

# The Procedures Leading to the Adoption of Decisions in the CFSP Area – Art. 31 TEU

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## Article 31 [procedures leading to the adoption of CFSP decisions] (ex-Art. 23 TEU)

**1. Decisions under this Chapter shall be taken by the European Council and the Council acting unanimously,<sup>7-12</sup> except where this Chapter provides otherwise.<sup>29-37</sup> The adoption of legislative acts shall be excluded.<sup>13, 15</sup>**

When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph.<sup>16</sup> 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.<sup>17, 18</sup> 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.<sup>19, 20</sup>

**2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:<sup>29-31</sup>**

- 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),<sup>32</sup>
- 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,<sup>33</sup>
- when adopting any decision implementing a decision defining a Union action or position,<sup>34</sup>
- when appointing a special representative in accordance with Article 33.<sup>35</sup>

If a member of the Council declares that, for vital and stated reasons of national policy,<sup>38, 39</sup> it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.<sup>40</sup>

**3. 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 paragraph 2.<sup>44-47</sup>**

**4. Paragraphs 2 and 3 shall not apply to decisions having military or defence implications.<sup>50-53</sup>**

**5. For procedural questions,<sup>56-59</sup> the Council shall act by a majority of its members.<sup>60</sup>**

1. Overview .....	1
2. Unanimity or qualified majority voting (paragraph 1) .....	2-21
2.1. Genesis.....	2-6
2.2. Unanimity as the default rule (subparagraph 1) .....	7-14
2.3. Constructive abstention (subparagraph 2) .....	16-21
3. Qualified majority voting under CFSP (paragraph 2).....	22-41
3.1. Genesis.....	22-28
3.2. Exceptions to unanimity (subparagraph 1).....	29-37
3.3. “Emergency brake” (subparagraph 2) .....	38-41
4. Qualified majority voting on the basis of a European Council decision: a <i>passerelle</i> ? (paragraph 3) .....	42-47
4.1. Genesis.....	42, 43
4.2. Notion .....	44-47
5. Decisions having military or defence implications (paragraph 4) .....	48-53
5.1. Genesis.....	48, 49
5.2. Notion .....	50-53
6. Procedural questions (paragraph 5) .....	54-60
6.1. Genesis.....	54, 55
6.2. Notion .....	56-60
7. Assessment.....	61-63

## 1. Overview

- 1 Art. 31 TEU contains the different **decision-making rules and procedures in CFSP** matters. These include CSDP issues, as CSDP shall be an integral part of CFSP (Art. 41.1 TEU). Due to the impact of foreign and security policy on domestic sovereignty, the provision sets the default rules to unanimity. However, a number of exceptions, i.e. where qualified majority voting applies, has been inserted, even though national interests are protected by “constructive abstention” (→ para 15 et seqq.) and the “emergency brake” (→ para 37 et seqq.). The introduction of the passerelle or bridging clause in paragraph 3 may be the most controversial novelty (→ para 43 et seqq.).

## 2. Unanimity or qualified majority voting (paragraph 1)

### 2.1. Genesis

- 2 The original Art. J.8.2 **TEU-Maastricht** stated: “The Council shall act unanimously, except for procedural questions and in the case referred to in Article J.3(2).” This is not to say that majority voting has not been debated. The Rome II European Council meeting in 1990 decided that it wished to include a provision which would allow for decision-making despite the non-participation or abstention of some MS.<sup>1</sup> However, this idea led not to a referencing of the provision on qualified majority voting (QMV) in the EC Treaty, but rather to Declaration No. 27, adopted by the IGC, which provided that “with regard to Council decisions requiring unanimity, Member States will, to the extent possible, avoid preventing a unanimous decision where a qualified majority exists in favour of that decision”.<sup>2</sup> MS under the Maastricht provisions indeed seemed to have an obligation to explain why the use of a qualified majority would not be possible in a certain case, but the Declaration could never be used to overrule the provision in Art. J.8 TEU-Maastricht. Nevertheless, it is generally assumed that the possibility of QMV has never been used in practice and that unanimity was at the basis of the cooperation.
- 3 The slow progress of CFSP in the early days was partly blamed on the fact that, because of the unanimity rule, a single MS could hijack the entire decision-making process. The 1997 **Treaty of Amsterdam** therefore introduced the possibility of abstentions, which would allow for decisions to be taken even if not all MS would vote in favour. Art. 23.1 TEU-Amsterdam stated: “Decisions under this Title shall be taken by the Council acting unanimously. Abstentions by members present in person or represented shall not prevent the adoption of such decisions.”
- 4 This was the general rule: decisions could (and can) be adopted when there are no explicit “No” votes. The Treaty text suggests that in those cases even MS that abstained from voting would be bound by the adopted decision. Art. 23 TEU-Amsterdam also introduced a different possibility that would prevent MS from being bound by the decision: **constructive abstention** (→ para 15 et seqq.).
- 5 The 2005 **Constitutional Treaty** maintained both the unanimity and the abstention rules in Art. III-300.3 TCE with minor changes in terminology only. The general rule that “[a]bstentions by members present in person or represented shall not prevent the adoption by the Council of acts which require unanimity” was no longer referred to in the CFSP provisions, but returned in Art. III-343.3 TCE (now Art. 238.4 TFEU).
- 6 The revision of the Constitutional Treaty that eventually led to the **Treaty of Lisbon** has introduced one major novelty. Besides the Council, Art. 31 also applies to the European

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<sup>1</sup> See European Council, Presidency Conclusions, Rome, 1990.

<sup>2</sup> A similar provision was already included in Art. 30.3 lit. c SEA. It is striking that this provision was “reduced” to a Declaration.

Council as a consequence of the latter's becoming a Union institution (Art. 13.1 TEU; → Art. 13 para ...). Thus **unanimity** is still the rule, which stands in stark contrast to the other EU policies where QMV has been established as the default voting rule. German and French proposals to make QMV the default option were not successful.<sup>3</sup> Furthermore, the adoption of legislative acts shall be excluded.

