The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting

Towards a more effective Common Foreign and Security Policy?
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Towards a more effective Common Foreign and Security Policy?

Abstract

This study has been commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the AFCO Committee. It analyses the possibilities and challenges regarding unanimity and qualified majority voting as well as the use of passerelle clauses in EU decision-making, with a special focus on the use of qualified majority voting in the European Union’s Common Foreign and Security Policy.
This document was requested by the European Parliament’s Committee on Citizens’ Rights and Constitutional Affairs.

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<tr>
<td>AA</td>
<td>Association Agreement</td>
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<tr>
<td>ACI</td>
<td>Anti-Coercion Instrument</td>
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<td>AFCO</td>
<td>Committee on Constitutional Affairs of the European Parliament</td>
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<td>AFET</td>
<td>Committee on Foreign Affairs of the European Parliament</td>
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<td>AFSJ</td>
<td>Area of Freedom, Security and Justice</td>
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<td>CCP</td>
<td>Common Commercial Policy</td>
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<td>CFSP</td>
<td>Common Foreign and Security Policy</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CoFE</td>
<td>Conference on the Future of Europe</td>
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<td>CSDP</td>
<td>Common Security and Defence Policy</td>
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<td>EC</td>
<td>European Communities</td>
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<td>ECB</td>
<td>European Central Bank</td>
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<td>EEAS</td>
<td>European External Action Service</td>
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<td>EMU</td>
<td>Economic and Monetary Union</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EPC</td>
<td>European Political Cooperation</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUGHRS</td>
<td>EU Global Human Rights Sanctions Regime</td>
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<tr>
<td>HR/VP</td>
<td>High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission</td>
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<td>IPC</td>
<td>Interparliamentary Committee Meeting</td>
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<td>GAC</td>
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<td>Code</td>
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<td>FAC</td>
<td>Foreign Affairs Council</td>
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<td>MEP</td>
<td>Members of the European Parliament</td>
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<td>MP</td>
<td>Members of the Parliament</td>
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<td>OLP</td>
<td>Ordinary Legislative Procedure</td>
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<td>SEA</td>
<td>Single European Act</td>
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<td>SLP</td>
<td>Special Legislative Procedure</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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EXECUTIVE SUMMARY

Background

The history of the European Union (EU) has shown us that Member States have increasingly accepted and codified the use of the qualified majority voting (QMV) in most policy areas. Indeed, QMV is now the default rule in the Council of the EU (Council) when it adopts EU legislation. However, even after the entry into force of the Lisbon Treaty, there remains certain areas of policymaking where QMV can only be applied to a limited extent. For instance, the Common Foreign and Security Policy (CFSP) is still subject to “special rules and procedures” that include the requirement of unanimity. Although EU Treaties provide for a limited set of options to use QMV in CFSP context, so far EU Member States have been cautious to activate those provisions.

The requirement of unanimity has sometimes blocked the EU in its foreign and security policy actions and has now created a general discontent towards the current CFSP decision-making rules. Indeed, in the last couple of years (between mid-2016 and mid-2022), we observed 30 individual vetoes, threats of veto or delays in CFSP context and, in the last decade or so (between mid-2013 and mid-2022), we have also observed 25 major political calls, partly as a reaction to those blockages, to change CFSP decision-making rules to avoid deadlock in decision-making. No wonder that the shift from unanimity to QMV, especially in the field of the CFSP, is increasingly on the EU’s political agenda. This is mainly due to the new types of challenges the EU faces, including Russia’s war in Ukraine, that require quick and efficient decisions. In addition, the Conference on the Future of Europe (CoFE) has once again opened policy discussions to remove the requirement of unanimity in most EU policy areas and in particular in the CFSP. Indeed, the CoFE, for instance, recommended to use QMV in almost all areas of EU policymaking. While EU institutions and Member States seem to be willing to seriously consider that recommendation, they have diverging views on how to best translate that recommendation into practice.

In fact, the CoFE recommendation to shift from unanimity to QMV in CFSP matters can be pursued in several ways. The first option is to amend the EU Treaties. Under Article 48(2) – (5) of the Treaty on European Union (TEU), any Member State government, the European Parliament (EP, Parliament) or the European Commission (Commission) can submit proposals to change EU Treaties. Indeed, in June 2022, recognising that EU citizens want to see a more efficient EU, Parliament adopted a resolution calling for a Convention for the revision of the Treaties. That resolution, among others, has called for reforming voting procedures in the Council to enhance the EU’s capacity to act, including switching from unanimity to QMV in areas such as sanctions. While amending the EU Treaties may indeed be a solution to ease or possibly to remove the unanimity requirement in e.g. CFSP matters, experience shows that such process certainly cannot be carried out overnight and usually involves a long bargaining process between the Member States.

Another option for a wider application of QMV in CFSP context is to use the already existing Treaty provisions to activate more efficient decision-making procedures. On the one hand, current EU Treaties already provide for four cases in which the Council can adopt CFSP decisions by QMV. To some extent, these QMV options are already being used, especially when the Council modifies already existing EU sanctions regimes or when the Council appoints Special Representatives, but they have not been fully used yet. On the other hand, existing QMV options can be further extended by the special CFSP passerelle clause under Article 31(3) TEU. The activation of that passerelle clause is currently being discussed in the General Affairs Council. EU affairs ministers have been relatively open to triggering
that provision, but the outcome of those negotiations is still uncertain and will probably not conclude before the end of 2022/early 2023.

Although unanimity in CFSP matters clearly prevails, it should be emphasised that QMV is being used in EU external action even in areas that have clear links to CFSP. In fact, there is an evolving interaction between the different facets of EU external action that is manifested in several nexuses between CFSP and non-CFSP areas. Nowadays, the Commission is more committed to apply, wherever it is possible, a more holistic view of EU external action and use e.g. EU trade legal bases to promote CFSP objectives where QMV applies. Examples of such actions include the Anti-Coercion Instrument, the new framework for the screening of foreign direct investments, the Anti-Torture Regulation or the Forced Labour Legislation. These show that in many cases the EU’s wide competences in trade matters may not only help to contribute to a more effective EU external action in terms of voting procedures but also in projecting EU power through commercial policy tools.

Yet another possibility not to block CFSP decisions is the wider use of constructive abstention under Article 31(1) TEU. Although unanimity remains the dominant voting procedure in CFSP matters, it does not imply that every Member State should vote in the affirmative if the Council seeks to adopt a CFSP decision. Constructive abstention under the second subparagraph of Article 31(1) TEU allows a (small group of) Member State(s) to abstain from a vote and decide not to apply a CFSP decision. Until the beginning of Russia’s war in Ukraine, constructive abstention has been invoked in only one case in 2008. Since the 24th of February 2022, it has been once again triggered in the case of the European Peace Facility (EPF) in relation to three Member States and also in the case of the setting up of a Military Assistance Mission in support of Ukraine (EUMAM Ukraine) in relation to one Member State.

Although the European Council and the Council dominate the CFSP, Parliament can also influence it, albeit to a more limited extent and perhaps in a more informal way. In fact, the EP but also other parliaments have the ability to provide a forum for debate in foreign policy questions. Those debates enhance the positions of the parliaments even in policy areas where formal competences are less pronounced. This rather informal power can be used to question and even to force EU executives to justify their (non-)actions in CFSP issues. Although the HR/VP or foreign ministers and their officials can always refer to their prerogatives under current Treaty provisions and can emphasise their own legitimate competences to shape EU-level foreign and security policy, the exposure to public opinion can force EU executives to move in a direction which is more in line with the expectations of parliaments. This is perhaps even more true in a policy area where the Council holds closed policy debates. The role of the parliaments, whose members are directly elected by citizens, becomes even more important as they can hold public debates on the outcome of foreign policy negotiations which are kept otherwise in an “intergovernmental” format. In the case of the EU’s Global Human Rights Sanctions Regime (EUGHRS), for instance, parliaments were quite successful in signalling their preferences to adopt a sanctions regime.
1. INTRODUCTION

This study was written upon a request from the Committee on Constitutional Affairs of the European Parliament (AFCO Committee), following a request from Parliaments’ Policy Department for a study on ‘The implementation of Article 31 of the Treaty on European Union (TEU) and the use of Qualified Majority Voting’. The reason for this being that the AFCO Committee needs expertise to assess the implementation of Article 31 TEU and the use of qualified majority voting (QMV) on proposals from the EU High Representative for Foreign Affairs and Security Policy / Vice-President of the Commission (HR/VP; High Representative).

Article 31 TEU contains the decision-making procedure on the basis of which the Council adopts decisions in the area of the Common Foreign and Security Policy (CFSP). The “special rules and procedures” that characterise CFSP include the default rule that CFSP decisions be taken by unanimity, which stand in stark contrast to most other policy areas, where QMV has by now become the default voting modality.\(^2\)

The study will thus contribute to the preparation of the AFCO Committee’s implementation report entitled “Implementation of *passerelle* clauses in the EU Treaties”, which is likely to look also into the implementation of Article 31 TEU, as well as to a wider discussion in the AFCO Committee on switching from unanimity to QMV and the possible need for Treaty changes.\(^3\)

The aim of this study is to analyse the possibilities and challenges linked to unanimity and QMV as well as the use of *passerelle* clauses in the EU decision-making, with a special focus on the use of QMV on proposals from the EU HR/VP. Within that broader context, the study, in particular,

- Gives an overview of the EU’s institutional and constitutional architecture, as regards decision-making procedures and their challenges (unanimity, QMV, *passerelle* clauses);
- Looks into the need for mainstreaming QMV in the EU decision making procedures, taking into account the recommendations adopted by the Conference on the Future of Europe (CoFE);
- Analyses the concept of *passerelle* clauses and their use in the EU decision-making in general;
- Describes the decision-making procedures in the field of CFSP and, in this context, investigates also the CoFE recommendation No 21;
- Analyses the use of Article 31 and the use of QMV on proposals from the HR/VP;
- Looks into the advantages and challenges of extending QMV to the CFSP;
- Gives policy recommendations on how to improve the EU decision-making in general and in the field of CFSP and, more specifically, whether the shift from unanimity to QMV, either via *passerelle* clauses or through Treaty changes, would be a sustainable solution for this.

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\(^1\) Dr. Viktor Szép is a post-doctoral researcher at the Department of European and Economic Law of the University of Groningen. Prof. Dr. Ramses A. Wessel is Professor of European Law at that same department. The authors wish to thank Marcell Szilágyi, student at the University of Groningen, for his assistance on this report during an internship, and to Ben Whyte for proofreading the document in its entirety. Any remaining mistakes are the authors’ responsibility.

\(^2\) Other areas where decisions are adopted by unanimity are taxation, social security or social protection, the accession of new countries to the EU and operational police cooperation. See [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0647&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0647&from=EN).

\(^3\) AFCO has recently started to prepare AFCO/9/10045 2022/2142(INI) Implementation report: Implementation of "passerelle" clauses in the EU Treaties. Rapporteur: Giuliano Pisapia (S&D)
1.1. Political context for the push for a more efficient EU

This request from the AFCO Committee could not have come at a better time. The topic of efficient decision-making in EU foreign and security policy is high on the political agenda. While the question of how to improve the efficiency in this area is not new, the current situation – in the words of Commissioner Thierry Breton – is an era of “perma-crisis” that may require renewed attention to more efficient decision-making procedures. The global pandemic, climate change and the brutal war of aggression at our doorstep underlines the urgency of assessing new options. Indeed, it is well known that EU integration advances faster when crises hit. As Jean Monnet famously said, the Union will be “forged in crises and will be the sum of the solutions adopted for those crises”. Geopolitics has re-entered the EU’s political agenda, and the EU is re-investing in the relationship with its neighbours. This is exemplified by the first meeting of the European Political Community that took place on 6 October 2022 in Prague. Simultaneously, world politics has fragmented in the last couple of years. Strategic supply chains and technological competition have become a political priority. Supply chains and our dependence on them are increasingly used as weapons.

These recent developments have triggered a renewed discussion about how to make the Union’s external action more effective, including its CFSP. In late August 2022, seeking to improve the resilience and governance of the EU, German Chancellor Olaf Scholz announced his intention to significantly alter the EU’s functioning. He argued that “even the European treaties are not set in stone [and their] rules can be changed – in the very short order if need be”. He further added that “[i]f together we come to the conclusion that the Treaties need to be amended so that Europe makes progress, then we should do that”. Chancellor Scholz also referred to the CoFE, the outcome of which showed that “the public wants an EU that delivers”. His reform proposals include in particular a shift from unanimity voting to QMV in not just sanctions policy and human rights issues, but also in foreign and tax policy. Chancellor Scholz concluded that “the alternative to QMV, such as a new system of opt-ins and opt-outs – would just weaken EU unity”.

As will be outlined further in this report, Chancellor Scholz was not the first to suggest making more use of QMV in foreign policy. It has been mentioned surprisingly often in the last years by prominent politicians. Among many others to which we will return later in this report, Commission President

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5 See also the new Brussels Institute for Geopolitics, that was launched in Prague with the support of the Netherlands, France and Germany; [https://big-europe.eu/]
Ursula von der Leyen, in her first State of the Union speech, proposed introducing QMV in decisions concerning human rights and sanctions. She pointed to “a clear need for Europe to take clear positions and quick actions on global affairs” and asked: “But what holds us back? Why are even simple statements on EU values delayed, watered down, or held hostage for other motives? When Member States say Europe is too slow, I say to them be courageous and finally move to qualified majority voting – at least on human rights and sanctions implementation.” This idea had been introduced by her predecessor, Jean-Claude Juncker in 2017. The discussion was echoed by the leaders of France and Germany in their 2018 Meseberg Declaration, as well as by other member States. Parliament had also prepared a brief on the matter. Thus, over the past years, the issue of QMV in CFSP has suddenly and prominently re-entered political discourse.

French President Emmanuel Macron also referred to the increasing difficulties Europe faces. In August 2022, during a cabinet meeting at the Elysée Palace, President Macron warned them to be ready for sacrifices, as Europe faces “the end of abundance”. He considered that Europe is going “through [...] a big shift, a big upheaval [...] a series of serious crises”, including the war in Ukraine and unprecedented droughts due to climate change. France and Europe are expected to face difficulties in public finance, resource shortages, and breakdowns in supply chains. “This overview that I’m giving – the end of abundance, the end of nonchalance, the end of assumptions – it’s ultimately a tipping point that we are going through that can lead our citizens to feel a lot of anxiety [...] [o]ur system based on freedom in which we have become used to living, sometimes when we need to defend it, it can entail making sacrifices.” This new situation may also require more effective EU decision-making procedures.

HR/VP Josep Borrell rightly argued that the “EU sometimes struggles to take decisions on foreign policy due to divisions among Member States. And yet many want the EU to play a stronger, geo-political role in a dangerous world. We need an honest debate without taboos on how best to achieve this, including

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9 European Commission (2020) State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels 16 September 2020. See also the President’s more recent speech in which she proposed to “improve the way we do things and the way we decide things”; Ursula von der Leyen, ‘State of the Union Address 2022’ (European Commission - European Commission).


12 See the Non-paper by Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden on strengthening the EU’s Common Foreign and Security Policy ahead of the informal lunch discussion at the Foreign Affairs Council on December 9, 2019.


on how we take decisions”. HR/VP Borrell identified history, geography, and identity as the main reasons for disunity in CFSP matters and believes that the long-term answer lies in the creation of a common strategic culture that would allow the Member States to see the world from a common viewpoint. HR/VP Borrell also added that while unanimity is the basic voting rule in CFSP context, QMV is used in other areas of EU policymaking and “crucially, market rules or climate targets are not secondary issues of lesser sensitivity. Indeed, big national interests are at stake, which often clash just as much as in foreign policy”. He concluded that the mere existence of QMV would create an incentive for the Member States to search for a common ground. Ideas to forge a common strategic culture – including establishing a European Diplomatic Academy – can be read in that context.

1.2. The aim of this report

The main aim of this report is to map the current legal and political options for using QMV in CFSP. In doing so, the report distinguishes between current possibilities and proposed options that would require a treaty change. Indeed, the latter option does no longer seem to be a taboo. The CoFE, in explaining its goal and function, explicitly used the following quote by Commission President Von der Leyen when addressing EU citizens:

“You have told us that you want to build a better future by living up to the most enduring promises of the past. Promises of peace and prosperity, fairness, and progress; of a Europe that is social and sustainable, that is caring and daring. You have told us where you want this Europe to go. And it is now up to us to take the most direct way there, either by using the full limits of what we can do within the Treaties, or by changing the Treaties if need be.”

In assessing potential options, this report does not limit itself to the area of foreign and security policy but refers to existing options in other policy areas as well. In presenting any legal options, it takes the political context of these matters into consideration. Improvement of the effectiveness of CFSP is also the topic of two extensive EU Horizon 2020 research projects: Understanding and Strengthening EU Foreign and Security Policy in a Complex and Contested World (JOINT) and Envisioning a New Governance Architecture for a Global Europe (ENGAGE). In these two projects, several academic institutions and think tanks work together in analysing options for improving EU foreign policy effectiveness. The present authors are members of the ENGAGE network.

Parliament has an important role to play. It is necessary to stress that the Treaties clearly indicate that the CFSP is a Union policy that is to be supported by the Member States. Despite its formally limited role in CFSP, the EP has always acknowledged the fact that CFSP is part and parcel of the Union’s
(external) policies and has taken its role seriously by using all available means at its disposal to pro-
actively influence CFSP. In fact, despite the restraints it has faced, Parliament is often regarded as one
of the most active parliaments in the world where foreign policy is concerned.21

The present report aims to provide further tools in that respect by explaining the current rules on EU
decision-making and existing, but underutilised, possibilities that are already offered by the Treaties
and potential new scenarios. As will be seen, there are pros and cons to a shift to QMV in CFSP. The
main challenge appears to be maintaining the idea of a Common Foreign and Security Policy while
facilitating the decision-making process. However, in many other equally sensitive policy areas, the EU
has shown itself to be able balance maintaining a common policy and acknowledging variations in
Member State’s perspectives. The coming paragraphs will show how this can be attained in CFSP as
well.

21 Compare R.A. Wessel, ‘Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy’, in Juan Santos Vara
and Soledad R. Sánchez-Tabernero (Eds.), The Democratisation of EU International Relations through EU Law, London/New
2. CURRENT EU INSTITUTIONAL AND CONSTITUTIONAL ARCHITECTURE

QMV has by now become the default voting mechanism in the Council, except for CFSP where unanimity is still the norm. The 2009 Lisbon Treaty led to a further integration of CFSP into the Union's legal framework, and subsequently allowed the Court of Justice to deal with many CFSP-related questions. However, despite this, decision-making procedures still differ and often stand in the way of integrating CFSP and other external policy elements into a coherent EU foreign policy.

In the following section, as a reminder of the roles of the various EU Institutions in the decision-making process, this report will briefly summarise the EU's institutional and constitutional architecture. This will facilitate a better understanding of the proposed changes made by the CoFE later on.

2.1. An institutional balance

When discussing the democratic legitimacy of the Union, comparisons are often made with the political structure of Member States. Several shortcomings can indeed be noted, such as:

- a Parliament that does not have the final word in all cases;
- a Commission whose members cannot be sent home individually by a parliament;
- a Council (of Ministers) that is prepared to delegate matters to the Commission, but at the same time wants to retain power as much as possible for the Member States through special committees;
- a European Council in which the Heads of State or Governments can take far-reaching decisions unimpeded by any scrutiny.

Seen in this way, the institutional structure of the Union is not set up according to the democratic rules of the art. Yet even in this structure there is a balance of power, which is again the result of a compromise. This compromise dates from the period of negotiations on the Treaty on the European Coal and Steel Community when the establishment of an independent Commission (then called the 'High Authority') served to counterbalance the Council in which the interests of the individual member states could emerge. This structure laid the foundations for an institutional balance that is still an important part of the European Union and the current debate about the decision-making procedures. In discussions about the composition of the Commission, the weighting of votes in the Council, or the application of the legislative procedure before the European Parliament, this balance plays an important role.

The structure is clear: the Commission is an independent body, which focuses on the interests of the European Union as a whole. This makes it possible, irrespective of the individual interests of the Member States, to take decisions in the interest of the entire Union. Here we clearly see the supranational element. The Council then represents national interests. In this way decisions can be made

22 Art. 24(1) TEU: *The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise.*
that consider the varying national preferences. The democratic dimension is reflected in the powers of the European Parliament, which as a directly elected body, aims to increase the legitimacy of European governance. Finally, the Court of Justice has the task of assessing the lawfulness of the implementation of the treaties. These bodies – Parliament, the Council, the Commission and the Court of Justice – alongside the European Central Bank and the European Court of Auditors, which monitor the expenditure of the Union’s own financial resources, are referred to as the ‘institutions’ by Article 13 TEU.

The institutions have powers in all Union policies. Article 13 of the Union Treaty refers in this regard to “a single institutional framework aimed at promoting its values, pursuing its objectives, serving its interests and the interests of its citizens and of the Member States, and ensuring consistency, ensure the effectiveness and continuity of its policies and actions.”

