Spanning the River

The Constitutional Crisis of 1965–1966 as the Genesis of Europe's Political Order

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There are two great objects which every constitution must attain to be successful ... Every constitution must first gain *authority, and then* use *authority ...*

Walter Bagehot (1867)

Crisis of '65-'66, Europe's first constitutional crisis – transition to majority – Hallstein's convictions and comportment – De Gaulle's Europe of States – Commission agricultural package – Debate in the Council 28-30 June 1965 – Hallstein overplays his hand – De Gaulle seeks out a confrontation with the Five – Founding treaty not to be changed – De Gaulle faces farmers – Crisis ends in a draw – Interpretations of outcome – Europe stronger for it – Consecration of founding pact – Disdain for the compromise – Interest, time, authority

1965 was a stormy year for the Europe of the Six. The most powerful member state failed to make an appearance in Brussels for a number of months and threatened to pull out of the foundational pact. Two national elections – the German one in September and the French one in December – made a decisive contribution to the resolution of the conflict, sealed in Luxembourg in January 1966. Ultimately, none of the six states got its way, yet they could all claim victory. The only evident loser was the seventh party at the table.

The events of 1965-66 can be considered to be Europe's first *constitutional crisis.*[1] A latent tension between two visions on the European order broke into the

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[1] This term was already used in 1966 by J.H. Kaiser, 'Das Europarecht in der Krise der Gemeinschaften', 1 *Europarecht* (1966) p. 4 on p. 23 ('Verfassungskrise') and by J. Lambert, 'The constitutional crisis 1965-66', 5 *Journal of Common Market Studies* (1966) p. 140.

open. The unprecedented intensity of the events – both in the eyes of contemporaries and in hindsight – are a sign that Europe experienced a fundamental moment of passage. In this article, the chain of events will first be recounted (*The crisis*). Subsequently I shall argue in contrast to the reigning interpretations that the result, the much-denigrated 'Luxembourg Compromise' of 29 January 1966, must not be regarded as the beginning of a blockade, but rather as the genesis of Europe's *political* order (*The passage*).

(A)   THE CRISIS (24 MARCH 1965–29 JANUARY 1966):
FIVE OATH-TAKERS, ONE GENERAL AND A DEFEATED PRETENDER

The subject of the crisis was the transition to majority decision-making as of 1 January 1966. This date was set in the Treaty of Rome. The states had given themselves twelve years (in principle) to institute the common market, starting in 1958. The period was sub-divided into three stages of four years each. While the step from the first to the second stage at the beginning of 1962 had taken place by means of a controversial 'transition decision', the transition from the second to the third stage was to take place *automatically*. As of that moment, the Council of Ministers would decide by majority vote on vital affairs such as grain prices, trade accords and movement of capital. This would drastically change the relationship between the member states severally and the ensemble, between the parts and the whole. But how?

Brussels confidently looked forward to the moment of majority. Once the requirement of unanimity was behind them, who other than the Commission would be able to speak on behalf of Europe? At least, that was the view of commission president Walter Hallstein. In April 1962, he explained the nascent Brussels orthodoxy to an American audience:

> The principle of majority voting is employed by the Community for its regular proceedings; the rule of unanimity, which was one of the stumbling blocks of previous experiences, is here reserved for exceptional cases ... Moreover, majority voting becomes more and more the norm for Council's decisions as the treaty's transition period progresses.

Decision-making by unanimity of states had to be seen as the last spasm toward the completion of the foundational phase. Besides, Hallstein had the conviction – encouraged by the American theoreticians of functionalism of the time – that European economic integration was *more* than economic; it created a new '*zoön politikon*', a political creature. The young Community was a 'collective personality' and his own institution was, if not the head, at least the motor. This reasoning brought the commission president close to the claim of representing a European

government. With the technical term 'executive' he remained but one step removed from that taboo word.[2]

At the same time, Paris too was aware of how rapidly 1 January 1966 was approaching. Since 1958, General De Gaulle had been in power. Against all expectations, the old war hero had not only courteously complied with the European treaty but also, to the extent that French agricultural interests were at stake, had made the other member states comply. This was not born of love for the supranational cause, as he made clear in legendary press conferences. In order to correct the expression that had generally been attributed to him, '*l'Europe des patries*', De Gaulle said to the press on 15 May 1962:

> The fatherland is a human element, a sentimental one; while Europe should be built on elements of action, authority, responsibility. What elements? Well, the States! … I have already said and now repeat that presently there is and cannot be another Europe than that of the States, apart from, of course, that of myths, fictions and parades (…) Would the French people, the German, the Italian, the Dutch, the Belgian, the Luxembourgian people even dream of submitting to laws voted by foreign deputies, when these laws would run counter to their deeply felt Wills? No way! There are no means, presently, to do as though a foreign majority could compel unwilling nations.[3]

This was more than mere rhetoric. At the General's request, a French minister had already investigated how the 'federal virtualities' of the Rome Treaty could be 'inactivated'. Through a secretary's carelessness, this confidential memo landed in the public domain.[4] French plans from 1961 and 1962 for a European political union, as well, were generally regarded as attempts to place the Community under guardianship – the reason why the Netherlands had vetoed the plans. So the parties knew each other's standpoints and intentions from the start.

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[2] W. Hallstein, *United Europe. Challenge and opportunity* (Cambridge Ma., Harvard University Press 1962) at pp. 23, x, 22.

[3] De Gaulle, 15 May 1962, in: Ch. De Gaulle, *Mémoires d'espoir, suivi d'un choix d'allocutions et messages sur la IVe et la Ve Républiques, 1946-1969* (Paris, Plon 1994) at pp. 792-793. ('[L]a patrie est un élément humain, sentimental, alors que c'est sur des éléments d'action, d'autorité, de responsabilité qu'on peut construire l'Europe. Quels éléments? Eh bien, les Etats! ... J'ai déjà dit et je répète, qu'à l'heure qu'il est, il ne peut y avoir d'autre Europe que celle des Etats, en dehors naturellement des mythes, des fictions, des parades. ... Est-ce que le peuple français, le peuple allemand, le peuple italien, le peuple hollandais, le peuple belge, le peuple luxembourgeois, songeraient à se soumettre à des lois que voteraient des députés étrangers, dès lors que ces lois iraient à l'encontre de leur volonté profonde ? Ce n'est pas vrai ! Il n'y a pas moyen, à l'heure qu'il est, de faire en sorte qu'une majorité étrangère puisse contraindre des nations récalcitrantes.')

[4] A. Peyrefitte, *C'était De Gaulle*, I (Paris, Fayard 1994) p. 70. The publication of the memo was on 8 Feb. 1963 in the Belgian newspaper *La dernière Heure*.

In early 1965, the affair came to a head.[5] This was initiated by Brussels' pretender to the throne. In mid-March, Hallstein made an official visit to the United States. He spoke with president Johnson in the White House and with the minister of defence in the Pentagon. This last step, a trespass into the sacred domain of national security, was unprecedented. It was unusual, as well, that the commission president stayed at Blair House, customarily reserved for visiting heads of state. And finally, behind the scenes there were whispers that Hallstein, upon being asked what his function was by an American journalist, had answered 'a kind of Prime Minister of Europe'.[6] These presumptions of protocol of the Commission's president betrayed political excitement in the Commission as a whole. According to one of the two French commissioners, himself sceptical, the majority of his colleagues thought at the time that the *jour de gloire* was approaching, and they dreamed of a Tennis Court Oath à la 1789.[7] (The constitutional oath which was to be sworn more than a half year later was, however, a different one.)

On Monday evening, 22 March, the Commission passed an ambitious package of proposals which, if accepted by the states, would mean taking the sought-after political leap. The driving forces behind it were Hallstein and the Dutch commissioner Mansholt. Three subjects were cleverly linked: agricultural financing, community budget and parliamentary powers. In short, the farmers would gradually be paid entirely from a European agricultural fund, the import duties on agricultural and industrial products would flow directly into European coffers and the Strasbourg MPs would get a decisive voice in the way the money would be spent. The first part of this three-part package was not very controversial, in theory (the conflict of interests lurked in the implementation); as to the second, it was striking that the inlays would massively exceed the outlays at a certain moment, and the Commission had a monopoly on proposals for spending; and the third was noteworthy because the parliamentarians would be able to change the budget against the will of up to four of the member states.[8] In a new violation of proto-

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[5] Best reports from contemporary observers: Lambert, *supra* n. 1, and John Newhouse, *Collision in Brussels: The Common Market crisis of 30 June 1965* (London, Faber and Faber 1967), both based on journalistic sources. Modern historical reconstructions by member state based on diplomatic sources in J.-M. Palayret et al. (eds.), *Visions, votes and vetoes. The Empty Chair Crisis and the Luxembourg Compromise forty years on* (Brussels, P.I.E. Peter Lang 2006); a comprehensive recent account in N.P. Ludlow, *The European Community in the Crises of the 1960s. De Gaulle challenges the Community* (London, Routledge 2006). Memoirs and testimonies: M. Couve de Murville, *Une politique étrangère, 1958-1969* (Paris, Plon 1971); P.-H. Spaak, *Combats inachevés* II (Paris, Fayard 1969); R. Marjolin, *Le travail d'une vie. Mémoires 1911-1986* (Paris, Laffont 1986); Peyrefitte, *supra* n. 4 and idem, *C'était De Gaulle*, II (Paris, Fayard 1997).

