Xavier Deniau, Voting in the Council of Ministers of the European Communities (July 1984)

Caption: In an article published in July 1984 in the Revue du Marché commun, Xavier Deniau, legal adviser to the French Conseil d'État and French MP, compares the voting rules in the Council of the European Communities, as provided for by the treaties, with the institutional practice that has developed since 1958. He considers, in particular, the consequences of the Luxembourg Compromise of 29 January 1966 and notes the importance of the majority decision of 18 May 1982.

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Voting in the Council of Ministers of the European Communities. Theory and practice

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Within the European Communities, the Council and the Commission are the two bodies invested with decision-making and executive power. The Commission is an institution that is independent of the governments and politically accountable to the European Parliament; the Council, for its part, represents the various governments and, in that capacity, is the meeting point of Member States' interests.

The rule governing the Council of Ministers' work is that it must take all decisions with general implications or of specific importance. In most other cases, it may act only on a proposal from the Commission.

As provided for by Article 149 of the Treaty of Rome, if it has acted unanimously, the Council has sovereign power to take a decision, even if the decision runs counter to the Commission's proposal. On the other hand, it may act by a majority only when it takes a decision that is in line with the Commission proposal.

The Commission decides by a majority, in accordance with the principle of collective responsibility. Voting within the Council is more complex: the Treaty of Paris of 18 April 1951 establishing the ECSC, the Treaty of Rome of 25 March 1957 establishing the EEC and Euratom and, lastly, the Treaty of Brussels of 3 April 1965 establishing a Single Council of the European Communities, in place of the ECSC Special Council of Ministers, the EEC Council and the Euratom Council, required that decisions be taken by a simple majority, a qualified majority or unanimity depending on the period and matters concerned.

The Council is made up of one member of each government, generally the Foreign Minister. But that body bears no resemblance to a traditional intergovernmental conference under international law: decisions are adopted by the Council as a Community institution rather than by each of the states that constitute it.

In the preparation of its work, the Council is assisted by the Committee of Permanent Representatives (Coreper), which is made up of the ambassadors of each Member State accredited to the Communities, and by many groups of experts.

1. — Treaty provisions on acts of the Council. Voting rules

Articles 148 of the EEC Treaty and 118 of the Euratom Treaty provide that 'save as otherwise provided in this Treaty, the Council shall act by a *majority* of its members'.

However, unanimity is required for important matters, such as autonomous amendments to the common customs tariff, derogations from the rules governing the common market, the accession of new Member States, the appointment of members of the Commission and the Court of Justice, associate membership of the Community, etc. In that event, ten out of ten votes are required. However, abstention does not prevent the adoption of acts that require unanimity. On the other hand, absence is not equivalent to abstention.

Some Council acts require a qualified majority: in that event, members' votes are weighted. France, Germany, Italy and the United Kingdom each have ten votes, Belgium, the Netherlands and Greece each have five votes, Denmark and Ireland each have three and Luxembourg two.

A minimum of 45 votes out of 63 is required to secure a qualified majority in a vote on a Commission proposal. In other cases, i.e. when the Council may take a decision without a Commission proposal, the act is adopted if those 45 votes represent a vote in favour cast by at least seven Member States.

That is a way to prevent a coalition of the big states and the right of veto of a single state.

The qualified-majority requirement is an innovation compared with the traditional rule of international law under which sovereign states are all equal. At all events, it is an attempt to reconcile the principle of equality before the law among states and the reality of the demographic entities which they represent.

Where the Council may act by a simple majority (e.g. free movement of workers, the Commission's powers of investigation and verification) — making a concession to the small states — the decision is obviously adopted if it is carried by at least six votes out of ten.

2. — Institutional practice

When the common market was first implemented, from 1958 to December 1965, unanimity was required for the adoption of a large number of Council decisions. Subsequently, i.e. at the end of that transitional period, that should have been replaced by majority decisions. The French Government, fearing that the principles of the common agricultural policy might be jeopardised by majority voting, pursued the 'empty chair' policy in the Councils of Ministers of the Communities from 30 June 1965 to 30 January 1966. That crisis was resolved by the 'Luxembourg Compromise' agreements of 28–29 January 1966.

A — The 'Luxembourg Compromise' of 28–29 January 1966

The six Member States adopted a joint declaration on the discussion procedure in the Council of Ministers. From a purely legal point of view, the agreements did not amend the provisions on voting rules, since those could be amended only by an amendment of the Treaties. As Benoit Cerexhe wrote, they therefore represent a kind of gentleman's agreement, the text of which is as follows:

1 — 'Where, in the case of decisions which may be taken by majority vote on a proposal from the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.

