

Expressing Disagreement in the Council of the European Union

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Abstract: *The Council of the European Union is the most important legislative body of the Union, which decides on the acceptance of legislation according to the rules prescribed in the Founding Treaties. As insiders and published data show, the majority of the legislation is approved by consensus. This paper deals with the infrequent cases when a country expresses its dissatisfaction with the final agreement. The author discusses the ways of expressing dissatisfaction, the frequency of its use, and the reasons leading countries to this behaviour. On the basis of this review, in the conclusion several recommendations are offered for increasing the transparency of Council's proceedings without disturbing the balance of the decision-making process.*

Keywords: *Council of the European Union, decision-making, expression of disagreement, voting, statements, reserves*

1 Introduction

The Council of the European Union is the most important legislative organ of the Union; it represents the member countries, which on its floor enforce their national interests.¹ Due to its special character, the Council is also called an “institutional chameleon” (Wallace 2002) because besides the predominant intergovernmental tendencies it also contains some supranational ones. Negotiating and decision-making

in the Council is much different from organs of classical international organizations as there are many elements that are more common for domestic political institutions (see in detail Hayes-Renshaw and Wallace 2006: especially 298–320, Westlake and Galloway 2004: 223–276). In one point, however, there is no difference from bodies of international organizations, namely the attempt to secure the widest possible agreement on the negotiated proposals. The practice was labelled “culture of consensus” in the Council. This paper does not aim at analysing the reasons for this conduct, which has the effect that even countries that dislike the proposal for various reasons support it. The intention of the present article is quite the reverse – to concentrate on the situations when the respective countries decide to speak against the adopted measures and express their true negative stance.

The reasons for breaching the rule of consensus can be a set deadline (negotiations could not be prolonged), the increased expense of continuing negotiations or simply the impossibility of further concessions to the opposing country without depriving the proposal of its true sense. In such cases the Council resorts to voting- the procedure foreseen by the Founding Treaties. This study will discuss the phenomenon of disagreement in greater detail, namely it aims to reveal how often countries vote against, what countries vote against the most and why, in what circumstances the disagreement occurs most often, and whether the accessible data can be analysed at all. The disagreement is however expressed not only by the procedure of voting but in other ways during or after the negotiations as well, so these possibilities will be analysed as well. However, it is necessary to say beforehand that most of the data used are of a preliminary character, as research of decision-making in the Council suffers from a lack of transparency of the negotiations and frequently changing conditions.

The present analysis is based mainly on the voting records of member countries in the Council when adopting legislative acts. Since the mid-1990s, the General Secretariat of the Council has each month been issuing a Summary of Council Acts, including the names of the countries voting against the proposal or abstaining from the vote. These raw data were processed into datasets by other researchers. The author worked with datasets established by Mika Mattila (1994–2000, 2004–2006), Fiona Hayes-Renshaw and Hellen Wallace (1994–2004) and Sarah Hagemann (1999–2006), as it would be unnecessary to shadow their work and create exactly the same dataset. It is true that the datasets slightly differ not only in period covered, but also in the scope and character of contained decisions. On the other hand, the quantitative data does not form the core of the analysis in our text, but only supports the qualitative arguments and therefore the differences are not damaging. Other very important sources of information are secondary sources and results of contemporary research projects; in certain aspects the article’s objective is to serve as the literature review and show the reader how little agreement exists in the academic community on the nature of the Council’s decision-making.

A serious problem for any research on the Council is the limitation of the available empirical data. Only the accepted proposals are registered, while those unsupported by the required majority are not submitted for a vote and negotiations on them continue on various levels of the Council or the Commission might occasionally prefer to withdraw them. The number of withdrawn proposals is somewhere around 10 percent.² This is not always a definitive withdrawal, usually the proposal is only redrafted by the Commission in order to accommodate the preferences of more member states.³ Purely theoretically it is possible to imagine for instance that in the Prelex database⁴ all Commission proposals could be found out which so far have not been adopted and then to seek those in which there are long periods of time between submitting the proposal and any recorded activity. Subsequently, by an analysis of the Council documents (if they are available), through media coverage of events or leaks of information from insiders it could be estimated whether the delay in the adoption of the proposal is due to the absence of the necessary majority or whether there are other reasons.

The Council's voting records register failed votes only in exceptional cases. A well-known example is the Ecofin session of 25 November 2003, when there was a vote on the imposition of sanctions against Germany and France due to their breach of the rules prescribed by the Growth and Stability Pact. The press release of the Council enumerates all countries, which voted in favour of the sanctions, although the needed majority was not achieved (Press release from 2546th Council meeting: 13–21). Another example, this time covered by unanimity, is the approval of the proposal made by the Commission for the Joint European Patent (COM (2000) 412). It was submitted by the Commission as early as 2000. Between 2001 and 2004, the proposal was placed nine times on the agenda of the Council meeting as point B.⁵ The Irish Presidency of the Council referred the last version of the compromise to a vote in June 2004. The record from the meeting openly registers the rejection of proposal by France, Germany, Portugal and Spain, so that the compromise was not approved and the whole question was forwarded to the European Council (Draft Minutes 2583rd Council Meeting: 8).⁶

The cases cited in the preceding paragraph are however only exceptions. On the other hand, it is customary that governments for tactical or utilitarian reasons hide their real interests and vote in favour of the proposal even when they do not agree with it. This means that data on disagreement is limited to the situations when a representative of a country in the Council does not vote actively for the adoption of the proposal, while the proposal nonetheless still secures the necessary majority (see however, below, the issue of reservations). In other words member states most probably agree in general with the proposals under discussion in the Council less often than the officially published data on voting suggests. This situation unfortunately could only be taken into account when considering the arguments presented below.