[6] Newhouse, *supra* n. 5 at pp. 86-87.

[7] Marjolin, *supra* n. 5 on p. 343 ('Serment du Jeu de Paume').

[8] Under the budgetary procedure proposed by the Commission, once the Council had agreed upon a (modified) draft budget and sent it to the Parliament, the latter could make amendments by

col, Hallstein made these plans known two days later during a session of the Strasbourg Assembly – at the time still made up of representatives from national parliaments – *before* submitting them to the member states. In this way, the Commission appealed directly to parliaments and public opinion, bypassing the governments. The ministers had, to their dismay, lost a bit of their room to manoeuvre. France, which held the presidency, was particularly irked.

The decisive debate in the Council of Ministers took place from 28 to 30 June 1965 in the Palais des Congrès in Brussels. The conflict boiled down to whether the three-part package was to be discussed as a whole (Italy, Germany, the Netherlands) or if it would be sufficient to reach agreement on the first part (France). Hanging over everyone's heads was the 1 July deadline. On that date, a temporary arrangement for agricultural financing would expire and a new five-year regulation would have to go into effect. As far as the French foreign minister Couve de Murville was concerned, who was chairing the meeting, the Council had only to solve that problem, unconditionally, and all parties had committed themselves to that obligation. For De Gaulle, more power for the 'foreign MPs' was anathema and the Community could wait to raise its own money. It was in the interest of the French to reach an agreement on the agricultural funds and they did not wish to take the bait of part one only to become entangled in the political trap that the Commission had set with parts two and three. The Italian, German and Dutch delegations insisted on including the Community's funding and the parliamentary purse strings in the discussion. All three of those governments were under pressure from their respective parliaments, which quite reasonably wished to regain the influence on the European level that they had lost on the national level. Besides, none of the three was inclined to give France what it wanted without getting something in return; the memory of the thunderclap of De Gaulle's veto against British accession in January 1963 was still fresh in their minds. The Italians had the specific problem that the previous agricultural deal had not worked out in their favour, and this time they preferred not to make any long-term commitments. For the Dutch, an anti-French attitude in European affairs had been a constant factor for years, if not centuries. The West German position was new. Since the departure of Chancellor Adenauer at the end of 1963, Franco-German relations had cooled; typical of this was the refusal of Adenauer's successor Erhard to contribute to De Gaulle's *force de frappe*.[9] The Belgians and the Luxembourgers sought the middle ground. In this minefield, not much more progress was made on the 28th than technical consultations about the financial regulation.

simple majority. If the Commission agreed with the Parliament's amendments, the Council could only block them with a 5/6 majority on a straight vote, so that, inversely, it suffices for Commission, Parliament and, say, Belgium and Luxembourg to agree for the amendments to stand. (Lambert, *supra* n. 1 at pp. 204-205.)

[9] Newhouse, *supra* n. 5 at pp. 34-35.

It was not until the afternoon of Wednesday the 30th that the conference was resumed. Many expected a marathon session in which the chair, following custom, would propose at midnight to stop the clock and negotiate until a compromise was achieved. The Italian minister Fanfani repeated Rome's wish to give the MEPs budgetary rights. The German state secretary Lahr applauded him. Couve issued a solemn warning on behalf of France that if the obligation of a new financial arrangement were not accepted, there would be '*no Community*' anymore. As the chair, he subsequently proposed that the discussion be limited to the distribution of the financial burden. Couve was supported only by the Belgian Spaak. Commission president Hallstein, who in light of the rapidly approaching crisis could have been expected to play a conciliatory role, stubbornly defended his plans. Then the German minister Schröder spoke for the first and last time. He refused to give up the commission package and notified his colleagues that the German Bundestag had unanimously passed a resolution that afternoon calling on his government to support the European parliamentary Assembly. As far as the financial arrangement was concerned: nobody was arguing for an inappropriate postponement, Schröder said, but there was no reason to be petty about clinging to 1 July; it was an arbitrary date and 'not the year One Thousand'. After this decisive intervention, it was time for dinner.

When the gentlemen resumed at 10:30pm, only an hour and a half remained. The French tried in vain to sop up the Italian problems (an offer from finance minister Giscard d'Estaing was rejected by his Italian counterpart). At 12:02 the lights went out in the Palais des Congrès. It was now 1 July. At 12:30 Couve summarised all the positions. No one had anything to add. The seven delegation heads withdrew behind closed doors for one more hour. Then it was over. At two o'clock on the dot Couve held the usual concluding press conference as the Council chair; he said that a serious crisis had broken out. Later that morning, the Élysée Palace declared that France had decided to draw the 'economic, political and legal consequences' from the setback.

This was not a bluff. On 6 July De Gaulle summoned his entire representation at the Council back to Paris. And so began the French boycott of the Community, later dubbed the 'empty chair crisis'. No one had expected this move. The situation was unprecedented. As far as the commissioner of agriculture was concerned, De Gaulle's violation of the European pact was 'the greatest disaster since Hitler'.[10] This pathos can be seen as a sign of the uncertainty about what would happen.

30 June 1965 is the turning point in this constitutional crisis. France's departure changed the stakes. The Commission's package was off the table; Hallstein had

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[10] Mansholt, circa 17 July 1966, quoted in: Johan Merriënboer, *Mansholt. Een biografie* (Amsterdam, Boom 2006) on p. 327. The news of this quote reached Brussels and Paris.

overplayed his hand. It was now all about the survival of the Community itself. In this way, the conflict lay where De Gaulle had wanted it from the start, between the states. What his contemporaries already suspected by now seems certain: the French president was looking to cause a rupture. Couve later revealed that a month earlier, he had spoken with De Gaulle about how they could profit from the collision to come: 'Confident of his blessings, I went back to Brussels and burnt the bridges.' The unspoken goal of the operation was to block the transition to majority decision-making. The crisis about the financial arrangement, in which Paris' position was formally justified, was an 'unexpected pretext'.[11]

The question was how and in what constellation the other states would respond. The Belgians' first reflex was to fall back on bilateral diplomatic consultations; Spaak, who saw his life's work hanging in the balance, was ready to mediate. It was on the sidelines of a NATO meeting that the Germans and the Dutch prevented him from doing so. Chancellor Erhard had a Bundestag election coming up in September and did not want to negotiate with De Gaulle before then. During a state visit on 7 July, Erhard called on the Italians, who had taken over the six-month presidency, to 'face the General as a Community'.[12] The day before, France had formally requested the cancellation of the coming session of the Council. Rome ignored this request and let the meetings planned for July go on. In spite of persistent Belgian and Luxembourgian doubts, the Five – as they were called from that moment – convened on 13 July as the Council. They declared their meeting to be legally valid; it was France that was violating its obligations.[13] This procedural countermove was of symbolic importance. Europe could continue to exist in the absence of one of its founding members. At the same time, this gesture frustrated De Gaulle's strategy of forcing a new *modus vivendi* by means of bilateral diplomacy.

If the Five had yet not formed a united front, the General drove them together with the nonchalant blindside that he delivered at a press conference opening the French political season on 9 September. In his merciless introduction, he let supranational Europe have it. The Commission was called 'some technocratic Areopagus, stateless and irresponsible', its proposals of earlier that year 'usurpation'. De Gaulle also gave his interpretation of the crisis and publicly announced that he had learned his lesson (all the while acknowledging behind closed doors that he had sought out the crisis in order to learn his lesson):

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[11] Couve de Murville, 16 Dec. 1988, quoted (in English) in: Palayret et al. (eds.), *supra* n. 5 on p. 58; De Gaulle, 28 July 1965, quoted in: Peyrefitte 1997, *supra* n. 5 on p. 296. ('un prétexte inespéré.')

[12] Erhard, quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 116.

