The Negotiating Process
João de Vallera

I – Introduction and background

To consider the negotiating process comprehensively and in depth is a vast and difficult task, basically because everything related to the European Union that happens in Brussels and, to a large extent, in governmental and administrative channels in the capitals, can be ascribed to that process. Alternatively, the topic could be restricted to an analysis of working methods and procedures, but I do not believe that I should choose in this context such a specialised approach, nor was I asked to do so. Therefore, a somewhat arbitrary and necessarily subjective delimitation is required, drawing from experience and memory what would appear to be more interesting to emphasise within the topic. I do not claim to offer any particular analysis, but rather to suggest lines for further reflection and to assist in some way those who wish to draw a more complete balance on Portugal's participation in the intricate network of practices and play of forces that occur – and are put to the proof – daily within the Community system. I shall address briefly some issues regarding the way national positions are adopted in Lisbon and the organisation and defence of Portuguese interests in Brussels, as well as the necessary coordination between the front line and the rear guard, trying to draw some conclusions. I shall also ponder the meaning of the vote within the Council, with the practice of qualified majority voting now firmly established in the community order. I will further attempt to summarise and give some consistency to what might seem, at first sight, like a mixture of scattered measures, considering the driving forces which I believe have, across the board, guided our action on the various levels of the different compositions of the Council.

2. However, before developing these topics, I would first like to make a number of general remarks that could be useful in better locating Portugal's approach within a decision-making structure where the main streams of its foreign policy quickly converged, and which became a predominant catalyst and conditioning factor of its economic development. I will also make some comments of institutional nature related to the Community's decision-making process and its development.

2.1. Contrary to what many predicted prior to signing the act of accession, Portugal's integration in the European Community, including the stage of initial shock, was not accompanied by disaster, nor did it lead to a break down when it came to adapting the country's economic and social structures, or when public administration was called to face new demands and challenges. The generally acknowledged success of the first Portuguese presidency in 1992 was an expression of maturity, preparation and the good performance of the different agents involved in the process of European integration. I underscore this aspect for several reasons. Firstly because, when motivated and put to the test, we are usually better than we care to admit; the need to take risks and exposure to foreign stimuli have paid off in Portugal, to the detriment of more defensive and fatalistic attitudes. Secondly because, when assessing the negotiating process in Brussels, memory tends to be short and oblique: one might say that the habit of success – enhanced by the tendency, rooted in Community choreography, of centring the analysis of the decision-making process excessively on the cult of triumph – made us, at the same time, more detachedly suspicious and *blasés*, removed from the context and above all preying on failure. Thirdly, because the focus of evaluation often tends to fail for being too immediate and circumstantial: the first one-off inconvenience shadows the good progress of the whole, as well as, inversely, a laudable performance in a particular sector up-stages global development that could tend to be hazardous. In such an exercise it is fundamental, without obviously overlooking management, not to lose sight of long term objectives and to view the inevitable enthusiasm and setbacks accompanying the intense Community daily routine against a wider reaching background.

2.2. Overall, accession was undeniably positive. Its beneficial effects were visible in the recovery of the gap in economic development, the change in attitudes and signs of social well-being, in the gradual restructuring of productivity with sacrifices controlled and limited in terms of employment, in the adaptation of the financial system and the development of infrastructure. The dynamic effect of the response to the challenge was greater than the effect of the disturbances caused in the more vulnerable sectors. Among these, agriculture, not surprisingly, proved to be a particularly difficult area. Even today the gap between a common agricultural policy geared to the countries of the North and the structural weaknesses affecting Portuguese agriculture, which are more striking than those to be found in the other southern European partners, has not been sufficiently narrowed. Despite emotional clashes and contradicting interests that occurred, for example, in deep sea fisheries and the canning industry, clear advantages have still been

obtained for Portuguese fisheries with the revision of the regime that was in force with Spain, with incentives given to market organisations and structural aid received. Besides, one can legitimately ask whether these difficulties would not have been even greater if accession had not occurred. Equally obvious is the fact that many of the benefits acquired lie in the considerable increase in the transfer of structural support to the less developed regions after Portugal and Spain joined. The cohesion policy, with all its merits, has to be viewed within the context of the relative distribution of wealth within the Community space, which has necessarily an evolutive nature, and of the priorities ensuing from the play of forces that condition each Community negotiation. It is difficult to imagine that Portugal will continue to benefit indefinitely from the amount of support received. The less positive phase that will follow must be overcome, as well as certain bad habits created at home in the meantime, such as the incorrect understanding that integration is above all worth while for the financial transfers received.

2.3. Far from concealing or clashing with other fundamental objectives of Portuguese foreign policy, a critical issue that, understandably, was also of concern to many, the European Union became not only a constant framework of reference, but it also complemented, extended and contributed towards feeding specific interests of Portugal as an entity in the system of international relations and at the centre of a dense network of historical links built up over the past. Without going into detail, I would argue that this was the case, both in the management and development of traditional areas where Portugal was active abroad (Spain, Brazil, to mention those where the level and nature of relations were most impressively intensified, the USA, NATO), as well as in the building of new or renewed areas of intervention (the African Portuguese-speaking countries, the Community of the Portuguese-Speaking Countries, Lomé, Africa, Morocco and the Mediterranean, Macao and Timor) or in the defence and expansion of elements intrinsic to a Portuguese identity (culture, language, diaspora).

