bring Europe closer to its citizens according to the Laeken Declaration, which set the agenda for a Convention on the Future of Europe. The Convention was charged with preparing a new treaty and set out to write a constitution for the EU. In the event, a somewhat less ambitious new treaty, the Lisbon treaty, was adopted. One of the main topics raised by the debate was the reform of legislative decision-making in the Council. The Council is a key body in the legislative process as all legislative proposals need the consent of the Council to become law.

The scholarly debate on the democratic deficit focused on two issues. First, whether or not there is a democratic deficit. Second, what changes – if any – are necessary to successfully address this issue. With regard to the existence of a democratic deficit, Majone (1998) argues that the EU is (only) setting regulatory policies. To ensure welfare gains it is desirable to limit the direct accountability of its elites. Others have pointed out that the institutional structure of the EU fulfills all criteria of a democratic polity (Zweifel 2002; Crombez 2003). Moravcsik (2002) argues that the impression of a democratic deficit is misguided for two reasons. First, it overlooks the relationship between the national and

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European level. Like Majone, he argues that many decisions taken at the European level are in areas which are often de facto made by a 'technocracy' because they do not involve redistribution and are of little importance to citizens. Second, the diagnosis of a democratic deficit is in his view often based on a comparison to an unrealistic ideal of democracy. The limited competences of the Union, the regulatory nature of its policies, the increased powers of the European Parliament, and the involvement of national governments via the Council ensure that EU policy-making is nearly always 'clean, transparent, effective and politically responsive' (Moravcsik 2002, p. 605). In other words, there is no democratic deficit. Even if that is the case objectively, the fact remains that public support for the EU has decreased since the 1980s and continues to be at relatively low levels (Hix 2008, Ch. 4). Furthermore, European citizens currently de facto do not have an opportunity to decide on the EU policy agenda or hold their representatives accountable for their actions in the EU (Follesdal and Hix 2006, p. 552). One proposed remedy for this situation is to increase the level of political contest in the European Union (Follesdal and Hix 2006). Party political competition can link the wishes of the people and the actions of their representatives via elections. However, at the moment the electoral connection in the European Union is weak. Parties do not compete on European issues. Voters do not vote with EU policies in mind. And political parties do not form a government at the level of the European Union (Thomassen 2009, pp. 9-14). Party political competition could be strengthened if a majority in the directly elected European Parliament would have stronger control over legislative decision-making in this chamber and the legislative process overall, if political camps would openly compete for the office of the Commission President and if debates in the Council would be more transparent (Hix 2008, Ch. 8). However, Bartolini (2006) points out that this politicization of EU policies via a more majoritarian competition among political parties also contains several risks. Indeed, the European Union might provide more favorable conditions for the consociational model of democracy (Gabel 1998, pp. 466-67). It is a culturally – along national lines – segmented polity with no cross-cutting (transnational) political allegiances. Furthermore, there is no European demos which would justify majority decisions, particularly if they involve re-distribution. In this perspective, the legitimacy of the European Union hinges on the involvement of member states. They remain the bearer of both sovereignty and legitimacy; the legitimacy of the European Union is only derived ('borrowed') from their consensual interaction (Scharpf 1999, p. 25; for a critical discussion see Beetham and Lord 1998, pp. 69-75). The Lisbon Treaty refers to both, the role of member state governments, 'themselves democratically accountable either to their national Parliaments, or their citizens', in the Council and the direct elections of the European Parliament. It also points to the role of political parties at the European level

to ‘contribute to forming European political awareness and to expressing the will of citizens of the Union.’

This chapter discusses the reform options for the Council that have been considered in the process leading to the Lisbon treaty in the light of the debate on the EU’s democratic credentials. The most prominent topics of discussion on the reform of the Council have been the voting rule, the Council Presidency and whether or not legislative debates should be public. I compare the provisions of the Lisbon treaty to the ideal-typical prescriptions of democratic theory. Democracies can follow two ideal-types, the majoritarian and the consensual model of democracy. In the majoritarian version, political camps compete with each other for office. The winner enjoys wide ranging powers to implement the policy agenda of the majority. In contrast, the consensual model comprises broad coalitions, compromise and a minority veto. The next section summarizes these two different ideal-types of democracy. Subsequently, the overall changes in the institutional set-up enacted by the Lisbon treaty are discussed. Finally, a detailed discussion of the provisions regarding legislative decision-making in the Council is provided. The practice of legislative decision-making in the Council resembled the consensual model of democracy. The Lisbon treaty is unlikely to change this. Whether or not decision-making in the EU should follow the consensual or majoritarian model depends on one’s view on the necessity and existence of a common identity for legitimate rule by a majority.