[13] In accordance with Art. 146 EEG (now 203 EC) which stipulates that each member state send a representative to the Council.

What happened in Brussels on June 30, concerning the financial regulation of agriculture, has exposed not only the reticence of most of our partners concerning the entry of agricultural policy into the Common Market, but also certain errors and ambivalences of principle which are contained in the Treaties. … This is why *the crisis was inevitable sooner or later*.[14]

The president outlined the danger that majority voting posed to France: everything that Paris had achieved, for instance in the agricultural sphere, could be taken away by a majority at any time. De Gaulle implied that these ruinous provisions had been agreed to by the weak leaders of the Fourth Republic, in other words, before France had 'taken its fate back into its own hands' under his leadership. Of course the Community could resume its work 'after a delay of which the length cannot be foreseen'. It was De Gaulle's foreign minister who drew the operative conclusion in a debate in the French National Assembly on 20 October. An arrangement for the agricultural funds was no longer enough, Couve said: France wanted a 'comprehensive revision' of the founding pact.[15]

Meanwhile, intensive diplomatic efforts were underway among the Five, with Bonn as its hub. The German elections of 19 September delivered a suitable victory for the Christian Democrat Erhard. From now on, the German government could permit itself some tenacity. The first opportunity to demonstrate it was the Council meeting of 25 October. At the instigation of the chair, Italian finance minister Colombo, the Five delivered a resounding reply to the French. In a respectful but firm public statement, they confirmed their attachment to the founding pact:

The Governments consider that the solution of the problems confronting the Communities must be found within the framework of the Treaties and of their Institutions.[16]

At the same time, they invited France to a 'special' Council meeting, specifically one at which the Commission would be absent, a possibility that the treaty provided for. This was a major concession to the French considering their criticism of the institution; a concession which was, however, made easier by the fact that

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[14] De Gaulle, 9 Sept. 1965, in: idem, *supra* n. 3 at pp. 931, 932. Italics added. (' … quelque aréopage technocratique, apatride et irresponsable … Ce qui s'est passé à Bruxelles, le 30 juin, au sujet du règlement financier agricole, a mis en lumière non seulement la réticence de la plupart de nos partenaires en ce qui concerne l'entrée de l'agriculture dans le Marché Commun, mais aussi certaines erreurs et équivoques de principe qui figurent dans les traités … C'est pourquoi *la crise était, tôt ou tard, inévitable.*')

[15] Couve de Murville, quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 256 ('révision d'ensemble'). For the Assembly debate, *see* Lambert, *supra* n. 1 at pp. 216-217.

[16] *Bulletin EEC* 12-1965 on p. 14.

Hallstein's presence had begun to be 'burdensome' to the Five as well.[17] What was even more unusual was that the Five concluded a secret pact, of which they made no mention in the Council minutes but which they did show to the French. It is a solemn declaration that the founding treaty was not to be changed. The document was signed by the German, Belgian, Luxembourgian and Dutch foreign ministers and by Colombo on behalf of Italy.[18] Each of them kept a copy. From now on the Five were to act in the crisis as one, as five oath-takers. It was no Tennis Court [Jeu de Paume], but it was truly a *constitutional oath*.

Now all eyes were on the French presidential election of December. Only a month in advance did De Gaulle declare his candidacy. In a bombastic television statement, he asked the electorate for 'massive support'; he was convinced that he would win an absolute majority in the first round. This turned out to be a miscalculation. He had completely failed to predict the way in which the European crisis would affect this national election. The most important federation of farmers – five million members – issued a call at the end of October to vote *against* De Gaulle. The farmers, estimated to constitute 20% of the electorate, feared that their agricultural subsidies were at stake along with the Community. The business community expressed its opinion that a speedy resolution of the crisis was of great economic importance.[19] *All five* opponents of De Gaulle played into these European concerns. Of them, the relatively unknown centrist Lecanuet had the most supranational message – with the personal seal of approval of Monnet, no less. In the first round, Lecanuet emerged from obscurity to win 15% of the vote. De Gaulle was deeply disappointed to come in with only 44%; his campaign staff briefly thought that he might withdraw. In the second round the General was up against the socialist who had won second place, Mitterrand (whose Vichy past De Gaulle was aware of, but did not exploit), who had entered the fray as '*le candidat de l'Europe*'. De Gaulle did ultimately win, with more than 55%, but this did nothing to offset the humiliating lesson of the first round. The president now knew that a majority of the French did *not* support his European politics.

The end game of the crisis could begin. In between rounds of the election, De Gaulle had let it be known that France would accept the invitation of the Five. Once more, the question of diplomatic form was raised. The Five wanted to meet as the Council, the French as an inter-governmental conference. The compromise was a meeting in Luxembourg on 17-18 January. This satisfied the French de-

[17] According to former Judge Pescatore, at the time of the events Secretary-General of the Luxembourg ministry of foreign affairs, in 'The "Luxemburg Compromise"', in: Palayret et al. (eds.), *supra* n. 5, p. 243 on p. 243.

[18] Newhouse, *supra* n. 5 on p. 141.

[19] J.-M. Palayret, 'De Gaulle challenges the Community', in Palayret et al. (eds.), *supra* n. 5, pp. 45-78, at pp. 68-69.

mand of meeting outside Brussels, while for the Five, the city had a European ring to it. In order to emphasise that, the Luxembourgers chose the *Hôtel de Ville* for the location of the meeting, specifically the Council Chamber where Monnet had opened the first meeting of the High Authority in 1952. The presence of the Council secretary confirmed the community character of the meeting. As had been agreed to, the Commission was absent.

On behalf of Paris, Couve de Murville put two questions on the table. The one question concerned the Commission's style of acting. The French had drafted a code of conduct for the institution, varying from how to receive ambassadors of third countries (only in the Council's presence) to how it was to introduce its own proposals (first to the states, then to Parliament and the public). The whole thing especially revealed how deep-seated French irritation was about the red-carpet pretensions of the Brussels bureaucrats. Although the Five found some complaints to be ridiculously petty, the ministers' representatives did subsequently come to agreement on some milder formulations that would be discussed with the Commission.[20] The second question was of a more fundamental nature. France wanted a guarantee that no country would be outvoted if a matter of vital national importance were at stake. The Five, for their part, refused to accept a text that would mean a violation of the treaty of Rome. The third stage of the transitional phase, bringing the contested majority voting, had begun as of 1 January. Although everyone felt the need to strive 'in all wisdom'[21] (Spaak) for common decisions agreed by all, this was about the possibility *in extremis* of holding a vote in conformity with the treaty. The French were demanding a veto right, then; and the Five were refusing to grant it. These two standpoints turned out to be unbridgeable. They decided to adjourn.

On 28-29 January, the Six resumed their deliberations in Luxembourg. All that was left to discuss was majority voting. The impasse was the same. Legally, the positions were irreconcilable, as they realised again after a day and a half. At the same time, there was the political desire to come to an agreement. They could either sweep the point of contention under the rug, or they could face up to the conflict. It was the Dutch minister Luns who, at Spaak's instigation, argued for the second option. A heated discussion followed. Ultimately, the six ministers came to a common statement that the chair Werner made known shortly after midnight. The text is known as the 'Luxembourg Compromise' and is as follows:

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[20] The complete text of the French 'décalogue' as well as the 'heptalogue' to which the list was reduced is in Lambert, *supra* n. 1 at pp. 221-223 and 224-225.

[21] Spaak, quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 172 ('en toute sagesse').

Majority voting procedure
1. Where, in the case of decisions which may be taken by majority vote on a pro-posal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions that can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, in accordance with Article 2 of the Treaty.
2. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.
3. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.
4. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.[22]

With this agreement, the French decided to once more occupy their seat on the Council. The ministers of the Five proudly told their parliaments that the treaty had not been violated, although Luns maintained in The Hague that it had been a 'draw'.[23] In Paris De Gaulle told his government with satisfaction: 'Supranationalism has disappeared. France will remain sovereign'.[24]

(B)   The passage (29 January 1966–29 March 1994):
Europe straddles the river before stepping across

The constitutional crisis of 1965-1966 was a deciding moment in Europe's passage. This is something that has not sufficiently been understood until now. The usual story focuses on the price that France bargained for its return to the table: the veto right. Nearly all the textbooks maintain that a practice of vetoing began in 1966 that paralysed European decision-making well into the 1980s. A few authors see this from the Gaullist perspective as the resumption of healthy inter-state functioning. In the dominant (communitarian) vision, the 'spirit of the Community' had been broken and the new situation was if not illegal, then in any case undesirable.