## 2.2. Unanimity as the default rule (subparagraph 1)

- 7 In general, **decision-making procedures of international organisations** include rules on which number of affirmative positions of participants is needed to allow a decision to be adopted. The most common forms are “consensus”, “unanimity” and “majority voting”. “Consensus” literally means “common feeling” or “concurrence of feelings” and has most often been defined in a negative way: for example: “[...] if no member, present at the meeting where the decision is taken, formally objects to the proposed decision”.<sup>4</sup>
- Decision-making procedures may also include “**voting**”. “Unanimity” implies that all votes should be affirmative in order for a decision to be taken. The disadvantage is obvious: granting each member a right of veto could in effect paralyse the decision-making process. However, unanimity also shows advantages: 1. Many States will participate more easily in an organisation, or policy field of an organisation, if they are sure they cannot be outvoted; 2. The implementation of decisions will be easier if these decisions have been supported by all MS.<sup>5</sup>
- 8 For the choice made in Art. 31.1 TEU, in line with Art. 24.1 (2) sentence 2 TEU (→ Art. 24 para ...), both reasons may have played a role. The general voting rules for the European Council and the Council can be found in Title III of the TEU on the institutions. Art. 15.4 TEU provides that decisions by the European Council shall be taken by consensus (→ Art. 15 para ...). Accordingly, the Council according to Art. 16.3 TEU shall act by a qualified majority (→ Art. 16 para ...). Both provisions, however, refer to exceptions to this rule in the Treaties: Art. 31.1 TEU for decisions “under this Chapter”, i.e. Chapter 2 of Title V on the CFSP (including CSDP). The default procedure has thus been set at “**unanimity**”. The unanimity rule is at the heart of the traditional “intergovernmental” image of CFSP. Indeed, it is safe to assume that the inclusion of CFSP in the Treaty of Maastricht was possible only because of the absence of majority voting, or more generally speaking, the inapplicability of the “Community method”. The current **exclusion of the “legislative procedure”** (→ para 13 ) reflects this original starting point.
- 9 Unanimity in CFSP does not mean that the affirmative votes of all MS are needed for the Council to be able to take a decision. Apart from voting in favour or against a decision, most international organisations provide for a third method of voting: **abstention**. In abstaining, a member participates in the voting but does not cast a vote. It thus indicates that it wished neither to support nor to reject the proposal. In modern international institutional law, **abstentions are usually recognised as not preventing unanimity**.<sup>6</sup> This is codified in the TFEU. Art. 235.1 (3) TFEU for the European Council and Art. 238.4 TFEU for the Council with the same wording state that “[a]bstentions [...] shall not prevent the adoption [...] of acts which require unanimity”. Note that the HR as chairperson of the Foreign Affairs Council does not take part in its votes (→ Art. 18 or 27). Thus, “consensus” suffices to take a decision, even in cases of “massive” abstention.<sup>7</sup>

<sup>3</sup> Amendments No. 6 (de Villepin) and No. 10 (Fischer), CONV 707/03 (9 May 2003), p. 60.

<sup>4</sup> WTO Agreement, Art. IX.1, note 1. Example borrowed from Schermers and Blokker 2003, p. 524.

<sup>5</sup> Schermers & Blokker 2003, p. 534.

<sup>6</sup> Schermers & Blokker 2003, p. 553.

<sup>7</sup> Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 14 et seqq.

- 10 Art. 31.1 TEU does not only allow members of the Council to abstain, but also introduces a specific procedure, according to which a MS may make a formal declaration, following which it is not obliged to apply the decision: **constructive abstention** (→ para 15 et seqq.).
- 11 Art. 31.1 TEU does, however, introduce a novelty in relation to the **actors involved in decision-making**. The explicit competence of the European Council to adopt CFSP decisions is new, although the pre-Lisbon TEU already allowed for the European Council to adopt “Common Strategies”. The new competences in Art. 31 TEU should be viewed, on the one hand, in line with Art. 13.1 and 15 TEU, i.e. the promotion of the European Council to a Union institution, and, on the other hand, within the context of Art. 22 TEU, which allows for the European Council to “identify the strategic interests and objectives of the Union” and to take decisions not only on these interests but also on the relations of the Union “with a specific country or region”.
- 12 A role for the European Council returns in Art. 26.1 TEU, which provides that it shall “identify the Union’s strategic interests, determine the objectives of and define general guidelines” for the CFSP and that it shall “adopt the necessary decisions” to that end.  
The last sentence in the Article seems to imply that the “**general guidelines**” are not to be seen as “decisions” (→ Art. 26 para ...). The practical relevance of that distinction is not clear, apart from the obvious fact that guidelines may not be adopted on the basis of **qualified majority voting** (→ para 21 et seqq.). They do seem to be binding on the MS as the **loyalty obligation** in Art. 24.3 TEU is not limited to “Decisions” (→ Art. 24 para ...). On the other hand, they do not seem to be able to function as a source of QMV in the Council, as Art. 31.2 TEU only refers to “a *decision* of the European Council”.
- 13 Another novel element in this provision is the explicit **exclusion of the adoption of “legislative acts”**. If anything, this element clearly distinguishes CFSP from the other Union policy areas in that it is more sensitive to national sovereignty. The Constitutional Treaty already excluded “European laws and framework laws” from the instruments to be used for CFSP, which could only be shaped on the basis of “European decisions” (Art. I-40.6 TCE). As can be concluded from the definition of “legislative acts” in Art. 289.3 TFEU, one can infer that only those “legal” acts that are adopted by (ordinary or specific) legislative procedure shall be excluded. Art. 31.1 TEU is an expression of the “specific procedures” for the CFSP foreseen in Art. 24.1 (2) TEU. Thus, the instruments for the CFSP are only those legal acts identified by Art. 25 TEU. The exclusion of “legislative acts” in Art. 31.1 (1) TEU is confirmed by Art. 24.1 (2) TEU, the latter, however, referring not to the taking of decisions but to the defining and implementing of the CFSP (→ Art. 24 para ...).
- 14 *P. Eeckhout* suggests a fundamentally different interpretation of the notion of the exclusion of legislative acts. According to him, the “straightforward reading” of this provision, as it is held also in this comment, “is difficult to justify in the light of the principle of effective Treaty interpretation”, as it would have been redundant to confirm – twice – that legislative acts should be excluded while it is clear from the TEU provisions already, that neither the ordinary nor a special legislative applies to CFSP.<sup>8</sup> He therefore suggests that “exclusion of legislative acts” should be read as meaning “exclusion of normative action producing legal effects in relation to third parties”, founding his criticism on two main arguments.

First, as the Union is founded on democratic principles (Art. 9-12 TEU), in particular representative democracy (Art. 10 TEU), *Eeckhout* holds that the exclusion of EP participation in the CFSP could not justify the creation of rights and obligations through normative acts. Democratic accountability would not be sufficient.<sup>9</sup> However, as citizens are represented at Union level by the EP directly and indirectly by the governments of the MS, themselves accountable to either the national Parliament or directly to the citizens (Art. 10.3 TEU; → Art. 10 para ...), there is a democratic link to CFSP legal acts. That it takes the by-

<sup>8</sup> Eeckhout 2011, p. 478.

<sup>9</sup> Eeckhout 2011, p. 479.

pass over national governments is due to the (still) intergovernmental character of the CFSP and of external action as a prerogative of the executive.

