



Passerelle clauses in the EU Treaties

Opportunities for
more flexible
supranational
decision-making



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Opportunities for more flexible supranational decision-making

Passerelle clauses are a mechanism for introducing Treaty changes of a very specific nature. They modify the decision-making rules that affect acts of the Council, by allowing a shift from unanimity to qualified majority voting or from a special legislative procedure to the ordinary legislative procedure. This study explores the differences between *passerelle* clauses and other flexibility measures (enhanced cooperation, the flexibility clause, and accelerator or brake clauses) and explores the main legal issues surrounding the introduction, revocation, and effects of *passerelle* clauses and their relationship with the other Treaty revision mechanisms. The analysis focuses not only on the two general *passerelle* clauses set out in Article 48(7) TEU, but also on the specific *passerelle* clauses contained in the Treaties in the field of environment, social policy, the multiannual financial framework, common foreign and security policy, family law and enhanced cooperation. Finally, the study outlines recent Commission proposals to use general and/or specific *passerelles* in certain policy areas and the approaches taken by other institutions with respect to this constitutional tool.

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Executive summary

Passerelle clauses are mechanisms to make decision-making in the EU more flexible and fast, but are as yet unused. A distinction can be drawn between general and specific *passerelles*. Both are concerned with modifying the decision-making of Council only, and cannot be used to modify the majorities or decision-making rules of other institutions (e.g. Parliament). The two general *passerelle* clauses (the first and second sub-paragraphs of Article 48(7) of the Treaty on European Union – TEU) are a true innovation of the Lisbon Treaty, although some of the current special *passerelle* clauses already existed, albeit unused, before the Lisbon reform. Most frequently, *passerelle* clauses are referred to as a means of bypassing unanimity in Council decisions, shifting from unanimity to qualified majority voting. This is true of only one type of general *passerelle* clause however – Article 48(7), first subparagraph (TEU). There is also a second type of general *passerelle* clause (Article 48(7), second subparagraph, TEU) that offers a way to move from a special legislative procedure to the ordinary legislative procedure, in that way enhancing the role of Parliament and introducing a higher level of transparency to supranational decision-making. Use of both forms of general *passerelle* must be unanimously authorised by the European Council and imply Parliament's consent, in addition to the non-opposition of national parliaments.

The six special *passerelle* clauses, two of which existed prior to the Lisbon reform (social and environmental), are aimed at modifying decision-making in the same way as general *passerelles* but only in certain sub-areas of a specific policy field in which qualified majority voting or the ordinary legislative procedure do not apply. These six special *passerelles* apply in the fields of i) common foreign and security policy (Article 31(3) TEU); ii) family law with cross-border implications (Article 81(3) of the Treaty on the Functioning of the European Union – TFEU); iii) social policy (Article 153(2) TFEU); iv) environmental policy (Article 192(2) TFEU), v) multiannual annual financial framework (Article 312(2) TFEU); and vi) enhanced cooperation (Article 333 TFEU). They differ from the general *passerelles* because, with some exceptions, they require a less elaborate procedure for their approval and introduction. Also, the role of Parliament is somewhat reduced (no role or only consultation) whereas the Commission's role as proponent is enhanced, in contrast with the general *passerelles* where the Commission has no formal role.

Passerelle clauses as a constitutional tool must be distinguished from other flexibility mechanisms contained in the Treaties that either introduce differentiated integration with respect to Union policies (enhanced cooperation, opt-ins, opt-outs, etc.) or enlarge Union powers under certain circumstances (flexibility clause). The main difference with respect to these mechanisms is that *passerelle* clauses do not fragment the uniform application of EU rules and policies from a territorial perspective and they do not increase or modify Union competences and powers in any way. Used only once under the Treaty establishing the European Community, but still unused in their Lisbon form, *passerelle* clauses have generated some interest in recent years. In 2018 and 2019, the Commission issued a number of very specific and innovative communications, where the use of *passerelle* clauses was analysed in relation to the current needs of a given policy area. Council has discussed the content of these communications, without so far having reached a position. Parliament, meanwhile, has reacted positively to these initiatives, not least because, even before this series of Commission communications, it had already been a steady advocate of the use of both general and special *passerelle* clauses to speed up the Council's decision-making procedures. The power to bring these constitutional mechanisms into play lies with the Member States however, and they have given mixed reactions. Nevertheless, in some cases the desire to improve and modernise the Council's working methods has triggered some interest.

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Abbreviations used

CoR	European Committee of the Regions
CFSP	common foreign security policy
ECOFIN	Economic and Financial Affairs Council
EEAS	European External Action Service
EESC	European Economic and Social Committee
EMU	economic and monetary union
EPPO	European Public Prosecutor's Office
EPSCO	Employment, Social Policy, Health and Consumer Affairs Council
FTT	financial transaction tax
IGC	intergovernmental conference
ILO	International Labour Organization
JHA	justice and home affairs
MFF	multiannual financial framework
OMT	outright monetary transactions
OLP	ordinary legislative procedure
QMV	qualified majority voting
SLP	special legislative procedure
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
VAT	value added tax
WHO	World Health Organization
WTO	World Trade Organization

1. Introduction

Rapid changes in society and the need for policy answers to keep pace, together with the dynamics of EU decision-making, are powerful catalysts for reflecting on ways to modernise and simplify EU working methods. In recent years, there have also been calls for more democratic and transparent decision-making.

The successive reforms that have modified the EU's constitutional setting since the 1980s have also adapted the EU's institutions and policies. However, some of the recent innovations introduced by the Lisbon Treaty remain thus far unused.¹ General *passerelle* clauses were introduced with the aim on the one hand, to make decision-making more flexible – as they would remove the need for Member States to find unanimity in the Council, by agreeing to use qualified majority voting – and, on the other, to introduce the ordinary legislative procedure (OLP) where the Treaties provide for a special legislative procedure (SLP), in this way adding a democratic supranational dimension to the legislation adopted. The Treaties also contain a number of specific *passerelle* clauses, some of which even existed prior to the Lisbon Treaty but were never used, and which possess different characters compared to the general *passerelle* clauses.

An almost mysterious innovation introduced by the Lisbon Treaty, *passerelle* clauses have been little explored by academics, and still less so by policy-makers. However, in recent years, having been almost over-looked as a constitutional mechanism, the *passerelles* have begun to draw attention as a 'lost Treasure' to be explored and perhaps utilised. Following this recent Trend, the present study attempts to explore some of the principal legal issues surrounding *passerelle* clauses and to describe the status of the current proposals on the topic.

Section 2 of the study analyses the *passerelle* clauses as a method for revising the Treaties, and for intervening in decision-making rules (pre-established by the Treaty). The analysis also draws on differences and similarities between the three Treaty revision methods. Section 3 differentiates *passerelles* from other flexibility measures, Sections 4 and 5 delve into the specifics of the general and special *passerelles* respectively, and Section 6 tackles the *semi-passerelles*. While Section 7 deals with Commission proposals on possible areas where *passerelles* could be used, Section 8 illustrates the current endorsements by EU institutions and Member States of the use of these mechanisms. Section 9 draws conclusions on the current status of *passerelles* and sets out some ideas for their future application.

¹ E. Bassot, Unlocking the potential of the EU Treaties, EPRS, May 2020.

2. *Passerelle* clauses as a means of achieving Treaty change

Conceptually, *passerelle* clauses belong to the set of procedures available in the Treaty on European Union (TEU) aimed at modifying the Treaties. Article 48 TEU, which in part existed prior to the Lisbon Treaty (2009), offer three ways to modify the Treaties. In addition, it is argued that the Treaties may also be amended through atypical procedures (accession) or special revision procedures² not included in Article 48 TEU.

2.1. Ordinary revision procedure

A first modifying procedure, the '**ordinary**' **revision procedure**, contains two variants (with or without a convention) and is provided for in Article 48(2) to (5) TEU. This is a solemn and complex revision procedure that empowers Member State governments, the European Parliament or the Commission to submit proposals to the Council, which submits them in turn to the European Council. National parliaments are also notified of proposals presented. The European Council may decide by simple majority, after consultation of Parliament and the Commission, to convene a convention composed of representatives of national parliaments, the Heads of State or Government of the Member States, the European Parliament and the Commission. The convention adopts recommendations by consensus, to be submitted to an intergovernmental conference (IGC). However, if the European Council does not deem it necessary to convene a convention to examine the proposed amendments, it can define the terms of reference for the IGC itself.

Parliament Rules of Procedure of relevance to ordinary Treaty revision

According to Parliament's **Rule 85**, Parliament's proposals to amend the Treaties are presented with an own-initiative report (Rule 46 and 54) submitted to Parliament, thereafter addressed to the Council. Rule 85(2) sets out the procedure for when Parliament is consulted on whether the European Council should decide to examine amendments to the Treaties that have been proposed by any entitled institution. The matter must be referred to the committee responsible (**Rule 105**), which drafts a report comprising a motion for a resolution stating if Parliament approves or rejects the decision and possibly containing proposals for the attention of the convention or the IGC, and if appropriate also an explanatory statement.

According to **Rule 85(3)**, if the European Council decides to convene a convention, Parliament, acting on a proposal by the Conference of Presidents, must appoint its representatives to the convention. Parliament's delegation must elect its leader and its candidates for membership of any steering group or bureau set up by the convention. Likewise, consent to a decision not to convene a convention is to be referred to the committee responsible in accordance with Rule 105.

Source: Rules of Procedure of the European Parliament, June 2020.

The IGC is convened by the President of the Council and decides by common accord the amendments to the Treaties. The solemnity of the ordinary amending procedure lies in the need for the agreed amendments to be ratified by all Member States, as the mere agreement of the IGC is not sufficient for the amendments to enter into force. The ratification requirement introduces an element of difficulty, as ratification by 27 (previously 28) Member States increases the likelihood that the procedure will be delayed or even stopped.³

² S. Peers in R. Schütze and T. Tridimas, *Oxford Principles of European Union Law*, Vol. I, OUP, 2018, p. 423.

³ By way of example, the Treaty establishing a Constitution for Europe was rejected by referendums in France and the Netherlands in 2005. The process of ratifying the Constitution was therefore abandoned. After a 'period of reflection' the [Treaty of Lisbon](#) was [signed](#) on 13 December 2007. The ratification by Member States was initially planned for the end of 2008, but this plan was derailed by rejection of the Treaty at a first referendum in Ireland in 2008. Ultimately,

The intention of the Treaty drafters was that this downside would be remedied, at least in part, by the possibility that the matter be referred to the European Council if within two years of the signature of the act amending the Treaties only four fifths of Member States had concluded the ratification process (Article 48(5) TEU). The solutions offered by the Treaty at this stage remain largely of a political nature i.e. negotiations with the Member State concerned and concessions, while the national constitutional ratification requirements remain applicable and cannot be overcome by a European Council decision.

The ordinary revision procedure has a very broad field of application, however, as it can be used with respect to both specific policies and broader institutional matters. Article 48(2) TEU refers to in fact to 'proposals to amend the Treaties' and it is explicitly provided that it can be used to increase or to reduce EU competencies. The current ordinary revision procedure is still subject to *double unanimity* (see box below) in the sense that all State representatives within the IGC must agree on the same text and all Member States must thereafter ratify the revisions to the Treaties adopted and agreed within the IGC. Ratification in accordance with the constitutional requirements of Member States (Article 48(4) TEU) is moreover an important aspect of the procedure as it introduces democratic scrutiny by involving national parliaments and in some Member States even requiring those Treaty changes to be approved by *referendum*. Nevertheless, the procedure remains demanding and the fact that there is no majoritarian system but only common accord has been seen as a lack of flexibility that marks also a difference with respect to federal constitutions.⁴

Failed attempts to modify the double unanimity rule governing Treaty changes

- European Parliament 1984 Draft Treaty on European Union: after approval by a majority of states representing two thirds of the EU population, decision by common accord on how to proceed ([Article 82](#))
- Parliament resolution of 11.7.1990 on a draft constitution: entry into force only for ratifying Member States ([Article 33](#))
- Parliament resolution of 12.12.1990 on the constitutional basis of the European Union: entry into force with a majority of three quarters of Member States (9) representing two thirds of the Community population ([Article 72](#))
- Parliament resolution of 10.2.1994 ('Herman Report'): ratification of majority representing four fifths of the Community population ([Article 47](#))
- '[Penelope Project](#)' (Feasibility study: Contribution to a preliminary draft constitution of the European Union, working document, 4.12.2002): unanimous ratification of amending agreement and contextual approval by Member States of a solemn declaration to remain in the EU which would make the constitution enter into force if approval came from three quarters of Member States, failing approval of the declaration the Member State would exit the EU but maintain its rights and status pre-Treaty modification.

Source: C. Closa Montero, Moving away from unanimity, RECON [Working Paper 2011/38](#).

after a number of concessions and assurances from the EU, a [second referendum](#) in Ireland in October 2009 secured the completion of the ratification process.

⁴ D. Triantafyllou, in *Genesis and Destiny of the European Constitution*, G. Amato, H. Bribosia and B. De Witte, Bruylant, 2007, p. 234.

Double unanimity has been observed⁵ to be an inadequate method for reforming the Treaties. Moreover, it is not a method adopted by many international organisations, which have tended to opt for the majority rule (often two thirds of their member states, e.g. UN, WHO, WTO, ILO). The 2002 Convention for the Future of Europe that put together the Draft Treaty establishing a Constitution for Europe received a number of proposals aimed at modifying the majority necessary for the adoption of Treaty revisions, (e.g. five sixths of Member States within the IGC for revisions not modifying EU competences) however the Convention did not endorse those proposals and left unchanged the requirement of common accord, the only addition, compared with Article 48 TEU (as applicable then), being the introduction of a convention.⁶ A rather complicated mechanism, referred to as the 'Penelope Project'⁷ was devised as part of the work of the European Convention under the aegis of Commission President Romano Prodi, who entrusted a group of specialists with coming up with a general idea of the content of a future European Union constitution.

The European Parliament has a certain role to play in the ordinary revision procedure, the details of which are set out in its Rules of Procedure⁸ (Rule 85 in conjunction with Rule 105 (see boxes on page 2 and 5)). Parliament's involvement is particularly evident in the initial phase as it may submit proposals to amend the Treaties and is consulted by the European Council on whether to examine proposed amendments to the Treaties with a view to summoning a convention. Parliament's consent (majority of votes cast)⁹ is also necessary for a decision of the European Council not to convene a convention, and Parliament participates in the convention. The outcome of the procedure is however mostly in the hands of the IGC, i.e. the Member States, as it is the IGC that debates, negotiates the amendments to the Treaty and adopts them by common accord.¹⁰ The role of Parliament, however, does not extend to any intervention on the final text of the Treaty amendments decided by the IGC, nor is its consent required.

⁵ H. Bribosia, [Revising European Treaties](#): A plea in favour of abolishing the veto, Notre Europe, policy paper No 37, December 2009.

⁶ D. Triantafyllou, *ibid.*, p. 236.

⁷ For details of the 'Penelope Project', see B. de Witte, [Ten reflections on the Constitutional Treaty for Europe](#), Robert Schumann Centre for Advanced Studies, European University Institute, San Domenico di Fiesole, Italy, April 2003, p. 201.

⁸ See Parliament's [Rules of Procedure](#), June 2020.

⁹ Article 231 of the Treaty on the Functioning of the European Union (TFEU) in conjunction with Article 48(3) TEU. The quorum is established in Rule 178 and consists of one third of the component members, which by request of at least 40 members can be verified by the President before the vote starts (Rule 178(3)).

¹⁰ This reflects the principles of international law enshrined in the [1969 Vienna Convention on the Law of Treaties](#), in particular its Article 40, which provides that each party to a multilateral treaty shall have the right to take part in the negotiation and conclusion of any agreement for the amendment of a treaty.

Parliament's Rule 105 on the consent procedure

- 1 Where Parliament is asked to give its consent to a legally binding act, the committee responsible shall submit to Parliament a recommendation to approve or reject the proposed act.

The recommendation shall include citations but shall not include recitals. Amendments in committee shall be admissible only if they aim to reverse the recommendation proposed by the rapporteur. The recommendation may be accompanied by a short explanatory statement. That statement shall be the sole responsibility of the rapporteur and shall not be put to the vote. Rule 55(2) shall apply *mutatis mutandis*.
- 2 The committee responsible may also, if necessary, table a report, including a motion for a non-legislative resolution setting out the reasons why Parliament should give or refuse its consent and, where appropriate, making recommendations for the implementation of the proposed act.
- 3 The committee responsible shall deal with the request for consent without undue delay. If the committee responsible has not adopted its recommendation within six months after the request for consent was referred to it, the Conference of Presidents may either place the matter on the agenda for consideration at a subsequent part-session or, in duly justified cases, decide to extend the six-month period.
- 4 Parliament shall decide on the proposed act by means of a single vote on consent, regardless of whether the recommendation from the committee responsible is to approve or reject the act, and no amendments may be tabled. If the majority required is not obtained, the proposed act shall be deemed to have been rejected.
- 5 Where Parliament's consent is required, the committee responsible may, at any time, present an interim report to Parliament, including a motion for a resolution containing recommendations for the modification or the implementation of the proposed act.

Source: Rules of Procedure of the European Parliament, June 2020.

2.2. Simplified revision procedure

The **simplified revision procedures**¹¹ introduced by the Lisbon Treaty have a more circumscribed scope compared with the ordinary revision procedure and are of a less solemn and burdensome nature. Article 48 of the TEU provides for two forms of 'simplified revision procedure':

- i) the revision of Part III of the Treaty on the Functioning of the European Union – TFEU (Article 48(6) TEU), and
- ii) the two general *passerelle* clauses (Article 48(7) TEU).

2.2.1. Revision of Part III TFEU (Article 48(6) TEU)

The first type of simplified revision procedure (above i) empowers governments of Member States, the European Parliament or the Commission to submit to the European Council proposals for the revision of Part III TFEU. The European Council may adopt a decision amending the Treaties by unanimity after consultation of Parliament,¹² the Commission or the European Central Bank, where the decision concerns the monetary area. The decision of the European Council must be approved

¹¹ Prior to the Lisbon Treaty, the Treaty establishing the European Community (TEC) provided for 'sectorial' amendments in matters that had a constitutional profile, such as the composition of Parliament (Article 190 TEC), and the rights of citizens (Article 22 TEC), sometimes requiring approval by Member States according to their constitutional requirements, for instance for modifications to the rules on own resources (Article 269 TEC).

¹² In this situation, Parliament does not give consent, but is only consulted.

by Member States in accordance with their constitutional requirements, similarly to amendments made under the ordinary revision procedure.

Whereas the Draft Treaty establishing a Constitution for Europe included the ordinary revision procedure,¹³ already present in the TEU,¹⁴ the Draft Treaty prepared by the Convention did not originally include the simplified revision procedure – what is now Article 48(6). This was added later at the stage of the IGC in the Treaty establishing a Constitution for Europe,¹⁵ with a wording that remained unchanged in the Treaty of Lisbon and is now reflected in the current Article 48(6) TEU.¹⁶

This simplified procedure is on the one hand more circumscribed in its scope compared with the ordinary one as it can modify only Part III TFEU. Nevertheless, it allows the modification of a broad range of Treaty provisions, as Part III TFEU includes Union policies and internal action and contains fundamental provisions in the areas of the internal market, freedom security and justice, economic and monetary union (EMU) and social policy. However, the simplified procedure of Article 48(6) TEU is more limited *ratione materiae* compared with the ordinary revision procedure, not only because it can intervene only on Part III TFEU, leaving institutional matters, common foreign security policy, external action, own resources and budgetary matters, beyond its scope, but also because, according to Article 47(6)(3) TEU, it may not lead to an increase in Union competences.

The simplified revision procedure provided by Article 48(6) TEU therefore allows intervention in a considerable range of Union policies without the solemnity of the IGC (with or without a convention). Amendments to the TFEU are achieved through a decision of the European Council, rather than a Treaty between Member States as is the case for the ordinary revision procedure. In the simplified revision procedure under Article 48(6) TEU, the role of European Parliament is also reduced compared with the ordinary revision procedure: there is no possibility to call for a convention prior to which Parliament would be necessarily consulted or give its consent in the case of a negative decision on the need to convene a convention. Also, the procedure remains solidly in the hands of the European Council (simplified revision procedure of Article 48(6) TEU), as opposed to of the Presidency of the Council (ordinary revision).

Parliament Rules of Procedure of relevance to the simplified revision procedure

Rule 86

Simplified Treaty revision

1. In accordance with Rules 46 and 54, the committee responsible may submit to Parliament in accordance with the procedure laid down in Article 48(6) of the Treaty on European Union a report containing proposals, addressed to the European Council, for the revision of all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union.

2. Where Parliament is consulted, in accordance with Article 48(6) of the Treaty on European Union, on a proposal for a decision of the European Council amending Part Three of the Treaty on the Functioning of the European Union, Rule 85(2) shall apply *mutatis mutandis* [see box above on Rule 85]. In that event, the motion for a resolution may contain proposals for amendments only of provisions of Part Three of the Treaty on the Functioning of the European Union.

Source: Rules of Procedure of the European Parliament, June 2020.

¹³ [Article IV-7.](#)

¹⁴ [Article 48 TEU.](#)

¹⁵ [Article IV-445.](#)

¹⁶ L. Gard, in L. Burgorgue-Larsen, A. Levaide and F. Picod, *Traité établissant une Constitution pour l'Europe - Commentaire article par article*, Vol. 1, Bruylant, 2007, p. 809.

2.2.2. The two general *passerelle* clauses (Article 48(7) TEU)

The second type of simplified revision procedure (above ii) is that contained in **Article 48(7) TEU** and provides for the possibility to modify only certain aspects of the Treaties, i.e. the decision-making process. In this situation, the two general *passerelles* contained in Article 48(7) TEU allow modifications only in one direction: from unanimity to qualified majority voting (QMV) and from a special legislative procedure to the ordinary legislative procedure, while for modifications in the opposite direction one of the other two revision procedures may be adopted.¹⁷

There are several differences between the general *passerelle* clause of Article 48(7) TEU, as the enabler of very specific Treaty modifications, and the other two revision procedures (ordinary and simplified of Article 48(6) TEU).

