Chapter 17: The Council

Introduction

17-1 This chapter deals with the following aspects of the Council:
- the role of the Council,
- the composition, Presidency and meetings of the Council,
- voting in the Council: qualified majority voting and its constitutional importance,
- the Committee of Permanent Representatives,
- the Council's Secretariat-General,
- the Council's rules of procedure,
- the relationship between the Council and the Commission,
- the relationship between the Council and the other bodies and
- transparency and the Council's proceedings.

The role of the Council

17-2 Both in legislation and in policy-making it is the Council which generally has the final power to take decisions. For some purposes the power is shared with the European Parliament. For some purposes decision-making powers are conferred on or delegated to the Commission. For some purposes even Council decisions may be subject to review by the Court of Justice. But constitutional power within the European Union still rests primarily with the Council.

17-3 Under the Treaty, the role of the Council is clearly prescribed.[1] To ensure that the objectives set out in the Treaty are attained the Council, in accordance with the provisions of the Treaty:
- must ensure coordination of the general economic policies of the Member States[2];
- has power to take decisions[3];
- may confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down and may impose certain requirements in respect of the exercise of these powers[4];
- may also reserve the right, in specific cases, to exercise directly implementing powers itself.[5]

The procedures for ensuring that the objectives set out in the Treaty are attained have to be consonant with principles and rules laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.[6]

Composition, Presidency and Meetings of the Council

17-3 One representative, at ministerial level, of each of the fifteen Member States constitutes the Council.[7] Although it is customary for the ministers to be those responsible, in their respective states, for the main subject of any given Council meeting - Ministers of Agriculture, for example, normally attend meetings of the Council at which agricultural questions are to be discussed[8] - this is not necessarily the case. Moreover, Council meetings at which a main topic is to be discussed, such as agriculture, are not prevented from discussing other topics, particularly where these call for an

urgent decision by the Council. What is important is that the Ministers concerned are authorised to commit the government of the Member State which they represent.[9] This is obviously important from a constitutional point of view: otherwise, it would be difficult for the Council to conduct business efficiently or expeditiously. At the same time, authorisation may raise constitutional problems for the individual states. In a democratic state Ministers, whether they themselves are elected or not, are accountable to the elected representatives of the people, so that in the last event authorisation must mean approval by the Member State's Parliament or equivalent. Where a national government enjoys only marginal support from its elected representatives, the ease with which it can authorise Ministers attending Council meetings is greatly weakened.

The Presidency of the Council

17-4 There is more to the Presidency of the Council than the right and duty to preside at Council meetings. In the first place, the nationality of the President of the Council determines the nationality of the chairman or president of a host of committees and other bodies, including the European Council.[10] In the second place, the President of the Council has a number of specific rights and duties conferred on him or her by various provisions of the Treaty.[11] In the third place, the President of the Council may be the more or less official spokesman for the European Union in matters covered by the Council in question. In matters coming within the common foreign and security policy, the Presidency formally represents the European Union.[12] It must be emphasised, however, that constitutionally there is no "President of the European Union".

17-5 It follows from the foregoing that the Presidency of the Council is not an office held *in personam*, but is determined by two objective factors. The first factor is the identity of the Member State to which the Presidency is assigned for six months at a time. As the Treaty puts it, "the office of President shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously".[13] The second factor is the identity of the Council meeting at any given time. Thus, if the United Kingdom holds the Presidency and the Council meeting is on agriculture, the President of the Council will be the British Minister of Agriculture.

17-6 As to the order in which the Presidency of the Council is assigned, the following dates indicate the six-month periods from 1 January 2000 and the Member States holding the Presidency during those periods[14]:

1 January 2000 to 30 June 2000:	Portugal
1 July 2000 to 31 December 2000:	France
1 January 2001 to 30 June 2001:	Sweden
1 July 2001 to 31 December 2001:	Belgium
1 January 2002 to 30 June 2002:	Spain
1 July 2002 to 31 December 2002:	Denmark
1 January 2003 to 31 July 2003:	Greece

17-07 Meetings of the Council are held when convened:

– by its President on his own initiative, or

– at the request of one of its members, or
– at the request of the Commission.[15]

The incidence of Council meetings varies according to the urgency of the matters on the agenda. The General Affairs Council, the Economic and Financial Affairs Council and the Agriculture Council meet once a month; other Council meetings, according to the topic, take place two to four times a year.