His second argument is based on the principle of the rule of law on which the Union is founded, Art. 2 TEU (and which reappears for external action as one of the “principles which have inspired [the EU’s] own creation, development and enlargement, and which it seeks to advance in the wider world, Art. 21.1 (1) TEU). With reference to the case law of the CJEU, this principle implies that “all acts of the institutions are subject to review as regards their conformity with the basic constitutional charter”<sup>10</sup> Therefore, the wide exclusion of CJEU jurisdiction over CFSP matters (Art. 24.1 (2) sentence 6 TEU)<sup>11</sup> could only be tolerable if general normative action would be excluded in the context of CFSP.<sup>12</sup> He concludes that, despite the jurisdiction of the CJEU over “restrictive measures against natural or legal persons” in the context of the CFSP, This may not be read as giving the competence to adopt normative acts, which may only be adopted under the TFEU.<sup>13</sup>

Nevertheless, although *Eeckhout*’s points at some very crucial issues regarding the current design of the CFSP, his interpretation runs counter to the wording of the Treaty (→ para 13).

- 15 The idea of “**decision**” as a CFSP instrument (Art. 25 lit. b TEU) should not be confused with the idea of “decision” as used in other policy areas. This latter type of “decision” is still one of the key legal acts of the Union and is described in Art. 288 (4) TFEU. The exclusion of the adoption of legislative acts does not deprive the CFSP decisions of their legal nature. Art. 28.2 TEU confirms their **binding nature** (→ Art. 28 para ...). In fact, the exclusion of legislative acts primarily has to do with the exclusion of the legislative *procedure* (Art. 289.3 TFEU) and hence with the inapplicability of the role of the Commission and the EP in this procedure (Art. 24.1 (2), sentence 5 TEU; → Art. 24 para ...) as well as with the limited role of the CJEU in deciding on the legality or the interpretation of a CFSP act (cf. Art. 24.1 (2), sentence 6 TEU; → Art. 24 para ...). The reduced involvement (especially of the EP as part of the legislative branch of the Union) is an expression of the CFSP and the external action in general as belonging to the executive.<sup>14</sup>

### 2.3. Constructive abstention (subparagraph 2)

- 16 Subparagraph 2 allows so called qualified abstentions. At first sight this opens the possibility of so-called “**coalitions of the able and willing**”. Since the introduction of this possibility CFSP actions no longer depended on the approval and implementation of all MS, and this more flexible approach allowed for smaller groups of States to engage in a certain action or to adopt a position. On closer inspection, however, non-participation through the issuing of a formal declaration did not at all deprive the abstaining Council member from the binding effect of the adopted decision. After all, the decision taken by the Council remains a “Union decision”. While the abstaining State may not be obliged by and asked to actively implement this decision, it has to accept that “the decision commits the Union”.
- 17 This is underlined by the rule that “in a spirit of mutual solidarity” the MS concerned “shall refrain from any action likely to conflict with or impede Union action based on that decision”. The wording of this provision closely resembles that in the general **duty of sincere**

<sup>10</sup> Cf. Case 294/83, *Les Verts v Parliament* (ECJ 23 April 1986) para 23; confirmed by Joined Cases C-402 and 405/05P, *Kadi and Al Barakaat v Council and Commission* (ECJ 3 September 2008) para 281.

<sup>11</sup> Pursuant to Art. 24.1 (2) sentence 6 TEU and Art. 275 TFEU, the CJEU only has jurisdiction over compliance with Art. 40 TEU (delimitation between CFSP and other policies) and in accordance with Art. 275 (2) TFEU (legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under CFSP).

<sup>12</sup> Cf. Case C-355/04P, *Segi v Council* (ECJ 27 February 2007).

<sup>13</sup> Eeckhout 2011, p. 479 et seqq.

<sup>14</sup> See Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 10.

**cooperation** (to be found in Art. 4.3 TEU; the specific obligation regarding external action is in Art. 24.3 TEU, in a slightly different wording). Indeed, both provisions seriously limit the freedom of MS, even in the case where a formal declaration of abstention has been issued. No national action that *could possibly* conflict with or impede Union action is allowed. Moreover, the duty to loyalty prohibits a systematic use of constructive abstention.<sup>15</sup> In effect, the loyalty clause is not impaired by the possibility of abstentions; instead, the abstentions may only be used in the limits of this principle (differently → Art. 4 ...).

From the outset this limited the advantage of the option of abstention to cases in which the MS had little or no interest in, and indeed no plans for, an individual national policy. Moreover, the declarations of dissent could even seriously undermine the effectiveness of CFSP decisions in relation to third States. This is the reason why the option of “**constructive abstention**” in Art. 23 TEU-Amsterdam was sometimes referred to as “destructive abstention”. It is acknowledged that this, indeed, took away much of the *rationale* of the declaration of abstention.

Art. 238.4 TFEU (→ para 9) brings an end to all possible speculations as to whether abstentions can or cannot block a decision by stipulating that **abstentions** by members present in person or represented “**shall not prevent the adoption**” of such decisions. This implies that in that case a decision could be taken. However, there seems to be little legally relevant advantage in using this opportunity, since it follows from the text of this provision that the abstaining MS, though not obliged to apply, would nonetheless be bound by the adopted decision.

- 18 The duty to loyal cooperation includes contributing to the administrative and operative cost of those decisions. However, according to Art. 41.2 (2) TEU, MS who have made a declaration under Art. 31.1 (2) TEU shall not be obliged to **finance expenditure** arising from operations having military or defence implications (→ para ...; → Art. 42 para ...).
- 19 As in the pre-Lisbon TEU, constructive abstentions do not prevent the adoption of decisions (Art. 238.4 TFEU), unless the number of MS qualifying their abstention by issuing a formal declaration represent *at least one third* of the MS *comprising at least one third of the population of the Union*. The phrasing of these criteria deviates somewhat from the pre-Lisbon text, which referred to *more than one third of the votes* weighted according to the QMV rules. The new rule can be explained on the basis of the changed QMV rules, although there does not seem to be an exception for the period until 2014 (→ Art. 16 para ...). The general *rationale* of this rule is clear: it is **difficult to maintain a CFSP decision once it is no longer supported by the vast majority** of the MS (including the larger ones).
- 20 If, by lodging a formal declaration, a MS not only refuses to be bound by the decision itself but also refuses to accept the binding character of that decision for the Union as a whole, this cannot be qualified as a “constructive abstention” but rather ought to be considered an **implicit “No”** to the decision. Moreover, if a MS is absent and not properly represented (cf. Art. 238.4, 239 TFEU), this MS has to be counted as voting “No” on the decision.<sup>16</sup>
- 21 In matters with defence implications, **Denmark** has a special position. According to Art. 5 (1) of Protocol No. 22, Denmark does not participate in the elaboration and the implementation of decisions and actions of the Union which have defence implications and consequently does not take part in their adoption (sentences 1 and 2). However, according to sentence 3 of that provision, Denmark will not prevent the other MS from cooperating in these matters. Denmark’s position could thus be regarded as a “permanent constructive abstention” in matters with defence implications, though such a position does not prevent the necessary unanimity for those decisions. According to Art. 7 of that Protocol, this position is revocable at any time.

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<sup>15</sup> Cremer, in Calliess & Ruffert (2011), Art. 31 EUV para 5.

<sup>16</sup> Cf. Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 19.