3 Unanimous voting and use of the veto

Unanimity is a voting procedure in which the expression of disagreement is of the utmost importance as each subject has the veto power and only proposals supported by all the parties are adopted. Standard views of negotiations demonstrate that the veto is a strong tool in negotiation, and formally as long as the delegations stand firm behind their positions, they must be complied with. According to the theory of rational choice, unanimity is the best mechanism for voting in the assembly or committee, as no minority views are disregarded and the result of decision, if all actors behave rationally, is frequently very close to the *Pareto frontier* (see Buchanan and Tullock 1962). When there are too many actors, however, the advantage of unanimity decreases because of the low effectiveness of decision-making, also because the position closest to the status quo usually wins, any progress could be inhibited. In general it holds that compared to bilateral negotiations, in a multilateral environment the veto is a protective mechanism rather than a strategy applicable in the negotiations (Dupont 1994: 154–155, also Habeeb 1988). Reflecting this, the use of veto in the Union is limited by informal rules, and it is for example very difficult for only one country to stand against a compromise achieved by the rest of the member states. A frequent use of the veto by any country would lead to the loss of trust and isolation of the given state, so in fact it is better to continue the negotiations and gain concessions by entertaining tools such as “logrolling” or “package deal.” In most cases the use of the veto is additionally conditioned by the necessity to have a strategy prepared as to how to proceed further and at the same time it is advisable to support one’s position with forcible arguments, such as that valid important national interest are affected (a sort of shadow of the Luxemburg Compromise, even though it is not directly mentioned).⁷

Considering the character of decision-making in the Council, when voting takes place only if the proposal secures the required majority and only adopted acts are registered, the frequency of veto’s use in unanimity cases is actually impossible to record. Similarly we do not know precisely what countries have the veto (or threat by veto) most often in the inventory of their negotiating tools. A certain indicator is provided by the interest of countries in the preservation of unanimity in particular areas during the Intergovernmental Conferences (usually by each amendment of the Founding Treaties the number of legal bases covered by qualified majority increases). If a member state rejects such a move, it can be assumed that it is in an area in which it has strong interests and at the same time the country fears that it could become outvoted. Another factor on which the disagreement could be estimated are the recorded abstentions from the vote. Naturally according to formal rules abstention does not prevent adoption of the proposal but indicates a lower degree of assent. The problem is that for instance out of the 97 legislative proposals adopted unanimously

between May 2004 and December 2006, only in three of them a country abstained from voting (Mattila 2007: 8). The most probable explanation for this behaviour is that in case of unanimity a real effort is made to find an integrating solution, which could be actively supported by all subjects.

4 Disagreement in case of qualified majority voting

A more revealing picture is uncovered by the analysis of voting in sectors covered by a qualified majority, as here the official records register negative votes and therefore certain data are available for further examination. Even registered votes against the proposal of course as mentioned do not have any impact on the adoption of the final decision (for exceptions see above). In the qualified majority voting procedure the option of abstention is available but its effect is identical with the negative vote (the quorum is not decreased), so both a vote against and an abstention have similar value. The difference between the two alternatives is formal rather than real. Representatives of states are probably conscious of it but further research is needed in order to establish whether the distinction is of any real importance or whether it is purely symbolic. It should be emphasized that in qualified majority voting the abstention mostly cannot be interpreted as an indicator of lack of interest or of indifference to the outcome as the position towards the proposal is negative. Moreover, the logic of repeated negotiations in the Council assumes that in the case of indifference to a certain issue one's "correct" position is to support the decision reached by the rest, so that next time one could demand the same from indifferent parties in cases of major importance for oneself, i.e., "logrolling."

Firstly it is necessary to answer the question why member states vote against or abstain when their attitude does not prevent the proposal from being adopted. The argument already presented points out that it should be better for them to continue in the negotiations and maximize the concessions or, as a last resort, agree to an even unfavourable decision and ask for the same attitude when the time comes, perhaps in a different sector. Similarly conclusions will be provided by the application of a constructivist research agenda: any expressed disagreement disturbs the expected standard of conduct (culture of consensus) and compromises the validity of the theory of socialization and behaviour of delegates according to the logic of appropriateness.

In the author's opinion the main reason behind negative votes or abstention is to publicly distance oneself from the result of the decision (act).⁸ The motive for such conduct could easily be the dissatisfaction of a certain state with the final agreement. Negotiating tools such as logrolling are not always available, other countries for example notice the isolation of the sole dissenter and reject any further concessions, which might make the initial objective of the proposal worthless. Sometimes the

member state is forced to say no to a compromise it helped to develop, because it has to satisfy national public opinion or pressure groups opposed to the proposal. For instance, Luxembourg and the Netherlands in the case of the so-called second railway directive voted against the final agreement in spite of having heavily cooperated on the compromise (Bal 2004: 130). In member states where the activity of its representatives in the Council is subject to intensive parliamentary control (e.g. Denmark) or must comply with the wishes of lower territorial units (federal systems such as Germany), the logic of two-level games applies. These countries have less space for manoeuvring and cannot react flexibly enough to use (some would say exploit) all opportunities offered by other parties in the frame of negotiation. Often they find themselves in a position to vote against although in case of support they could have gained additional concessions (Hayes-Renshaw et al.: 171; also Westlake and Galloway 2004: 267–269; more general on domestic influences Kassim (ed) 2001). If any state has a record of frequent disagreement in a particular area, it could function as a public declaration of the country's policy towards some principal issues for the future.⁹ Dorothee Heisenberg compares such a step to the dissenting opinions used by judges in some legal systems (Heisenberg 2005: 73).¹⁰

