

## **The Opacity of Consensus**

### **Decision-making at the Council of the European Union**

Stéphanie NOVAK

**At the Council of the European Union, decisions are usually made by consensus. Does this mean that all the countries are of one mind? In fact, disagreements are often concealed, since it is not in the interest of most countries to publicize the fact that they have been defeated. Stéphanie Novak describes the various practices that consensus entails and gives an account of the opacity presiding over the exercise of joint sovereignty.**

The European Union is a political community, and not just an international organization, in so far as its Member States have voluntarily given up their sovereignty in certain domains of decision-making. Concretely, this loss of sovereignty means that countries are forced to apply directives and regulations<sup>1</sup> even if they have opposed them at the time of the vote. However, when some measures are likely to be adopted despite the opposition of some, who are therefore taking the risk of being defeated, the Member States' representatives seek an apparent consensus so that there are no losers. This consensual appearance of the decision-making process conceals some complex practices whose real goal is not to avoid the existence of defeated minorities, but to mask them. The purpose of this article is to explain how and why the fact that some countries are marginalized is not publicized.

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<sup>1</sup> A directive sets a goal, but national governments are free to choose the way that they enact it; a regulation is more constraining, because it is directly applicable in the Member States.

## **Qualified Majority Voting and the Exercise of Joint Sovereignty**

Although the European Parliament and the Commission are better known to citizens than the Council of the European Union, this latter institution is the main instrument of legislative decision-making.<sup>2</sup> Member States are represented by their ministers. We think of the Council as a unique institution, but in fact there are several Council sections: an Environment Council, an Agriculture and Fisheries Council, a Competitiveness Council, and so on. The ministers of the Member States decide whether to adopt the propositions issued by the Commission. They can do so in co-decision with the European Parliament, but not in all domains. For instance, until the implementation of the Lisbon Treaty, for most questions relating to agriculture and fisheries, the Parliament's opinion was sought in only a consultative capacity.

Within the Council, the ministers can make a decision either by using the unanimity rule or by qualified majority voting. In the former case, they benefit from a right to veto; in the latter, roughly 72% of the votes are required for a measure to be adopted. Each country has a certain number of votes depending on the size of its population and other criteria that are not well defined. By deciding unanimously to abandon their right to veto and use qualified majority voting instead, the governments of the Member States accept a restriction of their sovereignty and decision-making power: if a minister votes against a particular directive or regulation, and he (or she) is in a minority, his (or her) government must nevertheless implement this directive because of the primacy of European law over national laws.

The fact that a Member State can be forced to implement a law that it had previously opposed hardly seems realistic. The reticence of Member States to be among the defeated manifested itself forcibly during the infamous "empty chair crisis" in the mid 60's. Because a decision on agricultural policy was imminent that went against the will of the French, de Gaulle decided that France would no longer sit on the Council. This episode led to the "Luxembourg compromise" (1966), which specifies that if the interest of a particular State is threatened by a decision, this decision cannot be made against its will, and a more satisfying solution must be

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<sup>2</sup> Its website is <http://www.consilium.europa.eu/>

sought. In addition, the extension of the domain of decision in which Member States abandon their right to veto in favor of qualified majority voting is negotiated fiercely and at great length. Still, this domain is expanding little by little. For instance, since the Treaty of Lisbon came into effect, Justice and Home Affairs matters that used to be decided by unanimity, have fallen under qualified majority voting.

### **What Does “Consensus” Really Mean?**

However, the Council is known for rarely using qualified majority voting when it is the legal rule and deciding instead “by consensus.” This assertion is based on two apparent manifestations of consensus.

1. First, the absence of formal voting during plenary sessions: a formal vote would imply voting by a show of hands or going round the table to let all present members make their position known. But instead of asking Council Members to vote, the Presidency makes a proposition and if no one objects to it, it declares it passed.
2. Second, the monthly records of the legislative acts of the Council indicate that a high proportion of decisions are passed without opposition when the qualified majority would have been sufficient. (Since 1993, when the Council first had to publish its voting results, roughly 80% of the decisions that could be made by qualified majority voting have actually been made without opposition.)

Are these indications of a real “consensus”? In fact, the meaning of the word itself is far from clear. Studies that describe the Council always use this word rather than the word “unanimity.” Yet it is not clear that “consensus” has exactly the same meaning as “unanimity.” These descriptions often infer from the practice of consensus that the Council seeks unanimity because the implementation of some measures would otherwise be compromised in countries that have initially opposed them. The “consensus” would therefore preserve the sovereignty of the Member States. Yet in order to assess the pertinence of this conclusion, we must define first what this “consensus” entails: does the absence of overt opposition really mean that decisions are unanimous?