### 3. Qualified majority voting under CFSP (paragraph 2)

#### 3.1. Genesis

- 22 The debate on majority voting has been present in CFSP negotiations from the outset. An early compromise was found in Declaration No. 27, adopted by the Maastricht IGC (→ para ...). At the same time, QMV was never completely ruled out. An explicit possibility was already included in the 1992 **Treaty of Maastricht**. “The case referred to in Article J.3(2)” was mentioned in Art. J.8 TEU-Maastricht as one of the exceptions to the general rule that “the Council shall act unanimously”. Art. J.3.2 TEU-Maastricht indeed ordered the Council to define the matters on which decisions were to be taken by qualified majority when it adopted a Joint Action and during the further development of the Joint Action. Nevertheless, the decision to adopt a Joint Action remained subject to the rule of unanimity. When the Council would make use of this possibility, the votes of its members would have to be weighted in accordance with the Community procedures on QMV. However, the rare attempts to introduce majority voting in the context of particular decision-making procedures were supposedly blocked by the British, and this made others reluctant to make further proposals to that end.<sup>17</sup>
- 23 An important step was taken in the 1997 **Treaty of Amsterdam**. Whereas the 1992 Treaty limited QMV to the *implementation* of Joint Actions, the new Art. 23.2 TEU-Amsterdam called for QMV by the Council for the *adoption* of Joint Actions, Common Positions or other Decisions on the basis of a European Council Common Strategy, or during the adoption of a decision *implementing* a previously adopted Joint Action or Common Position. In addition, a Council member could still declare that, for **important and stated reasons of national policy**, it intended to oppose the adoption of a decision to be taken by QMV, in which case a vote would not be taken (Art. 23.2 (2) TEU-Amsterdam). Since “important” was not defined by the Treaty, this provision provided opportunities for MS to block Council decision-making. A way out of this was offered by the provision that, in this event, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a unanimous decision. While the Heads of State or Government may indeed be able to settle the issue in connection with other agenda items, it is obvious that this provision put the possibility of QMV into perspective.
- 24 The TEU-Amsterdam provided that the votes of the members of the Council shall be weighted in accordance with the Community rules and that “[f]or their adoption, decisions shall require at least 62 votes in favour, cast by at least 10 members.” At the same time, it made clear that QMV could never be used for the adoption of “decisions having military or defence implications”.
- 25 Irrespective of the fact that the Council continued to strive for consensus, the 1997 **Treaty of Nice** maintained the possibility of QMV. In Art. 23.2 TEU-Nice: “when appointing a special representative in accordance with Article 18(5)”.
- The definition of QMV continued to be based on the Community rules, but the Treaty of Nice somewhat tightened the rules with a view toward ensuring that the adopted CFSP decisions would enjoy sufficient support from the (larger) MS, by requiring at least 232 votes in favour and (if requested) representation of at least 62 % of the Union’s population.
- 26 At the time of the Convention for Europe, which was to prepare the IGC on the 2005 **Constitutional Treaty**, it became clear that some of the larger MS (led by the United Kingdom) would vehemently resist a “communautarisation” of CFSP. It became obvious that CFSP would maintain a somewhat distinct position in the Treaty, despite the fact that a preference for more QMV was expressed by Working Group VII on External Action. In its

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<sup>17</sup> De Keukeleire 1998, p. 291.

final report this Working Group argued the following in relation to decision-making in CFSP:<sup>18</sup>

- “– The Working Group underlines that, in order to avoid CFSP inertia and encourage a pro-active CFSP, maximum use should be made of existing provisions for the use of QMV, and of provisions allowing for some form of flexibility, such as constructive abstention.
- In addition, the Working Group recommends that a new provision be inserted in the Treaty, which would provide for the possibility of the European Council agreeing by unanimity to extend the use of QMV in the field of CFSP;
- Several members consider that ‘joint initiatives’ should be approved by QMV.”

Art. III-300.1 TCE nevertheless maintained the “unanimity rule”. Art. III-300.2 TCE listed four **exceptions to the unanimity rule**. Three situations in which QMV could be used were already part of the Amsterdam regime (albeit with a somewhat modified phrasing).

This could certainly be seen as a major step. The Constitutional Treaty thus allowed for the Council to adopt CFSP decisions by QMV once the Union Minister for Foreign Affairs had based these decisions on a proposal. At the same time, the compromise is clearly visible in this provision: at the level of the European Council, all MS would have the possibility to block a request to submit a proposal to the Union Minister.

- 27 In a different part of the Constitutional Treaty, one comes across an **additional exception to the unanimity rule**. Art. III-313.3 TCE (now Art. 41 TEU) regulated the setting-up and financing of a start-up fund for expenditure arising from operations having military or defence implications. Art. III-311.2 TCE (now Art. 45.2 TEU) allows for QMV to be used in relation to the establishment of the EDA; and Art. III-312 TCE (now Art. 46 TEU) mentions QMV in relation to some decisions taken regarding the Permanent Structured Cooperation in the CSDP (→ para ...). All in all, the Constitutional Treaty thus substantively extended the possibilities for QMV in the CFSP area. At the same time, however, the opportunity of **allowing MS to block the possibility of QMV** (as introduced by the Treaty of Amsterdam) returned in Art. III 300.2 TCE (now Art. 31.2 (2) TEU).
- 28 In relation to the possibilities for QMV, the 2007 **Treaty of Lisbon** largely followed the text of the Constitutional Treaty, despite the fact that the terminology has been adapted to the new “Lisbon language” (“Decision” instead of “European decision”, “High Representative” instead of “Union Minister”).

### 3.2.Exceptions to unanimity (subparagraph 1)

- 29 Apart from consensus and unanimity, the decision-making procedure of international organisations may also allow for a system of “**weighted voting**”. Reasons may be to compensate for the inequality of members or to mitigate the effect on “trading” with votes.<sup>19</sup> Using population size as a criterion helps to provide a weighed vote, but national income, power or interest are all also factors that provide a reason to differentiate between members. However, the most important reason for introducing a weighted voting system is the need to acquire the cooperation of particular States.<sup>20</sup> In the EU, both “population size”, and “power” seem to have been influential in the division of votes.
- 30 In the EU Treaties, “weighted voting” is referred to as voting on the basis of a “**qualified majority**”. The general rule for QMV in the Council is Art. 16.4 TEU, according to which, as of 1 November 2014, a qualified majority shall be defined as at least 55 % of the members of

<sup>18</sup> CONV 459/02 (16 December 2002), point 8.

<sup>19</sup> Gold 1974, p. 687-708.

<sup>20</sup> Schermers & Blokker 2003, p. 539.

the Council, comprising at least **fifteen** of them and representing MS comprising at least 65 % of the population of the Union. A blocking minority must include at least four Council members, failing which the qualified majority shall be deemed attained (→ Art. 16 para ...).