2. Two Paths to Legitimacy: Majoritarianism and Consociationalism

The modern democratic ideal has been famously summarized by Abraham Lincoln in the Gettysburg address as requiring ‘government of the people, by the people and for the people’. This notion is closely related to the idea of self-government. ‘The role of citizens in a democratic society is to choose the overall aims of the society.’ (Christano 1996, p. 207) A political system is democratic if the people are sovereign and hence – directly or through a representative chamber – rule themselves. Democratic systems are, in turn, held to be legitimate forms of government. In general, policies can enjoy input or output legitimacy (Scharpf 1999; Bellamy 2010). Input legitimacy (government by the people) is derived from the consent of those who have to comply with a policy. Output legitimacy (government for the people) is based on policy outcomes: ‘policies can claim legitimacy if they serve the common good and conform to criteria of distributive justice.’ (Scharpf 1997, p. 153) Thus, policies in a representative democracy advance the interests of the people or have to reflect the will of the people to be considered legitimate. We can distinguish two aspects in this regard. First, a political system has to address the concerns of its citizens. A political system in which representatives ignore topics of concern

of the citizens or in which the rule of the people excludes some topics would not be considered legitimate (cf. Dahl 1989, pp. 112-4). Second, decisions by the representatives have to be taken in accordance to the preferences of the citizens. In other words, democratic government has to be responsive (Dahl 1971, p. 2). Input legitimacy focuses on how political institutions connect the ‘wish of the people’ to public policy. Output legitimacy asks if public policy is in line with the interests of citizens. The latter form of legitimacy has been criticized as not confirming to democratic ideals (Thomassen 2009, pp. 4-6). In any case, as citizens’ preferences are rarely identical, this raises the question of whose concerns and preferences have to be included and in which manner.

According to the majoritarian model of democracy, the answer is the preferences of the majority (or even plurality) of citizens via electoral competition. Power is shared through the alternation of (two) political camps in government. Once in government, the winning side has sweeping powers to implement its will. One mechanism to ensure the effective rule of the majority is agenda control. By limiting the scope of issues to be decided to the ones favorable to the majority a clear overall shift in policies according to the aims of the majority can be achieved (Cox and McCubbins 2005, pp. 2-5). Because majoritarian democracy concentrates power ‘[r]esponsibility for policy is obvious’ (Powell 2000, p. 5). Consequently, citizens (or at least a majority) can directly hold their representatives accountable (e.g., in elections). Majority rule can be based on the notion of input legitimacy if the individuals concerned share a collective identity (cf. Dahl 1989, pp. 146-9; Scharpf 199, pp.: 7-8). Majority rule is acceptable to its subjects the more homogenous they are, the less a structural majority exists which prevents alternation in power, and the less fundamental issues are affected (Dahl 1989, p. 161).

In contrast to majoritarianism, the consensus model of democracy tries to maximize the number of views included in decision-making and gives veto power to minorities in areas they deem vital (Lord 2004: 26). Power is widely shared and dispersed. A broad coalition is needed to enact public policy (Lijphart 1999, Ch. 1). Whereas the majoritarian version relies on competition for office, consociational theory builds on accommodation. Rather than presenting competing alternative policy packages to the citizens and letting them choose one of them, the political elites in a consociational system would deliberate in private to find a compromise solution that is accepted in a consensual manner. This implies that a minority can prevent a majority from making a decision if it deems that it would unduly reduce its autonomy or violate its minority rights (Lijphart 1996, pp. 261-2). Hence, ‘the majoritarian model of democracy is exclusive, competitive, and adversarial, whereas the consensus

model is characterized by inclusiveness, bargaining and compromise.’ (Lijphart 1999, p. 2). Because of the inclusive nature of decision-making in the consensus model and the possibility of a minority veto, the interests of minorities are protected. Thus, a common identity is not needed to derive legitimate decisions as a (structural) majority cannot overrule the minority (Scharpf 1997, p. 188). The diffusion of power in the consensus view of democracy however also implies that responsibility for political decisions is harder to discern (Powell 2000, p. 5). Indeed, to reach consensus among the different groups represented in a political system it might be necessary to give their representatives some leeway in negotiations on common policies. ‘Negotiated democracy can only succeed in achieving welfare efficiency and distributive fairness [i.e., output legitimacy] *among* units by weakening democratic accountability *within* units.’ (Scharpf 1997, p. 189, original emphasis) In general, there is a trade-off between inclusiveness and accountability. The more inclusive a government, the smaller are the chances of alternation and hence accountability (Kaiser et al. 2002).

In the next section I discuss how the reform options for the Council can be associated with the majoritarian and consociational model of democracy.

