Zentrum für Europäische Integrationsforschung
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Discussion Paper

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Negotiating EU Law
Particularities
and Conclusions

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I. Introduction

1. Importance of good negotiating skills

In Brussels nothing drops from the sky: not a directive, regulation, decision, green book, white book, recommendation, opinion, communication and so on. Everything is the result of the EU specific decision making process. This process is directed and controlled by negotiations. We can influence it to a high degree if we effectively participate in these negotiations.

Effective participation in EU decision making means above all to take an active part in and to influence the far-reaching EU legislation. A regulation on environmental standards for example - after difficult negotiations adopted in Brussels today - will be published in the EU's Official Journal tomorrow. The day after tomorrow this regulation will represent directly applicable legislation for the EU's nearly 500 million citizens. If we want to make sure that our interests, the interests of our institution or our national interests are taken into account, we have to negotiate effectively. That’s one reason why good negotiating is so important in the EU.

There is however another reason. Good bargaining in the EU is much more than pushing through our own interests, as the negotiations in the EU have to reconcile the very different interests of all participants, especially the interests of all Member States. Only if all participants negotiate well, can the negotiation result be acceptable to all EU partners in the long run. Most of the critical developments in the EU from the empty-chair policy in the

sixties to the veto situations in the eighties and the crises in recent years may be explained as the result of negotiating mistakes. This is why good negotiating skills form a fundamental basis of the functioning and stability of the EU.

2. Becoming successful or frustrated

Hundreds of negotiations are taking place every week in all kinds of EU bodies. It is always amazing to see that half of the negotiators enjoys negotiating and is successful in doing so, while the others do not succeed and are disappointed and frustrated.

On the one hand there are negotiators who know what they are doing on the European stage and who also know their importance. They assert the interests they represent as much as possible in EU decisions. Nevertheless, their relations with the other delegates are good. On the other hand, there are those who keep getting frustrated. They do not succeed in negotiations and they are unpopular with their bargaining partners. It is amazing to realize that the second group, the unsuccessful, listless and disappointed, includes many negotiators with outstanding technical knowledge. These are negotiators who are obviously experienced, skilful and successful in negotiations at the national or international bilateral and multilateral levels. Despite these qualifications, they are astonishingly ineffective and helpless at EU level. It is as if the engine of a car runs at a great number of revolutions but the power does not reach the wheels. That is, something is wrong with the gearbox of the car.

This is why the latter do not like to participate in EU negotiations. Most of them do not even try to hide it. They show their frustration and make the EU responsible for their failure. They say that the other delegates do not understand them. They say that the European Commission representatives are always working against them. They say that, unlike all the other participants, they are not provided with the necessary information and documents. To them EU policy-making seems to be obscure, undemocratic and Kafkaesque anyway. As a consequence, they are the worst communicators of EU ideas and ideals. They even spoil them.

This dichotomy is remarkable only at first glance. If you analyse the bargaining techniques of the delegates in detail, it soon becomes clear that the ones who work successfully in EU bodies are those who take into account the characteristics of the EU's decision-making process, while the others don't. A great number of the negotiators have no idea or at best a nebulous one about these particularities. Some of them are not interested in them at all. If the one and only secret to being successful the EU level is to take into account the particularities of EU decision making, we must try to better understand them and increase our ability to draw consequences from that for our negotiating approach.[1]

Aiming at this, we shall focus on the legislation of the Council and Commission bodies. They are the bodies in which the numerous national delegates, civil servants on technical level, experts, senior officials and ministers, negotiate directly every day. They are the bodies in which our students will negotiate most likely. While there is good political science literature concerning these bodies, there is much less literature giving the view of experienced insiders and practically useful hints. The Council and its preparatory bodies as well as the Commission's working parties seem to be the most opaque und secretive bodies of the EU.[2] The Presidency, the Commission and the national governmental actors negotiate behind closed doors.[3] Here the negotiations and the decision making cannot be observed directly by outsiders. The political science depends on indirect information. This is different for the European Parliament and its bodies. They are interested to „go public" with their politics and their negotiations.

To make EU negotiators efficient and effective we want to bring these particularities to our attention and increase our ability to draw consequences from that for our bargaining approach. With the insiders view we have to make some considerations and give recommendations that may at a first glance seem to be self-evident and some of them even trivial. We accept

1 For negotiating skills in general see e g. Fisher, Roger; Ury, William, Getting to Yes. Negotiating an agreement without giving in, London, 2003.
2 Westlake, Martin; Galloway, David, The Council of the European Union, London, 2006, p.367.
3 Altides, Christina, Making EU Politics Public, Baden-Baden, 2009, p.23.

this, convinced the considerations and recommendations will be useful for the players involved directly or indirectly.

II. The particularities of decision making in EU bodies: consequences for negotiating

1. Multitude of bodies and persons involved: multitude of possibilities to interfere and to act

If you want to buy a used car, you look for a suitable offer in newspaper ads. Then you meet with the seller and negotiate the price with him. You may also consult a car expert for his opinion on the condition of the car and on the appropriate price. Generally, no one else is involved in the negotiations.

This is very different in EU negotiations. For each member state, every other member state is a negotiating partner. That makes 26 partners. There are many more parties involved in the negotiation: The European Commission initiates the negotiation with its proposal in the Council and the Parliament. The European Parliament plays an important role in the process. The Presidency, too, influences the process and the outcome. Negotiations do not only take place at the level where you have to negotiate. If you negotiate an item e. g. in an EU working party, the same item will be dealt with also at other levels, i.e. in the Permanent Representatives Committee (Coreper), the Council's senior preparatory body, and in the Council itself as well as in other committees. So the number of bodies and persons involved multiplies.

The negotiations of the working party are prepared first by the Presidency on its own, then with the Council secretariat and then in a joint briefing of the Presidency, Council Secretariat and Commission. Each participant, each individual delegate of each member state is influenced by many other persons and bodies interested in the negotiated issue and may influence the others. The multitude of players seems to be confusing. So let us systemize them a little bit and have a short look at them: Council activity: Here the negotiating bodies start with the working parties at the lowest negotiating

level, then the Committee of the Permanent Re- presentatives (Coreper) and other committees at the medium level, then the ministers at the high level (Council) and finally the highest level of the heads of state and government (European Council). There is also the Council Secretariat, its Legal Service and the 27 Permanent Representations of the Member States designed to facilitate negotiating in the Council. Commission activity: There are numerous Commission units and a hierarchy up to and including the directors and directors general, the chefs de cabinet and the "Commission" as a political body, and there are numerous Commission working parties and committees.
European Parliament activity: There are up to 750 members, each of them with his or her own staff, parliamentary groups and more than 20 committees, in the committees one "rapporteur" and several "shadow rapporteurs" for each proposal and finally there is the plenary. There are more bodies at EU level designed to facilitate negotiating e. g. the Economic and Social Committee and the Committee of the Regions as well as many interests groups including lobbying services and NGOs. We must to keep in mind that at the Member State level there are also numerous bodies relevant for EU negotiating. In particular, there are the national parliaments and their committees, the leading ministry and the other involved ministries, the bodies of national EU policy coordination, political parties, press and national lobbying services. There is of course neither the need nor the possibility to use all of these players in all EU negotiations. You should however be aware that they exist. You should also think about whether and how you may be able to use them. If you don't make use of all negotiation possibilities, your negotiating partners will use them to achieve their own goals.

1.1 Best places to negotiate

Negotiations take place in the conference room. To us, this seems to be the normal thing: It is in the conference room that delegates exchange their arguments. In this room, working parties and the Coreper finalise the work of their respective levels and the Council finalises definitively its decision-making process on a proposal. Therefore, it is obvious that many delegates

concentrate their negotiating skills and their negotiating effort on the length of the meeting and on the conference room.

