

8.2. All change with qualified majority voting: relations with the Council

The biggest alterations in relations between the European Commission and the Council of Ministers during this period were caused by the significant changes in the rules on voting procedures introduced first by the Single European Act, then by the Maastricht Treaty and finally by the Treaty of Amsterdam. In each case what mattered was not just the formal change to the rules that were agreed upon, but also the patterns of interaction that the three institutions most directly involved — the European Parliament, the Council and the Commission — worked out among themselves in the months and years following each treaty change. Changing rules of procedure and evolving practice were as important, in other words, as treaty amendment. Each of these modifications will be discussed in the pages that follow. In addition, mention will be made of the growing size and expertise of the Council Secretariat during the 1990s, and especially the emergence of a Council-based European High Representative in the foreign policy sphere — a new role that challenged some of the Commission's assumptions about its own foreign policy responsibilities. There was also the looming question of how the Council of Ministers would cope with a massive increase in the number of Member States, a change the timing of which was uncertain, but the inevitability of which grew throughout the years under review. But the basic direction of travel was determined by the three rounds of treaty change and the altered patterns of behaviour that ensued.

The first big change sprang from the introduction of the cooperation procedure for some European legislation in the Single European Act — a rule change that made possible the recourse to qualified majority

voting for most of the proposed legislation connected to the single market project. The impact of large-scale majority voting was as much psychological as it was practical. The insistence that all major decisions be taken by unanimity had led to real delays ⁽¹⁾. As a result, the opening up of the possibility of majority voting — and the de facto elimination of the Luxembourg compromise, although a number of Member States would take some time to accept that it had gone — did make it easier and quicker to pass new laws. But just as important — if not even more vital — was the transformation that occurred in the expectations of both the Member States themselves and the European Commission. As Riccardo Perissich, Deputy Director-General for the Internal Market and Industrial Affairs in 1986-1987 and then Director-General for Industry between 1990 and 1994, recalls: 'the reality became very different because, having started to vote and having accepted that votes were going to take place, it became an unstoppable machinery' ⁽²⁾. This meant that Member States that would once have been inclined to veto — or to rely on others to veto for them — now had radically to alter their behaviour. To some extent this meant seeking amendments and alterations that made more palatable measures that, in an earlier period, they would simply have blocked. But it also affected attitudes towards the actual vote. To quote Perissich once more:

'The behaviour of different countries sometimes reflects their culture. There are governments — the Germans are among them — who, when they are in minority, they prefer to be outvoted ... so they can tell home that: "We tried, but we were outvoted. Of course, we are still convinced we are right but the majority was against this." But those are the exceptions. Most of the governments, when they realise that they are in a minority, they give up. So, if you

⁽¹⁾ Notorious examples of delay included the nearly 20 years needed to agree upon the mutual recognition of architects' qualifications. For the background see Comte, E., 'La formation du régime européen de migrations, 1947-1992', PhD thesis, Université Paris-Sorbonne, Paris, 2014, pp. 246-247.

⁽²⁾ Interview with Riccardo Perissich, 17 May 2016, p. 12.

look at the numbers, you can see that the great majority of decisions were made by unanimous vote. In fact, that wasn't the case. Simply, at some point the Presidency says: "Look, I have a qualified majority: what do we do?" And then most people said: "Well, okay. Go ahead." (1).

The change in the likely outcome of individual votes also had a wider impact on the atmosphere within the Council of Ministers — giving all involved a strong sense of powerful, almost irresistible forward momentum — and on the behaviour of crucial office holders within it, especially the Member State holding the rotating presidency, with each successive Member State vying to outdo their predecessors in the amount of progress they could make towards the 1992 objective (2) — all the more so given that from 1987 a change in the Council's internal regulations allowed the presidency to trigger each vote. The capacity of the substantially enlarged Council Secretariat to draft potential compromise texts also helped matters. These changes thus created almost the ideal conditions for a European Commission intent on pushing through an ambitious range of new legislation, as was the case in the late 1980s and early 1990s.