To answer this question, I will try to explain why there is no formal voting during plenary sessions and why, according to official records, a high proportion of the decisions are made without opposition. To describe the behavior of those involved, I refer primarily to the descriptions that were provided to me by several Council Members during forty-five semi-structured interviews that took place between the spring of 2006 and the winter of 2008. We will see that those behaviors that lead to the absence of formal voting and those that lead to a low proportion of public opposition have a common goal, which is to conceal the existence of dissident voices. Despite the implementation of a policy of “openness” by the Council, this type of cover-up endures, and is even reinforced by this policy. Those who find themselves in the minority find ways to avert the obligation of “transparency.” In the following pages, I will briefly set out some of the main aspects of this phenomenon that my interviews have allowed me to discover.<sup>3</sup> They are purely descriptive and I do not pretend to draw any kind of normative conclusion about the behavior of the various actors or assess their legitimacy. In showing what “consensus” really means, I emphasize that the public nature of the decisions does not guarantee that ministers are taking responsibility, but rather, quite frequently, leads them to conceal, or at least not be straightforward about the fact that they were in a minority. Rather than lifting the veil on the decision-making process, this exposure tends to ministers to maintain its opaque nature.

### **What Council Members Say**

According to the Council Members I interviewed, the qualified majority voting system is used systematically when it is the legal mode of decision. Clearly, the Presidency of the Council is aiming for qualified majority, not unanimity, since its goal is to pass as many laws as possible. The national representatives who preside over the Council, and who therefore oversee the decision-making process, must guarantee a maximum efficiency to meet their governments’ expectations. This is the point on which my interlocutors have insisted the most. They also stress how quickly the Presidency stops the negotiations as soon as the qualified majority is attained.

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<sup>3</sup> See Stéphanie Novak, *La prise de décision au Conseil de l’Union européenne*, preface by Bernard Manin, Paris, Dalloz, 2011.

There does not seem to be presidencies that are more “consensual” than others. The first goal for all of them is to pass the greatest possible number of measures. The representatives of the various Member States know this and they give into this frenzy of adoption when they have to defend the interests of their country, knowing that they will have to encourage decision-making when they preside in turn over the Council.

There are of course informal rules of exception dictated by political realism. First, a large Member State must not be marginalized against its will. Second, as we have seen, the passing of a law can be delayed if a Member State’s vital interests are threatened. The existence of such rules comes primarily from the fact that the same people make decisions together repeatedly: if a law were to be adopted despite the strong opposition of a minister, this minister may be much less cooperative during subsequent negotiations. But these two informal rules apply only in exceptional cases and the process of legislative adoption that I have described earlier generally prevails.

Things usually happen in the following way: for its part, the Presidency aims for a strictly qualified majority, while the representatives accept the eventuality of being in the minority. The main advantage of this risk (the efficacy of the decision-making process) is considered to be greater than its drawbacks. There is no resistance from State sovereignties that would manifest itself in an attempt by the Presidency to find solutions that would satisfy all the Member States, even if it meant taking more time. On the contrary, it is the representatives themselves who do their best to avoid being in the minority. In other words, the possibility of being marginalized is a determinant of the legislative decision-making process.

This phenomenon forces us to ask ourselves what causes the two types of apparent consensus that I described earlier. I will try to answer the two following questions in turn:

- ⇒ Why is formal voting not used for information purposes or to block decisions?
- ⇒ Why, according to public records of voting results, are decisions taken without opposition in most cases, when a qualified majority would have been sufficient?

## **The Invisible Vote**

In fact, most decisions are taken unofficially by the Permanent Representatives Committee of the Member States. This committee is composed of a small group of diplomats who work together on a daily basis. Their goal is to prepare files so that only the measures that the ministers will be able to pass reach the Council. During the in-camera sessions of the Committee of Permanent Representatives, formal voting is not used, even though participants say that decisions are made according to the procedure of qualified majority voting.

This may seem like a minor point. Sometimes the Member States representatives say that they do not vote because they do not need to, since they know each other well and work together on a regular basis. Yet those I talked to and who have been in charge of the Presidency mentioned that the representatives' positions are never very clear and information is often limited. Still, at no point in the process does the Presidency use formal voting, even though this could be an efficient way to be better informed.

