

# MAJORITY DECISIONS

*Principles and Practices*

EDITED BY  
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## Two effects of a high threshold of qualified majority

Stéphanie Novak

### INTRODUCTION

At the Council of the European Union, the legislative intergovernmental institution in which member states are represented by their ministers, laws are passed either by unanimity or by qualified majority voting (QMV). When QMV is the rule, votes are distributed to member states mainly according to their population. The threshold of qualified majority is approximately 73 percent of the votes. On average, 80 percent of the laws that could be passed by a qualified majority vote are in practice adopted without opposition.<sup>1</sup> In this chapter, I attempt to explain that the latter phenomenon mostly stems from the high threshold of qualified majority. On the basis of about sixty interviews with Council members, I found that the high threshold of the QMV has a decisive impact on the actors. It makes the minority all the more visible when a law is passed and stimulates the willingness not to be seen in the minority. This psychological mechanism generates two types of behavior. The ministers tend

- (1) to be "constructive" – as they say – and to *negotiate*; they are obstructionist only when proposed laws could create serious issues in their countries;
- (2) to *join the majority* if they are in the minority and cannot build a blocking minority.

On a theoretical level, these two effects lead us to assume that a high threshold of qualified majority has the following effects:

1. It stimulates the *decisional productivity* because it increases the reluctance to be seen as isolated in a minority position and favors concession making between negotiators.

<sup>1</sup> See Mattila and Lane (2001); Hayes-Renshaw, Wallace, and Van Aken (2006); Dehousse, Deloche-Gaudez, and Duhamel (2006); Hagemann and De Clerck-Sachsse (2007).



2. It stimulates decision making *without opposition* because the minority tends to join the majority when they know that they cannot block a decision.

I will bring out those hypotheses by analyzing how qualified majority (1) leads the actors to negotiate and (2) induces the minority to join the majority.<sup>2</sup>

## NEGOTIATING

### "The Shadow of the Vote" and the Sophisticated Use of the Qualified Majority Procedure

I attempt to show how qualified majority leads the actors to negotiate and discourages the opponents from voicing their disagreement. It is first necessary to explain how QMV is used in the Council.

The Council does not formally vote. Instead, the presidency collects the participants' positions on a given measure through bilateral talks and orally states that this measure can be adopted because the qualified majority is reached. The presidency is held by a different member state each semester, according to a preestablished order. Specialists sometimes argue that in the absence of a formal vote, only the possibility of a vote, or the "shadow of the vote," has an impact.<sup>3</sup> In reality, the process is more complex.

When the QMV procedure was created, its promoters did not intend that it would be systematically used. Instead, QMV was conceived as a way to avoid that the decision-making process be stuck. QMV was supposed to encourage participants who feared to be outvoted to soften their positions in order to find compromises.<sup>4</sup> QMV is often compared to a "deterrent weapon"<sup>5</sup> or to the "sword of Damocles"<sup>6</sup>: even if a formal vote is unlikely, each participant is aware that a vote is possible. This general awareness leads participants to have flexible positions. In fact, it seems that since its inception, QMV has been an efficient weapon to find compromises and to pass laws without opposition. In 1989, a report of the European Commission stated:

The possibility of majority voting has introduced an element of flexibility in the position of the member states, which are forced to reach a consensus. As in previous years, the dynamism generated by majority voting has not extended to those areas in which unanimity is still required.<sup>7</sup>

<sup>2</sup> This research is based on about sixty interviews conducted between 2006 and 2010. When I quote the interviewees, I note their institutional origin and the date of the interview. Interviewees quoted in this chapter belonged to (1) the Council Secretariat; (2) the Permanent Representations, that is, the embassies of the member states; or, more rarely, (3) to the Commission.

<sup>3</sup> See Golub (1999); Bayliss (1957).

<sup>4</sup> Ponzano (2002, p. 42).

<sup>5</sup> Ibid.

<sup>6</sup> See the account from a national representative in Meerts and Cede (2004, p. 129).

<sup>7</sup> Quoted in Bieber (1992, p. 57).

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Unanimity – or the right to veto – leads the participants to hold out for strong demands. By contrast, when the participants know that they can be outvoted, they tend to be “constructive” – a word they often use to describe their behavior when qualified majority is the rule.<sup>8</sup> According to a Dutch representative:

Delegations try to prevent themselves being outvoted in the open; thus, during the negotiation process, delegations will look for coalitions, and will offer compromises to make a gain when there is a threat of being outvoted. . . . One could say that working in a world of qualified-majority voting helps to stimulate convergence. Delegations, as shown by their behavior during negotiations, anticipate a possible vote.<sup>9</sup>

This is why even if most measures are passed without opposition when the legal rule is QMV, the absence of opposition results from mechanisms that differ fundamentally from those that are at work in the domains in which member states have a right to veto.<sup>10</sup>

Nonetheless, the “shadow of the vote” does not fully account for the role played by QMV, because the metaphor minimizes its role. In fact, during the negotiation process, the actors are permanently counting whether there is a blocking minority. The strategy of the actors varies with the strength of the opposition. For instance, if the participants know that there is a strong blocking minority against a measure, they tend to demand higher concessions than if a qualified majority is nearly reached. And they tend to formulate the highest demands when they know that their vote is pivotal. Therefore, at the Council, the qualified majority procedure is carefully followed and has a more important role than if it acted only as suggested by the metaphor of the shadow of the vote. Let us note that the representatives ask for amendments because the presidency can modify legislative texts. Given that (1) the presidency attempts to get adopted as many laws as possible and that (2) the threshold of qualified majority is high, the presidency has to grant concessions to a sufficient number of ministers in order to reach the qualified majority.