The disagreement as to *when* the Compromise ceased to be valid provides food for thought. Roughly speaking, there are three readings. The officials and political scientists are of the opinion that it lost importance in the 1980s and that the first treaty revision (1987) put it out of the picture for good. Their argument is that

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[22] *Bulletin EEC* 3-1966 on p. 9.

[23] Luns, quoted in: Merriënboer, *supra* n. 10 on p. 334.

[24] De Gaulle, 2 Feb. 1966, quoted in: Peyrefitte 1997, *supra* n. 5 on p. 620. ('La supranationalité a disparu. La France restera souveraine.')

votes were held and the policy machine got up to speed. National politicians in the parliaments of France and Great Britain maintained well into the 1990s that the Compromise was still in effect. Their argument was that it had never been revoked. The hardliners among community lawyers claim that the Compromise never existed and that it is a 'myth'. Their argument is that it is in conflict with the treaty.[25] The two last positions are especially irreconcilable. In a certain sense, in their unproductive deadlock they continue the debate between Paris and the Five that was going on *before* 29 January 1966. Worse yet, they represent a denial of the possibility that something could have happened or changed in the *event* of the Compromise itself.

From the perspective of the European order as a whole, there is another possible reading of the crisis and its outcome. It boils down to the following. With majority voting on the horizon, the Community was about to take an essential foundational leap on 1 January 1966, a self-imposed obligation. Five states were willing to take the leap – or at least claimed to be, it does not matter much – and one was not willing. That one could not be forced. As such, there was the threat of a rupture. *The genius of the Compromise is that the Six could postpone the existential (political) decision and yet pass the (legal) threshold of 1 January as a Community.* In a certain way, Europe was standing as of 29 January 1966 with one foot planted on one side of the foundational river and one foot on the other side. And it became stronger for it, not weaker.

This new relationship that the Compromise created between member states severally and their ensemble can only be understood in light of the chain of events *beforehand*; it is codified in the *text*; and it is confirmed by the events *afterward*. We shall examine each of these moments one by one. By choosing this approach, we will ultimately be able to suggest a date that the Compromise ceased to be effective.

(*1. the events beforehand*)

Let us first return to the *events beforehand*, between March and December 1965. It was necessary to retell them in some detail. We saw how even before the key

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[25] The first interpretation in, e.g., J. De Ruyt, *L'acte unique européen* (Brussels, Editions de l'Université de Bruxelles 1987) at pp. 13, 112-118; F. Hayes-Renshaw and H. Wallace, *The Council of Ministers,* 2nd edn. (Basingstoke, Macmillan 2006) at pp. 263-270. Second interpretation: P.G. Taylor, *The Limits of European Integration* (New York, Columbia University Press 1983) at pp. 39-40, and *see* below (Howe, Bérégovoy). Third interpretation: e.g., the authoritative Secretary-General of the Commission Emile Noël: '*Il n'y a rien dans les Accords de Luxembourg.*' (Noël quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 251) and former president of the Court Pescatore, in his *Die Geschichte der Europäischen Einigung zwischen Realität und Utopie* (Münster, Westfälische Wilhelms-Universität 1990) p. 24.

meetings in Luxembourg, the status of the ensemble was clarified and strengthened on two points.

First was the question, made particularly acute by the looming leap into majority voting, of who would speak and negotiate *on behalf of the whole*. The events provided an answer that could not have been predicted in advance. Hallstein's opening answer – 'the Commission' – was discredited on 30 June; De Gaulle's answer – 'then no one' – was discredited not long thereafter.

The Commission was without a doubt the loser in this crisis. The bluff advanced by Hallstein and his colleagues turned out to be hopeless; their political aspirations were all too apparent. In the subsequent events, that institution would hardly play any role at all. Not even the role of mediator would be granted to the Commission in a conflict that now had to do with the foundations of the Community, as the Commission's absence at the key meetings in Luxembourg made painfully obvious. Technical expertise was revealed to be of little value in a situation in which the Community had to defuse a political crisis. The commission president was himself the only casualty of the events; at the urging of the French, his mandate was not extended.[26] The three-part commission package of March, despite its impeccable constitutional logic, succumbed to the backlash that it created. The institution was forcefully thrust back into its role of a subservient bureaucracy; it would take years – in fact until the arrival of Delors in 1985 – before it would regain its self-confidence.[27] In the view of Hallstein and Co., the consequences of this setback were dramatic. Without a strong Commission, Europe would fall victim to a struggle of national interests; in the crisis, the collective personality of the Community was *beheaded*.

De Gaulle had a different reading of the situation. That the bureaucrats of Brussels had been shown their place was not surprising, and was of secondary importance anyways. The Community lost its political existence because of – and only because of – France's withdrawal from the Council. 'Our chair remains empty, every session is invalid', he said on 1 July to his ministers.[28] As far as the General was concerned, Europe was in a suspended state and the six states were back to dealing with each other directly. Even though De Gaulle consistently maintained

[26] During the Luxembourg negotiations, where the delicate issue of personnel was not officially on the agenda, the German government had refused to assent to De Gaulle's request to sacrifice Hallstein, but later on, in 1966, a new government in Bonn went along after all. In 1967, the friendly Belgian Jean Rey became the new commission president.

[27] E.g., N. Heathcote, 'The crisis of supranationality', 5 *Journal of Common Market Studies* (1966) p. 140; K. Neureither, 'Transformation of a political role: reconsidering the case of the Commission of the European Communities', 10 *Journal of Common Market Studies* (1972) p. 233; N.P. Ludlow, 'De-Commissioning the Empty Chair Crisis. The Community institutions and the crisis of 1965-1966', in Palayret et al. (eds.), *supra* n. 5, pp. 79-96.

[28] De Gaulle, in: Peyrefitte 1997, *supra* n. 5 on p. 290.

this point of view, it is not consistent with the way things went. As of 13 July, it was the *Council* that manifested itself as the focal point of Community life. This was astounding, considering France's absence. At the same time, that was the secret. The Council – not only the monthly gathering of the ministers, but also the weekly meetings of the ambassadors – served as an institutional round table for the Five. They realised that they could only stare down France if they co-ordinated their positions and did not let themselves be played against each other. The more important thing was that the Five went about their business *as if they were Six*. To be sure, no weighty decisions were taken in the period of the empty chair, and the absent party did lend its written approval to the decisions that were taken, but nonetheless the Five kept the European machine running. It was to its own consternation that Paris saw this. In November, Couve de Murville spoke dismissively of 'a *pseudo-Council*'[29] – ostensibly no more legitimate than a pseudo-czar. Indeed, all France could do to support its claim that the states were acting intergovernmentally was to attempt to de-legitimate a functioning Community institution. From the perspective of the Five, on the other hand, the French were violators of the treaty and the Council was symbolically strengthened. In the absence of one of them, they discovered the existence of a union separate from the member states. The empty chair made the independent existence of the table even more evident.

It was the status of the *foundation* that was of greater public importance than these diplomatic subtleties. This was the second matter in which the events *before* Luxembourg clarified the relationship between the ensemble of states and its members and once again reinforced the European order. We saw how Paris wanted to eliminate certain provisions while the Five remained faithful to the Treaty of Rome. The General may have had exact ideas about which provisions of the foundational treaty did not suit him, but he was less specific about how to implement those ideas. In mid-October he said to the Dutch ambassador that he did not care as long as it was all in writing.[30] Internally, he expressed his preference for a collective statement from the governments, 'without signatures, ratifications and the whole nine yards'.[31] Obviously, the Elysée was thinking of an international-legal accord to amend the foundational pact. That struck a nerve with the Five. Several days after Couve's public call for a 'complete revision', the Five swore their constitutional oath: that the pact of Rome remain intact. The result of the Five's constitutional oath was that the Community was more securely anchored in the political life of the member states. The formidable amendment procedure, seen in later

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[29] Couve de Murville, 13 Nov. 1965, quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 68.

[30] De Gaulle, 18 Oct. 1965, quoted in: ibidem at pp. 255-256.

[31] De Gaulle, 15 Sept. 1965, in: Peyrefitte, *supra* n. 5 at pp. 299-300 ('signatures, ratifications et tout le saint-frusquin').

years as a *brake* on collective development, served as *protection* in this situation. The Community would no longer have to fear being unravelled at the whim of the governments, but rather could derive confidence from the double unanimity of the signing governments and the ratifying parliaments/peoples.