The total number of proposals falling under qualified majority rule, in which disagreement is expressed, fully corresponds to the prevailing culture of consensus in the Council, and therefore only a minority of decisions is subject to the negative vote and/or abstention. Recorded data on disagreement per member states between 2002 and 2006 is displayed in Table 1. It is obvious that there are significant differences among the states: Prior to the 2004 enlargement, the most frequent opponents were Germany, Britain, Sweden and Denmark, on the other hand Finland, Greece and Luxembourg were on the other side of the spectrum. In an enlarged Union the culture of consensus became quite surprisingly even more profound (at least in the beginning) and disagreement has been limited.¹¹ Sweden and Denmark remain as the leaders in expression of disagreement, while Latvia, Estonia and Spain are the most reluctant ones to vote against or abstain. It must be pointed out that the results would be somewhat different if the other than final legal acts are included in the database.¹²

Table 1: Number of cases member states voted against the proposal or abstained when deciding on final legal acts falling under qualified majority voting

	Year					
	2002	2003	2004 (1-4)	2004 (5-12)	2005	2006
Belgium	1	3	9	1	0	3
Czech Republic	–	–	–	0	2	2

Denmark	6	8	5	2	4	5
Estonia	–	–	–	1	0	1
Finland	4	1	1	0	1	1
France	6	4	6	1	1	2
Ireland	0	4	3	0	0	2
Italy	2	5	3	2	5	1
Cyprus	–	–	–	0	1	2
Lithuania	–	–	–	3	2	4
Latvia	–	–	–	1	0	1
Luxemburg	2	4	0	2	1	0
Hungary	–	–	–	0	0	2
Malta	–	–	–	0	3	3
Germany	5	6	0	3	3	3
Netherlands	6	1	6	0	0	7
Poland	–	–	–	2	2	5
Portugal	4	6	1	1	5	3
Austria	1	7	7	1	1	2
Greece	2	3	0	3	3	3
Slovakia	–	–	–	0	1	3
Slovenia	–	–	–	0	1	1
United Kingdom	5	8	3	1	3	4
Spain	2	7	1	1	1	0
Sweden	11	8	3	2	6	7
Total	57	75	48	27	46	67

Source: Author, based on: Period 2002- April 2004: Dataset Wallace – Hayes-Renshaw. Available at <http://www.councildata.cergu.gu.se/Council%20Data/Wallace/Wallace.htm> (visited 12 June 2008); May 2004- 2006: Dataset Mattila. Available at <http://www.councildata.cergu.gu.se/Council%20Data/Mattila/Mattila.htm> (visited 12 June 2008).

Note: Although two datasets are not directly comparable, by extracting information only on final legal acts there shall be no issue with comparison.

Is it possible to generalize the presented data in any way and are we able to determine any objective reasons why certain member states vote against or abstain more often than other countries? Several research endeavours proposed hypotheses in this respect and tested concrete hypotheses by using qualitative and mainly quantitative methods. Especially the effect of the following factors has been examined:¹³

- **Size of the country.**¹⁴ Big countries should vote against more often because they do not have to worry so much about the eventual impact of such an unwelcome step on their reputation and generally are less afraid to stand up against the majority. On the other hand, big countries have more resources to use during negotiations and thus a better position to enforce their position, so theoretically the final outcome should correspond more often with their interests. In practice the first preposition prevails, as from the purely numerical point of view the five largest countries in EU-15 covered 46 % of negative votes and 54 % of abstention, which is a higher share than their arithmetic representation in the group (Heisenberg 2005: 74–75). The predominance of large countries in expression of disagreement has been confirmed by quantitative models (Mattila and Lane 2001: 43, Mattila 2004: 43, Hosli 2007: 15), new research, however points out that after the enlargement this link becomes less obvious and negative votes more likely come from medium-sized countries (Hagemann and de Clerck-Sachsse 2007: 16, 18–19).
- **Government's party affiliation.** The conduct of ministers who represent the country in the Council could be influenced by the ideological background of the government they are members of. Analyses of electoral manifestos suggest that right-wing oriented governments support integration less enthusiastically than left-wing governments (Hooghe et al. 2002, Hix 1999, Marks and Wilson 2000). The same results were confirmed by the research on European political parties during European Parliament's elections (Gabel and Hix 2004). There is another claim, namely that the more extremist is the party (both the right or to the left from the centre), the more it dislikes integration (Marks and Wilson 2000: 452). If the governments reflect the positions of the parties represented in it, the hypothesis should hold that governments with prevailing left wing, non-extremist parties vote against or abstain less often than right-wing governments or those hosting radical parties. Here the sources cope with the methodological problem of how to measure the ideological bias of governments, moreover when there are usually coalitions of parties with differing ideological roots. These might be reasons why the available findings are so divergent. Some research projects have confirmed that left-wing oriented governments are less likely to vote negatively (Mattila 2004: 42–45, Hagemann 2007: 19–20, Hosli 2007: 16, partly also Aspinwall 2006: 105), for others the hypothesis has not hold (Zimmer et al. 2005: 413–414, Hayes-Renshaw et al. 2006: 177).
- **Support for integration.** The classification of countries (governments, populations) into Euro-optimistic and Euro-sceptical is one of the most traditional ones. In general the more integration-prone countries should vote against proposals scarcely because these states share the similar interests with the traditionally pro-integrationist Commission. As this institution holds the monopoly of legisla-

tive initiation and its proposals structure significantly the outcome of Council's negotiations,¹⁵ from a purely logical viewpoint those government supporting integration should have fewer problems with accepting the proposal and final decision. As in the preceding case, there are difficulties with methodology, the authors usually measure the support for integration from Eurobarometer data, unfortunately the government needs not always reflect popular opinion and there is cross-influence with left/right ideology. Thus it is no surprise that the findings differ and studies on the whole have evenly backed (Hosli 2007: 16, Mattila 2004: 46, here the support of integration as a factor prevails over the right/left line), but also refuted the hypothesis (Hagemann 2007: 21, Zimmer et al. 2005: 413–414; Aspinwall 2006: 106).