Crucially, this new momentum allowed the Council of Ministers to pass on time almost all of the legislation required to complete the single market by the 31 December 1992 deadline. The spike in the amount of Community legislation passed in the single year was unprecedented: in 1992 a total of 166 directives were passed, more than twice that of any other year (before or after) within the period covered by this volume (3). Under the pre-Single European Act voting regime there would have been little chance of this lawmaking surge being successfully

carried through. Qualified majority voting was in other words a vital prerequisite for the Community's most fertile phase of legislative activity.

Both the changed voting rules and the acceleration of legislative output that this permitted had important implications for the European Commission's interaction with the Council of Ministers. For a start, the fact that the new voting rules applied to some policy areas and not to others made the Commission's choice of legal base even more sensitive an issue than before. In the course of the decade and a half covered by this volume there were repeated instances of the Commission's choice of legal base being disputed by the Member States, at least one of which ended up before the Court of Justice (4). The acceleration in legislative activity, meanwhile, made it ever more challenging for the Commission's Secretariat-General, which was responsible for overseeing all interaction between the Commission and different levels of the Council pyramid, to keep control of all that went on. There had always been incidents in which the normal rules of procedure were ignored. In December 1986, before the new voting rules came into play, Horst Günter Krenzler, the Deputy Secretary-General, wrote in concerned terms to Pascal Lamy, the President's head of cabinet, about a number of instances during the UK Council Presidency when representatives of the Secretariat-General had been wrongly excluded from crucial points of the discussion (5). But as the pace of advance increased the challenge of keeping on top of all that went on between the two institutions became ever more acute. The way in which David Williamson, the Secretary-General, felt obliged periodically to reissue a letter reminding all Commissioners and their cabinets of the need to allow

(1) Interview with Riccardo Perissich, 17 May 2016, p. 12.

(2) Interview with Riccardo Perissich, 17 May 2016.

(3) Figures taken from European Community/European Union General Reports, 1986-2000: European Commission, *General Report on the Activities of the European Communities/European Union*, Office for Official Publications of the European Communities, Luxembourg, 1986-2000.

(4) For a discussion of the issue see note from Diane Schmitt, HAEU, DORIE 524, 'Notes on the legal and institutional matters raised in the instances of the Council', 16 April 1996.

(5) HAEU, DORIE 524, SG(86) D/14.945, 9 December 1986, 'Note for the attention of Mr Lamy, the President's head of cabinet, on the role and functions of the Secretariat-General in relations with the Council and the means necessary to exercise it — problems encountered recently in specific cases'.



View of the 1470th meeting of the Economic and Financial Affairs Council on 28 January 1991.

the Secretariat-General to play its coordinating role speaks volumes, for instance ⁽¹⁾:

Complicating matters still further was the growing need to include the Parliament in the legislative process. In earlier periods interaction with the Parliament was limited, since Strasbourg had few real powers. This did not stop Members of the European Parliament seeking to exercise an influence over Community legislation — and periodically succeeding ⁽²⁾. Under the voting rules that prevailed for all but budgetary matters until the mid 1980s, however, three-way consultation could be kept to a minimum. But as the Parliament's stature as a co-legislator grew — first with the cooperation procedure, then with co-decision — ever greater efforts

needed to be made to ensure that the Parliament did not feel that it was being kept out of a dialogue between the Council and the Commission. The necessity of ensuring that the Parliament was consulted before any major change was made to draft legislation became a staple of the multiple codes of conduct drawn up between the Parliament and the Commission during the 1990s ⁽³⁾.

This became even more true once the Maastricht Treaty of 1992 not only extended the number of fields in which the cooperation procedure could be employed, but also introduced the new co-decision procedure. Under co-decision the Parliament's powers grew still further, notably through the introduction of a potential third reading stage involving the establishment of a conciliation committee, at which Council representatives and parliamentarians would seek to overcome their disagreements ⁽⁴⁾.