3. The Changes of the Lisbon Treaty

The Lisbon treaty has made a number of changes to the institutional set-up and functioning of the EU. It has increased the role of the European Parliament (EP) and national parliamentarians and introduced elements of direct democracy. The co-decision procedure under which the EP and the Council are co-equal legislators (Tsebelis and Garrett 2000) is now the default procedure when adopting EU legislation. The reach of this procedure has been extended to a number of policy fields, where the EP previously had less influence, including politically sensitive areas like asylum and immigration (Craig 2010, p. 37). Some commentators applaud these changes as likely to increase the legitimacy of the EU (Lenaerts and Cambien 2009). Others remain skeptical regarding the impact of these changes on the widely perceived democratic deficit of the European Union. After all, the changes in the institutional set-up enacted by the Lisbon treaty have not affected the fundamental nature of the EU (Sieberson 2008; Gervan 2009, pp. 173-176). The *de jure* formal monopoly on making legislative proposals still resides with the Commission, but both the Council and EP can make suggestions (Craig 2010, p. 33-34). Both the Commission and the Council, in particular the new President of the European Council, should develop a longer term agenda. Although the office of the President is a new feature due to the Lisbon treaty, the European Council as a whole already did formulate longer-term objectives of the EU which also potentially affected its legislative capacity prior to Lisbon (Nugent 2006: Ch. 11). The

member states have also retained control of the selection of the Commission. Although the Commission President is now 'elected' rather than 'approved' by the EP, the member states are still firmly in the driver's seat because the EP is restricted to electing a candidate put forward by the European Council. Thus, before and after Lisbon a qualified majority of member states puts forward a candidate for the office of the Commission Presidency which then needs the approval of the EP (Nugent 2006, pp. 150-155; Craig 2010, pp. 89-92). The other members of the Commission are (and have been) appointed by a qualified majority of the European Council subject to the consent of the EP. Thus, the elections to the European Parliament still do not directly determine the composition of the body that (primarily) sets the legislative agenda (Craig 2010, pp. 91-2). Similarly, there have been some changes to the institutional set-up and decision-making rules of the Council. In particular, there is the new office of an elected President of the European Council, the voting rules in the Council have been changed and deliberation on legislative matters are now supposed to be held in public. However, as will be explained in more detail below, they are unlikely to lead to *fundamental* changes in the way the Council takes part in the legislative procedures. Similarly, the provisions on the enhanced role of national parliaments in the Lisbon treaty and the attached protocols are relatively weak. National parliaments are now supposed to receive more (and timelier) information about what is going on in Brussels, which gives them an opportunity to address issues. But this is only a necessary but by no means sufficient condition to influence EU legislation. In addition, national parliaments have an enhanced role regarding the subsidiarity principle. If one third of the national parliaments considers a legislative proposal to be in violation of the principle of subsidiarity then the Commission must review its proposal. However, the Commission can still press ahead with its proposal despite the objections of national parliaments (Craig 2010, pp. 45-58). Finally, the Lisbon treaty added a provision regarding direct participation of citizens in the legislative process. In particular, an initiative of at least one million citizens can 'invite' the Commission to consider the adoption of a proposal on a certain topic. Whether this will affect EU legislative decision-making in the future remains to be seen. Thus, the changes in the institutional set-up do not necessarily fundamentally change the nature of the European Union. Some of the suggestions discussed in the lead-up to the Lisbon treaty like the direct election of the Commission President (Norman 2005, p. 120-121) would have implied a drastic change to the institutional status quo; they were, however, not adopted. In addition, it cannot be always taken for granted that institutional changes will lead to higher (perceived) legitimacy. For example, increases in the EP's power in the past have failed to increase participation in EP election or satisfaction with the EU. Furthermore, if the involvement of national parliaments leads to a narrowing of the gap between

citizens and EU decision-making or only to more bureaucratic delay and gridlock remains to be seen (Emmanouilidis and Stratulat 2010).

4. The Reform of the Council

The reform of the Council was one of the most contested issues in the Convention on the Future of Europe (König, Warntjen and Burkhart 2006) and the subsequent debate on institutional reform. The Laeken Declaration, which mandated the Convention to work out a proposal on institutional reform, raised three issues in particular with regard to the Council:

- The voting system
- The six-monthly rotating Council Presidency
- Public deliberation of legislation

The first two topics had been on the reform agenda before. Since the Single European Act introduced qualified majority voting discussions on treaty reform have always included the question of a re-weighting of votes and a change of the voting threshold (Nugent 2006, Ch. 5). Extending the term of office of the Presidency has also been repeatedly suggested by expert panels considering institutional reform in the Union (Tallberg 2006, Ch. 3). The Lisbon treaty grew out of the discussion on a Constitutional Treaty in the Convention on the Future of Europe. In the constitutional convention, which started its work in 2002, the issue of the institutional set-up of the EU was initially not included in the discussion of the working groups because it was deemed to be too contentious. After the Convention Praesidium made a proposal regarding the EU institutions, including the suggestion of a longer term Council Presidency, several groups of member states put forward their own suggestions regarding the future structure of the Council in 2003. Besides the Council Presidency, the voting weights were a particularly contested issue. The Convention also discussed the possibility of opening up Council deliberations to the public, a proposal that found support by several member states (Craig 2010, Ch. 2; Norman 2005). In the subsequent discussions of the proposed constitutional treaty the member states again took up the issues of the voting system in the Council (Hix 2006, p. 86). Following the rejection of the constitutional treaty in France and The Netherlands, a reform treaty was drafted that removed all the elements that directly referred to a constitution. The main points of the constitutional treaty were, however, included in the reform treaty as well. The reform treaty was signed

in Lisbon in 2007. After weathering two Irish referenda, the first one being unsuccessful, the Lisbon treaty finally entered into force on 1 December 2009 (Craig 2010, Ch. 2). In the following, the provisions of Lisbon regarding legislative decision-making in the Council are discussed in more detail and are subsequently compared to the majoritarian and consensual ideal-type of democracy.