### Voicing One's Disagreement during the Negotiations

I now attempt to explain how the high threshold of qualified majority encourages negotiating behavior and discourages obstructionism. It is necessary to distinguish two stages:

- the negotiations during which the presidency attempts to reach a qualified majority;
- the period during which the national representatives register their official vote. They do so *after* the presidency has unofficially informed all the

<sup>8</sup> National Representative, November 2007; Council Secretariat, December 2007 and January 2008.

<sup>9</sup> Meerts and Cede (2004, p. 130). See also Kranz (1982, p. 430 and n. 114).

<sup>10</sup> Council Secretariat, January 2008.



national delegations that a given measure can be adopted because the qualified majority is reached, and *before* the measure is officially adopted during a Council session.

I first focus on the negotiations. The decision makers' strategies are fundamentally determined by the fact that they do not want to be outvoted. Generally speaking, when the rule is qualified majority, the decision makers tend to show that they will not oppose a text if they get certain concessions. The representatives have an interest in being "constructive" even if they are not in favor of a proposition. If a representative states from the beginning of the negotiations that she will oppose a measure, she finds herself isolated and ignored by the presidency<sup>11</sup>: "[W]hen a country begins to negotiate and keeps a position that is not compatible with a majority agreement, it knows that it marginalizes itself and that it won't get any concession. That's why the countries attempt to stay in the game. ... When somebody marginalizes himself, the presidency says: I'm kicking him out."<sup>12</sup>

According to a member of the Council Secretariat, when representatives promise that they will support a measure, they have to do so in a subtle way. They have to state their conditions by "suggesting" that they will finally join the majority.<sup>13</sup> One should not affirm too quickly that one will approve a proposition. If the presidency is assured of the support of a delegation, it will stop caring about that delegation and will grant additional concessions to delegations that are not firmly committed to support a measure but could still do so.<sup>14</sup>

In that context, each delegation has to assess whether it is pivotal in order to get concessions *before* the qualified majority is reached. But delegations should not wait for too long before joining the majority. When the presidency succeeds in reaching qualified majority, the delegations that did not commit early enough to support its proposal lose everything.<sup>15</sup> In such a game, a delegation can get the maximal concessions when its vote allows the qualified majority to be reached.

In the cases where opponents are able to build a blocking minority, they inform the presidency of their disagreement to demand as many concessions as possible. A member of the Secretariat explained: "Ironically, forming part of a blocking minority can be a particularly effective means of extracting concessions. But being left as part of a defeated minority is deeply unattractive from a negotiating standpoint, since there is a risk of getting no concessions at all."<sup>16</sup>

<sup>11</sup> Council Secretariat, November 2007 and January 2008, Environment advisor, National Representation, November 2007. "With qualified majority voting, if a member state is alone and sticks to its position, it will lose everything"; Council Secretariat, January 2008.

<sup>12</sup> Deputy Permanent Representative, November 2007.

<sup>13</sup> Council Secretariat, November 2007.

<sup>14</sup> "One never says: 'we're going to vote for,' because one never gets any concession doing that. Either one is not clear, or one says that one is going to vote against; these are the best strategies to get something"; former President of the Special Committee on Agriculture, October 2008.

<sup>15</sup> Agriculture Representative, November 2007.

<sup>16</sup> Teasdale (1996, p. 106).

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<sup>17</sup> Cf. Hagmann.

<sup>18</sup> Council Secretariat.

<sup>19</sup> An official concerns are

<sup>20</sup> Deputy President.

<sup>21</sup> See, for instance,

<sup>22</sup> "After all, ..."

Very often, representatives insist on the fact that it is necessary to “give up” some demands to avoid being outvoted. They hierarchize their preferences and choose their key issues.<sup>17</sup> This general strategy leads to a blurring of the distinction between the losers and the winners of a negotiation.<sup>18</sup> Furthermore, there is a norm according to which representatives have to keep silent when they are not satisfied on a point that is not vital.<sup>19</sup> In those cases, ministers do not register negative votes or abstentions (an abstention counts as a negative vote). When a minister registers a negative vote or an abstention, she has to present good reasons to the presidency and the Council, and to the domestic journalists, the electors, and the political opponents. There is no legal obligation to justify one’s opposition or abstention, but if a minister does not give credible reasons, she will compromise her chances of being listened to by the presidency and the Commission in future negotiations. Given that the same persons work together on a daily basis for several months or several years, ministers have a strong interest in complying with this norm of justification.

Specialists have already noted that most decisions are made without opposition in the qualified majority area. My interviews revealed the influence of a factor that, to my knowledge, was not noted in existing studies: the high threshold of qualified majority (about 73 percent of votes) partly explains why most decisions are made without opposition. Because the threshold is high, the presidency must grant concessions to the delegations in exchange of their support. Knowing that they can receive concessions, the delegations “soften their positions”<sup>20</sup> to suggest to the presidency that they might support its proposal. Therefore, as shown in figure 9.1, the high threshold of qualified majority leads the actors to negotiate. While simple majority is usually considered to create adversarial behaviors,<sup>21</sup> the high threshold of qualified majority allows the presidency to grant mitigated satisfaction or mitigated dissatisfaction to a high number of participants.