However, only a small fraction of the persons and bodies involved in an EU negotiation is sitting in the Brussels meeting room where you negotiate: just the other delegates of the same Working party, the Presidency, the Commission and the General Secretariat of the Council with their respective staff. This makes it clear that our negotiating possibilities are very limited in an EU conference room. There are more reasons for that:

Now 27 delegations aside from the Presidency, Commission and Council Secretariat with their staff, the state and the prospects of the negotiation are rather difficult to assess in the conference room. The delegates don't bargain directly with each other. They don't speak directly to each other but rather via microphone and headset. Often their "dialogues" are even mediated by one or more interpreters. More and more often they can't see each other due to the increased number of participants and the distance between them. Sometimes it may even be difficult to know which delegation has the floor. Many delegates in a working party do not know each other personally. This was different in the past with fewer Member States. Among the few delegations the atmosphere in the EU conference room was familiar and often friendly. It facilitated coming to a consensus in difficult situations. If anywhere, this is the case today in the Coreper and in the Special Committee on Agriculture (SCA). Their members meet every week for bilateral negotiations often lasting more than one day. They belong to their committee for years and sometimes for more than a decade.[4]

One of the main bottle necks of the problem is the lack of time in the meeting room. During a meeting of 27 delegations each delegate has much too little time to bring forward his position, interests and arguments. At all negotiation levels up to the ministers, the speakers are restricted to two minutes in principle.[5] The limited availability of conference rooms and inter-

4 Westlake and Galloway, p.426.

5 "... the Presidency shall … indicate to delegations the maximum length of their interventions … In most cases interventions should not exceed two minutes." Section 9, Working Methods for an enlarged Council, Annex V to the Council's Rules of Procedure, Council Decision 2009/937/EU of 1 December 2009 adopting the Council's Rules of Procedure, OJ 2009 L 325/35).

preters as well as the limited time and patience of the other 26 delegates makes it hard to speak longer. It is now customary for only a very small part of EU negotiations to take place in the meeting room. Before and after each meeting there are a number of possibilities to influence decision making very effectively. "Each Council meeting is the – relatively short lived – culmination of lengthy preparatory work undertaken by many specialised working parties and committees and completed by Coreper".[6] It is the short starting point to a long period of follow-up operations. What applies to Council meetings also applies to the meetings of all of its preparatory bodies. By far the most important parts of meetings often occur outside the conference room. We must not limit our negotiating efforts to the length of the meeting and to the conference room.

In an EU now encompassing 27 Member States, negotiations have become a management task, most of which has to be conducted outside the meeting room, e.g. started by reflections in the office of the negotiator in his capital, continued by negotiations in the offices of the Presidency, Commission services and other delegations. It is our job to bring together all the relevant information, to see and understand the interests of the other parties involved and analyse what possibilities we have for exerting influence. We must also choose arguments which are useful or at least not harmful to our interests, to form networks and – in bilateral contacts – to win over other delegations, and all of the aforementioned parties including the EU, national governments and NGO's for our interests. During a short meeting we have few possibilities to effectively negotiate, if only for time reasons. Those who essentially restrict their negotiations to the official meetings forfeit the most and best opportunities to exert influence.

1.2 Best level and best time to negotiate

Many delegates negotiating in an EU working party take their task too lightly. They are hardly interested in bringing up the interests they repre-

6 The former Secretary-General of the Council Jürgen Trumpf, stated it long before the enlargement; meanwhile the number of Member states nearly doubled. Trumpf-Piris-Report "Operation of the Council with an enlarged Union in prospect", Report by the set up by the Secretary-General of the Council. Brussels: Council of the European Union, Doc. SN 2139/99, 10.03.1999.

sent. They feel there is no need for that, since there is always a negotiating hierarchy above them: What I do not achieve at my level will certainly be achieved at the next level that is to say in the Coreper. If not there, my minister will achieve it at his level in the Council: For the EU legislative body is – together with the Parliament – the Council acting always at ministerial level.[7]

However, this is a false and dangerous conclusion. Once the required majority is achieved after difficult bargaining in a working party or in the Coreper, a minister will have little chance if any to introduce changes at Council level. In most cases, he cannot even stop the decision-making process at this level, let alone turn it around as he wishes. This is a consequence of the EU specific procedures. Once a Commission proposal has found the necessary majority in a working party, it is passed on to the Coreper. It will be put on the agenda of the next Coreper meeting. It will generally be included in the so-called „Roman I-Part" of the agenda. All proposals thus entered as so-called "Roman I-items" will normally not be discussed in Coreper. Unlike the "Roman II-items", they are mostly items in transit. After the Coreper meeting these proposals are submitted to the Council. Normally it will be put on the agenda for the next meeting. It will be included not in the regular agenda, but on an annex to the Council's agenda, the so-called "list of 'A'-items". Once again all of these items are normally just items in transit: The ministers adopt all items on this list en bloc without any discussion. The legal effect is the same as for the items placed on the regular agenda and adopted following debate in the Council itself, the so-called "B-items".[8] Most ministers don't even know exactly what is on the list of "A-items" they adopt. Often these items are not the responsibility of these particular ministers and of the respective Council formation. [9]

7 Art. 16 par. 1 and 2 TEU.

8 Westlake and Galloway, p.264.

9 The former British minister Alan Clark recorded in his "Diaries" the view, "that, not really, it makes the slightest difference to the conclusions of a meeting what ministers say at it. Everything is decided, hors-traded off by officials at Coreper and working parties ... The ministers arrive on the scene at the last minute, hot, tired, ill or drunk (sometimes all of these together), read out their pieces and depart." Clark, p.139. This statement holds true even long before the last enlargements; meanwhile the number of countries nearly doubled.

1.3 First conclusions

We have to recognize that very effective negotiating is both necessary and possible irrespective of the conference room and length of the meeting. We must take action as soon as possible because if an opinion has been formed against us in the first place it is always hard and often impossible to change it again. It is important to recognize ways to make the best use of all these possibilities to exert influence including establishing and using contacts, making phone calls, passing on papers to other negotiators, "helping" them to understand and support our interests. Due to the lack of time it may be helpful to draft an amendment to the text which is discussed in our group, bringing our ideas and intentions forward in the language in which the Presidency has tabled its own draft. So we must not limit our negotiating efforts to the meeting and to the conference room. In other words, effective EU negotiations are not the result of rhetoric, body language or diplomatic behaviour used in the meeting room. These are management tasks. By far the most important part of it has to be done outside the conference room, starting at home by making all possible contacts in our own office. We have to act on time: Once bodies or people involved have formed an opinion, it is too late to bring up our interests. It is never too early to negotiate, but often too late. The lowest negotiation level is the most important one. If we don't make use of all possibilities to our own benefit, our partners will use them for their own interests.

2. Voting by majority, weighting of the member state votes

2.1 Qualified majority or blocking minority: we have to win allies

In international negotiations, important decisions can only be made if all participants agree. Yet the EU takes a different approach. Here, negotiations are generally concluded when a qualified majority has been formed[10]. The 27 Member States have 345 votes altogether. For a decision to be taken, 255 votes must be cast for the proposal in question. This is called a qualified majority. The other existing majority elements - majority of

10 Art. 16 par. 3 TEU.

members of the Council representing at least 62 % of the Union's population - are not relevant in practice. If we look at it the other way round: 91 votes against a proposal including abstentions, means the proposal in question will not be adopted. This is the so-called blocking minority[11].

In fact, today a qualified majority suffices for most EU decisions. This has been the case for twenty years regarding the Common Trade Policy, the Common Agricultural Policy and some other policy fields. The possibility of decision making by a qualified majority now increasingly prevails in most of the other policy fields too. The change from unanimity to qualified majority voting has constantly been in flux, extended by the Single European Act, the Treaty of Maastricht, the Treaty of Amsterdam, the Treaty of Nice and the Treaty of Lisbon. Now in principle unanimity is retained only for decisions of the European Council[12] and at the Council for a few areas including tax, foreign affairs, defense and social security.

For a negotiator, it is important to note that in practice the qualified majority is important even in those fields where unanimity is still legally required. This is because in these negotiations too, the participants notice when a proposal is backed by a qualified majority. This brings political pressure to bear on the other Member States. In practice a single member state or even some Member States cannot permanently object to a decision favoured by a qualified majority. This is even shown by the highest level at the European Council: In extremely difficult situations, decisions resisted by one or the other member state will not persist when the European Council conclusions are supported by a clear majority. An essential conclusion from this for our conduct of negotiations is: We must realize that we cannot achieve anything alone in the EU. As a single delegation and as a single member state we cannot prevent anything alone. We have to win allies in order to get a qualified majority for a decision we want or to form a blocking minority against a decision we want to avoid.

11 From 1st of april 2017 at the latest a qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing at least 65 % of the population of the Union (double majority). A blocking minority must include at least four Council members. The other future elements governing the qualified majority are laid down in Art. 238 par. 2 TFEU.

12 Art. 15 par. 4 TEU.

This holds true for the bigger Member States as well. To reach a qualified majority, the six biggest Member States still need a lot of the medium-sized or smaller Member States as they alone have only 170 votes in total. On the other hand, even the group of the bigger Member States needs four of them to prevent a decision because their votes only suffice for a blocking mino rity of 91 votes. The delegates of the bigger Member States often run the risk of forgetting this[13].

We must learn to think in terms of majorities and blocking minorities. In order to use our options at the bargaining table and to protect us from unpleasant surprises, we must always be aware of the respective majority conditions in the EU bodies. We must know if a majority is emerging for or against us or if it is possible to at least reach a blocking minority. Every good EU negotiator therefore, has a kind of calculator in his head constantly recording the number of votes[14]

2.2 How to win allies

We must work for establishing good human relations with our bargaining partners. For this we have to be active. There are multiple ways to approach them and we should use them all, if possible. Joining the meeting of a working party for the first time we should introduce ourselves to the representatives of the Presidency, the Commission, the Council's General Secretariat and all delegations and hand out our business cards. We should greet each of them personally, if possible, at every meeting. We should offer and provide information and contacts. We may call and visit. We may go to the canteen, coffee bar, pizzeria or a pub together with members of other delegations. All of this seems trivial, yet these activities are a precondition for winning delegations. Even though these are important activities, they remain neglected. If we don't cooperate with the others, they may side against us.