- **Contributions and receipts from Union's (Community's) budget.** Countries classified as net receivers should vote negatively less often because they are anxious to disrupt the integration process and inflow of money. Funds could also come in form of side payments used to buy the assent of reluctant states, thus further decreasing the opposition of these countries (see the discussion in Carrubba 1997). Conversely, the contributors to the budget might believe that they have bought the right to express their disagreement freely with no consequences. In this case the difficulty is to exactly define what country is a net receiver and net contributor and to what extent. Usually researchers start with the data provided by the Commission,¹⁶ but this does not reflect the situation in its complexity.¹⁷ Some analyses have confirmed the hypotheses and identified a strong link between the amount of funds gained or paid and amount of opposition (Aspinwall 2006: 105–106, Zimmer et al. 2005: 411–412, Hosli 2007: 15–16), whereas others arrived at the opposite conclusion (Mattila 2004: 39, Hagemann 2007: 21).
- **Length of membership.** While the previous points were based predominantly on rationalist grounds, the next two draw on constructivism. They start from the idea that the longer the specific Council's environment and the consensus culture have influenced the subjects, the more they will "learn" the norms and start to behave accordingly, which also means fewer votes against or abstentions. An example is provided by Sweden, which due to a misunderstanding of the Council's operational milieu voted regularly against proposals in its first year of membership, but soon it realized the mistake and after some time the amount of disagreement dropped to the acceptable level (in greater detail Lewis 2007: 16–19). Echoing this, one could often hear the insiders fearing the "inexperience" of the new members affecting negatively the functioning of the Council (Lewis 2002: 295). The available data however points out that those suspicions were false (Hagemann and de Clerck-Sachsse 2007: 19). There are still no consistent results available on the effect of the variable length of membership on the amount of disagreement.¹⁸

- **Presidency.** When the state is holding the Presidency, it is first expected not to enforce its will and work as a consensus builder, but at the same time it has many tools at his disposal to structure the agenda and influence the outcome of negotiations (see discussion below and also Tallberg 2004). Therefore, the country holding the Presidency should be voting against proposals much less often than other states, which is indeed the case according to the existing research (Mattila 2004: 43, Hosli 2007: 16). For the future, another hypothesis might be checked, namely whether the countries that have just finished their Presidency behave in an accommodating manner as they have a fresh experience as to how difficult it is to reach a consensus.

What information does one obtain if one looks at the structure of opposing groups? Surprisingly, before the 2004 enlargement in 47 % of the proposals affected by disagreement one country decided to dissent (the so-called *singleton*), in 19 % two states voted against or abstained, in 18 % three, and only in the remaining share was the opposition formed by more countries (Hayes-Renshaw et al. 2006: 169). With ten new countries¹⁹ we should record a move from singletons to more numerous groups and indeed the presumption has been confirmed as since May 2004 the share of a single country disagreement has decreased to 34 % of affected proposals, in 33 % of cases there have been two or three countries and in 33 % more than three (Mattila 2007: 14).²⁰

Several researchers have analysed situations when disagreement is expressed by more than one country simultaneously and used the data to explore the question of coalition formation in the Council. They start with the idea that if certain countries vote or abstain together regularly, they probably share the same interests and may develop something similar to a coalition. The issue of coalitions in the Council is however outside the scope of this paper (but see Elgström et al. 2001, Tunkrová 2005, Naurin 2007). A number of tentative divisions have been suggested, and in many ways they overlap with the above-given reasons explaining the frequency of member states' disagreement.²¹ By applying a statistical analysis of voting data, two-dimensional space diagrams could be drawn which illustrate the behaviour of member states: the closer they are to one another in the diagram, the more similar their voting pattern should be and vice versa.²²

How much do the data on disagreement reveal of the attitudes of the member countries and their governments? The presented review of sources demonstrates that with rare exceptions (Presidency) the available analyses do not provide a clear answer to the question of what factors contribute to a higher probability of the member state to vote against a proposal or abstain. We receive similar inconclusive results with analysis of disagreeing coalitions. By visual comparison of two-dimensional

diagrams from two sources (Mattila 2007, Hagemann and de Clerck-Sachsse 2007) we see completely different pictures, even though both of them should display the same issue (voting patterns) in the same time period (May 2004 and December 2006). The discrepancies may be partly justified by the application of divergent statistical methods by the researchers,²³ but a more likely explanation is that there is simply a very loose (if any) connection between the inherent characteristic of the country or its government and their behaviour in the Council (similarly Thomson et al. 2004: 257, Hayes-Renshaw et al. 2006: 177). In fact, the whole concept of using frequency of disagreement and its distribution among the countries as an instrument for research is somewhat artificial as even the most often opposing states vote against or abstain from only a very small share of total amount of proposals (around 2 %). Statistical samples are thus only of limited size and value, and moreover are usually unnaturally extracted from the larger datasets (for example, the analysis only involves negative votes and/or abstention). The other option is to use larger datasets, but then any statistical analysis will be influenced by the fact that the disagreement will be lost in the sea of decisions adopted by consensus.²⁴