Moreover, delegations are all the more reluctant to be seen as defeated because they negotiate together on a long-term basis. The “shadow of the future” has a strong impact at the Council. The representatives are permanently aware that they will have to negotiate with the same colleagues – their peers. The influence of such considerations has been observed in other small groups. For instance, in the U.S. Senate, the fact that in future negotiations one might need to ally oneself with present adversaries has an influence on the positions of the senators.<sup>22</sup> As national representatives at the Council know that they will negotiate again together, they tend to moderate their opposition, except if a measure raises a vital issue at the domestic level.

<sup>17</sup> Cf. Hagemann and De Clerck-Sachsse (2007, p. 20).

<sup>18</sup> Council Secretariat, January 2008.

<sup>19</sup> An official from the Secretariat explains that outvoted ministers “prefer to remain silent: their concerns are not so big that it would justify voting against, so they agree”; November 2007.

<sup>20</sup> Deputy Permanent Representative, November 2007.

<sup>21</sup> See, for instance, Dehousse (1995).

<sup>22</sup> “After all, your enemies on one issue may be your friends on the next”; Matthews (1973, p. 98).



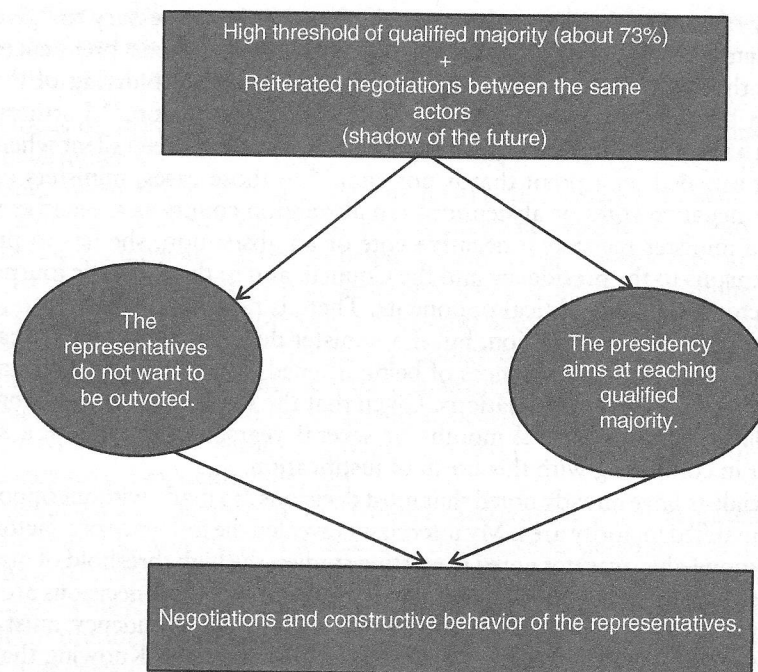


FIGURE 9.1 High threshold of qualified majority and incentives to negotiate.

Therefore, a large proportion of laws are adopted without opposition because of three combined factors: (1) the fact that ministers do not want to be outvoted; (2) the high threshold of qualified majority; (3) the shadow of the future.

Furthermore, empirical research allows us to conclude that the large qualified majority favors decisional productivity. As I pointed out, decisional productivity is a shared objective in the context of the Council,<sup>23</sup> and negotiators avoid being seen as isolated in a minority position. These facts are necessary conditions for the productive effect of the large qualified majority. Once these conditions are established, the necessity to grant concessions to reach qualified majority has a stimulating effect on the decision-making process. Given that for decades the qualified majority threshold has been about 70 percent of votes, we cannot establish that a smaller qualified majority – or simple majority – would lead to a decrease of the decisional productivity. Nonetheless, we can bring out a hypothesis that, to my knowledge, has not been suggested by existing studies on the majority rule. If members of a group share an objective of decisional productivity and avoid being seen as isolated in a minority position, a large qualified majority is the decision rule that stimulates the most decisional productivity because it stimulates concession making *and* the fear of being seen as

<sup>23</sup> For details, see Novak (2011, chapter 2).

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<sup>24</sup> Former Pres  
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isolated. Because the actors know that the probability of receiving concessions in exchange of their support is high and because their fear of being seen in a minority position is exacerbated, they tend by default to support the proposed measures. When the decision rule is a smaller qualified majority or simple majority, the stigma of being in a minority position and the probability of getting concessions are lower. As for unanimity, we know that it tends to hamper the decisional productivity. Further research is needed to establish that a high qualified majority threshold has the greatest stimulating effects on the decisional productivity, but the second section of this chapter provides additional empirical evidence to justify such hypothesis.

#### AVOIDING MARGINALIZATION AND JOINING THE MAJORITY

Even though the member states' representatives try to be constructive, the presidency states that a given measure can be adopted as soon as the qualified majority is reached. Attempting to get everybody on board is not compatible with its objective of productivity. For this reason, it is "very often" the case that measures are adopted even if a few delegations are opposed.<sup>24</sup> In this context, why are 80 percent of the adopted measures that could be voted by qualified majority actually passed without opposition?

I have already explained that the high threshold of qualified majority drives the actors to negotiate, a mechanism that partly explains the low rate of opposition. Qualified majority has a second effect: when the negotiators are defeated, they tend to keep silent and do not register negative votes or abstention. Why do representatives tend to join the majority when they are defeated?