2.4. One of the original features of the European Community – rarely mentioned among its distinguishing traits, perhaps because it is so obvious – is that it is not a static, completed, self-contained body, not only in terms of its composition, but also regarding the universe of horizontal and vertical areas of competence it comprises, and the actual rules that govern it. The changing nature of the Community has been a constant feature, intensified over the fourteen years following the enlargement that brought in Portugal and Spain. Revisions of the Treaty with the Single European Act, Maastricht and Amsterdam, past and future enlargements, expansion of areas of responsibility, introduction of new concepts and objectives, readjustment of policies and priorities, confrontation between levels of ambition, aims and means, changes to working rules and to the institutional balance, succeeded one another at a stage in which the notion of “permanent negotiation”, perhaps as never before, was intrinsically linked to the Community system. The Community that Portugal joined, even retaining essential characteristics of its core, was substantially different from the Union of which it is a part today, and certainly different from the one that will continue to be built over coming years. Nor can it even be said, as some were tempted to say at the time of concluding the second "Delors package" (once some doubts were cleared up regarding the concept of subsidiarity and the creation of new pillars), that its trajectory was linear and the meaning of integration almost pre-determined, so that the next steps to be completed were simply a question of time and political opportunity. The truth is that Amsterdam – and I am aware that here I am venturing into controversial matters – even if in some areas it continued the more orthodox integration approaches inaugurated or promised in the Treaty of the European Union, in others it accentuated specific original features or followed a number of different routes, some in fact leading away from what were the original intentions of their founders or the principles of the ever attentive guardians of the purity of the Treaty. Also in Amsterdam – besides hubs of tension within the field of inter-state power-sharing, held in limbo in previous reforms but which grew on the wake of the traditional debate on the distribution of responsibilities among institutions – there were increasing signs of a widening gap between ambitions announced and the means supplied to achieve them. Agenda 2000 was to a great extent the natural consequence of this approach, and the atmosphere surrounding its negotiation, as well as the perspectives that it opened up with its outcome, are substantially different from those characteristic of the Delors epoch. Despite the launching of the Euro and the new adventures announced in the fields of foreign policy and common security and defence, new areas of doubt arise. Additional work is again required to meet common goals beyond day-to-day management, to regain the interest and support of citizens, to give a renewed prestige to the institutions and to deal with what is being announced as a serious identity and growth crisis (although the history of the Community has been a whole succession of these same crises, all creative up to now). More than ever before, in such circumstances, a clear idea of national interest is required, but understood as an interest which is part of a mobile and ever changing Community, to whose moods one must be vigilant and whose course, for the benefit of all, one should attempt to influence and chart.

2.5. The Community structure, as we know it and as it has evolved to date, is based on a complex balance among institutions and among States which, despite not granting arithmetic parity to representation in all institutions, is based on the principle of equality, and provides guarantees and means to all, even the smallest, to shape policies and constitutional rules, in short, to influence the course of events and defend their interests. Even being aware of the reality principle which shows that the degree of influence does not depend only on the number of members of parliament nor on the votes within the Council – a principle which in fact often works both ways – and that the larger States benefit in any circumstance from other kinds of advantages, the fact is that, in this respect, the system has worked satisfactorily and to it much of the success and attraction of the Community model is due. It is a well known fact that the quality and efficiency of a presidency is not related to the size of the State holding it – more administrative flexibility and less permeability to internal constraints encourage the work of smaller members and facilitate their effort to reach compromise – and as the statistics of voting within the Council have shown both the great and the small are occasionally outvoted when decisions are taken on a qualified majority. Whoever wishes to change this state of affairs should remember that in the Community there are no permanent alliances, apart from a certain regularity of convergence, of varying geometry, that tend to be repeated in some recurrent themes or sectors of Community activity, and that it is common in the same meeting to oppose a partner with whom on the next item you find to be on the same side; that the "small countries", as a body of interests likely to unite against the "big countries", is an abstraction that was never manifest in the process of Community decision-making (while there are cases in which the opposite has occurred); and that it is fundamental to respect the principles of balance between States regardless of their size, as well as safeguarding legitimate interests that might be peripheral compared to the Community average, not only for reasons of principle or for the theoretical defence of the principle of equality, but quite simply because the Union would not survive the break down of this kind of social contract which is a keystone in the whole system.