2.2. European Council

The European Council meets at least four times a year. This is the highest policy-making body of the EU. The European Council is composed of the Heads of State or Governments of the Member States, its President, and the President of the Commission. The High Representative of the Union for Foreign Affairs and Security Policy takes part in the work of the European Council. The members of the European Council may decide to be assisted each by a minister and, in the case of the President of the Commission, by a member of the Commission. The constitutional law of the individual member states determines whether the head of state or government has a seat in the European Council. Despite the current treaty basis in Article 18 TEU, the European Council was informally established in 1974 and only legally enshrined in the Single European Act in 1986. The European Council can be regarded as an institutionalisation of the summits that were previously organized ad hoc, but their origin is becoming less and less apparent. In earlier days, meetings of the European Council usually took place in attractive locations in the Member States. However, since the most recent enlargement of the Union, the meetings have primarily taken place in Brussels, in order to take advantage of the security and translation facilities present. The idea of the European Council as a traveling circus – for which every organizing Member State had to make enormous efforts in the field of security, translation and communication – has disappeared. The European Council is now more clearly integrated into the ‘institutional framework’ of the European Union. The President of the European Council no longer exercises a national mandate but protects the Union’s interests. From a legal standpoint, the European Council must therefore be distinguished from the Member States as it has its own mandate under Union law.

Without dealing with legislation, the European Council provides important impetus for the Union’s development and defines the broad political guidelines and priorities. In addition, the European Council has some specific powers, such as to identify a breach by a Member State of the values on which the Union is founded (Article 7 TEU), to change the size and composition of the Commission (Article 17 TEU), setting priorities in the field of foreign and security policy (e.g. Articles 22, 24, 26 TEU) and the area of freedom, security and justice (Article 68 TEU), treaty revision procedures (Article 48 TEU), broad guidelines on economic policy (Article 121 of the Treaty on the Functioning of the European Union).

23 Article 15(3) TEU.
24 Article 15 TEU.
The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting

Union (TFEU)), or the monetary system (Article 141 TFEU). The outcomes of the European Council are reflected in decisions, often presented as 'conclusions', which are in principle adopted by unanimity, although in exceptional cases majority decision-making also takes place (Articles 235-236 TFEU). An example of the latter is the election of the permanent Chair for two and a half years.

2.3. Council

The Council of the European Union is also referred to as the Council or the Council of Ministers. This Council is the main decision-making body of the EU. Under Article 16 TEU, the Council exercises legislative and budgetary functions together with the European Parliament. The Council is responsible on the one hand for coordinating the economic policies of the Member States (Article 16(1) TEU) and on the other hand holds decision-making power, the implementation of which can be entrusted to the Commission (Article 290 TFEU).

In the Council, each Member State has a representative. Although in practice these are ministers, Article 16 TEU refers to representatives of the Member States at ministerial level who are authorized to bind the government of the Member State concerned. This means that not only can ministers of sub-state governments be delegated, but that it can also be the Heads of State or Government. The actual composition of the Council varies with the subject on the agenda. Traditionally, the Council was the domain of the foreign ministers. Due to its general character, this Foreign Affairs Council (FAC) is still the most important when it comes to foreign policy issues. General institutional issues are discussed in the General Affairs Council, which often consists of ministers or state secretaries for European Affairs. In addition, most ministries have 'specialist councils'. There are currently ten Council configurations. The meeting frequency differs per Council. A different classification can be chosen based on Article 236 TFEU.

Despite the changing formations, in a legal sense it is always the same institution. This is apparent, for example, from the fact that decisions in all areas can be taken by all Council formations. This is possible because many decisions are only on the Council's agenda as a formal final step in the process. This 'rubber stamping' (so-called 'A points' on the agenda) are possible because an agreement had already been reached in the preliminary phase. As a result, no substantive consultation is necessary, and any Council formation may act as a decision-making body. Although the Council is not in permanent session, the Union has a Committee of Permanent Representatives in which the Member States each have a representative at the ambassadorial level. This COREPER (Comité des représentants permanents) prepares Council meetings (Articles 240 TFEU and 16(7) TEU). Before draft decisions are submitted to COREPER, they are prepared by thematic working groups composed of national officials.

The Council is assisted by a secretariat, headed by a Secretary-General (Article 240(2) TFEU) and chaired by one of its members. The Foreign Affairs Council is chaired by the High Representative of the Union for Foreign Affairs and Security Policy. The latter function has clearly gained in importance since the Treaty of Lisbon. Not only is the HR/VP the Union’s main external representative in the world, but it is also a member (and one of the Vice-Presidents) of the Commission, making the person in office the linchpin of any foreign policy stances of the Union (Articles 18 et seq. TEU and the provisions on
external relations in the TFEU). It is perhaps ironic that the Council dealing with what is often perceived as the most intergovernmental area, foreign policy, is the only Council chaired by an EU official.

2.4. Commission

The European Commission is also referred to as the Union body *par excellence*. After all, the Commission consists of independent persons who do not act on behalf of a Member State, but who must put the interests of the European Union first. On 1 November 2004, the first new Commission took office following the recent enlargement of the European Union. The Commission currently consists of twenty-seven independent persons (Article 17 TEU), following a 2013 European Council decision ensuring that the number of members of the Commission would correspond to the number of Member States.

The tasks and powers of the Commission are multifaceted. The Commission has independent decision-making power on a limited number of points (the so-called original powers). In addition, the Commission has several powers delegated to it by the Council (the so-called delegated powers). The development and role of these committees has been called “the comitology issue”. This criticism stems from the fact that the Council grants the commission delegated powers, but maintains a ‘vice like grip’ through national representatives who have a strong influence on these committees.

Importantly, the Commission has the right of initiative (Articles 17(1) TEU and 289 TFEU). This means that in most cases where the Council and the European Parliament are jointly empowered to take decisions, a Commission proposal is a prerequisite for any decision to be taken. Finally, the Commission plays a key role in monitoring compliance with Union law (Article 258 TFEU). The latter two powers are often mentioned when reference is made to the distinctive character of the European Union in relation to other international organisations. This is not entirely unjustified. As noted, the Commission is the main Union body capable and empowered to rise above the interests of individual Member States and to initiate decisions that primarily concern the achievement of the objectives of the entire Union. As such, the Commission is also more neutral and can be trusted to be above national power games. This is expressed, for example, in the Commission’s aforementioned supervision of compliance with European legislation by the Member States or even its fellow institutions.

2.5. European Parliament

The European Parliament consists of 705 members who have been directly elected since 1979, for a period of five years (Article 14(2) TEU). The distribution of seats is based on more or less proportional representation with a minimum number of seats for small states. Despite the national party-political dimension in the composition of the Parliament (voters vote on lists of national parties), MEPs operate within delegations which, once in Brussels, merge into multi-national political groupings. In other

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25 This status of the High Representative was recently confirmed by the Court in Case T-125/22; Order of the President of the General Court of 30 March 2022; ECLI:EU:T:2022:483.

26 Note, however, Parliament’s recent resolution in which it calls for a “general direct right of legislative initiative” to be established for the EP. See EP resolution of 9 June 2022 on Parliament’s right of initiative (2020/2132(INI)).
words: despite the absence of European political parties that can be elected, the European Parliament
is underpinned by cooperation between like-minded people from other Member States. Although
there is no question of representation of a single 'European people', the MEPs are 'representatives of
the citizens of the Union' (Article 14(2) TEU).

Parliament’s powers are, according to many, too limited and are therefore always a subject of
discussion. Nevertheless, Parliament has grown from an institution that in its early years only acted as
an advisory body, to an important co-legislative body. However, given the turnout percentages in
European elections, voters do not seem completely convinced yet. In 2009, the overall turnout was at
43%, down from 45.5% in 2004. This may be changing however, as the 2019 election saw turnout
increase to its highest level since 1994, at 51%.

In summary, the main powers of Parliament are the following:

- Depending on the subject: co-deciding or advising on new legislation (see below);
- Agreeing to enlargement treaties or association agreements;
- Exercising control over the Commission’s policies;
- Adopting the budget together with the Council.

The latter power was used by Parliament to acquire a more prominent role (also referred to as ‘the
power of the purse’) even in areas where it only had an advisory role (such as foreign and security
policy). The control of the Commission is supported by Parliament’s power to dismiss the Commission
as a whole (Article 234 TFEU). However, this drastic measure has never been used. This is largely due to
the existence of a number of ‘safety valves’. For example, the vote on a resignation motion is public
(and the opinion of individual parliamentarian is visible to all), voting takes place under an increased
majority (two-thirds of the number of votes cast and a majority of the number of parliamentarians) and
provision is made for a ‘cooling off period’ of three days between the submission of the motion and the
vote. Resignation motions have thus far failed, although in 1999, following a report on financial
mismanagement and nepotism, the Commission decided to pre-emptively resign. This was because
otherwise a motion by Parliament would certainly have been adopted.

2.6. Court of Justice of the European Union

It can be said without exaggeration that without the presence of the Court of Justice, the EU would not
have reached the level of integration we know today. Many provisions in the treaties and in
implementing legislation can only be properly valued by using the interpretations given by the Court.
Many legal regimes – like those regarding the external relations of the EU or the internal market – have
been shaped to a significant extent by case law of the Court.

The Court of Justice of the European Union, or CJEU, consists of two bodies. The Court of Justice, with
one judge from each state, and the General Court, with two members from each state. According to
Article 19, the court ensures “observance of the law in the interpretation and application of the
Treaties”.

The Court has several facets and is difficult to compare to a national court. An important role is reserved
for the Court as a uniform interpreter, in which it renders judgments on the validity and interpretation
of European law (Articles 19(3) TEU and 267 TFEU). The underlying idea is that EU law should not differ
from Member State to Member State and that citizens from Finland to Greece, Slovakia to Ireland have
same rights. However, the other aspects of the Court are no less important.
For example, the Court has, under certain conditions, jurisdiction to:

- Settle disputes between the Commission and the Member States and the Member States themselves (the ‘infringement procedure’, Article 258-260 TFEU);
- The annulment of acts of the institutions (the 'action for annulment', Article 263 TFEU); and
- Establish a violation of the Treaty in the event of the institutions failing to take a decision (the ‘action for failure to act' Article 265 TFEU).

The Court also has jurisdiction to:

- Make an appeal in case of administrative sanctions (Article 261 TFEU);
- Determine the compatibility with the Treaty of treaties concluded by the Union or the Member States (Article 218(11) TFEU);
- Determine the non-contractual liability of the Union and related damages (Article 268 in conjunction with 340 TFEU);
- Rule under an arbitration clause in an agreement to which the Union is a party (Article 272 TFEU);
- Settle disputes between Member States related to the subject matter of the Treaty (Article 273 TFEU).

As a compromise between Continental and 'Common Law', the option of disclosing the differing opinions of the various judges (dissenting opinions) has not been chosen, but a prior opinion (‘conclusion’) by one of the eleven advocates-general was opted for (Article 252 EC). With this system, the Court aims to provide an impartial and often more academic and detached view of a particular dispute. The Court is not obliged to follow the conclusion of the advocate-general, and it does occasionally deviate with reasons, which increases the transparency of the case law.

In principle, the General Court has jurisdiction to hear all direct actions in the first instance. Citizens and businesses will also mainly have to deal with the General Court. This is the first place to go to for actions for annulment of decisions, for failure to take a decision and for damages in the event of Community liability. Based on Article 256(1) TFEU, judgments of the General Court can be appealed to the Court of Justice in matters of law.

2.7. Decision-making procedures

Decision-making in the EU largely takes place on the basis of either of the two legislative procedures: the [ordinary legislative procedure](https://example.com) and the [special legislative procedures](https://example.com). These apply to most policy areas. When regulations, directives or decisions are adopted under the legislative procedures, the resulting legal acts are to be regarded as 'legislative acts' (Article 289 TFEU). The most common procedure is the 'ordinary legislative procedure' where the Council takes a decision together with the European Parliament on the initiative of the Commission. Where, in a particular policy area, the Treaty provides that the Council shall act 'under the ordinary legislative procedure', Article 294 TFEU applies. The ordinary legislative procedure broadly corresponds to what was referred to as the co-decision procedure before the Lisbon Treaty. In short, the procedure entails that the Commission submits a proposal for new legislation to the European Parliament and the Council. The latter can adopt the decision, by qualified majority, if there is agreement on this with Parliament. If the Council and Parliament do not agree on the draft decision, agreement can be reached via a so-called conciliation
committee in which representatives of both institutions try to reach a compromise. This result can then be adopted by the Council (by qualified majority) and Parliament (by absolute majority). Or not, in which exceptional case the Commission will have to produce an adapted proposal.

On the basis of Article 16(4) TEU, QMV is defined as at least 55% of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65% of the population of the Union. A blocking minority must include at least four Council members, failing which the QMV shall be deemed attained. The other arrangements governing QMV are laid down in Article 238(2) TFEU. The latter provides that by way of derogation from Article 16(4) TEU, where the Council does not act on a proposal from the Commission or the HR/VP, QMV shall be defined as at least 72% of the members of the Council, representing Member States comprising at least 65% of the population of the Union. Article 238(3) TFEU further provides that where not all the members of the Council participate in voting, QMV shall be defined – on the basis of Article 238(3)(a) TFEU – in a same manner as in Article 16(4) TEU but the blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which QMV shall be deemed attained. Article 283(3)(b) TFEU further adds that by way of derogation from Article 238(3)(a) TFEU, where the Council does not act on a proposal from the Commission or from the HR/VP, QMV shall be defined as at least 72% of the members of the Council representing the participating Member States, comprising at least 65% of the population of these states.

In some cases, a ‘special legislative procedure’ applies. This variant cannot be found unambiguously in the treaties and differs per policy area. Examples can be found regarding measures in the field of discrimination (Article 19 TFEU), European citizenship (Article 21–23(3) TFEU), or the liberalisation of capital movements (Article 64(3) TFEU). Special procedures also apply for the amendment of the treaties and the accession of new Member States (Articles 48–40 TEU).

The role of Parliament has significantly increased compared to the past, in particular due to the general application of the ordinary legislative procedure. This procedure now also applies in sensitive policy areas such as asylum, immigration, and criminal law. Since the Lisbon Treaty, Parliament also has a right of co-decision in the field of agriculture and fisheries (Article 43(2) TFEU).

The only EU policy area not reflected in the TFEU is the Common Foreign, Security and Defence Policy. For political reasons, it was decided not to include this policy area in the TFEU, but to leave it in the TEU. This choice can be explained by the origin of the policy area. The CFSP was already excluded from the EC Treaty in the Maastricht Treaty in 1992 to allow the Member States to retain influence over the policy. In the European Union that was established with the Maastricht Treaty, the CFSP was one of the ‘pillars’, alongside the Community pillar (EC law) and cooperation in the field of Justice and Home Affairs. The intergovernmental decision-making model that characterised the CFSP at that time is still recognizable in the current arrangements found in Title V, Chapter 2 of the Union Treaty. The same goes for the Common Security and Defence Policy (CSDP), which was introduced in the Treaty of Nice in 2001 as the European Security and Defence Policy (ESDP) and is now found in Title V, Chapter 3 of the TEU.

There are significant differences regarding the procedures. Most notably, the legislative procedure cannot be used for the adoption of CFSP and CSDP decisions (cf. Article 24 TEU). In that sense, the decisions cannot be regarded as legislative acts. There is also a clear difference concerning the role of

27 Next to the related European Neighbourhood Policy.
the institutions. Further, with regard to the CFSP and CSDP, the Council is the main decision-making body, but unlike most other Union policies, the Commission is not the driver of new policies here. Article 30(1) TEU mentions in this respect the general rule that “any Member State, the High Representative of the Union for Foreign Affairs and Security Policy, or the High Representative with the support of the Commission”, may submit proposals to the Council. So far, the Commission has remained aloof from initiating CFSP policy, but the possibility to present proposals together with the High Representative of the Union for Foreign and Security Policy (HR) may change this.

What also plays a role is that the person holding the position of HR is also a member (and even Vice-President) of the Commission (Article 17, paragraphs 4 and 5). The HR’s role is clearly ‘upgraded’ in the Lisbon Treaty. It can safely be said that the HR is the most important person in the field of external relations because of his/her pivotal role. Even the President of the European Council exercises their external tasks “without prejudice to the powers conferred on the High Representative of the Union for Foreign Affairs and Security Policy” (Article 15(6)), albeit “at his [politically higher] level”. The HR is appointed through qualified majority by the European Council (with the agreement of the Commission President). He (or she) “implements the common foreign and security policy of the Union” (Article 18(2)), chairs the Foreign Affairs Council, is a de facto member of the European Council (Article 15), assists the Council and the Commission in achieving a consistent policy (Article 21), together with the Council, ensures compliance with the policy by the Member States (Article 24, paragraph 3) and is therefore clearly the pivot around which the entire common foreign, security and defence policy revolves.

Not only the Commission, but also Parliament has a much more limited role in this policy area. Although Parliament is consulted by the HR (Article 36), the fact that ‘legislative’ acts for the CFSP are excluded (Article 24), seriously limits Parliament’s formal role in this area. This is even though Parliament is seen as one of the most active parliaments worldwide in relation to foreign policy. Concurrently, this leads to complex situations where (for example because of a joint proposal of the HR and the Commission) decisions cover both CFSP and other areas. In those cases, the “specific rules and procedures” for the CFSP (Article 24) necessitate the adoption of different acts with different legal bases in different treaties and with a very varying role for Parliament.

The exclusion of legislative acts (i.e. the impossibility of adopting directives or regulations in this area) does not mean that the CFSP decisions are not binding on the Member States. Article 28 TEU states that these decisions are binding on the Member States in taking positions and in their further action. Yet, the role of the Court of Justice is limited. Under Article 40, the Court has the power to review whether the correct legal basis has been chosen for a decision and, in addition, the Court has the power to review the validity of restrictive measures against natural or legal persons (the well-known sanctions against persons or entities suspected of terrorism; Article 275 TFEU). The guiding role that the Court has regarding the development of, for example, the internal market is thus absent here. Over the past decade, however, the Court has taken its role under Article 19 TEU seriously and aims to provide judicial review of cases despite their CFSP context.28

This brief overview of the current institutional structure and the existing decision-making procedures allows us to take the next step and analyse options to make the EU more effective, especially in the

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field of EU external action. A final, yet fundamental, remark, concerns the fact that the CFSP decision-making procedures in the Treaties relate to the adoption of formal CFSP decisions by the Council. After all, Article 31(1) TEU refers to Decisions taken by the Council (and the European Council) and the entire procedure, including the voting modalities, seems to relate to these formal decisions only. At the same time, the Official Journal reveals that not so many formal CFSP decisions are adopted and that CFSP is in fact largely shaped on the basis of other output, including Council minutes, declarations and EU positions at other international organisations. With regard to the latter type of 'decisions', Article 34 TEU merely provides that "Member States shall coordinate their action in international organisations and at international conferences" and that they "shall uphold the Union's positions in such forums". Article 35 TEU adds that "that decisions defining Union positions and actions adopted pursuant to this Chapter are complied with and implemented". These provisions do not include a decision-making procedure, nor do they refer back to the default CFSP procedure. Interestingly enough, it is always assumed that the specific CFSP rules and procedures, including the unanimity rule, apply for all CFSP output and not just for the formal Decisions mentioned in Article 31 TEU. The Treaty, however, is far from clear on this, but practice reveals that the unanimity rule is also applied for the adoption of, for instance, Union positions at international conferences. While from strictly legal (treaty analysis) point of view questions can be raised as to the applicable decision-making procedure outside the Council, the present report follows the practice that Member States can also block CFSP output in the form of Declarations or EU-positions adopted at international conferences. Hence, the suggestions that will be made will apply across the board.

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3. MAKING THE EU MORE EFFECTIVE

3.1. The Conference on the Future of Europe and potential Treaty changes

There is now a new momentum to change EU Treaties, or to at least make more use of the possibilities the Treaties offer to make decision-making more effective. Some Member States and EU institutions are dissatisfied with the functioning of the EU. In particular, the shift from unanimity to QMV is on the top of the EU’s agenda, including the Czech Council presidency’s agenda, and this shift might either happen by amending the Treaties or using the so-called passerelle clauses (the clauses that allow for changes in a decision-making procedure without Treaty change; see further below). Indeed, one of the conclusions from the CoFE, at least for some Member States and the EP, is that the EU Treaties should be amended to make the EU more effective, including in its foreign policy actions. Thus, the outcome of the CoFE can be seen as a catalyst to potentially change EU Treaties that merits further analysis.

On 10 March 2021, EP President David Sassoli, Portuguese PM António Costa, on behalf of the Council, and European Commission President Ursula von der Leyen signed a joint declaration on the CoFE. In this joint declaration, they expressed their desire to “show that [the EU] can provide answers to citizens’ concerns and ambitions” and to create an opportunity for a “citizens-focused, bottom-up exercise for Europeans to have their say on what they expect from the [EU]”. Already however, in March 2021 some Member States excluded the possibility to change the Treaties in response to the outcome of the CoFE. The non-paper released by 12 Member States emphasised that the “Union framework offers potential to allow priorities to be addressed in an effective manner” and argued that the CoFE does not fall within the scope of Article 48 TEU.