#### Institutional Organization and Behaviors

It is first necessary to explain why public votes can differ from positions taken behind closed doors. As earlier pointed out, there is a time lag between the unofficial statement by the presidency that a measure can be adopted because it is supported by a qualified majority and its official adoption. Ministers register the votes that will be published between those two stages. According to an informal rule, a minister can vote against a measure or abstain only if she informed the presidency of her vote before the presidency orally stated that the measure could be adopted. This norm fits with the objective of productivity. It has the effect of avoiding the sudden rejection of a measure for which the presidency has informally stated that there was a qualified majority. By contrast, a minister can always join the majority at the last minute even when she stated that she would vote against a measure. Moreover, in most member states, ministers do not have to register a public vote that reflects the position that

<sup>24</sup> Former President of the Committee of Permanent Representatives 1 (Coreper 1), Commission, November 2007; Council Secretariat, December 2007.



they took behind closed doors. This institutional context enables the ministers not to publicly voice their opposition to adopted measures.

The fact that when positions are made public, the minority tends to join the majority has been noted for other institutional settings – the U.S. Supreme Court and the Open Market Committee of the U.S. Federal Board.<sup>25</sup> Research shows that when committee members think that their positions will remain secret, they tend to oppose more frequently than when they know that their positions will be publicized.

First I provide evidence of the fact that defeated ministers tend to join the majority. Then I attempt to explain this behavior.

It is a hard task to document the fact that defeated ministers tend to join the majority because they do not reveal the positions that they took behind closed doors.<sup>26</sup> Furthermore, this behavior is such a normal part of the decision-making process that the Secretariat members do not explicitly mention it.<sup>27</sup> I collected two types of evidence: accounts from persons who worked for several years at the Council and whose descriptions confirm the general trend of joining the majority, and noteworthy cases of opposed ministers joining the majority.

In 2001, a member of the Council Secretariat gave the following response to a question from a member of the European Parliament:

It should be remembered that qualified majority voting may in practice make it easier to obtain all delegations' agreement to a text, inasmuch as delegations which do not agree may be inclined to vote in favour once they know they are going to be in a minority.<sup>28</sup>

Joining the majority because one knows that one will be defeated has been a normal practice for several years. During a debate at the European Parliament, a UK official who presided the Council in 1977 noted this phenomenon:

Yes, it makes no doubt that I very often saw one or two member states in a minority position state that, even though they were in the minority, they did not want to hamper the development of the Council works – and that in those conditions, they were willing to withdraw their objections to a proposition and to accept the point of view of the majority.<sup>29</sup>

<sup>25</sup> See Epstein, Segal, and Spaeth (2001); Meade and Stasavage (2008).

<sup>26</sup> The fact that real dissent is not reflected by published votes has been barely noted in existing studies. Yet, a few recent studies have pointed out this phenomenon. See, for instance, in Naurin and Wallace (2008), the contribution of S. Hagemann, p. 38 and the contribution of J. Aus, p. 101. H. Wallace and F. Hayes noted this phenomenon when they referred to the fact that official opposition on commercial and budgetary issues does not reflect the polemical character of those fields (see Hayes-Renshaw et al. 2006, p. 172).

<sup>27</sup> Interview, January 2008.

<sup>28</sup> Reply of the Council Secretariat (27 September 2001) to a written question (E-3938/00) by Christopher Huhne (ELDR) (20 December 2000). Subject: Number of votes under QMV, *Official journal of the European Communities*, 2001/C 364 E/005, 20 December 2001.

<sup>29</sup> *Débats du Parlement européen, séance du 12 janvier 1977, la question no.22*, quoted by Kranz (1982, p. 424) (my translation from French).

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<sup>30</sup> Answer of the European Parliament. According to the end, the

<sup>31</sup> B. Bjørnulf and "The exis

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In 1990 (the publication of votes became compulsory in 1993), the Council presidency gave this response to a member of the European Parliament:

The difficulty in providing statistics (on votes in the Council) is related to the way in which votes are taken in the Council. On many occasions, when a Member State sees that a vote will not be to its advantage, it joins the consensus rather than ask for a vote which would not alter the situation. Consequently, even if records were available, I am convinced that they would not be especially reliable.<sup>30</sup>

Last, interviews with current Council members confirm the fact that defeated ministers often join the majority. The tendency to rally was already noteworthy thirty years ago and is now a deeply rooted norm. Accounts show that ministers who are in the minority tend to rally on their own. In addition, the presidency or the peers might exert pressure on the minority. Pressures from the presidency can be accompanied by cosmetic concessions or by more or less explicit threats. For instance, to compel the minority to join the majority, the presidency can argue that imperative deadlines must be respected.<sup>31</sup> As an example of peer pressure, I will quote an environment negotiator who, while arguing that this phenomenon is not rare at the Council, explained that, for instance, he strongly advised the Italian delegation not to oppose the directive "Strategy for the marine environment."<sup>32</sup> The minority tends to join the majority because national representatives assume that it is in their interest to rally when they are in the minority.

Moreover, interviews with Council members lead us to identify two cases that show how deeply rooted the norm of joining the majority is. The first is the adoption of the Galileo project. This project aims at creating a satellite positioning system that will compete with the U.S. Global Positioning System. The Spanish delegation voiced strong opposition to the text because they wanted a monitoring center to be created in Spain. For this reason, on November 30, 2007, they claimed that they would vote against this project. Yet, surprising the Council members, the delegation voted in favor of the text on December 1 even though they had not obtained any concessions. According to a member of the Secretariat, the Spanish delegation finally agreed because they did not want to publicly appear as defeated: "Spain agreed, swallowing everything ... they did not want to be downvoted in the end."<sup>33</sup>

<sup>30</sup> Answer of President-in-office of the Council to question No. 83 (H-609/90) of Mr. De Vries, European Parliament, verbatim report of 13 June 1990, quoted by Bieber (1992, p. 57). According to a member of the Secretariat: "The attitude of most states in the Council is that, in the end, they wish to be on the winning side"; Teasdale (1996, p. 106).