Through the crisis, the foundational pact was consecrated in yet another way. It was the role of parliaments and peoples as the crisis went on that was truly remarkable. Specifically, it was the pressure that the Italian, German and Dutch legislatures placed on their respective governments that made the collision of 30 June inevitable. Likewise, it was the electoral results of 5 December that narrowed De Gaulle's margin of freedom and forced Paris to return to the table. From the perspective of the European order, the French presidential elections were a glittering example of the ECJ's assertion in *Van Gend & Loos*, less than three years before, that the foundational pact 'refers not only to governments but to peoples'. To sum up: on the one hand the governments of the Five swore their allegiance to the letter of the foundational pact, and on the other hand the populations of the *Six* affirmed the spirit of the pact.

In both of these matters together, the European order acquired enough independence from the member states between July and December 1965 in order to survive the watershed date of 1 January 1966. In the absence of the government of one of the founding members, the Community had retained a communal voice and reinforced its foundations. It was on that basis that the Compromise could become effective.

(*2. the text*)

Having examined the events beforehand, we now arrive at the second point: the moment of the *text*. To what extent do the formulations of the Compromise of Luxembourg support the interpretation that the Compromise was a decisive moment of passage of the European order as a whole that cannot merely be reduced to the veto right?

The first provision expresses that all delegations were convinced that if a matter were very sensitive for one of them, they would have to negotiate until unanimity became possible.[32] None of the governments was of the opinion that just because the treaty permitted it, they had to vote on everything all of a sudden. Each of them knew that it could be the one struck by the sword of the majority someday. The debate concerned the question of *how long* they would have to continue negotiating in such a case. They had not succeeded in drafting hard and

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[32] Thomas Beukers, 'To agree or not to agree. Twee gevallen van constitutionele praktijk in de EU', unpublished master's thesis (University of Amsterdam 2004) at pp. 39-40; W. Nicoll, 'The Luxembourg Compromise', 23 *Journal of Common Market Studies* (1984) p. 35 on p. 36.

fast rules for that: for instance, Spaak had made the proposal that negotiation be limited to at most three rounds, but Couve had rejected it. Ultimately, they settled on the open formulation 'within a reasonable time'.[33] This gave them *time* without stretching it out into infinity.

The conflict in the Compromise is encapsulated in the second and third provisions. The parties did not agree on what should happen if no accord could be reached after postponement. France was of the opinion that no decision-making could take place in that case. (Apparently, Paris considered a period to only be reasonable if it meant that unanimity could be reached.) In the French interpretation, then, all member states had a right of veto on sensitive matters. The other member states did not seem to agree. This difference in opinion was expressed in the Compromise, but not resolved. The text says nothing about a *right* of veto, but between the lines it does contain a unilateral announcement that the veto would be *used*. As a highly placed Dutch official formulated it afterwards: 'Five partners established that the sixth would violate the treaty.'[34] However, as a highly placed French official noted (as if to answer the Dutch official):

> What could the other five countries do? Take decisions by majority vote as of 1 January 1966, establish that France refused to apply these decisions, and take it to the European Court of Justice for violating the treaty? This was conceivable, but absurd. The Community would have blown up.[35]

Wisely, the negotiators in Luxembourg left the solution to the conflict up to future practice – although everyone knew how that would end up.

To jump ahead: indeed, when France made its first appeal to a vital interest that was threatened by a decision supported by a majority on the Council, its request was honoured. The veto stood. It was not until that precedent was created that the *use* of a veto as announced in the text turned into a *right* to veto: it became a legal custom, or, perhaps better yet, a 'constitutional convention'.[36] Although the Five had agreed amongst themselves not to invoke the text, they did not hesitate to make use of it themselves. As such, 'Luxembourg' became a right for all, not a privilege for one.

[33] According to the Dutch delegation, this formulation was contributed by Luns; most reports attribute the mediating role to Colombo and Spaak.

[34] J. Linthorst Homan, *Wat zijt ghij voor een vent. Levensherinneringen* (Assen, Van Gorcum 1974) on p. 266, quoted in: Beukers, *supra* n. 32 on p. 40.

[35] Marjolin, *supra* n. 5 on p. 349. ('Que pouvaient faire les cinq autres pays? Prendre après le 1er janvier des décisions à la majorité, constater que la France refusait de les appliquer, la traduire ensuite devant la Cour de Justice de Luxembourg pour violation du traité ? C'était concevable, mais absurde. La Communauté eût volé en éclats.')

[36] The last term from Kaiser, *supra* n. 1 on p. 24, extensively defended in Beukers, *supra* n. 32 at pp. 46-59.

The concluding fourth provision is one of agreement and made an end to the empty chair crisis. The Six declare that the difference of opinion 'does not prevent' them from resuming their common work 'in accordance with the normal procedure'. This last turn of phrase is viewed by some as France's implicit acknowledgement that its behaviour in the preceding period had not been 'normal'.[37] This reading seems rather too preachy. It is better to apply those words to the behaviour of the Five. They express the political fact that the Community's activities during the French absence may have gone on in an unusual way, but were *not suspended*; in other words, they acknowledge that Europe *existed* between 30 June 1965 and 29 January 1966.

Calling the entire text a 'Compromise' is entirely correct. Nevertheless, in the literature it is fashionable to grumble that the Six 'actually did not make a compromise' in Luxembourg, but rather made an 'agreement to disagree' at best – apparently a more deprecated category.[38] This disdain is peculiar and superficial. Formally, the text is a political *accord*. An accord of historic importance, no less. After seven months of uncertainty it brought France back to the table. It made it unlikely that the crisis would repeat itself. Threatening to withdraw was no longer credible because it was superfluous, as even Paris realised.[39] In terms of its content, the text is an *encounter* of two conceptions of the European order. Which is no small feat, considering how irreconcilable the parties' opinions were. Yet this was accomplished, after a recess of ten days, at the end of the fourth day of the Luxembourg conference. The French acknowledged the legal reality of the foundational pact, which they could not have modified if they tried. The Five acknowledged the political reality of important national interests, which could not

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[37] See, e.g., Pescatore, *supra* n. 17 on p. 244.

[38] Five examples over time: P. Van der Meerssche, *De Europese integratie* (Leuven, Davidsfonds 1970) on p. 258 ('Te Luxemburg was men het dus alleen eens over het feit dat men het niet eens kon worden'); Emile Noël, 'Réflexions sur le processus de décision dans le Conseil des Communautés européennes', in *Mélanges offerts à Pierre-Henri Teitgen* (Paris, Pedone 1984) p. 345 on p. 346 ('Il n'y a toujours pas de "compromis" de Luxembourg. Il y a simplement un constat de désaccord, ou tout au plus accord pour constater le désaccord.'); De Ruyt, *supra* n. 25 on p. 12 ('le fameux "compromis de Luxembourg" qui est en réalité un constat de désaccord'); B. Olivi and A. Giacone, *L'Europe difficile. La construction européenne,* 3rd edn. 2007 (Paris, Gallimard 1991) on p. 90 ('... qui est généralement connu sous le nom de "compromis" de Luxembourg. En réalité, plus que d'un compromis véritable, il s'agissait plutôt d'une juxtaposition des différentes thèses ...'); D. Dinan, *Ever closer Union. An introduction to European integration,* 3rd edn. 2006 (Basingstoke, Macmillan 1999) on p. 51 ('a short declaration ... which amounted to an agreement to disagree'). Even in Ludlow's extensive account of the crisis the outcome is presented as 'a *gentleman's disagreement* on majority voting rather than the gentleman's agreement that has been widely discussed' (N.P. Ludlow, *supra* n. 5 on p. 101, *see also* on p. 204).

[39] Although the French delegation originally wanted to bracket the obligation to agreement with the warning '*pour éviter des difficultés graves*', it dropped this demand. Quoted in: Palayret et al. (eds.), *supra* n. 5 on p. 147.

be played down in the name of Europe. *The Compromise forces both worlds to relate to each other within the European order.* This is not merely a quick compromise achieved by splitting differences and watering down the wine. This is a fruitful, essentially political compromise that creates a new common reality. Within that reality, all involved are sentenced to each other's company.

The disdain toward the Luxembourg Compromise must be deflated one more degree. When one thinks about it, the commiseration about an agreement to disagree is incomprehensible. This is the basic rule of every political order. It is the baseline agreement amongst the members of a community that makes room for conflicts of a type that no longer splits the community, which ever since Athens we have called 'politics'. An accord to disagree is like a bare-bones constitution that makes it possible for parties and opinions to do battle in public, the form that makes a debate about the content possible. Now the deeper sense of the term 'constitutional crisis' is revealed for the events of 1965/66. The collision between the one party, which was thinking far ahead about a European government and parliament and the other party, which cared not for a suprastatist union, ends in the constitutional minimum for a political community: the acknowledgement of room for irresolvable conflict. With this, the Community breaks out of the strait-jacket of the treaty and of legal truth, which offers just as little room for compromise as religious truth does, and opens itself up to politics. In this way, the Luxembourg Compromise looks like one of the historic accords in which warring parties emerged from a sometimes bloody, hopeless impasse by setting their deepest convictions aside, thereby creating a foundation for political coexistence. Seen in this light, the Compromise may well deserve the same standing in the history of the European order as the Edict of Nantes (1598) does in French history or as the Pacification of 1917 does in Dutch history.