Specific arrangements are laid down in Art. 238 TFEU (→ Art. 16.4). Until 1 November 2014 the voting modalities are to be based on the Protocol (No. 36) on transitional provisions, which largely follows the system of the Treaty of Nice by according a number of votes to each MS. As of 1 November 2014, the following provision applies for CFSP decisions: where the Council does not act on a proposal from the Commission or from the HR, “the qualified majority 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” (Art. 238.2 TFEU).

- 31** QMV is thus possible under CFSP, but is clearly phrased as an exception to the rule of unanimity, indicating an attempt to find a way between (national) control and efficiency (at Union level). This **ambivalence** bears two risks: one is the larger MS’ disproportional loss of political power and influence when vetoed by even the smallest MS, and the second would be the marginalisation of small MS by applying QMV.<sup>21</sup>

The criteria are strict and the provision allows for a “way out” and a return to unanimity, i.e. when a MS states that “vital” reasons of national policy would not allow for adoption by QMV (→ para 37 et seqq.). Art. 31.1 TEU states that the unanimity rule shall apply “except where this Chapter provides otherwise”. Art. 31.2 (1) TEU thus lists the possibilities for QMV in the area of CFSP (and CSDP, as long as they do not have military or defence implications; → para 47 et seqq.), and can hence be seen as providing exceptions to the general rule of unanimity.

- 32** The first of these exceptions (first indent) is the adoption of a decision defining a Union action (Art. 28 TEU) or position (Art. 29 TEU) on the basis of a European Council decision relating to the **Union’s strategic interests and objectives** (Art. 22.1 TEU). Considering that the European Council acts unanimously on a Council recommendation (Art. 22.1 (3) TEU), obviously all (or at least most) concerns regarding national sovereignty in external matters have been discussed in detail before the Council adopts a decision on Union action or position, such that unanimity as protecting those national rights is no longer required.
- 33** Obviously, the possibility for the Council to use **QMV upon a proposal by the HR** (second indent) is the main novelty. The proposal follows “a specific request from the European Council”, which underlines that MS do have a possibility to block the procedure at the highest level. Nevertheless, once the HR has been given the green light, this mandate allows him to come up with potentially far-reaching proposals that could be adopted by QMV in the Council. Much will depend on the functioning of the EEAS (→ Art. 27 or Art. 18 ...) to provide the HR with solid proposals. In case a MS still wants to block decision-making, it will have to invoke the general “national interest” exception – “vital and stated reasons of national policy” – (→ para ...).<sup>22</sup> Again, as there has been a previous (unanimous) check-up leading to the HR proposal, unanimity for the actual decisions is not necessary. However, this exception does not apply to situations in which the HR makes proposals on its own initiative.<sup>23</sup>
- 34** Thirdly, while decisions on Union action or position need to be taken unanimously (except when made on the bases of a specific European Council decision or HR proposals), **decisions implementing a decision on Union action or position** shall be taken by qualified majority (third indent). As the Council has a margin of discretion for the implementation of Union actions or positions, the consequence is that the broader the basic decision is, the broader the potential field of application for QMV for implementing decisions. Examples include

<sup>21</sup> Cf. Cremer, in Calliess & Ruffert (2011), Art. 31 EUV para 15.

<sup>22</sup> See also van Elsuwege 2010, p. 995.

<sup>23</sup> Cf. Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 29. Regelsberger 2008, p. 273 et seq. Wessels & Bopp 2008, p. 23.

decisions on financial equipment for certain projects<sup>24</sup> or the amending of lists of persons and entities subject to restrictive measures.<sup>25</sup>

Although this rule is seldom applied, a qualified majority can also adopt Council decisions repealing already-implemented decisions. As these have to be regarded as *actus contrarius* to the actual implementing decisions, the voting rules on the latter are relevant.<sup>26</sup>

35 The fourth case listed in Art. 31.2 (1) TEU is the **adoption of special representatives** (Art. 33 TEU), including the prolongation of their mandate as well as their removal.<sup>27</sup> Meanwhile, the relevance of this possibility of QMV (introduced by the Treaty of Nice) remains doubtful, as practice shows that consensus remains the basis for appointing high-ranking foreign affairs personnel (→ Art. 33 para ...).<sup>28</sup>

36 In addition, QMV is possible in a **limited number of other cases**, which are to be found in other parts of the Treaty. First of all, the use of QMV for the establishment and financing of a **start-up fund** for military and defence operations was taken over from the Constitutional Treaty. This possibility is now mentioned in Art. 41.3 (3) TEU (→ XRF?). Secondly, one comes across QMV in Art. 45.2 TEU in relation to the **establishment of the EDA** (→ XRF?). And finally, some decisions in relation to the **Permanent Structured Cooperation** in the CSDP may be taken by QMV. With regard to notification by MS which wish to participate in the Permanent Structured Cooperation, Art. 46.2 TEU states (→ Art. 46 para ...) that QMV is also to make decisions of the establishment of and later accession to Permanent Structured

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<sup>24</sup> Council Decision 2002/381/CFSP of 21 May 2002 *implementing Joint Action 1999/878/CFSP with a view to contributing to the European Union cooperation programme for non-proliferation and disarmament in the Russian Federation*, O.J. L 136/1 (2002); Council Decision 2008/134/CFSP of 18 February 2008 *implementing Joint Action 2005/797/CFSP on the European Union Police Mission for the Palestinian Territories*, O.J. L 43/38 (2008); Council Decision of 27 November 2008 *implementing Joint Action 2007/749/CFSP on the European Union Police Mission (EUPM) in Bosnia and Herzegovina (BiH)*, O.J. L 318/14 (2008); Council Decision 2008/884/CFSP of 21 November 2008 *implementing Joint Action 2007/369/CFSP on the establishment of the European Union Police Mission in Afghanistan (EUPOL AFGHANISTAN)*, O.J. L 316/21 (2008). See also the examples listed in Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 31.

<sup>25</sup> Rather recent examples include Council Implementing Decision 2011/848/CFSP of 16 December 2011 *implementing Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo*, O.J. L 335/83 (2011); Council Implementing Decision 2011/847/CFSP of 16 December 2011 *implementing Decision 2010/639/CFSP concerning restrictive measures against Belarus*, O.J. L 335/81 (2011); Council Implementing Decision 2011/736/CFSP of 14 November 2011 *implementing Decision 2011/273/CFSP concerning restrictive measures against Syria*, O.J. L 296/55 (2011); Council Implementing Decision 2011/543/CFSP of 15 September 2011 *implementing Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya*, O.J. L 241/30 (2011); Council Implementing Decision 2011/698/CFSP of 20 October 2011 *implementing Decision 2011/486/CFSP concerning restrictive measures directed against certain individuals, groups, undertakings and entities in view of the situation in Afghanistan*; O.J. L 276/47 (2011); Council Implementing Decision 2011/670/CFSP of 10 October 2011 *implementing Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran*; O.J. L 267/13 (2011); Council Implementing Decision 2011/627/CFSP of 22 September 2011 *implementing Decision 2010/656/CFSP renewing the restrictive measures against Côte d'Ivoire*; O.J. L 247/15 (2011); Council Implementing Decision 2011/422/CFSP of 18 July 2011 *implementing Decision 2010/603/CFSP on further measures in support of the effective implementation of the mandate of the International Criminal Tribunal for the former Yugoslavia (ICTY)*, O.J. L 188/19 (2011). See also the list of European Union restrictive measures (sanctions) in force ([http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)).