<sup>31</sup> B. Bjurulf and O. Elgström give the example of the regulation on public access to EU documents: "The existence of a formal deadline, set by the European Council, created a formidable pressure for compromise that certainly helped to bring about the last-minute agreement" (2004, p. 265).

<sup>32</sup> Permanent Representation, November 2007.

<sup>33</sup> Council Secretariat, December 2007. The word "downvote" does not exist, but two members of the Secretariat used it as a synonym of "outvote" (November and December 2007).



To account for this event, Spanish journalists mentioned a reason but also noted that the reason was not clear. They quoted a tiny modification granted by the Portuguese presidency to the Spanish delegation during the night of November 30–December 1. The consultation of several articles from *El País*, *El Mundo*, and *ABC* did not allow me to precisely establish the content of this concession. An article referred to the “calculated ambiguities” that were contained in the amended text; and to the use of the conditional tense: “two centers might be necessary but . . .”<sup>34</sup> According to an account of December 1, 2007, the experts did not see any difference between the text that the Spanish delegation had opposed and the text that it soon after approved.<sup>35</sup>

The journalists insisted on the isolation of the Spanish delegation after the vote cast on November 30. Moreover, the fact that they joined the agreement was described as an important move by the Spanish and European media.

The decision rule that had to be used was unclear. After the Portuguese presidency negotiated a few lines with the Spanish delegation for eight or nine hours, it decided to pass the text by qualified majority. In fact, the Spanish delegation first strongly voiced its disagreement because they thought that the text could not be adopted against their will but required unanimity to be passed.<sup>36</sup> For this reason, they went to the Legal Service of the Council Secretariat and contested the validity of the procedure. But as soon as they heard that the decision could be made by qualified majority, the Spanish delegation joined the agreement.

According to Spanish newspapers, to adopt a project of such importance as Galileo in spite of the Spanish opposition would have been a damageable precedent. It would have been detrimental to the Council “culture of consensus.” Ambitious projects such as Galileo are usually supposed to be adopted with great unanimity.<sup>37</sup> By finally rallying, the Spanish delegation saved the appearances. They did not want to be compared with the Polish delegation that was reputed for its obstructionism. The Spanish delegation publicly distanced themselves from the Polish delegation<sup>38</sup> – an attitude that confirms how powerful the norm of consensus is at the Council.

Members of the Secretariat also referred to a second case. When the Council passed the directive on the market of electricity and gas: “It was clear that France and Germany were against. But the Spanish Minister (it was during the Spanish Presidency), Ana Palacio, said: ‘I note that there’s a qualified majority in favor of the proposal.’ There was a big silence after this assertion! Since everybody knew that France and Germany were against. . . . So they broke for lunch: Germany and France made cosmetic changes; they came back after the lunch

<sup>34</sup> “Servicios de satélite ‘made in Spain’,” *El País*, December 16, 2007, Madrid.

<sup>35</sup> “España se conforma sólo con un centro de apoyo al sistema de navegación Galileo,” *El Mundo*, December 1, 2007 Saturday, *A Edición*, col. 5, p. 39.

<sup>36</sup> Council Secretariat, January 2008.

<sup>37</sup> “España se conforma sólo con un centro de apoyo al sistema de navegación Galileo,” *El Mundo*, December 1, 2007, *A Edición*, col. 5, p. 39.

<sup>38</sup> *Ibid.*

and they said: 'now we can agree' ... in fact, Germany and France did not want to be outvoted."<sup>39</sup> The interviewees insist on the fact that those changes were only cosmetic and had no other goal than to allow German and French representatives to join the agreement without being humiliated.

Those two cases reveal that the minority complies with the norm of joining the majority by working out a justification outside the open Council room. When the French and German delegations joined the majority, they had elaborated a justification during the lunch break. The interviewees often refer to this break as an opportunity to "really negotiate" and to convince the minority to follow the majority. The Council sessions are partly public since 2006. This change triggered an extended lunch break in order to keep the possibility of negotiating.<sup>40</sup> When the Galileo project was adopted, the Spanish delegation and the presidency negotiated during the night.

Those who witnessed the defeated delegations joining the majority often tell ironically about their reversals. When I asked a member of the Secretariat about the frequency of the reversals, he replied: "that's part of the fun<sup>41</sup>!" The same irony was obvious when an Environment advisor explained that ministers could also justify their reversals by arguing that they managed "to get the Treaty implemented." For instance, a minister will demand that the law specifies that the principle of precaution must be implemented, while this principle is anyway part of the Treaty. Then she will tell the journalists: "I succeeded, the principle of precaution will be implemented!"<sup>42</sup>

Sometimes, the minority justify their reversal by arguing that the Commission added a declaration to the adopted text. Declarations are appendixes to legal texts that give specifications on the position of one or a few member states, the Commission or the presidency. For instance, the Commission can note its skepticism about the orientation of the text that the Council adopted; or it can state that in future initiatives, it will be prone to take into account concerns expressed by a delegation. According to some interviewees, the effects of those declarations are limited to the press conference that follows the Council session during which the measure has been adopted. An official from the Secretariat explained: "A declaration has no legal value; it is cosmetic and political; it aims at soothing the defeated delegation and at giving the impression that it gained something ... while, after a while, one forgets the content of the declaration. The purpose of a declaration is to avoid that a member state votes against a measure. One says to the member state: 'here is a lollipop, it will help you to calm down.' But what matters is what is going to be published in the Official Journal."<sup>43</sup> An environment advisor claims that those "face-saving" practices trigger declarations of the

<sup>39</sup> Council Secretariat, December 2007.