A first significant difference is to be found in the **material scope of the three Treaty revision mechanisms** as:

- the ordinary revision procedure (48(2) TEU) applies to the Treaties, i.e. the TFEU and the TEU, with the exclusion of the Charter of Fundamental Rights¹⁸ but with the inclusion of protocols and annexes of the Treaties¹⁹;
- the simplified revision procedure (Article 48(6) TEU), applies only to Part III TFEU (Union policies and internal actions), which excludes modification of other parts of the TFEU, or the TEU, that might be even indirectly modified by a modification of any provision contained in Part III TFEU;²⁰
- the general *passerelles* (Article 48(7) TEU) apply to the TFEU and Title V TEU (i.e. Union external action and specific provisions on the common foreign and security policy) for modifications to QMV, with the exclusion of decisions with military implications; and to the whole TFEU for changes consisting of a move to ordinary legislative procedure.

A second difference between the general *passerelle* clause and the two other revision procedures (ordinary and simplified of Article 48(2)-(5) and (6) TEU) consists of the **procedure necessary for the ratification or approval of the Treaty modifications**. While amendments introduced by the ordinary Treaty revision and the special Treaty revision under Article 48(2)-(5) and (6) TEU require national parliaments to express a positive vote either ratifying or approving the modifications in accordance with their respective constitutional requirements, the general *passerelle* clause of Article 48(7) TEU does not require any such ratification or approval process at national level, but instead gives **national parliaments** the decisive **prerogative to veto** the decision of the European Council authorising either a change in voting rules or in the type of legislative procedure. In the opinion of some authors, this 'toning down' of national parliament's role is due to the limited scope of the

¹⁷ See S. Peers in R. Schütze and T. Tridimas, *Oxford Principles of European Union Law*, Vol. I, OUP, 2018, p. 441, where it is argued that the different Treaty amendment procedures are not in a relation of *lex specialis*.

¹⁸ See S. Peers in R. Schütze, T. Tridimas, *op. cit.*, p. 427, who reasons on the basis that the Charter is part of primary law without being formally a full part of the Treaties, unlike the protocols and annexes. It follows from this that the EU institutions and Member States are not bound to follow the procedures of Article 48 TEU when revising the Charter. Furthermore, since the original and revised versions of the Charter were adopted by the EU institutions in 2000 and 2007, they could only be revised by the EU institutions. To give recognition to any amendment of the Charter, the author argues that also Article 6(1) TEU would need to be amended.

¹⁹ See R. Böttner, J. Grinc, *Bridging Clauses in European Constitutional Law*, Springer, 2018, p. 18. According to this author, as Article 51 TEU states that protocols and annexes form an integral part of the Treaties, they are primary law and supplement Treaty provisions. Therefore the subject matters and policy areas in the protocols containing voting or legislative procedures are comparable to those of the Treaties. Therefore, unanimous voting and special legislative procedures come under the scope of the general *passerelle* clause Article 48(7) TEU (provided the other requirements of Article 48(7) TEU are met). However, S. Peers, *op. cit.*, p. 439, argues that Article 48(7) TEU would not apply to protocols as these are attached to both Treaties, whereas Article 48(7) applies either to only part of the TEU or the TEU is totally excluded from its application.

²⁰ See S. Peers *ibid* p. 435.

Treaty amendments introduced with the *passerelle* clauses and their limited constitutional significance.²¹

Furthermore, in the ordinary revision procedure (Article 48(2)-(5) TEU) the role of national parliaments is enhanced compared to the simplified procedure of Article 48(6) TEU because in the former they are not only typically entrusted with ratification at national level, but they also take part in the convention aimed at presenting recommendations to the IGC, while in the latter their role is confined to the national procedure to approve the European Council's amending decision according to the constitutional requirements of Member States.

A third visible difference consists in the **role of the European Parliament**, which in the general *passerelle* clause (Article 48(7) TEU) is enhanced as its consent is needed (see box).

Furthermore, the two general *passerelle* clauses of Article 48(7) TEU do not require the proposal to modify the decision-making process to come from a specific institution but only provide that the European Council may adopt the authorising decision, provided some conditions are met, without further indications. Conversely, the initiative in the ordinary (Article 48(2) to (5) TEU) and simplified (Article 48(6) TEU) revision procedures must come from governments of Member States, the European Parliament or the Commission.

Finally, like the simplified revision procedure of Article 48(6) TEU, but in contrast to the ordinary revision procedure (Article 48(2) to (5) TEU), the general *passerelle* clauses may not be used to modify the Union's competences.²²

Parliament's role in the general *passerelle* clauses

The European **Parliament's consent** is required for the adoption of a decision on a general *passerelle* clause (Article 48(7) TEU); the majority being that of Parliament's component members, i.e. deviating from the usual simple majority (majority of votes cast) provided in Article 231 TFEU.

While for general *passerelles* the role of Parliament consists of a power of veto, in the ordinary revision procedure (48(2) TEU) the role of Parliament is different as it can propose Treaty amendments. Parliament in the ordinary revision procedure is also only consulted in the phase prior to the activation of the IGC, i.e. on European Council's decision in favour of examining the proposed amendments and on that not to convene the convention.

Similarly in the simplified revision procedure (Article 48(6) TEU), apart from the possibility to propose amendments to Part III TFEU, Parliament is only consulted, this time a majority of votes is needed (Article 231 TFEU) before the adoption by the European Council of the amending decision and Rule 86 of Parliament's Rules of Procedure applies.

²¹ E. Grabitz, M. Hilf, M. Nettesheim and C. Ohler, *Das Rech der Europäischen Union*, Supplement May 2020, Title VI, Article 48 TEU mn. 48-50; R.S Treinz, C. Ohler and C. Hermann, *Der Vertrag von Lissabon zur Reform de EU*, C.H. Beck, 2010, Part 2, Section 4, IV, 2. For the position of the German Constitutional Court, see Section 4.5.

²² E. Grabitz, M. Hilf, M. Nettesheim and C. Ohler *op. cit.* Article 48 mn. 46, 47.

3. *Passerelle* clauses, flexibility mechanism and other mechanisms impacting on EU decision-making

Passerelle clauses, or bridging clauses, are a means to achieve Treaty changes of a very specific and defined nature, i.e. using a less burdensome procedure, achieving more flexible decision-making (shift to QMV) and enhancing the supranational Union nature of decision-making (shift to OLP).

However, this type of flexibility is of a very particular type, as the flexibility underlying *passerelle* clauses allows derogation from pre-defined rules characterised by a certain degree of rigidity, in order to replace them with less cumbersome ones. This consideration is certainly valid for the *passerelles* (general and specific) designed to replace unanimity with QMV, while for those that replace SLP with OLP this is less evident.

These clauses therefore have specific and distinguishing features compared with other mechanisms, either adopted by Member States or provided by the Treaties, enabling the introduction into the EU system of a certain degree of flexibility. Mechanisms that allow this systemic flexibility have been referred to in various ways, e.g. 'differentiated integration', 'Europe à la carte', 'variable geometry', 'opt-outs' and 'opt-ins'. Some derive from specific Treaty tools, such as enhanced cooperation for instance. By virtue of Protocol 22 to the TFEU, for example, Denmark enjoys an opt-out from Title V of Part III of the TFEU, i.e. the area of freedom, security and justice. Likewise, Ireland and – while a Member State – the United Kingdom²³ have enjoyed similar *opt-outs* in the same field by virtue of Protocols 20 and 21 (Ireland) and 20, 21 and 36 (United Kingdom). Poland enjoys a further (partial) exclusion from the Charter of Fundamental Rights in the form of an opt-out by virtue of Protocol 30.²⁴ Enhanced cooperation, as provided in Article 20 TEU,²⁵ has been established among several Member States, e.g. among 17 Member States in the field of divorce law, and among 22 Member States for the establishment of the European Public Prosecutor's Office (EPPO).²⁶ These systemic forms of flexibility share the common feature that in order to allow further integration the system is ready to accept that not all Member States advance at the same speed, or participate to the same extent in a certain policy area (opt-outs), or that a 'pioneer' group of Member States integrate more deeply without distorting the cohesion of the internal market (enhanced cooperation).

This type of 'systemic' flexibility, however, differs from that introduced by the *passerelles* (general or specific) in that *passerelles* do not fragment the participation of Member States either geographically or temporally, but 'loosen' the rules (from unanimity to qualified majority voting) in order to achieve a more efficient result in which all Member States participate.²⁷ Furthermore, it can be said that

²³ See also A. Christie and G. Sabbati, [Differentiated integration in the European Union](#), EPRS, European Parliament, February 2016.

²⁴ In particular, Article 1 of Protocol 30 states that: '1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms'. Paragraph 2 clarifies that: 'In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'.

²⁵ Further rules on enhanced cooperation are set out in Articles 326-334 TFEU.

²⁶ See Infographic [Scenario 3 of the White Paper on the Future of Europe](#): those who want more do more, European Commission, March 2019.

²⁷ This consideration applies for the general and specific *passerelles* that introduce a shift to QMV, with the exception of the specific one provided for in Article 333 TFEU and applicable only in the framework of enhanced cooperation, see Section 5.6.. In this situation, the possibility to shift permanently to QMV in the framework of an enhanced cooperation arrangement clearly does not affect all Member States, enhanced cooperation being a mechanism that applies to selected Member States.

passerelle clauses tend to re-establish the Community method as they tend to replace unanimity with qualified majority voting or a special legislative procedure with the ordinary legislative procedure, in that way emphasising supranational as opposed to inter-governmental methods of EU integration.

3.1. Flexibility clause (Article 352 TFEU)

The flexibility to which *passerelle* clauses tend must be also distinguished from the '**flexibility clause**' provided in Article 352 TFEU in terms of its features, purpose and acceptance by Member States. The flexibility clause of Article 352 TFEU allows the Council, acting unanimously on a proposal from the Commission and with the consent of Parliament, to adopt appropriate measures where the Treaties have not provided the EU with the necessary powers. The fundamental requirements for invoking the flexibility clause are that action by the Union proves necessary, within the framework of policies defined in the Treaties, that the action is necessary to attain one of the objectives of the Union and that the Treaties have not provided the Union with the necessary powers in that respect. In other words, Article 352 TFEU gives the EU the power to obviate the EU's insufficient powers with respect to statutory objectives and therefore to complement them or enable them to adapt to novel challenges under defined conditions.

There are however some crucial differences between the flexibility clause and the *passerelle* clauses (general and specific).

The flexibility clause is a mechanism that, subject to the conditions and safeguards established by Article 352 TFEU, has an impact on Union competences or on EU powers to implement them. Extensive use of the flexibility clause in Article 352 TFEU, and in particular its predecessor Article 308 of the Treaty establishing the European Community (TEC), has in the past generated criticism of a 'creeping expansion of competences'²⁸ although in hindsight it also enabled the EU to act in areas such as the environment, research, and regional social and monetary policy before they were incorporated into the Treaty with the Maastricht Treaty and the Single European Act.²⁹ While the flexibility clause affects or is strictly related to the competences of the Union, the *passerelle* clauses presuppose clearly established competences. Furthermore, *passerelle* clauses are not designed to alter or expand EU competences. The argument that *passerelles* are not aimed at altering, not even in the slightest way, the system of competences is corroborated by Article 353 TFEU, which prevents general *passerelles* (Article 48(7) TEU) from applying to the flexibility clause of Article 352 TFEU. This means that a change via a *passerelle* of Council's unanimity rule, as required by Article 352 TFEU, into QMV in order to apply the flexibility clause would not be allowed.

Use of the flexibility clause may not bring harmonisation where the Treaties exclude it (Article 352(3) TFEU) and may not be used in the area of common foreign and security policy (CFSP).

Although very different in nature, the two mechanisms share the common feature of being broad in scope. Some distinctions can be nevertheless made. The material scope of the two general *passerelles* (Article 48(7) TEU) is in fact very broad, as the *passerelle* clause introducing QMV applies to unanimity voting in Council under the TFEU and Title V TEU (external action and CFSP) excluding decisions on military involvement or in the area of defence, whereas the *passerelle* introducing OLP does not contain any policy or otherwise-related exception. Likewise, the flexibility clause of Article

²⁸ P. Craig and G. De Búrca, *EU Law, text, cases and materials*, OUP, 2015, p. 91. For example, [research](#) on EUR-Lex shows that 149 regulations 55 agreements and 5 directives have been adopted using Article 352 TFEU, or one of its predecessors (Article 308 TEC, Article 235 TEEC) as a legal basis.

²⁹ R. Geiger, D-E. Khan and M. Kotzur, *European Union Treaties*, C.H. Beck, 2015, p. 1050.

352 applies 'within the framework of the policies defined by the Treaties' to the exclusion of the CFSP area, making it a broadly applicable tool.

Finally, a certain mistrust *vis-à-vis* the flexibility clause transpires from Declarations 41 and 42, which are dedicated to defining and clarifying the use of Article 352 TFEU. Declaration 41 states that when it comes to attaining the objectives of the Treaties, specific policy objectives apply as defined in Article 3(2), 3(3) and 3(5) TEU with respect to external action in Part V TFEU. Declaration 41 rules out the use of the flexibility clause to pursue the broadly formulated objectives of Article 3(1) TEU, which are to 'promote peace, its values and the well-being of its peoples'. It also contains a reminder that legislative acts in the area of CFSP are not permitted. Declaration 42 is more explicit in its intention to fence out 'creeping competences', pointing out that the flexibility clause belongs to a system of conferred powers and cannot be used to widen those powers beyond the framework created by the provisions of the Treaties as a whole, in particular those defining the task and activities of the Union. Declaration 42 also rules out the use of Article 352 TFEU to circumvent application of the Treaty revision procedures.

3.2. 'Brake' and 'accelerator' clauses

Passerelle clauses share also common features as regards their nature with 'brake' and 'accelerator' clauses as they all pertain to the decision-making process, however they have different aims and pursue different objectives.

The brake clause allows application of the ordinary legislative procedure to be put on hold where particularly important concerns of Member States come into play. This mechanism can be applied in three areas:

- measures for coordinating social security systems for migrant workers (Article 48 TFEU);
- judicial cooperation in criminal matters having a cross-border dimension (Article 82(3) TFEU); and
- the establishment of common rules for certain criminal offences (Article 83(3) TFEU).

The main reason justifying recourse to a brake clause is when the draft legislation in question affects important aspects of national policy. This could occur in the social security field, where the scope, cost, financial structure or the financial balance of the national social security system is affected (Article 48 TFEU), or where there is an impact on fundamental aspects of the criminal justice system (Article 82(3) TFEU and 83(3) TFEU). In such a case, the Member State may decide to refer the matter to the European Council, which can suspend the ordinary legislative procedure. Within four months, the ordinary legislative procedure either resumes taking into account the concerns voiced, or starts again with a new proposal to be submitted by the Commission.³⁰

However, for judicial cooperation in criminal matters and the establishment of common rules for certain criminal offences, if the European Council is not able to solve the *impasse*, this does not

'Brake' clauses can be established in the field of:

- measures for coordinating social security systems for migrant workers (Article 48 TFEU);
- judicial cooperation in criminal matters (Article 82(3) TFEU);
- the establishment of common rules for certain criminal offences (Article 83(3) TFEU).

'Accelerator' clauses can be introduced in the field of:

- judicial cooperation in criminal matters (Article 82(3) TFEU);
- the establishment of common rules for certain criminal offences (Article 83(3) TFEU);
- the creation of the European Public Prosecutor's Office (Article 86 TFEU); and
- police cooperation (Article 87(3), third subparagraph, TFEU).

³⁰ L. Woods and P. Watson, *Steiner & Woods EU law*, OUP, 2014, p. 77.

necessarily imply that the procedure must recommence with a new proposal. In those two policy areas, an unresolved brake clause may lead to the establishment of enhanced cooperation if at least nine Member States wish so. In this case, they must notify the European Parliament and Council of that intention accordingly. This mechanism is referred to as the **accelerator clause**, because the establishment of enhanced cooperation is 'accelerated' to the extent that the authorisation required by Article 20 TEU is deemed to be granted.

In addition to the two cases provided for in Articles 82(3) and 83(3) TFEU, two further cases of accelerator clauses are to be found in the field of police cooperation (Article 87(3)(3) TFEU), and in the creation of the Prosecutor's Office (Article 86 TFEU). In the first case, where Member States within Council do not unanimously agree, as required by Article 87(3)(1) TFEU, to establish operational measures in the field of police cooperation, in a first step at least nine Member States may 'brake' the procedure by referring the matter to the European Council, which suspends the procedure. If the absence of an agreement persists for a four-month period, at least nine Member States that wish to do so may establish enhanced cooperation and notify the European Parliament and Council accordingly. In that case, the necessary authorisation shall be deemed to be granted. A very similar procedure applies under Article 86 TFEU, if the draft regulation establishing the European Public Prosecutor's Office does not receive unanimous support in Council. Article 86(1)(3) in fact states that, after a failed attempt to solve the disagreements by referring the draft to the European Council, at least nine Member States who so wish may establish enhanced cooperation on the basis of the draft regulation. To that end, the intention must be notified to the European Parliament, the Council and the Commission and authorisation shall be deemed to be granted. This mechanism was indeed applied to establish the European Public Prosecutor's Office.³¹

A common feature of *passerelle* clauses, brake and accelerator clauses is that they are used to resolve, remedy or overcome disagreements between Member States within Council. However, the remedies offered are quite different.

As to their particular function, brake clauses are designed first and foremost to allow further reflection on the legislative proposal or measure and to slow down or suspend the process where a fundamental interest of a Member State is at stake. Accelerator clauses, on the contrary, allow some Member States to further the degree of integration in spite of some Member States not intending to participate in a certain action or measure. *Passerelle* clauses that shift decision-making to QMV, meanwhile, allow for a faster decision-making process, although, unlike accelerator clauses, without 'leaving behind' any Member State. *Passerelle* clauses that shift to OLP do not seem to share common aspects with either the accelerator or the brake clause, because they tend to establish a different legislative procedure that involves Parliament on an equal footing with Council.

As to material scope, unlike the special *passerelle* clauses (see further Chapter 5), general *passerelle* clauses have a very broad scope of application, whereas brake and accelerator clauses can be applied only in one-off situations and in relation to specific provisions. This makes their application rarer.³²

General *passerelle* clause and brake clause

The European Council is the institutional actor who holds the reins of the decision in the two general *passerelle* clauses (Article 48(7) TEU) as well as in 'brake' clauses.

The European Council may in fact either authorise in the general *passerelle* the shift to the different voting requirement (QMV) or to the different legislative procedure (OLP) or in the 'brake' clause endeavour to solve the negotiation policy *impasse*.

³¹ See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), Recitals 6 to 9.

³² See on this topic, Flexibility mechanisms in the Lisbon Treaty, European Parliament, Directorate General for Internal Policies, 2015, p. 19.

4. General *passerelle* clauses

Prior to the Lisbon Treaty, the possibility to change the method of legislative decision-making was not unknown. Article 67(2) TEC, in fact, provided the possibility to shift from a special procedure to the co-decision procedure (Article 251 TEC) in the field of visa, asylum or migration. The TEC also contained a number of *passerelles* applicable to specific policy areas (see Table 1). The innovation of the Lisbon Treaty has been to provide a permanent and generalised mechanism allowing changes to the decision-making process, which is now embodied in Article 48(7) TEU.

Legal basis of the two general *passerelle* clauses: Article 48(7) TEU

'Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

'Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

'Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

'For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.'

The 2002 Convention on the Future of Europe, triggered by the Laeken Declaration, designed two mechanisms similar to the current *passerelles* provided in Article 48(7) TEU in response to the perceived need to reform the functioning of EU decision-making in the light of the upcoming enlargements. The Treaty establishing a Constitution for Europe in fact made provisions for the European Council to decide unanimously to shift from unanimity to QMV and from the SLP to the OLP, in a similar way to the existing *passerelle* clauses. However, the process that led to the formulation of the general *passerelle* clause (Article 48(7) TEU) in the Treaty establishing a Constitution for Europe saw a gradual strengthening of the role of national parliaments. The Draft Constitutional Treaty issued by the Convention, in fact, provided only for their right to be informed (Article I-24). It was within the IGC that this right was converted into a right of veto and reflected in the Treaty for the Constitution of Europe (Article IV-444).³³ The IGC in fact allowed for further possibilities to be explored³⁴. The participation of national parliaments remained an essential part of the negotiation on the *passerelles* which led to the acceptance of an institutional role on their behalf within the adoption of *passerelles*.

³³ See footnote 69 for a similar strengthening of national parliaments' role within the IGC with respect to the special *passerelle* clause on family law with cross-border implications.

³⁴ The Commission fearing total paralysis was in favour of abandoning the unanimity necessary to perform the shift and was in favour of a 5/6 majority in order to maintain the unanimity requirement for decisions where Union competences would be altered.

This concession, seen as a form of compensation for the absence of any form of ratification or approval of the Treaty modification, did not pass without criticism.³⁵

Table 1 – Overview of the main features of the general *passerelle* clauses Article 48(7) TEU

Legal basis	Type of shift in decision-making	Institution whose acts are affected	Material scope of <i>passerelle</i>	Acts affected	Adoption procedure
Article 48(7)(1) TEU	From unanimity to QMV	Council	Area or case in: - the TFEU - Title V of the TEU (Union's external action and CFSP)	Council acting by unanimity	Notification to national parliaments, which can veto within six months
Article 48(7)(2) TEU	From SLP to OLP	Council	Where the TFEU provides that legislative acts are adopted by Council under a special legislative procedure	Legislative acts to be adopted by Council with a special legislative procedure	Consent of European Parliament (majority of component members) European Council adopts decision on <i>passerelle</i> by unanimity

Source: Author.

4.1. Scope of the two general *passerelle* clauses

The scope of application of the two general *passerelle* clauses is indeed intentionally broad, although some particularities can be observed.

Article 48(7) provides for two types of general *passerelle* clause:³⁶

- **from unanimity to QMV:** where the Treaty on the Functioning of the European Union (TFEU) or Title V on external action and common foreign and security policy provides that the Council acts by unanimity, the European Council may adopt a decision authorising the Council to decide by QMV. This shift cannot be applied to decisions with military implications or those in the area of defence;
- **from special to ordinary legislative procedure:** where the TFEU provides for legislative acts to be adopted by the Council according to a special legislative procedure, the European Council may adopt a decision authorising the application of the OLP.