13 See below chapter 2.3.
14 For the official voting calculator see the website of the Council (http://europa.eu/index_en.htm).

2.2.1 Best time

It is easiest to win somebody as a friend when you don't need him urgently. The same is true if you want to win somebody as your negotiating ally. Indeed, this insight is not particular to EU bargaining. However, it is so often neglected in EU negotiations that it is worth being mentioned.

We have discussed the amount of players as a particularity of EU decision making. When there are many players involved, it becomes more difficult to develop a common position. What is worse, once they have painfully made up their minds and agreed upon a position, it will become much harder, often even impossible to change it.[15] If an opinion or - even worse - a majority has formed against us it is too late to effectively bring in our interests. It is never too early but often too late to win allies. So we must take action as soon as possible

2.2.2 Best arguments

It is useful to have good personal relations with the other players. However, nobody will become our ally just because we are liked as a person. Every player involved in EU bargaining is driven by his interests. So we have to address these interests. If possible, we must try to include the interests of our partners in our own argumentation.

If the farm minister of a Mediterranean country wants the EU to help his olive-growers it isn’t helpful to complain specifically about the hardship of the olive-growers in his own country. If he does, the northern Member States concerned about budgetary burdens and the competitive position of their butter producers, as well as other olive-producing countries may be against him. This is because they want to prevent giving a special advantage to the olive-oil farmers from other countries. They do not necessarily want to alleviate the hardship of these producers as they would benefit from the market situation if these competitors ceased farming. So the Minister would be better served complaining about the hardship of all olive-growers in the EU or to ask for sales promotion based on a research opinion of the WHO recommending the consumption of olive oil.

It is much better to include in our argumentation the interests of as many negotiating partners as possible so as not to exclude other delegations and their interests. Additionally, it is convincing if we include the interests of the EU itself in our own argumentation. Sometimes you hear arguments that are not only useless but dangerous and harmful. This may happen when a delegate violates the mandatory requirements of EU legislation. Such requirements include the ban on discrimination and the acquis of the internal market. Many delegates like to present legal arguments attacking or supporting a controversial position. They generally attack a proposal of the Commission as illegal. Such legal arguments are likely convincing only for delegations already likeminded. All other delegations will not follow them.

If a delegate asks for an opinion of a Legal Service he should be aware that there are two different Legal Services involved in the negotiation. If he addresses the Legal Service of the Commission the answer is always predictable as this Legal Service will always defend the Commission's proposal. It is its duty, and it has given its official consent to the proposal long before. If the delegate addresses the Legal Service of the Council the answer may be more in line with its position. Even this Legal Service is disappointing when you really need its help: "Whenever a political orientation finds a qualified majority in a Council body the Legal Service, if illegality is not evident, must not give an opinion on the solution that is in line with this orientation".[16]

2.3 Weighting of votes: big vs. small, small vs. big?

The usual principle underlying international organisations is the sovereign equality of states: one state, one vote. Here again the EU takes a particular approach. Its Member States are formally unequally represented. They have

15 Fisher and Ury, p.7.

16 "Dans la mesure où une orientation politique recueillant une majorité qualifiée des members du Conseil s'est dégagée lors du Conseil précité, il n'est pas lieu pour le Service juridique, en l'absence d'illégalité manifeste, d'exprimer un avis sur la solution qui comporte cette orientation." quoted from a note of the Director General of the Council Legal Service to the President and the delegations of the Special Committee on Agriculture (SCA), a senior preparatory body of the Council).

unequal numbers of votes: from 3 votes for Malta as the smallest member state up to 29 for each of the four biggest Member States. The weighting of member state votes is a key characteristic of the decision-making process in the EU.

It is easier for us to achieve a qualified majority or blocking minority if we can win the support of the large Member States for our position than if we are only supported by small Member States. Winning the Italian delegate provides the support of 29 votes, winning the delegate from Luxembourg provides only 4 votes. Therefore it is obvious that most delegates try to obtain the support of large Member States. Some of them treat their colleagues from small Member States as "quantitées négligeables". At best, they canvass the small Member States' support merely as a marginal by-product as each vote brings them closer to their aim. In fact, some delegates' behaviour shows that the small and medium-sized Member States are not really taken seriously as negotiating partners. Astonishingly there is no difference whether these delegates themselves represent small, medium or larger Member States. If, for instance, the ministers express their view in the Council, many seats are taken when the large Member States, and the Commission and the Presidency have the floor. Many assume, however, that they can do without the contributions of smaller Member States and use that time for a phone call or a stop at the coffee bar. This is not only impolite, but it is also inefficient and harmful to the negotiating process.

2.3.1 Small is beautiful and influential

Winning the support and the votes of the small and medium Member States pays off. They are important negotiating partners and sometimes more useful and reliable to us than the bigger ones. 20 of the 27 Member States are small or medium-sized. In negotiations they can exert an important influence. Since the beginning of integration, the small Member States have been "overrepresented". Each of them has relatively more votes, more Commissioners, more members in the EP, more members of staff in the institutions and more speaking time in each meeting than a large Member State. Thus they have more relative influence in the negotiations than the

large states. They "punch above their weight".[17] Luxembourg, for example, has four votes. This is one vote for each 125,000 of its 500,000 inhabitants. Hungary as a medium-sized Member State has 12 votes, approximately one vote for 1 million of its 10 million inhabitants. Germany as the biggest Member States has 29 votes, this is one vote for each 2.8 million of its 82 million inhabitants. So Luxembourg has, relatively speaking, 8 times more votes than Hungary and 28 times more than Germany.

Until the time of voting, however, the small Member States are even more "privileged".[18] In the meeting room they have the same negotiating rights and possibilities as the largest Member State: number of delegates, microphones, the same possibilities to intervene and the same time to speak. Outside the conference room, they have the same negotiating options as a large state. They have access to all the other delegations, to the Commission units and to the Presidency. They have "their" Commissioners with whom they have particularly good access. Often a small Member State is less directly concerned by the negotiated proposal than the large Member States. In this case its argument appears to be less self-interested, more credible and in accordance with the common interest. Its capital is credibility and a realistic approach. In addition, they often have a popularity bonus with the other delegates, which benefits negotiations. That is why the delegates of smaller Member States are often the leading characters in a working party. We should join them. Small is beautiful.

The support by smaller Member States can be very valuable. If a small Member State is only marginally or not concerned at all, it is easier for us to win its support for our position. This is especially useful in difficult negotiating situations. For example, a difficult negotiating situation exists when we are the only delegation to advocate a concern. From the point of view of negotiating tactics it is of great benefit if a small member state, irrespective of the number of its votes, with its credibility takes the floor and expresses support or at least understanding for our isolated position. While

17 Tallberg, Jonas, Bargaining power in the European Council, in: JCMS 2008, Vol.46, No. 3, p.685-708, p.693.

18 Hayes-Renshaw, Fiona; Walace, Helen, The Council of Ministers, Basingstroke and New York 2006, p.72.

the self-interested position of an individual Member State can be easily dismissed with reference to the Union's interest, the support of the smallest Member States creates the impression that the Union's interest could be involved. This will be taken seriously during the negotiations. Therefore, it pays off to approach every delegation, especially the small ones. Win the smaller Member States as your ally! They are good allies.

On the other hand, the smaller Member States register polite and impolite acts very well. Maybe their delegates are especially sensitive to this point and react in a very emotional way. If one or more of the "large ones" treat a small one badly, this mostly results in the solidarity between all smaller states. The last enlargement has increased the amount of the smaller Member States considerably. That is why it has become even more important for the bigger Member States to appreciate them as important negotiating partners. Otherwise, they run the risk of opposition by all of the smaller ones: "Don't bully us we are so small and fragile!"[19] Sometimes such an impression of bullying has no foundation at all, but a small Member State may claim in order to buttress its position which is known as "playing with fire". This is a strain on the negotiating climate and the decision-making process. The media too, is also very quick in taking the side of the small countries and defending them against the large ones even if it is the media of large Member States. In practice, this can be a severe burden on the negotiations. The bigger the Member State is, the more it has to know this risk. For sometimes even large Member States feel invited to play this card against a still bigger country.

2.3.2 Big is useful

Generally the delegates of smaller have a high realism and low complacence. They know the advantages larger Member States have in EU negotiations. Large Member States have a higher number of national EU staff. Statistically their staff is better trained, skilled and prepared. Due to their higher scientific and administrative capabilities, they have better information on the negotiated items. They often have a dense national network and

19 Thorhallsson, Baldur, The Role of Smaller States in the European Union, London, 2000, p.239.

more contacts in the EU network. The accession of 12 smaller and medium-sized countries has probably reinforced the influence of large Member States, as issues that previously were settled in formal plenary sessions are increasingly resolved behind closed doors in informal trilateral negotiations between Presidency, Commission and the most “essential” es[20]. The capital of the large Member States is information and network.