This claim gives rise to new questions. If the Luxembourg Compromise opened a space for European politics, then what was that exactly? Did that not exist before? As to that last question: the innovation is *not* on the part of the states severally; they – of course – had continued to act in accordance with centuries-old rules of power and interest, even after the foundational pact. The innovation is on the side of the ensemble of states. The young Community, as represented by the Commission, had systematically shunned the uncertain world of politics by its own doctrine and inclination, had sought support for its decisions in the text of the treaty, had spoken to the states in the language of obligation, law and competences – and had ideologically elevated this clerical weakness to the level of a promise by enlisting the theory of functionalism, according to which a new world era had dawned, blurring the boundaries between bureaucracy and politics.[40] The Luxembourg Compromise created a first opening onto this claustro-

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[40] Reality proved to be immune to doctrine, as Hallstein's longing for red carpets reveals – a practical misstep that ironically enough heralded the theoretical decline of functionalism.

phobic world by asserting the right of existence of three misunderstood political concepts in Community life: *interest, time* and *authority.*

The term *interest*, open and elastic, is the first to appear in the text. The common point of departure in the accord is the question of what to do when 'very important interests' are at stake for one or more of the 'partners'. Since it is the member states that are meant by the 'partners', this brings us into the world of *national interest* or *general interest* (although these terms are avoided). In the European political tradition, the general interest is not a fixed concept, but rather is the subject and the result of a permanent political struggle. It is therefore not surprising that the six governments in Luxembourg did not draft any common criteria to determine which interests were 'very important' and which were not. Fixed criteria would have slammed the very door shut that the political solution had just popped through. (In a certain sense, the ministers would have reduced themselves to civil servants.) Yet the notion of 'very important interests' is not entirely arbitrary, as the future would show. It is striking, finally, that the Five took the opportunity, as the final clause of point 1 shows, to also grant the Community 'interests' – a gift to the ensemble that the foundational pact had been too stingy to grant.

Secondly, in close connection with the interests, the Compromise introduces *time*, specifically in the 'reasonable time' available to achieve a solution. It is a matter of time that is gained, time as postponement. The intention of this is to create a chance for *negotiations.* After all, whenever majority voting is rejected (and when the use of force is not an option), only negotiation remains as a means of lifting a blockade amongst equal partners. That political practice is as old as the European system of states.[41] However, traditional diplomacy was something that was explicitly discouraged in the Community as conceived by Monnet or Hallstein. The problems were seen as technocratic and the partners supposed to be full of the *esprit communautaire*. In a certain way, every question had a 'right' answer, both in a technical and a moral sense, that had already been formulated by the Commission. Following this logic, a request for postponement appears to be little more than a sign of unwillingness, and so there is no room for negotiations. However, things had been different in practice. Ever since the Community's formative years, the Council of Ministers – and its front door, the ambassadors' meeting – had resolved many an impasse by making package deals. In this political wheeling and dealing with agricultural prices, financial responsibilities and political posts, the Council showed itself to be a direct successor of the early-modern peace conferences where European monarchs exchanged territory, redrew borders, arranged marriages and made alliances until a 'balance of power' had been achieved. In the

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[41] C.A. Colliard, 'L'irréductible diplomatique', in *Mélanges offerts à Pierre-Henri Teitgen* (Paris, Pedone 1984) p. 109 at pp. 124-126; W.T. Eijsbouts, 'Constitutional sedimentation', 1 *Legal issues of European integration* (1996) p. 51 on p. 55.

Luxembourg Compromise, the Five grudgingly acknowledged that this '*irréductible diplomatique*' (Colliard) was part and parcel of community life. Ever since then, the functioning of the European order is unthinkable *without* the permanent requests for postponement, the playing for time allowing all of the interests to be reconciled.

The third element, *authority*, does not explicitly appear in the text of the Compromise. Yet if that was not the source of the French demand to retain the veto, it at least provided a motivating reason for the other governments to tacitly concede the point. Governments realise that signing a common decision does not yet guarantee that the population will accept it as authoritative. In order to impose that authority, a national government can use force, if need be. However, if the state in question had been outvoted in establishing a certain European decision, this would lead to a sticky situation. Minister Couve explained it thusly to a French legislator who was complaining about the agricultural prices with the argument that these are really set by majority vote: 'Do you really think that it is possible to decide, say against Germany's will, about grain prices? Who then would confront the uprising of the German farmers that could result, the Commission or the member states?'[42] The governments of the Five, too, were seized of this dilemma – more so than their parliaments. The Community did not have the means to force compliance with a common decision against the will of the government involved. Past experience with the Coal and Steel Community had demonstrated that it was not enough to call an institution '(High) Authority' in order to grant it authority. In the Luxembourg Compromise the Five now acknowledged, under pressure from De Gaulle, that the authority of European decisions rests on the member states. This realisation introduced a political dimension into the Community that the foundational pact had perhaps optimistically neglected to address.

A hundred years before, Walter Bagehot had formulated the question succinctly:

> There are two great objects which every constitution must attain to be successful … Every constitution must first *gain* authority, and then *use* authority; it must first win the loyalty and confidence of mankind, and then employ that homage in the work of government.[43]

First authority, then government. In 1965-66 the Five (and the Commission) found out that the would-be founders of a European government could not reverse this royal order. Seen from Bagehot's perspective, the Treaty of Rome was

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[42] Couve de Murville, *supra* n. 5 on p. 298. ('Je demandais s'il croyait vraiment possible de décider, par exemple contre l'Allemagne, du prix du blé. Serait-ce alors la Commission ou les Etats-membres qui feraient leur affaire de la révolte qui risquerait d'être la réaction des paysans allemands?')

[43] W. Bagehot, *The English Constitution* (London, Penguin 1963 [1867]) on p. 61.

little more than a manual-cum-script for taking decisions, a set of administrative rules without overarching lines of authority. It was not until the Compromise that the Community melded administration and authority. And in so doing, it got itself its first, rudimentary 'constitution'.

These three political elements – interest, time, authority – enmeshed and reinforced the European and national orders to the point that they could no longer be disentangled. The governments are the link; they come first in a double role. In advance of decision-making, the Luxembourg veto ensures that a common decision will not counter important national interests. During the negotiations it functions not only as a right, but as an obligation to come to a common decision. Afterwards, the veto right (particularly insofar as it was not invoked) forces the governments to take *responsibility* for the decision taken before their respective populations.

(*3. events afterward*)

We have so far sketched the picture of a Europe, not quite capable of making the leap to majority voting, which thanks to the Luxembourg Compromise was able to stand with one foot on each side of the foundational river and thereby prevent a rupture. Now we will fill this picture in. As of 1966, it was up to each state to decide whether to put its weight on the old power politics foot (veto) or on the community treaty foot (majority). This metaphor also clarifies the previously mentioned circumstance that no one seems to know how long the Compromise was in effect: no visible leap is necessary to reach the other side of the river.

In light of this we must now take the *events afterward* into consideration, having dealt with the events beforehand and the text. In the standard (communitarian) account, the noxious effect of the Compromise after 1966 is highlighted, followed by its inevitable decline, and finally the happy ending of a return to pure adherence to the treaty.[44] This is half of the story. However, the fact of the matter is that the political forces and notions that the Compromise introduced to the European order *did not* disappear with its decline. On the contrary, those notions – interests, time, authority – gradually settled *into* the treaty. That is the half of the story that is usually omitted, neglecting the essence: *how the legal order turned into a political one.*

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[44] For this standard account of the 'post-Luxembourg' history, *see* for instance: Nicoll, *supra* n. 32; J.-P. Jacqué, 'L'évolution du triangle institutionnel depuis l'élection du Parlement européen au suffrage universel', *Mélanges offerts à Paul-Henri Teitgen* (Paris, Pedone 1984) pp. 183-208; De Ruyt, *supra* n. 25 at pp. 112-118; A.L. Teasdale, 'The Life and Death of the Luxembourg Compromise', 31 *Journal of Common Market Studies* (1993) p. 567; Hayes-Renshaw and Wallace, *supra* n. 25 at pp. 259-299.