<sup>26</sup> See Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 32.

<sup>27</sup> See e.g. most recently Council Decision 2011/819/CFSP of 8 December 2011 *appointing the European Union Special Representative for the Horn of Africa*, O.J. L 327/62 (2011); Council Decision 2011/697/CFSP of 20 October 2011 *amending Decision 2011/621/CFSP extending the mandate of the European Union Special Representative to the African Union*, O.J. L 276/46 (2011); Council Decision 2011/478/CFSP of 28 July 2011 *extending the mandate of the European Union Special Representative in Kosovo*, O.J. L 197/12 (2011); Council Decision 2011/427/CFSP of 18 July 2011 *extending the mandate of the European Union Special Representative in Afghanistan*, O.J. L 188/34 (2011).

<sup>28</sup> Cf. Regelsberger 2008, p. 275.

Cooperation, while only participating MS can take part in the vote (Art. 46.3 TEU). Similarly, the Council (i.e. participating MS) may decide upon the suspension of a MS from the Permanent Structured Cooperation, on the basis of QMV (Art. 46.4 TEU).

- 37 Moreover, according to Art. 31.3 TEU and in line with Art. 48.7 (1) TEU, the European Council may make use of the so called “**passerelle**” or bridging clause. In that case, the European Council authorises the Council to act by a qualified majority in that area or in that case where unanimity is foreseen by the Treaty, except for those having military or defence implications (→ para 47 et seqq.).

### 3.3. “Emergency brake” (subparagraph 2)

- 38 As a **counter-weight to all these new exceptions to the unanimity rule**, the Treaty maintained the “emergency brake” (as a codification of the 1966 Luxembourg Compromise) for situations in which a member of the Council declares that, for *vital* (the term was already introduced by the Constitutional Treaty) and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by QMV. The reasons are particularly “vital” when (politically) fundamental decisions are taken or if a MS would be obliged to take a position that differed gravely from its actual standpoint. Mere details, however, can usually not be “vital” reasons.<sup>29</sup>
- 39 Note that indeed the “important and stated reasons” were replaced by “**vital and stated reasons**”, by which – at least on paper – the possibility to oppose QMV seems further restricted. In the end, the change from “important” to “vital” reasons may be not at all significant. Nonetheless, the MS will still have a wide margin of appreciation to decide what reasons are “vital” to them, as one could not imagine obliging the States to reveal all details of their domestic concerns (which are likely to have an impact on its sovereignty) and activities that they would like to protect. The possibility for the other MS or the HR as president of the Council to review these reasons thus seems limited. This is underlined by Art. 346.1 lit. a TFEU, according to which no MS shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security.

However, in the light of the **principle of sincere cooperation** of Art. 4.3 TEU and Art. 24.3 TEU (regarding external action), MS are held to bring forward only those reasons that are truly essential. In this regard, the loyalty principle is not impaired by the possibility of the “emergency brake”. The opposite is true: the principle of sincere cooperation as a general principle of Union law (→ Art. 4 para ...; → Art. 24 para ...) sets limits to MS’ margin of appreciation (differently → Art. 4 para ...)

- 40 If a MS makes use of the “emergency brake” the HR will first search for a solution, before the Council, acting by a qualified majority, may request that the matter be referred to the European Council for a unanimous decision. In line with the text of the Constitutional Treaty, the HR may thus act as a broker to reach a **compromise** at the level of the Council. The opposing MS is given a straightforward choice: either accept decision-making by QMV (which will only be realistic once the draft decision takes the objections raised by the MS into account), or move the issue to the level of the European Council (where the MS would have the possibility to block the decision, or to link it to other strategic issues), turning the European Council into a sort of “final decision-making body”.<sup>30</sup>
- 41 Despite the systematics of this provision, it is unclear whether it will only apply to the cases listed in paragraph 2 or if – with regard to the *telos* – it also applies to those cases in which unanimity applies after having activated the passerelle of paragraph 3 (→ para ...). On the one hand, the MS can block a transition from unanimity to QMV in the process of the bridging clause itself. On the other hand, the approval to make use of QMV instead of

<sup>29</sup> Cf. Frenz 2011, para 5344.

<sup>30</sup> Cf. Wessels & Bopp 2008, p. 24.

unanimity in a certain *area* does not take into account that a certain *decision* opposes national interests that would justify the emergency brake. As a result, **paragraph 2 also applies to QMV by passerelle.**<sup>31</sup>

#### 4. Qualified majority voting on the basis of a European Council decision: a *passerelle*? (paragraph 3)

##### 4.1. Genesis

- 42 Apart from the exceptions to the unanimity rule (→ para ...), Art. 31.3 TEU introduces a more general legal basis for the use of QMV, a decision by the **European Council** authorising action by QMV where unanimity would normally be required according to the Treaty.
- 43 The 1992 **Treaty of Maastricht** allowed for the Council to decide on a case-by-case basis what implementing decisions could be taken by QMV (Art. J.3.2. TEU-Maastricht). As noted (→ para ...), this possibility was never used,<sup>32</sup> although the option was included in, for instance, the Joint Actions on anti-personnel mines.<sup>33</sup>

This option was replaced by the so-called “fixed” exceptions to the unanimity rule in the **Treaty of Amsterdam**, which returned in the **TEU-Nice**. The **Constitutional Treaty** took a new step in the sense that it introduced a “dynamic” move to more QMV (sometimes referred to as a **passerelle clause**). Art. III-300.3 TCE, as the predecessor of Art. 31.3 TEU, was worded identically. This opened the way to more QMV in CFSP without formal Treaty amendment.

##### 4.2. Notion

- 44 Irrespective of the fact that unanimity is still the rule in CFSP, the exceptions to the rule have increased over time. In addition to the specific exceptions that were introduced since the Treaty of Amsterdam, the Treaty of Lisbon took over the more general rule from the Constitutional Treaty that the **European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority**. This new QMV possibility potentially allows for a more speedy process in the Council, once the European Council has agreed on it. However, the actual impact remains to be seen. It may be assumed that this situation relates to more structural issues, as the possibility to use QMV, once a Council decision is based on a decision by the European Council, is mentioned separately. This would mean that the European Council has been given the competence to extend the list of the four (current) exceptions to the unanimity rule, which would indeed resemble a true *passerelle*.
- 45 The most important question regarding Art. 31.3 TEU is its **relationship to the general bridging clause of Art. 48.7 (1) TEU**, since the latter – in conjunction with Art. 48.7 (3) and (4) TEU and Protocol No. 1 – foresees participation of the EP and of national Parliaments in the application of the *passerelle*.