The smaller Member States are skilful enough to utilize these advantages for their own interests. Experience shows that we don’t have to explain their opportunities to them. On the other hand, we have to remind the medium and large countries from time to time how useful smaller countries can be as allies.

2.4 The real worth of a blocking minority

It is our aim to achieve a qualified majority for our interests. If it is not possible to reach this majority we must strive to prevent a qualified majority against us. In other words, we must at least reach a blocking minority. If a blocking minority is thus achieved, the Commission proposal cannot be adopted. As a consequence we have gained time and we can approach the chairmanship, our partners and the Commission from a stronger negotiating position. 91 votes are all that is required for this. These are relatively easy to achieve as our arguments can only be directed at the deficiencies of the Commission proposal. We can expect that several delegations will not see the proposal as the best possible. At this stage, we need not persuade our negotiating partners to decide on another regulation with us.

Then, with a blocking minority we have reached an important intermediate objective but nothing else. For a blocking minority is always at risk. It is "volatile" and always breaks up in the end: The only open question is when it will break up and to whose benefit or detriment. It becomes worthless in the course of time. The vast majority of partners are working toward breaking up the blocking minority as soon as possible and at the lowest possible price. Among those partners are the two negotiators wielding particularly strong negotiating power: the Presidency and the Commission. To this end,

20 Tallberg, 2008, p.691.

the Presidency and the Commission can amend the proposal to the benefit or detriment of individual negotiators; they can also make concessions, distribute "gifts" and exert pressure.

Thus, we always have to reckon with majority proportions changing to our disadvantage. Positions of Member States vary in the course of time. We should not see them as immutable fixed points. It is amazing how some delegations will all of the sudden advocate nearly the contrary of what they had fiercely advocated in the last meeting. For this reason we must become active at an early stage. If there is any suspicion, we must approach the "risky" partner right away. Once he has "given in" to the majority it is too late.

2.5 Unanimous decision-making despite the option of a majority decision

"The Council shall act by a qualified majority except where the Treaties provide otherwise."[21] We realized this as a particularity of the EU decision making with considerable consequences for negotiators. In practice, EU decisions are mostly adopted unanimously even if majority decisions are legally possible. Most decisions, which can be adopted by a qualified majority, are adopted unanimously.[22] . For example, in national parliaments the slightest majority suffices to make decisions. If a majority has been reached in the EU negotiations, a vote can be taken as the negotiations have been successfully concluded. Yet in practice, they are mostly continued with the aim of reaching a broader majority, and if possible unanimity.

Asking for an explanation of this particularity you will normally hear an altruistic one: By adopting a decision unanimously we avoid the decision-making process involving sacrifices; nobody has been passed over and nobody has lost face. But this explanation is too altruistic to be realistic. In a national parliament, the majority never feels for the outvoted: It celebrates its triumph. The explanation for this particularity is again the self-interest of the negotiators: If a member state votes against a decision, its further

21 Art. 16 par. 3 TEU.
22 Westlake and Galloway, p.225.

response remains a risk. Often its negotiators on all levels up to the minister will publicly demonize the decision, the Presidency, the Commission and all the partners consenting to the final compromise. This member state gives its authorities a pretext to prevent or delay the implementation (as a result of the "well understood" national interest). Furthermore, it may be driven by the public opinion to an action in the European Court of Justice.

Those who agree to a decision in Brussels will defend it publicly. They cannot voice complaints later, even if they encounter problems at home due to this decision. A member state which has agreed despite all reservations will ensure that this decision is implemented in due time by its authorities. It will generally not be ready to jeopardize this decision later with an action in the European Court of Justice. The existence and effect of a legal act adopted by a majority is thus legally and politically less secure than that of a legal act adopted unanimously.[23]

Last but not least, after negotiating a politically difficult dossier and finally voting for a decision it is better to come home with a unanimous decision, than with a decision taken only by the majority. It is always easier to present a unanimous decision than a majority vote at home because in this case nobody can accuse me of having made a possibly contentious decision with my vote. In a legal sense, our votes did not count any more. Hence we ourselves were not the cause of potentially undesirable consequences (as opposed to a decision taken by qualified majority which was only possible thanks to our votes). On the contrary, we followed national interests by "selling" our votes. This is a valid argument in discussions with politicians and with business representatives who are dissatisfied with the decision. It is very useful if a negotiator is criticised by the opposition in a Committee of its national parliament or in a meeting of a lobbying association.

23 The implementation of the Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora (Habitats Directive) was a problem for more than a decade in member states having voted against it. At the end of the crucial Banana-dossier Denmark voted in favour despite strong reservations and did not bring an action in the Court; Germany voted against and brought an action due to internal pressure. Adopting the Hormone Directive the United Kingdom voted against and brought an action in the Court; Germany voted in favour even if it had taken a fundamentally different legal view up to that date and did not bring an action.

Hence all negotiators are anxious that all participants agree on an EU decision, if possible, even if this is not legally required. That is why the majority supporting the decision, as well as the Presidency and the Commission "reward" a hesitant member state getting on board at a late stage. This is an important characteristic of EU decision making and for the successful conduct of negotiations in the EU. This characteristic is often misjudged and as a result a lot of negotiating options remain unused. A good negotiator never definitively says "no". As long as he has not definitively said "no" and as long as his negotiating partners hope to get him on board they will listen to his arguments and take them into account if possible. They are prepared to pay to get him on board. Those who do not make use of this option do not realise their negotiating potential.

A negotiator who rejects a certain project is always faced with the question of whether in the final analysis it would've been better to eventually support it in order to influence negotiations in his direction. He has the choice. If he does not agree and sticks to his previous argument, this makes the domestic debate easier and keeps the option of taking legal action against the decision open. However, if he is prepared to eventually accept the decision he can make use of this willingness as part of the negotiated issues aiming to get some side payment. The question is always the same: which negotiating option do I have and which of these options is best for me or for my country?

For instance, negotiating to reduce the pollution of coal energy plants we are confronted with a proposal that envisages a maximum standard of 100. Since our government is more environmentally ambitious, one option for us is to demand a maximum standard of 60 and to stick to this position until the end, even if this demand is unrealistic since the majority rejects a maximum standard below 80. Due to our definitive opposing attitude we will probably drive home with a very bad result, perhaps with a standard above 80, as the chairman knows that he cannot get our votes for a realistic solution. Hence he must try to get the necessary votes from other delegations. Therefore, he will agree with these delegations on a solution which is to their benefit and our detriment.

There is a second option which is much better: To demand a reduction of the pollution as far as reasonably possible with a maximum standard of 60, but not reject other solutions from the outset. Then to constructively participate in the negotiations taking into account the interests of the opposing countries and helping them to get on board. At the end of the day to get a standard of 80, or 70 or even 60 and some side payment - thanks to this constructive participation and to the prospect of our eventual agreement is a much better alternative.

It is customary procedure in the EU that if a delegation makes it clear that it will not accept a decision under any circumstances, the Presidency, the Commission and the other Member States do not only negotiate without them but even against them. This is quite understandable because the qualified majority can only be achieved by making concessions to other member countries which are disadvantageous toward the refusing Member State. It's truly winner takes all. Therefore, it is an indicator of good negotiating skills that most EU decisions that could be taken by qualified majority are adopted unanimously. Generally, to reject definitively an agreement and to vote against a decision is a sign of having not fully used all of our negotiating opportunities.

Of course it is possible that the internal political situation does not allow an EU negotiator to agree to a decision which cannot be avoided due to majority proportions. Due to clear prior political positions and pressure from associations and the public, a government may believe that it has to reject the Commission's proposal even if it was going to be largely amended to its benefit. If for domestic policy reasons we ultimately cannot vote with the majority, it is still much better from the perspective of negotiating tactics to abstain than to vote against the decision. From a domestic policy view, this can often still be justified especially if we record our divergent arguments for public consumption during the proceedings of the negotiations. We can also obtain some "reward" for our abstention. For all negotiators our abstention is more desirable than an outright rejection. In contrast to a rejection, a decision on EU legislation is considered "unanimously" accepted if

one or more delegations abstain.[24] Thus, if we know that we will not be able to agree to a decision for internal policy reasons and would rather abstain, we should inform the Presidency and the Commission and individual delegations: They should be given the opportunity to "reward" our efforts to avoid rejection.