The Choice of a Voting Rule

In international negotiations, agreements usually require unanimity. Decisions in national legislatures, on the other hand, often only need a simple majority. In the Council of the European Union, unanimity has been giving way to a lower threshold in a large number of policy fields since the Single European Act (Hix 2006, Appendix, Nugent 2006, Ch. 5). This used to be a system of weighted votes, giving more votes to member states with a larger population, and an overall threshold (around 71%) that was close to a three-quarter majority (Hayes-Renshaw and Wallace 2006, Table 10.1). At the same time, however, according to the Luxembourg compromise, agreed upon in 1966, the Council would strive to reach a consensus decision even in areas formally subject to majority voting if one or several member states felt that an issue was particularly important (Hayes-Renshaw and Wallace 2006, pp. 266-7). Similarly, the Ioannina compromise of 1994 effectively increased the voting threshold (Hayes-Renshaw and Wallace 2006, pp. 274-5). The new system adopted in the Nice treaty featured a triple majority requirement: a qualified majority of votes (around 72%) and a majority of member states which had to include at least 62% of the EU population. The distribution of votes was not strictly proportional to population size (Hix 2006, pp. 84-87). In practice, the Council rarely puts a proposal to a formal vote and both at the preparatory and the ministerial level members of the Council generally strived to reach a broad consensus (Bostock 2002; Heisenberg 2005; Hayes-Renshaw and Wallace 2006, Ch. 10 and 11; Lewis 2010).

The Laeken Declaration put the issue of extending qualified majority on the agenda again. In general, there was a widespread feeling after Nice that subsequent changes of the institutions would be necessary, not least due to the upcoming enlargement of the Union, which nearly doubled its membership. In the words of British prime minister Tony Blair: ‘... we cannot do business like this in the future.’ (cited in Norman 2005, p. 16). The working group on simplification in the Convention on the Future of Europe proposed linking the use of a qualified majority as a voting rule in the Council to the use of the codecision procedure and even discussed discarding unanimity altogether (Norman 2005, p. 83). Similarly, the working groups on external policy and the working group on freedom, security and justice proposed to extend the use of qualified majority voting in these often politically sensitive

issue areas (Norman 2005, pp. 92-93 and 100-101). The President of the Convention, Giscard d'Estaing, former President of the French Republic, proposed a double majority, consisting of a majority of member states representing a qualified majority of the EU population, to replace the triple majority requirement of the Nice Treaty (Norman 2005, p. 191). This was criticized by Spain and Poland, two countries who benefited from the Nice Treaty agreement (Norman 2005, pp. 196-197; Hix 2006, p. 86). The new voting system that was finally adopted in the Lisbon Treaty consists of three criteria (Article 16 (4) Treaty on the European Union): a percentage of member states (55%), a minimum number of member states (at least 15) and a percentage of the population represented by the states (65%). Furthermore, a blocking minority has to consist of at least four member states. The requirement regarding the minimum number of member states is redundant in an EU of 27 member states. Overall, the changes would shift power to the big member states (Baldwin and Widgren 2004). If the Council does not act on a proposal from the Commission or the High Representative of the European Union or when not all member states vote in the Council, different thresholds apply (Article 238 Treaty on the Functioning of the European Union). The Lisbon Treaty increased the areas in which qualified majority applies. However, unanimity still prevails in over 70 policy areas (Craig 2011, p. 43). By unanimous decision in the Council, further policy fields or topics (except for military or defense issues) can become subject to qualified majority voting (Article 48 (7) Treaty on the European Union). The voting threshold has an effect on inclusiveness, responsiveness and accountability.

In terms of inclusiveness, there is a qualitative difference between unanimity and majority voting, regardless of the required size of the latter. The voting rule of unanimity stands out as it is the only voting rule which grants all members veto power. Having veto power allows a member to prevent any change of the status quo that runs contrary to its interests (Tsebelis 2002). In particular, under unanimity no collective decision can be reached that implies costs for a member without its consent or compensation (Buchanan and Tullock 1965, p. 81). Thus, unanimity is in line with a consensual version of democracy as it includes all interests and makes broadly supported compromises necessary. All voting thresholds that require less than unanimity allow a member to be outvoted.