2.6. The practice of unanimity, difficult to overcome in matters of a constitutional nature or with a particularly sensitive dimension, has often been the cause of obstacles to legislative activity and, in principle, an invitation to a certain degree of rigidity in negotiations. It can also be seen as a false advantage when one has to face the costs of preventing single-handedly the approval of an act supported by the remaining partners. Qualified majority involves risks, but is undoubtedly necessary for the system to function properly and, therefore, for pursuing the common interest. Only Q.M.V. allows the Commission to fully exert the prerogatives granted by article 250.1, a keystone of the so-called Community method that has survived, even if sometimes under attack, the different revisions made to the Treaty. The threat to face a vote in the final step of negotiation forces Member States to negotiate well from the start and separate the essential from accessory aspects; this is why it is usually said, paradoxically, that a qualified majority is, more often than not, the most effective and swift way of achieving consensus. However, for its force of attraction to continue and for its nature not to be wrested, negotiating practices in force – including the detailed and thorough analysis of the proposals and the serious attempt to overcome the problems raised by Member States at the three levels on which the Council operates – should not disappear on the wake of any simplification of working methods. It is nonetheless difficult, within the package of subjects scheduled for the next Intergovernmental Conference, that Q.M.V. be assessed according to its own merits, as it will be inevitably linked to the other basic terms of the negotiation: the Commission’s composition and the weighting of votes within the Council. The latter is tremendously sensitive; as for the former, when returning one day to the possibility of some Member State having no Commissioner, there will be countries that will always refuse it. This is not because a Commissioner represents his or her country of origin, but because it is difficult to imagine that a body with the powers of the Commission can exercise with propriety its right of initiative without access to a comprehensive and direct knowledge of the realities of its Member States. On the other hand, the Commission might lose credibility, authority and legitimacy in a Member State, or at least with its economic agents and citizens as a whole, if it were not to include a member of the nationality of that Member State.

2.7. It may seem a minor issue, but it is a mistake to imagine that procedural rules and practices are a secondary aspect that can be casuistically laid aside in the name of simplification and efficiency. In an ever more complex Community, and with increasingly more bodies involved in the decision-making process, institutional and procedural heterodoxy or abuse, in Community routine, serve only those with most capacity for exerting influence outside the system and the basic principles of true transparency.

2.8. Not so directly linked to the negotiating procedures, but with regard to enlargement and changing structures, I would like to make one last general remark: certainly any enlargement brings with it the seeds of dissolution, the more so in affecting the degree of homogeneity previously achieved and threatening, in

the mathematics of voting and management of time, the decision-making procedure. It is nevertheless false to conclude from this premise that an enlargement process is necessarily followed by dilution. The response of the system to the threat of greater difference, if the right conditions are made available, could, on the contrary, encourage quality progress in the integration project. This was indeed what happened after Portugal and Spain joined. The effects of dissolution may be accentuated not only through enlargement and the admission of new members, but by the attitude of the States that are already part of the Community. In future enlargements it will be particularly interesting to see the outcome of the dialectical opposition between centrifugal and centripetal forces, how far and in which areas it will lead either to new stages of integration, or to dilution or differentiation, the third way opened up by the Amsterdam Treaty with flexibility and reinforced cooperation. The terms in which the negotiations for Agenda 2000 were conducted – overdetermined by the prevailing will of some Member States to constrain spending – may provide an initial understanding of how trends will be tabled.

II – The formation of the national position

3. In the capitals

3.1. It is commonly said that joining the European Union demands radical changes in the way in which the foreign policy of a country is conceived and organised. Difficulties do arise, even for the specialists and even for those countries that have been involved in the integration process for longer. Problems occur when setting up a structure to give constant, effective and smooth backing to conducting a policy which is to be consistent and to accommodate the interests of the different sectors involved in the Community, while ensuring control over the significant areas of sovereignty that have been transferred to the European sphere. The correct response to this problem is as necessary as it is complex, particularly when fully bearing in mind the implications of the growing enlargement of the jurisdiction of the Union within its three pillars, together with the deepening of the decision-making process, due to the increasing number of instruments to be approved by qualified majority and to the introduction of a new process, in itself evolving, as proved in Amsterdam, of co-decision with the European Parliament. A preliminary conclusion drawn from experience is that there is no ideal system for coordinating Community affairs, and that even in the better organised countries where there is a solid tradition of centralised management of foreign policy, decision taking involves a cumbersome process that occasionally misfires. After trying out a good number of possible models, Portugal decided after the final negotiations for accession, to use the system that from its general outline prevails in most Member States of a similar size, and which is different from the systems in force in countries such as France, the United Kingdom and Germany. The coordination structure is based on the Ministry of Foreign Affairs, where an Inter-Ministerial Committee meets weekly, under the presidency of the Minister (who usually delegates the task to the Junior Minister for European Affairs or to the Director General for Community Affairs) in which all the Ministries that have responsibilities in community affairs are represented at Director General level, as well as the Autonomous Regions and the Office of the Prime Minister. Shortly after, two additional, inter-ministerial structures were created up-stream, one at the top (Council of Ministers for European Affairs), to define strategic guidelines and to arbitrate in inter-departmental conflicts of interest which were left unresolved at inferior level, and another intermediary, at Junior Minister level, to ensure the tasks of political coordination of more common aspects of management, and of control of the implementation and enforcement of EU law and of the occasional community legal disputes with the Commission or the European Court of Justice. Preparing major dossiers, such as Treaty revisions, enlargement or the negotiation of the financial perspectives, was sometimes entrusted to ad hoc coordinating structures, under the control of the above-mentioned Inter-ministerial Committee. As mentioned above, the system is not perfect and it could certainly be improved in many of the ways it works. However, it is also true that with an appropriate dash of pragmatism, flexibility and a great deal of personal dedication – and despite some dispensable overstrained heterodoxies – it has fulfilled its role, so much so that, following the different solutions experimented before accession, it has remained unaltered for fifteen years.