3. Role of the European Commission

3.1 Monopoly on proposals

EU legislative acts may only be adopted on the basis of a Commission proposal, except when the Treaties provide otherwise.[25] In principle, the European Parliament and the Council being the legislators of the EU can only take legislative decisions if the Commission has submitted a proposal. The Commission has a monopoly on proposals. Nobody except the Commission can initiate a legislative procedure in the EU. In fact, no Member State, nor the Council, nor the European Parliament, nor the European Council, can initiate legislation even if there is unanimity.[26] It is difficult to see any other comparable monopoly on initiatives, either in national legislative procedure, or at the international level. This monopoly is the corner stone of the "méthode communautaire" and is a crucial characteristic of the EU decision-making process. It is the first important element of the Commission's strong bargaining position. For it endows the Commission with the possibility to decide which interests will be taken into account when shaping its legislative proposal. This right of the Commission is far-reaching in terms of contents. It comprises the substantive content of the proposed rule, its legal form (e.g. regulation, directive, decision) and the legal basis.

24 See the "constructive effect" of abstentions in Art. 238 par. 4 TFEU: "abstentions ... shall not prevent the adoption ... of acts which require unanimity".

25 Art. 17 par. 2 TEU.

26 The Lisbon Treaty has reaffirmed this quasi-monopoly over the formal initiative, though the Commission has to share the right of political initiative with the European Council, Art. 15 TEU, the EP, Art. 225 TFEU, the Council, Art. 241 TFEU, and the civil society, Art. 11 par.4 TEU. National parliaments now collectively have a de facto power to veto European Commission legislative. This "yellow" and "orange" card procedure aims to ensure respect for the subsidiary principle. TFEU, Prot. 2.

3.2 Modifying and withdrawing proposals

The second element of the Commission's strong bargaining position is its privileged possibility to modify and to withdraw a proposal. As long as the Council has not acted, the Commission may alter its proposal at any time. Legally, the Council may also alter a Commission's proposal at any time. But in principle, the Council can only deviate from the Commission's proposal if it reaches unanimity on a different content, on the legal form and the legal basis (Art 293 par. 1 and 2 TFEU)[27], which is hardly possible in practice.

It is extremely rare that the Council adopts a rule derogating unanimously from the Commission's proposal. The preconditions for this are practically impossible to create as the Commission does not make its proposals in a vacuum. It places them in such a way as to benefit at least some Member States. As a rule these Member States are not prepared to support an amendment to the Commission proposal, which would be detrimental to them. The Commission can also always try to buy out Member States who intend on opposing its proposal.

Of course, the Commission can change its proposal in the course of the procedure of negotiations. But for a practitioner - a negotiator, a lobbyist - it would be utterly reckless to rely on this. Even if the responsible Commission official can be persuaded that the proposal must be amended, these amendments are usually very hard to achieve inside the Commission and can only be tabled with an uncertain result. This is due to the complex procedure inside the Commission. Indeed, this is the reason why national experts often come home from negotiations to their capitals accusing the Commission's officials as being inflexible, impolite, arrogant and even "autistic". We must not excuse impoliteness and arrogance, but as negotiators we have to understand how the Commission's representatives are and have to be as they are.

This shows clearly that we must start to negotiate as soon as possible before the negotiations are officially opened, i.e.in concrete terms even before

the Commission has submitted its proposal. As every Commission proposal exerts a decisive influence on the course and outcome of negotiations, it must be our aim that the proposal takes our interests into account. However, this is ignored again and again. If a Commission proposal protects our interests, this places us in a favorable position. It only requires our negotiating skill to prevent changes which are negative for us. This is because in all the following negotiations the Commission representatives will defend the proposal and thus indirectly our interests with their authority and their claim of representing the collective interest of the EU.

If in an individual case the majority conditions necessitate an amendment to the proposal that is not in our interests, we are still in a far better position than if the Commission proposal had not taken our interests into account. The amendments appear as a kind of sacrifice for our position. This sacrifice should be offset by favorable arrangements on other points. As a result, we do not have to pay the others for the amendments, but the others have to pay us. Again as soon as possible, we must voice our interests even before the proposal is drafted or, even better before the Commission officials seriously start working on it. In this phase they do not yet have a determined position, and they can be better influenced. It is our "first-mover advantage".[28] On the other hand, they cannot take our position into account if they do not know it. We have to act in time. We have to bring up our interests before the proposal is made. Once the Commission has tabled a proposal, it is too late to bring up our interests. We must therefore strive to bring up our interests before the proposal is made.

For this we need contacts in the Commission units. These contacts can be established in all possible ways: visits, phone calls, letters or sending material like position papers, formulation aids, expert opinions or statistics. The lowest level is often the most important (decentralised, numerous, near to the subject, easy to reach). Contact can also be established indirectly. It is effective, for instance, when a MEP or his assistant makes our interest

27 Or if it adopts the EP opinion in every detail in the Conciliation Procedure Art. 294 par. 13 TFEU.

28 For the analysis of complex EU legislative decision making with the view of the game theory see: De Groot, Tjeerd, Dertien is een boerendozijn. Decision Making in the EU-Agricultural Council on Reforms of the Common Agricultural Policy, Delft 1997.

heard in the Commission units. Associations representing our interests are also useful. The Permanent Representations can establish contacts for us and act on our behalf. At the political level we can exert influence on the Commissioners and their cabinets. Furthermore, we can invite Commission officials to our country, our organisation, or our company to show them our positions and promote our interests.

There are an unlimited number of possibilities to make our interests clear to the Commission. We can participate in the expert and working parties which advise the Commission when it prepares proposals. If we cannot participate in the work ourselves we should at least show interest and influence those who are working in the groups. There is always a possibility to do so. The preparatory work of the Commission is much more transparent than often supposed.[29] However, our work must always be done on time. It is a bad negotiating style if you do not respond on time and then lament a bad Commission proposal and make the Commission the scapegoat. In fact, such a stance could be disastrous.

3.3 Other elements strengthening the negotiating power of the Commission

There are many more particularities underlining the important negotiating power of the Commission: The Commission has the best possible access to all information at both the national and EU levels. It has the upper hand as an objective body, while the rest of the negotiators are often viewed as selfish. It has the role of custodian of the general interest of the Union, while the rest of the negotiators often defend national interests. It often slips into the role of defender of the interests of the smaller Member States, while the rest of the negotiators are seen as against the smaller Member States. The Treaty the Commission has the role as custodian of EU law and EU legislation (Art. 17 par.1 TEU, Art. 258 TFEU). The Commission therefore has the possibility to reward good negotiating behaviour. All of this underlines the important negotiating powers of the Commission. It underlines how important it is for us to negotiate on good terms with the Commission.

Even after the proposal is tabled we want to have the Commission as an ally, not as an enemy.

4. Role of the European Parliament

4.1 The other legislative body

Today the EP together with the Council plays a decisive role in EU legislation. Its influence has never been as strong as it is now with the Lisbon Treaty. The Lisbon Treaty continued to extend Parliaments formal powers in the legislative process. Today the “ordinary legislative procedure”, formerly the “co-decision procedure”, gives the EP and the Council equal responsibility for the adoption of legislation. This procedure applies to most policy areas of the EU since the Lisbon Treaty including Home and Justice Affairs, the Common Agricultural and Fisheries Policies, the Common Commercial Policy, intellectual property rights and measures necessary for the use of the euro as the single currency. Here the Parliament is now a true legislative body on an equal footing with the Council.

4.2 Ordinary Legislative Procedure

As legislator, the EP acts together with the Council on the basis of a proposal the Commission has submitted to them simultaneously. In a first and second reading the Parliament and the Council try to find a joint position. If Council and Parliament cannot agree on a piece of proposed legislation, it is put before the ”Conciliation Committee” composed of representatives of the Council and equal number of members representing the European Parliament. The Commission shall take part in the Conciliation Committee’s proceedings and shall take all necessary initiatives to reconcile the positions of the Parliament and the Council. Once this committee has reached an agreement on a joint text, this text is sent once again to the Parliament and the Council with a view to finally adopting it as law.

29 E. g. calls for expression of interest to participate in the preparatory bodies in the Official Journal

4.3 Our possibilities

Not all national delegates acting in Council or Commission bodies seem to know that the EP is a decisive negotiating partner. This is understandable insofar as the EP is not directly involved in their negotiations. The representatives of the EP don't work in the same meeting rooms. Most of the delegates don't see an opportunity to come in contact with members of the EP.

Even with only indirect contact, it would be very shortsighted for a negotiator to neglect the EP's far reaching influence on EU legislation. First of all, a negotiator must always be informed about the direction in which the EP probably will proceed. For this direction may strengthen or weaken his own bargaining position in his group or committee. It is easier to defend one's own interests when they jive with the arguments of the majority in the EP rather than against them.

Secondly the national delegate must know how to influence the decision making process in the EP and its composite bodies. The Presidency and the Commission are in contact with the EP at an early stage. To make the co-decision procedure work, they meet in "Trialogues". These meetings are not provided for in the treaties but have become more and more useful and routine in practice. They are effective because they take place at an early stage of the decision making process and usually only a few representatives participate. The early mutual exchange of information, the limitation of participants, the informal character and the common interest in compromising have reinforced cooperation particularly between Council and Parliament. So today most legislative acts passed in the co-decision procedure are adopted without a formal conciliation. Therefore, we must follow the early steps of this cooperation and try to influence it.