⁽¹⁾ The note was originally produced in February 1989: HAEU, DORIE 524, SEC(89) 250, 14 February 1989, 'Note for the attention of the heads of cabinet on the role and functions of the Secretariat-General with regard to relations with the Council'. It was reissued less than a year later on 10 January 1990, and the substance was reiterated in each new vade mecum on Commission–Council relations.

⁽²⁾ The extent to which even the early Parliament was able to exercise a degree of influence over legislation, despite its lack of formal powers, emerges strongly from Roos, M., 'The power of nuisance — The European Parliament's gain in power in the area of Community social policy, 1952-1979', PhD thesis, University of Luxembourg, 2018.

⁽³⁾ See Chapter 8.3 'From love affair to stand-off: relations with the European Parliament'.

⁽⁴⁾ For details of the procedure and the way in which it has been implemented in practice see O'Dwyer, U., 'La dynamique historique des relations inter-institutionnelles — Le point de vue d'un praticien sur l'évolution de la procédure de codécision', *Revue du droit de l'Union européenne*, No 3, Éditions Clément Juglar, Paris, 2010, pp. 487-525.

A major gain for the Parliament, this new set of procedures involved a potential threat to the Commission's role, since final decisions taken at the third reading would largely depend on a bilateral engagement between the two other legislative bodies, with the Commission marginalised⁽¹⁾. In practice, however, this threat has proved to be less serious than initially feared by some in the Commission. While some of the early examples of legislation being decided by co-decision did place the Commission in an uncomfortable position, informal practices soon grew up that allowed a real three-way discussion (or trilogue) between the three institutions to develop, and permitted the Commission to gain a vital role as mediator and honest broker. From 1999 onwards the Commission also benefited from the Parliament's decision to allow its representatives to attend as observers the preliminary discussions among Members of the European Parliament about their approach to the trilogue. This helped restore a useful level of symmetry to the Commission's knowledge of the other parties' positions, as the Commission already attended the preparations of the Council position by the Permanent Representatives Committee (Coreper) as of right, and thereby made it easier for the Commission to perform a mediating role⁽²⁾.

The final treaty-driven procedural change in the legislative process came about in the wake of the Amsterdam Treaty. Here the main changes to the legislative process were first a further extension of the areas of European Union business covered by the co-decision procedure, and second a streamlining of the procedure allowing decisions to be taken at a much earlier stage. In part this involved recognition that the informal three-way dialogue could begin from the outset of the process, rather than having to await the third reading⁽³⁾. This change not only

speeded up legislative decision-making, but also further enshrined the Commission's honest-broker role⁽⁴⁾. This role furthermore could be played at all three stages of the procedure, and not just during the third as had originally been stipulated.

Also significant to Commission–Council relations during this period was the gradual strengthening of the Council's own Secretariat. This trend had started in the early 1980s with the appointment of Niels Erbsøll as Secretary-General⁽⁵⁾. It was counter-balanced furthermore with the even more rapid growth of the European Commission itself. Nevertheless, between 1986 and 2000 the Council Secretariat expanded significantly, acquiring in the process capabilities and expertise that at best could complement those of the Commission, but could also be seen as a challenge. No longer was the Council Secretariat purely designed to organise meetings and facilitate discussion between Member States' representatives; in certain fields it was now acquiring a degree of policy expertise that could provide an alternative 'European-minded' policy input to that of the Commission. In no field was this clearer than foreign policy, where Member State determination to emphasise that this remained primarily an intergovernmental rather than supranational policy preserve meant that when a European High Representative, Javier Solana, was appointed in 1999, he was attached to the Council of Ministers rather than to the Commission. Chris Patten, the first External Relations Commissioner to have to work closely with the new High Representative, talks in upbeat fashion about the very effective *modus vivendi* that he was able to establish with his Spanish counterpart, but the implicit institutional rivalry with the Commission could not be entirely disregarded⁽⁶⁾.

⁽¹⁾ Interview with Una O'Dwyer, 16 February 2018.

⁽²⁾ Ibid.