On 9 May 2021, an inaugural event of the Conference took place in Parliament. Approximately 800 randomly selected citizens were involved in deliberative sessions. The CoFE concluded on 9 May 2022 and its final report now includes 49 proposals and 326 individual measures to the three EU institutions. These proposals covered nine broad themes, including a stronger economy, social justice and jobs; education, culture, youth and sport; digital transformation; European democracy; values and rights, rule of law, security; climate change, environment; health; EU in the world; and migration.

These proposals may require new legislative proposals or even Treaty amendments in certain cases. An EU Law Professor and his team categorised the proposals into four categories and concluded that

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30 The current trio is made up of the presidencies of France (1 January to 30 June 2022), the Czech Republic (1 July - 31 December 2022) and Sweden (1 January 2023 to 30 June 2023).
32 Austria, Czech Republic, Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, Malta, the Netherlands, Slovakia and Sweden
proposals need no new action; 21 need new action by Member States; 113 require new action by the EU; and only 21 require Treaty change. The latter includes new competences in welfare (7), education (5), institutional reforms (4), health care (2), taxation (2) and energy (1). Thus, the percentage of proposals requiring Treaty change is approximately 12 percent.\textsuperscript{35}

After the closing conference of the CoFE, two competing visions appeared on whether EU Treaties should be modified. On the one hand, a non-paper was released by thirteen Member States\textsuperscript{36} that underlined that “Treaty change has never been a purpose of the Conference [on the future of Europe]. What matters is that we address the citizens’ ideas and concerns. While we do not exclude any options at this stage, we do not support unconsidered and premature attempts to launch a process towards Treaty change”. This non-paper also emphasised the potential to rely on underused Treaty provisions for more effective EU level solutions. On the other hand, six other Member States (and informally France)\textsuperscript{37} also released a non-paper on the same matter but approached the outcome of the CoFE more differentiated. These six countries did not rule out the potential change of the Treaties. In fact, in their letter, they called on the Commission to differentiate between proposals already being implemented; proposals that could be quickly implemented within the existing Treaty framework; and proposals that would require Treaty change.\textsuperscript{38}

Meanwhile, Parliament was also quick to react to the outcome on the CoFE. On 9 June 2022, Parliament, for the first time in its history, adopted a resolution – with 355 votes in favour, 154 against, and 48 abstentions – calling for a Convention for the revision of the Treaties. Given that the proposals of the Conference require amendments of the Treaties, it also called on the AFCO committee to prepare proposals for Treaty amendments accordingly. The resolution foresees the amendment of the Treaties to make sure the Union has the competence to take more effective action during future crises. The resolution, among others, calls for reforming voting procedures in the Council to enhance the EU’s capacity to act, including switching from unanimity to QMV, in areas such as sanctions, the so-called passerelle clause, and in emergencies.\textsuperscript{39}

In particular, the EP resolution proposes the following Treaty articles to be amended as follows:\textsuperscript{40}

On the adoption of restrictive measures (sanctions):

— Article 29 TEU “The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Where a decision provides for the interruption or reduction, in part or completely, of economic and financial relations with one or


\textsuperscript{36} Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Sweden.

\textsuperscript{37} Germany, Belgium, Italy, Luxembourg, the Netherlands and Spain. France would have been part of this group but given that at the time of publishing the non-paper France held the EU Council presidency, it did not sign the letter.

\textsuperscript{38} Alemanno Alberto, ‘13 Member States opposing Treaty reform?’ (Twitter, 2022) \url{https://twitter.com/alemannoEU/status/15269229932970262528} accessed 21 October 2022.


\textsuperscript{40} The AFCO has started to prepare a new draft report AFCO/9/09208, 2022/2051(INL) “Proposals of the European Parliament for the amendment of the Treaties” (pursuant to article 48 of the Treaty on the European Union and Rule 85 of Parliament’s Rules of Procedure).
more third countries, the Council shall act by a qualified majority. Member States shall ensure that their national policies conform to the Union positions."

On the competence of the European Council to change a unanimity-requirement into QMV:

— Article 48(7), fourth subparagraph TEU "For the adoption of these decisions, the European Council shall act by a qualified majority as defined in Article 238(3), point (b), of the [TFEU] after obtaining the consent of the European Parliament, which shall be given by a majority of its component members." 41

While the proposed changes are understandable in the context of the current debate, one may wonder whether Article 29 TEU is the best provision to be changed in this context. Article 29 TEU does not deal with voting rules but lays down a general competence to adopt decisions alongside an indication of the binding force of those decisions. CFSP voting rules are laid down in Article 31 TEU. The proposed change could be in that particular provision, which already included other exceptions to the unanimity rule. Thus, a modified Article 31(2) TEU could include an addition exception to the unanimity rule:

"By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:

 […]

– Where a decision provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries."

The Commission also adopted a Communication setting out how it can follow up on the outcome of the CoFE. Seemingly, it adopted a differentiated approach, similar to the six Member States mentioned above, in that the Commission set out four categories of responses. These were; (a) where the Commission is already implementing initiatives; (b) where proposals have been made by the Commission and the co-legislators are currently working; (c) where the Commission is already planning to make proposals; and (d) where proposals made by the Conference are partly or wholly new and require new initiatives or proposals.

The Commission is also flexible in its approach in the sense that, on the one hand, it emphasises that the introduction of new reforms and policies should not necessarily result in Treaty change. The EU institutions and the Member States agreed to use the full potential of the EU Treaties when they pursue existing and new policy objectives. Indeed, there are untapped potentials within the existing Treaties which could respond to the Conference’s proposals, in particular by using the passerelle clauses to move from unanimity to QMV in certain policy fields. On the other hand, the Commission also highlights that some proposals explicitly call for Treaty change and that it “will always be on the side of those who want to reform the [EU] to make it work better, including through Treaty change where that may be necessary”. 42 The Commission also welcomed Parliament’s willingness to use, for the first time under the Lisbon Treaty, its powers to propose Treaty amendments. In her 2022 State of the Union address, Commission President Ursula von der Leyen reiterated her institution’s willingness to convene


42 European Commission, '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: Conference on the Future of Europe: Putting Vision into Concrete Action' 5 https://ec.europa.eu/info/sites/default/files/communication_1.pdf.
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a European Convention, echoing the justification of the EP as doing this partly to “improve the way we do things and the way we decide things”.43

The General Affairs Council (GAC) held a meeting in October 2022 and discussed the follow-up to the CoFE. It confirmed that it received Parliament’s above-mentioned proposals to change EU Treaties. Ministers discussed the timing for submitting those proposals to the European Council and for notifying national parliaments. The GAC indicated that it would wait until the EP has concluded this work in its AFCO Committee before transmitting the EP proposals to the European Council. Many ministers in the GAC also noted that most of the Conference proposals can be implemented by already existing Treaty provisions and took the view that these proposals should be given priority.44

It is no wonder that some EU institutions are willing to move forward with the issue of unanimity. The Plenary proposals of the CoFE includes, in its “EU in the world” section, proposals concerning the decision-making and cohesion of the Union. In particular, it is proposed that the EU improves its capacity to take speedy and effective decisions, especially in the CFSP. It is further recommended that “in the area of the CFSP, issues that are currently decided by way of unanimity to be changed, normally to be decided by way of a [QMV]”.45 In its “European democracy” section, proposals included a more general recommendation in relation to EU decision-making procedures. It proposes that “[a]ll issues decided by way of unanimity should be decided by way of a [QMV]. The only exceptions should be the admission of new membership to the EU and changes to the fundamental principles of the EU as stated in Art. 2 TEU and the Charter of Fundamental Rights of the [EU]”.46

Within this context, it is appropriate to examine the legal framework to amend EU Treaties with a view to make the EU more effective and the potential to move from unanimity to QMV, especially in the field of the CFSP. There are several ways to change the EU Treaties, or at least certain parts of it. Article 48 TEU provides that “[t]he Treaties may be amended in accordance with an ordinary revision procedure. They may also be amended in accordance with simplified revision procedures”. Indeed, Article 48 TEU provides for three types of revision procedures for the Treaties:

- The ordinary revision procedure: Article 48(2) – (5) TEU
- And two simplified revision procedures
  - Article 48(6) TEU
  - Article 48(7) TEU (which provides for two general passerelle clauses)

3.2. Ordinary Treaty revision

The scope of the ordinary Treaty revision is the “Treaties” which, according to the third sub-paragraph of Article 1 TEU, comprises the TEU and the TFEU but also, based on Article 51 TEU, the Protocols and the Annexes “which are integral part of [the Treaties]” as well as the accession Treaties, unless they

46 Ibid. 83.
provide for specific amendment rules.\textsuperscript{47} This procedure also applies to the Euratom Treaty and its six Protocols.

One of the profound changes that the Lisbon Treaty has brought under the ordinary revision procedure is that Parliament can now submit proposals to amend the Treaties.\textsuperscript{48} Indeed, from a procedural point of view, proposals for the amendment of the Treaties can be submitted by Member State governments, Parliament or the Commission. This proposal, which may also include recommendations to increase or to reduce EU competences, shall be submitted to the Council. Next, the Council submits these proposals to the European Council (where EU Heads of State and Government negotiate with each other) and it also notifies national parliaments of the proposals.


\textsuperscript{48} ibid 6.
Box 1: Ordinary Treaty revision (own elaboration)

Any MS Government ➔ European Parliament ➔ Commission

proposals for the amendment of the Treaties

notifies national Parliaments ➔ Council of the EU

submits proposal ➔ European Council

after consulting the European Parliament and the Commission

simple majority decision to examine proposal

Convention

Representatives of national Parliaments
European Parliament
Heads of State or Government
Commission

examines proposal, adopts recommendation by consensus

Treaties amended

simple majority decision not to convene the Convention ➔ European Council defines the terms of reference ➔ Intergovernmental Conference determines the amendments ➔ ratification by all MS in accordance with their respective constitutional requirements

*: If the amendment entails institutional changes to the monetary area, the ECB shall also be consulted
From this point, there are two options to proceed with. Based on Article 48(3) TEU, the first option is the convening of a Convention by the President of the European Council. That can be done if, after the consultation with Parliament and the Commission (and the ECB in some cases), the European Council adopts by a simple majority a decision in favour of examining the proposed amendments. The Convention must be composed of the national Parliaments, of the Heads of State and Government, Parliament and the Commission. The role of the Convention is to examine the proposal for Treaty amendments and to adopt by consensus a recommendation to a conference of representatives of the Member State governments. If, however, the extent of the proposed amendments is not justified, the second option is to not convene the Convention which is subject to decision of the European Council by simple majority and the consent of the EP, by a majority of the votes cast. In the latter case, the European Council defines the terms of reference for a conference of representatives of Member State governments.

**Article 48(2) – (5) TEU**

2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.
Once the Convention reaches consensus or – in the case the Convention is not convened – once the European Council defines the terms of reference, an IGC is convened to determine the amendments of the Treaties. These amendments enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. Obviously, this procedure takes a long time, which does make sense considering that changing the Treaties, as the constitutional foundations of the Union, should not be done overnight. Further, as the pre-Lisbon proposal for a Constitutional Treaty revealed, the end-result may be that one or two Member States may in the end fail to ratify the changes due to negative referendum results or other domestic reasons. To overcome these complexities, a simplified revision procedure was introduced that may be more appropriate to be used in the case of minor revisions.

3.3. Simplified revision procedure

3.3.1. Amending Part III of the TFEU

The simplified revision procedures introduced by the Lisbon Treaty – Articles 48(6) and 48(7) TEU respectively – have a more limited scope compared to the ordinary revision procedure. The scope of Article 48(6) TEU covers Part Three of the TFEU relating to the internal policies and action of the Union encompassing Articles 26 to 197 TFEU, which is about half of the TFEU. It includes for example matters like the internal market, agriculture, the Area of Freedom, Security and Justice (AFSJ) or the Economic and Monetary Union (EMU). Based on that provision, any Member State Government, Parliament or the Commission can submit proposals to revise certain parts of the TFEU. This proposal should be submitted to the European Council which may, acting unanimously and after consultation with Parliament, the Commission, and the European Central Bank (ECB) in certain cases, adopt a decision amending all or part of the provisions of Part Three of the TFEU. The entry into force of that European Council decision is subject to the approval of the Member States. The third sub-paragraph of Article 48(3) TEU demonstrates a further restriction in scope which provides that the above-mentioned decision of the European Council may not increase the competences conferred on the Union in the Treaties.

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There are a few differences between the ordinary revision procedure and Article 48(6) TEU: (a) proposal for Treaty amendment shall not be submitted to the Council but to the European Council which retains full control of the process; (b) more significantly, the Treaty amendment originates from a European Council decision and not from an agreement between the Member States; (c) the Treaty amendment is not preceded by an IGC or Convention and therefore the consent of the EP is not needed. In terms of procedure, Article 48(6) TEU also differs from the ordinary revision procedure: (a) unanimity, as opposed to common accord of the Member States, is required in the European Council; and (b) the European Council decision needs an approval rather than ratification by the Member States. The difference between approval and ratification is explained by the need of using a lighter procedure in the case of approval of secondary EU measures (compared to the ratification of Treaties).50

Article 48(6) TEU

The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

50 ibid 431–434.
Box 2: Simplified revision procedure

Any MS Government → European Parliament → Commission → proposals for revising Part Three of TFEU

European Council may unanimously adopt a decision to amend Part Three of TFEU

approval by all MS in accordance with their respective constitutional requirements

Part Three TFEU amended

*: The proposed amendment shall not increase the competences conferred on the EU

**: If the amendment entails institutional changes to the monetary area, the ECB shall also be consulted
A key question in the context of the present report is whether the use of Article 48(6) TEU can be used to change EU decision-making rules, including the extension of QMV or the use of the ordinary legislative procedure. From a legal point of view, that can indeed be done for Treaty provisions covered by the scope of Article 48(6) TEU, and hence not for CFSP, but its potential use is questionable as Article 48(7) TEU provides for a much lighter procedure to achieve that objective. It should also be pointed out that Article 48(7) TEU is not limited to Part Three of the TFEU (see details in the next paragraphs).

Article 48(6) TEU has already been triggered to introduce amendments relating to the EMU. Suffice here to say that during eurozone crisis of early 2010s Member States adopted different measures with the objective of making financial support available to Greece. The EU measures covering this financial support, however, contradicted Article 122(2) TFEU that only allows EU financial assistance where “a Member States is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. The measures were not compatible with Article 125 TFEU which contains the so-called “no bail-out” clause. Therefore, Germany proposed a Treaty amendment which was agreed and formally adopted in December 2010. However, the EP, the ECB and the Commission could not influence the European Council decision as they were formally consulted after the European Council agreed on its decision to modify Article 136 TFEU. If the latter provision had been modified through the ordinary revision procedure, these institutions must have been consulted before the convening of the IGC (and Convention).51

For the purposes of the present report, the so-called passerelle clauses may therefore be more appropriate.

### 3.3.2. The two “general” passerelle clauses

Article 48(7) TEU, often referred to as containing a general passerelle clause, provides for a second type of simplified revision procedure concerning decision-making rules. Based on that, the first sub-paragraph provides that the Council can vote by QMV where the TFEU or Title V of the TEU provides for the Council to act by unanimity in a given area or case. This shift from unanimity to QMV is subject to a decision authorised by the European Council and shall not apply to decisions concerning military or defence policy. The scope of the first sub-paragraph thus includes the potential change of the unanimity requirement in CFSP matters but cannot modify the unanimity requirement of Article 7 TEU as it falls outside Title V TEU.

The second sub-paragraph of Article 48(7) TEU allows the Council to adopt legislative acts in accordance with the ordinary legislative procedure, where the TFEU provides for legislative acts to be adopted in accordance with a special legislative procedure. A move from special legislative procedure to ordinary legislative procedure equally requires the European Council to adopt a decision allowing that shift. The first passerelle clause applies to 33 Treaty provisions, whereas the second one applies to 27 TFEU provisions.52 However, Article 48(7) TEU does not provide for general powers to alter any decision-making powers and thus it cannot abolish the so-called “emergency brakes” in the Council.

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51 ibid 434.

e.g; Article 31(2) TEU. 53 Another important limitation of the scope of these general passerelle clauses is that they cannot be used to change voting rules in the EP or to change legislative procedures other than those applied in the Council. 54

**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.

Compared to the ordinary revision procedure and Article 48(6) TEU, there is no explicit trigger to begin the second type of simplified revision procedure in the sense that the central role is given to the European Council that can consider Treaty amendments. It is assumed that in practice some of the EU institutions like Parliament or the Commission or the Member States would place such issues on the political agenda. 55 Although no ratification by national parliaments is needed, within six months they can oppose the decision of the European Council, whether that be a move from unanimity to QM V or from special legislative procedure to ordinary legislative procedure. If opposed, the decision of the European Council shall not be adopted. If unopposed, the European Council can adopt the decision.

The relative weak power of national parliaments is explained by the narrow scope of Article 48(7) TEU and their limited constitutional significance. 56

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53 ibid 440–442.
54 Böttner and Grinc (n 45) 18.
55 Peers (n 47) 438.
56 Silvia Kotanidis, ‘Passerelle Clauses in the EU Treaties: Opportunities for More Flexible Supranational Decision-Making’ 7
Article 353 TFEU further provides that Article 48(7) TEU shall not apply to: Article 311, third and fourth paragraph (concerning the Union’s own resources), 312(2), first subparagraph (concerning the MFF), Article 352 and 354 TFEU.

Apart from EU law obligations, some Member States may have their own domestic rules that may limit the (European) Council’s representatives in their negotiations with other EU partners. For instance, in Germany, Section 4(1) of the Responsibility for Integration Act provides that a German representative’s approval of a proposal for a decision that falls within the meaning of Article 48(7) TEU is subject to law as defined in Article 23(1) of the Basic Law. That law under Article 23(1) requires a two-third majority of the Members of the Bundestag and two-third of the votes of the Bundesrat (Article 79(2) of the Basic Law). 57

Box 3. The general passerelle clauses

One should note that the above-mentioned passerelle possibilities are aimed at more structural shifts in the decision-making process. They do not at all stand in the way of other options to bypass the unanimity requirement in CFSP. In Section 4 below this piece will analyse these latter options in more detail. It will in particular focus on the possibility of constructive abstention (Article 31(1) TEU), allowing members of the Council to allow for a decision to be adopted by abstaining from voting, or through the special CFSP passerelle possibility (Article 31(3) TEU). This latter option allows the European Council to decide on a shift to QMV in addition to the general exceptions.

Source: Authors' illustration
3.4. Special passerelle clauses in non-CFSP matters

Apart from the two general passerelle clauses under Article 48(7) TEU, the Treaties provide for five special passerelle clauses in non-CFSP matters. These provide for less stringent conditions compared to the two general passerelle clauses, e.g. national parliaments are not involved except in the case of family law with cross-border implications. However, in contrast to the general passerelle clauses, these special passerelle clauses only apply to individual policy areas and to narrow subject matters.

Table 1: A summary on the special passerelle clauses in non-CFSP matters

<table>
<thead>
<tr>
<th>Policy field</th>
<th>Authorising institution</th>
<th>Procedure</th>
<th>Modification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social policy</td>
<td>Council</td>
<td>Proposal from the Commission</td>
<td>From SLP to OLP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unanimity in the Council</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>EP consulted</td>
<td></td>
</tr>
<tr>
<td>Environmental policy</td>
<td>Council</td>
<td>Proposal from the Commission</td>
<td>From SLP to OLP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unanimity in the Council</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>EP, EESC and CoR consulted</td>
<td></td>
</tr>
<tr>
<td>Family law with cross-border implications</td>
<td>Council</td>
<td>Proposal from the Commission</td>
<td>From SLP to OLP</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Unanimity in the Council</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>EP consulted</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>National parliaments notified</td>
<td></td>
</tr>
<tr>
<td>MFF</td>
<td>European Council</td>
<td>Unanimity in the European Council</td>
<td>From unanimity to QMV</td>
</tr>
</tbody>
</table>

It is noteworthy that the existence of special passerelle clauses does not exclude the possible application of the general passerelle clauses under Article 48(7) TEU. The determination of lex specialis must take into account the intention of legislators and the ratio legis of the special provisions. These special passerelle clauses exist to offer an alternative for a simplified procedure in a limited set of policy areas.

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58 Please note that the special CFSP passerelle clause is discussed in section 4.6.5.
59 Böttner and Grinc (n 45) 41.
areas that may require a more flexible response than the general passerelle clauses. The rationale behind the specific passerelle clauses is not to exclude parliamentary participation. Indeed, the general passerelle clause can be invoked if EU institutions seek to enhance the legitimacy of Treaty changes through parliamentary participation. Conversely, the special passerelle clauses are not leges speciales in the strict sense; instead, they are sector specific alternatives to enhance the Union’s functioning.