For a negotiator it is important to know that the major part of the detailed work of the EP is done within its 22 policy-specialized standing committees and two special committees. Their composition reflects that of the Parliament as a whole. Members do not sit in national groups as in the Council

and on the internet.

bodies, but in political groups. Here all legislative proposals are examined under a high level of autonomy. Only one committee is responsible for a proposal although other committees may contribute. Only its amendments to the proposal are considered in the plenary. A “rapporteur”, appointed by this committee, follows the proposal to the conclusion of the procedure. He contacts the “shadow rapporteurs”, appointed by the other political groups for this item. On the basis of the work and the report of the rapporteur, the responsible committee adopts its position that will normally prevail in the plenary. So the rapporteur and – to a less degree - the shadow rapporteurs are highly influential and the main targets of all those who want to influence the shape of a proposal.[30] We should make as early as possible profit of the negotiating possibilities this procedure offers.

5. Role of the Presidency

5.1 Fixing programs and procedures

Every six months another Member state assumes the Presidency in the Council bodies of the EU. The Presidency fixes the program of work for the Council and all its preparatory bodies during this six-month term and provides the chairpersons in all Council bodies. The respective chairperson of a Council working party draws up the program for his group and the agenda for each meeting, chairs the meeting, allows others to take the floor, decides if and when a vote is taken and can submit compromise proposals. This chairperson therefore has a lot of influence. For this reason it is important that the delegate knows the rights and duties of the chair. He must also know which options exist for exerting influence on the Presidency and the chair.[31] However, all of this is not a particularity of EU bodies. It is more or less the same in all organizations where you have a chairmanship or a presidency, like public authorities as well as football clubs.

30 Peterson, John; Shackleton, Michael (ed.), The Institutions of the European Union, Oxford 2006, p.112f.

31 All of this can be gathered from the Council's Rules of Procedure of 15.09.2006, OJ 2006 L 285/47. Key conclusions for the chairperson of the individual body are set out in the "Council Guide- Presidency Handbook". See Tallberg, 2006, p. 82 ff., Westlake and Galloway, p.325ff.

5.2 Antipode of the Commission

However, due to the peculiarities of decision-making in the EU, the influence of the chairman goes far beyond what a chairman might otherwise have in multilateral negotiations. This is not however laid out in the Council's Rules of Procedure. His especially strong position results as a reflex to the strong position of the Commission on the one hand and the fragmentation of the influence of the individual Member States on the other hand. A single Member State alone cannot prevent a Commission proposal, nor can it assert a different opinion alone. Even though several Member States, whose votes suffice for a blocking minority, can prevent a proposal, they cannot put through an arrangement deviating from the proposal.

A qualified majority of Member States can accept or reject the proposal of the Commission. However, as the composite Member States largely pursue different interests, it is extremely difficult for them to agree on an arrangement against a Commission proposal (phenomenon of "atomization" of member state influence in EU decision making). As a rule, it is difficult for the Commission to amend proposals (see above). From the Commission's negotiating table, it is also very doubtful whether it would be advisable to amend its proposal. This is because amendments which do not result in a qualified majority for its proposal are useless concessions from the Commission's perspective. Furthermore, they often provoke further demands and therefore they are- from the point of view of the Commission - counterproductive.

This is why the Presidency has such a particularly important role in the EU decision-making process. It is the sole instance where pooling Member State influence and can be effective toward the Commission. Thus in the EU decision-making process, the Presidency is the antipode of the Commission. While the Commission has to stick to its proposal the Presidency can be more flexible. Its role is to be an honest broker. In this sense it can be more objective and more independent than the Commission. It has a very constructive and useful role to play. In practice, difficult negotiations in the EU are mostly concluded on the basis of compromise proposals

made by the Presidency.[32] Thus we have to find and use all opportunities to make the Presidency our ally. We must keep the chairman and his staff precisely informed about our own interests and arguments. We have to help them to understand what we want and need for only this enables the Presidency to be "our" broker and to cover our interests by its compromise proposal. The meetings are short and so the possibilities to act there are limited. Therefore, we must keep in touch with the Presidency both before and after meetings.

Six months is a very short time, therefore we have to act accordingly. We have to make the Presidency our ally long before its presidency starts. Good personal relations must be built up for this in advance. This is best achieved before the beginning of the Presidency. Once his Presidency begins the new chairman has much less time for you than before. Since 2006, the one member state holding the presidency is linked to the other two holders of the presidency as a "trio presidency".[33] This facilitates the delegations continuously having the best possible relations to the presidency. It is never too early, but often too late. Again the old rule applies; it is easiest to win somebody as a friend or an ally when you don't urgently need him.

6. Diversity of national interests

6.1 Understanding the interests of our partners

Generally speaking, negotiating successfully means bringing different interests into line. In order to do so, one needs to understand the interests of the negotiating partners and make sure the partners understand one's own interests. If two people negotiate the sale of a used car their interests are quite clear: The seller would like to get a high price or at least does not want to sell his or her car below the price that he or she could get from another buyer. The buyer would like to buy the car at a cheap price or at least

32 The meeting of Commission working parties and committees are chaired by the Commission itself. Thus there is no "Presidency" as the antipode to the Commission. There is no honest broker making effective the member state influence versus the Commission. That is one reason why national delegates often feel lost in the Commission's bodies particularly.

33 Council's amended Rules of Procedure: "Every 18 months, the three Presidencies due to hold office shall prepare, in close cooperation with the Commission, and after appropriate consultations, a draft programme of Council activities for that period."

it should not be more expensive than a comparable car he or she could buy somewhere else. This is not as clear in EU negotiations. Here it is much more difficult to find out the interests of our partners and to assess them correctly. It is also much more difficult to make our partners understand our own interests. There are several reasons for this.

6.1.1 Broad spectrum of interests

One reason is that the spectrum of interests of 27 delegations participating in EU negotiations is often very broad. If there are different opinions in the EU bodies, the delegates usually present their opposing positions only. Rarely do we know which interests they really pursue with the positions they present. However, these interests are the decisive factor.

For instance, if the Commission has tabled a proposal for an EU rule for immigration from a crisis region, it does make a difference whether a delegation objects because it fears disadvantages for its domestic economy, a burden to its own labour market, a burden to the national budget or an alienation from the culture of its own country. Maybe the planned rule would cause a special problem in the constituency of the negotiating minister. Or perhaps a delegation's rejection of a proposal just results from a misunderstanding.

In its package for the Agenda 2000, the EU Commission proposed, inter alia, an expensive reform to the organisation of the wine market. The ministers of several northern Member States put up fierce resistance. Obviously, because of their climates, none of these countries represented any wine-growing interests. However, the motivation for their rejection differed sharply. Yet all of them represented typical interests of their countries. The Presidency had to recognise these interests and take them into account in its compromise proposals. In collaboration with the Commission, it found the following motives: One minister pursued financial interests, as not a single Euro out of the billions which were to be spent for the support and the reorientation of the wine market would have gone to his country. Another minister under the same climatic conditions, however, was not concerned at all about financial consequences. His concern was that the southern pro-

ducers of wine and brandy might gain a competitive advantage over the Irish producers of whiskey and beer, resulting in a drop in sales. One minister wanted to prevent any new expensive regulation of the wine market as he was in the middle of an election campaign and had agreed to spearhead a public campaign against the consumption of alcohol. One minister was not interested at all in the proposal. He put up resistance only because he needed negotiation power vis-à-vis the wine-growing Member States, the Presidency and the Commission to push through his own demands in other parts of the Agenda 2000.[34]

6.1.2 Restrictions in the meeting room

Another reason for the difficulty in understanding stems from the fact that only a small part of a partner's real interest emerges; much like the tip of an iceberg. It is necessary and, through active negotiating, also possible to find out, to realise and to understand the remaining part. We can only find out the real interests of the other negotiating partners if we approach them. During the official meeting in the conference room this is almost impossible. Here, every delegation keeps repeating its position. Astute questions in the circle of 27 Member States leads to a repetition of the old position – perhaps in other words but old nevertheless. Today, in the EU 27 however, you even don’t have the speaking time to ask your partners.

But in the margins of the meeting's official course, however, this is different. If we speak with our partners during a break of the meeting they will say more than in the formal meeting. They can hardly read out their speaking notes to us once again. Maybe they will explain their position once again, leading to new points of departure that help us understand their real interests. In particular, we can question what is really behind some of their arguments. We will be more successful outside the conference room. It is usually easy to find out the interests of your partner while having a cup of coffee at the coffee bar, or a common lunch in the canteen or pizzeria, or a glass of beer in the next pub.