⁽³⁾ O'Dwyer, 'La dynamique historique des relations interinstitutionnelles', p. 503.

⁽⁴⁾ Interview with Una O'Dwyer, 16 February 2018.

⁽⁵⁾ See Bussière et al., *The European Commission 1973-86*, p. 220.

⁽⁶⁾ For a discussion of the *modus vivendi* see interview with Chris Patten, 11 October 2016.



Niels Erbsbøll (first left) and Jacques Delors (second right) got on well, which facilitated the progress of European integration. They had an informal meeting with Norman Lamont (opposite Jacques Delors), UK Chancellor of the Exchequer, at the meeting of the Council of Finance Ministers on 23 November 1992.

A final and important trend was the mounting concern, in the Commission but also shared widely elsewhere, about the ability of the Council of Ministers to cope with the increase in the number of Member States — and the inevitable knock-on effects that this would have in terms of decision-making effectiveness. The Commission, after all, had already been worried about how the Council was coping with Spanish and Portuguese membership, in other words a rise in Member State numbers from 10 to 12. In March 1988 Marcell von Donat had written to Carlo Trojan, the new Deputy Secretary-General, denouncing the continued use of a *'tour de table'* as a relic of 19th century diplomacy, and spelling out the implications for the Commission of a larger number of Member States: 'It is already clear that a group of 13 delegations (Council/

Coreper) can no longer negotiate within a meeting once there are more than two different positions. The real negotiation then takes place via bilateral contacts between the presidency, the Commission and certain delegations, and in fact that happens before the debate takes place. With more delegations, the Commission has to change its approach by stepping up negotiations with the Member States and just formalising the outcome of these negotiations at the level of the Community institutions' (1). How much more difficult would it become as numbers climbed from 12 to 15 in the mid 1990s, with an increase to 20 or more foreseeable in the early years of the 21st century? There was anxiety in the Commission that the growing size of the European Union

(1) HAEU, DORIE 524, 'Note for the attention of Mr Trojan on the Commission's reflection seminar of 30 April 1988', 29 March 1988.

would cause Council decision-making to slip back into the pattern of impasse and delay that had been decisively broken in the mid 1980s. This was one of the constant background issues in the debate about enlargement. Still greater use of majority voting was certainly part of the answer, especially in the revised co-decision procedure discussed above. But as von Donat's note had suggested, other alterations in behaviour also needed to be explored. This was to have been the main business of the Treaty of Nice, but when this proved inadequate it became something that would have to await first the abortive European constitution and then the Lisbon Treaty of 2008.

PIERS LUDLOW

8.3. From love affair to stand-off: relations with the European Parliament

The relationship between the European Commission and the European Parliament evolved substantially during the years under review. At first this change was largely positive: Jacques Delors would enjoy a generally good relationship with Strasbourg and would be given substantial credit by Members of the European Parliament (MEPs) for transforming the European Community (EC) system for the better. It was Delors seemingly who had been most important in delivering the first substantial increase in the Parliament's powers since 1979; it was Delors furthermore who brought to a mutually satisfactory end the lengthy struggle between the Parliament and the Council/Commission over the setting of Community budgets. More broadly, Delors and his Commissions were given credit for delivering both 'more Europe' — in the form of enhanced integration — and more attention to Europe, both of which were regarded as welcome developments by most MEPs. But this highly positive relationship began to sour as the 1990s advanced, with Parliament–Commission relations becoming that much more antagonistic. And the rise of mutual suspicion would culminate in the biggest single crisis in Strasbourg–Brussels relations to date, namely the row that would precipitate the collective resignation of the Santer Commission in 1999.

It had all started so well. Jacques Delors was not the first Commission President to promise MEPs that he would take Parliament more seriously than ever before; François-Xavier Ortoli, Roy Jenkins and Gaston Thorn had all made similar pledges⁽¹⁾. Nor was he unique in having been a member of

⁽¹⁾ See Bussière et al., *The European Commission 1973-86*, p. 231.