During plenary sessions, all the participants make mental calculation to assess if there is a blocking minority, but no one talks about the vote. The participants only talk explicitly about the number of people who oppose the measures that are being discussed outside of plenary sessions, during the frequent meetings of the Presidency and the Secretariat, or during bilateral talks between the Presidency and the representatives of the Member States. It is also at that moment that a representative may inform the Presidency that he (or she) will vote against a proposition or that he (or she) will abstain. Why is the usage of qualified majority voting invisible in plenary sessions and how can decisions be made without formal vote?

If there is no formal voting, it is because the negotiations are at the heart of the decision-making process and they require a certain amount of double language. It is also because without formal voting, the Presidency maximizes its chances of passing laws, and finally, because members with dissident voices do not want to be perceived as such by their peers.

First, it is very difficult to know for sure during plenary sessions what the positions of the representatives, or their “red lines,” are. This opacity is due to the fact that the measures that are passed are the result of negotiations between the Presidency and the Member States. Indeed, the level of the qualified majority (72%) forces the Presidency to transform the proposition of the Commission by granting concessions to the various members; its chances of passing the greatest possible number of laws would otherwise be reduced. But if the representatives can benefit from the Presidency’s willingness to grant concessions to reach the qualified majority, they must be careful not to ask for too much during the negotiations, or else the Presidency might reach the qualified majority with the support of less demanding representatives. When the representatives negotiate under the threat of being in the minority, it is not in their interest to make their position clear during plenary sessions, since their main resource is precisely to remain ambiguous about their possible support for the proposition of the Presidency. If they voted in favor of a proposition in a straw vote, the Presidency would try to reach the qualified majority without granting them any concession; if they voted against it, the Presidency would ignore them and look elsewhere for support. Therefore, the Presidency needs to decode what is being said during plenary sessions and seek information in the bilateral talks.

The absence of votes leads therefore to a certain amount of obscurity that the representatives use in their negotiations in yet another way: they hint at the possibility of their support during bilateral meetings with the Presidency, but take a hard line during plenary sessions to create in their rivals the hope that by moderating their demands, they will obtain concessions from the Presidency. Those who are unbending in their resolve wager that the softening of rival positions will give the Presidency more latitude to grant them what they want.

However, if the Presidency does not use its right to make participants vote, it is because it knows the cost of formal voting for the delegations: by forcing them to vote formally, the representatives who are in charge of the Presidency might bear the consequences in subsequent votes, when they no longer preside over the Council. They could also reduce their chances to see their proposition adopted by highlighting the opposition. It is in the Presidency’s interest to only orally “state”—the preferred word in this case—the qualified majority without resorting to a

formal vote, to capitalize on the ambiguities and the fact that the positions of the members are not clear, and to encourage the adoption of measures when the qualified majority is fragile.

Finally, a last motivation, combined with the previous ones, may explain the absence of a formal vote: the representatives who find themselves in a minority want to avoid the embarrassment, and perhaps even the humiliation of appearing defeated in front of their peers. This type of decision-making without a vote, sometimes called more positively a decision “by consensus,” can be observed in several international organizations. The president of the session makes a proposition and declares it adopted if no one objects to it. The unquestioned voice of the president of the session replaces the horizontal aggregation of voices that the vote allows. This practice allows decision-making by a qualified majority in a diplomatic context, while casting a veil over the identity of opponents. This diplomatic usage gives the illusion of consensus and comes into conflict with the democratic obligation of transparency – or, more precisely, with the obligation to reveal the identity of opponents. But in a club of diplomats like the Committee of Permanent Representatives, it may be that the members of the group can only be placed in a minority at the cost of some opacity.

Therefore, the absence of formal vote does not indicate that the Presidency is trying to reach a consensus and that the preferences of all the Member States are satisfied. If a formal vote is not used, it is paradoxically because the rule of qualified majority voting determines the decision-making process: directives are adopted despite the existence of opponents who do not admit their disagreement within the Council.