34 For the extremely complex bargaining package of the Agenda 2000 as a whole see Westlake and Galloway, p.277ff.

What is important is that we as negotiators are able to recognize a problem. When we Europeans negotiate with people coming from totally different cultural backgrounds like the Japanese or Saudis for example, the problem is self-evident. However, in EU negotiations many people believe that they fully understand their partners and their partners' interests. This leads to open and hidden dissents and "unexplained" negotiation blockades. This is why we should keep assuming that each and every one of our negotiating partners is an "unknown person", even if we have known him or her for years. We have to keep trying to put ourselves in our partner's shoes and look behind the façade. It is always necessary to make additional efforts to recognize the real interests.

Sometimes it is helpful to think of the typical interests of the member state in question. In the negotiations about any EU measure that has an impact on the budget, a net contributor to the EU's budget, like Great Britain, the Netherlands, Denmark, Germany or Sweden, has other interests in mind than a member state which gets much more from the EU's budget. Member States that are geographically situated on the periphery of the EU are always interested in avoiding possible disadvantages resulting from their peripheral position or in getting compensated for it regardless of the effect on centrally situated Member States.

Often, however, this is not enough to clearly discern specific interests. Then, the Council Secretariat, the Commission's services and our Permanent Representation are important information sources. Particularly, the representative of the Council Secretariat is usually experienced in the dossier and has established good contacts with all delegations, and therefore knows their interests.

6.2 Explaining our own interests

As important as understanding the interests of our partners is, it is important to make our partners understand our own interests. This means much more than just repeating our own position all the time. We have to disclose our interests proactively. We must approach the other parties including the other delegations, the Commission, the Presidency and so on (in the mar-

gins of the meetings, in bilateral meetings with individual delegations, with representatives of the Commission, with representatives of the Council Secretariat or via the Permanent Representation) in order to achieve this. We must talk, call, write and travel. Our partners are interested in knowing what we think, want and need. Information is our capital.

Thus we must never try to negotiate with a poker face. How could our partners know what we think, want and what we need if we keep the visor of the helmet closed? Once again, we have to act at an early stage. In EU negotiations it is always better to disclose one's interests early on. Only then do we have the chance to have our interests taken into account. Usually it is too late if a majority emerges before we have presented and explained our interests. We have to assert our interests and not a position. For the Member State, interests are stable. The Member State position has to develop as negotiations develop.

7. Cultural diversity

The cultural diversity of the EU and the cultural differences between the Member States are often seen as a particularity that has to be taken into account strictly by EU negotiators. EU negotiators have made different allowances as the EU became bigger and bigger with each enlargement. Therefore, the fact that our ways of thinking and expressing ourselves differ from our partners' makes it harder to understand and correctly assess their various. We are not used to the way our partners behave. Some things seem strange to us. When we negotiate with people coming from totally different geographical and cultural backgrounds we know the problem. In EU negotiations many people believe that they fully understand their partners and their interests. As useful as the knowledge of these differences is and as interesting the vast literature on this item may be in general, in practice this item is much less important than often expected.

First of all, the country-specific characteristics of our EU partners are less strange for us than those of negotiation partners from totally different geographical and cultural backgrounds. However, in an EU 27 it is impossible to know the cultural characteristics of all our 26 partners and to take them

into account. Fortunately, it is not really necessary. In EU negotiations, the characteristics of each country have become decreasingly important and diluted, the more the EU has grown. They have been replaced by the negotiation particularities of the EU as a whole. To know these particularities and to draw the appropriate conclusions from them is the "cross-cultural competence" we need in negotiating EU law.[35]

8. Diversity of languages, EU language regime

8.1 Being aware of problems

Those who negotiate at an international level expect that linguistic problems might arise. Those who negotiate in a foreign language know that this is a risk as nobody can express himself in a foreign language as well, precise and rich in subtleties as in a native language. We do encounter these problems in the EU bodies too, but they are not characteristics of EU negotiations. Here we have other linguistic problems. In an important part of the EU bodies, every delegate speaks in his own native language, and relevant texts must generally be available in all 23 EU official and working languages. A great number of excellent interpreters and translators see to that. This is because under Art. 1 of Regulation No. 1 determining the languages to be used by the EU, the languages of all Member States are equal official languages and working languages of the EC bodies.[36]

Thus it is not the diversity of languages which characterizes EU negotiations, but rather the language coverage in its bodies which distinguishes EU negotiations from other international negotiations. As convenient as this full-language coverage might be, it harbors risks we must realize and take into account. Otherwise these risks will turn into serious problems. First of all we have to accept that due to the full language coverage, many good

35 On the other hand it is the country-specific interest of each member state which remains of particular importance in EU negotiations; see above chapter 2.2.

36 Art. 342 TFEU; Regulation (EEC) No. 1, 15.04.1958, OJ 1958, p. 385, last amended by Regulation (EC) No. 920/2005, OJ 2005 L 156, p.1; Art. 14 of the Council's Rules of Procedure of 15 September 2006, OJ 2006 L 285/47. Given the nearly doubled number of official EU languages as a result of the enlargement, since 2004 the "request-and-pay" system has been introduced in a part of the Council preparatory bodies. Under this system member states may choose whether or

pieces of advice from books on rhetoric are of no use in the EU negotiations. Our negotiating partners do not hear us directly, but only their interpreters. Our sophisticated body language is ineffective because it does not match the interpretation. And our rhetorically excellent statements are not correctly received by the addressee because they were expressed by ourselves in a way which makes it impossible for the interpreters to fully understand them. Many a delegate speaking in his native language in the EU conference room apparently assumes he is speaking directly and in his own language with the delegates of the other Member States. In fact, at first he is speaking with an interpreter he does not see. At best this interpreter will speak with another delegate in his native language. Frequently, this interpreter is first speaking with another interpreter who interprets the already interpreted contribution to the negotiation again and passes it on to the actual addressee ("relay interpreting"). Obviously, this interpretation by "Chinese Whispers"[37] increases the risk of message distortions, omissions and mistakes. The participants in this "communication" never directly speak with each other and often cannot even see each other in the conference room. Naturally the delegates focus exclusively on the texts in their native language. However, these texts have been – directly or via other languages – translated from the language of the original text by an interpreter, who might be highly proficient linguistically, but who may not understand the matter at hand. Since he or she does not know the previous course of negotiations, he or she would find it hard to understand and translate the subtleties of the text and the negotiations.

Furthermore, the full-language coverage increases the usual risk of misunderstandings in negotiations. In practice, "inexplicable" disagreements and blockades in the negotiations occur again and again. They are so dangerous because we do not expect these risks here due to the convenience of the full-language coverage. The full-language coverage leads to misunderstandings at all levels. Even at the level of the Heads of State and Government surprising problems arise even though the best professional

not they wish to have interpretation services provided in their own language in a particular preparatory body.

37 "Stille Post", "Telephone", "Le telephone arab".

negotiators had prepared for the meeting for months. What is true for interpretations holds true for translation too. The Council witnessed bitter discussions because the word "no" figured in the English version, in which the compromise proposal of the chairmanship was formulated. It was missing in the version passed on to the translators, and it was therefore also missing in the translated texts with which the delegations worked. It can take hours of negotiations before this kind of error is noticed.

8.2 Avoiding problems

Due to the opportunities for misunderstandings, we have to be aware of problems. On the one hand, we have to make our own contributions translatable. We must use simple language, short sentences, verb first format, slow speech with pauses and repetition of key statements. We have to establish contacts with interpreters and translators send them technical texts in advance and be available for questions relating to understanding. The Commission's Directorate General for Interpretation gives the following "Tips for speakers with interpreters". Speak your mother tongue, if possible. Speak naturally, at a reasonable pace. Speaking freely or on the basis of notes is better than reading. If you read out prepared texts or statements, please ask the Secretariat to ensure that copies are distributed beforehand to all the interpreters' booths. Quote document references. Make figures, names and acronyms clear. Explain rare acronyms. Talk to your interpreters and give them feedback.[38]

The last point may cause you to bring yours or your minister's speaking notes to the interpreters. We will always profit from doing that. It is true what the General Directorate "Interpretation" promises: information and copies given to EU interpreters are always treated with the utmost confidentiality and checked against delivery. On the other hand, we have to check important texts in other languages especially if "inexplicable" differences arise. We should always expect that misunderstandings could arise in the interpretation and translation. We have to listen to the interpretation of our contributions into the other languages. We should do it for our col-

38 eu.europa>dg interpretation>working with interpreters>tips for speakers; download 15.01.2011.

leagues, boss and minister. You should ask your colleagues to do so as well if you give a contribution. Since this is an item that seems so simple or even trivial for some negotiators, we have to point out these aspects as a reminder.