Comparatively more useful is information in which substantive sectors of disagreement occur most frequently. Before 2004, it was widespread in the areas of the Common Agricultural Policy and Common Fisheries Policy, and the trend has partly continued after enlargement as well (see in detail Hagemann and de Clerck-Sachsse 2007: 28–33; Hayes-Renshaw et al. 2006: 170–175, Mattila 2007: 10).²⁵ Agriculture and fisheries are followed from a considerable distance by the sectors of internal market, e.g., state subsidies, transportation and the environment. This chart based on the absolute number of proposals affected by disagreement however should always be compared with the number of proposals adopted in each sector, as the legislative activity differs profoundly. For instance in agriculture, 48 proposals recorded at least one negative vote or abstention out of the total of 330 (14,5 %) proposals adopted between May 2004 and December 2006, whereas in transportation and telecommunications 14 proposals out of 62 (18,3 %) were affected (Mattila 2007: 10).

Additionally the negative votes or abstention are more common in issues with a looming deadline or when there is a financial loss caused by non-decision. In these cases the decision must be taken and there is no time for prolonged negotiation and satisfaction of everyone's interests. Similarly it holds in areas with well-organized national lobbies and high public interest, where member states (governments) could either satisfy the concerns of these groups or must save face and show how they fought to the bitter end. On the other hand in cases which would move integration considerably forward, for instance when adopting a decision transferring a certain issue to the responsibility of Union, disagreement almost never occurs and consensus is preferred (see Heisenberg 2005: 77–78).²⁶ Exceptions to this general framework are the budget issues, in which time and financial constraints are present but disa-

greement is hardly ever registered. This might be explained by the strict limits the budget is framed by the long-term financial perspective as well as by the preceding indicative votes in the budget related Council's working groups. It is also desirable to reach consensus between the contributors and receivers. Likewise, in the area of external trade policy the consensus is always reached. This may again be due to the important influence of the lower levels of the Council on negotiations (here Art. 133 Committee), the member states in this sector also find it advantageous to reach an unanimous agreement in order to guarantee the unity and stronger negotiating position of the Union vis a vis its trade partners or on the floor of World Trade Organization (Molyneaux 1999).

Cross analysis between data on negative votes and abstentions in sectors and by countries reveals that certain states express their disagreement only in one or very few (e.g. Spain and Sweden in agriculture), but no state opposes in all sectors, so the claims labelling some countries as generally euro-sceptic (e.g. Britain, Poland) are unsubstantiated, at least from the Council voting data. Taking in account the spread of negative votes and abstention among the states and sectors, and comparing it to the total amount of unopposed adopted legislation, we can firmly conclude that no absolute winner or loser can be found in any sector and that no country becomes systematically outvoted. The absence of a clear boundary between the majority and minority may be one of the cornerstones of the integration's success.

5 Other instruments for expressing disagreement

A negative vote in the case of unanimity prevents the adoption of the proposal and because of that its use is quite limited in the Union. We also noticed that to cast a negative vote under qualified majority voting is not a widespread practice either as the actors are, for various reasons, reluctant to disrupt the culture of consensus. But countries have other tools at their disposal to express their displeasure with the proposal, tools that are more sophisticated and nuanced than just to say no. By utilizing these instruments the states could satisfy their interests in a much more efficient way, either before the adoption of the proposal (reservations), with the adoption of it (statements) or even after the adoption (legal means). All of them are discussed in turn.

Each proposal is hotly negotiated in the lower levels of the Council's hierarchy (relevant working groups, Coreper) and it is logical that during discussions the delegates representing the member states state and pursue their preferences, including disagreement with the whole proposal or certain parts of it. This could be done behind the scenes (corridor bargaining), but more often the delegates openly express their disagreement to other delegations. For this purpose a special system of reserva-

tions (*réserves*) has been developed. If the position of a delegation to a particular point of the proposal is negative or unclear, it places a reservation towards this point. No formal classification of reservations is available; in general they are divided into two categories: procedural and substantive (see also Westlake and Galloway 2004: 226, Kiljunen 2002: 1–4). Among the former belong the linguistic reservation—when a delegation is waiting for the translation of a proposal into their language or for an interpretation of some parts by linguistic experts and also the scrutiny (or review) reservation. In this case the delegation demands more time for examining the proposal, but it agrees with the general content of it. Especially the review reservations are often used but do not significantly hinder the negotiation, which usually proceeds without major delays. These reservations are removed as soon as the reason for their use expires.

A special kind of procedural reservation is the parliamentary scrutiny reservation, which is used by some member countries to indicate that their position demands sanction from their parliament. Denmark and the United Kingdom exercise them most often, but it is not uncommon for other states as well. This reservation again is considered to be technical; the negotiations continue and even the political agreement on the proposal could be reached. Such agreement is *de facto* binding for the member state, but formally the proposal is adopted only after the reservation of parliamentary scrutiny is raised. Procedural reservations could be employed also as strategic or delaying instruments but that scarcely delivers any major success.

Delegations often attach reservations regarding financial costs of implementing the proposal and require explaining the source of funds to cover them. Such reservations are usually swiftly removed. The most serious is the general substantive reservation, which is applied if a delegation disagrees with the whole proposal or its important part because of its content. In this case a change of the proposal is necessary or the state withdraws under pressure from others, either at the level where the reservation was placed or the solution is found at higher levels of the Council.²⁷ A second option is the adoption of the proposal by the required majority and without any concessions to the objecting state, than formal reservation is typically transformed into negative vote.