<sup>40</sup> Council Secretariat, November and December 2007.

<sup>41</sup> Council Secretariat, December 2007.

<sup>42</sup> Environment advisor, Permanent Representation, November 2007.

<sup>43</sup> Council Secretariat, January 2008.

Commission that are "devoid of meaning." They are the best way for the Commission not to take any risk and to provide delegates that joins the majority with a small gain they can show off in front of the journalists.<sup>44</sup>

For instance, a declaration can consist in a "review clause." The Commission states that it will check whether a measure still works out in two or three years. Such statement gives the hope to the unsatisfied delegations that they will get what they wish; and it lets the supporters of the measure hope that the Commission will not change anything. The review clauses encourage the unsatisfied delegations to join the agreement and do not compromise the support of the other delegations given that declarations are not legally binding and apply to a remote future. Even if, according to interviewees, declarations are doomed to oblivion, they are formulated because they have a political and social utility.

Interviews show that defeated ministers often receive minimal concessions when they rally. Those concessions must not change the content of the text because changes might lead the supporters to withdraw. Still, such concessions have a social utility because they prevent a defeated minister who joined an agreement from losing face inside the Council. Furthermore, they have a political utility because they allow ministers to publicly justify their reversal. The national representatives who are in charge of the Council semestrial presidency have an interest in helping the defeated ministers because they know that their colleagues from the Permanent Representation or themselves might be in the same situation when their government does not preside over the Council anymore.

The fact that those concessions barely change the texts shows how much the minority want to avoid to be seen as such in the Council. Of course, ministers sometimes intend to publicly distance themselves from the majority that supported an adopted measure. In those cases, they register negative votes.<sup>45</sup> But the norm is to rally, and I now attempt to explain why the defeated ministers comply with such norm.

### The Two Audiences

One could argue that defeated ministers do not register negative votes because it would be useless. According to some interviewees, the norm when one is defeated is "to give up because it is useless to vote against."<sup>46</sup> Still, I can infer from my interviews that defeated ministers tend to rally because they deem it less costly not to vote against measures. They believe that a negative vote or an abstention is most of the time costly because neither is well received either inside or outside the Council. I define the internal audience as composed of the presidency, the Commission, the national representatives (the peers), and the members of the Secretariat. Furthermore, ministers decide on the vote they will make public by

<sup>44</sup> Environment advisor, Permanent Representation, November 2007.

<sup>45</sup> See Hayes-Renshaw et al. (2006).

<sup>46</sup> Council Secretariat, December 2007.

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considering different groups outside the Council: the national government, journalists, their constituency, lobbies, and political opponents. When they register their votes, ministers take into account the assumed expectations and probable reactions of the internal and external audiences. According to an official on the Committee of Permanent Representatives (which informally makes decisions on most texts before they are officially adopted by the Council<sup>47</sup>):

[A] minister acts by considering his public; there are always the national media, the articles in good newspapers have an impact on public opinion; *and* there is the attitude towards the peers; if one's record of achievements shows that "one never votes against," it has an impact on one's weight; it has a function, it is a signal towards the peers; if the list of one's votes shows that "one often votes against," the presidency will pay less attention to this person.<sup>48</sup>

The consideration of the two audiences, inside and outside the Council, induces the defeated ministers to rally.

When I observed that many decisions seem to be made without opposition at the Council, a member of the Secretariat spontaneously replied that this impression was attributable to the fact that defeated ministers rally because "they do not want to appear as losers."<sup>49</sup> This person added ironically that the public display of voting results "with green and red arrows" and the anticipation of the press conference right after the Council session prompt all the more the losers not to vote against measures for which their negotiating strategy failed.<sup>50</sup> That is why "when there is a consensus [in the qualified majority area], everybody knows who lost the negotiations. There is consensus in most cases, but one knows who voted in favor with both hands, and who voted for gnashing one's teeth."<sup>51</sup>

In the 1990s, a member of the Secretariat noted the same phenomenon. According to him, ministers pay domestic costs when they fail in the negotiations. The fact that votes are published since December 1993 reinforces their fear of being seen as defeated.<sup>52</sup> When that Secretariat member made this claim, the only part of the decision-making process that was publicized was the voting results. Thereafter, different media were added: voting results began to be published on the Internet in 1999 and to be displayed during Council sessions in 2006. In addition, the same year, Council sessions began to be partly broadcast by video streaming. Those who witness decision making as it currently operates specifically refer to the impact of the latter media on the voting behavior.<sup>53</sup> While the recent

<sup>47</sup> Cf. Van Schendelen (1996).

<sup>48</sup> Council Secretariat, January 2008; on those two dimensions in international negotiations, cf. Putnam (1988).

<sup>49</sup> Council Secretariat, December 2007.

<sup>50</sup> On the presence of journalists, cf. Wallace and Hayes (2006, p. 126).