The two above sub-mechanisms (i.e. the two general *passerelle* clauses) exhibit some common procedural features:

- they do not envisage the modification of Union competences, but only a change in the decision-making procedure, using existing powers;³⁷

³⁵ D. Triantafyllou, in G. Amato, H. Bribosia and B. De Witte, *Genesis and Destiny of the European Constitution*, Bruylant, 2007, p. 240.

³⁶ For a list of cases where unanimity in Council applies and references to a special legislative procedure throughout the Treaties, see R. Böttner and J. Grinc, *op. cit.* pp. 20-24 and the Annex to this study.

³⁷ C. Callies, M. Ruffert and H.-J. Cremer, *EUV/AEUV, Der Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtcharta*, 2016, Article 48, mn. 12.

- they presuppose a notification to national parliaments. If a national parliament makes known its opposition within six months of the notification, the general *passerelle* in question is not adopted (national parliament veto or procedure of '*nihil obstat*');
- the European Council is the institution that decides by unanimity in both general *passerelles* whether to give authorisation;
- the European Parliament must consent,³⁸ by majority of its component members, to the decision/authorisation to introduce a general *passerelle*.

The general *passerelle* clauses³⁹ were conceived as a mechanism to make Council decision-making more efficient and as a means to enhance the supra-national features of EU decision-making by applying the OLP rather than the SLP, thus giving Parliament an increased legislative role. In this respect, as QMV and the OLP are the standard methods of decision-making introduced with the Lisbon Treaty, the two general *passerelle* clauses must be seen also as a way to enable a transition to the 'default decision-making rules' where this would not otherwise be the case.

The two general *passerelle* clauses (and the same can be said about the special *passerelles*) are **monodirectional**, as they cannot be used in the opposite direction, i.e. to shift from QMV to unanimity or to shift from the OLP to the SLP (although they can be revoked, see Section 4.5).

The two general *passerelles* differ in their material scope however. The general *passerelle* aimed at introducing QMV (Article 48(7)(1) TEU) applies to 'areas or cases' (to the exclusion of decisions with military implications and in the defence area) where the TFEU and Title V of the TEU (i.e. external action and CFSP) provide for unanimity in Council. The *passerelle* introducing the OLP (Article 48(7)(2) TEU) applies without distinctions or limitations, but only to areas where the TFEU mandates a special legislative procedure.

As to whose decisions and whose acts the two general *passerelles* refer to, they are not meant to alter or simplify the decision-making of other institution than the Council. Only when the Council must decide by unanimity (Article 48(7)(1) TEU), or in accordance with a special legislative procedure (Article 48(7)(2) TEU) may the two general *passerelles* come into play. Consequently, situations where Parliament acts following a special legislative procedure remain out of bounds. This is the case when Parliament lays down regulations governing the performance of the Ombudsman (Article 228(4) TFEU) or when Parliament determines the rules governing the exercise of the right of inquiry (Article 226(3) TFEU). Likewise, **changes to voting majorities within Parliament are also beyond the scope of the general *passerelle***. As far as the type of act is concerned, the two general *passerelle* clauses display differences. The clause that allows a shift to QMV (Article 48(7)(1) TEU) contains a broad formulation referring to cases where the Council 'acts' by unanimity, whereas the clause that allows a shift to OLP (48(7)(2) TEU), applies to acts adopted by Council that qualify as legislative acts. On the one hand, this excludes acts that are not of a legislative nature (e.g. adoption of competition measures under Article 103 TFEU because the procedure is not legislative in nature).

³⁸ Article 48(7) TEU does not indicate any deadline for Parliament to give consent. However, under Rule 105(3) of Parliament's Rules of Procedure, the committee responsible must deal with the request for consent without undue delay. Failing that, the Conference of Presidents may either place the matter on the agenda for consideration at a subsequent part-session or, in duly justified cases, decide to extend the six-month period. See above p. 5.

³⁹ This could also be said of the special *passerelle* clauses, see further Section 5.

On the other, it excludes those acts that, although adopted under a legislative procedure, are attributable to both institutions (e.g. the annual budget Article 314 TFEU) and where Council and Parliament act as co-legislators. In other words, the general *passerelle* shifting to OLP (Article 48(7)(2) TEU), applies to legislative acts that are to be adopted by Council alone, without Parliament's involvement.

The wording of Article 48(7)(1) and (2) TEU also excludes from its scope the possibility to alter the unanimous voting of the European Council or to change to ordinary legislative procedure for acts of the European Council, since the European Council cannot adopt acts of a legislative nature. In the same vein, decisions adopted by 'common accord'⁴⁰ of *Member States* are excluded from the scope of the general *passerelle* clause. Although neither Article 48(7) nor Article 49 TEU make an express statement on the point, it is argued that the accession of a new Member State, which is subject to a unanimous Council decision, cannot be subject to a *passerelle* shift.⁴¹

A particular question concerns the possibility to apply *passerelles* to legal acts provided for in the protocols.⁴² It has been argued that

Cases of unanimity and special legislative procedures contained in the protocols

Cases of unanimity:

- Protocol No 3 on the Statute of the Court of Justice of the EU (Article 64(1) and (2))
- Protocol No 13 on the convergence criteria (Article 6)
- Protocol No 19 on the Schengen *acquis* integrated into the framework of the European Union (Article 4 and Article 6(1) and (2))
- Protocol No 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice (Article 5)
- Protocol No 22 on the position of Denmark (Article 9)
- Protocol No 31 concerning imports into the European Union of petroleum products refined in the Netherlands Antilles (Article 6(1)).

Special legislative procedure:

- Protocol No 37, Article 2(1) on the financial consequences of the expiry of the ECSC Treaty and on the research fund for coal and steel contains the only case of a **special legislative procedure** in the protocols.

Source: R. Böttner and J. Grinc, *Bridging Clauses in European Constitutional Law*, Springer, 2018, p. 24.

⁴⁰ Common accord does not constitute a voting rule within the meaning of the TFEU (as opposed to unanimity) for the adoption of acts of the Council, but the TFEU provides that in certain situations acts of the representatives of governments of Member States may be adopted by common accord, i.e. with the Member States' agreement (see [Council's Rules of Procedure](#) p. 54). These acts are not formal Council acts however. For example, common accord is the decision-making rule applicable to appointments and some rules relating to the Court of Justice. The appointment of judges, advocates-general of the Court of Justice and judges of the General Court by the governments of Member States is done by common accord (Article 19 TEU, Articles 253 and 254 TFEU). Likewise, conditions of employment of officials and staff attached to the Court of Justice are determined by common accord between the President of the Court of Justice and the President of the General Court (Article 52 of Protocol No 3). The conference of representatives of Member States, which is convened by the President of the Council when the ordinary revision procedure applies, determines by common accord the amendments to the Treaties (Article 48(4) TEU). Moreover, the Statute of the European Investment Bank (Protocol No 5) provides for the appointment of alternate directors by common accord between some Member States. Finally, according to Article 341 TFEU, the seat of the institutions of the Union is to be determined by common accord of the governments of Member States. In a few situations, however, the TFEU refers to common accord among EU institutions. For example, in the procedure leading to the appointment of commissioners, the Council, by common accord with the president-elect, adopts the list of the other names it proposes for appointment as members of the Commission (Article 17(7) TEU). Likewise, common accord is needed between Council and the president of the Commission for the appointment of a new member for the remainder of the term of office in the event of the resignation, compulsory retirement or death of one of the commissioners.

⁴¹ See R. Böttner and J. Grinc, *op. cit.* p. 18, and S. Peers in R. Schütze and T. Tridimas, *op cit.*, p. 440.

⁴² For an example of unanimous Council decision, see Protocol 3, Article 64, on the language regime of the Court of Justice.

this is possible since, under Article 51 TEU, protocol provisions not only have equal standing with Treaty provisions, but they are also incorporated into the Treaties, which would make the general *passerelle* of Article 48(7) TEU applicable to legislative acts provided in the protocols. Consequently, general *passerelles* could apply to one special legislative procedure and nine cases of Council unanimity contained in the protocols. However, a dissenting opinion⁴³ objects that the two *passerelles* of Article 48(7) TEU do not apply to both Treaties in the same way, and that therefore there is not full correspondence between protocol status and the scope of the general *passerelles*.

As general *passerelles* are aimed at improving the efficiency of Council's decision-making, this also explains why the institution entrusted to authorise both general *passerelles* is the European Council.

As useful as they are intended to be, general *passerelles* may not be applied to all fields where either unanimity or a special legislative procedure is provided. The Treaties provide for a number of exceptions (see below) that are intended to preserve either the original complexity of the EU's decision-making process or the veto power of Member States.

Further boundaries to the use of the general *passerelle* clauses have been identified⁴⁴ in the amendments to the accession Treaties and in the abolition of 'emergency brakes' in Council⁴⁵ (Articles 48(b) TFEU, 82(3) TFEU, 83(3) TFEU and 31 TEU). General *passerelle* clauses therefore have a broad, but not unlimited, scope of application.⁴⁶

4.2. Areas excluded from the two general *passerelle* clauses

4.2.1. Codified exceptions

Article **353 TFEU** rules out application of the general *passerelles* in a number of cases.

A first exception concerns Article 311(3) and (4) TFEU. Article 311(3) refers to the power of Council to **determine the system of own resources** by a unanimous decision under a special legislative procedure, after consultation of Parliament. The fourth paragraph of that article refers to the power to adopt regulations under a special legislative procedure with the purpose of implementing measures for the Union's own resources. The prohibition on altering either the voting requirements within Council or the type of procedure means that the power to rule on budgetary matters remains within the sovereignty of Member States. The dominance of the Member States' competence in this field is further evidenced by the requirement that Member States approve, in accordance with their respective constitutional requirements, any decision to establish or abolish categories of own resources (Article 311(3) TFEU).

The second exception in Article 353 TFEU refers to Article 312(2)(1) TFEU, according to which Council adopts the **multiannual financial framework** under a special legislative procedure, acting unanimously, after consent of Parliament (majority of component members). Article 312(2)(2) TFEU includes its own *passerelle* clause whereby the European Council may unanimously authorise Council to adopt the MFF by qualified majority. The relationship between the prohibition of the *passerelle* contained in Article 312(2)(1) and the fact that Council may adopt the MFF under a special legislative procedure *and* unanimously must be established. With respect to these two decision-making mechanisms, Article 312(2) allows one type of *passerelle* to be applied, i.e. that which

⁴³ R. Schütze and T. Tridimas, *op cit.*, p. 439.

⁴⁴ R. Schütze, T. Tridimas, *op cit.*, p. 440.

⁴⁵ This means that Member States may not decide by unanimity that a brake clause provided by the Treaties should not be activated (see Section 3.2).

⁴⁶ For a fuller account of the distinction between special legislative procedures and unanimous voting covered and not covered by Article 48(7) TEU, see R. Schütze and T. Tridimas, *ibid.* Annex II, p. 452.

replaces unanimity with QMV. It follows from this, that the prohibition of the *passerelle* to which Article 312(2)(1) TFEU refers is the one preventing a shift from an SLP to the OLP.⁴⁷

A third exception under Article 353 TFEU refers to the '**flexibility clause**' of Article 352 TFEU, empowering Council, acting unanimously on a proposal of the Commission and with Parliament's consent, to adopt appropriate measures where the Treaties have not provided the Union with the necessary powers but an action proves necessary within the framework of existing policies. In this case, by virtue of the exception in Article 353 TFEU, the unanimous decision cannot be bypassed by a majority decision in Council. Ruling out application of any general (or specific) *passerelle* clause to the 'flexibility clause' serves the purpose of keeping the sensitive aspects of the confines of the Union's action under the control of the Member States.

A fourth exception contained in Article 353 TFEU refers to Article 354 TFEU, which does not, however, contain any decision of Council under the unanimity rule or any special legislative procedure, but rather the methods of vote counting when a Member State has been sanctioned with the suspension of certain rights owing to the violation of fundamental EU values (Article 7 TEU). A tenuous link to the unanimity rule could have been made had there been a reference to Article 7(2) TEU, although, even so, it would be about a decision of the European Council and not of Council as the general *passerelle* requires. Difficulty in giving a reasonable meaning to this provision has induced scholars to suppose that the reference to Article 354 TFEU is due to a drafting error,⁴⁸ although a minority opinion⁴⁹ considers it possible that the exclusion refers to the initiation of an Article 7 TEU procedure.

4.2.2. Uncodified exceptions

Further exceptions, although not explicitly contained in the Treaties, to recourse to a general *passerelle* have been identified⁵⁰ in situations where it is necessary to maintain the institutional balance. In this vein, for example it would not be possible to shift the voting rules with which Council may amend a Commission proposal (Article 293(1) TFEU) from unanimity to QMV. This conclusion is justified by the need to preserve a high degree of approval for a proposal originating from the Commission, the institution representing the interests of the Union.

A second uncodified exception consists of the situation envisaged in Article 294(7-9) TFEU, where in second reading Parliament may propose amendments to Council's first reading position and such amendments are forwarded *inter alia* to the Commission for an opinion. Normally, Council would act by QMV if it intended to approve Parliament's amendments. However, if the Commission has issued a negative opinion, Council is obliged to act unanimously on them. In such a situation, it would not be possible to introduce a *passerelle* allowing Council to decide by QMV on those amendments, the reason being, as in the previous situation, to preserve the institutional balance and safeguard the furtherance of Union's interest embodied in the Commission's (negative) opinion, which can be overruled only by a higher degree of political will (unanimity) of Council.

The relationship between the two general *passerelle* clauses can be described as being not mutually exclusive. Neither is there any *lex specialis* relationship between the two. Article 48(7)(1) refers to the shift to QMV for Council decisions, while the second subparagraph refers to the shift from SLP to OLP for the adoption of legislative acts.

⁴⁷ See R. Böttner and J. Grinc, *op. cit.* page 40.

⁴⁸ See R. Böttner and J. Grinc, *op. cit.* page 27; and R. Schütze and T. Tridimas, *op. cit.* p. 441, footnote No 148.

⁴⁹ See R. Streinz/Pechstein AEUV Article 353 Rn. 1.

⁵⁰ See R. Böttner and J. Grinc, *op. cit.* page 27.

Some observations are however necessary. A special legislative procedure is the one described by Article 289(2) TFEU that allows regulations, directives or decisions to be adopted either by Council with the participation of Parliament or vice-versa. The possibility offered by Article 48(7) TEU to shift from special to ordinary legislative procedure can be exercised only in situations where it is Council that adopts the legislative act with the participation of Parliament, not *vice versa*. It is true, however, that most of the special legislative procedures provided by the Treaties involve Council adopting the act with the participation of Parliament, with the Council acting unanimously. In such circumstances, either of the two general *passerelles* of Article 48(7) TEU may be used, with differing legal consequences. The *passerelle* in the first subparagraph of Article 48(7) TEU may only change the decision-making majority without allowing Parliament to act as co-legislator with Council, while the *passerelle* in the second subparagraph of Article 48(7) TEU changes the legislative procedure only, leaving the unanimity requirement of Council unchanged. Nothing in Article 48(7) TEU seems to forbid the simultaneous adoption of both *passerelles*. Finally, it should be noted that Parliament has the possibility to exercise a certain leverage on the activation of a general *passerelle* clause as its consent is needed.

Qualified majority voting of Council in the context of a special legislative procedure

There are very few cases where Council acts by qualified majority voting in a special legislative procedure: Article 23(2) TFEU on EU citizens' consular protection in a third country; Article 182(4) TFEU on specific programmes within the multiannual framework programme; Article 311(4) TFEU, which is however excluded from the application of a *passerelle* clause by virtue of Article 353 TFEU.

Other provisions envisage Council acting by QMV under a special legislative procedure, but in the process of adoption of an act of Parliament (Article 226(3) on exercise of the right of inquiry and Article 228(4) TFEU on regulations and general conditions of the performance of the Ombudsman's activity). This excludes the application of *passerelle* clauses as they apply only to acts of Council.

Source: R. Böttner and J. Grinc, *Bridging Clauses in European Constitutional Law*, Springer, 2018, pp. 20-24.

4.3. Procedure to adopt a *passerelle*

A general *passerelle* clause may be activated by the European Council without a formal proposal of the Commission. The lack of an initiator however does not rule out informal or formal endorsement by the Commission (see Section 7).⁵¹ However, the Commission does not have a formal role and remains excluded from the procedure. When adopted, the decision to activate the *passerelle*, is contained in a decision of the European Council, which should indicate the policy area or cases in which it applies and the type of general *passerelle* that is activated, although Article 48(7) TEU is silent on this.

4.3.1. Role of national parliaments

The procedure that leads to the adoption of general *passerelle* clauses is designed in such a way that national parliaments are substantially involved and **can veto the initiative**, possibly even more decisively than in the subsidiarity control procedure (Protocol 2). The decision to activate a general *passerelle* (Article 48(7)(3) TEU) is notified to national parliaments in the national language. From the moment of the notification, national parliaments have six months to manifest their opposition. The six-month period begins – by analogy with what Protocol 1 and 2 provide in a similar procedure – from the moment at which the act is notified to all national parliaments. The opposition of national parliaments must be explicit. Article 48(7) TEU expressly requires national parliaments to 'make known their opposition', which conversely entails that expressed approval or consent is not

⁵¹ E. Grabitz, M. Hilf, M. Nettesheim and C. Ohler, *op. cit.* Article 48 r. 48-50.

necessary. The TEU does also not require the opposition to take any specific form in order to be valid, nor does the opposition need to be specifically motivated. There is no minimum number of opposing parliaments needed as a threshold in order to block a *passerelle* initiative, as is the case *mutatis mutandis* for the subsidiarity control procedure, where either one third or a simple majority of votes attributed to national parliaments may cause the proposal to be reviewed (Article 7 of Protocol 1 to the Treaties). In other words, the opposition of one single national parliament is sufficient to abort the initiative (for bicameral parliaments see box on this page).

From the point of view of national parliaments, the expression of veto must be the unequivocal expression of the will of the national parliament⁵². The process by which the will of national parliaments is formed is established by national rules. These rules may, for example, make the decision dependent on an electoral consultation, such as a referendum. It is however for the national authorities to translate the result of the referendum into the validly expressed will of a national institution for the purposes of Article 48(7) TEU. The power of veto as described, gives national parliaments a very broad power of interference, although they are deprived of the power to (formally) amend the decision of the European Council. From the point of view of EU law, the powers attributed to national parliaments should be able to be exercised in an autonomous and free manner, although their exercise may coexist with national rules providing for quora or majority rules for the adoption of parliamentary positions.

Vetos to *passerelle* clauses by national parliaments with bicameral systems

The methods for forming a national parliament's position in bicameral systems varies greatly among Member States. In some states there is an asymmetrical constitutional setting whereby one chamber prevails over the other (e.g. Slovenia and Austria). In other Member States, the two chambers cooperate but a veto materialises only if both chambers adopt a negative position (e.g. France, Italy, Romania and Spain).

In other Member States, the two chambers vote separately or independently from each other without reaching a common position (e.g. Germany, Poland, Czech Republic, Ireland and the Netherlands). Particular arrangements are made in Belgium, as seven parliaments are involved in the constitutional process of ratification and in the subsidiarity control procedure (Protocol 2).

Complexities may arise when a Member State has adopted a bicameral system, in that the veto, or absence thereof, must represent the will of the national parliament as a whole. Bicameral systems, where parliaments consist of two separate chambers, each with its own governance and functions, are not uncommon in the EU. Twelve out of the (now) 27 Member States have such systems, with different constitutional settings and internal workings. A 'second chamber' is normally, although by no means always, entrusted with representing different interests or may discharge a different function with respect to the 'first chamber' and is not necessarily elected. The application to the general *passerelle* clause of the 'one chamber one vote' principle applicable in the subsidiarity control mechanism (Protocol 2) has been viewed with criticism.⁵³ The function of the two mechanisms is in fact different and the granting of two votes to parliaments with bicameral systems would warrant an advantage over monocameral parliaments, as each chamber could have a vetoing power over a *passerelle* initiative meaning a *de facto* 'double' veto power.

⁵² For a fuller account of the expression of the national parliament's position in bicameral and monocameral parliaments, see R. Böttner and J. Grinc, *ibid.* p. 66-74. On the role of national parliaments with respect to the *passerelle* clause, see P. Kiiver, 'The composite case for national parliaments in the European Union: who profits from enhanced involvement?', *European Constitutional Law Review*, Vol. 2(2), 2006, pp. 227-252.

⁵³ R. Böttner and J. Grinc, *ibid.* p. 68.

4.3.2. Role of the European Parliament

The European Parliament plays a substantial role in the procedure of adopting general *passerelle* clauses. Although the power it enjoys is not of a constituent type, it can steer or at least influence a fine-tuning of the European Council's initiative by **exercising the (political) leverage of Parliament's consent for the adoption of general *passerelle* clauses**. To this end, the majority required for Parliament's consent is that of its component members. This higher threshold signifies the constitutional value of *passerelle* clauses that are aimed at modifying decision-making procedures enshrined by the Treaties. The TFEU does not detail the procedure or how the notification to the European Parliament should be performed. Most likely, it can be assumed that the European Council notifies national parliaments and the European Parliament simultaneously.

The European Parliament's consent is on the one hand an essential requirement of the procedure, whose absence may justify an action for annulment (Article 263 TFEU),⁵⁴ as the decision on a *passerelle* is an act of secondary law subject to judicial review⁵⁵ (see however Section 4.5).