2 — As regards the preceding paragraph, the French delegation considers that, where very important interests are at stake, discussion must continue until unanimous agreement is reached.

3 — The six delegations note that there is a divergence of views on what should be done in the event that conciliation is not completely successful.

4 — The six delegations nevertheless consider that this divergence does not prevent the resumption, according to normal procedure, of the Community's work.'

Paragraph 2, which is a unilateral declaration by the French delegation, although included in the joint declaration, does not really constitute a reservation within the meaning of that term in international law.

In practice, the unanimity rule became established practice, in spite of the provisions on majority voting, which subsequently applied only to administrative and budgetary measures. All the Member States — both the founding states and the new Member States — implicitly claimed the right of veto that France had explicitly conferred on itself; they did so not only when 'important interests' were at stake but also at every other opportunity, given that it was accepted that each state was the judge of the importance of its own interests.

This was followed by several attempts to curb the more general use of the right of veto.

B — The Paris Summit of 9–10 December 1974

Firstly, the Heads of State or Government of the nine Member States decided to meet 'three times a year … and whenever necessary, in the Council of the Community and in the context of political cooperation.' At those meetings, which came to be called the European Council, the discussions would cover Community affairs as well as political cooperation (coordination of foreign policies). The European Council — which does not exist as an institution in legal terms — in fact represents a synthesis between the Council of Ministers and a simple diplomatic conference. It has resulted in a substantial modification to the system of Community decision-making which, in its initial form, may seem to have been abandoned surreptitiously in favour of cooperation between states.

Moreover, the Heads of State or Government of the Nine agreed at that same Paris Summit that, in order to improve the functioning of the Council, it was necessary to renounce the practice whereby agreement on all questions was made conditional on the unanimous consent of the Member States, whatever their respective positions may be on the conclusions reached in Luxembourg on 28 January 1966.

That same day, the President of the French Republic declared: 'We have jointly decided to abandon that practice while, naturally, retaining the right to invoke considerations of national interest when those are effectively justified. The change in this area consists of expressing a joint resolve henceforth to apply, as widely as possible, a decision-making procedure other than unanimity, i.e. qualified majority voting.'

It should be noted that, until recently, that principle was never applied and that the practice of decision by consensus was actually strengthened by the accession of new Member States with a stronger intergovernmental tradition.

Moreover, as is generally argued, the risk of a decision being taken by a majority has, paradoxically, made it easier for a decision to be adopted unanimously by a political consensus being reached.

Furthermore, as Commissioner Frans Andriessen stated in a speech on the decision-making process in the Community which he gave in Brussels on 10 February 1984, 'little by little, majority decisions have been needlessly politicised'. Indeed, there were many cases of misuse resulting from the assumption by some national experts that every question was important and required a unanimous vote.

C — The majority decision of 18 May 1982

For the first time, the Council of Ministers overruled a veto brandished by a Member State. The United Kingdom was invoking the unanimity rule and maintaining that the question under discussion represented a vital national interest.

In fact, it was not disputing the new scale of agricultural prices but wanted to block its entry into force in order to achieve what it wanted at budgetary level, that is to say a higher rebate on its contribution to the Community budget than the one its partners had already granted. The UK Government felt that some Member States could not, mainly for domestic policy reasons, refuse it the right to invoke the 'Luxembourg Compromise' without reviving the dispute about supranationality. The attempt failed. The Belgian President of the Council of Ministers for Agriculture decided to make unprecedented use of the qualified-majority voting procedure for fixing agricultural prices.

The French Minister for External Relations argued that 'the Luxembourg Compromise must not apply to implementing measures'. And the French and Italian delegations had the following text recorded in the minutes of the meeting: 'The object of the Luxembourg Compromise has never been and cannot be to allow a Member State to paralyse the normal functioning of the Community, with the consequence of fundamentally altering its spirit and rules.'

Could that mean, thanks to that majority decision, that the unanimity rule will be abandoned? It is considered

unlikely, given that some delegations have taken care to reaffirm their support for the 1966 arrangement, underlining the fact that it was not called into question by the vote concerned.

On that occasion, as on others, the unanimity rule was misused; in fact, there are now signs that the unanimity rule is beginning to be used in a reasonable manner.