Some argue that Art. 31.3 TEU is *lex specialis* to Art. 48.7 TEU, and thus prevails over the latter.<sup>34</sup> It is argued that, due to the specific nature of CFSP participation of the EP –

<sup>31</sup> See also Rathke, in v. Arnault & Hufeld (2011), p. 232 para 98; Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 38.

<sup>32</sup> De Keukeleire 1998, p. 291.

<sup>33</sup> See Joint Actions 95/170/CFSP, O.J. L 115/1 (1995), 96/588/CFSP, O.J. L 260/1 (1996) and 97/817/CFSP, O.J. L 338/1 (1997).

<sup>34</sup> Cremer, in Calliess & Ruffert (2011), Art. 31 EUV para 18 and Art. 48 EUV para 16 – although he admits that the system is not very consistent and that it would be detrimental to the intended enhancement of democratic legitimisation of the Union. Cf. however, also Kaufmann-Bühler, in Grabitz et al. (2011), Art. 42 EUV para 74 and 77. See also Wessels & Bopp 2008, p. 24; Wouters, Coppens & De Meester (2008), p. 163; Booß, in Lenz &

especially due to its limited roles as indicated by Art. 24.1 (2) sentence 5 TEU (→ Art. 24 para ...) – and national Parliaments be opposed to the (still) executive and intergovernmental character of CFSP. Under this interpretation, notifying the EP (Art. 36 TEU) would suffice. In this context, Declaration No. 14, which is not legally binding (→ Art. 51 para ...) states that provisions concerning CFSP shall not increase the role of the EP. However, as both provisions refer to the same range of provisions, the *lex specialis* rule cannot apply.

On the other hand,<sup>35</sup> Art. 48.7 (1) TEU explicitly refers to Title V of the TEU. The duplication of the passerelle clauses could thus be justified with systematic reasons and with the concept of the “unity of the constitution” (→ Art. 1 para...). Art. 48 TEU lists the Treaty revisions procedures. In order to give an exhaustive list in one place/provision, this Article also lists the passerelle clause for CFSP. Art. 31 TEU on the other hand lists the voting procedures and especially the application of QMV within CFSP. Thus, the list in Art. 31 TEU would be incomplete without at least giving a “reminder” to the bridging clause, which is also applicable to these provisions. Thus, Art. 31.3 TEU needs to be read and applied *in combination* with Art. 48.7 TEU.<sup>36</sup>

Furthermore, both Art. 48.7 and 31.3 TEU lead to changes in the primary law of the Union (the Treaties).<sup>37</sup> With regard to more democratic legitimation of Union action in connection with a more supranational approach, even in CFSP matters after the Treaty of Lisbon, full application of the procedure foreseen in Art. 48.7 TEU is justified, even if the Union’s primary law does not prohibit installing more rigid safeguards in national constitutional law (such as in Germany (→ para 44) or the UK (→ para 45); → Art. 48 para ...; → Protocol No. 1 para ...).<sup>38</sup> The involvement of national Parliaments and the EP, however, may constitute an insurmountable obstacle, leaving this passerelle unimplemented.

**46** The **German Federal Constitutional Court** in its well-known judgment of the Treaty of Lisbon has in fact made a distinction between the procedure of Art. 48.7 TEU and Art. 31.3 TEU.<sup>39</sup> As the special bridging clauses have only a limited scope, “the total extent to which the influence of the German representative in the Council will be reduced by the introduction of qualified majority voting can at least be ascertained in a general manner”.<sup>40</sup> Consequently, the lack of participation of national Parliaments, pursuant to Art. 31.3 TEU, would not be harmful. Accordingly, in its effort to conform to the “**responsibility for integration**” (*Integrationsverantwortung*) that the Court regarded necessary, the German legislator has treated both provisions separately. The *Integrationsverantwortungsgesetz*<sup>41</sup> (IntVG) provides, in its section 4.1, that the use of the general bridging clause (Art. 48.7 TEU) requires a law

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Borchardt (2010), Art. 48 para 5; Hummer, in Vedder & Heintschel von Heinegg (2012), Art. 31 para 10; Regelsberger & Kugelman, in Streinz (2012), Art. 31 EUV para 14.

<sup>35</sup> Cf. Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 37, who base the application of Art. 48.7 TEU on the fact that Art. 31.3 TEU does not give any further indications regarding the procedure for the use of the passerelle clause. For an application of Art. 48.7 TEU also Regelsberger 2008, p. 273; cf also Pechstein, in Streinz (2012), Art. 48 EUV para 20.

<sup>36</sup> Unclear in Rathke, in v. Arnould & Hufeld (2011): See para 81 (combination of the special bridging clauses and Art. 48.7 TEU) and para 97 (national Parliaments have no veto under Art. 31 TEU).

<sup>37</sup> Rathke, in v. Arnould & Hufeld (2011), p. 229 para 92.

<sup>38</sup> Piris 2010, p. 262.

<sup>39</sup> German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 53 and 316 – *Lisbon*.

<sup>40</sup> German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 317 – *Lisbon*.

<sup>41</sup> Act on the exercise of the responsibility for Integration of Bundestag and Bundesrat in matters of the European Union of 22 September 2009, BGBl. I, p. 3022, as amended by Art. 1 of the Act of 1 December 2009, BGBl. I, p. 3822.

pursuant to Art. 23.1 of the Basic Law, whereas an Art. 31.3 TEU decision merely requires approval by Parliament due to the provision's limited scope of application.<sup>42</sup>

- 47 The **United Kingdom** has followed this model with its **European Union Act 2011**, which provides that a “Minister of the Crown may not vote in favour of or otherwise support a decision [according to Art. 31.3 and 48.7 TEU] unless [...] the draft decision is approved by Act of Parliament [and] the referendum condition is met” (Sections 6(1) and 7(3)).

## 5. Decisions having military or defence implications (paragraph 4)

### 5.1. Genesis

- 48 The origin of the special position of military and defence decisions dates back to the introduction of a **common defence policy** (→ Art. 24 para ...). The provision in the Luxembourg Draft of 19 June 1991, that “the Union shall pursue its common foreign and security policy objectives [...]”,<sup>43</sup> included an objective on “a common defence policy, which might in time lead to a common defence”. However, this objective was deleted in the final version and retained only in Article B of the Common Provisions of the 1992 Treaty of Maastricht. In the 1997 Treaty of Amsterdam, this provision returned as “[a CFSP] including the progressive framing of a common defence policy, which might lead to a common defence [...]” (Art. 2; see now Art. 24.1 (1) and 42.2 (1) TEU).

- 49 The **Treaty of Maastricht** allowed for the Council to decide on an *ad hoc* basis that implementation of a particular decision could take place on the basis of QMV (→ para ...). Ironically, this option was used for a decision that obviously had defence implications (a Joint Action on anti-personnel mines).<sup>44</sup> Ever since the **Treaty of Amsterdam**, in which the structural possibility of QMV was introduced, the treaties have excluded “decisions having military or defence implications” from decision-making by QMV (see Art. 23.2 TEU-Amsterdam and TEU-Nice).