Another legitimate method to articulate disagreement with the proposal is the delaying tactic, which becomes useful particularly when a member country is unable to change the proposal according to its interests. However, delegations have only a limited number of instruments at their disposal to radically delay the negotiations, they can (in addition to the above-referred reservations) point out a breach of the subsidiary principle or the wrongly-selected legal basis of the proposal, but unless their position is supported by relevant arguments (and other delegations), they will not be successful. The Presidency holds wider opportunities in this respect, as it can use its agenda-setting and agenda-structuring powers to postpone the negotiations

of the particular point it dislikes (in greater detail Tallberg 2003: 11–13). The space for manoeuvring by chairpersons from the Presidency who head all meetings is partly counterbalanced by the requirement that the Presidency should behave neutrally during its mandate. Still the Presidency is usually at least able to delay the decision it disagrees with, unless it is a question on which a quick decision is needed.²⁸ It is very difficult to empirically prove the use of the delaying tactic as a sign for expression of disagreement as the result is inactivity. Such a situation might be, however, caused by other reasons as well, e.g., by exogenous changes.

An interesting element in Council decision-making is the institute of statements (*déclarations*). It is a text in which member state(s) or Union's institution(s) (Council, Committee, and Parliament) might explain in detail their attitude towards the adopted legal act or its parts. The statements are attached to the publicly available Council minutes (see Art. 9 of the Council's Rules of Procedure),²⁹ the legal basis for their existence is to be found in Art. 13 Para 1 of the Council's Rules of Procedure. The statements are however not legally binding and are not published in the Official Journal. The statements are a very useful tool when explaining disagreement in the case of negative votes or abstention as the member states sometimes justify why they resorted to so "drastic" a step. An example of such an explanatory statement is found in Box 1.

Box 1: Statement by the Polish delegation on the approved Council Regulation fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2007

Poland does not agree with the reduced TAC, which has been adopted for the Eastern cod stock, which will not bring any added value in terms of cod conservation; it will primarily hit honest fishermen, giving rise to justifiable protest and making cooperation with the administrative authorities and with scientists more difficult. This reduction will cause a further deterioration in the difficult socio-economic situation facing Polish fishermen, who are already suffering from the decommissioning of almost 50 % of the cod-fishing fleet, and this in regions with high structural unemployment, in excess of 30 %. Poland is grateful to the Presidency and the Commission for their efforts to find a compromise

Source: Addendum to the draft minutes. 2772nd meeting of the Council. 16566/06 ADD 1, p. 4. Available at <http://register.consilium.europa.eu/pdf/en/06/st16/st16556-ad01.en06.pdf> (visited on 1 July 2008).

Note: Poland voted against the proposal.

The statements are also used by the member states for other purposes than to explain their voting. Even when the delegation votes in favour of the proposal, it could still indicate in the statement that there is something in the final text it does not support, thus expressing some sort of a milder intensity of disagreement. Example of such a statement is presented in Box 2.

Box 2: Statement by the United Kingdom delegation (supported by the by the Danish, Netherlands and Swedish delegations) on the approved Regulation of the European Parliament and of the Council establishing the European Globalisation Adjustment Fund

Whilst supportive of the European Globalisation Adjustment Fund, the United Kingdom has doubts about the effectiveness of some of the eligible actions of the fund and how well it ensures added value from EU level spending. In order to maximise the efficiency of expenditure in this area and ensure the fund adds value above and beyond national action, the eligible actions of the fund should explicitly concentrate on measures to increase the employability of individuals and to improve their transition from redundancy into sustainable employment through active labour market policies.

Source: Addendum to the draft minutes. 2774th meeting of the Council. 16973/06 ADD 1, p. 19. Available at <http://register.consilium.europa.eu/pdf/en/06/st16/st16973-ad01.en06.pdf> (visited on 1 July 2008).

Note: The United Kingdom, Denmark, the Netherlands and Sweden voted in favour of the proposal.

According to some views, the frequency of statements as a sign of disagreement has increased since the 2004 enlargement at the expense of negative votes and abstentions (see Table 2). The trend could be explained by the argument that while it much more difficult to accommodate the interests of so many parties into one proposal, member states do not wish (at least publicly) to undermine the traditional culture of consensus. Statements than allow them to signal their view even without resorting to the much more visible negative vote (Hagemann and de Clerck-Sachsse 2007: 14).

Table 2: Number of acts to which a statement was attached as an expression of disagreement

	2002	2003	2004 (1–4)	2004 (5–12)	2005	2006
Total of acts adopted	164	163	139	86	121	153
Declaration attached						
Number	24	33	35	10	39	35
in %	14.6	20.2	25.2	11.6	32.2	22.9

Source: Hagemann and de Clerck-Sachsse 2007: 13.

Statements are very controversial instruments. If they contain a detailed explanation of the country's voting, the decision-making process and its outcome become more transparent (see the example of Poland above). On the other hand, in cases when a member state actively supports the proposal and simultaneously voices its disagreement with the substance of proposal in the statement, it finds itself in a sort of schizophrenic position, which is hardly understandable for the general public (see Box 2). The problem also has its legal dimension. The statements often include a country's interpretation of selected part(s) of the proposal. Subsequently two roads are open. Either the statement has no legal value (a more frequent opinion) but then the interpretation becomes merely a political proclamation, or there is some limited legal relevance and then the space is open for *de facto* flexible interpretation of legal acts by member states. In both alternatives the statements could still create legitimate expectations in citizens or legal entities from the country, which made the declaration, while in reality such expectations could be hardly met. Similar apprehensions were expressed by the Legal Service of the Council in its report in 1995,³⁰ the final verdict on the liability and impact of the statements can only be made by the Court of Justice; it has so far never dealt with such a case.