3.4.1. Social policy

In the field of social policy, the Union and the Member States, on the basis of Article 151 TFEU, pursue several objectives. These include the promotion of employment, improved living and working conditions, social protection, dialogue between management and labour, the development of human resources to lasting high employment combat exclusion. In order to realise these objectives, the Union, based on Article 153 TFEU, supports and complements the activities of the Member States in the following fields:

(a) improvement in particular of the working environment to protect workers’ health and safety;
(b) working conditions;
(c) social security and social protection of workers;
(d) protection of workers where their employment contract is terminated; (e) the information and consultation of workers;
(f) representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5;
(g) conditions of employment for third-country nationals legally residing in Union territory;
(h) the integration of persons excluded from the labour market, without prejudice to Article 166;
(i) equality between men and women with regard to labour market opportunities and treatment at work;
(j) the combating of social exclusion;
(k) the modernisation of social protection systems without prejudice to point (c).

Parliament and the Council, acting in accordance with the ordinary legislative procedure and after having consulted with the Economic and Social Committee and the Committee of the Regions, may encourage cooperation between the Member states. They can do this by adopting directives containing minimum requirements for the gradual implementation of the above listed points. Article 153(2) TFEU, however, provides that in fields related to (c), (d), (f) and (g), the Council acts unanimously, following the special legislative procedure, after consulting Parliament and the above-mentioned Committees. The same provision also provides that on a proposal from the Commission, the Council, after consulting Parliament, can unanimously decide to render the ordinary legislative procedure applicable to (d), (f) and (g). It does not include (c), as social security remains a sensitive area of policymaking for the Member States. It should also be pointed out that this special passerelle clause requires the Council to decide unanimously on the possible shift from special to ordinary legislative

60 ibid 42.
61 ibid 37–38.
procedure and not the European Council, as is the case for the general passerelle clause under Article 48(7) TEU.62

3.4.2. Environmental policy
In the area of environment, Union policies – based on Article 191(1) TFEU – contributes to the following objectives: preserving, protecting, and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. Article 191(2) TFEU also provides that EU environmental policy aims for a substantial degree of protection that considers the diversity of situations in the various regions of the Union.

In principle, the ordinary legislative procedure applies in the field of EU environmental policy. Indeed, as Article 192(1) TFEU provides, Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, decides what action should be adopted to achieve the objectives referred to in Article 191 TFEU. However, in certain sensitive cases, only the special legislative procedure can be applied. Article 192(2) TFEU provides that by way of derogation from the above-mentioned ordinary legislative procedure, the Council acting unanimously and after consulting Parliament and the above-mentioned Committees, can adopt certain measures in accordance with a special legislative procedure. This latter procedure applies to provisions primarily of a fiscal nature. For example, those affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly the availability of those resources, and land use, except for waste management, as well as measures significantly affecting a Member State’s choice between different energy sources and the general structure of its energy supply. The Treaties, in principle, require the special legislative procedure in these sensitive areas. However, there are possibilities to move from special to ordinary legislative procedure if, in accordance with Article 192(2)(2) TFEU, the Council adopts such a decision unanimously on a proposal from the Commission and after consultation with Parliament, the Economic and Social Committee and the Committee of the Regions.

3.4.3. Family law with cross-border implications
Within the context of the AFSJ, the Union develops judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Article 81(2) TFEU lists the areas where ordinary legislative procedure applies, including:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

62 Kotanidis (n 53) 26.
(d) cooperation in the taking of evidence;
(e) effective access to justice;
(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary, by promoting the compatibility of the rules on civil procedure applicable in the Member States;
(g) the development of alternative methods of dispute settlement;
(h) support for the training of the judiciary and judicial staff.

However, the ordinary legislative procedure does not apply to family law with cross-border implications. Article 81(3) TFEU provides that measures concerning family law with cross-border implications shall be established by the Council following a special legislative procedure. Based on this procedure, the Council acts unanimously after consulting Parliament. The main reason for the use of the special legislative procedure is that family law remains an area where sovereignty concerns dominate due to the different legal and cultural traditions in the Member States, a notable example being same-sex marriage.63 Concurrently, certain aspects of family law with cross-border implications may be decided within the ordinary legislative procedure. Article 81(3) TFEU empowers the Council to adopt, on a proposal from the Commission, a decision determining those aspects of family law with cross-border implications which may be subject of acts adopted by ordinary legislative procedure. That Council decision should be adopted unanimously after the consultation with Parliament. One of the legal features of this special passerelle clause is that it is similar to the general passerelle clause in that the former also requires that the national parliaments be notified of the proposal of the Commission. Article 81(3)(3) TFEU empowers national parliaments to make known their opposition within six months of being notified. In that case, the Council decision shall not be adopted.

3.4.4. Multiannual Financial Framework (MFF)

Another sensitive issue for the Member States is the negotiations regarding the MFF, the Union’s long-term budget. The EU’s long-term budget is established at least for a period of five years but generally recent MFFs have been adopted for a period of seven years. Once approved, the MFF sets maximum spending allowances which have broad repercussions on EU policies. No wonder that the passerelle clause linked to the MFF, which could allow for the use of QMV for the adoption of the long-term budget, requires the involvement of the European Council – and not the Council as in the other three above-mentioned cases.

Article 312 TFEU regulates the procedure leading to the adoption of the MFF. Article 312(2) TFEU provides that the Council adopts a regulation laying down the MFF in accordance with a special legislative procedure. The Council adopts that regulation unanimously after obtaining the consent of the EP, which shall be given by a majority of its component members. Article 312(2)(2) TFEU, however, provides for a special passerelle clause according to which the European Council may unanimously adopt a decision authorizing the Council to act by QMV when adoption the above-mentioned regulation. The case of the MFF is special given that according to the second indent of Article 353 TFEU, the general passerelle clause - Article 48(7) TEU – shall not apply to Article 312 TFEU. This also means

63 Böttner and Grinc (n 45) 39–40.
that this special MFF passerelle clause does not change legislative procedure from special to ordinary but just from unanimity to QMV.

### 3.5. Enhanced cooperation in non-CFSP matters

A final option to evade the need to have all member States onboard is provided through 'enhanced cooperation'. Enhanced cooperation allows a group of Member States to advance integration and cooperation in a particular domain of EU policymaking. It aims to reconcile the interests of those Member States wishing to keep the status quo and those that see further integration in one specific area as an opportunity to advance the objectives of the EU. As the Rome Declaration of 2017 stated: "[w]e will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible" (European Council, 2017). Enhanced cooperation, originally introduced in primary EU law by the Amsterdam Treaty, is the institutionalisation of prior ad hoc arrangements such as the Economic and Monetary Union or the Schengen Agreement.64

Currently, Article 20 TEU contains the general possibility for "Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences [to] make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties", subject to certain limits. This thus allows smaller groups of a minimal number of nine Member States to work closed together in areas in which they still have competences. The Treaty clearly mentions this as a measure of last resort, "when [the Council] has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole" (Article 20(2) TEU).65 We will further analyse this option below in relation to CFSP specifically.

QMV in EU external action

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64 Viktor Szép and Ramses A Wessel, 'Mapping the Current Legal Basis and Governance Structures of the EU’s CFSP' 29
https://static1.squarespace.com/static/604251cac817d1235cbfe98d/t/620f82c7ad293c1bd294256/1645183692089/EN GAGE+Working+Paper+5_Mapping+the+Current+Legal+Basis+and+Governance+ Structures+of+the+EU%E2%80%99s+CFSP_v2.pdf

4. UNDERSTANDING THE EU’S LEGAL FRAMEWORK ON EXTERNAL ACTION

In EU external action, there is not a single voting procedure followed by EU institutions.66 That is because EU Member States as drafters of the Treaties have always sought to differentiate between the different areas of EU external action e.g. between foreign and trade policy. This is partly due to fears of being outvoted in certain issues that are considered closely related to State sovereignty. For instance, in foreign, security and defence policy EU Member States have been particularly careful to act in a way that retains their primacy. Indeed, in CFSP/CSDP issues, the dominance of the Member States is ensured through, for example, the use of unanimity in the Council which guarantees that no major foreign or security reasons are overlooked. Different voting rules are indeed one of the reasons why legal and scholarly discussions on EU external action even after the Lisbon Treaty differentiate between CFSP and non-CFSP areas. Unanimity and QMV are being used in parallel in EU external action, but the determination of voting rules depends on whether a measure falls within the EU’s CFSP competence or other fields of external action.

Understanding the division of EU external action is important because although external action is separated by two Treaties in the EU, these policy areas cannot be always neatly separated from each other in day-to-day policymaking. Given that QMV is being used in EU external action, this chapter aims to lay down the ground for further understanding how e.g. trade policy instruments can be used to advance CFSP objectives.

To fully understand the voting procedures in EU external action, and the potential of unused or underused QMV possibilities to enhance the EU’s overall position in the world, it is important to know how the different fields of EU external action have developed in the last couple of decades. It is also important to know how that development has affected the EU’s current legal framework governing EU external action and how these different fields, like trade and foreign policy, may interact with each other, thus also possibly changing voting procedures and opening the way to use more QMV to pursue CFSP objectives. The essence of this historical legacy is that EU external relations policies, still today, are constitutionally separated policy areas and are defined by either the TEU or the TFEU.

One of the historical lessons of EU external actions is that they have developed in quite different manner. This unequal historical development still has its mark on the organisation in EU Treaties and on their functioning. First, it is noteworthy that the 1957 Rome Treaty already contained express external powers in Common Commercial Policy (CCP) matters and in the conclusion of Association Agreements (AA).67 However, for foreign policy cooperation, it was only in the beginning of the 1970s that EC Member States established the predecessor of the CFSP, the European Political Cooperation (EPC). The latter fundamentally differed from the CCP and one could even argue that they were “antidotes” to each other. This is because the EPC started as an informal cooperation between the original Six which initially had no legal basis in primary EC law. More importantly, EC Member States emphasised the intergovernmental nature of the EPC which translated among other things, in the introduction of unanimity requirement in EC foreign policy matters.

66 This section is largely based on Szép and Wessel, op.cit.
67 Marise Cremona, ‘Structural Principles and Their Role in EU External Relations Law’ in Marise Cremona (ed), Structural principles and their role in EU external relations law (Hart 2018) 5–6.
A major turning point was the 1992 Maastricht Treaty. It created a more extensive form of political cooperation through more precise procedures and legally binding decisions as well as widening the scope of the CFSP to cover “all areas of foreign and security policy”. At the same time, the Maastricht Treaty created the well-known pillar structure. The latter clearly maintained a distinction between different areas of activities: the first encompassing the EC, the second the CFSP and the third Justice and Home Affairs (JHA). This distinction was reflected also in the Treaty framework: the EU was based on two Treaties, the EC Treaty and the then newly born TEU. The CFSP was placed in the latter along with JHA, indicating that the second and third pillars had fundamentally different legal characteristics compared to the EC legal order. One of these differences was the continued insistence on the requirement of unanimity. Indeed, Article J.8(2) TEU provided that the Council in principle “shall act unanimously” in CFSP issues. And although a Declaration annexed to the Maastricht Treaty gave the option of QMV in some limited cases, Member States continued to use unanimity as the default voting rule.

The 2005 Constitutional Treaty never came into force and its innovative solution of grouping all external actions under a single title was also rejected. The EU even after the Lisbon Treaty of 2009 continues to be based on two treaties: the TEU and the TFEU. They together constitute the “Treaties” on which the Union is founded (Article 1 TEU and Article 1 TFEU). The TEU with its 55 articles is the shortest of the two EU Treaties and is considered the framework treaty. It sets out the most fundamental legal properties of the EU, its aims and objectives for, which of its organs has what roles in making decisions binding on legal persons, essential principles of conduct within the organisation, how to leave or become a member of the Union and how its constitutional rules can be changed. The TFEU, by comparison, as is clear from its name and its 358 articles, “fleshes out” the functioning of the EU. It regulates where the EU institutions can adopt measures in pursuit of the external objectives set out in the TEU, which procedures should the institutions adhere to, which legally binding instruments they can use, etc. It also contains all policy areas aside from the CFSP and the European Neighbourhood Policy.

This “two-treaty solution” has important repercussions on how external relations are now organised in the Treaties. In fact, it is the only area of activity that is scattered throughout the two Treaties. The CFSP, including the CSDP, continues to be placed in the TEU, which itself shows that the Treaty drafters sought to differentiate CFSP from non-CFSP areas. Other areas of external action, including trade, development, or humanitarian aid, are in the TFEU. The fragmentation of the EU’s external relations is one of the obstacles in defining a consolidated policy. As Robert Schütze argued: “the Union […] suffers from a ‘split personality’ […] It has a general competence for its [CFSP] within the TEU; and it enjoys various specific external powers within the TFEU”. In comparison with the failed 2005 Constitutional

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Treaty, the Lisbon Treaty is a step back, and constitutes a “suspended step” towards integration.73 Pillar talk cannot be entirely avoided because of the noticeable differences between CFSP and other EU policies. Among other things, these differences extend to decision-making procedures, the role of EU institutions, the types of (non-)legislative acts and the nature of competences.74 In fact, the CFSP has remained a competence distinct from others with regards to its procedures and instruments.

Table 2. The Union’s split personality in its external action75

<table>
<thead>
<tr>
<th>Title V of the TEU</th>
<th>Part Five of the TFEU – The Union’s External Action</th>
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<tbody>
<tr>
<td>Chapter 1 – General Provisions on the Union’s External Action</td>
<td>Title I – General Provisions on the Union’s External Action</td>
</tr>
<tr>
<td>Chapter 2 – Specific Provisions on the CFSP</td>
<td>Title II – CCP</td>
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<tr>
<td>• Section 1: Common Provisions</td>
<td>Title III – Cooperation with Third Countries and Humanitarian Aid</td>
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<tr>
<td>• Section 2: CSDP</td>
<td>Title IV – Restrictive Measures (sanctions)</td>
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<td></td>
<td>Title V – International Agreements</td>
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<td></td>
<td>Title VI – Union’s Relations with International Organizations and Third Countries and Union Delegations</td>
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<td></td>
<td>Title VII – Solidarity Clause</td>
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</table>

Some issues are dealt with by provisions in both Treaties. In the area of external relations, for example, a traditional example is the use of sanctions: the imposition of economic and financial sanctions on the basis of Article 215 TFEU is subject to a unanimous foreign policy decision based on Article 29 TEU. Another example is the European Neighbourhood Policy (ENP) under Article 8 TEU which refers to the EU’s ability to conclude international agreements under Article 218 TFEU.76 While a collective defence clause can be found (somewhat hidden) in Article 42(7) TEU, a similar and related solidarity clause is

positioned at the far end of the other Treaty, in Article 222 TFEU. Political compromises do not always make sense in legal terms.

**Article 3(5) TEU**

In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

Yet, EU external relations are now somewhat more concentrated in comparison to the situation pre-Lisbon and, more importantly, are more closely knit together. Thus, separate CFSP and non-CFSP objectives no longer exist and instead a bridge was created by including unified principles and objectives for all EU external relations policies. Articles 3(5) and 21 TEU – laying down the objectives of the Union – apply to both CFSP and non-CFSP areas and give a double response to the question as to what kind of international actor the EU is and how it relates to the international order. On the one hand, these provisions in the TEU impose substantive requirements on EU external relations by stating that there are certain fundamental objectives which shall guide its internal and external policies. On the other hand, these provisions also impose a strong methodological imperative upon EU international action: it must pursue its action through a multilateral approach based on the rule of law. It is then also clear that the scope of objectives which EU action in the world must pursue is extraordinarily broad. Aside from perhaps issuing a declaration of war, there is very little that does not fall within the purview of these objectives. Furthermore, Article 21(3) TEU establishes a legal connection between all EU internal and external policies.

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78 Wessel and Larik (n 67) 11.

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Article 21(2)-(3) TEU

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;
(d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
(e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;
(g) assist populations, countries and regions confronting natural or man-made disasters; and
(h) promote an international system based on stronger multilateral cooperation and good global governance.

3. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action covered by this Title and by Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.

The list of common objectives is generally considered a welcome development in EU external actions and is often seen as an attempt to overcome the duality between CFSP and non-CFSP external actions. However, legal scholarship has raised legitimate concerns over the question of determining the scope of different EU policies: how to delimit CFSP from other EU policies? What are the boundaries of EU external relations policies? While these uncertainties have reasonable grounds, a distinction can be made between the objectives listed under Article 21(2) TEU. Some of the objectives can be directly linked with certain EU policies. For instance, objective (c) is the closest to what CFSP is supposed to achieve, while objectives (d) to (g) refer mostly to development cooperation, trade, environmental protection and humanitarian aid. Other objectives, though, are indeed more of a cross-sectoral nature.

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such as objectives (a), (b) and (h).81 However, as Marise Cremona argued, “there is nothing in the text to set apart any of the objectives listed in Article 21(2) as being particularly concerned with the CFSP”.82

The Court also refrained itself from determining the scope of the CFSP by declaring specific objectives linked to the CFSP. Instead, the Court has preferred the explicit external competence over an implied power derived from an internal competence.83

Thus, in many cases, it is difficult to determine whether a decision needs to fall under the TEU or TFEU. In fact, as some of the EU’s recent actions have demonstrated, commercial policy forms part of the broader foreign policy toolbox and, in certain instances, it can hardly be separated from the EU’s CFSP objectives. A recent example includes the EU’s proposal for a new anti-coercion instrument. This is expected to enable the EU to use trade-related countermeasures in the emerging geopolitical environment. Still, given that external relations are constitutionally separated in the sense that they are spread between the two Treaties,84 taking decisions based on either the TEU or the TFEU is crucial. Although CFSP intends to cover all areas of foreign and security policy,10 it is clear that many Union actions cannot be adopted within the framework of the CFSP. The reason this distinction matters is that the choices EU institutions make have obvious repercussions on decision-making procedures or the degree to which certain EU institutions are involved in policymaking processes. Clearly, the Commission and Parliament seek to avoid situations where Union actions are considered “CFSP issues” at the expense of their rights guaranteed by the Treaties, especially under TFEU policies.

A classic example of how the blurred boundaries between trade and foreign policy led to key litigations before the Court is the use of economic sanctions. Restrictive measures – the EU’s official notion for sanctions – are in fact commercial policy tools but they are applied to achieve broader foreign and security policy objectives. The dichotomy between the nature of economic sanctions and their objectives created tensions in the EU’s legal order. This was because the potential use of exclusive Union powers in commercial policy would have prevented the Member States from pursuing foreign policy objectives which are disconnected from Community legal obligations. An infringement of what many would call a ‘reserve of sovereignty’ of States.85 The issue was settled after several Court judgments declaring economic sanctions to be covered by the wide scope of commercial policy.86

The case of sanctions may seem a particular example of EU external relations but it still shows, from a wider perspective, how the differentiation of external relations policies, both in terms of their place in the Treaties and the EU’s altering competences in these fields, may bring conflicts into the EU’s constitutional architecture.87 Therefore, the choice of legal basis continues to hold great importance given that the effects of legal instruments or the applicable procedure may vary greatly.88 In fact, the

83 ibid.
84 Eeckhout (n 78) 501.
88 Wessel, ‘Legality in EU Common Foreign and Security Policy’ (n 26).
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question of “who decides” remains one of the central concerns in EU external relations. As the Court reminded us in the Tanzania case:

“The choice of the appropriate legal basis of a European Union act has constitutional significance, since to proceed on an incorrect legal basis is liable to invalidate such an act, particularly where the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed.”

Pre-Lisbon, choices for the correct legal basis were to be made based on (old) Article 47 TEU. This so-called “non-affect clause” had as its main purpose the “protection” of the acquis communautaire from incursion by the special CFSP method and provided that “nothing in [the TEU] shall affect the Treaties establishing the European Communities or the subsequent Treaties and Acts modifying and supplementing them”. The landmark case at the time was ECOWAS (or Small Arms and Light Weapons). The result of the ECOWAS case was that the Council’s CFSP Decision was annulled because it included aspects of development cooperation, an area not covered by the CFSP legal basis.

Post-Lisbon, the pillars no longer exist, and Article 47 TEU has been replaced by what is now Article 40 TEU. The current provision reflects the current focus on coherent EU external relations and is therefore more balanced between the TFEU policy fields and the CFSP. Article 40 TEU – what Marise Cremona labelled as the “Chinese wall” between EU policies – safeguards the (old) separation between CFSP and other Union policies but after Lisbon intends to protect both sides. It provides that neither the CFSP nor other EU external actions should affect each other. In other words, after Lisbon, not only shall CFSP measures not encroach on another Union competence, but the exercise of the latter also shall not encroach on CFSP competence. Both types of competence are given equal weight which is also supported by the fact that the TEU and TFEU have the same legal value (Articles 1 TEU and TFEU).