Voting in the Council

17-08 According to the various provisions of the Treaty, voting in the Council must be:
– unanimous[16], or
– by simple majority[17], or
– by "qualified majority".[18]

17-09 Where the Council is required to act by a qualified majority, the votes of its members are weighted as follows[19]:

Austria	4	
Belgium		5
Denmark		3
Finland		3
Germany		10
Greece	5	
France		10
Ireland	3	
Italy		10
Luxembourg		2
Netherlands		5
Portugal		5
Spain		8
Sweden		4
United Kingdom		10

17-10 For their adoption by qualified majority voting, acts of the Council require at least:
– 62 votes in favour, where the Treaty requires them to be adopted on a proposal from the Commission (that is, the majority of cases) or
– 62 votes in favour, cast by at least 10 members, in other cases.[20]

17-11 Two additional rules on voting are laid down in the Treaty, over and above those laid down in the Council's own Rules of Procedure. One is that abstentions by members present in person or represented do not prevent the adoption by the Council of acts which require unanimity.[21] The other is that, where a vote is taken, any member of the Council may also act on behalf of not more than one other member.[22]

17-12 In constitutional terms, the form of voting in the Council is of fundamental importance.

Since the Council is the main decision-making body in the European Union, the form of voting determines whether individual states can veto any policy or legislation which they believe to be against their interests or whether their objections can in effect be overridden. Where unanimity is required, individual states may veto Council acts. Where a majority is required, whether simple or qualified, the majority can override the objections of individual states or groups of states. For some years there was an understanding between the Member States that if a policy or law, though supported by the requisite majority, was opposed by a Member State on the grounds of serious national interest, the Council would not act; but this understanding had neither a legal basis[23] nor lasting and consistent results. However, a new concept has been introduced since 1 May 1999, under which a Member State may plead its national interest in certain policy areas. For example, in the context of decisions of the Council implementing the common foreign and security policy, if a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote is not taken; and the Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.[24]

17-13 Although a qualified majority is harder to obtain than a simple majority, the constitutional principle remains the same: that majority voting tilts the balance of power in favour of the centralised institutions at the expense of the Member States' individual interests. The difference between simple and qualified majority voting is more a question of political tactics than of constitutional law. Parties and lobbyists have to calculate and manoeuvre according to whether they can secure the votes of a given number of large and small states.[25]

17-14 In the past fifteen years, the Single European Act, the Treaty on European Union and the Treaty amending the Treaty on European Union, have progressively extended majority voting.

Council acts

17-15 There are three categories of Council acts:
- non-legislative acts[26],
- legislative acts[27], namely,
  - regulations,
  - directives,
  - decisions,
  - recommendations,
  - opinions, and
- acts in accordance with the common foreign and security policy and police and judicial cooperation in criminal matters[28], namely,
  - joint actions and
  - common positions.

The Committee of Permanent Representatives

17-16 To prepare the work of the Council and to carry out tasks assigned to it by the Council, there is a Committee of Permanent Representatives.[29] This comprises the Permanent Representatives

(Ambassadors) of the fifteen Member States to the European Union. A section of the Committee comprises the Permanent Representatives' deputies. Council working parties, which are appointed by the Council and comprise national officials from the Member States, report to the Committee of Permanent Representatives on proposed legislation and policies. The Committee, which has power to take procedural decisions[30], then decides on the way in which proposals and any working party recommendations for amending them should be presented to the Council.[31] On the face of it, the Committee's constitutional powers are firmly subordinated to the wishes of the Council itself. In practice, the Committee wields considerable power. It is not well known to the public and its proceedings, like those of the working parties, are confidential.

The Council's Secretariat-General

17-17 Although each of the institutions has a secretary-general or equivalent, only the Council and the Court of Justice merit a Treaty provision to that effect. Under the Treaty, the Council is assisted by a General Secretariat, under the responsibility of a Secretary-General[32], who in turn is assisted by a Deputy Secretary-General responsible for running the General Secretariat. Both the Secretary-General and the Deputy Secretary-General are appointed by the Council acting unanimously. It is for the Council to decide on the organisation of the General Secretariat.[33]

The Council's Rules of Procedure.

17-18 Under the Treaty, the Council is required to adopt Rules of Procedure governing its activities and proceedings.[34] It is also required to elaborate the conditions under which the public have access to Council documents[35]; and it must, after receiving an opinion from the Commission, determine the rules governing the Committees provided for in the Treaty.[36]

The relationship between the Council and the Commission

17-19 In general, as the next chapter shows, the Commission initiates and proposes; and the Council acts on Commission initiatives and proposals. However, the Council may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals.[37] A different approach is adopted in the common foreign and security policy, in which the Council takes the initiative[38] and the Commission is "fully associated with the work carried out" in this field.[39] The intricate relationship between the Council and Commission in matters of legislation is discussed in a later chapter; but the principle is unaffected that, in legislation as in other fields, the Commission inititiates measures and the Council, with or without the European Parliament, adopts them.