Let us first take a look at the reign and fall of the Compromise. As of 1966, an intemperate veto culture developed in the Council of Ministers. Just about all decisions were taken unanimously, even when there were no 'very important interests' at stake. Although the Compromise was only invoked perhaps ten times in fifteen years, it was constantly hanging over everyone's heads. It took only one partner to voice objections for the discussion to swiftly run aground. Hundreds of commission proposals never made the finish line. (A side effect of the veto was that these proposals could never be decisively *rejected*, which made it appear as if the work was piling up.) Complaints about European stagnation became commonplace in the seventies. Contrary to community lawyers' claims, the Compromise was integrated in community life. This was also the British government's understanding on the eve of British accession in 1973. When at the end of the decade, three 'wise men' consulted with the capitals to find out what was on their minds, none of the by then nine governments was in favour of taking a majority vote when the very important interests of one of the member states were at stake.[45] Apparently, the Five had reconciled themselves to the Compromise.

However, there had been several attempts to cut back on the use of the veto, at least to within the boundaries that had been meant in Luxembourg. A 1974 statement to that effect by the heads of government remained without consequence, although some observers subsequently noted that there was a limited increase in the number of majority decisions.[46] It was also suggested that any government using the veto should put its reason for using it in writing, so that it would have to take public responsibility for any ensuing deadlock. Slowly, things changed. An important milestone was passed on 18 May 1982. For the first time, the Council took a vote against the express wishes of a member state. It was the annual decision on agricultural prices. The British had agreed with those prices in an earlier phase, but now wanted to block the decision-making with a veto because of its discontent about the budget – another matter. This was not accepted. The 'very important interests' of Luxembourg, in the view of a majority on the Council, could only be related to the matter at hand. The Belgian chair went on with the vote. London claimed to be the victim of the first-ever violation of the Compromise, but was only supported by Copenhagen and Athens – and outvoted. It was striking that Paris took sides with the original Five (and Dublin). As the French minister of agriculture formulated it when it was over: her government had not

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[45] Marjolin, *supra* n. 5 on p. 351. Together with the Dutch ex-premier Barend Biesheuvel and the British politician Edmund Dell, the author, a former French European Commissioner, was one of the three 'wise men' whose *Rapport sur les institutions européennes* was published at the beginning of 1980.

[46] According to the Belgian diplomat De Ruyt, between 1966 and 1974 a vote was held in the Council a total of between six and ten times, between 1975 and 1979 approximately 35 times and between 1980 and 1984 about 90 times. (De Ruyt, *supra* n. 25 on p. 116.)

abandoned the Compromise, but 'it has never had and cannot have the purpose of allowing a member state to paralyse the functioning of the Community.'[47] This was an important precedent. On the one hand, a member state needed to convince its partners in the Council that the national interests invoked were serious and relevant; on the other hand, the interests of the Community as a whole had to be put in the balance. This was the first time that the political notion of 'interest' counteracted the veto in favour of the ensemble.

The Compromise was not out of the picture by a long shot. But this vote in 1982 was a turning point. Four political circumstances had contributed to the change. First of all, as of 1979 there was a directly elected European Parliament. It quickly discovered that majority decision-making in the Council was a condition for its own independent political existence and began to agitate for it – which resonated with the German and Italian governments, sensitive as they were to parliaments. Second, Thatcher had come to power in 1979 in Great Britain: she irritated her partners with her nonchalant way of creating blockades. Third of all, in January 1981, Greece had acceded as the tenth member state and Spain and Portugal were in the waiting room as numbers eleven and twelve: the increase in the club's membership reinforced the argument that the veto was becoming impractical. Fourth, in May 1981, the French had elected Mitterrand, the first president since the General who did not need to rely on the support of the Gaullists. This last circumstance was crucial. However, no one took full advantage of the opening at first, as was revealed at the collective signing of a Solemn Declaration on Europe (1983). While the old Five – Germany, Italy and the Benelux – were proponents of abolishing the Luxembourg veto, France stuck by it, as did the four new member states.

Mitterrand's conversion came a year later; after his socialist experiment had ended in a fiasco, he sought to model Europe into his new projection screen for hope and statesmanship. On 24 May 1984 – three weeks before the European elections – the French president said in the Strasbourg Parliament, interrupted by applause:

> How can the complex and diverse system that the Community has become be governed according to the rules of the Diet of the former Kingdom of Poland, in which every member could block the decisions? We know how that ended up. It is time to return to a normal and more promising practice; the French government, which was at the origin of this compromise, has already proposed to limit its use to circumscribed cases. The increasing practice of voting on important questions heralds *the return to the Treaties*.[48]

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[47] Edith Cresson, quoted in: Jacqué, *supra* n. 44 on p. 188. ('il n'a jamais eu et ne peut avoir pour objet de permettre à un Etat membre de paralyser le fonctionnement de la Communauté'.)

[48] Mitterrand, speech before the European Parliament 24 May 1984. Italics added. ('Comment l'ensemble complexe et diversifié qu'est devenue la Communauté peut-il se gouverner selon dès

With this highly solemn speech, by turns a European profession of faith, the fate of Gaullist doctrine was sealed. The road to majority decision-making was open. Particularly striking was the use of the phrase '*the return to the Treaties*', which was popular in Brussels at the time. The term is a brilliant lie. It referred to a return to a place where Europe had never been. The voyage to *terra incognita* that De Gaulle had refused to embark on, on 1 January 1966, was now being spun by Mitterrand as a return to the home port. This is the ingenious thing about the Luxembourg Compromise: the political leap to majority decision-making could be dressed-up as the repeal of a previous legal error. And so, Europe founded itself retroactively.

From this point forward, it went quickly. At the Fontainebleau summit in June 1984, the heads of government set up an institutional committee; a year later in Milan under leadership of Craxi, they decided that an informal return to the treaty was not enough and that a revamp was necessary. In the first change since 1957 to the European foundations, majority decision-making was introduced to five articles of the foundational pact.[49] The substantial goal was the creation of an internal market as of 1992, but the formal political relationship between the member states severally and the ensemble was changed along with it. This was promptly revealed on 20 July 1987 at the first meeting of the Council after the new treaty had gone into effect. The ministers took a decision establishing new rules of procedure. The council president, who previously had called a vote on his own initiative, was now obliged to do so upon the request of a majority of ministers.

Did the Luxembourg Compromise still exist after the Single European Act went into effect? Community insiders were of the opinion that they were finally relieved of this snag. This vision is supported by the fact that in practice, decision-making did finally get up to speed. The principle of majority voting was no longer disputed. However, it mainly works as a means of exerting pressure to come to an agreement. To this day, the Council of Ministers largely decides by consensus, but consensus is now reached 'in the shadow of the vote' rather than 'in the shadow of the veto'. [50] The pressure of the whole on the parts has therefore increased. The Luxembourg veto is no longer successfully invoked. In this vision, the last time that that happened was shortly before the Milan Summit in 1985, with a German

règles de la diète de cet ancien royaume de Pologne, dont chaque membre pouvait bloquer les décisions? On sait comment cela est fini. Il est temps de *revenir* à une pratique plus normale et plus prometteuse, le Gouvernement français, qui avait été à l'origine de ce compromis, a déjà proposé d'en restreindre l'usage à des cas précis. La pratique plus fréquente de voter sur des questions importantes annonce *le retour aux Traités*.')

[49] Aside from the newly inserted Art. 100A for internal market legislation, these were the provisions on the free movement of workers, services and capital (formerly Art. 49, 59 and 70) as well as on air and sea transport (formerly Art. 84).

[50] Terms in: J.H.H. Weiler, 'The Transformation of Europe' [orig. 1991], in idem, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) at pp. 71-72.

veto of the agricultural prices. On the other hand, the British foreign minister Howe stated during the ratification debate in the House of Commons in 1986:

> as a last resort, the Luxembourg Compromise remains in place untouched and unaffected … [It] is not a provision of the Treaty; *it is a component of political reality in the Community* … [and] is in no way affected one way or the other by the Single European Act.[51]

The French premier Bérégovoy made comparable claims in 1992, at the time of the ratification of the Union Treaty, in the National Assembly. In 1993, Paris publicly threatened to unilaterally block a European statement in trade negotiations with America.[52] According to a Dutch agricultural minister, the Compromise was still an unspoken presence above the table in the agricultural council well into the mid-nineties.[53] Seen in this light, Luxembourg was still alive (even if not visibly kicking).