<table>
<thead>
<tr>
<th>Article 40 TEU</th>
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<tr>
<td>The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.</td>
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<tr>
<td>Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.</td>
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93 Ibid. 44-46.
The Court has established two criteria for defining the correct legal basis of a legislative act. First, the centre of gravity test in which the Court examines the aim and the content of an act. The preamble is a decisive factor to define the main aim and purpose. Second, exceptionally, two or more legal bases can be combined if several objectives of a legislative act are inextricably linked, no hierarchy between the norms exist and they are compatible in their respective legislative procedure.\(^{94}\)

Despite uncertainties on delimitation between different EU policies, the Lisbon Treaty has altogether improved the provisions on external relations. For instance, the revised CCP provision in Article 207 TFEU has, to some extent, increased the clarity over its scope and has ensured greater involvement of the European Parliament.\(^{95}\) The provisions on CSDP are extended and its scope is particularly well defined at least compared to the CFSP, which is supposed to cover all areas of foreign and security policy.\(^{96}\) As a further novelty, the Union is now explicitly given competence in the field of humanitarian aid under Article 214 TFEU.

With this an improved legal framework, EU policymakers have the possibility to use non-CFSP areas to pursue CFSP objectives, as the next subsection will show, where QMV can be used to achieve the Union’s external policy objectives.

4.1. QMV in EU external action: the nexus between CFSP and trade

It could be argued that the “special rules and procedures” that are still present in the current Treaties have gradually become an anomaly because of the clear links between CFSP and non-CFSP issues, and the fact the Union’s external objectives do not differentiate between CFSP and non-CFSP activities. As the present section will show, it is sometimes even possible to use a non-CFSP legal basis to reach foreign policy objectives, thus overcoming potential complexities in decision-making. Although unanimity in CFSP matters clearly prevails, it should again be emphasised that QMV is being used in EU external action even in areas that have clear links to the CFSP. Indeed, there is an evolving interaction between the different facets of EU external action. As section 4.1 demonstrated, although EU external relations policies are constitutionally separated, the interaction between e.g. trade and foreign policy is almost inevitable. As Piet Eeckhout rightly emphasised, one can notice “the awkwardness of the EU’s dichotomy between trade policies […] and general foreign and security policy. […] From a political perspective […] this state of affairs appears to make no sense. How can trade issues be dissociated from general foreign policy? If one looks at the practice of third countries, it is clear that their position and participation in international trade relations form part of a broader foreign policy, and that decisions on trade matters may be guided by such broader policy”.\(^{97}\)

The first traditional example which showed the dichotomy between EU trade and foreign policy and created a tension in the EU’s constitutional architecture was the use of economic sanctions. These restrictive measures are in the border area between trade policy and foreign policy where it is difficult,
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if not impossible, to draw clear boundaries.\textsuperscript{98} The historical development of EU sanctions policy helps to understand the place of restrictive measures in EU external action. In short, already in the 1980s, the use of sanctions created a legal tension in the EC given their dual nature: in most cases, sanctions are commercially policy tools but are imposed to pursue wider foreign and security policy objectives. Foreign and commercial policy were originally created as constitutionally separated areas with exclusive competences either in the hands of the member States or the Union. Thus, the question was whether the use of economic sanctions falls within the EU’s foreign or commercial policy competences. This was an issue of constitutional significance given that the choice of appropriate legal bases also determines the decision-making procedures and the role of EU institutions among other things. As a result of the expanding scope of the CCP and Court judgments, a compromise solution was that sanctions were adopted in two steps. First, within the framework of the EPC, the establishment of sanctions regimes required the unanimous foreign policy decision between the Member States. However, as a second step, concrete measures were adopted based on the EC commercial policy provisions in view of the EC’s expanding competences in trade matters.

This system is still largely in place. From the perspective of voting procedures, sanctions are thus quite peculiar cases of EU external action: unanimity and QMV are used in parallel. EU sanctions now have specific Treaty legal bases. They also follow the so-called two-step procedure: the establishment of EU sanctions regimes is based on a unanimous CFSP vote on the basis of Article 29 TEU. This Council Decision can provide for travel bans and arms embargoes. However, if that decision also provides for the reduction or interruption of economic and financial sanctions, the Council also needs to adopt a Council Regulation by QMV based on Article 215 TFEU. QMV is also used whenever the Council needs to modify EU sanctions regimes on the basis of Article 31(2) TEU. From a statistical point of view, a recent study found that sanctions dominate EU foreign policy: approx. 80% of CFSP decisions concern the adoption of sanctions regimes on the basis of Article 29 TEU (approximately 50%) or their amendments on the basis of Article 31(2) TEU (approximately 30%).\textsuperscript{99}

Another traditional example is the dual-use goods which are products used for both civilian and military purposes. In short, in the 1980s, several legal concerns were raised concerning the export of dual-use goods to Middle East countries. In particular, a fundamental question was whether (current) Article 207 TFEU covers only measures with commercial policy objectives, or its scope extends to measures with foreign and security policy objectives? In its rulings, the Court famously considered that “measures whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside of the scope of the [CCP] on the ground that [they have] foreign policy and security objectives”.\textsuperscript{100} After these judgments, no wonder that the current EU regulation on dual-use items is based on Article 207(2) TFEU despite that they have clear foreign and security policy dimensions.\textsuperscript{101} This latter dimension was confirmed by Executive Vice-President and Commissioner for EU Trade, Valdis Dombrovskis who argued that the 2021 update of EU dual-use regulation was necessary to “better respond to emerging threats in an increasingly volatile world […] EU countries will now also

\textsuperscript{98} ibid 501–502.
\textsuperscript{99} Wessel and others (n 27).
\textsuperscript{101} Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items
work even more closely amongst themselves and with allies on potential security risk arising from biotech, Artificial Intelligence and other emerging technologies”. 102

Apart from these two traditional examples, we can witness the evolving interaction between trade and foreign policy in several recent EU instruments – thus opening the door for more QMV in these areas. No wonder that the European Commission in its 2018 Communication on a more efficient CFSP underlined:

“where a matter does not relate to CFSP “but to the external aspects of a policy governed by the [TFEU], the corresponding legal bases should be used for taking decisions, thereby not applying the unanimity rule.” 103

In his annual conference for EU ambassadors in October 2022, HR/VP Josep Borrell also recognised that the separation of EU external relations is no longer a viable option:

“We still operate in silos [ed. in isolation from each other] - I can tell you. I am supposed to be the one who bridges the [European] Commission and the Council and, inside the Commission, my colleagues from different policy [fields]. But we continue working in silos, and each policy continues having its own logic and its own rhythm – be it climate, be it trade, be [it] whatever. Commission, College, the communisation of policies through the Commission, the nationalisation of policies through the Council. It continues being a difficult task. Certainly, the national policies and the Community policies, we want to bridge them – with Team Europe and the Global Gateway – but we [have] still a lot to do to be one power, someone that acts on behalf of the Union as a whole.”

These statements clearly show that nowadays the European Commission is more committed to apply, wherever it is possible, a more holistic view of EU external action and as a direct consequence, to possibly use QMV more frequently in areas linked to the CFSP. Since the entry into force of the Lisbon Treaty, in particular, the link between trade and non-trade objectives has been further strengthened given that the CCP is now guided by the principles and values laid down in Articles 3(5) and 21(1) TEU. 104

This, in combination with the greater ambition of the European Commission to become more “geopolitical”, has resulted in an increased number of EU legislations which have been based on Article 207 TFEU but whose objectives clearly fall within the EU’s foreign and security policy. EU acts adopted based on Article 207(2) TFEU are subject to ordinary legislative procedure which means the use of QMV in the Council. Therefore, several measures with clear CFSP links are not subject to unanimity.

A recent example includes the new Anti-Coercion Instrument which, if adopted by the co-legislators, is expected to defend the EU's strategic autonomy. In other words, the instrument protects its “capacity to act autonomously when and where necessary and with partners wherever possible”. In fact, there is an increasing tendency whereby the EU is economically coerced for its policy choices by third states.


Indeed, as recognised by the European Commission, the “weaponization” of economic instruments to interfere with the EU’s legitimate policy choices “continues to compromise the economic and geopolitical interests of the EU and its members and undermine the EU’s open strategic autonomy”. One of the recent events that triggered the EU to speed up the adoption of the new Anti-Coercion Instrument was China’s decision in 2021 to block all imports from Lithuania and, as a form of a Chinese secondary sanctions, Beijing’s decision to threaten EU companies to sever ties with the Baltic state or face the potential exclusion from the Chinese market. In short, China blocked imports due to Lithuania’s decision to open a representative office by Taiwan in Vilnius, a de facto embassy, as part of the Baltic state’s wider foreign policy efforts to support Taiwan’s fight for freedom. China’s embargo against Lithuania is perceived as an interference into the EU’s policy choices rather than merely a malign trade measure. Indeed, Lithuania exported 300 million EUR of goods to China in 2020 which represented less than one percent of its total exports.

No wonder that the Anti-Coercion Instrument was discussed at least five times by EU foreign ministers in the Foreign Affairs Council. Once again, China’s decision is less about the potential to keep trade relations open, but it brings the question whether and under which conditions the EU and its Member States can take legitimate policy choices without any interference in its actions. Seeking to protect the EU’s strategic autonomy the Commission proposed a regulation based on Article 207(2) TFEU where Parliament and the Council act in accordance with the ordinary legislative procedure which includes QMV in the Council. If adopted by the co-legislators, the Commission will be able to adopt trade, investment, or other restrictions, including imposing tariffs, restricting imports from the country in question, etc.

Another example of trade policy measure with a clear security nexus is the EU’s new framework for the screening of foreign direct investments into the Union. This is also based on Article 207(2) TFEU. Since 2019, it has enabled cooperation and the exchange of information on investments from non-EU countries that may affect security or public order. Indeed, the EU recognised that foreign investment screening and export controls play a critical role in safeguarding European security and public order. As commissioner for Trade Valdis Dombrovskis argued, the EU should remain open to foreign direct investment, but its openness is subject to conditions, including the EU’s ability to safeguard key European assets and protect collective security. By September 2021, the Commission examined more than 400 foreign direct investments in the Union to find out whether such investments threaten EU security or public order. Commissioner Dombrovskis argued the mounting security challenges the EU faces, including the war in Ukraine, further highlight the need to acquire the necessary strategic trade and investment controls instruments up and running. The analysis run by the Commission found, among other things, that the vast majority of FDI poses no problem from a security/public order perspective and that FDI regulation has helped the EU to identify quickly and efficiently potential challenges in that regard.

Yet another example could include the EU’s so-called Anti-torture Regulation, also based on Article 207(2) TFEU, which aims to eradicate torture and death penalty through measures to prevent trade in

certain goods that could be used for such activities.\textsuperscript{108} It is an instrument through which the EU is expected to further promote human rights and human dignity. The Anti-torture Regulation, among other things, prohibits exports and imports of goods that are only used for capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment and also makes exports of goods that could potentially be used for these objectives. The update and management of the Anti-Torture Regulation is the responsibility of the Service for Foreign Policy Instrument in the European Commission.\textsuperscript{109}

Finally, the EU’s so-called “forced labour legislation”\textsuperscript{110} also falls into the blurred category of foreign trade policy. On 14 September 2022, the European Commission proposed the prohibit products made with forced labour on the EU market. The proposal covers all products without targeting specific companies or industries. A clear link between the forced labour legislation and world politics was promoted by Commissioner for Internal Market, Thierry Breton who said, “[i]n today’s geopolitics, we need both secure and sustainable supply chains […]. Being industrial and technological leaders presupposes being more assertive in defending our values and in setting our rules and standards. Our Single Market is a formidable asset to prevent products made with forced labour from circulating in the EU, and a lever to promote more sustainable across the globe”.\textsuperscript{111} This proposal could further antagonise the EU’s trade relations with China. The new legislation may affect the import of shoes, clothes, and commodities such as timber, fish, and cocoa. The US already enacted similar legislation and banned all imports from China’s Xinjiang province due to allegations of widespread human rights violations against Muslim Uyghurs and other minorities.\textsuperscript{112}

The use of trade measures to pursue wider foreign and security policy objectives was also on Parliament’s agenda before Brazil’s elections. In an open letter to Commission President Ursula von der Leyen and HR/VP Josep Borrell, the Greens-European Free Alliance and some of MEPs from the S&D argued that Brazilian President Jair Bolsonaro attacked his country’s electoral system and announced that “the EU [shall] use different levers, including trade, to defend Brazil’s democracy and human rights”.\textsuperscript{113}

However, in relation to politically sensitive questions, using the EU’s trade competences in areas relating to the CFSP may not always be feasible. For instance, in September 2022, Hungarian Foreign Minister Péter Szijjártó said during a press conference after a FAC meeting that after several rounds of negotiations with energy Commissioner Kadri Simon the imposition of cap price on Russian gas was unacceptable for Hungary. In particular, the Hungarian Foreign Minister emphasised that the plan was to adopt such measures based on the EU’s trade competences which would require QMV in the Council.

\textsuperscript{108} Regulation (EU) 2019/125 of the European Parliament and of the Council of 16 January 2019 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment (codification)


\textsuperscript{110} Proposal for a Regulation of the European Parliament and of the Council on prohibiting products made with forced labour on the Union market


\textsuperscript{112} Financial Times, ‘EU Set to Ban Products Made Using Forced Labour’ \url{Financial Times} (12 September 2022).

However, according to Foreign Minister Szijjártó, the imposition of cap price on Russia gas equals to an imposition of EU sanctions against Russia which, in turn, would require unanimity in the Council.114

4.2. The CFSP as a special field of EU external action

To understand the current debates in CFSP decision-making and a possible move to QMV, some background knowledge is necessary. In EU external action, despite the reforms introduced by the Lisbon Treaty, the CFSP continues to hold a certain distinctiveness and exhibits a “tradition of otherness”115 which is manifested in several legal provisions. In particular, Article 24(1) TEU provides that CFSP is subject to “specific rules and procedures”. These include for instance the requirement of unanimity.116 Although the European Council and the Council act indeed unanimously in most of the cases, it is often forgotten that in some limited cases QMV is possible in CFSP context (see further in section 4.5.4). However, that is counterbalanced by the fact that the CFSP is the only policy area in which the Member States can still invoke the “Luxembourg compromise”. This old compromise from the 1960s allows the Member State concerned, based on Article 31(2) TEU, to oppose the adoption of a CFSP decision to be taken by QMV if that act would go against its “vital and stated” national interests. Thus, the CFSP remains the only area where “specific provisions” apply for decision-making.117 In practice, that means that unanimity remains the default rule in CFSP matters.118

It should also be underlined that the adoption of legislative acts is excluded. This latter further supports the idea that the “specific procedures”, as referred to by Article 24(1) TEU, imply the exclusion of ordinary or special legislative procedures (which would otherwise be applicable to adopt legislative acts in the EU). Thus, the instruments for the CFSP are only those acts that are identified by Article 25 TEU.119 But, once again, as was referred to in section 2.7, the exclusion of legislative acts does not mean that CFSP decisions would not be binding on the Member States,120 even if the legal enforcement of CFSP decisions through infringement procedures remains highly questionable.

116 This requirement is further reiterated in Article 31(1) TEU
117 Paul James Cardwell, ‘On “Ring-Fencing” the Common Foreign and Security Policy in the Legal Order of the European Union’ (2013) 64 Northern Ireland Legal Quarterly 443, 447; Schütze (n 69) 207.
120 Hillion and Wessel, ‘Restraining External Competences of EU Member States under CFSP’ (n 74).
It should also be recalled that voting rules are not the only “special rules and procedures” in CFSP context. Apart from decision-making rules, the CFSP is different from other EU policies for several other (legal) reasons, including these elements (a non-exhaustive list) that clearly affect its functioning:

- The EU has neither an exclusive nor a shared competence in CFSP matters. Instead, a special category of competence has been created under Article 2(4) TFEU which provides that the “Union shall have competence, in accordance with the provisions of the [TEU], to define and implement a (CFSP), including the progressive framing of a common defence policy”. The nature of this competence remains undefined but the same provision underlines that it is indeed the Union that has this competence. As Marise Cremona also points out, “the CFSP is intended as a policy of the Union, distinct from (although in harmony with) the foreign policies of its Member States. It is not simply a coordination of Member State policy; rather, the Member States are to support the Union’s policy”. 121 The CFSP has thus clearly become a policy for which the Union institutions bare responsibility, albeit alongside the foreign policies of the Member States.

- Another significant difference compared to other EU policies is the institutional setting. In the ordinary legislative procedure, the Commission proposes legislation which is submitted to the two co-legislators for adoption. However, Article 24(1) TEU provides that the CFSP is defined and implemented by the European Council and the Council – clearly, the two major actors in CFSP context. Parliament and the Commission have “specific role” (see more on the role of the EP in section 4.3.1). The Commission does not have the exclusive right to submit proposals to the Council. Instead, initiatives and proposals under Article 30 TEU can be submitted by any Member State, the HR/VP or the HR/VP with the Commission’s support.

- The limited, although continuously expanding, jurisdiction of the CJEU in CFSP matters. Article 24(1) TEU provides that the CJEU “shall not have jurisdiction” except for two cases. However, the limited role of the CJEU should not be overemphasised, especially in the light of recent case law which have all demonstrated that the CFSP is now a fully integrated part of EU law.

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121 Marise Cremona, ‘Structural Principles and Their Role in EU External Relations Law’ in Marise Cremona (ed), Structural principles and their role in EU external relations law (Hart 2018), 6.
Despite clear differences, however, one cannot deny that the Lisbon Treaty has contributed to the “normalisation” of the CFSP.122 The Lisbon Treaty abolished the pillar structure in an attempt to unify the EU’s legal order. The EU replaced and succeeded the Community and the TEU and the TFEU now have equal legal wight (Article 1(3) TEU). The CFSP no longer “supplements” other EU policies: instead, the CFSP is now integral and equivalent part of EU external action and former EC (now TFEU) policies do not enjoy priority over the CFSP. In addition, separate CFSP and non-CFSP objectives ceased to exist and instead a bridge was created by including unified principles and objectives for all EU external relations policies. Moreover, EU Member States have accepted a significant legislation and institutionalisation. This includes for instance the inclusion of objectives and principles governing EU external action, including the CFSP, under the same Treaty section (Articles 21-22 TEU). The HR/VP, who chairs the FAC in the Council, is also the Vice-President of the Commission. The expanding role of the Court also points towards an idea that the EU system of judicial protection fully applies. The use of sanctions has also facilitated the legislation process due to the EUs ever more frequent use of restrictive measures which are particularly legalised forms of instruments.123

4.2.1. The role of Parliament in CFSP matters
For this specific report, it is appropriate to expand on the role of Parliament in CFSP context. The role of Parliament is affected by the “specific rules and procedures”. Article 24(1) TEU provides that the EP, alongside with the Commission, has a “specific role” in CFSP context. This role is further defined in Article 36 TEU.

**Article 36 TEU**
The High Representative of the Union for Foreign Affairs and Security Policy shall regularly consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform it of how those policies evolve. He shall ensure that the views of the European Parliament are duly taken into consideration. Special representatives may be involved in briefing the European Parliament.

The European Parliament may address questions or make recommendations to the Council or the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy.

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123 Szép V and Wessel RA, ‘Mapping the Current Legal Basis and Governance Structures of the EU’s CFSP’ [https://static1.squarespace.com/static/604251cac817d1235cbe98d/t/620f82c7ad293c1bd9294256/1645183692089/ENGAGE+Working+Paper+5_Mapping+the+Current+Legal+Basis+and+Governance+Structures+of+the+EU%2EZ%80%99s+CFSP_v2.pdf]: 8-9.
Compared to other EU policy areas, Parliament is not a co-legislator in the context of CFSP and cannot formally influence CFSP decisions. Instead, it is consulted on the “main aspects and the basic choices” of CFSP. The formal influence of the EP is therefore limited to general policy lines. The EP also uses non-legislative instruments, such as EP resolutions, to formulate and share its views on CFSP matters. Indeed, according to recent research, most of EP resolutions relate to CFSP matters that are used as a counterbalance to the lack of its meaningful competences in this policy field.

Further, MEPs can interact with the HR/VP and the Council Presidency through two different interparliamentary meetings. First, an Interparliamentary Conference (IPC) for the CFSP/CSDP is held twice a year by the Parliament of the EU Member States holding the rotating Council Presidency. For instance, the 19th session of the IPC for the CFSP/CSDP was organised in September 2021 in Ljubljana. EP delegations were present from the Committee on Foreign Affairs of the EP (AFET Committee) and its Subcommittee on Security and Defence (SEDE). This Ljubljana IPC meeting was attended by 88 MPs from the 27 Member States and nine MEPs. In this IPC, MEPs can discuss the EU’s foreign, security and defence priorities and ask the Council Presidency and the HR/VP about their actions in CFSP/CSDP matters. Secondly, the EP AFET Committee also organises a separate interparliamentary committee meeting where it invites MPs to the EP to discuss the EU’s foreign policy challenges. For instance, a few days after that the von der Leyen Commission was approved, HR/VP Josep Borrell participated in his first ever AFET interparliamentary committee meeting to meet with MEPs and MPs with a view to discuss the EU’s foreign policy priorities.