The fulfilment of Parliament's obligation to give or deny consent cannot be suspended indefinitely by virtue of the principle of sincere cooperation. It has been argued therefore that a 'pocket veto', i.e. blocking Parliament's decision indefinitely, could be subject to an action for failure to act.⁵⁶

4.4. Role of the European Council

The European Council is the first and last actor in the procedure. Once the procedure before national parliaments and the European Parliament is complete, the decision to adopt a general *passerelle* clause is in the hands of the European Council. In this situation, Article 48(7) TEU – by derogation to the European Council's default decision-making method which is consensus (15(4) TEU) – explicitly requires the European Council to adopt the initiative by unanimity. This entails the European Council deciding with a formal vote. Unanimity, however, as Article 235(1) TFEU mandates, is not precluded by the abstention. In other words, the abstention of a State representative within the European Council does not count as a vote against the initiative. As in all situations where the European Council votes (Article 235(1) TFEU) and does not act by consensus, the President of the European Council and the President of the Commission, who in accordance with Article 15(2) TEU are also members of the European Council, may not cast their vote. The unanimity required in European Council coupled with the requirement that no national parliament exercise a veto have contributed to the procedure to adopt general *passerelles* being referred to as one of 'double unanimity'. The role of the European Commission is thus smaller and relegated to one of a consultative nature. This, together with the thorough involvement of national parliaments, the role of the European Council and the necessary consent of Parliament, testify once more to the highly political nature of the adoption of general *passerelle* clauses.

⁵⁴ R. Manko, Action for annulment of an EU act, EPRS, European Parliament, November 2019.

⁵⁵ R. Böttner and J. Grinc, *op. cit.* p. 76 and F. X. Priolla and D. Siritzky, *Le traité de Lisbonne*, La documentation française, 2008, p. 343. For the notion of reviewable acts with particular reference to acts of the European Council see K. Lenaerts, I. Maselis and K. Gutman, *EU Procedural Law*, Oxford University Press, 2015, p. 303.

⁵⁶ R. Böttner and J. Grinc, *op. cit.* p. 77. However, see Rule 105 of Parliament's Rules of Procedure whereby paragraph (3) establishes that the committee responsible shall deal with the request for consent without undue delay. If the committee responsible has not adopted its recommendation within six months after the request for consent was referred to it, the Conference of Presidents may either place the matter on the agenda for consideration at a subsequent part-session or, in duly justified cases, decide to extend the six-month period.

4.5. Effects of the adoption of a general *passerelle* clause

The adoption of a general *passerelle* clause modifies the way in which decision-making is carried out (shift to QMV or to the OLP) in a particular area or policy, not only for the particular (legislative) act to be adopted, but also for its future amendments. In other words, the shift also affects the future life of the legal instrument or measure adopted under the activation of a general *passerelle* clause.

The most remarkable legal as well as political effect derived from the adoption of a general *passerelle* clause is the **loss of veto power for individual Member States**. This is particularly evident for one of the two *passerelle* clauses i.e. that under Article 48(7)(1) TEU, which allows a shift from unanimity to QMV. This effect, as it impacts on the possibility for a Member State to exercise sovereign powers to influence an EU policy, has been recognised by scholars and the judiciary. In Germany, in the *Lisbon*⁵⁷ and *OMT*⁵⁸ cases the German Constitutional Court addressed the issue of the reduced influence resulting from the introduction of majority voting not agreed with a formal revision of the Treaties and, in the *Lisbon* case in particular, the German Constitutional Court indicated that approval by the German representative within the European Council of such shift would require a law within the meaning of Article 23(1) of the German Basic law in order to guarantee the decision an adequate level of democratic legitimacy, requiring two thirds approval votes in both the *Bundesrat* and the *Bundestag*.⁵⁹

The shift to QMV therefore makes the position of each individual Member State opposing a decision within Council less influential, by introducing the possibility for the Member State to be outvoted. Opposition is not totally impossible, however, as – if QMV is introduced – the 'ordinary' rules of Article 16(4) TEU apply, which establish that QMV is attained when a decision is supported by 55 % of Council members, i.e. at least 15 States, representing at least 65 % of the population of the Union. Conversely, a 'blocking minority' must comprise at least four Council members in accordance with Article 16(4) TEU.

A *passerelle* clause can be adopted, but it can likewise be revoked. The question is how can a general *passerelle* be revoked and what are the effects of the revocation. When it comes to the procedure to revoke a *passerelle* the Treaties are silent. General principles of legal theory may, however, come to the rescue, as the principle of *actus contrarius* could apply, entailing that a decision of the European Council, consent of Parliament and non-opposition of national parliaments would be required. This argument, however could lead to surprising outcomes, such as the possibility for national parliaments to oppose a return to the original Treaty prescriptions by vetoing the decision to revoke a general *passerelle* clause. Also, if an *actus contrarius* was the answer, Parliament could refuse its consent, and thus maintain leverage and the prominent role awarded by a *passerelle* that shifted to the OLP. On the other hand, it could be argued that the return to the original constitutional setting does not require all the procedural steps fulfilled for the adoption of a general *passerelle* to also be followed for revocation, but only the most salient. This question however seems to remain open.

Another issue concerns the destiny of legislative or other acts adopted under a revoked *passerelle* clause. Since the decision-making mechanisms established by effect of the general *passerelle*

⁵⁷ Case of the Federal Constitutional Court, 2 Bv 2/08 and others, *Treaty of Lisbon*, judgment of 30 June 2009, paragraphs 319-414.

⁵⁸ Case of the Federal Constitutional Court, 2 BvR 2728/13 et al, *OMT*, of 21 June 2016, paragraph 131.

⁵⁹ C. Callies and M. Ruffert; H.-J. Cremer, *op. cit.* Article 48 rs. 17-18; R. Böttner and J. Grinc, *op. cit.* p. 79. For a fuller account of the *Lisbon* judgment with respect to *passerelle* clauses, flexibility and brake clauses, see P. Kiiver, 'The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU', *European Law Journal*, Vol. 16(5), September 2010, pp. 578-588. For a comparative perspective on constitutional requirements for the use of *passerelle* clauses and flexibility mechanisms in France and Czechia, see M. Wendel, 'Lisbon before the courts: comparative perspectives', *European Constitutional Law review*, Vol. 15(4), 2019, pp. 619-643.

(QMV/OLP) are revoked, the question arises as to whether after revocation these mechanisms cease to apply for all future acts to be adopted in the area covered by the *passerelle*, or whether the future acts may continue to be subject to the *passerelle*. The question is, in other words, whether a 'grandfathering clause' could apply in this circumstance. Commentators⁶⁰ take the view that since it is the law in force at the time of adoption (*tempus regit actum*) that determines the regime of a legal act, there is no reason why this same principle could not also apply when the regime applicable has been modified, in which case no grandfathering clause would be applicable. In addition, it may be also argued that as a 'grandfathering clause' is an exception to the rule, it must be explicitly provided for by the law.

General *passerelle* clauses can be subject to judicial review, although they modify *de facto* primary law which on the contrary is not subject to such review. However, a decision of the European Council to adopt a general *passerelle* does not qualify as primary law, but as secondary law. As such, it is subject to the standard means of review provided for by the TFEU, in particular the preliminary reference procedure under Article 267(1)(b) TFEU, concerning the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.⁶¹ The question remains as to whether it is admissible to exercise a review of the legality of acts under Article 263 TFEU against acts of the European Council, considering that in accordance with Article 263 TFEU such a review is applicable to acts of the European Council intended to produce legal effects *vis-à-vis* third parties. The broad notion of acts of the EU institutions with binding effects that are subject to a review for annulment, which excludes acts not intended to produce legal effects, such as recommendations, opinions or even Commission declarations unless a binding commitment is attached to them,⁶² would confirm this approach. Moreover, account should also be taken of the extension of the range of reviewable acts brought with the Lisbon Treaty and intended to establish a comprehensive system of review of legality of the acts of the institutions.⁶³

⁶⁰ R. Böttner, J. Grinc, *ibid.* p. 34 and 35.

⁶¹ R. Böttner, J. Grinc, *ibid.* p. 35.

⁶² U. Ehrlicke, in Streinz, *op. cit.* Art. 263, mn. 21-23.

⁶³ I. Dervisopoulos in H.-W. Rengeling, A. Middeke, M. Gellermann, *Handbuch des Rechtsschutzes in der Europäischen Union*, C. H. Beck, 2014, mn. 29-48. On this point see also *infra* footnote 55.

5. Special *passerelle* clauses

In addition to the two general *passerelle* clauses, the Treaties provide for **six special *passerelle* clauses**. Whereas the general *passerelle* clauses of Article 48(7) TEU were introduced *ex novo* with the Lisbon Treaty, only four of the six current special *passerelles* were a novelty of the Lisbon Treaty (see box below). The question may be raised why special *passerelle* clauses are needed at all, since the two general ones already establish a uniform procedure that allows the decision-making rules set out in the Treaties to be modified. The answer could lie in the fact that the procedure for adopting the special *passerelle* clauses is less burdensome and introduces **less stringent conditions compared with the two general *passerelle* clauses (48(7) TEU)**. Conversely, it could also be argued that some of the safeguards attached to the general *passerelle* clause (Article 48(7) TEU) are absent from the special *passerelles*, e.g. the involvement of national parliaments (with the exception of the special *passerelle* on family law with cross-border implications).

A common feature of the special *passerelles* is that the decision to introduce them is taken by Council as opposed to the European Council – although for two of them, on the MFF and on the CFSP, it is the European Council that authorises their use.

Special *passerelle* clauses after the Lisbon Treaty

There are **currently six special *passerelle*** clauses in the Treaties.

The Lisbon Treaty **retained two pre-existing special *passerelles*** on:

- **social policy** (now Article 153(2) TFEU), this special *passerelle* was introduced with the Nice Treaty (see Article 2, point 9, [p. 17](#)), which modified Article 137 TEC and allowed the introduction of the ordinary legislative procedure in some areas of social policy;
- **environmental policy** (now Article 192(2)(2) TFEU). This special *passerelle* was introduced with the Maastricht Treaty ([Article 130s](#)) and thereafter became [Article 175 of the TEC](#) but enabled a shift from unanimity to QMV in certain areas of environmental policy largely coinciding with areas subject to the current special environmental *passerelle* (Article 192(2)(2)). The Lisbon Treaty amended Article 175 TEC modifying this pre-existing special *passerelle* into one that allowed a shift to the OLP ([Article 2, point 144 \(a\) of the Lisbon Treaty](#) (p. 87)). A special *passerelle* shifting from unanimity to QMV had however already been introduced by the Single European Act ([Article 130s](#)) but referred broadly to 'matters' in the environmental area, and not to specific areas in the field of environment).

The **Lisbon Treaty introduced four new special *passerelles***:

- in **CFSP**, allowing a shift for certain decisions from unanimity to QMV (Article 31(3) and (4) TEU); this *passerelle* was introduced by [Article 1, point 34](#) of the Lisbon Treaty (p. 28);
- for the **MFF**, allowing a shift from unanimity to QMV (Article 312(2) TFEU), this *passerelle* was introduced by [Article 1, point 261](#) of the Lisbon Treaty (p. 122);
- in **family law with cross-border implications**, allowing a shift from an SLP to the OLP (Article 81(3)(2) TFEU), this *passerelle* was introduced by [Article 2, point 66](#) of the Lisbon Treaty (p. 62);
- in **enhanced cooperation**, allowing a shift from unanimity to QMV and from an SLP to the OLP (Article 333 TFEU), this *passerelle* was introduced by [Article 2, point 278](#) of the Lisbon Treaty (p. 127).

In some cases a Commission proposal is required (social policy, family law and environment). While for the two general *passerelles* (Article 48(7) TEU) Parliament's consent is necessary, **the role of Parliament in the special *passerelles* is less as it is only consulted**. Moreover, with the special *passerelles* on MFF, CFSP and on shifting to QMV in enhanced cooperation (Article 333(1) TFEU), neither consultation nor consent of Parliament applies.

The question arises as to the relationship between the special *passerelle* clauses on the one hand and the two general *passerelles* (Article 48(7) TEU) on the other, and whether the former take

precedence over the latter by virtue of the principle of *lex specialis derogat legi generali*. Scholars⁶⁴ seem to accept that the relationship between the two is not one of precedence or mutual exclusion, but one that allows a choice between the two. The reason for this is that the special *passerelles* would not qualify as *lex specialis*⁶⁵ in the strict sense, but as sectorial-specific mechanisms that mitigate the procedural rigidity of the general *passerelles* and whose aim is not that of excluding national parliaments from the procedure. It would therefore be possible, if enhanced democratic legitimacy was sought, to initiate the more complex procedure enshrined in the general *passerelles* where national parliaments maintain a veto power.

5.1. Social policy

In the field of social policy the Union has limited competences consisting of coordination and supporting competences in areas such as the working environment, working conditions, social security, etc. The power of Parliament and Council in social policy is limited to the adoption of measures aimed at encouraging cooperation between Member States.

Parliament and Council may however adopt directives for the purpose of setting minimum requirements in the fields from (a) to (i) of Article 153(1) TFEU, which are the following:

- a) improvement of the working environment;
- b) working conditions;
- c) social security and protection of workers;
- d) protection of workers where their employment contract is terminated;
- e) information and consultation of workers;
- f) collective defence of interest of workers and employers, including co-determination but excluding the right of association, the right to strike or the right to impose lock-outs;
- g) conditions for the employment of third-country nationals legally residing in the Union;
- h) integration of persons excluded from the labour market;
- i) equality between men and women.

In principle, when Council and Parliament adopt legislative acts in the field of social policy, which includes the above points from a) to i) of Article 153(1) the OLP applies, together with consultation of the European Economic and Social Committee (EESC) and the European Committee of the Regions (CoR).

However, by derogation, a special legislative procedure must be applied for some of the above points, with Council acting unanimously after consultation of Parliament, namely:

- c) social security and social protection of workers;
- d) protection of workers where the employment contract is terminated;
- f) representation and collective defence of interest of workers and employers including co-determination but excluding the right of association, the right to strike or the right to impose lock-outs; and
- g) conditions for employment for third-country nationals.

⁶⁴ See R. Böttner and J. Grinc, *ibid.* p. 42.

⁶⁵ See however the opinion of J.-C. Piris, *The Lisbon Treaty – A legal and political analysis*, Cambridge University Press, 2011, p. 108, who considers special *passerelle* clauses to be *lex specialis* with respect to the general ones.

The retention of Council's unanimity rule reveals the will of national governments to exercise enhanced control in certain areas of social policy, which seems to be justified given the sensitive nature of these policy areas.

A special *passerelle* that already existed under the Treaty establishing the European Community (Article 137(2)(2) TEC) can however be activated by virtue of Article 153(2) TFEU. Here Council, acting unanimously on a proposal from the Commission and after consultation of Parliament, may decide **to apply the OLP to Article 153(1)(d), (f) and (g) TFEU**, i.e. to the field of the protection of workers whose employment contracts have been terminated; representation and collective defence of the interests of workers and employers and conditions for employment for third-country nationals legally residing in the Union. The *passerelle* clause that allows a shift to OLP cannot apply, and therefore a special legislative procedure remains applicable to the sensitive area of social security and social protection of workers (Article 153(1)(c) TFEU). In this field, however, the general *passerelle* clause may be applied with the stricter conditions attached.

Practical example of the application of a (special) *passerelle* clause under the TEC

The Treaty establishing the European Community contained a special *passerelle* clause applicable to the field of visas, asylum, immigration and free movement of persons (Part III, Title IV, TEC). These policy areas, which were 'communitarised' by the Treaty of Amsterdam, were mostly subject to the unanimity rule in Council. Article 67(2), second indent, TEC, however, contained a *passerelle* clause that allowed the Council, acting unanimously after consultation of the European Parliament, to decide that for all or parts of the areas covered by Title IV the co-decision procedure (Article 251) would apply.

On this basis, a special *passerelle* was adopted by Council [Decision 927](#) of 22 December 2004, which, as of 1 January 2005, empowered Council to apply the co-decision procedure to: i) measures aimed at ensuring the absence of any controls on persons (EU or third nationals) when crossing internal borders, ii) standards and procedures to be followed by Member States in carrying out checks on persons at external borders, iii) measures defining the conditions for nationals of third countries to travel freely within the territory of the Member States during a period of no more than three months, iv) measures promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons, v) measures in the field of illegal immigration and illegal residence, including repatriation of illegal residents.

As a consequence of the above shift to the co-decision procedure, also Regulation 789/2001 and 790/2001 reserving for the Council implementing powers for practical procedures on the examination of visa applications and for carrying out border checks and surveillance, were also modified, requiring Council to act by qualified majority.

A noteworthy aspect of this special *passerelle*, compared with the procedure for the adoption of the general one in Article 48(7) TEU, is that it is Council that decides unanimously on the adoption of this (social policy) *passerelle* that can allow the shift from the SLP to the OLP, as opposed to the European Council as is the case for the general *passerelle* clause. This special *passerelle* also requires a proposal from the Commission prior to the Council's decision, which would normally mean that the Commission must issue a formal proposal for a Council decision. Involvement of national parliaments is totally absent from the process that leads to the proposal or to the adoption of this special *passerelle*. Likewise, Parliament's role is reduced compared to that enjoyed in the general *passerelle*, as under Article 153(2) TFEU Parliament is only consulted and needs not give consent. Theoretically, this could, at first sight, signify a reduction in the leveraging power that Parliament can exercise because Council, in deciding on the introduction of this *passerelle*, is no longer bound by Parliament's opinion. It must be noted, however, that the decision to adopt the (social policy) *passerelle*, if successful, would entail the adoption of the OLP, which increases overall the power of Parliament in the legislative process as it is put on the same footing as Council.

5.2. Environmental policy

The attainment of the environmental policy objectives of the Union is governed, in accordance with Article 192 TFEU, by the OLP whereby Council and Parliament legislate after consultation of the EESC and the CoR. The environmental objectives pursued by the EU are broadly those enshrined in Article 191 TFEU: preserving, protecting and improving the quality of the environment, protecting human health, engaging in a prudent and rational utilisation of natural resources, and promoting measures at international level in particular in the field of climate change.

The OLP that in this field applies by default to Union action does not however apply in a handful of very specific and sensitive fields related not uniquely to the environment but also to areas where Member States seek to maintain the possibility to maximise their influence.

These sensitive areas where a special legislative procedure and unanimity still apply, are those identified in Article 192(2) TFEU:

- provisions primarily of a fiscal nature (192(2)(a) TFEU);
- measures affecting town and country planning; quantitative management of water resources, or measures affecting the availability of those resources directly or indirectly; land use, except waste management (192(2)(b) TFEU);
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply (192(2)(c) TFEU).

The above areas are clearly of strategic importance to Member States, suffice it to consider the importance of the management of water resources or the decisions concerning the structure of energy supply. In those specific areas where a special legislative procedure applies, Council acts unanimously after consultation of Parliament, the EESC and the CoR (Article 192(2)(1) TFEU).

A special legislative procedure in the above policy areas may however be overruled by a **special passerelle clause**, introduced by the Maastricht Treaty,⁶⁶ making the **OLP applicable to the above areas identified in Article 192(2) TFEU**. For this special (environmental) *passerelle* to be adopted it is necessary for Council to act unanimously on a proposal from the Commission and after consultation of Parliament, the EESC and the CoR. This special (environmental) *passerelle* clause, by authorising a shift to the OLP and not merely changing the Council voting mechanism to QMV, enhances the role of Parliament, which effectively becomes a co-legislator in the areas indicated in Article 192(2)(a), (b) and (c) TFEU.

5.3. Family law with cross-border implications

Judicial cooperation in civil matters with cross-border implications is based on the principle of mutual recognition of judgments and decisions on extra-judicial cases. This cooperation involves the approximation of laws and regulations of Member States where the default decision-making rule is the OLP, with Parliament and Council acting on the same footing for the proper functioning of the internal market. Article 81(2) TFEU details in a long non-exhaustive list⁶⁷ the specific areas where Union action may be exercised by the co-legislators. These areas are the following:

- a) mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
- b) cross-border service of judicial and extrajudicial documents;

⁶⁶ See box on page 25.

⁶⁷ R. Mańko, Europeanisation of civil procedure - Towards common minimum standards?, EPRS, European Parliament, 2015, p. 12.

- c) compatibility of Member States' rules on conflict of laws and jurisdiction;
- d) cooperation in the taking of evidence;
- e) effective access to justice;
- f) eliminating obstacles to the proper functioning of civil proceedings, also by promoting the compatibility of rules on civil procedure applicable in Member States;
- g) development of alternative methods of dispute settlement;
- h) support for training the judiciary and judicial staff.

In the areas from a) to h) the two co-legislators may adopt legislative acts aimed at approximating Member States' legislation. However, by virtue of Article 81(3) TFEU, the OLP is not applicable to family law with cross border implications, and a special legislative procedure applies with Council acting unanimously after consultation of Parliament. As for previous special *passerelles*, the sensitive nature of the policy area⁶⁸ justifies Member States' wish to keep the area under the strict control that the unanimity guarantees, i.e. with the possibility to exercise the power of veto.

That said, not necessarily all aspects of family law with cross-border implications are destined to be decided using a special legislative procedure where Council acts unanimously. **A special (family law) *passerelle* clause** in fact allows a **shift from a special legislative procedure, with unanimity of Council, to OLP**. Article 81(3)(2) TFEU in fact empowers Council to identify certain aspects of family law in which measures may still be subject to the OLP if a special *passerelle* is introduced. For a decision to adopt this special *passerelle*, Council must decide unanimously on a proposal from the Commission and after consultation of Parliament.

This special (family law) *passerelle* clause, also retains one of the procedural aspects of the general *passerelles*, as it requires that the Commission proposal be notified to national parliaments,⁶⁹ which may object within six months its adoption. If an objection is expressed, the special *passerelle* may not be adopted. Like the others, this special (family law) *passerelle* clause **enhances the role of Parliament**, which effectively becomes a co-legislator in the matter. In addition, this special *passerelle* grants national parliaments a highly significant role, as they potentially have the power to block the *passerelle* procedure and neutralise its adoption. Here, again, the authorising institution is the Council, in contrast to the general *passerelle* clauses of Article 48(7) TEU, where the authorisation is given by the European Council.

⁶⁸ The sensitivity of this policy area is further evidenced by the fact that the two Commission proposals on matrimonial property regimes (COM(2016) 106 final of 2.3.2016) and registered partnerships (COM(2016) 107 final of 2.3.2016) could not be adopted using legally binding acts, but through the establishment of enhanced cooperation. Further information may be found in the EPRS [legislative train](#) on matrimonial property regimes and property consequences of registered partnerships – enhanced cooperation.