Justifications of majority rule build on the argument that the status quo should not be privileged. Any voting threshold requiring more than a simple majority implies that a minority can prevent a majority from adopting its preferred policy. Using the analogy to the case of a minority adopting a policy, proponents of majoritarianism would argue that only simple majority yields legitimate outcomes. In the words of Dahl's advocate of majoritarianism: 'If it's wrong to allow a minority to prevail over a

majority, then isn't it also wrong to allow a minority to block a majority?' (Dahl 1989, p. 137) Further arguments for the legitimate use of majority rule are that it maximizes the average utility and allows the greatest number of citizens to rule themselves. These arguments are related. While majority rule allows members to be outvoted, under certain conditions the average utility of a group is maximized by majority rule because the losses of the minority are outweighed by the benefits of the majority. Consider a decision to change an existing policy and three voters. Two voters would prefer a change in policy, one prefers the status quo. If they all value their most preferred outcome equally, then majority rule would give the greatest number of voters their most preferred outcome and maximize the utility of the group as a whole. A higher voting threshold would give a minority (in this case a minority of one) the opportunity to frustrate the wishes of the majority, which would lead to lower utility overall.

However, many authors argue that the legitimate use of majority rule presumes the existence of a common identity similar to the one in a nation-state (Dahl 1989, p. 147; Scharpf 1999: 8; for a critical perspective see Thomassen and Bäck 2009, pp. 185-187 and Beetham and Lord 1998, Ch. 2). 'The authority and legitimacy of a majority to compel a minority exists only within political boundaries defined by a demos.' (Weiler 1995, p. 222) In the absence of a common identity, unanimity or a consensual style of decision-making are more likely to lend (input) legitimacy to a decision. This is particularly true in the case of a 'structural majority' which precludes an alternation in power and leaves one group of citizens constantly aggrieved.

In contrast to inclusiveness, responsiveness is inversely related to the voting threshold. Both, the average proximity of an outcome to the desired policy and the chances of a new issue being addressed are negatively affected by an increase in the voting threshold. A higher voting threshold can also thwart accountability. Increasing the voting threshold tends to increase the number of interests that have to be taken into account. This leads to an overall compromise that does not directly reflect a position of any of the groups involved in the agreement. Subsequently, it becomes harder for citizens to identify the group responsible for the decision and hold them accountable. Furthermore, a broad coalition makes it harder for citizens to 'throw the rascals out'.

For example, changing the voting threshold from unanimity to simple majority moves the outcome from the lowest-common denominator to the position of the median voter assuming Euclidean preferences on a single dimension (Shepsle 2010). Consider a committee consisting of seven members (P1 through P7) that has to decide on a one-dimensional issue (figure 1). According to the median voter theorem, the outcome using simple majority will be the ideal point of the median voter (P4). In

contrast, under unanimity the outcome will be the lowest common denominator (i.e., P1). On average, P4 is closer to the ideal positions of the committee members than P1. Hence, the overall utility of P4 is higher than that of P1. The move is however not pareto-efficient. While it improves the utility of most members, one player (P1) is worse off.

A higher voting threshold, *ceteris paribus*, also decreases responsiveness. A higher voting threshold implies that more actors have to give their consent, turning some of them effectively into veto players (Tsebelis 2002; Warntjen 2011a). This often implies that more policy positions have to be accommodated and might make it impossible to change the status quo. In the example of figure 1, any policy that is located between P1 and P7 would be subject to gridlock under unanimity rule. No unanimous decision could be reached to change a policy in that range. In contrast, under majority rule P4 through P7 could change any policy to the left of P4. Likewise, any policy to the right of P4 would be changed by a majority consisting of P1 through P4. If the status quo is biased towards a subgroup of citizens, high voting thresholds could lock in decisions that are running against the wishes of a majority of citizens. According to Scharpf (1999) this is the case in the European Union. According to his argument, the high voting threshold in the Council impedes its ability to respond to the wishes of European citizens in (re-)regulating the economy and providing social protection at the European level. In light of enlargement, it was widely expected that the increased preference heterogeneity in the enlarged Council would lead to more policy gridlock (König and Bräuninger 2000). In fact, the Lisbon voting rule might increase the likelihood that a bill passes. The passage probability in an EU of 27 member states with the Lisbon rules is higher than it was in the EU with 12 member states (Baldwin and Widgren 2004). This measure, however, does not take preference heterogeneity into account (Tsebelis and Garrett 1996). In any case, the majority threshold remains relatively high. Furthermore, in practice informal and consensual decision-making has prevailed in the Council (Heisenberg 2005; Hayes-Renshaw, Wallace et al. 2006). Thus, the voting system in the Council is closer to the consociational idea of decision-making than majoritarianism. The Lisbon treaty has not significantly changed this.

The Council Presidency

The Presidency is one of the striking features of the institutional set-up of the Council. Originally it was designed as an alternating chairman of the meetings of ministers. Consequently, the Presidency was taken over by a different member states every six months. Since its inception the office of the Presidency has taken on additional responsibilities. Besides chairing the meetings, it also represented

the Council vis-à-vis other EU institutions as well as – in particular in the field of foreign policy – to the wider world and offered member states an opportunity to shape the agenda of the EU (Hayes-Renshaw and Wallace 2006, Ch. 5; Tallberg 2006). There is evidence that the member state holding the Presidency can affect the legislative agenda (Tallberg 2006; Warntjen 2007, 2009), pushing forward issues that it deems to be particularly important, and even has a disproportionate influence on legislative outcomes (Schalk et al. 2007; Warntjen 2008b; Tallberg 2006).