3.2. The problem of defining the national position can be summed up simply into three areas:

- the sounding out of opinions from the different economic and social interests and the more general question of information and communication with citizens;
- democratic control;
- defining the content, timing, level and placement of coordination.

The first area, more traditional in outline when dealing, for example, with organising contacts with professional associations or with university circuits, has varied in scale and became particularly important

when European public opinion – following a trend opposite to the development of the European Community itself, that changed direction from prevailing economic concerns to political and social aims, moving towards citizenship –began gradually to lose interest in the phenomenon of integration. The second area, that has been felt in relations between national Governments and Parliaments, although with varied intensity within each Member State, gave rise within the Community to a vast output of literature. It also resulted in some misunderstandings, fed inter-institutional debate and, under the concept of "democratic deficit", it ensured in recent revisions of the Treaty a central role and the transfer of significant powers to the European Parliament.

The third area leads to the crux of the Community decision-making process. The immediate question is to determine which matters are to coordinate, and to what extent, out of the tremendous number of affairs that are decided in Brussels. If, on the one hand, the Community experience became part of a context in which there was more – and often excessive – penetration and gradual autonomy seized by sectoral departments in areas where in the past the Ministry of Foreign Affairs had almost exclusive control, on the other hand, it is also true that the internationalisation of economic relations, and above all the degree of integration achieved by the Community, led to a situation where a substantial part of the policies for which these departments were responsible started to be decided in Brussels. The tendency is, therefore, not to distinguish them from other instruments of internal policy. Inversely, and even in those decisions that do not require a close coordination of the views of different departments, global consistency for action must be ensured, institutional compatibilities verified, possible co-relations fine tuned, the building of a centralised memory made possible, a *vue d'ensemble* guaranteed... Therefore, depending on the sectors, timing and people involved, the central unit can coordinate more, less, or even sometimes just what is required. This is *par excellence* a vast grey area in which the outlines and definition of rules of the game are far from being stable.

The timing, level and seat in which a position must be adopted, with or without prior coordination, is crucial in the negotiating process given that, in a system with three vertical stages such as that of the Council, in which an increasing number of decisions are taken by qualified majority, it is essential to intervene right from the start of the process, at working group, and to adjust and filter positions in the later stages of Coreper and Council, according to the pace and exigencies of the negotiations. Here, as with survival within the grey area, the Permanent Representations are called upon to play a constant and often decisive part, as we will see later on. The problem of coordination also arises in the stage prior to the legislative process when, not wishing to be restricted only to reacting to proposals made by the Commission, the genesis of which is often unknown, the Member States try to influence not only their development but, ultimately, to create their own *raison d'être*. This entails a wide and complex universe of coordination with private interests, with national experts contracted and consulted by the Commission at the pre-legislative stage, as well as the need to establish inter-institutional bridges. From a different point of view, the same need for consistency and cooperation among the different departments within the same country is felt at execution level (for example, in transposing directives or in defining and implementing Community support frameworks as part of structural policy) and whenever a Community dispute arises.

4. In Brussels

4.1. Defending the interests of a Member State can, thus, be viewed from a broader perspective than that of its involvement in the actual decision-making process of the Community, expressed through the participation of its representatives in the different bodies where decision taking is prepared within the Council – and also, increasingly, in co-decision procedures with the European Parliament – until the final approval of the instrument to be adopted. It makes sense to extend the view as far as the pre-legislative stage, when the Commission gathers information, consults national experts and germinates the proposals it intends to present to Council, prior to deliberating on them; and to further extend it to the post-legislative period, in which the execution of policies and management of disputes heavily mobilise the administrations of all Member States and multiply their points of contact with the Community bureaucratic machinery. The scope of the analysis can also include, still within the public sphere, but by-passing the responsibility and the line of command of the national hierarchies, the participation of the nationals of each country in the Community institutions. And to make the scope of observation even more complete, increasing the number of players involved, it is conceivable to stretch it to the private sector. If you add to this equation fifteen countries, the need to bring together the vision of the decision-making centres in the capitals with the depending bodies located in Brussels with varying autonomy, the number of sectors covered, including those of the two new pillars, with their own rules, introduced by the Treaty of the European Union, and finally the role public opinion and domestic and international media play in all this, then you get a

reasonable view of all that is to be understood and, whenever possible, coordinated, within this vast and complex process.

