Voting in the Councils: A Compromise, No Revolution

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Article 4 EU; 250 EC; I-20(4) and I-22.3, I-24, et al. Draco[1]

Consensus, unanimity and qualified majority voting in the European Council

The European Council actually, as a rule, takes decisions by *consensus,* as its major function is to bring a primary *political* impetus into the integration process through 'conclusions', 'principles', 'guidelines', and 'joint strategies' or 'recommendations' not having the force of a legal act.[2] This is a customary rule; it is not stipulated in Article 4 EU. Consensus may be regarded as a 'soft' unanimity, reached without voting, in a silent way (no opposing statements), and allowing – within the framework of the common position – some divergences by individual Member States.

Article I-20(4) of the Draft Constitution states that decisions of the European Council shall be taken by consensus, unless the Constitution provides otherwise. By this, it calls for the *express*, i.e., *transparent* listing of decisions, which have to be taken either by *unanimity* ('hard' consensus) or by *qualified majority*. The first category, that of unanimity, lists decisions regarding the extension of the scope of the ordinary legislative procedure for the adoption of European laws and framework laws (Article I-24(4) first paragraph) and on the extension of the scope of qualified majority in the Council of Ministers in other cases (Article I-24(4), second paragraph). The second category, that of qualified major-

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[1] All references in the text are to the Convention's Draft Constitution of 18 July 2003 (here Draco) unless identified otherwise. The Constitution's provisions have been renumbered upon its conclusion. The final numbering was not yet established at the time of printing.

[2] I.e., it does not excercise legislative functions. See for decisions within the concrete policies: Article 13(1) and (2), Article 17(1) EU (on Common Foreign and Security Policy); Article 99(2) EC (economic policy), Article 128(1) EC (employment policy).

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ity, contains decisions on the election of its President (Article I-21(1)), on the proposed candidate for the Presidency of the Commission (Article I-26(1)) and on the appointment of the Union Minister for Foreign Affaires (Article I-27(1)). Therefore, the Draft provision is not a mere codification of the existing European customary rule preserving the *status quo* of the intergovernmental decision-making on fundamental issues of the European integration. It should be added that the previous consensual decision-making in the European Council will facilitate the later operation of qualified majority voting in the Council of Ministers (see *infra*), enabling the better consistency of positions at national level.

Although strengthened within the institutional balance of the Union by its Chair's two and half years term (renewable once), the European Council cannot be taken as a real collegiate head of the Union because of the weak mandate that allows the Member States' representatives to reach a consensus. Why is the mandate weak? It is because the consensus does not constitute for each a personal legal obligation. So the heads of state and government do not necessarily have to immediately justify their positions taken in the European Council *vis-à-vis* national Parliament or the public.

The evolution of decision-making in the Council of Ministers

Simple majority voting, i.e., decision-making by a majority of the Council's members, is in the current EC Treaty still prescribed as the general rule, save as provided otherwise (Article 205(1) EC). But this voting procedure has been limited to rare cases, like the adoption of the Council's Rules of Procedure under Article 207(3) EC or requests to the Commission to submit appropriate proposals under Article 208 EC.

The prevailing voting modality was *unanimity* (with the addition that abstentions do not prevent the adoption of an act), *de jure* until 1965, the end of transitional period, when the most important decisions connected with the establishment of the common market should have been taken. Nevertheless, thanks to the *Luxembourg Compromise*, which has never been officially revoked and which refers to 'very important interests' of one or more Member States at stake, unanimity remained *de facto* in use until the Single European Act. Recourse to the spirit of the *Luxembourg Compromise* was made in the Treaty of Amsterdam. It concerns the conditions for authorisation of closer co-operation (Article 11(2) EC) and the possibility to adopt certain acts under the Common Foreign and Security Policy by qualified majority (Article 23(2) EU, simplified in Nice: if a member of the Council 'for vital and stated reasons of national policy' resists the adoption of an act by qualified majority, a vote shall not be

taken and the matter will be referred to the European Council for decision).

The Single European Act, which entered into force in 1987, not only gave birth to real majority voting in the Council but also started the process of a progressive replacement of unanimity by qualified majority voting (QMV) through Treaty revisions. When it comes to QMV, the votes of members are weighted per country as prescribed by the Treaty (Article 205(2) EC). Later, on account of the Ioannina Compromise (1994), the process of majority building has been softened by the duty to undertake efforts to reach a more broadly acceptable solution in the Council in case a substantial number of its members, without having the formal possibility of blocking a decision, oppose it. This *modus vivendi* has been confirmed by the Treaty of Amsterdam, which at the same time succeeded in introducing still more QMV on a number of areas. The Treaty of Nice tried to tackle the problem that the importance of the individual Member States, in terms of the size of population and economy, was inadequately articulated in QMV and introduced a new (double) majority voting system. This solution however was immediately criticized as being too complex a compromise, which neither enabled easy and rapid decision-making nor lacked an equitable, proportionate distribution of votes, in particular, in context of the next enlargement (Declaration No. 20). The Accession Treaty (Article 12) nevertheless prolonged this system.

At present, QMV is the most frequent mode of voting within the Community 'pillar' of the Union, applied in some 80% of all decisions, whereas unanimity voting remains dominant in practice within the Common Foreign and Security Policy and the PJCJM 'pillars'. The ever extending scope of majority is now narrowing the democratic legitimacy of Council decisions, indirectly, through a diminishing of accountability of the individual Council members before their national Parliaments and, directly, through the limited weight of population proportions.