How to ensure consistency in the Council's work and whether this required strengthening the role of the Presidency has already been discussed in the 1970s (Hayes-Renshaw and Wallace 2006, pp. 157-161, Tallberg 2006, pp. 47-49). The Laeken Declaration also questions the value of the six-monthly rotation in the context of efficiency. Several proposals regarding the Presidency of the Council were discussed in the context of the Convention on the Future of Europe. The British and Spanish prime ministers together with the French president put forward the idea of a full-time President for the European Council, elected by the European Council by qualified majority for a term in office of up to five years. The Benelux countries and many other smaller states opposed this idea as it violated the idea of the equality of member states in the Council and threatened to upset the institutional balance between the Council and the supranational bodies in the EU. A Franco-German proposal included a variety of different presidencies for the different Council formations. The European Council would be chaired by an elected President. The General Affairs Council, which is charged with coordinating the work of the other Council formations, would be chaired by the General-Secretary of the Council of Ministers. A new foreign minister would be in charge of the meetings on the EU's foreign policy. Several Council formations (on economics and finance as well as justice and home affairs) would elect a chair for a two year period, whereas the remaining formations would continue using a system of rotation. Most of the speakers at the Convention rejected those plans. In the final proposal by the Convention, two Presidencies were established. The European Council would be chaired by a President who would be elected by the European Council by qualified majority for a term of 2 ½ years, renewable one. The European Council would not exercise legislative functions. The Presidency at the ministerial level would continue to be based on a system of rotation, but with a minimum term of office of one year. The latter provision was not adopted by the intergovernmental conference following the constitutional convention (Magnette and Nicolaidis 2003; Warntjen 2007b, Ch. 2).

The Lisbon treaty established an elected President for the European Council, i.e. the meetings of the heads of government (Art. 15 (5) and (6) Treaty on the European Union). The European Council is

charged with defining the priorities of the Union, but is not supposed to exercise legislative functions. In the part, this meeting of the heads of government acted as the final arbiters in legislative disputes which could not be resolved at the ministerial level. The vast majority of decisions are however taken by the Council of the European Union, i.e. the meetings of ministers, or de facto at the preparatory level by the permanent representatives in COREPER or in the Council working groups (Hayes-Renshaw and Wallace 2006; Häge 2007). At the ministerial and preparatory level where legislative decisions are made, however, Lisbon effectively keeps the current system. Member states hold the Presidency for all council configuration (except for foreign affairs) for six months on a basis of equal rotation “taking into account their diversity and geographical balance within the Union” (Declaration No. 9 to the Lisbon Treaty). These Presidency terms are organized within team presidencies covering 18 months, similar to the ‘troika’ system before Lisbon.

In the majoritarian version of democracy, the majority would enjoy wide powers to implement their agenda (Lijphart 1999: Ch. 1). In the legislature, this could be ensured by a partisan leadership office with procedural privileges such as (de facto) gate-keeping or agenda-setting powers (Shepsle 2010, Ch. 5; Warntjen 2011a,b). Both powers would allow the majority to skew decisions in line with their preferences, restrict the topics on which a decision is made and prevent divisive votes. The latter is important for the majoritarian model as it allows the political camps competing for office to present clear alternatives (Cox and McCubbins 2005; Tsebelis 2002). Consider a situation where decisions are taken by simple majority (figure 2). If no actor has special powers, the outcome would be the position of the median actor (MC) regardless of the location of the status quo (solid line). Now assume that there is a cohesive fraction that constitutes a majority in line with the majoritarian model of democracy. Let us say that the median of this majority coalition (ML) is located to the left of the overall median (MC). If the majority controls a leadership office with gate-keeping power it could skew the decision agenda in its favor. Whether or not the outcome would differ from the situation where no actor has procedural privileges depends on the location of the status quo. We can distinguish two situations. The status quo can be either closer (II) or further away (I, III) from the ideal position of the majority coalition than the overall median. If the status quo is closer, then the majority will use its gate-keeping

power to prevent a change of the status quo to the position of the overall median. Hence, the status quo prevails (dotted line).²