Deepening and extending the areas of competence of the Union changed Brussels into a centre of power where the representation of the most varied interests of the economic, social and political life of Member States converge and multiply, as well as those of third countries, the multinational sector and professional organisations on a European scale. Their activities revolve essentially around policy making, seeking to set processes in motion or influence final decisions, or around access to the distribution of the plentiful budgetary means that the Commission makes available in fulfilling its right of initiative and in conducting its central responsibilities as the executive body of Community policies.

Regarding the latter aspect, a great part of the spending takes place at national level, as laid down in precise regulations (particularly in the case of agriculture and structural funds). Brussels is, nonetheless, responsible for supervising and monitoring whether the measures in the Member States conform with the Community provisions in force; and it has a considerable capacity for directly attributing funds to implement programmes for international cooperation or approved as part of internal Community policies, as well as for ordering studies, enquiries or external evaluation.

Without going into details under this heading, I would like to add the following:

- the authorities in all Member States are cyclically confronted with the wish to organise a national lobby which to some extent gathers, or at least creates, possible and effective channels of communication among the different spheres mentioned above;
- the difficulties met within a task of this type are obvious, in view of the size and diversity of the areas to be covered (remembering first of all that the Permanent Representations and central coordinating structures are already overloaded, before attempting anything else, with the decision-making process in the strictest meaning of the term, demanding as it is in terms of defining and defending national positions); due to the fact that this involves groups of persons whose activities are based on a logic, institutional framework and codes of conduct that are different, promoting interests that are not always compatible and might even be conflictual; faced by the need to outline areas of responsibility and intervention (not uncommon are the cases of confusion of roles, and sometimes dysfunction, among Permanent Representations, Commissioners' offices or even European Members of Parliament, often caused, although involuntarily, by the capitals themselves); such difficulties can however be attenuated if the level of ambition be adjusted, the rules of the game clarified, the code of conduct respected and if the sense of priorities is not overlooked;
- there are practices in all Permanent Representations that are designed to contribute to integrate forces, as a defence reaction to the natural scattering of the many agents involved in Community life; there is a need for coordination that arises spontaneously from different sectors, bottom up, and not just as the result of a purely theoretical exercise, and which tends to become sharper with the development of integration and of the gradual understanding of the system and its decision-making mechanisms; however, the national experiences, successes and capacity for mobilisation vary, depending on practices, traditions and administrative disciplines, on national idiosyncrasies in relation to coordination, on the actual effectiveness of private lobbying which in turn depends on several other factors (economic development, level of internationalisation of the economy, acquired experience of integration, size of companies and sectors of activity covered, capacity for association and to react adequately to the Community's "supply" and requirements, in a field in which the costs of geographic remoteness from decision-making centres cannot be ignored).

4.2. As mentioned above, it is the decision-making process within the Council that is the core of the work of the Permanent Representations, and the main object of coordination between these and those bodies responsible in the respective capitals for the coordination of Community affairs. I will make five brief comments on this topic. At the three classical levels in which decisions are taken within the Council (working groups, Coreper and the Council of Ministers) Coreper – despite the intervention of high level committees created in the meantime in specific sectors in the area of competence of the Union – continues to play a pivotal role in the preparation of decisions. This role, recognised in the Treaty after Maastricht, was reinforced and extended with the introduction of the co-decision process. Coreper, although split in two, continues to be the only place that enables a global view of a decision-making system that is increasingly more complex and where the horizontal, vertical and inter-institutional ramifications of the exercise of power are a constant invitation to dispersion (suffice to remember that upstream of the Council there are more than 200 working groups and, downstream, more than 20 different formations of the Council of Ministers, apart from the European Council); and due to the moment it intervenes in the negotiation, it continues to be the best place, linked closely to the working groups' activities, for smoothing

out conflicts of interest between the different national spheres intervening in European affairs and the Community sphere.

The outcome of negotiations tends to improve when intervention begins at the initial stage of the process, in the search for a good compromise. Inversely, a postponed or crystallised position, left insufficiently worked through for the final political decision level, does not stand many chances of being well succeeded. It is convenient, therefore, to define the fundamental interests needing to be safeguarded, to understand the course of the negotiation and to assess the existing display of forces, thus adjusting objectives and alliances, as soon as possible.

It is important to ensure a single formal channel for the transmission of instructions from the centre to the periphery, although – and also because – the routine of the "permanent negotiation" and the speed of reaction often demanded implies using alternative informal channels to obtain or change a specific orientation at any stage along the way. Swift communication with the capital and confidence between the centre and the periphery are essential for this system – that includes the need for improvisation and flexibility, although under control and within strict limits – to function.

The Permanent Representations have enormous responsibility in managing this margin of flexibility, suggesting adaptations to the negotiating approach and, when necessary, anticipating guidelines, as well as in the coverage of the "grey area" of coordination mentioned in the previous chapter. They also function as a final control network where incongruencies, contradictions of inter-sectoral interests, possible conflicts between sporadic positions and pre-established doctrine on a horizontal and wider reaching plane are detected. In this exercise, the Representations ensure a *a posteriori* coordination, using their own resources (advisors who cover sector-based areas of responsibility, dependant, in the capital, on the different state departments), or, in more serious cases, giving rise to a second opportunity for reflection or arbitration in the capital, at a higher level.