Thus, Parliament uses all instruments at its disposal to influence CFSP/CSDP but taken together these aspects one may still be left with the impression that MEPs are side-lined in this policy area. In political science literature, however, it has been long argued that Parliament can “exploit the loopholes that are left [and] can bring other European actors to concede certain ‘informal’ powers to it”. Indeed, literature has already shown that the EP does not necessarily accept the institutional asymmetry that is created by the Treaties and uses tools that directly or indirectly affect the EU’s CFSP. Parliament, for instance, can use its budgetary powers to influence the EU’s CFSP. It was also argued that proactive approach to CFSP issues can enhance Parliament’s role to keep certain issues on the agenda.

124 Ramses A Wessel, ‘Legal Aspects of Parliamentary Oversight in EU Foreign and Security Policy’ in Juan Santos Vara and Soledad Sánchez-Tabenero (eds), The Democratisation of EU International Relations through EU Law (Routledge 2018).


129 Kleizen (n 115).


Indeed, a recent study found that despite the limited Treaty-based competences in CFSP matters, the EP but also other parliaments can provide a forum for debate in foreign policy questions. Those debates enhance the positions of the parliaments even in policy areas where formal competences are less pronounced. This rather informal power can be used to question and even to force EU executives to justify their (non-)actions in CFSP/CSDP issues. Although the HR/VP or foreign ministers and their officials can always refer to their prerogatives under current Treaty provisions and can emphasise their own legitimate competences to shape EU-level foreign and security policy, the exposure to public opinion can force EU executives to move in a direction which can be in line with the expectations of parliaments. This is perhaps even more true in a policy area where the Council holds closed policy debates. Indeed, the FAC is the only Council configuration where discussions between the (foreign) ministers remain completely hidden from public eyes. Public opinion is not and cannot be informed about every detail of key foreign policy debates held by otherwise democratically elected governments. Even if those debates, especially if decisions concern sanctions, have wider economic implications on individuals and entities, the public cannot access all information which therefore raises broad questions of accountability and legitimacy of foreign policy decisions.

Within this context, the role of the parliaments, whose members are directly elected by citizens, becomes even more important as, once again, they can hold public debates on the outcome of foreign policy negotiations which are kept otherwise in an “intergovernmental” format. In the case of the EU’s Global Human Rights Sanctions Regime (EUGHRS), for instance, the above-mentioned study found that parliaments were quite successful in signalling their preferences to adopt a sanctions regime – a measure that clearly falls outside the competences of parliaments. Even though the time span was long to adopt such sanctions regime, and it took almost 10 years to realise, the Council finally adopted this EUGHRS in December 2020, partly due to the activism of parliaments in a field directly related to CFSP matters.

In the case of the EUGHRS, three levels of parliamentary actions could be observed. At the supranational level, Parliament was clearly the most vocal actor in promoting an EU-level human rights-based sanctions regime. Since 2010, it called several times on the Council to adopt such measures with an immediate effect mainly – but not exclusively – against Russian individuals and entities. It even exchanged ideas and debates with the HR/VP and representatives of the Commission. The interaction with these two actors is significant as, according to Article 215 TFEU, regulation on the reduction or termination of economic and/or financial relations is submitted jointly by the HR/VP and Commission. They were requested by MEPs to justify their non-actions in this field and were forced to explain to the public why certain actions have not been taken.

Parliament, however, was not the only parliamentary actor in this field. At cross-level, where MEPs meet their fellow national representatives, parliamentarians were also pushing the agenda of a human rights sanctions regime. For instance, the members of the AFET interparliamentary committee – consisting of MEPs and MPs – invited the then newly appointed HR/VP Josep Borrell to ask whether he would be ready to negotiate an EU-wide ‘Magnitsky Act’ with the Member States. The Inter-Parliamentary...
Conferences on CFSP/CSDP also adopted conclusions to press foreign ministries to adopt a human rights sanctions regime.\textsuperscript{134}

Finally, at Member State level, the Dutch parliament was clearly one of the most active legislatures. Already in 2011, Dutch MPs passed a resolution calling on the government to impose sanctions against perpetrators of human rights violations. Despite the initial reluctance of the Dutch government, MPs did not remain passive and continuously urged the Dutch executive to adopt the necessary measures even in the absence of EU level support. One of the clear results of Dutch MPs’ efforts was that in 2018 the Dutch Foreign Ministry organised a diplomatic meeting with fellow EU Member States in The Hague to see whether there was a multilateral support for the human rights sanctions regime.\textsuperscript{135} That meeting further enhanced EU-level discussions and led to the adoption of the EUGHRS.

All these parliamentary activities are useful to keep certain CFSP issues on the EU’s (political) agenda and can even contribute to hold the executives accountable and to force them – in a public setting – to justify their non-actions in CFSP issues. This does not mean that parliaments could stretch the limited legal competences they enjoy under the Lisbon Treaty, but they can use already existing tools – e.g. under Article 36 TEU – to push EU executives in a direction that is favourable by MEPs and/or MPs. However, the success of these parliamentary actions cannot be measured in a short term. Obviously, without powerful Treaty based competences, parliaments cannot directly influence CFSP decisions. Instead, experience shows that usually the parliaments, including the EP, must be consistent and persistent, perhaps through multiple parliamentary cycles, in their demands and must be clear where they see the future of the CFSP, sometimes against the will of EU executives. Parliamentarians need to step up jointly to influence CFSP decisions as the case of the EUGHRS demonstrated – using all possibilities, including national, cross, and supranational parliamentary settings.

\textbf{4.3. Constructive abstention}

Although unanimity remains the dominant voting procedure in CFSP/CSDP matters, it does not imply that every Member State should vote affirmative if the Council seeks to adopt a CFSP Decision. Constructive abstention under the second subparagraph of Article 31(1) TEU allows a small group of Member State(s) to abstain from a vote and not to apply a CFSP Decision. If the members of the Council do not represent one third of the Member States comprising at least one third of the population, the Council can still adopt a CFSP Decision in question, thus allowing the Union to act at international level.


\textsuperscript{135} ibid.
The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting

**Article 31(1) TEU (second subparagraph)**

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted.

However, this option comes with certain limits. The Member State concerned, even if it invoked Article 31(1) TEU, remains under a legal obligation not to take actions that would go against the EU’s position. After all, the decision taken by the Council remains a “Union decision”. It also implies that while the Member State concerned does not have to actively implement the decision, it must accept that the decision commits the Union. Indeed, this is also underlined by the “spirit of mutual solidarity” whereby the Member State concerned “shall refrain from any action likely to conflict with or impede Union action based on that decision”. This is like the general duty of sincere cooperation (Article 4(3) TEU) but also similar to the specific CFSP obligation under Article 24(3) TEU which provides that “[t]he Member States shall support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity and shall comply with the Union’s action in this area”. These obligations limit the freedom of the Member State in a way that national actions cannot conflict or impede Union actions. All this implies that although the Member State concerned would not be under obligation to implement Union action, it would nonetheless be bound by the adopted decision. Also, the duty of loyal cooperation includes contributing to the administrative and operative cost of those decisions.136

This might be the reason why for a long-time constructive abstention was used only once when in 2008 Cyprus abstained on establishing the EULEX Kosovo crisis management mission.137

Since the Cypriot decision of 2008, constructive abstention has played a relatively minor role. For instance, during a celebration of the 10th anniversary of the EEAS, the HR/VP encouraged Member States to use constructive abstention more frequently as a first step for a more efficient EU foreign policy.138 Another example includes the call of Matti Nissinen, Head of the Unit for European Common Foreign and Security Policy at the Ministry for Foreign Affairs in Finland. Mr Nissinen, during Finnish Council presidency, argued that “[i]n matters to be decided unanimously, member states could opt for

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136 Wessel and Böttner (n 111) 1058.
‘constructive abstention’. This means the action of the entire Union would not be blocked whenever a single member state chooses to be excluded from decision-making and action”.139

Constructive abstention was once again invoked in February 2022. The war in Ukraine has been a catalyst for quick and decisive EU actions. The Council not only agreed on six packages of sanctions but also decided, through the European Peace Facility, to provide military aid, including lethal weapons, to Ukraine. This was the first time that EU included provisions to provide lethal equipment to third states.140 The establishment of such facility was only decided one year before the war.141 It was created as an off-budget instrument the aim of which has been to prevent conflicts, build peace and strengthen international security, by enabling the financing of operational action under the CFSP that have military or defence implications.142 Between February and July 2022, the EU has agreed within the framework of the European Peace Facility to five tranches of support totalling 2,5 billion EUR this year. It is expected to support the capabilities and resilience of the Ukrainian Armed Forces.143

Already in 2018, however, several Member States (Ireland, Austria, Malta and Sweden) were sceptical about the former HR/VP’s suggestion to transfer arms to third countries.144 And while the EU and its Member States effectively agreed on multiple rounds of aid to Ukraine, three out of the four Member States above – Austria, Ireland and Malta – abstained regarding the Council Decision on an Assistance Measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force.145 All of them submitted formal declarations to the 27 February 2022 Foreign Affairs Council but cited different reasons for their abstentions and the alternative ways they will contribute to support Ukraine. Austria deemed the “decision sensitive for the specific character of her security and defence policy”. It will not contribute to the financing of the Assistance Measure but “will voluntarily contribute an additional amount to a non-sensitive assistance measure for Ukrainewithin the framework of the European Peace Facility”. Malta, for its part, “reserves its right to constructively abstain from assistance measures” but “through […] voluntary elective commitment, Malta will instead provide a corresponding contribution to the budget for assistance measures in support of Ukraine which do not involve supply of such lethal equipment or platforms”. Finally, Ireland “will not be contributing to the costs of [the] Assistance Measure” and “signals its preference to contribute instead to the Council Decision on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces”.146 For instance, Ireland increased its contribution

141 Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528
145 Council of the EU, ‘Summary Record - Extraordinary Meetings of the Permanent Representatives Committee: 22, 24, 27, 28 February, 1, 3 and 4 March 2022’.
146 ibid.
to the facility given that 10% of the fund is for non-lethal aid, which Ireland contributes towards.\textsuperscript{147} The contribution by non-lethal aid does not undermine Ireland’s military neutrality.\textsuperscript{148}

In October 2022, constructive abstention was yet again invoked by Hungary in relation to setting up a Military Assistance Mission in support of Ukraine (EUMAM Ukraine). The objective of the mission is to contribute to enhancing the military capability of Ukraine’s Armed Forces and will provide individual, collective, and specialised training to these armed forces. The EUMAM Ukraine will operate in the territory of EU Member States and will have its Operational Headquarters within the EEAS.\textsuperscript{149} Hungarian Foreign Minister Péter Szijjártó, however, announced that: “Hungary has not voted in favour of the proposal. We were alone triggering constructive abstention […] Hungary does not see from its part any obligation to implement it […], we do not take part in this training mission and obviously we do not send trainers to it, nor do we contribute to the costs with financial resources”.\textsuperscript{150}

4.4. QMV in CFSP matters

4.4.1. Vetoes and delays

It is increasingly common to see EU Member States – formally or informally – blocking or delaying the adoption of certain CFSP decisions. To a certain extent, this is simply because it is not always possible to reconcile the interests of 27 Member States. This is, of course, part and parcel of the European integration process in which compromises need to be found on almost all policy decisions. And, in the context of CFSP one could argue that the possibilities of vetoes was part of the deal. Yet, as we have seen, the unanimity rule is also believed to stand in the way of the Union’s effectiveness at the global level. Indeed, the question of potentially using the special CFSP passerelle clause is raised explicitly also in view of a future enlargement rounds where the EU could easily have 30+ Member States. Of course, the increasing number of vetoes cannot be explained only by the number of Member States. There are three broad arguments as to why we can see that trend. First, certain EU governments do not share some of the values that other Member States deem important (e.g. LGBT+ rights). Second, some members of the Council wait for the final moment to block the process even though they could have participated more actively in the formulation of CFSP activities and signal their potential disagreements with certain policy proposals. Third, certain governments don’t mind what the EU institutions or other Member States think about potential vetoes; instead, the important thing is to convince the local electorate or perhaps to meet the expectations of foreign powers (e.g. Russia or China).\textsuperscript{151}

\textsuperscript{151} Karolina Pomorska and Ramses A Wessel, ‘Editorial: Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?’ (2021) 26 European Foreign Affairs Review 356
### Box 4. A non-exhaustive list of vetoes, threats of veto and delays in CFSP matters 152

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 2016</td>
<td>Hungary and Greece delay and water down EU statement on the dispute between China and the Philippines in relation to territorial claims in the South China Sea</td>
</tr>
<tr>
<td>February 2017</td>
<td>Hungary blocks the extension of arms embargo against Belarus until other Member States agreed to exempt a certain category of small arms.</td>
</tr>
<tr>
<td>March 2017</td>
<td>Hungary blocks EU joint letter denouncing the reported torture of detained lawyers in China</td>
</tr>
<tr>
<td>June 2017</td>
<td>Greece blocks EU statement on UN criticizing China’s human rights record</td>
</tr>
<tr>
<td></td>
<td>Greece delays sanctions against Venezuela. Measures were finally adopted in November.</td>
</tr>
<tr>
<td>May 2018</td>
<td>Hungary, the Czech Republic and Romania veto an EU statement condemning the relocation of the US Embassy to Jerusalem.</td>
</tr>
<tr>
<td>February 2019</td>
<td>Italy vetoed a statement on an EU position to recognise Venezuela’s opposition leader Juan Guaido as interim president</td>
</tr>
<tr>
<td></td>
<td>Hungary threatened to veto a declaration proposed agreement between the EU and the Arab League. HR/VP Mogherini said that 90-95% of the declaration was saved.</td>
</tr>
<tr>
<td></td>
<td>Hungary threatens to veto arms embargo against Belarus</td>
</tr>
<tr>
<td>April 2019</td>
<td>France vetoed a call on Khalifa Haftar to halt his eastern forces’ offensive in Libya</td>
</tr>
<tr>
<td></td>
<td>Hungary vetoed a CFSP statement at the UNSC Criticism on Israel over the violence and the continued building of Israeli settlements in the West Bank and East Jerusalem. At the end, the Finnish ambassador spoke on behalf of the 27 Member States (out of 28).</td>
</tr>
<tr>
<td>May 2019</td>
<td>Hungary opposed EU statement at the UNSC criticising Israel. That statement was later presented as the position of 27 EU Member States</td>
</tr>
<tr>
<td>October 2019</td>
<td>Hungary vetoed an EU resolution on the condemnation of Turkish military intervention in north-east Syria</td>
</tr>
<tr>
<td>November 2019</td>
<td>Hungary blocks EU statement criticizing China’s new security law on Hong Kong</td>
</tr>
<tr>
<td>March 2020</td>
<td>Austria and Hungary derail EU naval plan on Libya arms</td>
</tr>
<tr>
<td>September 2020</td>
<td>Cyprus delayed for approx. three weeks the adoption of individual sanctions against Belarus</td>
</tr>
<tr>
<td>April 2021</td>
<td>Hungary vetoed an EU statement on China’s new security law in Hong Kong</td>
</tr>
<tr>
<td>May 2021</td>
<td>Hungary vetoed an EU declaration on a ceasefire between Israel and the Palestinians</td>
</tr>
<tr>
<td>June 2021</td>
<td>Hungary vetoed an EU statement on criticizing China’s Hong Kong policy</td>
</tr>
<tr>
<td>April 2022</td>
<td>Hungary delayed for approx. five weeks the adoption of oil embargo against Russia</td>
</tr>
<tr>
<td></td>
<td>Greece, Cyprus and Malta block sanctions against Russia-owned ships from EU ports</td>
</tr>
<tr>
<td>June 2022</td>
<td>Hungary vetoed to add Patriarch Kirill, head of Russia’s Orthodox Church, to EU sanctions lists</td>
</tr>
<tr>
<td>September 2022</td>
<td>Hungary threatened to block some EU sanctions on Russia if three oligarchs are not spared</td>
</tr>
<tr>
<td></td>
<td>Hungary threatened to block the EU’s request in the UN Human Rights Council to appoint a newly-created independent expert on alleged human rights abuses in Russia</td>
</tr>
</tbody>
</table>

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152 This table is based on own research and: Nicole Koenig, ‘Towards QMV in EU Foreign Policy’ 3
Since mid-2016, based on Box 4., 30 individual vetoes, threats of veto or delays could be observed. From these 30 cases, 60 percent are related to Hungary (18 cases), while the rest can be linked to eight other Member States (Greece (4), Cyprus (2) and Austria, Czech Republic, Italy, France, Malta and Romania (1 each)). From the 30 cases, 21 were actual vetoes, 3 threats of veto and 5 delays. The cases concerned altogether nine geographical locations or thematic areas: China (6), Russia (5), Venezuela, Belarus and Israel/Palestine (3 each), Libya (2), US, Turkey and the Arab League (1 each). Most of these cases can be related to CFSP statements/declarations/joint letter (14), whereas some others to sanctions (8) or CSDP missions (2).

### 4.4.2. Political calls for QMV

Given the seemingly increased number of different kinds of obstructions, political actors – mostly EU institutions but also some EU governments – called on the Member States to gradually move from unanimity to QMV in CFSP matters. And although the call for the use of QMV is almost as old as the CFSP itself, in the last few years we could witness a more intense political agenda to remove the general requirement of unanimity (see table 3. below). In this sense, the more frequent call to use QMV coincides with seemingly more frequent blockages of CFSP issues.

In the last almost one decade (between mid-2013 and mid-2022), we have observed 25 major political calls to shift from unanimity to QMV in CFSP matters.

<table>
<thead>
<tr>
<th>Who?</th>
<th>Where?</th>
<th>When?</th>
</tr>
</thead>
<tbody>
<tr>
<td>5. Commission President Jean-Claude Juncker</td>
<td>54th Munich Security Conference</td>
<td>17 February 2018</td>
</tr>
<tr>
<td>6. Franco-German Meseberg Declaration</td>
<td>Meseberg, Germany</td>
<td>19 June 2018</td>
</tr>
<tr>
<td>7. Commission President Jean-Claude Juncker</td>
<td>State of the Union speech 2018, European Parliament</td>
<td>12 September 2018</td>
</tr>
<tr>
<td>8. European Commission</td>
<td>Commission communication: A stronger global actor: a more</td>
<td>12 September 2018</td>
</tr>
</tbody>
</table>

Note that in cases where two or more Member States vetoed, threatened to veto or delayed a CFSP decision, every Member State is counted as ‘one’ occurrence. E.g. in May 2018, a veto by three Member States is counted as three different vetoes.
<table>
<thead>
<tr>
<th>No.</th>
<th>Source</th>
<th>Event Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.</td>
<td>European Parliament</td>
<td>Resolution (only for human rights sanctions)</td>
<td>14 March 2019</td>
</tr>
<tr>
<td>10.</td>
<td>Matti Nissinen, Head of the Unit for European Common Foreign and Security Policy at the Ministry for Foreign Affairs in Finland</td>
<td>Informal Meeting of Ministers for Foreign Affairs (Gymnich)</td>
<td>27 August 2019</td>
</tr>
<tr>
<td>12.</td>
<td>HR/VP and the European Commission</td>
<td>Joint proposal for a recommendation of the Council to the European Council on the adoption of a decision identifying the strategic objectives of the Union to be pursued through the EU Action Plan on Human Rights and Democracy 2020-2024</td>
<td>25 March 2020</td>
</tr>
<tr>
<td>14.</td>
<td>HR/VP Josep Borrell</td>
<td>EEAS blogpost</td>
<td>2 February 2020</td>
</tr>
<tr>
<td>15.</td>
<td>Armin Laschet (one of the former German frontrunners who could have succeeded Angela Merkel)</td>
<td>Konrad-Adenauer-Stiftung</td>
<td>19 May 2021</td>
</tr>
<tr>
<td>16.</td>
<td>Former German State Secretary Miguel Berger</td>
<td>Twitter</td>
<td>4 June 2021</td>
</tr>
<tr>
<td>17.</td>
<td>Former German foreign minister Heiko Maas</td>
<td>Declaration</td>
<td>7 June 2021</td>
</tr>
<tr>
<td>18.</td>
<td>Germany’s SPD, the Greens &amp; FDP parties</td>
<td>Coalition deal</td>
<td>November 2021</td>
</tr>
<tr>
<td>19.</td>
<td>European Parliament</td>
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<td>8 June 2022</td>
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<td>European Parliament</td>
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<td>21.</td>
<td>HR/VP Josep Borrell</td>
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<td>German Chancellor Olaf Scholz</td>
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The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting

In its recommendation of 2013, Parliament proposed to use QMV on CFSP matters, as laid down in Article 31(2) TEU, and to formally explore the broadening of QMV on CFSP matters by means of the passerelle clause. In 2014, the EP also launched an own-initiative procedure leading to two reports issued by the EP AFCO Committee: in late 2016 and early 2017, the EP AFCO Committee was closely examining on how the EU’s functioning could be further developed. The “Verhofstadt Report” took a wider approach and called for QMV in many EU policy fields, including in the CFSP, fiscal affairs and social policy and to move from special legislative procedure to ordinary legislative procedure whenever it is needed. The so-called “Bresso-Brok Report”, on the other hand, called for using existing Treaty provisions to use QMV in CFSP matters. These led to the an EP resolution of 2017 on “Improving the functioning of the [EU] building on the potential of the Lisbon Treaty” in which MEPs noted that EU Treaties “have not yet been exploited to their full potential” and called for the use of the passerelle clauses. In its resolution of 2019, the EP reiterated that “unanimity […] is an almost insurmountable obstacle in important moments and decisions, and advocates therefore […] the principle of [QMV] … this can be achieved by using the various passerelle clauses or, in the case of enhanced cooperation, by using Article 333 TFEU”. In 2022, as a reaction to the war in Ukraine, the EP used its prerogatives under Article 36 TEU and issued a recommendation to the Council and the HR/VP which, among other things, called for the introduction of QMV for certain foreign policy areas, including for sanctions. After receiving the final outcome of the CoFE of Europe, on 9 June 2022, the EP adopted a resolution, for the first time in its history, for a Convention for the revision of the Treaties in which, among other things, it called for switching from unanimity to QMV, in areas such as sanctions, the so-called passerelle clauses.