In the majoritarian model of democracy the majority would establish a leadership structure in the legislature as its instrument to control the legislative agenda and legislative outcomes. The leadership office would be elected by the majority and enjoy procedural powers to further the majority's causes. In contrast, the consensus version of democracy would disperse power. A leadership office in the legislature would be reduced to being a mere legislative clerk and/or its use would be shared. The Lisbon treaty has established an elected Presidency for the European Council. At the ministerial level, however, the system of rotation was kept. If the elected President of the European Council will have an effect on legislative decision-making remains to be seen. Furthermore, the procedural powers of the Presidency remain unchanged. The monopoly for making of legislative proposals lies with the Commission, which is nominated by the Council members (Hug 2003; Wonka 2007). Despite this link the preferences of the Commission might not reflect the majority view in the Council at any given moment as the composition of the Council is subject to change due to national elections (Manow and Döring 2008). A majority in the Council cannot keep items completely off the agenda even if it had complete procedural control over the Council. However, it could in principle delay legislation (in first reading), restrict amendments by the Council to the Commission's proposal, and bias the Council's bargaining position in the conciliation committee. In its current form, the Presidency however does not enjoy strong procedural powers comparable to the majoritarian office of, say, the Speaker of the U.S. House of Representatives. Nevertheless, establishing an effective leadership structure implies some delegation of authority (Warntjen 2008b). By limiting the Presidency's term in office and by using a system of rotation, however, its power is widely dispersed. In sum, the office of the Presidency in the pre-Lisbon EU conformed to the consensual model of democracy. The changes contained in the Lisbon Treaty are unlikely to change that.

² We should note that some members of the majority coalition would have an incentive to defect from the majority line as represented by its median member. For some members of the majority coalition (e.g., the committee median) the evaluation of the relative merits of the majority and committee median differ from those of the majority median. The cohesiveness of the majority faction would have to be ensured by exogenous measures. Furthermore, this version of majoritarianism would not lead to the majority of the citizen's preferences being implemented – even if their representatives have similar or identical preferences - but rather to the rule of a majority of the majority.

Deliberation in the Council: Public or Private?

One frequent criticism of EU politics is its seemingly intransparent nature. Public access to the Council and its deliberation has increased starting in the 1990s (Hix 2008, pp. 149-150). Nevertheless, critics of the pre-Lisbon situation argued that the Council was the only legislative body, except for those in North Korea and Cuba, which adopted law behind closed doors (Norman 2005, p. 116). Others maintained that legislative decision-making in the Council is at least as transparent as it is in national politics (Gabel 1998, p. 471; Moravcsik 2002, pp. 612-3). In any case, the member states raised the issue of transparent decisions in the Council explicitly in the Laeken Declaration and highlighted the importance of transparency to raise the legitimacy of EU policies:

‘The European Union derives its legitimacy from the democratic values it projects, the aims it pursues and the powers and instruments it possesses. However, the European project also derives its legitimacy from democratic, transparent and efficient institutions. ... The first question is thus how we can increase the democratic legitimacy and transparency of the present institutions, a question which is valid for the three institutions... Should the Council act in the same manner in its legislative and its executive capacities? With a view to greater transparency, should the meetings of the Council, at least in its legislative capacity, be public?’ (Laeken Declaration on the Future of Europe)

Subsequently, the Convention on the Future of Europe discussed the possibility of having a separate Council formation which would decide on all legislative proposals and would by default act in public (Norman 2005: 111, 150). This suggestion is in line with majoritarian model of democracy because public debate in the legislature allows for fiercer competition among the political camps vying for office. If citizens can follow the decision-making process, they can hold their representatives directly accountable for their actions (cf. Hix 2008, pp. 101, 103, 150-2). In contrast, in the ‘negotiated democracy’ of consociationalism, deliberations outside of the public’s eye allows representatives to make the necessary concessions to reach fair agreements that increase welfare overall: ‘negotiations could not succeed if all communications at the bargaining table were publicized’ (Scharpf 1999, p. 189). Negotiators might not reach possible mutually beneficial agreements if the public gaze induces them to take on overly uncompromising positions (Stasavage 2004). Thus, transparency involves a trade-off between accountability and efficiency. Whereas the majoritarian model of democracy would emphasize accountability, the consensual model of democracy would lean towards efficiency.

The Lisbon treaty has further increased public access to its deliberations. Nevertheless, most of the decisions are still de facto reached behind closed doors (Lewis 2010, p. 156). There is still no Westminster style public debate in the Council, facilitating political competition between elected officials from different political parties to galvanize public opinion, that a majoritarian view would view as essential (Hix 2008, pp. 98-107). Despite increases in transparency, legislative practice remains to be closer to consensual rather than majoritarian decision-making.

In sum, before and after the Lisbon treaty legislative decision-making in the Council follows the consociational model of democracy (table 1). In institutional terms, a (simple) majority controls neither the agenda-setting process nor the voting outcomes. Furthermore, the most relevant parts of the deliberations are conducted in private and public Council debates do not aim at political competition between rival political camps.