The introduction of the co-decision process has increased substantially the responsibilities of the Permanent Representations, not only from the point of view of quantity, since it opens one more platform for negotiation, but above all from the point of view of quality. Indeed, although this is a stage closer to final decision, preparation for negotiation takes place within Coreper and the representation of Member States in the conciliation committees with the European Parliament is provided at the level of Permanent Representatives or Deputy Permanent Representatives, and not members of government, with the exception of the presidency in office.

III – The meaning of the vote in Council

5. The moment in the decision-making process which attracts more attention is the voting in Council. Much has been said and written on this topic, which is also one that lends itself most to preconceived and definitive opinions, not only from a reactive and conservative perspective, but also from the side of Community "political correctness". This is a sensitive field, where the consequences of transferring sovereignty to the Community are stressed and more clearly exposed, where many opposing variables appear, where the weighting of individual interests is far from being uni-dimensional, linear or constant, where intentions frequently clash with day-to-day practice and where, whatever the direction of the basic position adopted, it will result in a two-edged sword effect. On the one hand, the will exists to build an effective decision-making system, that enables the Community to fulfil its objectives, without being held hostage to the extreme position of one State or a very small group of States; on the other, the determination to ensure the defence of legitimate individual interests, and the fear that these could be mechanically forgotten or overlooked as the simple result of arithmetical majorities, cannot be underestimated.

Basically, agreeing to the enlargement of the instruments to be approved by qualified majority involves a weighted risk for each Member State. On one side of the balance hangs the advantage of the Community being able to function and make progress as a whole, less vulnerable to being blocked by opponents and, on the other side, the assessment of individual vulnerability in the case when the position of that Member State stands against the course of negotiation. The analysis of this risk comprises the perception of the capacity of being able to block single-handedly a decision in a situation where unanimity is required (as mentioned under item 2), as well as the level of confidence in the system to cover individual and minority concerns or, *in limine*, and in extreme cases, in the future of the "Luxembourg compromise".

6. I will try to take the analysis of this topic a little further. From a purely logical point of view, qualified majority renders the decision-making process more flexible, avoiding potential blockage of decisions, and it is a central element to the so-called Community method. Furthermore, unanimity tends to make

decisions more difficult, as we saw also in item 2. However, it does not follow, as many assume, that unanimity necessarily leads to blocking or postponing decisions. Turning to statistics, we can see that more than 83 per cent of the decisions adopted between October 1995 (after which the break down of the vote in each decision became public) and December 1998 were approved by consensus, in a universe in which most decisions could have been adopted by qualified majority. There are certainly several explanations for this: not all proposals raise the same degree of difficulty, or cause serious divisions of interest among Member States, and the actual prospect of the vote tends to make negotiators more realistic and moderate in relation to their objectives. But it is also a fact that presidencies have tended to maintain, up to now, the healthy practice of integrating differing positions and of finding solutions that, without undermining the proposals, make them acceptable to the largest number of States and, ideally, to all. But there are other examples that contradict that over simplistic thesis. Revisions to the Treaty, financial prospects, the framework programme for research, where fundamental interests clash and where delays are prejudicial to all, have always been resolved and in time, although the rule of unanimity applies to them. One might argue that this is achieved through excessive compromise in one direction or another, but it is the price to pay for constitutional decisions, or decisions of special transcendence, in whose results all Member States' fundamental preoccupations have to be somehow contemplated, naturally in a context of reciprocal give and take. However, there was neither blocking nor delay, in these cases the incentive to finalise the negotiation being rooted not in the risk of being overruled in a majority voting, but in the awareness of the common objectives to be achieved and in the importance of losses – both collective and individual – that will be suffered in the absence of a decision.

Lastly, it is known that the universe of qualified majority has come to almost coincide with that of co-decision, a mechanism that has made the decision-making process more cumbersome and slower, immaterial of the other virtues and needs that it has covered. It follows that the efficiency of the decision-making process does not only rely on the majority vote and that, as an abstract value, this efficiency has necessarily its limits, which, if they are accepted as a consequence of the "democratic deficit", they should also be recognised from the point of view of the safeguard of essential interests of the Member States – even if the discussion on their identification remains opened and sometimes defies logic. The Union serves a common interest, which is often held back by a constellation of national reservations (although these have often proved not to be definitive, allowing the Community system to develop as it did over the past fourteen years), but there are obvious risks and limits in trying vanguardistic and demiurgical attitudes to impose one view of the common interest, as opposed to a more gradual development of the integration process. If the main concern of the critics of unanimity in any circumstance rested on effectiveness, they should defend consistently the generalisation of the simple majority, envisaged in the Treaty as a general rule when the mode of decision is not specified, thus getting round the difficulties still found in building up a qualified majority.