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**References:**


clause, and in emergencies. The Spinelli Group of the EP is also active in that matter and in its manifesto “Federal Europe: Sovereign, Social and Ecological”, it proposed to end the requirement of unanimity which should be replaced by “majority voting across a raft of existing policy areas”. 160

In his 2017 State of the Union speech, former Commission President Jean-Claude Juncker declared that he wants the EU “to become a stronger global actor. In order to have more weight in the world, we must be able to take foreign policy decisions quicker. This is why I want Member States to look at which foreign policy decisions could be moved from unanimity to [QMV]. The Treaty already provides for this, if all Member States agree to do it. We need [QMV] in foreign policy if we are to work efficiently”. 161

The Franco-German Meseberg Declaration of June 2018 on “Renewing Europe’s promises of security and prosperity” also devoted a separate section on CFSP/CSDP. Concerning the CFSP, the declaration emphasises the necessity to “look into new ways of increasing the speed and effectiveness of the EU’s decision-making in our [CFSP]. We need a European debate on new formats, such as an EU Security Council and means of closer coordination, within the EU and in external fora. We should also explore possibilities of using [QMV] in the field of the [CFSP] in the framework of a broader debate on majority vote regarding EU policies”. 162

In his 2018 State of the Union (SOTEU) speech, former Commission President Jean-Claude Juncker reminded MEPs that “[t]he geopolitical situation makes this Europe’s hour: the time for European sovereignty has come. It is time Europe took its destiny into its own hands. It is time Europe developed what I coined ‘Weltpolitikfähigkeit’ – the capacity to play a role, as a Union, in shaping global affairs. Europe has to become a more sovereign actor in international relations”. 163 In his annual speech, President Juncker also proposed “to move to [QMV] in specific areas of our external relations […] not in all but in specific areas: human rights issues and civilian missions included. This is possible on the basis of the current Treaties, and I believe the time has come to make use of this ‘lost treasure’ of the Lisbon Treaty”. 164

During his participation at the 54th Munich Security Conference, Jean-Claude Juncker announced that if Europe seeks to be ‘Weltpolitikfähig’, “then we also need to simplify our decision-making processes. It is this compulsive need for unanimity that is keeping us from being able to act credibly on the global stage”. The former President listed a number of regions where unanimity was prevented (e.g. South China Sea, human rights in the People’s Republic of China or Jerusalem) and argued that “[w]e need to simplify our decision-making processes so that the [EU] can also reach positions by [QMV]”. As a follow-up document after Juncker’s 2018 SOTEU speech, the Commission adopted a Communication in which it identified three concrete areas where QMV could be used within CFSP context: the defence and promotion of human rights, the imposition of EU sanctions or the adoption of positions on key regional

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164 Ibid. 11.
and geopolitical questions. In its resolution of 2019, the EP welcomed Juncker’s proposal and urged the Council to adopt human rights sanctions by QMV. The Commission also invited EU Heads of State and Government to agree at the Summit in Sibiu on 9 May 2019 to broaden the scope of QMV in CFSP matters by using the passerelle clause in these three proposed areas. However, reportedly, during the Summit in Sibiu Member States dragged their feet on those matters.

Before her election by the EP, Ursula von der Leyen in her political guidelines (2019-2024) noted that the “to be a global leader, the EU needs to be able to act fast: I will push for [QMV] to become the rule in this area. I will work closely with the [HR/VP] to ensure a coordinated approach to all of our external action, from development aid to our [CFSP]”. President von der Leyen also added that she aimed to increase investment in EU external action by 30%, raising the total to EUR 120 billion. In her first State of the Union speech, Ursula von der Leyen called for a Europe that can take clear positions and quick actions on global affairs. She regretted that simple statements on EU values are often delayed or watered down. President von der Leyen even described Europe as too slow and called on the Member States to “be courageous and finally move to [QMV] – at least on human rights and sanctions implementation”.

In March 2020, as a follow up on President Ursula von der Leyen’s political guidelines for the period of 2019-2014, the Commission and the HR/VP submitted a joint proposal on the use of QMV in a narrow field of the CFSP. The proposal recommended the adoption of a European Council Decision identifying the strategic interests and objectives of the Union pursuant to Article 22(1) TEU through the EU Action Plan on Human Rights and Democracy for the period of 2020-2024. If it had been adopted, the Council could have adopted human rights-related sanctions by QMV. In November 2020, however, EU Member States rejected the use of QMV to implement the Action Plan despite that it would have been a “modest” change according to HR/VP Borrell. Despite the negative vote, HR/VP Borrell

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168 Lațici (n 129) 4.
170 Ibid. 18.
emphasised that the use of QMV will be potentially used in the future for the simple reason that the EU would need to act quickly to certain developments, especially in the field of human rights and democracy. 175 HR/VP Borrell continued to argue that although “abandoning the unanimity rule would not be a silver bullet”, QMV could be used in limited cases, such as human rights statements or sanctions. 176 In mid-2022, HR/VP Borrell added that the best answer to today’s challenges is “to remove the dead weight of unanimity rule” and proposed to advance with “super QMV” that would imply “27 [Member States agreeing on an issue] minus 2 or 3, so as not to be blocked by one or two single countries”. 177

Germany, especially in the last couple of years, has been a vivid proponent for the introduction of QMV in CFSP matters. For instance, former German Foreign Office State Secretary Miguel Berger wrote on Twitter, after Hungarian blockages on Hong Kong and the Middle East, that the CFSP “cannot work on the basis of a blocking policy. We need a serious debate on ways to manage dissent, including [QMV]”. 178 Also, former German foreign minister Heiko Maas argued that “we can’t let ourselves be held hostage by the people who hobble European foreign policy with their vetoes […]. The veto has to go, even if that means we can be outvoted”. 179 Armin Laschet (CDU), one of the former German frontrunners to succeed Chancellor Angela Merkel held a speech in May 2021 in which he called for a new, more strategic German foreign policy, which includes a gradual move towards QMV in CFSP matters. 180 Left wing German political parties usually share this opinion: in November 2021 the current German government (SPD, Greens and FDP) in its coalition deal indicated that they seek to move from unanimity to QMV in CFSP matters. 181 In September 2022, German Minister of State for Europe and Climate Anna Lührmann also said before a General Affairs Council meeting that “the topic of the EU's ability to act is close to my heart. We need to get to making more decisions by qualified majority. That is, there should be less veto. We think that’s very important here, and that’s what we’re going to talk about today”. 182 Ms Lührmann also added that discussions on QMV is particularly relevant in the area of the CFSP by using passerelle clauses. Other countries, such as France, Denmark, Sweden, the Netherlands and Italy also favour the idea of moving to QMV on certain foreign policy issues. 183

Finland also supports the wider of QMV in CFSP matters by using existing Treaty provisions. During Finnish Council presidency in 2019, for example, Matti Nissinen, Head of the Unit for European Common Foreign and Security Policy at the Ministry for Foreign Affairs in Finland, argued that QMV can increase the effectiveness of the CFSP while constructive abstention could also be used in cases where

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176 Borrell (n 16).
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A Member State does not want to block the EU’s external action. More recently, in September 2022, Finnish Prime Minister Sanna Marin, as part of the debate series called “This is Europe”, delivered a speech in the EP in which she called for the increased use of QMV in CFSP matters. The Finnish PM referred to the proposals brought up by the CoFE but firmly stated the European citizens “did not ask for institutional changes as much as for reforms that respond both to the major challenges facing humankind and people’s everyday concerns” and that “a crisis is not the right time to open up a debate on the Treaties”. Sanna Marin argued in favour of using the “current framework” to extend QMV in CFSP matters.

4.4.3. Central Europe against QMV?

Despite the recent proposals to improve the efficiency of foreign policy decision-making, it is no secret that not all Member States see eye to eye. QMVs are often opposed by some Central and Eastern European Member States. However, according to a recent data set, outvoting also concerns Western European states. In general, since 2010 Poland has been outvoted 55 times in 1316 votes which implies that in 95% of the cases Poland is part of the majority. In the same period, Germany has been outvoted 59 times and has become the most outvoted larger Member State. Before Brexit, the UK was the single most outvoted Member State, being on the losing side 174 times. The five most outvoted Member States are: Austria, Hungary, Germany, the Netherlands and Poland. France, by contrast, was only outvoted three times in the last 12 years.

The political statements do not all point in the same direction. There remain clear differences between various Member States' views on the pros and cons of a move towards more majority voting. This fear of abandoning unanimity was reiterated by the President of the European Council. In 2020, during his speech on the EU’s strategic autonomy, European Council President Charles Michel argued that “[d]efence is not an EU competence like any other. I am aware of the various national sensitivities”. While Michel recognised that the “requirement of unanimity slows down and sometimes even prevents decision-making”, he also emphasised that “unity is also our strength” and is unsure about the benefits of completely abandoning unanimity. According to Michel, political confrontation, the exchange of substantive arguments, trust and personal respect play a key role in achieving unity.

Charles Michel’s cautious approach to move to QMV can be explained by the reluctance of some Member States to accept such modifications in EU Treaties, including in CFSP issues. In particular, Central European states see QMV as possibly leading to creating a “German Europe”. German Chancellor Olaf Scholz’s speech on the possible extension of QMV at the Prague-based Charles University was not even attended by the Czech Prime Minister Petr Fiala who in the past had even argued that further European integration would lead to the erosion of democracy. This view is shared by Polish

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184 Nissinen (n 130).


Prime Minister Matesz Morawiecki who argued that unanimity saves the EU against “the tyranny of the majority” and that “[m]oving away from the principle of unanimity brings us closer to a model in which the stronger and bigger dominate the weaker and smaller”. 188

In his usual annual speech in Transylvania in July 2022, Hungarian Prime Minister Viktor Orbán also criticised the potential move from unanimity to QMV in CFSP matters. Like the Polish PM, he linked this move to “imperialism” and argued that: “we can see the danger posed by the [EU]’s proposal to change the system of foreign policy decision-making for the Member States […]. Hungary’s historical experience tells us that if a country is forced to adopt a foreign policy that it does not want, even if that policy needs to gain two-thirds of the votes in the EU, then quite simply the name for this is imperialism. And the argument that only in this way can Europe become a world political player is, once again, a sleight of hand. The reason that Europe cannot become a world political player is that it cannot keep its own house in order, it cannot keep order in its own backyard. The best example of this is the Russo-Ukrainian war. […] The aim should not be to become a world political player. It should be enough for our ambition to be that the EU is able to defend its own borders; but it cannot, and poor Salvini – who tried to do so – is being taken to court, and there are those who want to imprison him. Or there is EU enlargement in the Balkans: Greece is a member of the EU, Hungary is a member of the EU, but between us there is a big black hole, the Balkans. For geopolitical and economic reasons, the EU should be bringing others into its own world, but it is unable to do so. So, Europe should not be aspiring to a role in world politics but should be setting and achieving the modest goal of being able to settle foreign policy issues arising in its own backyard”. 189

That Hungarian position was reinforced by Minister for Justice of Hungary Judit Varga who, upon her arrival at the General Affairs Council of 20 September 2022, said that: “[the Hungarians] want to protect and safeguard the unanimity procedure as it is in the Treaties. So, Hungary is not supporting the deletion of the unanimity procedure. Actually, we are striving to draw the attention the culture of consensus. […] there are not vetoes in the Treaties, there is only the culture of consensus in the Treaties. So, every Member State’s serious and vital interests should be taken into account when we are sitting at the negotiating table” (authors’ own translation). 190

It should be underlined that not only certain Central European Member States are opposed to the idea of QMV in CFSP matters. A research project currently being finalised within the framework of the H2020 ENGAGE project 191 highlights, based on interviews made with officials and policymakers working for 14 different EU Member States, that France, for instance, believes that legal technicalities are not the solution to the problem of the CFSP. Instead, France emphasises the strengthening of a common strategic culture as a better way to overcome potential blockages. Other states, such as Cyprus or Greece, are in general not in favour of “normalising” QMV in CFSP matters because the requirement of unanimity guarantees that their interests are not simply overlooked. Greece, however, is more open to use the passerelle clause in certain areas of the CFSP. Based on that ENGAGE research, Belgium, Estonia,

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191 https://www.engage-eu.eu/
Finland, Germany, Ireland, Italy, Slovakia, and Spain would be, partly or completely, open to consider the broader use of the QMV in CFSP context.\(^{192}\)

These statements underline that the political landscape is uneven and that a clear consensus on the direction to take is lacking, despite the recent statements by the Commission and some EU Member State leaders. It will be important to acknowledge these differences in assessing the assorted options to make CFSP more effective.

### 4.4.4. Current legal possibilities to use QMV in CFSP matters (Article 31(2) TEU)

Even though unanimity is the default rule in CFSP matters, it is often forgotten that QMV is already an option. In fact, the Lisbon Treaty – apart from the passerelle clauses – offers four possibilities to switch from unanimity to QMV within the CFSP framework. The table below summarises the legal bases of these four options, offers an explanation to them and shows whether they have been used or not.

<table>
<thead>
<tr>
<th>Treaty provision</th>
<th>Explanation</th>
<th>Old or new provision?</th>
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<tr>
<td>&quot;when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union’s strategic interests and objectives, as referred to in Article 22(1)&quot; (Art. 31(2) TEU first indent)</td>
<td>This provision offers the European Council the possibility to adopt a unanimous Decision, setting out the EU's strategic interests and objectives in one or more specific areas of CFSP. Once the European Council sets the strategic objectives and principles of the envisaged action or position, the Council would then adopt by qualified majority all decisions implementing the European Council's strategic decisions.</td>
<td>In substance, this option was available in a pre-Lisbon context where the (old) TEU provided that legal acts implementing a common strategy adopted by the EU CO could be adopted by QMV. Until today, there has been one case when such decision was made: in 1999, the Council established the EU Cooperation Programme for Non-proliferation and Disarmament in response to the EU Common Strategy on Russia. Although common strategies no longer exist, the European Council can now adopt decisions on the EU’s strategic interests whose implementation by the Council could be adopted by QMV. This has not happened</td>
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\(^{192}\) Vladislava Gubalova and et al., ‘Analysing Political Acceptability of Reforms among National Policymakers’.

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<th><strong>“when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative” (Art. 31(2) TEU second indent)</strong></th>
<th>This provision allows the European Council (either on its own initiative or further to a proposal by the High Representative) to unanimously request the High Representative to submit a proposal to the Council for a decision defining a Union action or position. In such cases, the Council would decide by qualified majority. The potential content of such request of the European Council is not defined in the Treaties and could thus encompass all areas of Common Foreign and Security Policy.</th>
<th>This is one of the innovations of the Lisbon Treaty but has never been used.</th>
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<tr>
<td><strong>“when adopting any decision implementing a decision defining a Union action or position” (Art. 31(2) TEU third indent)</strong></td>
<td>This concerns the situation following the adoption by the Council of an initial action or position by unanimity, it would adopt all further implementing decisions by qualified majority.</td>
<td>Existed before Lisbon. In practice, the Council regularly adopts implementing decisions in the context of the CFSP, especially in the field of sanctions on the basis of Article 31(2) TEU. Approximately 30 percent of all CFSP decisions are based on this provision to amend existing EU sanctions regimes.</td>
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<tr>
<td><strong>“when appointing a special representative in accordance</strong></td>
<td>The special representatives have a mandate in relation to particular Common Foreign and Security Policy issues. Qualified majority has worked well in practice leading to speedy decisions, without</td>
<td>Existed before Lisbon.</td>
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The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting

with Article 33* (Art. 31(2) TEU fourth indent) even having to resort to formal voting. As in other areas of qualified majority decision-making, the appointment of special representatives has always been decided by consensus.

QMV is indeed being used in CFSP matters, at least some of these options have already been triggered. A recent study found that approximately half of CFSP decisions (47 percent) are based on Article 29 TEU which is the legal basis for establishing a sanctions regime with unanimous support. However, another around 30 percent of CFSP decisions are based on Article 31 (2) TEU which is mostly used to amend existing sanctions regimes by QMV. ¹⁹⁵

Even if QMV is allowed to a limited extent, the CFSP is the only policy area in which the Member States can invoke the “Luxembourg compromise”. This old compromise from the 1960s allows the Member State concerned, based on Article 31(2) TEU, to oppose the adoption of a (CFSP) decision to be taken by QMV if that act would go against its “vital and stated” national interests. In the field of the CFSP, this provision already existed in the Treaty of Amsterdam and the Treaty of Nice. However, the current emergency brake is different from its previous versions. First, the provision now refers to “vital and stated” rather than “important and stated” reasons of national policy which implies a higher bar for the use of the emergency brake. Second, it provides for a clearer procedure concerning the role of the HR/VP who shall search for a solution in close consultation with the Member State concerned and in case of failure, the Council by QMV can refer the matter to the European Council for a unanimous decision. ¹⁹⁶

4.4.5. Even more QMV options? The special CFSP passerelle clause (Article 31(3) TEU)

Apart from the above-mentioned QMV possibilities, the Treaties offer the possibility to use QMV in fields other than the above-mentioned cases. Article 31(3) TEU provides that the “European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to [in section 4.5.4 of this paper]. As can be seen, the activation of this provision is subject to a unanimous agreement at the highest political level. This provision has never been activated but since the entry into force of the Lisbon Treaty there have been several discussions on its potential activation, especially in the last couple of weeks.

Already in 2014, the EP launched an own-initiative procedure that resulted in its resolution of February 2017 “Improving the functioning of the [EU] building on the potential of the Lisbon Treaty”. The

¹⁹⁴ Article 33 TEU provides: “The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative”.