As soon as the proposal is formally adopted by the Council and published properly in the Official Journal, it becomes legally binding.³¹ The member countries that opposed the act usually acknowledge defeat and begin to comply or implement the act. In exceptional cases the states might continue in their resistance outside the Council framework.³² These means are represented by legal instruments provided by the Founding Treaties, in particular the action for annulment. In this procedure the member states belong to privileged applicants and can contest any act adopted by the Council (see Art. 230 TEC). Usually they justify their action with arguments that an incorrect legal basis of the act was used, the proper procedural rules of adoption were not heeded or that the principles of subsidiarity and proportionality were breached.³³ Statistics reveal that there are only a few actions of this type annually,³⁴ and that the Court of Justice rejects most of them, though reversed verdicts have occasionally occurred as well.³⁵

When a member state is ready to dispute the political decision with legal instruments in such a consensual system as the Union, it is likely that the state believes its arguments are valid and the act in its opinion suffers from legal flaws. If the actions for annulment become an acceptable continuation of politics by other means and countries would decide to start legal proceedings against each decision they disagreed with, the stability of the whole system could be in danger.³⁶

6 Conclusion

The Council of the European Union is an institution in which disagreement, at least in an empirically noticeable manner, is expressed less often than an uninitiated observer would expect from valid formal rules. Still, when member countries defend their interests it is obvious that they cannot always succeed. The subsequent concealment of disagreement decreases the transparency of the decision-making and the whole process becomes incomprehensible for the common public and high democratic standards are not met. That is why many specialists believe that in the next phase of integration the members need to accentuate political competition in the Council and to offer more transparent programmes and solutions based on left- and right-wing ideology. It is only natural that there should be not only winners, but also losers in the Council. Of course it does not mean that there will be a fixed line between both camps, rather the division will correspond to the strength of the groups at a particular moment and in a particular situation (see e.g. Hix 2006). One way to achieve this goal is to replace the culture of the consensus with a systematic application of qualified majority voting as provided in the Founding Treaties. Such a step was incidentally promoted by major figures of the Union policy in the past (see Prodi 2001).

Of equal value, however, are the objections to why the more frequent expression of disagreement should be avoided. Integration continues to be predominantly a project of sovereign states and if any states find themselves regularly in the minority with none of its interests recognized, the very principles and substance of integration could be endangered. These countries might start to defer acts not respecting their interests, in an extreme case they might decide to withdraw from the Union. It is well known that if there is a high level of cohesion and solidarity among the territorial units they are willing to subordinate to the majority will. The recent difficulties with ratification of primary law changes have proved that there is indeed hardly any consensus on “common European framework” both among politicians and the public.

Finding an acceptable compromise between two requirements becomes weighing upon an apothecary's scales. The analysis revealed that researchers are not able to agree on the reasons or attributes of the country, which cause more frequent disagreement. Moreover, even the most enthusiastic dissenters vote against or abstain from a vote only several times a year. The same results were extracted from an examination of opposition per policy sectors. The objection that contradicting findings emanate from the missing methodological uniformity is only partly valid. In our view the ambiguity reflects the real behaviour of the countries, which has an *ad hoc* character according to the momentary situation and interests and lack any pattern. But at the same time we think it is still possible, on the basis of existing research reviewed in this text, to arrive at several recommendations which might make the expression of

disagreement more efficient and transparent without affecting the necessary prerequisites discussed above:

- Statements should be used only for explanation of disagreement of a member country (negative vote, abstention), not as a instrument for saying yes and no at the same moment or for legal interpretation of the proposal.
- It is necessary to draw a clear line between voting against and abstention, they shall not function as different shades of the same thing.
- Disagreement should reflect only the situation when the state is really unhappy with the result. It should not be used as an instrument of negotiation strategy or a face saving measure to domestic groups.
- For each legislative proposal, which has not been approved for a prolonged period (for instance two years) since it was submitted, the reason for such situation should be openly stated in the Prelex database, even if it is due to an insufficient agreement in the Council. It is essential to systematically publish all documents related to the proposals also from the lower levels of the Council (working groups, Coreper).
- If there is an indicative vote organized at any level of the Council, the results shall in principle be published.

Implementation of these recommendations will require either zero or minimal costs, legally it will not be necessary to undergo difficult changes to primary law, an amendment of the Council's Rules of Procedure is sufficient in our view. The expected benefits would certainly outweigh the negatives, the result being that expression of disagreement becomes constrained under a clearer framework and that the decision-making in the Council becomes more transparent for the citizens.

Notes

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² According to an estimate, between 1974 and 1995 only 10 % of the proposed acts were withdrawn by the Commission (Golub 1999: 738). Golub included in his research only the directives; from January 2001 to October 2007, 170 proposals of legal acts were withdrawn by the Commission (data from the Prelex database).

³ In its fight against excessive regulation, the Commission in 2004 and 2005 withdrew a relatively high number of proposals.

⁴ Prelex database contains all the information on the pre-adoption phase of the legislative process and covers the involvement of all institutions in it. It could be accessed at <http://ec.europa.eu/prelex/apcnet.cfm?CL=en> (visited 1 July 2008).