5. Conclusion

Democratic theory suggests two paths to legitimacy. The majoritarian model of democracy builds on the competition of political camps, which alternate in power. The consensus model of democracy relies on inclusiveness and power sharing. Applying these models to legislative decision-making in the Council would yield two different institutional settings. The majoritarian version would call for simple majority voting, a strong partisan leadership office and public debates that would clearly set out the different views of the clashing political camps. In contrast, the consensus model would consist of unanimity or consensual decision-making, a rotating and/or weak chairmanship and would lean towards private discussions to find compromises. The agreement reached in Lisbon led to a change away from unanimity. In practice, however, decision-making might remain consensual anyway. In any case, majoritarian voting along clearly demarcated political lines is unlikely as long as the voting threshold remains relatively high. Furthermore, policy positions are often idiosyncratic and depend on the policy field rather than being aligned on one political cleavage. Thus, it is difficult to form competing political camps across several issues. The meetings of the ministers in the Council where legislative decisions are made continue to be chaired by a rotating Presidency. The office of the Presidency also did not gain any procedural powers through the Lisbon treaty. Although the 2004 enlargement might have de facto strengthened the hand of the Presidency, this implies that in effect the power over the decision agenda remains widely dispersed in the Council. Finally, debates continue to be held primarily behind closed doors with no public clashes of rival political views and legislative agendas to galvanize public opinion.

A normative assessment of this state of affairs depends on one's view on the necessity of a collective identity to reach legitimate decisions via majoritarian means. Furthermore, the choice between the majoritarian and the consensual model involves a number of trade-offs between accountability, responsiveness and inclusiveness.

Table 1: Majoritarianism, Consociationalism and Decision-making in the Council

	Majoritarianism	Consociationalism	Council of EU
Voting rule	Simple Majority	Consensus Minority veto	Unanimity or qualified majority voting 'Culture of consensus'
Legislative Organization	Majority control of agenda	Power-sharing	Rotating Presidency with limited procedural powers
Transparency	Full	Limited	De facto limited

Figure 1: The Choice of the Voting Rule

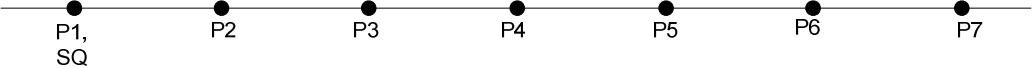
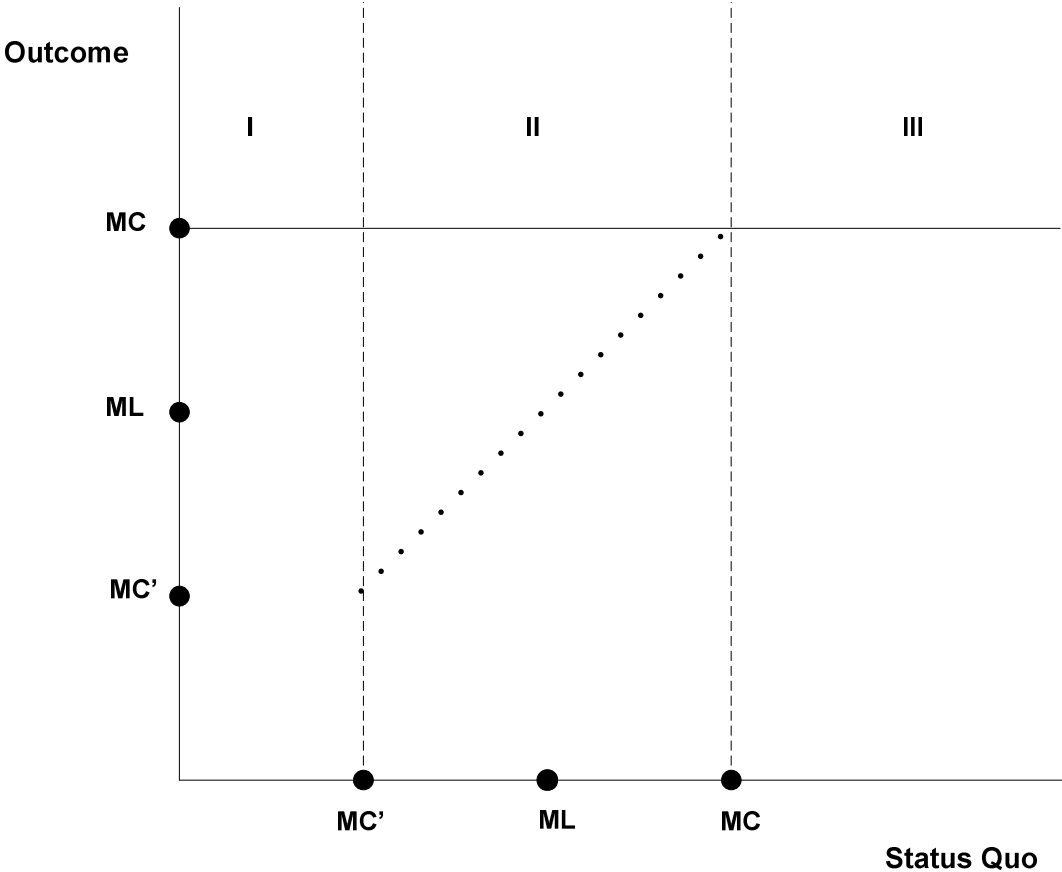


Figure 2: The Effect of Majoritarian Gate-Keeping



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