### **Unanimous Decisions?**

The other mystery raised by the pursuit of strict qualified majority is that of the unanimous nature of most decisions. If the Presidency aims for the qualified majority, why do public records indicate, three quarters of the time, that “all the Member States [were] in favor” of the decision taken?<sup>4</sup> This apparent unanimity can no longer be explained by the fact that the

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<sup>4</sup> See the monthly reports of legislative acts on the website of the Council:

<http://consilium.europa.eu/documents/legislative-transparency/monthly-summaries-of-council-acts.aspx?lang=en>



opponents to the proposition prefer to remain silent about their disagreement when they face their peers within the Council. More relevant is the fact that they think it is wiser not to reveal that they have been defeated to groups outside of the Council – national journalists, non-governmental organizations, lobbies, their political opponents or, more generally, the voters.

Voting results have been public since 1993. This reform followed the rejection of the Maastricht referendum by the Danish people in 1992. The policy of transparency of the decision-making process within the Council has developed progressively and was also a response to the request of European Members of Parliament. Nowadays, not only are the results of votes published, but some of the sessions of the Council are also broadcast.

However, the results that are published only concern the legislative acts that have been passed. No information is published about the laws that have been rejected. This fact contributes to the apparent unanimity of the decision-making process. In addition, this process is such that the ministers are allowed not to reveal the fact that they have been defeated. There are countries in which ministers are obliged to publicize a negative vote or an abstention if the law that has been passed does not satisfy the demands of the national Members of Parliament. But in most Member States, such an obligation does not exist. As I have said earlier, decisions are almost always made before the meetings of the Council of Ministers by Permanent Representatives who receive more or less strict instructions from their governments. The ministers register their vote for publication when they already know that a measure will be passed. And there is an informal norm according to which, at the time of the political agreement, a minister, if he has not indicated that he would vote against a decision, can no longer change his mind, even though he has the right to do so in principle. However, the realignment of ministers who opposed the law is not discouraged and tends, in fact, to be encouraged by peers, the Presidency, and the Commission.

This organization can incite the ministers to use a negative vote or an abstention for the purpose of “public display,” in particular as a sign addressed to lobbies or part of their electorate or political opponents; to distinguish themselves from others; to show that they are

uncompromising; or because they are accountable in some way. It may even happen that a minister declares publicly that he has voted against a law, when in fact he has supported it. For example, in the Environment Council, a minister can display a vote of opposition to show that he is in favor of a more progressive measure. In this case, he does it *because* he knows that it will not prevent the adoption of the measure.

And yet it is the opposite behavior that prevails: ministers tend to be quiet about their defeats. There is an old and well-established norm of the realignment of losers. This attitude is more or less common depending on the Member States. The interviews I conducted with national representatives indicated that some delegations are explicitly instructed by their government not to publicize their defeats.

More generally, the representatives mention that there are always costs in publicizing a negative vote, at least within the Council. The fact of not supporting a proposal of the Presidency and the Commission can indeed be perceived negatively by them and weaken the position of the representatives in subsequent negotiations.

To explain why they do not go public about their defeats, the representatives also mention the difficulty of passing a law at the national level if they were initially opposed to it. Also, according to them, a negative vote is generally perceived in their own country as a failure of the negotiations, and not as dignified political opposition. This failure may lead to a political weakening of the minister at the national level and be used later by his political opponents. Finally, the ministers may think it is wiser not to reveal certain costs of belonging to the European community. They can however exploit their defeat by blaming “Bruxelles” for some unpopular decision to which they are not necessarily as opposed as they pretend to be. Yet their tendency to conceal their defeat and the predominance of an apparent consensus reveal the fact that, most of the time, they accept the application of the majority rule, but without taking public responsibility for their “defeat.”

Therefore, there is a gap between the behavior of the representatives when they negotiate behind closed doors and their behavior in a public vote. The absence of a formal vote during plenary sessions, while giving the illusion that decisions are unanimous, hides rather than sheds light on the positions of the representatives on the laws that are passed. Similarly, public voting results conceal the benefits and losses of the Member States at the end of the negotiations. Publishing voting results does not guarantee that the ministers will clarify their position on a particular law. On the contrary, it tends to discourage them from voting publicly against laws that are passed by the Council. The publicity contributes to the appearance of unanimity of the decisions.

### **Publicity Without Transparency**

Although it is supposed to encourage ministers to take responsibility, the publication of votes is organized in such a way that it can have counter-productive effects. In my conclusion, I will outline some of the effects that my investigation has allowed me to identify.