<sup>51</sup> Council Secretariat, December 2007.

<sup>52</sup> Cf. Teasdale (1996, p. 106).

<sup>53</sup> Environment advisors, Permanent Representations, November 2007; Council Secretariat, December and January 2007.

developments were intended to better reflect the positions taken by ministers, they actually prompted them to determine their public positions by considering the image that they want to communicate to their constituency. Even though ministers tended to rally before votes began to be published in 1993, the Council members explain that they currently decide which vote they will publicize by first considering the external audience.

Therefore, the development of a policy of "transparency" has perpetuated and reinforced the norm of rallying. The interviewees refer to the public perception in order to explain that norm. The actors want to avoid being outvoted because it entails material costs, but also because they do not want to be seen as defeated. This incentive is reinforced by the fact that when a measure is passed by qualified majority, the high threshold of qualified majority makes the minority all the more visible. I will now describe this reluctance to be seen as isolated and its link to the high threshold of qualified majority.

### Avoiding Marginalization

The norm of rallying is deeply rooted because the representatives want to avoid "isolating" or "marginalizing" themselves – two verbs often used by interviewees. For instance, during a session of the Committee of Permanent Representatives, the representative of a small member state was not satisfied with a text and found herself isolated. She attempted to prevent its adoption by invoking a procedural error: the document was not translated in all the official languages, and the new Treaty had to be presented to the national parliaments a few weeks later. The presidency pretended not to hear those arguments and "ignored" the representative. The person who told me this anecdote emphasized the fact that fighting with the majority is a very rare behavior – "it's a very rare example of a member state trying to defeat the majority."<sup>54</sup>

Furthermore, legislative texts include footnotes in which national delegations state their difficulties. The delegations are designated with the initials of their countries written in capital letters and underlined. For this reason, delegations that disagree with parts of texts can be easily identified and if a minister is isolated, the other national representatives and the presidency can notice it at once. According to a representative: "If we are alone in the footnotes, the presidency ignores us."<sup>55</sup> The presidency explicitly uses the threat of isolation to discourage the opponents<sup>56</sup>: "After a certain stage, the presidency will say to the member states: be careful, you could stay alone."<sup>57</sup>

In other institutional settings, where the actors do not attempt to avoid isolation, the possibility of being outvoted would not confer such influence on

<sup>54</sup> Member of the Committee of Permanent Representatives, October 2007.

<sup>55</sup> Environment advisor, Permanent Representation, December 2007.

<sup>56</sup> Council Secretariat, November 2007.

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the presidency. Even at the Council, a minister may want to appear as isolated because she expects electoral benefits from such behavior.<sup>58</sup> The fact that marginalization and exclusion are perceived as risky is characteristic of the Council. Isolation entails personal and symbolic costs for the representatives who will work again with the same colleagues. The tendency to rally partly originates in the fear of being humiliated and of being seen as not prone to compromise.

Those incentives are combined with the fact that delegations attempt not to weaken the position of their country in future negotiations. The delegations take into consideration the symbolic and material costs of a negative vote. One representative notes that "one has to be cautious. If one wants to vote against a measure or abstain, one must have very clear reasons. . . . One has to be careful to preserve one's credibility."<sup>59</sup> Except when ministers have received a strict parliamentary mandate (but control by national parliaments exists only in a few member states), they determine their public vote by considering the fact that the presidency or the Commission might not listen to them in future negotiations if they draw attention to themselves by not rallying.

According to a study by Matthews, members of the U.S. Senate tend to keep silent in order to maximize their chances of being listened to in the future. This strategy is close to the strategy that consists in saving one's negative votes:

Speaking too much tends to decrease a senator's legislative impact. "Look at \_," one of them said. "He came in here with his mouth open and he hasn't closed it yet. After a while, people stop listening."<sup>60</sup>

According to interviewees, the Polish delegation had this misfortune because they opposed too frequently and with too much virulence.<sup>61</sup>

Moreover, delegations of states that are either new members of the EU or small (the two factors often combine in the case of the countries that joined the EU in 2004) are all the more prone to keep silent. Some of them deem that it is in their interest to adopt a "low profile."<sup>62</sup> Both national representatives and members of the Secretariat claim that this attitude is typical of the delegations that began to work at the Council in 2004.<sup>63</sup> The fact that a newcomer has an interest in being unobtrusive is peculiar to small groups whose members often decide together. To quote again the case of the U.S. Senate, its members expect that a freshman will remain unnoticed:

<sup>58</sup> Interviews, Environment advisor, Permanent Representation, December 2007; Council Secretariat, December 2007 and January 2008.

<sup>59</sup> Environment advisor, Permanent Representation, December 2007.

<sup>60</sup> Cf. Matthews (1973, p. 96).

<sup>61</sup> Quoted by most interviewees.

<sup>62</sup> Member of the Committee of Permanent Representatives, October 2007. One might recall how during a press conference held in 2003, the French President Chirac claimed that Romanians and Bulgarians should have not supported the U.S. intervention in Iraq and should have remained silent because they were not already members of the EU but only applicants.

<sup>63</sup> Cf. Dehousse et al. (2006, pp. 72, 74).



The new senator is expected to keep his mouth shut, not to take the lead in floor fights, to listen and to learn. "Like children," one freshman said, "we should be seen and not heard." Just how long this often painful silence must be maintained is not clear, but it is certainly wiser for a freshman to postpone his maiden efforts on the floor too long than to appear overly aggressive.<sup>64</sup>

Silence is imposed by a norm of humility and has a strategic aspect. Likewise, at the Council, the habit of keeping silent in order to be listened to in important occasions combines normative imperatives and strategic considerations.