Taking this analysis further, it can be said that within the three types of decision envisaged in the Treaty – unanimity, qualified majority and simple majority – a loophole, at least in theory, may exist: that of the non-weighted qualified majority (in which each country casts a vote, as in simple majority, but the decision would only be adopted based upon the approval of a number of votes higher than that of "half plus one" that characterises the simple majority). This design could make sense in areas where unanimity was the rule, which coincide with domains essential for the exercise of sovereignty, and where the aim was to introduce more effective decision taking. It was supported by this approach that Portugal defended in Maastricht the opening of common foreign and security policy to the majority vote. Even if this move proved to be unsuccessful, it left nevertheless a trail: the exigency of a dual majority, that requires a minimum number of votes but also a minimum number of countries for a decision to be approved (in Maastricht: 8 Member States out of 12; later 10 out of 15, after the last enlargement).

Today it is difficult to centre the discussion on the extension of the qualified majority on its own merits, as was done in the past, for two reasons: firstly, in view of the stated objective of the larger Member States in having the vote weighting scheme reviewed in their favour, as described in the introduction; secondly, because of the existence of co-decision. Co-decision was already, to a certain extent, an operation of re-weighting. The distribution of MEPs per country is closer to the logic of population proportionality, which means that small and medium sized states are less well represented there than in Council; and also, it can be hardly denied that the attribution of wider powers to the European Parliament has been accompanied to a certain extent by a regrouping of interests according to the nationality of MEPs, cutting across the logic of organised party groups on a European scale. The same discussion is hindered by the fact that there are no longer many fields left in unanimity likely to become majority, which makes it more difficult to find points

of convergence between Member States whose approach to the problem on a sectoral scale has, in fact, always been a source of division.

The concept of “democratic deficit”, or “democratic legitimacy”, that worked-out in the case of the European Parliament, has been used as an argument in favour of re-weighting votes in favour of larger Member States. The argument is that these, relatively under-represented from the point of view of population differentials, could be in a worse situation with future enlargements, that will bring in States with smaller population numbers, and that a possible situation might occur in which qualified majority decisions were taken supported on less than 50 per cent of the total population of the Union. Underlying this approach is the principle that one person corresponds to one vote, unquestionable at national level, but difficult to transpose to a structure with the degree of integration that is to be found in the Union, in which the Member States retain their status of principal subjects, with a scarce common budget, where social policies remain basically within the national framework and where there are no systems for distributing income more evenly. And even federal structures include forms of representation for their Member States immaterial of the logic of proportionality, based on parity. Apart from this, the data for the period in question (October 1995 to December 1998) show that more than 83 per cent of decisions were supported by countries representing 100 per cent of the population, as indicated before; and that in 5 cases only, from a total of 749, was 62.6 per cent of the population reached (when the lowest limit of the system in force is 57.6 per cent).

The extension of the qualified majority would interest above all, on the one hand, the countries benefiting, in mathematical terms, from a greater potential influence within the Council and the European Parliament; on the other hand, the countries that, because of their structure and level of development, could more easily integrate into the centre of common interest and, as a result, more frequently take their place within the majorities that in each case determine Community decisions, as those are basically the ones that would have least to lose and most to gain from the predicted direction impressed upon the different Community policies and approaches.

However, other factors come into play: the reality of the situation is not so simple, and it comes in different combinations. The decision to adopt a position within the average of Community interests does not depend only on the convergence of exogenous objective conditions; not always are the countries supposedly located at the “centre” those that are less likely to vote against; nor are all those that most frequently vote against, those that oppose extending the majority vote (although it is clear that in this case they seem to overvalue the method, accepting its consequences or even, almost paradoxically, defending a system that protects them from the not always desirable option to veto, when they show an uncomfortable tendency to isolate themselves); sectoral concerns clash with positions of principle, in many cases; and there are countries with interests that tend to be less “centred” (like Portugal) that not only have shown an open attitude towards the majority vote, but are also not among those that more often choose to vote against in Council.

It is interesting to note – also bearing in mind that, in unanimity, the larger Member States have the widest room for manoeuvre to impose, alone, a veto, and are those that more frequently have blocked decisions – that the three Member States that most often have voted against, and the sum of whose negative votes combined with abstentions was higher than that of any other Member State, are three of the largest States in the Union (during the same period, and in decreasing order: Germany – 40 negative votes and 18 abstentions; United Kingdom – 22 negative votes and 9 abstentions; Italy – 22 negative votes and 7 abstentions; for the remaining countries, respectively: The Netherlands (20 and 3); Sweden (17 and 1); Denmark (14 and 3); France (9 and 6); Belgium (9 and 5); Spain (8 and 9); Greece (9 and 2); Austria (7 and 2); Portugal (6 and 9); Ireland (6 and 1); Finland (6 and 0); Luxembourg (1 and 5).