⁶⁹ G.-R. de Groot and J. Kuipers, 'The New Provisions on Private International Law in the Treaty of Lisbon', *Maastricht Journal of European and Comparative Law*, Vol. 15, No 1, 2008, pp. 109. These authors explain that although the *passerelle* clause was already contained in Article 111-269(3) of the Constitutional Treaty, the notification to national parliaments was a new element. During the IGC phase, therefore, the role of national parliaments in the *passerelle* procedure in the Treaty of Lisbon became stronger than in the Constitutional Treaty.

5.4. Multiannual financial framework

The MFF is established for seven years and ensures that Union expenditure develops in an orderly and sustainable manner⁷⁰ within the limits established by the own resources. The MFF also acts as the setting with which the annual budget must comply.

A special *passerelle* clause allows a shift from unanimity in Council to QMV for the adoption of the multiannual financial framework (MFF). For this special (MFF) *passerelle* to be adopted authorisation is required from the European Council, which may, by a unanimous decision, authorise Council to apply QMV for the adoption of the regulation on the MFF.

The background of this special *passerelle* clause is that in accordance with Article 312(2)(1) TFEU the regulation laying down the MFF is adopted by Council in accordance with a special legislative procedure. In this way, Council acts unanimously after consent of Parliament by a majority of its component members. The second subparagraph of Article 312(2) provides for a special *passerelle* clause, which is formulated in such a way as to allow the *passerelle* only to shift the decision-making of Council to QMV, without changing the type of legislative procedure. As a result, the special (MFF) *passerelle* may be used only for shifting from unanimity to QMV in Council and not for shifting from a special legislative procedure to the OLP where Parliament is involved.

This particular restriction to the type of shift, which entails the loss of the 'veto' power by Member States, seems to be rather unusual in consideration of the traditionally protective attitude of Member States in budgetary matters. Also, the absence of any involvement of national parliaments has been indicated as an oddity of this special (MFF) *passerelle* clause.⁷¹ However, this peculiarity seems to be overcome by the fact that the decision on the MFF concerns limits on expenditures whose methods and sources of financing have already been decided, also with the participation of Parliament. Article 311(3) TFEU in fact entrusts Council, acting by unanimity and after consultation of Parliament, with the decision laying down the provisions on own resources of the Union. However, for the adoption of provisions on own resources no *passerelle* (special or general⁷²) can be applied, which entails that unanimity is maintained, also by virtue of the express prohibition of Article 353 TFEU. It can therefore be said that the QMV that can be introduced with the special (MFF) *passerelle* applies in the framework of own resources decisions where Council, acting by unanimity, has already been able to control its content.

Another feature of this special (MFF) *passerelle* is that, as with the general *passerelles* of Article 48(7) TEU, the European Council is the authorising institution. It must be noted, however, that the involvement of national parliaments, the European Commission, the European Parliament or other consultative institutions is absent from the adoption procedure. The procedure leading to the adoption of this special (MFF) *passerelle* clause therefore remains fully in the hands of national governments, in a way reminiscent of intergovernmental decision-making.

5.5. Common foreign and security policy

A rather interesting special *passerelle* is that provided by Article 31(3) TEU on common foreign and security policy (CFSP).

⁷⁰ Article 312(1) TFEU states that the MFF 'shall be established for a period of at least five years'. On the alignment of the EU's budgetary cycle to the institutional cycle, see briefing by A. D'Alfonso, Multiannual financial framework for the years 2021 to 2027, EPRS, European Parliament, June 2019.

⁷¹ See R. Böttner and J. Grinc, *ibid.* p. 40.

⁷² On the exclusion of a general *passerelle* for own resources, see Article 353 TFEU, which rules out application to Article 311 (3) and (4), as noted in Section 4.2.1.

According to Article 31(1) TEU decisions in the area of CFSP are adopted by the European Council and the Council acting unanimously. The few exceptions to this general rule are laid down in Article 31(2) TEU, whereby Council acts by QMV. These refer to Council decisions: i) concerning the Union action or position on the basis of the European Council's decision on strategic interests and objectives; ii) based on a proposal of the High Representative upon the request of the European Council or on its own initiative; iii) implementing a decision defining the Union action or position; iv) appointing a special representative.

Article 31(3) TEU allows the European Council to adopt by unanimity a decision authorising Council to act by QMV in cases other than those already provided in paragraph 2 of the same Article.

The peculiarity of this special (CFSP) *passerelle* lies, first, in the type of flexibility that it introduces and, second, in its relationship with the general *passerelle* clause.

In contrast to the other *passerelles*, this special (CFSP) *passerelle* does not just affect the decision-making regime, it also extends the scope of the flexibility introduced since it allows Council to be authorised by the European Council to adopt decisions by QMV 'in fields other than those referred to' in the previous paragraph (i.e. Article 31(2) TEU). This special (CFSP) *passerelle* therefore has the potential to touch upon a broad range of areas falling *ratione materiae* under other provisions of Chapter 2 (CFSP) of Title V TEU. It does not extend, however, to decisions having military implications by virtue of Article 31(4) TEU. This means that neither the statutory QMV (Article 31(2) TEU) nor the QMV applicable by virtue of this special (CFSP) *passerelle* (Article 31(3) TEU) may apply to decisions with military implications.

One point of contention is the relationship between this special (CFSP) *passerelle* with the general *passerelle* of Article 48(7) TEU. The special *passerelle* of Article 31(3) TEU requires only authorisation of the European Council for the Council to act by QMV. The general *passerelle* of Article 48(7) TEU however provides for greater constitutional safeguards, since Parliament and national parliaments are thoroughly involved, even having the possibility to block the decision. The scope of the general *passerelle*, which is 'the Treaty on the Functioning of the European Union or Title V of this [TEU] Treaty' (i.e. the Union's external action and CFSP) overlaps with the scope of the special (CFSP) *passerelle* since Chapter 2 on CFSP – to which the special (CFSP) *passerelle* may also apply – is also contained in Title V TEU, which falls within the scope of the general *passerelle*. In addition, both provisions, Article 48(7) TEU and Article 31(3) and (4) TEU exclude the application of any *passerelle* to decisions with military implications. Considering therefore this overlap of policy areas, the question arises as to which *passerelle* should be applied in the field of CFSP, whether one prevails over the other and what is the relation between the two.

Academics have debated this issue without reaching a clear-cut outcome. The possibility of a drafting mistake in Article 31(3) TEU not being excluded but highly improbable,⁷³ the issue is whether or not the special *passerelle* of Article 31(3) TEU qualifies as *lex specialis* and as such therefore prevails over the *lex generalis* of Article 48(7) TEU (*lex specialis derogat legi generali*). The widely accepted position⁷⁴ attributes to Article 31(3) TEU a special nature (*lex specialis*)⁷⁵ following

⁷³ R. Böttner and J. Grinc, *op. cit.*, p. 47.

⁷⁴ S. Peers, *The Future of EU Treaty amendments*, p. 65. See also the authors mentioned in footnote 22 at page 47 in R. Böttner and J. Grinc, *ibid.*

⁷⁵ H.-J. Cremer in C. Callies and M. Rufert, *EU/AEUV, op. cit.* mn. 18. This author considers that Article 31(3) TEU (informal translation from German) 'will have to be ascribed a real specialty, which expresses the fact that the CFSP - despite attempts to strengthen the Union as a foreign policy center of gravity (see Article 24, paras. 8-11; Article 25, para. 6) is still to be understood essentially as a mechanism for coordinating the Member States' foreign and security policy. In this regard, it would appear unconvincing, with recourse to Article 48 para. 7(4) to demand the consent of the European Parliament for the decision of the European Council to change the matter according to the Treaty on the transition to a qualified majority, as this is only of limited importance in the CFSP area (see Article 24(1)(2), p. 5, Article 36). Admittedly, this reading does not achieve any conceivable gain under democratic law'.

in this respect also the approach of the German Constitutional Court in the *Treaty of Lisbon* judgment.⁷⁶ In this vein, it is argued⁷⁷ that, as the CFSP is a mechanism that basically coordinates national foreign policies, the validation of national parliaments is less compelling and normally the European Parliament is structurally less influential in this policy area than in others. Accordingly, the special nature of Article 31(3) TEU is less in contradiction with the context in which it should be applied.

A more compromising solution, which allows for the 'best of both worlds' is given by an interpretation⁷⁸ that reads Article 31(3) TEU in conjunction with Article 48(7) TEU and whereby somehow the relationship between the two provisions is reversed. According to this view,⁷⁹ the double repetition of the *passerelle* clause would be justified in the name of 'unity of the constitution' where Article 48(7) TEU lists the procedural details of a *passerelle* applicable also in CFSP and Article 31 recalls the existence of the *passerelle* in the same field. This argument makes it doubtful that the Article 31(3) TEU *passerelle* is autonomous as a special *passerelle* clause. According to this view, Article 31(3) TEU would have to be read in combination with Article 48(7) TEU and would be supplemented by it with particular regard to the procedure to be followed, which would require the participation of national parliaments and of the European Parliament as Article 48(7) TEU provides.⁸⁰

5.6. Enhanced cooperation

The TFEU contains very specific possibilities to modify the decision-making process for legal acts by means of two special (subtypes of) *passerelle* clause, once enhanced cooperation has been established. These two special *passerelles* reproduce for enhanced cooperation the two general *passerelles*, one special (subtype of) enhanced cooperation *passerelle* allows a shift from unanimity to QMV, the other a shift from an SLP to the OLP.

Enhanced cooperation is a form of cooperation that can be established among a restricted number of Member States (minimum of nine) in order to put in place a specific action or project that would fall within a non-exclusive competence of the Union, but where the Union as a whole is not likely to attain the same objectives within a reasonable period of time (Article 20 TEU).⁸¹

The first special enhanced cooperation *passerelle* builds on the fact that although unanimity within enhanced cooperation is to be understood as unanimity of the participating Member States only, it is likely to reproduce the well-known set of problems i.e. difficulties in achieving a unanimous decision, as in the non-enhanced cooperation scenario. For this reason, Article 333 (1) TFEU establishes a special *passerelle* clause that allows Council to adopt a decision by QMV when it would otherwise have to act unanimously in the framework of enhanced cooperation based on the applicable Treaty provision. The Member States that may vote on such a shift to QMV are those taking part in the enhanced cooperation (Article 330(1) TFEU). Deliberations are open to all Member States, i.e. also to those not participating in the enhanced cooperation project, although without the right to vote.

⁷⁶ German Federal Constitutional Court, 2 be 2/08 and others, *Treaty of Lisbon*, judgment of 30 June 2009. See C. Callies, M. Ruffert and H.-J. Cremer, EU-Vertrag (Lissabon), 2016 Article 31 Rn. 16-19.

⁷⁷ See on this point C. Callies, M. Ruffert and H.-J. Cremer, *op. cit.* Article 31 Rn. 16-19.

⁷⁸ R. Böttner, 'The Treaty amendment procedure and the relationship between Article 31(3) TEU and the general bridging clause of Article 48(7) TEU', *European Constitutional Law Review*, Vol. 12, pp.499-519, 2016.

⁷⁹ R. Böttner, *op. cit.* p. 517.

⁸⁰ R. Böttner, *op. cit.* p. 517.

⁸¹ On a recent assessment of enhanced cooperation decisions to date, see I. Kiendl Krišto and C. Isaksson, Implementation of the Treaty provisions concerning the enhanced cooperation, EPRS, European Parliament, December 2018.

As to the second special (enhanced cooperation) *passerelle*, Article 333(2) TFEU allows Council to decide by unanimity to adopt acts using the OLP that would normally require a special legislative procedure. In this case, consultation of Parliament is necessary. Neither of the enhanced cooperation *passerelles* in Article 333(1) and (2) TFEU can be applied to modify the decision-making regime where decisions with military or defence implications are concerned.

This special *passerelle* clause⁸² allows the same simplification available under the general *passerelle* clause to be reproduced for enhanced cooperation. A number of observations can be made however. Like all the other special *passerelles*, the special *passerelle* available under enhanced cooperation (Article 333(1) and (2) TFEU) does not involve national parliaments. There is no role for the Commission, and the European Parliament does not participate in the procedure either, apart from under the subtype of special *passerelle* under Article 333(2) TFEU i.e. the one shifting from SLP to OLP, where Parliament's consultation is required. Under the general *passerelle*, Parliament's role is stronger as its consent is needed.

Interesting questions arise as to the relationship between this special (enhanced cooperation) *passerelle* clause and the two general *passerelles*. In particular, what is the scope of application of the latter with respect to the former. It has been argued⁸³ that the two general *passerelle* clauses of Article 48(7) TEU apply to the area or cases within a desired policy area in general, whereas the special *passerelle(s)* of Article 333 TFEU apply only to the decision-making process of the individual enhanced cooperation arrangement. To give an example, a general *passerelle* clause that shifts decision-making from unanimity to QMV in an area of indirect taxation, which is currently subject to unanimity in Council by virtue of Article 113 TFEU, could – depending on the wording – entail as a result that all subsequent legislative proposals in the area of indirect tax would be subject to QMV. On the contrary, a special *passerelle*, whether under Article 333(1) or (2) TFEU, would apply only to the specific actions within an enhanced cooperation arrangement and would for example shift decision-making to QMV only in that specific perimeter. Accordingly, the shift of the decision-making process may be decided unanimously by virtue of Article 333(1) TFEU by the participating Member States within the specific enhanced cooperation arrangement, such as for instance the one establishing the financial transaction tax.⁸⁴

Another question concerns the destiny of the amendment or withdrawal of a legal act adopted under enhanced cooperation, in other words the life cycle of a legal act whose decision-making

Fields in which enhanced cooperation has been established

Agreed and implemented:

- European Unitary Patent (26 Member States)
- Divorce law (17 Member States)
- European Public Prosecutor's Office (EPPO) (22 Member States)
- Property regimes of international couples (18 Member States)
- Permanent structured cooperation (PESCO) in the area of defence and security (25 Member States)

Agreed, not yet implemented:

- Financial transaction tax (FTT) (10 Member States)
- Investing in supercomputing – the European High Performance Computing joint undertaking (25 Member States + Norway)

Source: [Those who want more do more](#), European Commission, March 2019.

⁸² As the two forms of this special *passerelle* have now been explained, the enhanced cooperation *passerelle* will, from now on, be referred to as a single mechanism.

⁸³ R. Böttner and J. Grinc, *ibid.* p. 43.

⁸⁴ [Proposal](#) for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, 14.2.2013 COM(2013) 71 final.

procedure has been shifted by a special (enhanced cooperation) *passerelle*. As it has been argued,⁸⁵ this shift also concerns all future amendments of the legal act in question.⁸⁶

A further dilemma arises where an enhanced cooperation arrangement is joined by all EU Member States, and the initiative under enhanced cooperation becomes part of the EU *acquis*. In such cases it could be argued that either the decision introducing the special (enhanced cooperation) *passerelle* should cease to apply or, on the contrary, that it should be extended to future acts adopted in that area. A grandfathering regime could also be envisaged, whereby the acts decided under the special *passerelle* (Article 333 TFEU) would still be subject to the new QMV or OLP regime decided upon. There is some uncertainty around these issues, without the matter ever having arisen so far in practice. One way to solve the issue would be to consider the special (enhanced cooperation) *passerelle* applicable as long as and to the extent that the enhanced cooperation remained in force, while, if this latter ceased to exist, the activation of the general *passerelle* under Article 48(7) TEU would come into play. This latter mechanism, in fact, provides for enhanced democratic guarantees, such as the involvement of national parliaments and of the European Parliament, contrary to the special (enhanced cooperation) *passerelle* of Article 333 TFEU. On the other hand, the special (enhanced cooperation) *passerelle* applies only to the Member States who wish to participate in a specific project on a voluntary basis, making the need for national parliamentary scrutiny less necessary.⁸⁷ Nevertheless, the view has been expressed⁸⁸ advocating for the survival of the special (enhanced cooperation) *passerelle* clause after all Member States have joined the enhanced cooperation and therefore once acts that were previously adopted under enhanced cooperation become part of EU law and *acquis*. This position essentially attaches to the special (enhanced cooperation) *passerelle* adopted under Article 333 TFEU the same legal effects as those of the general *passerelle* under Article 48(7) TFEU.

⁸⁵ R. Böttner, J. Grinc, *ibid.* p. 43.

⁸⁶ The issue raised here is however distinct from the one raised on p. 24 (Section 4.5.), which concerned the destiny of legislative or other legal acts adopted under a *passerelle* clause that is afterwards revoked. There the question was whether the revocation of a *passerelle* affected all future acts to be adopted in the area originally covered by the *passerelle*, or whether a 'grandfathering clause' would apply. Here, the question is whether the modified decision-making introduced by a *passerelle* in legal acts adopted under enhanced cooperation arrangements also affects future amendments of those same legal acts, or whether for example a new *passerelle* must be agreed among the Member States taking part in the enhanced cooperation initiative to continue to apply the same modified decision-making mechanism for the entire life cycle of that act. The question seems to also depend on the scope of the enhanced cooperation, as indicated in Council's act of authorisation (Article 329(1)(2) TFEU).

⁸⁷ See R. Böttner and J. Grinc, *ibid.* p. 45.

⁸⁸ R. Böttner and J. Grinc, *ibid.* p. 46.

Table 2 – Overview of the main features of special passerelle clauses

Broad policy area	Specific policy areas where the <i>passerelle</i> applies	Existence before Lisbon Treaty	Modification to decision-making	Which institution authorises	Whose decisions are affected?	Procedure required to adopt the special <i>passerelle</i>
CFSP Article 31(3) TEU	Decisions under Title V, Chapter 2 TEU (CFSP)	No	From unanimity to QMV	European Council	Council	Adoption by European Council unanimously
Family law with cross-border implications Article 81(3)(2) TFEU	Certain aspects of family law with cross-border implications	No	From SLP to OLP	Council	Council	<ul style="list-style-type: none"> ➤ Proposal from the Commission ➤ Unanimous adoption by Council ➤ Consultation of Parliament ➤ Notification of Commission proposal to national parliaments, which have six months to object to the adoption of the special passerelle clause
Social policy Article 153(2) TFEU	<ul style="list-style-type: none"> ➤ Protection of workers where the employment contract is terminated ➤ Representation and collective defence of the interest of workers and employers including co-determination ➤ Conditions for employment for third-country nationals legally residing in the Union 	Yes Article 137(2)(2) TEC	From SLP to OLP	Council	Council	<ul style="list-style-type: none"> ➤ Proposal from the Commission ➤ Unanimous adoption by Council ➤ Consultation of Parliament

Broad policy area	Specific policy areas where the <i>passerelle</i> applies	Existence before Lisbon Treaty	Modification to decision-making	Which institution authorises	Whose decisions are affected?	Procedure required to adopt the special <i>passerelle</i>
Environmental policy Article 192(2)(2) TFEU	<ul style="list-style-type: none"> ➤ Provision primarily of a fiscal nature ➤ Measures affecting the town and country planning, quantitative management of water resources or affecting directly or indirectly the availability of those resources ➤ Land use except waste management ➤ Measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply 	Yes Article 175(2)(2) TEC which provided for a shift to QMV	From SLP to OLP	Council	Council	<ul style="list-style-type: none"> ➤ Proposal from the Commission ➤ Unanimous adoption by Council ➤ Consultation of Parliament, EESC and CoR
Multiannual financial framework Article 312(2)(2) TFEU	Content of Multiannual Financial Framework Regulation	No	From unanimity to QMV	European Council	Council	Unanimous adoption by the European Council
Enhanced cooperation Article 333 TFEU	Decisions to be adopted in an established enhanced cooperation where the Treaties provide for the unanimity rule or a special legislative procedure	No	<ul style="list-style-type: none"> ➤ From unanimity to QMV ➤ from SLP to OLP 	Council Member States participating to the enhanced cooperation	Council Member States participating to the enhanced cooperation	<ul style="list-style-type: none"> ➤ For the shift to QMV, adoption by the 'enhanced cooperation Council configuration',⁸⁹ unanimously ➤ For the shift to OLP, adoption by 'enhanced cooperation Council configuration', unanimously after consultation of Parliament

⁸⁹ This expression does not allude to any additional configurations beyond the 10 established by Article 2 of the Council's Rules of Procedure, but indicates the Council acting in accordance with the arrangements of Article 330 TFEU (as Article 333 TFEU mandates), in other words the Member States participating in the enhanced cooperation arrangement.

6. 'Competence-competence' clauses

The TFEU provides also specific clauses that in Anglo-Saxon and Germanic academia are labelled as 'competence-competence' or 'Kompetenz-Kompetenz' clauses, indicating the power of the holder of a certain competence or jurisdiction to determine (or enlarge) the range of its own competence or jurisdiction. This particular type of clause bears some resemblance to a *passerelle* clause, because modifications to the competence are based on an act of self-determination of the institution. It differs however from the *passerelle* clause in that it does not alter the decision-making process but only the scope of the statutory competence.

Examples of such competence-competence clauses⁹⁰ or 'semi-*passerelle*' clauses⁹¹ although this latter denomination may lead to some confusion, can be found in Articles 82(2)(d) and 83(1) TFEU.

The background to the semi-*passerelle* clause of Article 82(2)(d) TFEU is that in the field of judicial cooperation in criminal matters the principle of mutual recognition of judgments and judicial decisions applies. To the extent necessary to facilitate mutual recognition of judgment and judicial decision and police cooperation in criminal matters with a cross-border dimension, the EU may adopt legislative acts under the OLP (Article 82(2) TFEU) setting minimum rules in several fields such as mutual admissibility of evidence, rights of individuals in criminal procedures, rights of victims and any other specific aspect of the criminal procedure that the Council may identify in advance by decision.

Article 82(2)(d) TFEU therefore empowers Council to identify *other specific aspects* of the criminal procedure for which the European Parliament and Council may adopt directives establishing minimum common rules. The decision as to whether these other aspects of criminal procedure may be subject to law making through common rules is taken by Council unanimously with the consent of Parliament. As it is clear, Council must unanimously agree to *extend* a competence of the Union and Parliament must consent to it.

Similarly, Article 83(1)(3) TFEU allows Council to adopt a decision identifying *other areas of crime*, in addition to those already identified in Article 83(1) i.e. terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime, for which the EU co-legislators may establish common rules. This concerns the definition of criminal offences and sanctions, where the crimes in question have a particular cross-border dimension resulting from the nature or impact of the offences or from the special need to combat them on a common basis. Minimum rules concerning the definition of criminal offences and sanctions are subject, whether they are the 'original' areas or those added by Council, to the OLP.