Therefore, the combination of a high threshold of qualified majority and of the "shadow of the future" leads the representatives to soften their positions during the negotiation process (as shown in figure 9.1) and, at the ultimate stage, not to voice their opposition by registering a vote (as shown in figure 9.2). To my knowledge, existing studies have not highlighted the fact that a high threshold of qualified majority can discourage opposition. Still, interviews reveal clearly this effect. A national representative nicely phrased this phenomenon by stating that ministers avoid publicly voting against adopted measures because they would "appear as a fly on the milk."<sup>65</sup>

Interviews also show that the high threshold of qualified majority stimulates the reluctance to be marginalized because it is articulated with circumstances

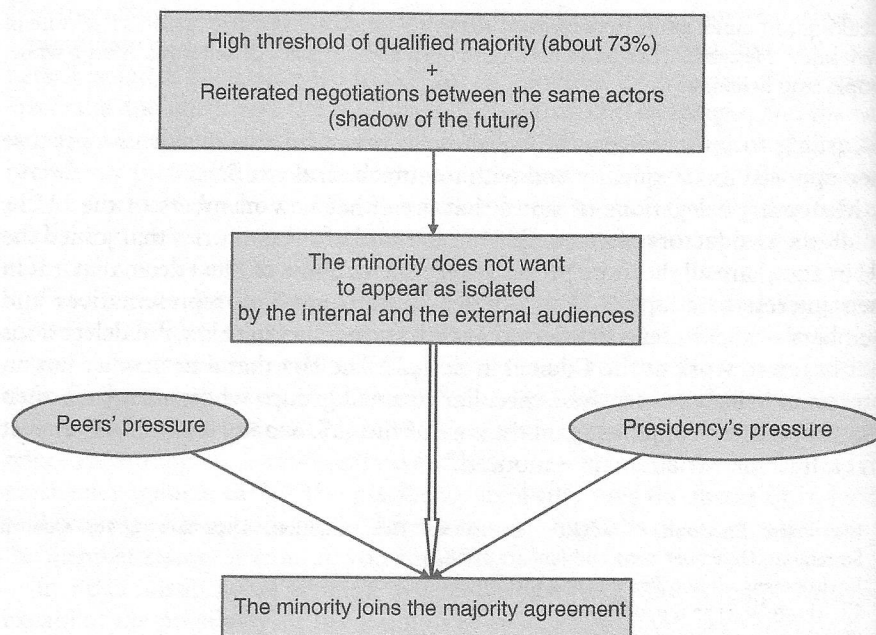


FIGURE 9.2 High threshold of qualified majority and incentives to join the majority.

<sup>64</sup> Matthews (1973, p. 93).

<sup>65</sup> November 2007.

peculiar to the Council: (1) the same actors negotiate together on a long-term basis and fear being ostracized; (2) the general belief of the political actors is that national audiences interpret negative votes as failures in negotiations and not as evidence of courageous defense of one's country's interests. After one has disentangled those circumstances and the need for a large qualified majority, it is difficult to deem to what extent the latter factor discourages the opponents. To put it in other words, one could check the impact of that factor if the threshold of qualified majority were lowered. If laws had to be adopted by a lower qualified majority, would the proportion of measures adopted despite opposition be higher? Only a real reform of the decision-rule would allow us to answer this question but the interviews provide us with strong evidence that the rallying of the minority is an effect peculiar to the high threshold of qualified majority because it stimulates the reluctance to be seen as marginalized.

#### CONCLUSION

In conclusion, I would like to distinguish what the empirical research allow us to establish and the theoretical hypotheses that my empirical results entail – and that need further confirmation.

As for the empirical results, I can distinguish two effects of the high threshold of qualified majority:

1. The large qualified majority deters the opponents from being obstructionist by creating incentives to negotiate. Actors have to negotiate because the qualified majority would be too difficult to reach if concessions were not granted. This factor has an impact because two other factors are present: (a) The actors aim at decisional productivity. Productivity is first the aim of the presidency. But given that the presidency is held by the different member states, national representatives tend to be cooperative. They know that they will also hold the presidency, which leads them to avoid behaving in a way that they would not appreciate from other national representatives during their own presidency. (b) The texts can be modified.
2. The high threshold of qualified majority deters the opponents from publicly stating their defeat because they do not want to be seen as isolated. Two conditions are necessary: (a) the reiteration of decision making between the same actors and the fact that the actors do not want to be ostracized; (b) the belief that being seen as outvoted is costly.

Those empirical results lead me to make the following hypotheses:

1. A high qualified majority fosters decisional productivity.
2. A high qualified majority fosters "consensual" or general agreements.

Although one might expect that an increase of the majority threshold would be correlated with a decrease in the decisional productivity, empirical research

indicates that productivity could be a non-monotonic function of the required degree of approval, with both simple majority and unanimity being less productive than a qualified majority. As for the hypothesis that a large qualified majority fosters general agreement, we may recall that the reluctance of the minority to be seen as defeated or opposed has been noted for other institutional settings.<sup>66</sup> I believe that my interviews confirm this theory and allow us to elaborate on it by showing that the tendency to rally is prompted by the fact that being opposed to an adopted measure involves opposition to a broad majority.

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<sup>66</sup> Meade and Stasavage (2008); Epstein et al. (2001).

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