The challenge of enlargement

The Draft Constitution reflects the fact that unanimity could be more easily reached in the Europe of the original 6 Member States than it can be in a Europe of 25 Member States. The practical difficulty, if not impossibility, of reaching unanimity with such a large number of states would inevitably lead to stagnation in the progress of the European integration and the large majority of Member States running the risk of being taken hostage by a single one. Therefore, QMV has been made the *general rule* for taking decisions by the Council of Ministers (Article I-22(3)), to be used in the *ordinary legislative procedure* for the adoption of European Laws and European Framework Laws (Article I-

33(1), as set out in Article III-302), which includes co-decision by the European Parliament and the Council. So far the distinction between legislative and non-legislative acts is a substantial improvement of the Union decision-making and not only from the perspective of effectiveness. According to the Draft Constitution, a qualified majority more adequately takes into account population sizes. This double majority system – regardless of modifications of the criteria for counting the majorities or of the introduction of an additional protection clause on building blocking minorities by the IGC[3] – gives the Union's acts greater democratic legitimacy than the QMV-modus produced in Nice.

Nevertheless, there are some exceptions to the general rule of QMV. The Draft Constitution takes into account the reluctance of some Member States to give up veto rights in areas that they consider vital to themselves. These concern the sensitive areas of harmonizing indirect taxation (Article III-62), approximating fiscal provisions, provisions relating to free movement of persons and to rights and interests of employed persons (Article III-64), of instruments of uniform intellectual-property rights protection (Article III-68) and the establishment of a European Public Prosecutor's Office (Article III-175). For decisions in these areas a special legislative procedure exists, combining unanimity in the Council with an irregular involvement of the European Parliament (consultation or consent instead of co-decision). This undermines the initial idea to give the same democratic treatment to the acts of the same legal nature. On the other hand, unanimity is justifiable in some other cases, such as the flexibility clause (Article I-17). In effect, failing the unanimity requirement, the Member States might not act individually (lack of competence), but the Union would not be provided with an effective procedure to act.

The present third 'pillar' of the Union, on Police and Judicial Co-operation in Judicial Matters apart from a few exceptions (like the right of legislative initiative under Article III-165 mentioned above, shared by the Commission and a quarter of the Member States), is fully incorporated into the general legal framework (i.e., concerning the respective legal instruments as well as the ordinary legislative procedure, including QMV). However, the merger of the second 'pillar', on Common Foreign and Security Policy, with this framework is of formal significance only, although the link between both areas is very close.

[3] The definion adopted during the Brussels summit on 17 and 18 June 2004, is the following:
1. A qualified majority shall be defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained.
2. By derogation from paragraph 1, when the Council is not acting on a proposal from the Commission or from the Union Minister for Foreign Affairs, the qualified majority shall be defined as 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union.

Here, European Laws (Article III-195(3)) and no QMV (Articles I-39(7) and III-201) gained no ground.

All in all, the Convention's Draft Constitution followed the way of further gradual developments, based on an ever finer balance between the different national sensitivities, rather than aspiring for a constitutional revolution in the Council's decision-making. Even so, as the amendments of the IGC have shown, the Convention's sense for the current political reality was not always sufficient.

The 'passerelle', a salvation?[4]

Some relaxation of the resting unanimity requirement (either within a special legislative procedure or within a non-legislative procedure) is possible under Article I-24(4). It grants the European Council, by a unanimous decision, the possibility to allow the Council of Ministers to act by qualified majority when Part III of the Constitution, on internal policies and action, requires unanimity.

Such a *pactum de contrahendo* promises a way to make the decision-making process more flexible in the future and is, in fact, a veiled way of informally revising the Constitution. It entails, however, a couple of partially opposing problems. Firstly, one wonders if it is sufficient compensation for the rigid approach of the drafters to amendments to the 'policies' part (III) of the Constitution. Secondly, would not it have been more appropriate to differentiate the cases of giving up unanimity? In some sensitive areas, for instance, the requirement of national constitutional (mostly parliamentary) scrutiny (amendment of/by 'organic laws') might have been added, whereas in others a super-qualified majority in the Council of Ministers could have been demanded. Thirdly, does the European Council, by its involvement in the process of the 'small' revision of the Constitution, not exercise a legislative function, contrary to Article I-20(1), last sentence ('it does not exercise legislative functions'). Finally, the 'passerelle' could lead to a narrowing of the scope of (sovereign) powers exercised at the national level (Member States will lose the former veto-prerogative), comparable to the effects of the initial conferring of powers on the Union. Would not it challenge the national constitutions as a point of departure for such transfer?

Questions for future scholarship and practice

1. Does the European Council, by its involvement in the 'passerelle' or 'small revision' of the Constitution (Article I-24(4)) not exercise a legislative func-

[4] Note of the editors. The passerelle provisions have been transferred to Part IV, provision on simplified revision procedure, in the consolidating operation. It accords national parliaments a right of veto.

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tion contrary to Article I-20(1), last sentence ('it does not exercise legislative functions')?

2. How is the 'passerelle' (Article I-24(4)) related to the principle of conferral of competencies on the Union by the (sovereign) states (Articles I-1(1) and I-9(1))?
3. What should such a relationship to the principle of conferral mean for the mode of ratification of the Constitutional Treaty in the Member States?

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