Also, in the case of Article 83 TFEU, the enlargement of the competence to identify other areas of crime, where the common definition of rules may be adopted, can be decided by Council acting unanimously after consent of Parliament (Article 83(1)(3)).

In other words, in both these two cases of competence-competence clauses it is the Council, i.e. the institution representing the interests of Member States, that by unanimous decision may enlarge the scope of a Union competence where legislation is subject to the OLP.

⁹⁰ Grabitz, Hilf and Nettesheim, *Das Recht der EU*, Rn. 11-113.

⁹¹ R. Böttner and J. Grinc, *ibid.* p. 53.

7. Proposals to apply *passerelle* clauses

None of the existing general or specific *passerelle* clauses has been implemented to date. The only experience in this sense relates to a special *passerelle* adopted in 2004 in the field of visas, asylum, immigration and free movement of persons under the TEC.⁹² However, it must be admitted that, general or specific, *passerelle* clauses are not much sought after in current times. There are a number of possible reasons for this.

One reason could be the scarce political interest in this mechanism, which entails in one of its forms the abandonment of the veto power. This is also reflected in the scant attention paid to it by academia. Another reason could be the inherent hurdle that this mechanism contains, namely the unanimity required in the European Council or Council (special *passerelles*) for its adoption.

Nevertheless, in recent years the Commission has explored the issue and made some concrete proposals on policy areas or actions where *passerelle* clauses could be implemented, although for special and general *passerelle* clauses the Commission does not have a formal role as initiator or proponent.⁹³ In four successive communications between 2018 and 2019, the Commission gave impulse to the discussion and made concrete proposals, taking into account the challenges and needs of some specific policy areas.

A common thread running through these four communications is the acknowledgment that **where unanimity is currently the rule, the culture of compromise is neglected if not put aside**, for the reason that unanimity is not conducive to Member States finding common ground for agreement. The 'risk' of being outnumbered in a qualified majority scenario, however, is a powerful enough incentive for Member States to resort to dialogue and negotiation.

The Commission explored the matter between 2018 and 2019 and proposed the introduction of *passerelle* clauses with respect to i) CFSP; ii) tax policy; iii) climate policy; and iv) social policy.

7.1. Proposed *passerelles* in common foreign and security policy

The Commission issued a communication on 12 September 2018⁹⁴ in which it explored possibilities to use the *passerelle* clause in the field of CFSP,⁹⁵ the idea behind being to promote a stronger role for the EU on the global stage. In his 2018 State of the Union address, Commission President Jean-Claude Juncker had already made a bid for the EU to stand on its 'own two feet' and strengthen the international role of the euro. Furthermore, the Meseberg Declaration⁹⁶ between France and Germany called for the EU to speed up the decision-making process and make it more efficient.

Although through successive reforms QMV has been introduced in the majority of policy areas, in the field of CFSP unanimity remains the rule. As explained by the Commission, the main downside of unanimity in CFSP is that it prevents quick and coherent positions that are able to empower the EU to act decisively in the global arena. The positive effect of introducing QMV to some elements of the CFSP would therefore enable the EU to act on the basis of robust and consistent positions, in a more reactive and efficient manner, taking account of pressing foreign policy challenges. This would

⁹² See [Council Decision](#) 927 of 22 December 2004.

⁹³ Except the special *passerelle* clauses on family law (81(3), second subparagraph, TFEU), social policy (153(2) TFEU) and environmental policy of Article 192(2), second subparagraph, TFEU.

⁹⁴ Communication from the Commission to the European Council, the European Parliament and the Council, A stronger global actor: a more efficient decision-making for EU common foreign and security policy, [COM/2018/647 final](#) of 12.9.2018.

⁹⁵ See also the EPRS [legislative train](#) on this topic.

⁹⁶ [Meseberg Declaration](#) a Franco-German [Declaration](#) of 19 June 2018.

also strengthen the resilience of the EU, also protecting Member States from targeted pressure from third countries. The Commission is not suggesting that QMV alone would solve all the problems in the field of CFSP. However, as Member States' interests need to be made to converge and the EU's position in bilateral relations needs to be implemented, QMV could bring some improvements, particularly considering that even in those policy areas where QMV is the rule (e.g. trade) the Council seldom proceeds to a formal vote and decisions are taken by consensus.

Negative examples of where the opposition of one or several Member States has prevented unanimity and hence the adoption of an EU position in the field of human rights or with respect to sanctions include the cases of Belarus and Venezuela. The Commission regrets that in some cases the opposition of a single Member State on a CFSP matter has triggered the opposition of another Member State on another issue unrelated to CFSP. The Commission however, recognises that the opposition of one or a number of Member States does not ultimately prevent the adoption of a specific decision, but rather creates a divisive climate and taints the influence and cohesiveness of the EU's action.

Decisions in CFSP are taken as a general rule by unanimity. A means of mitigating this principle is found in the '**constructive abstention**' (Article 31(1)(2) TEU) whereby a Member State may abstain from a unanimous vote and may qualify such abstention with a formal declaration. If this occurs, that Member State is not obliged to implement the decision but must accept that the decision commits the Union and shall refrain from actions that may conflict or impede Union action. Likewise, the other Member States should respect the decision of the abstaining Member State.⁹⁷ In Council, QMV applies, however, in a number of cases enshrined in Article 31(2) TEU:

- when Council adopts a decision defining a Union action or a position already agreed within the European Council of a strategic interest and objective as referred in Article 22;
- when Council adopts a decision on a Union action or position proposed by the High Representative following a request of the European Council, this latter request may stem from an own initiative or from the High Representative;
- when adopting any decision that implements a decision defining an action or a position of the Union;
- when it is about the appointment of a special representative pursuant to Article 33 TEU.

The TEU guarantees however that the QMV is mitigated by two safeguards. The first safeguard is the 'emergency brake' (Article 31(2) TEU) which allows a formal vote to be avoided if a Member State declares its intention to oppose a decision by QMV due to vital and stated reasons of national policy. In this case the High Representative will look for an acceptable solution, together with the Member State in question. If this cannot be achieved, Council may, acting by QMV, decide to refer the matter to the European Council, which decides by unanimity. A second safeguard is contained in Article 31(4) TEU, which excludes decisions with military implications from QMV.

In this context, the Commission invited Member States to reflect on instances where QMV could make a positive effect and be of added value. The Commission invited Council to refrain from agreeing positions by common accord on CFSP or related matters when it could be possible to use Treaty tools. The Commission also invited Council not to use the CFSP legal base for external aspects of a policy area governed by the TFEU, in other words not to abuse the unanimity rule.

⁹⁷ The Commission reports that 'constructive abstention' has been used only once, in 2008 when setting up a civilian common security and defence policy mission for Kosovo.

The Commission also **recommended the use of passerelle clauses** in the three following areas:

- Human rights in multilateral fora

Considering the universality and indivisibility of human rights and the need for the Union to affirm its position in a cohesive manner seeking political unity and credibility as a soft power, the Commission suggested that EU positions that must be conveyed to international fora, which are currently agreed by common accord, instead be agreed by QMV. The Commission therefore proposed that **based on Article 31(3) TEU the European Council adopt a decision whereby EU positions on human rights in international fora be adopted by QMV in the form of Council decisions.**
- Adoption and amendment of sanction regimes

Sanctions are a very powerful tool for the EU to affirm its foreign and security policy agenda. In this respect, in recent years these restrictive measures have been used with increased frequency to react to, deter and influence external policy developments and for exercising economic and political pressure. The Council has already decided by QMV on amendments to listings under EU restrictive measures decided by the United Nations or by the EU where the amendments were not politically sensitive. The European Commission has suggested, however, regular use of QMV based on Article 31(3) TEU, recommending that the European Council adopt a decision by unanimity according to which **decisions establishing sanction regimes are adopted by QMV by the Council.**
- Civilian common security and defence policy

Civilian common security and defence policy missions are an important tool that the EU can deploy to respond to and engage in crisis or post-crisis situations, providing national authorities and local communities with support. In order to rise to the challenge they need to be able to be deployed quickly however. Effective and agile management becomes crucial in a rapidly changing and challenging political environment. On the basis of Article 31(3) TEU, the Commission has **suggested that the European Council should adopt decisions providing that all decisions relating to civilian common security and defence policy be adopted by QMV.** The Commission has proposed to start with the rule of law capacity building and security sector reform missions, as they are linked to other instruments adopted with QMV too.

7.2. Proposed *passerelles* in tax policy

On 15 January 2019 the Commission issued a communication⁹⁸ on more efficient and democratic decision-making in EU tax policy. In this communication the Commission explained⁹⁹ that the use of unanimity in the field of taxation is one of the last fields to remain untouched by the successive reforms that have enlarged the application of QMV in EU decision-making. However, the current method of policy making in tax matters is not keeping up with current developments in markets and the economy. A purely national approach in fact, does not guarantee an effective solution to problems, particularly since national interests are often intertwined. Globalisation and digitalisation are examples of how much stronger coordinated action is needed. The tax field 'survived' the various reforms that since the Single European Act have shifted many policy areas to QMV.

⁹⁸ Communication from the Commission to the European Parliament, the European Council and the Council, Towards a more efficient and democratic decision-making in EU tax policy, [COM/2019/8 final](#) of 15.1.2019.

⁹⁹ See also [press release](#) of the European Commission of 15 January 2019 and information available on Commission [website](#).

In addition to being an area where unanimity prevails, the tax field is also one of the few policy areas where decisions are still taken using a special legislative procedure, where Council decides unanimously on a proposal of the Commission without decisive involvement of Parliament, the latter only being consulted. This exclusion of Parliament from decision-making is at odds with the democratic principle that should govern EU action.

According to the Commission, taxation is a very important policy for the development of the single market. It is crucial for economic development, growth and job creation and it is crucial for social justice. In reality, however, it is not currently delivering on many fronts, starting from the fact that the system is fragmented by 27 tax jurisdictions, resulting in very high compliance costs for EU enterprises that operate across borders. The common corporate tax base, the standard VAT return and other projects have over the years fallen victim to the inability of the EU to decide on concrete policy projects. Unanimity, and the difficulty of reaching it, also have detrimental effects that cascade onto other core policy areas of the EU. For instance, a lack of agreement prevented the revision of the Energy Tax Directive, which was also aimed at supporting the environmental and energy-related objectives of the EU, from effectively playing that role.

The Commission has also pointed out that in recent years it has been possible to adopt some legislation under the wave of political pressure in the field of tax abuse, the fight against VAT fraud and tax transparency. It is however inappropriate according to the Commission that in tax policy matters the EU reacts mainly under the pressure of public opinion rather than by a conscious self-chosen and forward-looking approach.

The Commission has also highlighted the most common downsides that derive from unanimity in the tax field. First of all, the difficulty in achieving a compromise as the possibility of the 'veto' provides an incentive to retreat from negotiations and feeds into a mind-set geared towards the preservation of national interests rather than serving common EU interests. Second, the quest for unanimity has as an undesired outcome that legislation eventually agreed is inevitably based on the lowest common denominator (e.g. the VAT invoicing directive). Third, unanimity encourages negotiation behaviours whereby a tax proposal is used as a 'bargaining chip' by a Member State for success in another tax field. Fourth, according to the Commission, unanimity produces a sort of 'fear to rectify' because a decision by unanimity can be modified only by unanimity, an ambitious initiative may therefore be weakened by the perspective of too burdensome an amending procedure.

In its communication, the Commission also pointed out the weak role of the European Parliament in a special legislative procedure – the one applicable to taxation. Parliament has sought to remedy this institutional weakness by exercising political pressure through committee work. Therefore, a shift to QMV together with a shift to OLP would greatly benefit the building of a stronger and more democratic EU tax policy where Parliament, unbound by national interests, could provide a fresh contribution.

The Commission has recognised the existence of other mechanisms and legal provisions in the Treaties that could mitigate the use of unanimity in tax matters. Enhanced cooperation, for example, has already been [authorised](#) for the financial transaction tax, yet this mechanism does not offer a comprehensive solution to broader cross-border issues. Article 116 TFEU, which allows distortions of competition to be eliminated by means of legislative acts adopted under the ordinary legislative procedure, if agreement between Member States cannot be reached, has not yet been used owing to its strict conditions and the inability to address a broader set of issues. Furthermore, Article 325 TFEU cannot be used in the opinion of the Commission because this provision only addresses pathological aspects of taxation and not proactive policy-making.

The Commission therefore believes that use of *passerelle* clauses should be further explored, as they have the benefit of not impacting on Member State's tax competence, since they simply modify the

decision-making procedure with a democratic decision of Member States. In other words, the decision to activate the *passerelle* and hence move to QMV or OLP would remain under the control of the Member States. The Commission has laid down the following roadmap on the use of *passerelles* in the tax field:

- **Step 1:** introduce QMV for measures **without a direct impact on taxing rights or tax rates**, i.e. measures that are critical for combating tax fraud, evasion, avoidance and that may facilitate tax compliance.
Measures of this kind would be aimed at improving administrative cooperation, mutual assistance in fighting tax fraud evasion or abuse. Measures that could fall under this type of initiative could also include the conclusion of international agreements.
- **Step 2:** QMV for measures of a fiscal nature designed to support other policy goals of the Union
This would help achieve more coherent alignment between EU tax policies and core competences of the EU, e.g. in the fight against climate change, protection of the environment or in order to improve public health by bringing in more environmentally-friendly energy policies to help in the fight against climate change.
- **Step 3:** QMV for largely harmonised fields that must evolve and adapt
This type of initiative could for example concentrate on VAT and excise duties. The VAT system for example, is outdated and currently perceived as too cumbersome and prone to fraud. The Commission therefore believes that, together with tobacco and alcohol taxation, the VAT system could be modernised and brought up to speed with current technologies. Special attention is given to reform of the VAT system, VAT being an own resource of the EU.
- **Step 4:** QMV for other initiatives in the tax area which are necessary for the single market
Areas where a move could be made to QMV in this respect could include tax policy projects that have long been awaiting finalisation, such as for example the **common consolidated corporate tax base, or taxation of the digital economy** for which a comprehensive solution is needed.

The Commission has therefore invited EU leaders to endorse the above roadmap and to decide swiftly on the use of the general *passerelle* clause, i.e. to move to QMV and OLP for steps 1 and 2. To this end, the European Council must notify the related initiatives to national parliaments and seek the consent of the European Parliament. For steps 3 and 4 the Commission has also suggested activating the general *passerelle* clause by moving to QMV and OLP by the end of 2025.

7.3. Proposed *passerelles* in EU energy and climate policy

On 9 April 2019, the European Commission issued a communication¹⁰⁰ on more efficient and democratic decision-making in EU energy and climate policy. Although in the field of energy the EU can count several achievements (energy security package, Clean energy for all, three mobility packages of 2017-2018), the quest to 'overcome unanimity' and introduce a higher degree of democratic accountability through the OLP is also felt in the energy and climate change policy area.

In line with previous reforms, beginning with the Single European Act, extending QMV to many policy areas, the Lisbon Treaty extended OLP and QMV to the field of energy, making them the default decision-making regime as provided by Article 194(1) and (2) TFEU for measures aimed at i) ensuring the functioning of the energy market, ii) ensuring the security of energy supplies in the

¹⁰⁰ Communication from the Commission to the European Parliament, the European Council and the Council, A more efficient and democratic decision-making in EU energy and climate policy, [COM/2019/177 final](#) of 9.4.2019.

Union, iii) promoting energy efficiency and energy saving and the development of new and renewable forms of energy, iv) promoting the interconnection of energy networks. Notwithstanding this, Member States remain free to determine conditions for exploiting their energy resources, the choice between different energy sources and the general structure of their energy supplies (Article 194(2)(2), TFEU). The application of the OLP and QMV to the energy field, with the limitations established by Article 194(2) TFEU, means that Parliament and Council act on an equal footing, with consultation of the EESC and CoR.

By way of derogation to this general rule established in Article 194(1) TFEU, Article 194(3) TFEU makes a special legislative procedure, i.e. Council acting unanimously, after consultation of Parliament, applicable to measures of a primarily fiscal nature. In addition, a special legislative procedure applies to three other sub-fields enshrined in Article 192(2) TFEU:

- i) provisions of a primarily fiscal nature;
- ii) measures affecting town and country planning, quantitative management of water resources or the availability of such resources, land use except waste management taxation;
- iii) measures affecting the Member States' choice between different energy sources and the structure of energy supply.

These latter exceptions to the main rule, are also those in which a special *passerelle* clause could be activated.

The Commission has highlighted the importance that regulatory, financial and taxation policies in the field of energy and climate align with each other and support each other to achieve a common goal. In this respect, it has warned that the energy taxation framework is no longer fit to achieve the EU's ambitious climate and energy goals, for the reason that taxation policies, which include also taxation policies for the environment, are currently based on revenue raising needs and fail to take into account the impact of fuel and electricity consumption on health and energy objectives. The European Commission has pointed out the inadequacy of the current European framework for energy taxation, which dates back to 2003, notwithstanding recent attempts to modernise it.

Furthermore, the favourable tax regime awarded to certain sectors (maritime, aviation, road haulage, fisheries, agriculture and energy intensive industries) constitutes a burden for public finances, which places a heavier burden on private households to make up the difference. This also introduces differences in tax treatment between different industries and distorts competition, aside from the fact that it does not foster investment in transitioning to more energy-efficient models. As an example of an attempted but failed reform, the Commission mentioned the 2011 proposal to amend Directive 2003/96 on energy taxation, which had the laudable objective of restructuring the Community framework of energy taxation by introducing a CO₂ component to elements of taxation for sectors not covered by the emissions trading system. This would have introduced the idea that energy products are taxed according to their energy content and would have simplified the exemption regimes. Regrettably, this proposal did not secure the unanimity in Council that is required in the field of indirect taxation (Article 113 TFEU) and it was withdrawn in 2015.

The Commission therefore considers that energy taxation should first support the clean energy transition, also by providing tax incentives that can steer social behaviour to that end. Taxation should also implement the 'polluter pays' principle in a consistent way that would imply phasing out environmentally harmful subsidies or introducing for instance a carbon tax that could change consumption and production patterns. Secondly, energy taxation should contribute to sustainable and socially fair growth. Energy taxation should have a positive impact on the single market. While the EU energy regulatory framework has progressively become more integrated, energy taxation remains significantly impacted by national policies and incentives. The Commission has also pointed out that any reform must ensure that tax shifts towards more environmentally friendly objectives and are also socially acceptable.

In its communication, the Commission noted the existence of the special *passerelle* clauses giving Council the power to decide environmental measures of a fiscal nature under the OLP and with QMV. To decide on such a shift, unanimity in Council is necessary after consultation of Parliament, the EESC and the CoR. In this way, energy tax measures that could be envisaged include those aiming at reducing polluting emissions or improving energy efficiency, in particular CO₂ taxation measures. The Commission pointed out that use of *passerelle* clauses does not affect Union competencies as such, but the way in which they are exercised. In addition, the use of *passerelle* clause would 'import' into the field of energy taxation the benefits of QMV and OLP, which is to represent different interests on an equal footing and to favour a culture of compromise, already experienced in energy and climate policy.

The Commission therefore supports the use of the **special *passerelle* clause of Article 192(2) TFEU for energy taxation measures**, in the same vein as its position in the communication on tax policy. As an alternative, it has also suggested the **use of the general *passerelle* clause of Article 48(7) TEU and QMV for tax measures primarily designed for energy goals**.

The Commission's communication devoted some final thoughts to decision-making under the Euratom Treaty. This Treaty provides significant supranational powers at Community level that have been exercised in recent years in the field of nuclear safety, security of supply, waste management, and protection against radiation. The Euratom Treaty however, in the Commission's opinion, does not contain any clauses comparable to the general or specific *passerelles* clauses of the TEU or TFEU. For this reason, any changes to decision-making in the Euratom Treaty would need a broader process of Treaty reform using the ordinary revision procedure under Article 48 TEU.

In conclusion, the Commission has invited EU leaders to decide on the use of a **general *passerelle* clause to move to the OLP and QMV on the basis of Article 48(7) TEU** and to **explore the use of the special *passerelle* clause of Article 192(2) TFEU**. The Commission has also invited the European Parliament, the Council and other stakeholders to reflect within the High-level Group of Experts on how to increase democratic accountability and transparency in the framework of the Euratom Treaty.

7.4. Proposed *passerelles* in social policy

The Commission communication¹⁰¹ of 16 April 2019 explored possibilities to implement more efficient decision-making in social policy through an enhanced move to qualified majority voting. The Commission pointed out that in the field of social policy the EU is bound to the role of supporting and complementing Member States' social policies. However, this less prominent competence is also subject to changing times and to the need to react in a quick, effective and flexible manner to emerging challenges. Although the majority of decisions in this field are already taken by QMV, the Commission highlights the need to do away with the last instances where unanimity applies and where the involvement of Parliament is very limited.

These remaining areas of unanimity and special legislative procedure may be found in certain specific fields or sub-fields belonging to the broader area of social policy:

- i) non-discrimination (Article 19(1) TFEU);
- ii) social security and social protection of workers (Article 153(1)(c) TFEU);

¹⁰¹ Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting, [COM/2019/186 final](#) of 16.4.2019.

- iii) protection of workers where their employment contract is terminated (Article 153(1)(d) TFEU);
- iv) representation and collective defence of the interest of workers and employers (Article 153(1)(f) TFEU);
- v) conditions of employment for third-country nationals legally residing in the EU (Article 153(1)(g) TFEU).

In its communication of 16 April 2019, the Commission advocated for this difference in decision-making to be overcome, given in particular the distortions and unevenness of legal protection that such a difference in decision-making causes. One example of this unevenness is the protection of equal treatment on grounds of religion, disability, age and sexual orientation. Further examples are the treatment of third-country nationals whose equal treatment with EU nationals is guaranteed in terms of labour market access, but for whom there are no minimum EU requirements designed to stimulate their effective integration into the labour market; and the fact that there are no common minimum rules on the representation and collective defence of workers and employers interests.