- ⁵ Here the previous view is confirmed that from prolonged negotiations in the Council the presence of a sufficient blocking coalition could be indirectly deduced.
- ⁶ In light of this Hayes-Renshaw and Wallace are not correct, when they claim that the vote on sanctions within the Growth and Stability Pact was the sole case of publicly-acknowledged non-adoption of the proposal (Hayes-Renshaw and Wallace 2006: 290).
- ⁷ For discussion on the use of the veto in the European Council including the quotation of statements by many representatives of the member states see Tallberg 2007: 19–21 (arguments mentioned there can be applied to the Council as well).
- ⁸ Similar arguments are to a certain extent valid also for abstention in a case of unanimity and all other sorts of disagreement discussed in part four of the article.
- ⁹ For example selected member states (e.g. Finland, Sweden or the Netherlands) consistently vote against decisions in matters related to Council's proceedings transparency, as they would like to make more documents publicly available.
- ¹⁰ We believe that the institution of the statement (see below) is a more suitable tool for expression of one's country's view on the future development than the negative vote or abstention.
- ¹¹ On the effects of enlargement to the Council and the reasons behind growth of consensual decision-making see Hagemann and de Clerck-Sachsse 2007: 10–12, Lempp 2007: 41–48.
- ¹² The overall number of negative votes and abstentions will naturally grow; the sequence of the most often disagreeing countries will shift as well, see Mattila 2007: 11.
- ¹³ The hypotheses proposed below were extracted by the author from the literature cited below. The presented results, for the most part, reflect the situation prior to the 2004 enlargement. Again it should be stressed that not all researchers used the same corpus of data.
- ¹⁴ The size is meant as the function of power, derived especially from the number of votes in the Council, number of inhabitants and the absolute size of GDP (France, Italy, Germany, and the United Kingdom are regarded as big countries, sometimes followed by Poland and Spain).
- ¹⁵ This idea is based on spatial models of decision-making emphasizing the position of the agenda-setter (Commission). See Tsebelis and Kreppel 1998.
- ¹⁶ For the calculations of member states' contributions and revenues to the EU budget between 2000 and 2007 see European Commission 2008.
- ¹⁷ There is other direct financial impact of a membership of the state in the Union than simple transfers of money from and to the Union's budget.
- ¹⁸ An exception is Heisenberg 2005: 76, who found no link (her hypothesis was however reversed and not based on socialization: long-lasting members are not so anxious to express their true position and vote against more often than new members).
- ¹⁹ Romania and Bulgaria have so far not been included in the analysis because the 2007 data are still incomplete.
- ²⁰ In eight cases the number of disagreeing countries was higher than seven, which is a fairly large minority.
- ²¹ The discussed list on the causes of disagreement however also contains data on the cases of singletons, which is of course not applicable in the case of coalitions.
- ²² For such diagrams see Mattila and Lane 2001: 45 (for EU-15, using MDS method); Hagemann and de Clerck-Sachsse 2007: 23 (for EU-25, using NOMINATE method), Mattila 2007: 16 (for EU-25, using MDS method).

- ²³ Other findings are derived from the bivariate correlation, still others from the multivariate regression, even within a single set of data; as we said several times before, the results are not directly comparable, one reason being that each author used a somewhat different dataset.
- ²⁴ Again it should be also emphasized that the available data contain only information on positively adopted proposals, thus the level of disagreement is *a priori* manipulated downwards.
- ²⁵ Some sources extract the information to which sector a proposal belongs from the Council configuration adopting it. This is however not a reliable method as in many cases one Council formation formally adopts proposals on which an agreement in principle was already reached by other Council configuration. E.g. after political agreement about a proposal on olive oil subsidies reached by the Council for Agriculture the proposal is checked by legal experts and subsequently formally adopted as an A-point on the closest Council session no matter of what configuration (see General Secretariat of the Council 2000: 8–9).
- ²⁶ Here the hypothesis of the culture of consensus (and the shadow of the Luxembourg compromise) is confirmed and it is shown that outvoting is only possible when a strong interest of a member country is not threatened and when a policy had long been developed jointly; for more on the legacy of the Luxembourg compromise and its effect upon present-day decision-making see Zbiral 2008: 782–787.
- ²⁷ The proposals without necessary consensus are sent from the working group to Coreper as points I, from Coreper to the Council as B-points.
- ²⁸ Despite the officially demanded neutral role of the Presidency, some sources confirm that it can efficiently use its powers to enforce its interests, see Selck and Steunenberg 2004: 36–37.
- ²⁹ Council Decision 2006/683/EC of 15 September 2006 adopting the Council's Rules of Procedure. OJ L 285, 16 September 2006, p. 47–71.
- ³⁰ See Study of Council practice regarding statements for the minutes in connection with openness. *Doc. no. 6879/95*; author tried to obtain the document but his application was turned down by the General Secretariat of the Council and so was his appeal against the decision (Document SGS7/17394). At this point (July 2008) the application is reconsidered in light of the judgment of Court of Justice in *Turco* given on 1 July 2008 (Joined Cases C-39/05 P and C-52/05 P. *Sweden and Turco v Council and Others*. Not yet reported in the register).
- ³¹ At least in the case of regulations, directives, decisions and international treaties.
- ³² Of course they could also use the standard legislative process and try to persuade others either to repeal the act or renegotiate (amend) it.
- ³³ To assess the strategy the member countries use in order to defend their interests at the Court of Justice, see Granger 2004.
- ³⁴ In 2007 only eight actions of this type were filed at the Court of Justice, some of them were submitted by the Commission or the Parliament (Court of Justice 2007: 89).
- ³⁵ E.g. Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I-8419.
- ³⁶ The negative effects of this strategy are witnessed in the present-day situation of the Czech Republic, where numerous acts are attacked at the Constitutional Court as unconstitutional by the opposition political parties.

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