17-20 Much of the business of legislation is conducted in Council working groups, comprising officials of the Member States and representatives of the Commission. The committee or working group system has grown increasingly complex; and the Council has attempted a partial simplification of the system and its procedures.[40]

The relationship between the Council and the other bodies

17-21 In certain cases specified by the Treaty, the Council must, and in certain other cases it may, consult the Economic and Social Committee and the Committee of the Regions.[41] In addition there are many other committees which it may consult in the course of its work.[42]

Transparency and the Council

17-22 Although some Council proceedings at the working party level are closely analogous to those of a parliamentary chamber or committee, involving first and sometimes second and third "readings" of a proposed measure and the formulation of amendments[43], the proceedings are confidential. It is arguable that, since these proceedings are more closely analogous to the deliberations of officials in their national ministries, the main difference being that the officials making up the Council working parties are drawn from fifteen nations' government departments, the proceedings should be no more public than those of the respective ministries. This analogy is, however, false. The Council is, for many purposes, a legislative body, with the final power of adopting legislative measures. Its deliberations on proposed measures, and particularly on possible amendments to the published proposals of the Commission, are just as important to the interests affected as the proceedings in the European Parliament; in some ways, more so.[44]

17-23 It is therefore a salutary development since 1 May 1999 that the Council has increased duties in matters of transparency. The Council is now required to define the cases in which it is to be regarded as acting in its legislative capacity, with a view to allowing greater public access to Council documents in those cases, while at the same time preserving the effectiveness of its decision-making process. In any event, when the Council acts in its legislative capacity, the results of votes, explanations of votes and statements in the minutes are all to be made public.[45] There are two weaknesses in these requirements. One is that the Council is left with quite a substantial degree of discretion. The other is that its working parties, in which all the proposals and most of the amendments are given the "readings" referred to above take place, do not appear to be covered by the transparency principle.

17-24 Since the instruments guaranteeing Council transparency[46] are justiciable, it is ultimately for the Court of Justice to decide in individual cases whether the Council has acted within its powers or not. If it has not, the Council's formal decision to refuse an applicant access to certain documents may be annulled.[47]

1. Article 202 (formerly 145), EC Treaty.

2. See, in particular, Articles 98 and 99 (formerly 102a and 103), EC Treaty.

3. Not all decisions taken by the Council are of a legislative character: see, for example, Article 133(3) (formerly 113(3)), EC Treaty.

4. For example, Council Regulation EEC/19/65 conferred power on the Commission to make regulations, such as Commission Regulation EEC/4087/88, on the application of Article 85(3) to categories of franchise agreements.

5. For example, in Article 7(6), Council Regulation EC/384/96, on protection against dumped imports from non-member states.

6. See paragraph 17-18 below.

7. Article 203 (formerly 146), first sentence, EC Treaty.

8. When Ministers of Foreign Affairs meet to discuss external relations and general policy questions, they attend what is known as the General Affairs Council; and, when Ministers of Finance and Economic Affairs meet to discuss their interests, they attend what is known as the Economic and Financial Council (sometimes known by its acronym, "ecofin"). The Council meets under different names, according to the main topic; there is, however, only one Council in constitutional terms.

9. Article 203 (formerly 146), first sentence, EC Treaty.

10. Article 4 (formerly D), second paragraph, EU Treaty.

11. For example, the President of the Council has the right to take part in meetings of the Governing Council of the European Central Bank: Article 113(1) (formerly 109b(1)), EC Treaty; and has the duty to inform the European Parliament of any decision on the membership of the Economic and Financial Committee: Article 114(3) (formerly 109c(3)), EC Treaty.

12. Article 18(1) (formerly J.8(1)), EU Treaty. The reference to the "Presidency" in this provision, without specifying the European Council or the Council, leaves open the level at which the European Union is being represented.

13. Article 203 (formerly 146), second paragraph, EC Treaty. See paragraph 17-6 below.

14. Council Decision EC/2/95. The order may be varied by unanimous agreement.

15. Article 204 (formerly 147), EC Treaty.

16. For example, under Article 308 (formerly 235), EC Treaty.

17. In all cases where it is not otherwise specified: Article 205(1) (formerly 148(1)), EC Treaty.

18. Qualified majority voting applies to almost all cases, beginning with Article 12 (formerly 6), second paragraph, EC Treaty, and continuing throughout the Treaty. References to the procedures under Articles 189b and 189c, EC Treaty, all mean in effect qualified majority voting in the Council.