First of all, the partial access to the sessions by the public has led the actors to shift the decision-making process to the lunch break. As mentioned earlier, since the threshold of qualified majority is particularly high (72%), the imperative of productivity can only be respected if the various players negotiate the content of the propositions of the Commission. The Presidency grants concessions in order to find enough support, and the representatives moderate their own demands or “drop” some of them (this is one of the words they use most frequently to describe their behavior when facing the risk of defeat), because they are always threatened by a defeat. The negotiation moves forward not only through double language, but also through the exchange of concessions and sacrifices that ministers have no interest in making public. Therefore, opacity plays a role in the remarkable legislative productivity of the Council. If the representatives were forced to make their position clear in an open vote, the efficacy of the decision-making process would probably be reduced.

In addition, in the Environment Council – which I have studied more specifically – this publicity has remarkable effects, perhaps more salient than in other Councils, because of the

current trend of environmental policies. I have already mentioned that the ministers can use publicity to display their opposition to some measures, on the ground that they are not ambitious enough. Conversely, according to some national representatives who have been in charge of the Presidency of the Environment Council, publicity is a resource for the Presidency, because ministers cannot publicly say “no” to measures that aim at protecting the environment. It is therefore in the Presidency’s interest to move the discussion to the public arena: not only can it then encourage the adoption of ambitious measures, but it can also make sure that these propositions are accepted without apparent opposition in a key electoral domain. Several negotiators for environment-related issues have said that laws have been passed with the help of media exposure, since it is easier to express one’s opposition behind closed doors. So hypocrisy may be a civilizing force<sup>5</sup> and publicity in the end may have beneficial consequences, in so far as it forces reluctant ministers to pass laws that they would have rejected behind closed doors. But we should make sure that these agreements that have been forced by publicity are followed by actual application of these measures. Nothing is certain in that respect.

Finally, if the rallying of minorities is an ancient norm that existed apparently before votes were published, the Council interviewees attribute this behavior today to the fact that ministers consider the public reception of their opposition to the measures that are passed. When they rally to the majority for fear of being defeated, they estimate that a vote of opposition would attract the attention of this or that group outside of the Council – journalists in the national press, lobbies, government, political opponents, or voters in their country – and that these people would adversely judge their performance in the negotiations. A member of the Secretariat of the Council explains, without irony, that the public display of votes opposing the laws that are passed in plenary sessions, which is broadcasted on the Internet, deters the “losers” from publicly voting against them.

At the Council, publicity is not an extension of transparency. Decisions are still made behind closed doors, public sessions tend to be used for rhetorical effect, and the publication of

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<sup>5</sup> See Jon Elster, « Argumenter et négocier dans deux assemblées constituantes », *Revue Française de Science Politique*, 44/2, 1944, pp.187-256.

votes mostly encourages defeated opponents to remain silent. The policy of transparency is implanted in such a way that it only leads to a publicity without transparency. Despite the “open nature” of the Council, the decision-making process remains opaque and publicity itself serves this opacity.

## **Conclusion**

If the decisions seem so often unanimous in the sphere of qualified majority, it is not because the Commission and the Presidency try to satisfy all the Member States. It would be wrong to think that the apparent unanimity is the result of a resistance of sovereignties. On the contrary, the principle of minority position is well accepted by those involved, because it makes the decision making-process more efficient. They consider that this efficacy is a greater advantage than the risks of being defeated.

The apparent unanimity is therefore not the sign of a tension between the protection and the relinquishing of sovereignty. It is the symptom of a more complex phenomenon: the relinquishing of sovereignty is really at the heart of the decision-making process, but most of the time, it is not acknowledged publicly by the ministers. There is a gap between the losses that those in charge accept for their country when they end up in the minority and those they agree to publicize.

The façade of consensus is the result of the diplomatic nature of the decision-making process, which mostly involves silencing the opposition. This diplomatic aspect has wide-ranging consequences: it is when they face their peers in the Council and outside groups that ministers generally consider it is more prudent not to appear defeated. The fact that opacity persists despite public claims of transparency underlines the fact that the decision-making process within the Council obeys diplomatic rules. It seems that without this opacity, the machine of the Council could not function as efficiently. The disjunction between what the representatives regard as useful for their country and what they think is prudent to say in public can probably be explained by the fact that in a community that is being built, like the European

Union, the Member States must appear to be winning in all circumstances. The price paid for the making of this community may be the silence that must be kept about some of its costs.

Are we to say that these obstacles to transparency are insurmountable? What this study shows is that publicity, as it operates in the Council, has an effect on the results, not on the process; far from establishing the responsibility of the ministers, it helps to reinforce opacity. We must still find out what the effects of a greater transparency would be.

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