Yet, the Commission warns against the emergence of common challenges, such as the impact of new technologies, emerging new forms of work that will entail the need to safeguard the fundamentals of the European social model, in particular with respect to an ageing population, the occurrence of frequent work-life transitions, and the need to provide life-long learning opportunities and ensure social inclusion and equal opportunities for all. All these challenges require decision-making that is up to the task.

The two types of *passerelle*, i.e. the two general ones (Article 48(7) TEU) and the special (social policy) *passerelle* (Article 153(2) TFEU, last subparagraph), may come into play and offer a way to deal with these challenges together with the possibility to resort to enhanced cooperation, which also includes a *passerelle* specific to this mechanism. However, enhanced cooperation may not be the right tool as it could risk fragmenting the single market, creating a two-tier Europe, or different 'categories' of citizen depending on the Member State of residence; and because according to Treaty provisions (Article 326 TFEU) it may not undermine the internal market, economic, social and territorial cohesion.

The use of *passerelle* clauses could, rather, ensure that the EU advances as a whole, while modifying its decision-making only. Further benefits would be:

- advancing in areas where Union action is needed while upholding the principle of subsidiarity and proportionality;
- that the scope of EU powers would remain unaltered: for example Article 153(2)(b) TFEU makes reference to directives providing 'minimum requirements' that 'avoid imposing administrative, financial and legal constraints' and Article 153(5) TFEU excludes forms of intervention (minimum requirements, cooperation or *passerelles*) on pay, the right of association, and the right to strike or to impose lock-outs;
- that the consultative role of the social partners would be maintained in law making as Article 154 TFEU requires;
- that the Better Regulation guidelines would be observed; and
- that the decision on whether or not to activate a *passerelle* clause and therefore to move to QMV or OLP would remain in the Member States' control.

The Commission has made also the case for modifications to voting and decision-making in the following areas of social policy:

- Non-discrimination
EU legislation provides for varying levels of protection depending on the grounds of discrimination, whereby gender and racial equality in employment is protected, and on

grounds of religion, disability or age. However, the Commission suggests an approach whereby discrimination should be broadly banned from the EU in line with the Rome Declaration of March 2017 and the 2030 Agenda for Sustainable Development. Discrimination, as confirmed by a 2018 study¹⁰² of the European Parliament has detrimental effects and represent obstacles to the everyday lives of individuals, ultimately also impacting on the good functioning of the internal market. EU legislation requires that bodies be set up to promote equal treatment, but the Commission only has the power to issue non-binding guidelines. **The Commission has suggested using the general *passerelle* to facilitate decision-making for non-discrimination acts.**

➤ Social security and social protection of workers (outside cross-border situations)

This area is subject to unanimity under a special legislative procedure, owing mainly to the fact that social security and social policy are strictly linked to the economic, tax and income redistribution models in force in Member States. However, as labour markets evolve, other phenomena come into play and put strain on national social security models such as demographic changes, increased life expectancy, and reduced contributions from working-age populations, creating the need to rethink how social models are funded. A variety of new working relationships has also emerged, as a result of technological advances, leading to gaps in social security coverage. All these factors must be taken into account as they put pressure on social security systems that needs to be tackled with a common approach. In the framework of the European Pillar of Social Rights the Commission has focused on issuing recommendations, e.g. one on access to social protection for workers and the self-employed. However, as unanimity is the rule, it is still awaiting adoption. The Commission believes that this field could be a good candidate for the implementation of a general *passerelle* clause according to Article 48(7) TEU, whereby recommendations in areas where unanimity applies for the adoption of a Union act (Article 292 TFEU) could be adopted by QMV. In this way the Commission supports and suggests the **activation of a *passerelle* clause for the adoption of recommendations in the field of social security and social protection of workers.** It needs to be pointed out that, in this area, the Commission suggests use of the general *passerelle* clause as social security and social protection of workers is not covered by the special *passerelle* clause contained in Article 153(2)(b), last subparagraph, TFEU.

➤ Conditions of employment for third-country nationals legally residing in the Union (Article 153(1)(g) TFEU))

This refers to students, researchers, seasonal workers and intra-corporate transfers. Directives in this field have been adopted by QMV and with the OLP. EU employment law sees to it that workers should be guaranteed fair conditions, health and safety at work in the most generalised manner without distinction of nationality. The Union has also adopted recommendations by QMV for more fragile categories of workers through the Youth Guarantee, and recommendations on the integration of long-term unemployment into the labour market and on upskilling pathways. As a result, the Commission believes that the role of supporting and complementing within the scope of Article 153(1)(g) TFEU is somehow reduced given the measures already adopted, and therefore that there is no significant added value in using the *passerelle* in this area.

➤ Protection of workers where their employment contract is terminated (Article 153(1)(d) TFEU)

This area is strictly linked to national social protection systems and where national law remains best placed to provide the appropriate rules, account taken of the particularities of national protections systems. The EU provides specific measures aimed at protecting the most fragile

¹⁰² W. van Ballegooij with Jeffrey Moxom, Equality and the fight against racism and xenophobia (Cost of non Europe), EPRS, European Parliament, March 2018.

categories of workers, e.g. through certain basic principles such as protection against dismissal during pregnancy (Part-Time Work Directive), equality of treatment between men and women in self-employment (Gender Equality Directive), establishment of information rights on the length of the notice period (Transparency and predictable working conditions), prohibition of dismissal for having applied for paternity, parental or carers' leave (Work-Life Balance Directive). The Commission therefore believes that in the area of protection of workers where the employment contract is terminated, there are strong arguments for leaving this area to be regulated by national legislation and therefore that unanimity is justified without the need to activate a *passerelle* clause.

➤ Representation and collective defence of interests of workers and employers (Article 153(1)(f) TFEU)

This area could also potentially be subject to the special *passerelle* clause of Article 153(2)(b), last paragraph, TFEU. Representation and collective defence of workers and employers interests, including co-determination are strong principles enshrined in the Charter of Fundamental Right and the European Pillar of Social Rights. Article 153(5) TFEU excludes, however, from the measures that can be adopted in the field of social policy those concerning the right of association, the right to strike, or the right to impose lock-outs. Moreover, the Commission believes that traditions and legal frameworks in Member States on representation and collective defence differ greatly between Member States to be effectively tackled at EU level. For this reason in this area the Commission does not see a clear case for the activation of a *passerelle* clause.

In conclusion, the Commission believes that not all areas of social policy currently subject to unanimity and to a special legislative procedure are essential to improve the Union's capacity, but considers that **a general *passerelle* on non-discrimination and for the adoption of recommendations on social security and social protection of workers could be of added value.** For other areas such as employment conditions of legally residing third-country nationals, dismissals, representation and collective defence of interests of workers and employers, which in principle could be subject to the special *passerelle* clause (Article 153(2)(b), last subparagraph, TFEU), there is currently no clear case in favour of their activation. The Commission's initiative has been seen¹⁰³ as a positive development, although with some criticism as to its limited scope.

¹⁰³ A. Aranguiz, More majority voting on EU social policy? Assessing the Commission proposal, June 2019, [EU Law analysis](#) blog.

Table 3 – Proposed use of *passerelle* clauses by the Commission

Field	Commission communication	Type of <i>passerelle</i> proposed	Measures proposed
CFSP	COM(2018) 647 final of 12.9.2018	Special <i>passerelle</i> clause Article 31(3) TEU	The European Council to authorise by unanimous decision the Council to decide with: <ul style="list-style-type: none"> ➤ QMV for EU positions on human rights in international fora ➤ QMV for decision establishing sanction regimes ➤ QMV for all decisions related to the civilian common security and defence policy Ideas to focus on: <ul style="list-style-type: none"> ➤ Rule of law capacity building ➤ Security sector reform missions
Tax policy	COM(2019) 8 final of 15.1.2019	General <i>passerelle</i> clause Article 48(7) TEU	Council to decide by QMV in four steps: <ul style="list-style-type: none"> ➤ (1) measures without a direct impact on taxing rights or tax rates but that are critical for combating tax fraud, evasion, avoidance and may facilitate tax compliance ➤ (2) QMV for measures of a fiscal nature designed to support other policy goals of the Union ➤ (3) QMV for largely harmonised fields that must evolve and adapt ➤ (4) Other initiatives in the tax area which are necessary for the single market
Environmental policy	COM(2019) 177 final of 9.4.2019	Special <i>passerelle</i> clause Article 192(2) TFEU, alternatively general <i>passerelle</i> clause of Article 48(7) TEU	<ul style="list-style-type: none"> ➤ Special <i>passerelle</i> clause allowing Council to decide unanimously to make the OLP and QMV applicable, after consultation of Parliament, the EESC and the CoR, to energy taxation measures (environmental taxation for reduction of CO₂ and other polluting emissions, improving energy efficiency) ➤ General <i>passerelle</i> clause (Article 48(7) TEU) and QMV for tax measures primarily designed for energy goals
Social policy	COM(2019) 186 final of 16.4.2019	General <i>passerelle</i> clause Article 48(7) TEU	<ul style="list-style-type: none"> ➤ European Council to authorise the use of a general <i>passerelle</i> clause (48(7) TEU) on measures concerning non-discrimination and for the adoption of recommendations on social security and social protection of workers. The use of a general <i>passerelle</i> clause would also trigger other safeguards such as non-opposition of national parliaments and consent of European Parliament by majority of component members according to normal rules ➤ No particular added value is seen in making use of the special <i>passerelle</i> clause (Article 153 TFEU) for employment conditions of third-country nationals legally residing in the EU, protection of workers upon termination of contract or representation and collective defence of interest of workers and employers

7.5. Reactions to the Commission's proposals

Council has traditionally been less prone to embrace modifications to its decision-making patterns. Moreover, the current built-in conditions in the *passerelle* clauses have so far acted as disincentives from employing them. Whereas Council has not reacted formally to the various Commission proposals, it has engaged in a certain debate.

The Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) discussed the communication on more efficient decision-making in social policy on 24 October 2019¹⁰⁴ when it was presented by the Commission.¹⁰⁵ Similarly, the communication on more efficient and democratic decision-making in tax issues was discussed soon after its publication at the ECOFIN meeting on 12 February 2019, with initially mixed reactions from Member States.¹⁰⁶ Some Member States, in fact, expressed the desire not to change the *status quo*, while others were interested in exploring the possibilities indicated in the Commission's communication further. During the first discussion held at the ECOFIN meeting some ministers pointed to the 'impressive track record achieved in the area of EU tax legislation' which seems to suggest a certain reluctance to modify decision-making rules. In the update of June 2019 to the European Council on the state of discussion on tax issues within Council, ECOFIN reported that positions on the use of *passerelles* in the tax field were still divided, with a large number of Member States deeming it inappropriate to change voting rules in the tax field. Some other Member States were instead open to discussing the matter further, in particular for administrative cooperation or the fight against tax avoidance. The Committee of the Regions, in an opinion¹⁰⁷ of June 2019, supported the Commission's proposals to gradually introduce QMV in decision-making in tax issues, and considered that the proposed step-by-step approach should be backed up by the European Semester, enabling aggressive tax planning to be tackled as well. The CoR, however, expressed doubts as to the postponement of the special *passerelle* applicable to environmental matters (Article 192(2) TFEU) to a later stage, since taxation was key to attaining EU's sustainable development goals. The CoR therefore suggested using *passerelles* for environmental taxation as from the very beginning.

In its resolution¹⁰⁸ of 26 March 2019, Parliament explicitly welcomed the Commission's communication 'Towards a more efficient and democratic decision-making in EU tax policy'.

¹⁰⁴ Council [meeting](#) of 24 October 2019.

¹⁰⁵ See Background [Brief](#) of the meeting.

¹⁰⁶ See Council [website](#) on the meeting of 12 February 2019.

¹⁰⁷ See [opinion](#) of the CoR of 26 June 2019.

¹⁰⁸ See [Report](#) on financial crimes, tax evasion and tax avoidance, 26 March 2019.

8. Endorsement of *passerelle* clauses

8.1. Position of the Commission

The general *passerelle* clauses, which were introduced with the Lisbon Treaty, were supported by the Commission¹⁰⁹ already in 2003 when the Constitution for Europe was discussed. The Commission at the time saw an obvious hurdle to their use in the unanimity required for their adoption. Before the Lisbon Treaty, the Commission had proposed the use of the *passerelle* contained in Article 65 TEC, which allowed measures to be adopted under the co-decision procedure as opposed to unanimity in the area of maintenance obligations.¹¹⁰

For a long time however, the Commission was less vocal on the issue of implementing *passerelle* clauses. However, with the Juncker Commission, in particular in the last two years of its mandate, concrete references were made to the mechanism. In the 2017 State of the Union address,¹¹¹ Juncker expressed the need for a stronger Union, to be achieved in part by means of decisions taken in a quicker and easier manner without Treaty changes but through the activation of *passerelle* clauses. In the 2018 State of the Union address,¹¹² this idea was reiterated for external action and foreign policy, where overcoming unanimity was suggested only for specific areas (e.g. human rights issues and civilian missions). This idea provided the foundation for the proposals contained in the communication on more efficient decision-making for EU common foreign and security policy of September 2018.¹¹³ President Juncker's Commission can finally be said to have fully tapped into this 'lost treasure', as it was referred to in the 2018 State of the Union address, by having initiated four concrete proposals on the use of *passerelles* (see previous section).

In her opening statement ('A new push for European democracy') delivered on 16 July 2019¹¹⁴ before her election by Parliament, Commission President Ursula von der Leyen supported the idea that decisions should be taken with QMV in CFSP in order to give the EU 'a stronger and more united voice in the world' and made an invitation in that sense in her mission letter¹¹⁵ to Josep Borrell, High Representative of the Union for Foreign Affairs and Security Policy. Borrell in turn expressed support for this approach during his hearing¹¹⁶ before Parliament. Von der Leyen returned to this idea in her political guidelines,¹¹⁷ adding the intention to exploit possibilities to adopt proposals on taxation with OLP and QMV. This was a commitment shared also by Commissioner Paolo Gentiloni during his hearing.¹¹⁸ A similar endorsement of QMV in CFSP was made by some Heads of State or Government

¹⁰⁹ Communication from the Commission – A Constitution for the Union – Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties, [COM/2003/0548 final](#) of 17.9.2003.

¹¹⁰ Commission communication calling on Council to provide for measures relating to maintenance obligations taken under Article 65 of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, [COM/2005/648](#), of 15 December 2005.

¹¹¹ Jean-Claude Juncker's [State of the Union Address](#) 2017, Brussels, 13 September 2017.

¹¹² Jean-Claude Juncker's [State of the Union Address](#) 2018, Brussels, 12 September 2018.

¹¹³ Communication from the Commission to the European Council, the European Parliament and the Council, A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy, [COM/2018/647 final](#).

¹¹⁴ [Opening Statement](#) in the European Parliament plenary Session by Ursula von der Leyen, Candidate for President of the European Commission, 16 July 2019.

¹¹⁵ [Mission letter](#) to the High Representative of the Union for Foreign Policy and Security Policy/Vice-President designate of the European Commission, 10 September 2019.

¹¹⁶ J. Tvevad, M. Lerch and J. Legrand, [Commitments](#) made at the hearing of Josep Borrell Fontelles High Representative of the Union for Foreign Affairs and Security Policy / Vice-President designate of the European Commission, EPRS, European Parliament, October 2019.

¹¹⁷ A Union that strives for more, [Political Guidelines](#) for the next European Commission 2019-2024.

¹¹⁸ D. Verbeke, A. Zoppè, [Commitments](#) made at the hearing of Paolo Gentiloni Commissioner-designate for Economy.

during the debates on the Future of Europe¹¹⁹ that took place between 2018 and 2019 in Parliament, although only a few of the participating country leaders took this position.

8.2. Position of Parliament

While the Commission has described concrete ways to use *passerelles*, Parliament too has been a steady advocate of their use in several fields and instances. In its **resolution of 16 February 2017**¹²⁰ (based on the 'Bresso-Brok Report'),¹²¹ Parliament gave a clear and broad endorsement of the use of *passerelle* clauses, both general and special. Parliament called for use of Article 48(7) TEU switching to QMV in cases where the Treaties required unanimity; it made a specific call for the use of the *passerelle* clause specific to enhanced cooperation, envisaging even denying its consent to any new enhanced cooperation proposal unless the participating Member States committed to activate the specific *passerelle* clause of Article 333 TFEU allowing a switch to QMV and to the OLP. Parliament has also called for activation of the *passerelle* clause for CFSP (Article 31(2) TEU) switching to QMV. The field of family law with cross-border implications was also targeted in this resolution, with a clear call for Parliament to be placed on an equal footing with Council through the activation of a *passerelle* shifting from the SLP to the OLP, not only in family law (special *passerelle* of Article 81(3) TFEU), but also in justice and home affairs through the general *passerelle* of Article 48(7) TEU.

With the 'twin' **resolution also issued on 16 February 2016 with the title 'Possible evolutions of and adjustments to the current institutional set-up of the European Union'**¹²² (based on the 'Verhofstadt Report')¹²³ Parliament supported a reduction in the number of instances where unanimity voting is used in Council, proposing a shift to QMV, particularly for foreign and defence matters, fiscal affairs and social policy, and suggesting converting cases where special legislative procedures apply into ordinary legislative procedures.

In its resolution of 14 May 2018 on 'The next MFF: Preparing the Parliament's position on the MFF post-2020',¹²⁴ Parliament also found the application of unanimity for the MFF to be a 'true impediment in the process', and suggested application of the specific *passerelle* clause of Article 312(2) TFEU in order to shift Council's decision-making to QMV and application of the general *passerelle* clause of Article 48(7) TEU to shift from a special legislative procedure to the OLP.

Amid debates on the Future of Europe¹²⁵ that took place during Parliament's plenary sessions, and ahead of European elections in 2019, with two resolutions in 2019, Parliament delved into mechanisms that could improve EU decision-making. In its resolution of 17 January 2019 on differentiated integration,¹²⁶ Parliament expressed the opinion that an 'appropriate answer to the need for flexible tools is to tackle one of the roots of the problem', therefore Parliament called for 'a

¹¹⁹ R. Drachenberg and S. Kotanidis, [The Future of Europe debates in the European Parliament](#), 2018-19, A synthesis of the speeches by EU Heads of State or Government, EPRS, European Parliament, May 2019.

¹²⁰ [Parliament Resolution](#) of 16 February 2017, Improving the functioning of the European Union building on the potential of the Lisbon Treaty.

¹²¹ [Report](#) by M. Bresso and E. Brok, improving the functioning of the European Union, building on the potential of the Lisbon Treaty (2014/2249(INI)), 9 January 2017.

¹²² [Parliament Resolution](#) of 16 February 2017, Possible evolutions of and adjustments to the current institutional set-up of the European Union.

¹²³ [Report](#) by G. Verhofstadt, on possible evolutions of and adjustments to the current institutional set-up of the European Union (2014/2248(INI)), 20 December 2016.

¹²⁴ [Parliament Resolution](#) of 14 March 2018, The next MFF: Preparing the Parliament's position on the MFF post-2020.

¹²⁵ R. Drachenberg and S. Kotanidis, *op. cit.*

¹²⁶ [Parliament Resolution](#) of 17 January 2019, Differentiated integration.

further shift in Council voting procedures away from unanimity and towards qualified majority voting, by making use of the '*passerelle* clause' (Article 48(7) TEU)'.

With the resolution on the state of the debate on the future of Europe of 13 February 2019,¹²⁷ Parliament again advocated for the principle of QMV in Council and for the use of the ordinary legislative procedure in all areas where this is possible. Parliament also referred to the possibility to use the various *passerelle* clauses or, in the case of enhanced cooperation, to use the specific *passerelle* of Article 333 TFEU.

With particular attention to tax matters, tax avoidance and tax evasion, in the resolution of 26 March 2019,¹²⁸ Parliament welcomed the Commission's communication 'Towards a more efficient and democratic decision-making in EU tax policy' which proposed a roadmap to QMV in specific tax policy areas and also expressed appreciation for the support for it given by some Member States. Parliament noted however that all scenarios should remain open and that *passerelle* clauses should be only one of them.

Following the outbreak of the coronavirus pandemic, in its **resolution of 17 April 2020** on an EU coordinated action to combat the Covid-19 pandemic and its consequences,¹²⁹ Parliament highlighted the limits of the EU's current capacity to act and deemed it necessary to activate the general *passerelle* clause so as to 'ease the decision-making process in all matters which could help to cope with the challenges of the current health crisis'.

With respect to **CFSP**, as early as 13 June 2013, in its review of the organisation and functioning of the EEAS,¹³⁰ Parliament called for exploration of the possibilities to use QMV through a *passerelle* clause beyond the statutory cases set out in Article 31(2) TEU, in other words, endorsing the use of the special *passerelle* clause in CFSP (Article 31(3) TEU).

With its annual report of 12 December 2018 on the implementation of the common foreign and security policy,¹³¹ Parliament supported the discussion on QMV in CFSP initiated by the State of the Union address of Jean-Claude Juncker in September 2018, not least in selected areas such as human rights issues, sanctions and civilian missions, and encouraged Member States to examine ways to act more efficiently. In the same report, Parliament also encouraged the use of general *passerelle* clauses. Similarly to the 2018 report, in the 2019 annual report on the implementation of the common foreign and security policy,¹³² Parliament called on Council to use the special *passerelle* in Article 31(3) TEU and encouraged Council to extend QMV to other areas of CFSP.

Suggesting improvements to the current mechanisms for adopting the **MFF**, Parliament has called for use of the special *passerelle* that would allow a shift from unanimity to QMV on a number of occasions. In its resolution of 13 March 2013 on the European Council conclusions of 7-8 February 2013¹³³ concerning the multiannual financial framework, underlining the need for a compulsory and comprehensive revision of the MFF, Parliament called for the use of the *passerelle* clause in Article 312(2) of the TFEU. A similar invitation was made in the resolution of 15 April 2014

¹²⁷ [Parliament Resolution](#) of 13 February 2019, The state of the debate on the Future of Europe.

¹²⁸ [Parliament Resolution](#) of 26 March 2019, Report on financial crimes, tax evasion and tax avoidance.

¹²⁹ [Parliament Resolution](#) of 17 April 2020, EU coordinated action to combat the COVID-19 pandemic and its consequences.

¹³⁰ [Parliament Resolution](#) of 13 June 2013, 2013 review of the organisation and functioning of the EEAS.