This picture shows an interesting view of the direction vote tends to follow within the Council, and some hints on the level of satisfaction obtained by each Member State in the decision-making process, on its objective negotiating effectiveness, and on the level of existing “decentering” inside the Community. However, it should be read with caution before drawing general conclusions, since the importance of decisions varies considerably; it depends on the range of each Member States’ effective interests in EU business (and in a World scale), and the motivation present at the time of the vote does not always coincide or remain constant from State to State, sector to sector or time to time. There is no doubt that a favourable vote expresses approval, and a negative vote rejection, but apart from these obvious situations, where there is no room for hesitation, multiple factors can intervene and determine the decision. For example, in a situation in which a State would normally be inclined to express a negative vote it may decide to do otherwise:

- when the awareness of a higher interest prevails over a particular disadvantage (giving priority to the approval of standards, although considered imperfect, to cover a legislative vacuum is a typical instance of this type of situation);
- to avoid it being perceived from the outside that the negotiation has not been well conducted or successful;
- not to distress the presidency (particularly if other decisions underway, and comparatively more important, depend on it);
- to reduce losses and make some partial gains (the presidency can offer some concessions in exchange for a positive vote; and a presidency tends to remove from the centre of negotiation and from the construction of compromise a delegation whose behaviour shows signs right from the start that it will vote against the decision in question in any circumstance);
- to avoid creating a blocking minority;
- for tactical reasons, within the process of co-decision: if it is thought that the position of the European Parliament will tend to further accentuate the negative aspects of a common position, it could be more advisable to abstain, so that there still remains room for negotiation and there may be greater credibility for invoking the solidarity of the Council before Parliament.

Inversely, there may be the temptation to vote against, even when the situation is not so serious as to justify it in principle:

- to credit upon discontentment;
- to express displeasure to the presidency for the way in which a particular negotiation was conducted;
- to mark a question of principle;
- to give the Community the onus of decisions that it prefers not to assume domestically;
- to create a blocking minority;
- for tactical reasons, within the context of co-decision: when it is thought that the position of the European Parliament will favour the points of view of the State in question, it could be an advantage to vote against in order to maintain room for a positive vote to be eventually offered at the end of the process, in exchange for the Council's acceptance of some of the Parliamentary amendments that are of interest to that State.

IV – Predominant guidelines on which the Portuguese have based their action in Brussels

7. Without being exhaustive, I have tried in conclusion to identify and group the basic concerns that I feel have been more prevalent in defining Portugal's positions in the various centres of negotiation since accession. These help to reveal the underlying presence of a logic and continuity in what, on first analysis, might appear to be a simple succession of scattered decisions. The following could be recognised, not listed in order of importance:

- Integration and compatibility of interests and preferential relations that Portugal, for reasons rooted in history, maintains with other parts of the world; one good example to emphasise is the special case of Timor, that ran through all the formations of the Council for years, and was for Portugal a source of constant difficulty within a Community that rather recently understood Portugal's position and what was at stake in that part of the world; and also, among others, the African Portuguese-speaking countries, Brazil and Macao.
- Monitoring the development of a common foreign and security policy within limits compatible with the Atlantic and multi-continental dimension of Portuguese foreign action.
- Integration or safeguard of fundamental interests in sensitive areas where particular debilities subsist, and which tend to be out of line with dominant Community interests: textiles, agriculture and fisheries.
- To render compatible situations of disadvantage or backwardness due to a different economic development stage with the pace imposed by the Community in developing certain policies (internal market, the opening up to competition of protected sectors, certain aspects of social legislation, environment; the general concern was also present, particularly in this last area, to ensure that the characteristics of the countries of the South be integrated in policies that have their roots, and are guided, by the patterns of the North).
- Defence of economic and social cohesion as a pillar of the European construction (not only centred on the negotiation of the financial perspectives, of the competent regulations and of the distribution of

structural funds, but also, across the board, in the defence of the place of cohesion among the remaining policies and in the reaction to the frequent attempts to divert or undermine its objectives to the benefit of certain sectoral interests).

- Defence of the Portuguese language within the institutions.
- Respect for the principle of equality among States, with particular attention to the situation of small and medium sized States, not only when the Treaty is revised but on a permanent basis, as the decision-making process is carried out.
- Defence of inter-institutional balance and respect for procedural standards, avoiding less transparent situations.
- Reservations about including in the Community structure models of “variable geometry” and of uncontrolled and excessive forms of flexibility; and when these cannot be avoided, attempt to restrict moves away from orthodoxy and to retain a presence within the different circles of EU development.
- Defence of a Community model in which the Portuguese specific characteristics are integrated and accounted for within the different policies, rather than looking for compensation or correction on the side-lines and in addition to the normal legislative flow; Portugal as a specific case has been invoked rarely and only as a last resource, when the proposed framework completely excludes it or contradicts it.
- Involvement in creating and developing the concept of European citizenship.
- More recent investment in implementing a Community intervention in the area of employment (employability) – and later in finding a new strategic model of development integrating competitiveness, information society and social inclusiveness – replacing a more defensive attitude in the past (particularly because of the risks associated with contradicting principles and interests established within structural policy).