9. Sustainability of negotiating relations

9.1 Brussels network

If you buy a used car via a newspaper ad you have a single and short negotiating relationship with the buyer. Once the sales contract has been concluded and settled, there is usually no continued communication between the negotiating parties. Negotiating relations in the EU tend to be permanent and sustainable. If we negotiate today in a committee about regulation of environmental standards for coal energy plants, we could be negotiating about perhaps climate change or animal welfare next week. Presumably, we will be negotiating for several years in a row in our working party or our committee or in the Coreper. The same delegates negotiate together in most EU bodies for several years. This is particularly evident in the Coreper where national delegates often stay for five to ten or for some, even 20 years. Even when leaving his group or committee, the delegate will normally continue to work on EU items and thus stay in the “Brussels old boys’ network.

9.2 Credibility is my capital

If the seller of a used car has concealed a defect to the buyer, the sale may have a judicial consequence. But if buyer and seller do not know each other personally, there will be no further effects on the relations between the parties. If a partner is dishonest in EU negotiations, this will have consequences for all future negotiations. The trust between the negotiating partners is permanently destroyed. However the partners cannot avoid each other as they have to keep on negotiating together due to their tasks. So we must always be aware of the fact that our conduct in today's bargaining will influence the conduct of our partners in all future negotiations. It must therefore be our aim to improve the relations with our partners in every

bargaining situation and in every meeting, if possible. If this not possible, our conduct must on no account worsen this relationship. If we have to argue very firmly against another delegation, we should reflect on how we can still maintain our personal relationships and a basis of trust for the future. We should always counter in a targeted way. This is best done on the fringes of a meeting. For example, we can inform our colleague delegate why we must take up position against him (due to national interests, political commitments or instructions). Aiming not to worsen the relations to our partner, we should inform him if we have to leave a coalition with him during an EU negotiation. Since the sudden U-turn of an ally may be painful for him. In EU negotiating, the ongoing relationship with our partners may be more important than the outcome of any particular negotiation or enforcement of a position in an individual case.[39]

The following should also be noted in this context. Once a delegation casts a vote in support of a decision, it must stick to it. Occasionally as a negotiator you are tempted to withdraw your approval of a political agreement after having experienced trouble at home because of the approval and to prevent the still outstanding formal adoption. If you do this you will violate a taboo and lose your credibility in the long run. So if you are not sure that you are able to uphold your approval you should give the Presidency sufficient notice of your reservation. Or you may give your approval "ad referendum" which indicates that your approval is still pending and will become definite once it is confirmed by your superiors or the responsible body. As the negotiating relations in the EU are marked by sustainability, mean tricks never pay off. They backfire on those using them. We must not risk burning our bridges. Since mutual trust can be strained or damaged for the future, one should renounce the use of tricks, threats and everything which might hurt other participants in the negotiation. This often includes avoiding a brisk bargaining style and even irony. On the other hand, due to the sustainability of relations, there is much less reason in EU negotiations than elsewhere to give in when somebody uses tricks or works with threats or undue pressure. It is sufficient to reveal this conduct, preferably in a

39 Fisher and Ury, p.20.

form hurting the partner as little as possible, and hold the common interest against it.

10. Sustainable coalitions among Member States

He who negotiates multilaterally needs allies. It is a great advantage if you have allies you can count on. Therefore, from the very beginning of the EU, Member States were seeking like-minded countries to possibly form permanent coalitions with. This applies to Belgium, the Netherlands and Luxembourg, using the Benelux Union as the first of these permanent coalitions. The EU countries bordering the Mediterranean are seen as a coalition if EU law with particular reference to the Mediterranean is concerned. The Nordic Member States regularly coordinate common positions and meet before council meetings. The Member States joining the EU with the last enlargement were supposed to form a sustainable coalition. From time to time, new "permanent" coalitions are emerging in different policy fields with promising names.[40] The existence of such coalitions is often seen as a characteristic of EU decision making.

10.1 Benefits, limits and risks

Permanent or more or less regular negotiating coalitions are useful in the early stages of negotiations. They enable an early, uncomplicated exchange of ideas among like-minded people about a legislative project of mutual interest. They help us to understand the interests of other delegations early and to build up confidence. These coalitions also facilitate the formation of blocking minorities by countries with parallel interests. This is useful in terms of negotiating tactics.

But we should also see the limits and risks of these coalitions. Most of them are less permanent and less effective than the participants might expect.[41] Usually, they only continue as long as they have not entered a decisive stage in negotiations and before each delegation has determined its own interests. Afterward, they can easily break apart. At the end of bar-

40 E.g. "Gang of Four", "Group of Five", "Capri Group", "Club Med".
41 Hayes-Renshaw in Peterson and Shackleton, p.73.

gaining when you have to decide whether you will ultimately agree to a final compromise, only your own interests will matter.

He who only talks with like-minded people obtains a unilateral and biased view. He overestimates his own position and potential agreement with his interests. Those who bring about a blocking minority with these negotiating coalitions must understand that this is only a partial victory. It usually is not enough to prevent a Commission proposal or a proposal made by the Presidency. In the end, a qualified majority must be gained for a proper solution. There is another risk with coalitions, a group of Member States holding together their blocking minority to prevent an important regulation can easily build up a reputation for blackmail politics. A negotiating coalition among neighboring countries is also fragile if one is big and the other small or if historical experience prompts one neighbor to demonstrate its independence. The relations between Great Britain and Ireland, Germany and Austria, Sweden and Finland and Spain and Portugal illustrate this concept. Earlier expectations that permanent negotiating coalitions might emerge between these neighboring countries have turned out misplaced.

10.2 The Franco-German relationship

A special example for a sustainable coalition may be the Franco-German partnership. There has been an institutionalized Franco-German cooperation since the 1963 Elysée Treaty. According to this agreement, both countries should through intensive consultations, reach an aligned position regarding European issues. This is done through frequent Franco-German contacts at all levels. These contacts range from the technical level to that of the Heads of State. Apart from the cooperation among the Benelux countries, this formalized bilateral cooperation is unparalleled in the EU. Incidentally, the Franco-German tandem has lost in importance in terms of voting. In the EC of six states, Germany and France formed a blocking minority. Nothing could be done in defiance of these two Member States. Today, Germany and France have only 58 votes at their disposal which is well short of the 91 votes needed for a blocking minority. Among the other permanent coalitions in the EU, the Franco-German coalition stands out because at all levels there appear to be few identical interests. Most of the

time, both partners seem to promote opposing interests.[42] Therefore, there are occasional crises between the partners which are covered extensively in the media which often declares the relationship dead.

Yet this special relationship still plays a role in EU negotiations.[43] Contrary to some other negotiating coalitions, the coordination between France and Germany starts out with widely divergent interests on concrete issues. In other words, Germany and France often represent complementary interests. When Germany and France want to reach an agreement, they must regularly reconcile the conflict of interests existing among all Member States. When France and Germany have agreed on a compromise despite widely varied interests at the beginning, as long as they can live with the solution, it is often seen as acceptable and advantageous to other Member States.[44] This may be the reason why this special relationship has endured since the beginning of European integration and is often seen as positive by the other Member States regardless of public reservations and harsh criticism.[45] We should make sure to take this relationship into account in our negotiations.

III. Conclusion

We have identified some characteristics of the EU decision making process and drawn conclusions for our negotiating approach. In principle, these characteristics are the same wherever EU decision making and negotiations take place including the working party and the senior preparatory bodies, the Council and the European Council. Negotiating EU law is a complex and often long process in which numerous players are involved. Only a small part of it is done in the conference room and during formal meetings. To be successful, we need an intelligent and realistic strategy which is de-

42 E.g. recently the open dispute at the highest level on the financial crisis of some EU countries till Merkel-Sarkozy's beach promenade in Deauville October 2010.

43 On the other hand the intended trilateral coalition France-Germany-Poland (Weimar triangle) has gained only low practical relevance. See Hilz and Robert, p.3ff.

44 For bringing forward difficult negotiations by bringing together the extremes see Westlake and Galloway, p.227.

45 E.g. the Luxembourg Foreign Minister Jean Asselborn after a Merkel-Sarkozy pre-agreement in Deauville warning France and Germany against the "claim to power showing a certain hubris and arrogance", in Frankfurter Allgemeine Zeitung, 16.12.2010, p.10: "Scharfe Töne".

veloped as early as possible and developed according to the progress. EU negotiations are not a matter of rhetorical skills; rather they are a management task.

It is always satisfying to get one's own interests through by negotiating successfully. It is particularly satisfying when negotiating EU law. Here the negotiators most of whom are civil servants who don't have senior positions have a privileged task and position. They are directly participating in the negotiations over EU legislation which will become directly applicable for nearly 500 million citizens. This is about much more than pushing through one's own interests. The skills of all negotiators form the fundamental basis for a functioning and stable EU. By skillfully and successfully negotiating EU law, we can contribute to this and to the construction of the "new legal edifice …, a construction which will be in harmony with the requirements of these new times". [46]

46 Grossi, Paolo, A History of European Law. Making of Europe, Chichester 2010, p.162.

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