¹³¹ [Parliament Resolution](#) of 12 December 2018, Annual report on the implementation of the common foreign and security policy.

¹³² [Parliament Resolution](#) of 15 January 2020, Annual report on the implementation of the common foreign and security policy.

¹³³ [Parliament Resolution](#) of 13 March 2013, the European Council conclusions of 7/8 February 2013 concerning the multiannual financial framework.

on negotiations on the 2014-2020 MFF,¹³⁴ and in the resolution of 6 July 2016 containing Parliament's input ahead of the Commission's proposal on the preparation of the post-electoral revision of the 2014-2020 MFF. More vocally, in the reflection paper on the future of EU finances of 24 October 2014,¹³⁵ Parliament urged the European Council to use the *passerelle* clause in Article 312(2) TFEU. Furthermore, the interim report on the 2021-2027 multiannual financial framework containing Parliament's position with a view to an agreement of 14 November 2018,¹³⁶ contains a similar invitation.

The special *passerelle* clause that can be activated in the framework of **enhanced cooperation** (Article 333 TFEU) has been also addressed explicitly in the Resolution of 12 February 2019 on the implementation of the Treaty provisions concerning enhanced cooperation.¹³⁷ Here, Parliament strongly recommended that 'the special *passerelle* clause enshrined in Article 333 TFEU be activated to switch from unanimity to QMV, and from a special to the ordinary legislative procedure, immediately after an agreement on the start of enhanced cooperation is approved by the Council, in order to avoid new blockages if the number of participating Member States is significant'.

Prior to the entry into force of the Lisbon Treaty, Parliament also called for use to be made of *passerelle* clauses. After the work of the Convention on the Future of Europe concluded, in a resolution of 24 September 2003¹³⁸ Parliament gave its opinion on the draft Treaty establishing a Constitution for Europe and on the convening of the IGC tasked with negotiating the text of the Constitutional Treaty based on that draft. On that occasion, Parliament welcomed the introduction of a general *passerelle* clause allowing a shift to the OLP. During the 'period of reflection' that started after the failure of some Member States to complete the ratification process for the Constitutional Treaty, in particular the negative outcome of the French and Dutch referendums in 2005, Parliament recognised the merits of making full use of the *passerelle* clause in the field of **justice and home affairs** in a resolution of January 2006¹³⁹ and, in a resolution of June 2006,¹⁴⁰ supported improvements not requiring Treaty changes, such as the use of the *passerelle* to QMV and co-decision in justice and home affairs.

A particular call was made for use of the *passerelle* contained in Article 67 TEC (visas) and Article 42 TEU (on police and judicial cooperation in criminal matters) in several instances, in a resolution of November 2006¹⁴¹ and again for the *passerelle* on police and judicial cooperation in criminal matters in a resolution of June 2007.¹⁴² Article 42 TEU, in fact, allowed for action in the field of Article 29 TEU (i.e. police and judicial cooperation in criminal matters) within the scope of the Community framework, with a decision of Council, acting unanimously on an initiative of the

¹³⁴ [Parliament Resolution](#) of 15 April 2014, negotiations on the MFF 2014-2020: lessons to be learned and the way forward.

¹³⁵ [Parliament Resolution](#) of 24 October 2017, on the Reflection paper on the future of EU finances.

¹³⁶ [Parliament Resolution](#) of 14 November 2018 on the Multiannual Financial Framework 2021-2027 – Parliament's position with a view to an agreement.

¹³⁷ [Parliament Resolution](#) of 12 February 2019 on the implementation of the Treaty provisions concerning enhanced cooperation.

¹³⁸ [Parliament Resolution](#) of 24 September 2003, on the draft treaty establishing a constitution for Europe and the European Parliament's opinion on the convening of the intergovernmental conference.

¹³⁹ [Parliament Resolution](#) of 19 January 2006, on the period of reflection: the structure, subjects and context for an assessment of the debate on the European Union.

¹⁴⁰ [Parliament Resolution](#) of 14 June 2006, on the next steps for the period of reflection and analysis on the future of Europe.

¹⁴¹ [Parliament Resolution](#) of 30 November 2006, on the progress made in the EU towards the area of freedom, security and justice (AFSJ) (Articles 2 and 39 TEU).

¹⁴² [Parliament Resolution](#) of 21 June 2007 on an area of freedom, security and justice: Strategy on the external dimension, action plan implementing the Hague programme.

Commission or a Member State and after consultation of Parliament. Council could also determine the voting conditions.

8.3. Position of Member States

The enthusiasm of individual Member States regarding the general or specific *passerelle* clauses cannot be said to equal that of Parliament. The Meseberg Declaration,¹⁴³ a set of commitments between France and Germany, includes a general intention to broadly explore QMV in EU policy making, and at the same time a specific reference to QMV in CFSP. Support for *passerelle* clauses on the contrary is quite a delicate matter depending on the policy area. A *passerelle* in the domain of taxation could well be seen as a loss of political leverage, and therefore a rather undesirable step, especially for smaller countries that might fear the dominance of bigger countries and may wish to maintain their power of veto. Thus, some countries¹⁴⁴ (Ireland, Malta, Sweden, Cyprus and Hungary¹⁴⁵) have expressed little or no interest, while others (France, Spain, Italy and Portugal) seem to endorse it.¹⁴⁶ Similarly, the *passerelle* on CFSP¹⁴⁷ further dilutes the power of individual Member States¹⁴⁸ to shape foreign policy on a bilateral basis, potentially also affecting their power to attract foreign investment, hence some Member States may be rather reluctant to support its introduction.

¹⁴³ [Meseberg Declaration](#), a Franco-German [Declaration](#) of 19 June 2018.

¹⁴⁴ [Politico](#), 'Brussels' bid to kill tax veto faces uphill battle', 13 January 2019.

¹⁴⁵ [Visegrad Group](#), 'Hungary rejects EC proposal on qualified majority voting for tax policy', 12 February 2019.

¹⁴⁶ [Euractiv](#), 'Member states shield national vetoes on tax matters', 12 February 2019.

¹⁴⁷ [EUobserver](#), 'EU ignores Hungary veto on Israel, posing wider questions', 1 May 2019.

¹⁴⁸ [L. Schuette](#), 'Should the EU make foreign policy decisions by majority voting?' Centre for European Reform, 15 May 2019.

9. Conclusions

Creating the legal conditions for the EU institutions to function in a more efficient and transparent way was at the origin of the Lisbon reform, one of whose innovative constitutional tools was the possibility to modify the decision-making process of Council. The current Treaty framework contains two types of *passerelle* clause, general and specific. They have in common the fact that they aim at modifying Council's decision-making process. The two general *passerelle* clauses have a very broad scope of application (Article 48(7) TEU) and can lead either to a shift from unanimity to qualified majority voting in Council or to a shift from a special legislative procedure to the ordinary legislative procedure. The special *passerelle* clauses however refer to specific and targeted policy areas, sometimes in specific sub-areas of a policy field, and provide for the same type of shift, save that this happens under a less burdensome procedure than that provided for under the general *passerelles*.

General *passerelle* clauses belong to the broader area of mechanisms that introduce Treaty modifications, and are therefore surrounded by specific safeguards such as unanimous authorisation by the European Council, the consent of Parliament and the non-opposition of national parliaments. The particular procedure that leads to their adoption is so designed because general *passerelles* bring about *de facto* Treaty change, in the sense that they alter the type of legislative procedure and majority requirement with respect to that provided in the Treaties. For this reason, for example, Article 48(7) TEU provides the *nihil obstat* from national parliaments, as a form of replacement of the ratification process that, on the contrary, is required in the ordinary Treaty revision and in the simplified Treaty revision procedures of Article 48(6) TEU.

Passerelles of a general or specific nature have now been in force for more than 10 years, and some special *passerelles* even existed prior to the Lisbon reform. Notwithstanding this, their application is extremely rare, if not non-existent (except for one case). The question may be asked why these tools have been neglected by academics and policy-makers alike. Despite a certain optimism with which their introduction was accompanied, the reason they have not been used in the past and are possibly regarded with some scepticism now, may relate to the need to overcome existing approaches and mindsets that are reminiscent of intergovernmentalism. Despite this, *passerelles* deserve a closer look because they offer undeniable advantages with respect to other flexibility mechanisms contained in the Treaties, not least the fact that they do not fragment normative and policy application within the EU, and they do not involve a departure from the current allocation of Union competences.

Indeed, although it is clear that *passerelles* do not enlarge or expand the scope of Union powers or competences, the reluctance to use them, which is also the crucial point of this tool, derives from the effective loss of the veto power. In this vein, the courts of some Member States (see the *Lisbon* case of the German Federal Constitutional Court) have found that due to the potentially far-reaching effects of *passerelles* in terms of the decreased possibility for a Member State to steer Council's decision-making, they require authorisation at national level with enhanced representativeness from a constitutional perspective.

It has been observed that a shift to majority decision-making benefits decision-making as a whole, since the risk of being outvoted represents a strong enough incentive for parties to promote their positions and reach compromises with the others. It is therefore from this viewpoint that *passerelles* should be considered. The introduction of *passerelle* clauses, in fact, remains a somewhat political issue, in other words, one that requires strategic thinking coupled with a sense of openness to the fact that if everyone gives up a little, there could be benefit for all. This requires a certain change in mindset and expectations on the part of Member States.

Parliament's role in *passerelles* is quite strong for general *passerelles*, less so for special ones. For the former, Parliament's consent is required while for the latter it is often only consultation that is

required. Notwithstanding this, Parliament has made its voice heard over the years by inviting, suggesting and urging the use of *passerelles* in Council, whether general or specific. In specific cases, Parliament has even expressed the possibility to deny its consent to any new enhanced cooperation proposal unless the participating Member States commit to activating the specific *passerelle* clause under Article 333 TFEU. It remains, however, a matter of political influence that Parliament can exercise. In this respect, the Conference on the Future of Europe, delayed owing to the coronavirus pandemic, could offer a precious opportunity to explore and convince Member States of the utility of this tool.

A possible strategy that could be put in place to make *passerelles* more accessible and attractive, could be to use the approach shown by the Commission in at least one of the four proposals made in 2018 and 2019. Indeed, the step-by-step approach suggested in the field of tax policy could offer a feasible path whereby *passerelles* could first be implemented in non-contentious or non-politically sensitive matters. Another approach would be to somehow secure an informal commitment from Council that, failing the approval of a proposal within a certain period of time, the activation of (general or specific) *passerelles* would be explored. Admittedly, however, these proposals remain in the realm of non-binding and non-enforceable initiatives.

10. Annex

Cases in the TEU and TFEU where a special legislative procedure and/or unanimity applies in Council and indication of potential application of *passerelle* clauses

Provision	Legislative procedure	Council	European Parliament	Policy field
TEU				
Article 24(1)(2)	None (general rule)	Unanimity	-	Rule on decision-making in the field of CFSP
Article 31(1)(1)	None (general rule)	Unanimity	-	Rule on decision-making in the field of CFSP
Article 31(1)(3)	None	Unanimity	-	Special <i>passerelle</i> clause in the field of CFSP
Article 39	None (general rule)	Unanimity (see Article 31(1) TEU)	-	Processing and free movement of personal data in the field of CFSP
Article 41(2)(1)	None (general rule)	Unanimity	-	Operating expenditures of CFSP
Article 41(2)(2)	None (general rule)	Unanimity	-	Operating expenditures of CFSP
Article 41(3)(1)	None (general rule)	Unanimity	Consultation	Rapid access to appropriations in Union budget for actions of CFSP
Article 42(4)	None (general rule)	Unanimity	-	Decisions relating to CFSP
Article 44	None	Unanimity (see Article 42(4) TEU)	-	Entrusting the implementation of tasks on CFSP to a group of willing Member States
Article 46(6)	None (general rule on PESCO)	Unanimity	-	Decisions and recommendations in the framework of PESCO

Provision	Legislative procedure	Council	European Parliament	Policy field
TFEU				
Article 19(1)	Special	Unanimity	Consent	Measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation
Article 21(3)	Special	Unanimity	Consultation	Decisions on social security and social protection for the purpose of free movement and residence in the territory of Member States
Article 22(1) and (2)	Special	Unanimity	Consultation	Arrangements on the right to vote and stand as candidates in municipal and European elections in the Member State of residence other than that of nationality
Article 23(2)	Special	Qualified majority voting	Consultation	Coordination and cooperation measures concerning diplomatic and consular protection of a citizen of a Member State in a third state where his/her Member State of origin does not have diplomatic or consular presence

Provision	Legislative procedure	Council	European Parliament	Policy field
Article 25(2)	Special	Unanimity	Consent	Provisions to strengthen or add to the rights deriving from EU citizenship (Article 20 TFEU)
Article 64(3)	Special	Unanimity	Consultation	Measures regarding restrictions of movement of capital to and from third countries
Article 65(4)	Special	Unanimity	-	Decision on compatibility of Member States' restrictive measures regarding movement of capital with the Treaties
Article 77(3)	Special	Unanimity	Consultation	Provisions on passports, identity cards, residence permits and any other similar document
Article 81(3)	Special	Unanimity	Consultation	Family law
Article 81(3)(2)	Special	Unanimity	Consultation	Family law. Special <i>passerelle</i> clause
Article 82(2)(d)	None	Unanimity	Consent	Aspects of judicial cooperation that may be subject to minimum rules in the field of judicial decision and police and judicial cooperation. Competence-

Provision	Legislative procedure	Council	European Parliament	Policy field
				Competence clause ¹⁴⁹
Article 83(1)(3)	None	Unanimity	Consent	Definition of criminal offence and sanctions. Competence-Competence clause ¹⁵⁰
Article 86(1)	Special	Unanimity	Consent	Establishment of the EPPO
Article 87(3)	Special	Unanimity	Consultation	Measures establishing operational cooperation in the field of police cooperation
Article 89	Special	Unanimity	Consultation	Conditions and limitations under which national authorities may operate in the field of judicial cooperation in criminal matters (Article 82 TFEU) and police cooperation (Article 87 TFEU)
Article 92	None	Unanimity	-	Derogation to the standstill obligation on discriminatory measures applicable to carriers
Article 108(2)(3)	None	Unanimity	-	Decision on the compatibility of aid granted by Member States with the internal market

¹⁴⁹ See Section 6.

¹⁵⁰ See Section 6.

Provision	Legislative procedure	Council	European Parliament	Policy field
Article 113	Special	Unanimity	Consultation	Adoption of provisions on the harmonisation of turnover taxes, excise duties and other forms of indirect taxation
Article 115	Special	Unanimity	Consultation	Adoption of directives on the approximation of laws, regulations or administrative provisions of Member States affecting the establishment of the internal market
Article 118(2)	Special	Unanimity	Consultation	Language arrangements for European intellectual property rights
Article 126(14)(2)	Special	Unanimity	Consultation	Measures replacing the Protocol on the excessive deficit procedure
Article 127(6)	Special	Unanimity	Consultation	Conferral of specific tasks to the European Central Bank concerning prudential supervision of credit institutions and other financial institutions
Article 140(3)	None	Unanimity (of euro-area Member States and the Member State concerned)	-	Establishment of the exchange rate at which the euro is substituted for the currency of a Member State

Provision	Legislative procedure	Council	European Parliament	Policy field
Article 153(2)(3)	Special	Unanimity	Consultation	Social policy. Special <i>passerelle</i> clause of Article 153(2)(4) applies
Article 153(2)(4)	None	Unanimity	Consultation	Special <i>passerelle</i> clause in social policy
Article 155(2)(2)	None	Unanimity (if unanimity required by Article 153(2))	Information	Decision Implementing agreements between management and labour concluded at Union level
Article 182(4)	Special	Qualified majority voting	Consultation	Adoption of specific programmes implementing the framework programme
Article 192(2)(1)	Special	Unanimity	Consultation	Environmental policy of the EU. Special <i>passerelle</i> clause of Article 192(2)(2) applies
Article 192(2)(2)	None	Unanimity	Consultation	Special <i>passerelle</i> clause in the field of energy policy
Article 194(3)	Special	Unanimity	Consultation	Measures concerning energy policy of the EU of a fiscal nature
Article 203 (first sentence)	None	Unanimity	-	Adoption of rules on the association of countries and territories with the Union
Article 203 (second sentence)	Special	Unanimity	Consultation	Adoption of rules on the association of countries and territories with the Union

Provision	Legislative procedure	Council	European Parliament	Policy field
Article 207(4)(2)	None	Unanimity (if required for the adoption of internal rules)	Consent or consultation (see article 218)	Negotiation and conclusion of agreements in the fields of trade in services, commercial aspects of intellectual property and foreign direct investment
Article 218(8)(2)	None	Unanimity	Consent or consultation	Conclusion of international agreements
Article 219(1)	None	Unanimity	Consultation	Establishment of exchange rate system of the euro with currencies of third states
Article 222(3)	None	Unanimity (in accordance with Article 31(1) TEU if there are defence implications)	Information	Definition of the arrangements for the implementation of the solidarity clause
Article 223(1)(2)	Special	Unanimity	Consent (majority component members)	Establishment of the rules on the election of Member of Parliament
Article 246(3)	None	Unanimity	-	Decision not to fill the vacancy of one of the Members of the Commission for the remainder of the term of office
Article 252(1)	None	Unanimity	-	Decision to increase the number of Advocates-General
Article 257(4)	None	Unanimity	-	Appointment of members of the

Provision	Legislative procedure	Council	European Parliament	Policy field
				specialised court attached to the General Court
Article 262	Special	Unanimity	Consultation	Act of conferral of jurisdiction to the Court of Justice in the field of intellectual property rights
Article 293 ¹⁵¹	None	Unanimity	-	Conditions under which Council may amend a Commission proposal
Article 294(9) ¹⁵²	None	Unanimity	-	During first reading of the OLP, Council acting on amendments on which the Commission has given a negative opinion
Article 301(2)	None	Unanimity	-	Determination of the composition of the European Economic and Social Committee
Article 305(2)	None	Unanimity	-	Determination of the composition of the Committee of the regions
Article 308(3)	Special	Unanimity	Consultation	Amendment of the Statute of the European Investment Bank
Article 329(2)	None	Unanimity	Information	Establishment of enhanced cooperation in the field of

¹⁵¹ However, this provision could be an unwritten case of exclusion, see Section 4.2.2 uncodified exceptions.

¹⁵² However, this provision could be an unwritten case of exclusion, see Section 4.2.2 uncodified exceptions.

Provision	Legislative procedure	Council	European Parliament	Policy field
				common foreign and security policy
Article 331(2)	None	Unanimity (of Member States participating in enhanced cooperation)	-	Participation in enhanced cooperation in progress in the field of common foreign and security policy
Article 332	None	Unanimity	Consultation	Regime of expenditure for enhanced cooperation
Article 333(1)	None	Unanimity	-	Special <i>passerelle</i> clause in enhanced cooperation
Article 333(2)	None	Unanimity	Consultation	Special <i>passerelle</i> clause in enhanced cooperation
Article 342	None	Unanimity	-	Language regime of the institutions
Article 346(2)	None	Unanimity	-	List of products on which Member State may take special measures for the protection of their essential interests
Article 349	Special	Qualified majority voting	Consultation	Application of the Treaties to remote regions (e.g. Guiana, Guadeloupe, etc.)
Protocols				
Article 64(1) Protocol No 3	None	Unanimity	Consultation	Language arrangement of

Provision	Legislative procedure	Council	European Parliament	Policy field
				the Court of Justice
Article 64(2) of Protocol No 3	None	Unanimous consent	-	Language arrangement of the Court of Justice
Article 6 of Protocol No 13	None	Unanimity	Consultation	Convergence criteria
Article 4 of Protocol No 19	None	Unanimity (of Schengen Member States)	-	Participation of Ireland and the UK and Northern Ireland in the Schengen <i>acquis</i>
Article 6(1) of Protocol No 19	None	Unanimity (of Schengen Member States)	-	Association of Iceland and Norway to the Schengen <i>acquis</i>
Article 6(2) of Protocol No 19	None	Unanimity	-	Agreement establishing rights and obligations between Iceland and Norway on the one hand and the United Kingdom and Northern Ireland and Ireland on the other
Article 5 of Protocol No 21	None	Unanimity	Consultation	Financial aspects of the (non) participation of the United Kingdom and Ireland in the area of freedom security and justice
Article 9 of the Annex to Protocol No 22	None	Unanimity	Consultation	Financial aspects of the (non) participation of Denmark in the area of freedom security and justice

Provision	Legislative procedure	Council	European Parliament	Policy field
Article 6 of Protocol No 31	None	Unanimity	Consultation	Regime of imports of petroleum products from the Netherlands Antilles
Article 2(1) of Protocol No 37	Special	Qualified majority voting	Consent	Financial arrangements of the research fund for coal and steel derived from the expiry of the European Coal and Steel Community Treaty

Source: R. Böttner and J. Grinc, *Bridging Clauses in European Constitutional Law*, Springer, 2018, p. 20, in combination with S. Peers, in R. Schütze and T. Tridimas, *Oxford Principles of European Union Law*, Vol. I, OUP, 2018, p. 450. This table does not include those provisions where the (legislative) act is adopted by Parliament, such as for example Articles 223(2) TEU, 226(3) TFEU and 228(4) TFEU, etc. or where Article 353 expressly excludes the application of the *passerelle* clause.

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Passerelle clauses are a mechanism for introducing Treaty change of a very specific nature. They modify the decision-making rules that affect acts of the Council, by allowing a shift from unanimity to qualified majority voting or from a special legislative procedure to the ordinary legislative procedure. This study explores the differences between *passerelle* clauses and other flexibility measures (enhanced cooperation, the flexibility clause, and accelerator or brake clauses) and explores the main legal issues surrounding the introduction, revocation, and effects of *passerelle* clauses and their relationship with the other Treaty revision mechanisms. The analysis focuses not only on the two general *passerelle* clauses set out in Article 48(7) TEU, but also on the specific *passerelle* clauses contained in the Treaties in the field of environment, social policy, the multiannual financial framework, common foreign and security policy, family law and enhanced cooperation. Finally, the study outlines recent Commission proposals to use general and/or specific *passerelles* in certain policy areas, and the approaches taken by other institutions with respect to this constitutional tool.

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