¹⁹⁵ Wessel and others (n 27).

resolution noted that Treaty provisions “have not yet been exploited to their full potential, and this resolution aims only to provide an assessment of the legal possibilities in the Treaties for improving the functioning of the EU”. It called on the European Council to make use of the _passerelle_ clause under article 48(7) TEU authorising the Council to switch from unanimity to QMV where the Treaties require unanimity. It also called on the Council to activate the special _passerelle_ clause under Article 333 TFEU to switch from unanimity to QMV and from a special to the ordinary legislative procedure. In the area of the CFSP, it called on the Council to use Article 31(2) TEU and the use of the special CFSP _passerelle_ clause under Article 31(3) TEU.197

The use of _passerelle_ clauses was also raised when the new Commission came into office. Commission President Ursula von der Leyen famously argued that she would lead a “geopolitical Commission”198 that largely refers to a more strategic, more assertive and more united EU. In her mission letter to HR/VP Josep Borrell, Ursula von der Leyen explicitly tasked the HR/VP to search for solutions to overcome the problem of unanimity in CFSP and called on the HR/VP, when submitting CFSP proposals, “to use the clauses in the Treaties that allow certain decisions on the [CFSP] to be adopted by [QMV].199

Since 2021, the use of the special CFSP _passerelle_ clause has regained momentum. In particular, there is now a consensus between the Member States that the outcome of the Conference on the Future of Europe needs to be followed-up, but there is a little appetite for Treaty change. However, German Minister of State Anna Lührmann is confident that dynamics in the coming months in the Council may lead to the use of the _passerelle_ clause.200

In September 2022, EU affairs ministers held a first discussion in the GAC to activate the _passerelle_ clause, especially in the field of foreign and security policy. During the GAC meeting, different views were presented on the potential (further) use of QMV. Most of the EU Member States were open to consider using the _passerelle_ clauses in certain fields, on a case-by-case basis. Several others asked for more time to consider the move from unanimity to QMV.201 That is a slight change compared to the “2019 status quo” when only seven Member States supported to use of QMV via the _passerelle_ clause.202

During the September 2022 GAC meeting, Swedish minister for European affairs Hans Dahlgren said that “there were some very hesitant voices […] but did not hear anybody who slammed the door”.203 During the GAC meeting, the intention of the Czech Council presidency was to overview the state of play on the CoFE and in particular to examine the viability of using the _passerelle_ clauses to switch from unanimity to QMV. Minister for European Affairs of the Czech Republic Mikuláš Bek said after the GAC meeting that, on the one hand, unanimity was referred to as an advantage because it makes the Union

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stronger but, on the other hand, Minister Bek emphasised that other Member States were open to QMV in selected policy areas.\footnote{Mikuláš Bek, ‘Press Conference - Part 1’ (2022) https://newsroom.consilium.europa.eu/events/20220920-general-affairs-council-september-2022/136684-1-press-conference-part-1-20220920 accessed 21 September 2022.} More importantly, Minister Bek referred to a possible package deal that could result in the possible activation of the passerelle clause. In particular, he argued that "some of the former strong opponents of QMV are simultaneously strong proponents of the enlargement"\footnote{Mikuláš Bek, ‘Press Conference - Part 4 (Q&A)’ (2022) https://newsroom.consilium.europa.eu/events/20220920-general-affairs-council-september-2022/136684-4-press-conference-part-4-q-a-20220920 accessed 21 September 2022.} probably referring, among others, to Hungary. Minister Bek also referred to the speech by Bundeskanzler Olaf Scholz in Prague at Charles University and, partly based on that, suggested that there is a connection between the enlargement and possible changes. Therefore, he proposed not to take the issue of decision-making separately from other EU issues but to look at the current issues together, including EU electoral law, a transnational list, enlargement, the further integration of Ukraine into the Single Market, etc. and to have a compromise on all of these issues in a package deal. As Minister Bek said, "if we try to identify an attractive set of items, there is some hope, then we can make some limited progress under the Czech Presidency [in the use of QMV]"\footnote{ibid.}. According to a list compiled by MEP Daniel Freund (Greens/European Free Alliance), 10 Member States support the use of the passerelle clause, 8 Member States are against while 9 are silent on the issue.\footnote{Freund Daniel, ‘Scraping national vetoes in EU-politics’ (Twitter, 2022) https://twitter.com/daniel_freund/status/1575426845360766981 accessed 30 September 2022.}

However, some Member States, in particular Hungary, have been reluctant to accept such proposals. For instance, in October 2022 Hungarian Prime Minister Viktor Orbán and German Chancellor Olaf Scholz held a bilateral discussion in Berlin. Although the two sides have not shared publicly the issues they discussed, Prime Minister Orbán later said, in a conversation with editors at Cicero and the Berliner Zeitung, that the issue of QMV was raised by the German Chancellor. Prime Minister Orbán said, "You [Germans] are proposing to change unanimity in foreign policy […] Now that the British have left [the EU], we Central European countries have no power to organise any blocking minority against a majority decision. The only way I can implement and protect Hungary’s foreign policy interest is to include us in the discourse because there is no common foreign policy without us. Now the Germans are suggesting that we give this up. Now, I can understand if this is raised by a medium-sized country. But Germany which is [already] putting pressure on the entire European politics? So, should not Germany be a little more careful with such proposals? Because what do we see from this? That Germans want to decide on foreign policy matters. This is not good".\footnote{Author’s own translation from the Hungarian version available on the PM’s official website. Viktor Orbán, ‘Panelbeszélgetés a ,,Cicero” Című Németországi Hav láp Vezetőivel’ (2022) https://miniszterelnok.hu/orban-viktor-panelbeszazelgetese-a-cicero-cimu-nemetorszagi-havlap-vezetoivel/ accessed 14 October 2022.}

Despite the sensitive nature of the topic, it can be argued that the active discussions on the use of the passerelle clauses is already a success. In the past, a discussion at the highest political level would have been unimaginable. The issue of QMV in CFSP matters will likely need more time to sort out a compromise and possibly a package deal on the issue may enhance the negotiations. In late 2022 or early 2023, there may be further developments in that regard.

Finally, it is also worth noting the difference between Articles 48(7) and 31(3) TEU. Both provisions have the same intention, namely, to allow for a relatively easy change of the voting procedures. They are even largely saying the same thing. While Article 48(7) TEU provides for “the European Council [to]
adopt a decision authorising the Council to act by a qualified majority”, Article 31(3), as we have seen, allows “the European Council [to] unanimously adopt a decision stipulating that the Council shall act by a qualified majority”, thus deciding on additional exceptions to the unanimity rule in CFSP. In a substantive sense, there is no difference, despite the fact that the two provisions for some reasons are worded differently. Yet, Article 48(7) is much longer and suddenly adds additional criteria. First, “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.” And second, 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.”. These conditions are not mentioned in the specific CFSP passerelle clause in Article 31(3). Apart from a perhaps erroneous mistake in the Treaty text, the solution to this inconsistency could be that Article 48(7) – aims to stay close to the ordinary treaty revision procedure by involving the European Parliament and the national parliaments. In light of the specific passerelle clause in Article 31(3) it should perhaps be read as not including that particular CFSP situation, despite the fact that it also refers to the CFSP part of the Treaty.

4.4.6. The advantages and challenges to extend QMV to CFSP matters

There are advantages of using QMV in CFSP. The first benefit is certainly its potential to react more quickly to a rapidly changing international environment. Trade policy could be an example in case where QMV has been widely used. A common experience is that if the interests of the Member States have significantly diverged, they have usually taken a decision by consensus.209 Another advantage could be to counter the potential external influence on individual EU Member States whose relationship with third states may compromise EU foreign policy decisions. These third countries can exploit friendly bilateral relationships with some EU Member States and prevent the EU from acting at the international level. QMV is certainly not a panacea for EU foreign policy as such, but it would combat the divide and conquer tactics employed by our/its adversaries.210

There are a number of potential disadvantages. The first difficulty may be that not only formal but also informal forms of CFSP negotiations change, including practices of consensus-building, taking everyone on board, not being a ‘trouble-maker’ or justifying one’s position. These practices have existed since the establishment of the EPC in the early 1970s and they would need to change if QMV is introduced: negotiations would then take place “under the shadow of QMV” without a need to “keep everyone on board”. A recent non-CFSP example where QMV was applied against the will of all Member States was the Council Decision on the refugee relocation quotas which resulted in non-implementation of EU law by some of the Member States and proceedings before the Court on that Relocation Decision. Another disadvantage is that the (wider) use of QMV may easily decrease the ownership of this policy by the Member States. Even today, without the wider use of QMV, small Member States complained that they are not listened enough in the Council, and it would be difficult to imagine a policy on Russia without the Baltic states or a policy on Cuba without Spain.211

209 Pomorska and Wessel (n 142) 354; Lațici (n 129) 5.
210 Lațici (n 129) 5.
211 Pomorska and Wessel (n 142) 354–355.
Along similar lines, the argument could be made that decisions that are not supported by all Member States may not contribute to the Union's effectiveness. After all, it would be easy for third states to point to the fact that there was not even agreement among the EU Member States. Indeed, in general there is a clear risk that the introduction of more QMV would affect the 'common' nature of CFSP. At the same time, this question is not raised in relation to for instance the Common Commercial Policy or the Common Agricultural Policy, where – irrespective of the voting outcome – decisions are perceived as Union decisions. While it is difficult to maintain that non-CFSP decisions affect the Member State's sovereignty less than CFSP decisions, the general perception still seems to be that CFSP is indeed a more 'sensitive' area.

From a practical legal perspective, if QMV is introduced in CFSP context and a particular Member State does not comply with a CFSP decision, the question in any case arises what the Union can do with that non-compliance. In particular, the Court has a limited role in the CFSP context, and the Commission cannot launch infringement proceedings against the Member States in this policy domain. In other words, there is no 'legal route' to potentially enforce certain CFSP decision in case a Member State decides not to comply with certain decisions. This does not mean that enforcement completely lacks from CFSP context but that it should be exercised in a more political way.

Therefore, unanimity has advantages: the participation of EU Member States is easier given that everybody knows that no outvoting will take place and, second, the implementation will be easier if CFSP decisions have been supported by all Member States.212

This does not mean that nothing is possible under the current Treaty framework. As discussed, for instance, the Union can activate the already existing QMV options under Article 31(2), it can use the special CFSP passerelle clause under Article 31(3) TEU and it can even use some TFEU legal bases to pursue wider CFSP objectives.

4.5. Enhanced cooperation in CFSP matters

Even if negotiations are conducted in good faith and with good intentions, there are some situations where EU Member States simply cannot compromise. In those cases, one viable way out could be the launch of the so-called enhanced cooperation where a group of Member States can implement policies that others see less beneficial. As the Rome Declaration of 2017 stated: "[w]e will act together, at different paces and intensity where necessary, while moving in the same direction, as we have done in the past, in line with the Treaties and keeping the door open to those who want to join later. Our Union is undivided and indivisible".213

Pre-Lisbon, enhanced cooperation in CFSP matters only enabled the implementation of already implemented policies by a group of Member States.214 The Lisbon Treaty has reformed its scope and

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212 Wessel and Böttner (n 111).
214 This section is largely based on Szép V and Wessel RA, 'Mapping the Current Legal Basis and Governance Structures of the EU’s CFSP' [https://static1.squarespace.com/static/604251cac817d1235cbfe98d/t/620f82c7ad293c1bd9294256/1645183692089/ENGAGE+Working+Paper+5_Mapping+the+Current+Legal+Basis+and+Governance+Structures+of+the+EU%E2%80%99s+CFSP_v2.pdf](https://static1.squarespace.com/static/604251cac817d1235cbfe98d/t/620f82c7ad293c1bd9294256/1645183692089/ENGAGE+Working+Paper+5_Mapping+the+Current+Legal+Basis+and+Governance+Structures+of+the+EU%E2%80%99s+CFSP_v2.pdf)
enhanced cooperation can also be used to establish a new line of policy in CFSP (not merely an implementation of already implemented policy) and covers military and defence issues as well. The aim of enhanced cooperation “[i]s to further the objectives of the Union, protect its interests and reinforce its integration process” (Article 20(1) TEU). With regard to its initiation, on the one hand, the Treaties continue to require a minimum number of Member States (one-third) to be involved; on the other hand, the procedure for authorising enhanced cooperation has been tightened in CFSP given the requirement of unanimity in the Council (Article 329(2) TFEU). In the field of CFSP, requests to establish enhanced cooperation should be addressed to the Council. This request is forwarded to the HR, who gives an opinion on whether the proposal is consistent with the EU’s CFSP, and to the Commission, which examines whether the proposal is consistent with other Union policies. The EP is merely informed. Enhanced cooperation should be open to all Member States, but their admission will be ‘subject to compliance with any conditions of participation laid down by the authorising decision’ (Article 328(1) TFEU).

The Treaty of Lisbon has opened the possibility to use enhanced cooperation as a procedural passerelle. The Treaty provides that “where a provision […] which may be applied in the context of enhanced cooperation stipulates that the Council shall act unanimously, the Council, acting unanimously […], may adopt a decision stipulating that it will act by a qualified majority” (Article 333(1) TFEU). Similarly, where the Council shall adopt acts under a special legislative procedure, the Council, acting unanimously, can adopt a decision stipulating that it will act under the ordinary legislative procedure (Article 333(2) TFEU). These paragraphs cannot apply to decisions having military or defence implications (Article 333(3) TFEU).

Later participation is possible and should be notified to the Council, the HR and the Commission. The new member is expected to fulfil certain conditions and, in certain cases, to adopt certain transnational measures. The Council acts unanimously in its enhanced cooperation format. Acts adopted within the enhanced cooperation format only bind the participating Member States, but non-participants are under obligation not to impede the implementation of the acts adopted within the framework of enhanced cooperation. Thus, in areas covered by enhanced cooperation, non-participants may have restricted possibilities to take autonomous actions. In the area of EU defense, there are some developments in that regard. Permanent Structured Cooperation (PESCO) is a form of enhanced cooperation which has become a crucial element in the gradual implementation of the CSDP since its activation in 2017.

One of the reasons why enhanced cooperation has not yet been activated in the EU’s CFSP may be that differentiated integration, although without necessarily relying on specific Treaty legal bases, has been the norm in this policy field. In fact, the current EU legal framework, discussed mainly in sections 3 and 4, allows Member States to act outside the EU framework under certain conditions. Regional groups (e.g., Benelux, Nordic or Visegrad countries), ad hoc contract groups or lead groups (e.g., E3 on Iran or the Normandy format in Ukraine) may take joint measures to tackle international issues.

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216 Ibid.

217 Ibid.
5. RECOMMENDATIONS

As this report has outlined, the European Council and the Council are in a dominant position in CFSP context. Therefore, part of our recommendations covers actions that can be triggered by these institutions. However, other parts of our recommendations also cover areas where Parliament could be a more prominent actor in promoting QMV in CFSP-related matters and perhaps even become a player in the shaping of EU external action.

1. **Use already existing QMV possibilities under Article 31(2) TEU**

While some of the QMV possibilities are already being used in CFSP context, especially when the Council modifies existing EU sanctions regimes or when it appoints Special Representatives, the Council can still activate more QMV possibilities under Article 31(2) TEU. In fact, in 2020 the European Commission and the HR/VP have already tried to trigger these yet unused QMV possibilities when they recommended the adoption of a European Council Decision identifying the strategic interests and objectives of the Union through the EU Action Plan on Human Rights and Democracy for the period of 2020-2024. However, the paradoxical situation is that unlocking unanimity in that matter requires a unanimous decision in the European Council. If it had been adopted, the Council could have adopted e.g. human rights-related sanctions by QMV. In November 2020, however, EU Member States rejected the use of QMV to implement the Action Plan. Therefore, activating those provisions is certainly not an easy task but by building a broad coalition of Member States, the HR/VP and the Commission might still attempt to encourage Member States to use already existing QMV options to advance the Union’s interests.

2. **Use the special CFSP passerelle clause under Article 31(3) TEU to move from unanimity to QMV in certain areas of the CFSP**

In case EU Member States do not wish to activate already existing QMV options under Article 31(2) TEU, the Union may still have the possibility to deviate from the requirement of unanimity. Indeed, the special CFSP passerelle clause under Article 31(3) TEU allows the European Council to unanimously adopt a decision stipulating that the Council shall act by QMV in cases other than the already existing, but mostly underused, QMV possibilities in CFSP context. The activation of that provision is currently being under serious discussion in the General Affairs Council, especially after the end of the CoFE which recommended to use QMV in almost all areas of EU policymaking. **The current Czech Presidency (from 1 July to 31 December 2022) aims to forge a compromise between EU affairs ministers to activate that passerelle clause.** Although most of the Member States are more or less open to activate that provision, discussions are not expected to conclude before the end of 2022/early 2023. A way out of the negotiations may be the adoption of a “package deal” where the unwilling group of Member States is offered a kind of policy advantage in return to use QMV in some areas of the CFSP. Another related potential solution could be to use “super QMV”, as advocated by HR/VP Borrell, where the threshold of adopting a decision could be higher than 55% of the Member States.
3. **Use constructive abstention under Article 31(1) TEU**

The use of constructive abstention in CFSP matters could qualify as the second-best option apart from using QMV. Although full harmony is not realised in case of abstention, the Union as such is not prevented from adopting a CFSP decision. At the same time, the Member State will not lose face back home as it did not vote in favour of a particular decision. Until the 24th of February 2022, this option was only invoked once. However, since Russia’s war in Ukraine it has been triggered two additional times by four Member States. In the future, it can also offer a way out of deadlocks because the Member State(s) triggering constructive abstention are not under legal obligation to implement the concerning CFSP decision but other Member States – and thus the Union – still has the possibility to move forward. In addition, although the Member States abstained do not need to implement that CFSP decision, they cannot adopt national policies that would go against the Union’s position.

4. **Use enhanced cooperation in CFSP matters**

In the history of EU integration, differentiation has almost always existed. It means that some willing Member States may decide to move forward in certain EU policy issues whereas others have the possibility to stick to the status quo. In CFSP matters, one of the innovations of the Lisbon Treaty is that enhanced cooperation can now be used to establish a new line of policy (not merely an implementation of already implemented policy). Enhanced cooperation has not been activated in CFSP matters but it can offer a solution to a group of willing Member States to move forward certain CFSP issues. The downside is of course that the Union may become too fragmented which may be in stark contrast with the objective of creating a common foreign and security policy. In the area of EU defense, there are some developments in that regard. PESCO is a form of enhanced cooperation that has become a crucial element in the gradual implementation of the CSDP since its activation in 2017.

5. **Use exemptions in EU sanctions policy**

Another form of differentiation, especially in the field of EU sanctions policy, is the use of exemptions. It is certainly not ideal to grant exemptions to the Member States to deviate from EU sanctions regimes because to some extent they create a more fragmented Union. However, exemptions allow the Union to adopt sanctions that otherwise would be impossible to implement by a group of Member States. As the sanctions against Russia have demonstrated, it is not always feasible to convince 27 Member States to adopt every single restrictive measure. In particular, the oil ban against Russia has proved to be a contentious issue where the Union granted exemptions to some Member States to alleviate their concerns on the impact of oil ban on their economies. Thus, where quick Union actions are needed, exemptions may be a way out from deadlocks.

6. **Whenever possible, use non-CFSP legal bases, especially EU trade legal bases, to pursue CFSP objectives**

In the last couple of years, the EU has increasingly adopted trade measures that have explicitly pursued wider foreign and security policy objectives. This includes, for instance, the Anti-Coercion Instrument, the new framework for the screening of foreign direct investments, the Anti-Torture Regulation or the
Forced Labour Legislation. From a procedural perspective, one of the advantages of these instruments is that they all have TFEU (trade) legal bases which require the Union to adopt legislations with ordinary legislative procedure involving QMV in the Council and full participation of the EP. In that way, not only is a more effective decision-making guaranteed in the Council but Parliament, as the only directly elected EU institution, can further enhance the legitimacy of these instruments. In addition, in these cases, the EU relies on its trade clout which has traditionally been described as its most impactful tool related to external action.

7. Keep QMV on the EU’s political agenda by using already existing EP competences under Article 36 TEU

Traditionally, Parliament has been sidelined in CFSP/CSDP matters. However, Parliament can use its competences under Article 36 TEU to scrutinise EU executives and can hold accountable them for their (non-)actions in CFSP matters. Having debates in Parliament that are open and accessible for the public is particularly important in CFSP where most, if not all, discussions take place behind closed doors. This is where Parliament’s essential role comes into play: it has the ability to provide forum for foreign policy debates where EU executives are forced to explain their positions. That power should not be neglected. After all, Parliament can cause uncomfortable moments for EU executives who, seeking for their re-election, must explain their policy choices in a public setting in CFSP/CSDP matters. These public sessions could be used to keep the issue of QMV on the EU’s political agenda. The EP can also team up with the Members of national Parliaments who are not only able to pressure their own governments at local level but can also cooperate with MEPs in different settings, in particular in the inter-parliamentary conferences for the CFSP/CSDP and in the interparliamentary committee meetings in the EP AFET Committee. In these sessions, parliamentarians can further ask questions from the HR/VP or the Council Presidency.

8. Initiate Treaty amendments to change EU decision-making rules

Parliament can also submit proposals to amend EU Treaties, as it did in June 2022, which can also relate to EU decision-making rules. Some of the EP proposals concern the shift from unanimity to “super QMV” under point (b) of Article 238(3) TFEU in the activation of the general passerelle clause under Article 48(7) TEU. While that could indeed be done, ordinary treaty revision also makes it possible to open other parts of the Treaties. That could include revising CFSP decision-making rules and move certain CFSP actions under QMV rules. However, experience shows that such process certainly cannot be carried out overnight and usually involves a long bargaining process between the Member States.
6. CONCLUSIONS

The aim of this study was to assess ‘The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting’. It is clear that the use of QMV in the context of CFSP has gained momentum. This report has first of all revealed that the current legislative framework allows for a number of decision-making procedures that are clearly under-used. These include not only the possibility of ad hoc constructive abstention in CFSP – allowing for CFSP decisions to be adopted, even when a limited number of Member States are not in favour – but also the more structural solution to use the available passerelle clauses to allow for a smoother decision-making in indicated sub-areas of foreign policy. We have also analysed the possibilities to more frequently use enhanced cooperation, to allow a smaller group of Member States to go ahead or, to make use of the strong links that exist between CFSP and other external policy areas, such as trade. In fact, many external policy decisions are taken on the basis of the TFEU QMV decision-making procedures, despite a link with foreign policy.

While account must be taken of Article 40 TEU to prevent a misuse of TFEU procedures to side-step CFSP unanimity, the current Treaty deliberately combines the various (CFSP and other) external objectives in a single provision. In its recent case law, the Court of Justice has also become aware of its role to provide judicial protection across the board despite a potential CFSP context of a decision or situation.

Furthermore, we have assessed options that would require a reform of the Treaties. Even though Treaty modification has become less of a taboo issue now that it has often been mentioned by the Commission, Parliament, and several Member States, the complexities of this route will have to be considered. The ‘pandora’s box’ argument has some truth in it; yet it should not block essential changes that would allow the Union to face the current challenges. The European Parliament’s proposals to add the adoption of a restrictive measure to the list of exceptions to CFSP unanimity deserve serious consideration. The latter situation where the adoption of a restrictive measure with economic consequences combines unanimity with QMV is indeed quite strange and seems to originate from a political compromise, rather than from proper legal design.

Overall, this report is optimistic about the legal possibilities to improve CFSP decision-making. Our list of recommendation indicates the points to focus on in further (inter-institutional) discussions on this topic.
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