The gap between the two visions can be bridged. The change in practice in the Council and the aforementioned political statements both reveal that from 1987 to 1993, there was a return to the French position of 1966: the Compromise as the possibility of a blockade *in extremis*. Nonetheless, in twenty years the interests at stake had shifted so much toward the collective side that the political veto was practically unusable as a weapon in negotiation. It was still possible to threaten to shoot, but even Paris and London feared that actually shooting would damage more interests than it would protect.[54] The result was a balancing act. In reality, the member states were entirely standing on the community foot as of 1987, even if for five years afterwards they were still telling the citizens at home that the other foot was still on the ground.

And so, all the member states gradually accepted that they were embedded in a constitutional order where they could be outvoted on certain important issues. Of course there are still a number of treaty provisions that require unanimity. These 'legal' vetoes, which as such should be clearly distinguished from the Luxembourg veto, have been a significant point of contention amongst the states since the nineties in the quasi-permanent revamping of the European foundations. However, the crux is that *on the issues for which and to the extent that the Treaty prescribes*

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[51] Sir Geoffrey Howe, quoted in: Teasdale, *supra* n. 44 at pp. 574-575. Italics added.

[52] Teasdale, *supra* n. 44 at pp. 575-576.

[53] Personal communication of Jozias van Aartsen, Dutch agriculture minister from 1994 to 1998, to the author, 12 Sept. 2007.

[54] Teasdale, *supra* n. 44 on p. 578, provides the example of the British attempts in 1992 and 1993 to block two directives on European social policy (parental leave and working hours); London considered invoking the veto but decided not to 'on the grounds that the exercise might backfire', and fought the directives via the ECJ instead.

it – and that was what Paris refused on 1 January 1966 – the transition to majority voting would seem to be complete. The world of De Gaulle is no more. At the same time, however, it is important to understand that Europe has not yet gone on to adopt a Hallstein model.

This brings us to the other, neglected half of the story subsequent to the Luxembourg Compromise. The Compromise did not simply *wither away*, as the standard account would have it. It makes more sense to say that it has been *succeeded* – and to be sure, on both banks of the river that it formerly spanned. On the one hand, the political notions of interest, time and authority have gained a place in formal community life, whatever Brussels orthodoxy may hold to the contrary. On the other hand, the principle of majority voting has by now become part of the untamed political life of the states. We can consider 29 March 1994, the moment that that fact came to light, to be the end of the passage hallmarked by the Luxembourg Compromise.

As to the way in which interests and time became part of the European order, it shall suffice to refer to the most extensive institutional reform between 1966 and 1994: the establishment of the European Council of heads of government (1974), an old French wish. This periodic meeting of the leaders was part of the solution to the blockades resulting from the Luxembourg veto.[55] When the ministers meeting in their various special configurations – agriculture, transport, trade – would negotiate about *particular* interests and run aground, the European Council served as a final decision-making body to make the tough decision that was in everyone's *general* interest. Shifting a decision to the leaders meant buying time, on the one hand, and being able to weave more particular interests into a generally acceptable accord on the other. This unpredictable negotiation forum was kept formally outside community affairs for a long time due to virulent resistance from the Netherlands, Belgium and the Commission in particular (in much the same way as the existence of the Luxembourg Compromise was rationalised away). In fact, the periodic Summits soon became an essential component of the European order.[56]

When the ministers began taking their decisions in the shadow of the vote, a fascinating collaboration between the Council and the European Council emerged. A minister who was in danger of being outvoted on a particular interest could sometimes employ a diplomatic emergency manoeuvre in order to delay the decision, calculating that his boss might be able to win a concession at the next Sum-

[55] Colliard, *supra* n. 41 at pp. 124-126. *See* point 1.2 of the conclusions of the Paris Summit establishing the European Council: 'recognizing the need for an overall approach to the internal problems involved in achieving European unity'.

[56] J. Werts, *The European Council* (Amsterdam, Elsevier 1992) at pp. 57-76.

mit. This would often happen informally, for instance by blocking another (arbitrarily chosen) matter that was supposed to be decided unanimously, as long as the matter of contention remained on the table.[57] In European foreign policy, however, this procedure was formalised. The decisions determining broad policy guidelines are taken by consensus, but some implementing decisions are taken by majority vote. It is noteworthy how the Treaty of Amsterdam (1997) provides for an exception to this:

> If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by a qualified majority, request that the matter be referred to the European Council for decision by unanimity.[58]

This provision, which is known as the *emergency brake*, can be read as the *first successor in treaty law* to the Luxembourg Compromise. The elements are the same: considerations of national interest give rise to a right of postponement until the next Summit. (In passing, it becomes apparent that it is the very chink in the legal armour of the treaty created by the Luxembourg Compromise that the European Council used to barge in as a political body.) In the Lisbon Treaty of 2007, this emergency brake is still there, but the formulation has been narrowed to '*vital reasons of national policy*' – a choice of words redolent of memories of the Compromise.[59]

More important, however, is the *first political successor* to the Compromise of Luxembourg. This is the so-called 'Ioannina Compromise' of 29 March 1994. It is an accord amongst the foreign ministers reached in the Greek town of the same name, which ended a constitutional impasse about voting weights.[60]

The impetus was the expansion of the Union with Finland, Austria and Sweden as of 1995. This had consequences for everyone's relative voting weight. After all, the more members there were, the harder it would be for an individual mem-

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[57] A recent example is the Bulgarian government's threatening in Oct. 2007 not to sign the Association Treaty with Montenegro as long as the European Central Bank had not approved the Cyrillic spelling of 'euro'. The problem was solved in the European Council at Lisbon, 18-19 Oct. 2007 – in Sofia's favour.

[58] Art. 23.2 TEU. A similar provision was also introduced for justice policy (Art. 40.2 TEU), but this was discarded again with the Treaty of Nice.

[59] Future Art. 15b TEU. The Lisbon Treaty also introduces new emergency brakes in the area of justice, specifically for cross-border family law (a veto period for national parliaments, future Art. 65.3) and criminal justice co-operation (referral to the European Council, future Art. 69A.3). Numbering according to *OJ* [2007] C 306, 17.12.2007.

[60] About 'Ioannina', *see* Beukers, *supra* n. 32 at pp. 60-76.

ber state to block a decision. A coalition of two large countries and one small one would no longer suffice for a blockade. Great Britain and Spain expressed their concern about this. They threatened to block the accession of the new member states. London was under heavy pressure from the House of Commons not to give up any power; and Madrid had never been enthusiastic about the accession of three rich northern countries. The ten other member states, however, refused to give in to the British-Spanish demands. In particular, the Dutch, the Belgians and the European Parliament – which could veto the accession treaty – feared stagnation in European decision-making. It was a complete impasse between the two camps.

The Greek holder of the presidency sought to make *time* the way out. His proposal was a *two-month postponement* for a decision encountering resistance from a minority that could have thrown up a blockade under the old points system. London and Madrid did not agree to this. During the meeting in Ioannina, the parties forged a compromise:

> If Members of the Council representing a total of 23 to 26 votes indicate their intention to oppose the adoption by the Council of a Decision by qualified majority, the Council will do all in its power to reach, *within a reasonable time* […] a satisfactory solution that could be adopted by at least 68 votes.[61]

The similarity to the first provision of the Luxembourg Compromise is fitting. The Ioannina Compromise makes a provision outside the treaty for extra time, of indefinite length, for the member states to negotiate until the decision can be adopted by the usual majority. The British and the Spanish could live with this. Their ten partners assented as well, the Netherlands the most reluctantly of all. Referring to the Luxembourg era, the Dutch minister said, 'I absolutely do not want to see that period repeat itself'.[62]

The Ioannina Compromise is legally *non*-binding in the view of community lawyers.[63] The ministers had not changed the treaty with their accord. One can recognise the disputed status of the Luxembourg Compromise: accord outside the foundational pact, political reality parallel to legal reality. The recapitulation is especially significant because of the *difference* between the two situations. In 1966, the political conflict had to do with retaining the veto; in 1994, it had to do with retaining a certain blocking minority. The very fact that the member states circumvented the treaty at the crisis moment of Ioannina in order to express their

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[61] *OJ* [1994] C 105/1, 13.4.1994. Italics added.

[62] Kooijmans, 27 March 1994, quoted in: Beukers, *supra* n. 32 on p. 66.

[63] They point out that it was published in the C-series of the Union's *Official Journal*, in which notices are published, and not in the L-series where binding decisions are published.

common situation goes to show *that all states recognised majority voting as the political reality*. The difference between the political foot and the legal foot was no longer a matter of veto versus majority voting, but of a lighter majority versus a heavier majority. The states now stood politically and legally on the side of the ensemble. After twenty-eight years, Europe had made the step across the foundational river.

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