19. Article 205(2) (formerly 148(2)), first paragraph, EC Treaty, as amended by the Treaty of Accession of Austria, Finland and Sweden.

20. Article 205(2) (formerly 148(2)), second paragraph, EC Treaty.

21. Article 205(3) (formerly 148(3)), EC Treaty.

22. Article 206 (formerly 150), EC Treaty.

23. It is entirely unsupported in the Treaties; and the argument that it constitutes a part of the *"acquis communautaire"* is not only tenuous but also outside the purview of the Court of Justice. See paragraph 4-21 above.

24. Article 23(2) (formerly J.13(2)), second paragraph, EU Treaty. Compare Article 40(2) (formerly K.12(2)), second paragraph, EU Treaty.

25. For example, to muster 62 votes, the votes of the four largest states, with ten votes each (France, Germany, Italy and the United Kingdom), of the next largest state, with eight votes (Spain), of two states with five votes each (say, Belgium and the Netherlands) and of one state with four votes (such as Sweden) would suffice. To defeat a proposal, the votes of the four largest states would suffice; or the votes of all but two of the states with fewer than eight votes.

26. This is a miscellaneous category, ranging from the provision of guidelines to the appointment of members of committees. It also includes the determination of the salaries, allowances and pensions of the President and Members of the Commission, and of the President, Judges, Advocates-General and Registrar of the Court of Justice, under Article 210 (formerly 154), EC Treaty.

27. This category is described fully in chapter 21.

28. This category has been described in chapters 7 and 8; it is peculiar to the Treaty on European Union and does not figure in the Treaty establishing the European Community.

29. Article 207(1) (formerly 151(1)), first sentence, EC Treaty.

30. Article 207(1) (formerly 151(1)), second sentence, EC Treaty.

31. Usually as "A" or "B" items, being respectively matters requiring full consideration or formal approval by the Council itself. These matters are covered by the Council's Rules of Procedure, Article 2(6) and (7).

32. Who is also the High Representative for the common foreign and security policy: Article 207(2) (formerly 151(2)), EC Treaty, and Article 26 (formerly J.16), EU Treaty.

33. Article 207(2) (formerly 151(2)), EC Treaty. The organisation is divided into Directorates-General, similar to, but on a smaller scale than, those of the Commission.

34. Article 207(3) (formerly 151(3)), first paragraph, EC Treaty. See Council Decision EC/396/00.

35. Article 207(3) (formerly 151(3)), second paragraph, EC Treaty. See paragraph 17-22.

36. Article 209 (formerly 153), EC Treaty.

37. Article 208 (formerly 152), EC Treaty.

38. See, in particular, Articles 13(3) and 24 (formerly J.3(3) and J.14), EU Treaty; chapter 7 above.

39. Article 27 (formerly J.17), EU Treaty.

40. Council Decision EC/468/99. The system is sometimes referred to as "comitology", a word which is not to be found in any respectable English dictionary.

41. See chapter 22.

42. See paragraph 15-9 above.

43. Formal amendments to legislative proposals can be made only in accordance with Article 250 (formerly 189a), EC Treaty; but informal amendments, involving a strong hint to the Commission that the proposal will not be adopted unless the Commission alters the proposal, are common.

44. The Council's legislative role is covered by its Rules of Procedure, Article 7(5); the confidentiality factor by Article 4(1) and access to documents by Articles 22 and 23. However, these Rules of Procedure antedate the Treaty amending the Treaty on European Union, whose provisions are referred to in the next paragraph. The amendments introduced by the amending Treaty may have been prompted by the litigation leading to the decision of the Court of Justice in Case T-174/95, *Svenske Journalistförbundet v Council*. (Judgment in this case was delivered

after the Treaty had been signed, but before it had come into force.)

45. Article 207(3) (formerly 151(3)), second paragraph, EC Treaty. This results from an amendment under Article 2(39) of the Treaty amending the Treaty on European Union.

46. Notably, Council Decision EC/731/93 on public access to Council documents. More recently Regulation EC/1049/01 of the European Parliament and of the Council governs public access to to European Parliament, Council and Commission documents. All the case-law antedates this regulation: see paragraph 18-25 and note 89 thereto.

47. As in Case T-188/98, *Aldo Kuijer v Council*.