This provision returned in the **Constitutional Treaty** in Art. III-300.4 TCE, which also excluded the potentiality that the European Council would decide on a future possibility for QMV in this area. The original draft of the provision did not exclude this potentiality and the version in the Constitutional Treaty is the result of a British amendment to the text.<sup>45</sup> The **Treaty of Lisbon** kept these changes.

### 5.2. Notion

- 50 Also in the post-Lisbon period, QMV is excluded at all times in relation to “**decisions having military or defence implications**”. Art. 31.4 TEU applies to two cases. The first is the application of QMV in the cases listed under paragraph 2 of the provision (→ para 28 et seqq.). The second case is the application of the bridging clause of paragraph 3 (→ para 43 et seqq.). Consequently, the content of Art. 31.4 TEU is repeated by Art. 48.7 (1) sentence 2 TEU and in Art. 333.3 TFEU for cases of enhanced cooperation.

- 51 Still, the **distinction** between “military” and “defence” is not made clear. At the same time, it remains striking that paragraph 4 does not simply refer to “decisions taken within the framework of the CSDP”, but rather to “decisions having military or defence implications”. This could imply that general CFSP (non-CSDP) decisions having military or defence

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<sup>42</sup> Cf. German Federal Constitutional Court, 2 BvE 2, 5/08, 2 BvR 1010, 1022, 1259/08, 182/09 (Judgment of 30 June 2009) para 320, 321 – *Lisbon*.

<sup>43</sup> Laursen & Vanhoonacker 1992, p. 399 (emphasis added).

<sup>44</sup> Art. 6.3 of Council Decision 95/170/CFSP of 12 May 1995.

<sup>45</sup> Amendment No. 11 (Hain), COV 707/03 (9 May 2003).

implications also require unanimous support. This is underlined by the fact that this rule is mentioned under the CFSP voting modalities, rather than merely in the (specific) CSDP Title. In practice, this would imply that general CFSP (non-CSDP) decisions (for instance on humanitarian assistance) would require unanimity in all phases when they would have military or defence implications. Conversely, CFSP/CSDP decision of a mere civilian nature, such as purely civilian missions and the use of civilian assets under Art. 42 and 43 TEU, can be subject to QMV. Nonetheless, it may be hard to argue that a project under CFSP/CSDP does not have any military or defence implications whatsoever.<sup>46</sup>

- 52 At the same, the scope of the provision is rather wide in that it not only excludes decisions with military or defence *content* from a potential QMV; it is instead sufficient that those decisions have military or defence *implications*. This means that the provisions apply even to cases where the decision itself has a non-military/defence content yet in some way affects military or defence matters. The Treaty does not regulate how to decide on the **nature of the decisions** (and hence on the applicable voting procedure), but one may assume that in these cases MS may fall back on the general possibility of blocking QMV in cases of “vital and stated reasons of national policy” (→ para 37 et seqq.).
- 53 In return, Art. 31.4 TEU implies that *all other* CFSP issues which do not have military or defence implications can potentially be subject to QMV. In this context, **Art. 40 TEU** should be mentioned. Pursuant to this “membrane” between CFSP and the other Union policies (→ Art. 40 para ...), for those policies outside the scope of CFSP but which are still “external action”, the Community method applies anyway.<sup>47</sup>

## 6. Procedural questions (paragraph 5)

### 6.1. Genesis

- 54 Art. J.8.2 TEU-**Maastricht** already included the applicability of majority voting in the event of procedural questions. Nowhere in Art. J.8 TEU-Maastricht, nor in any other part of the Treaty, were these “procedural questions” further defined, and the protocol for their adoption was never provided. The only possible conclusion on the basis of Art. J.8 TEU-Maastricht was that they need not be adopted unanimously. Hence, one could argue that a simple majority would be sufficient. However, the conclusion (that the adoption of procedural questions was subject to the rules governing QMV) was more in line with the context of the CFSP Title in the TEU-Maastricht, in which the QMV also dealt with the only other exception to the unanimity rule.
- 55 The 1997 **Treaty of Amsterdam** somehow settled the question of what kind of majority should be used to decide on procedural questions in its Art. 23.3 TEU-Amsterdam: “For procedural questions, the Council shall act by a majority of its members.” The text in the Treaty of Amsterdam returned in the 2001 **Nice** version in exactly the same wording (Art. 23.3 TEU-Nice). Interestingly enough, the provision disappeared in the 2005 **Constitutional Treaty**. A reference to procedural questions (with a reference to “a *simple* majority”) can only be found in the general title on the Council of Ministers, in Art. III-344.3 TCE: “The Council shall act by a simple majority regarding procedural matters and for the adoption of its Rules of Procedure.” Not only does this provisions return with the **Treaty of Lisbon** (Art. 240.3 TFEU), but the old Nice provision also returns in relation to the specific CFSP voting-rules, now Art. 31.5 TEU, the latter being *lex specialis* for CFSP.

### 6.2. Notion

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<sup>46</sup> Cf. also Kaufmann-Bühler, in Grabitz et al. (2011), Art. 42 EUV para 24.

<sup>47</sup> Cf. Frenz 2011, para 5350.

56 The question of what should be seen as a “procedural question” became famous in the context of the UN. The voting rules in the **UN Security Council** provide that it can adopt no important decision that is opposed by one of its five principal Powers of 1945 (Art. 27.3 UN Charter), i.e. the permanent members. Only procedural questions cannot be subject to a veto, which made the distinction extremely important. The smaller MS have continuously tried to move the borderline in favour of procedural questions. In 1949, the General Assembly defined the notion “procedural” as follows:<sup>48</sup> “Procedural questions should include: the submission to the General Assembly of any question related to the maintenance of peace; a request to the Secretary-General for the convocation of a special session of the General assembly; the approval of credentials; the establishment of subsidiary organs; decisions on the rules of procedure; questions concerning the agenda; invitations to states to participate in Security Council debates.”

Obviously, some of the criteria come very close to substantive questions. Therefore, in the eyes of the five permanent members, the issue of whether a question is procedural is in itself a non-procedural question. This allows them to block the possibility of deciding on “important questions” by labelling them “procedural” (the so-called double veto).

57 An implicit difference is also made between procedural and non-procedural questions in the TEU. The distinction brings us to the last opportunity for the Council to escape unanimity (Art. 31.5 TEU). However, these “**procedural questions**” are defined neither in the Treaties, nor in the Council’s Rules of Procedure.<sup>49</sup> However, one can define them as “concerning the internal business of the Council”.<sup>50</sup> The **Council’s Rules of Procedure** in Art. 19.7 TEU contain a list of cases in which “Coreper may adopt [...] procedural decisions”. These are *inter alia*: decisions to hold a Council meeting in a place other than Brussels or Luxembourg; authorisation to produce a copy of or an extract from a Council document for use in legal proceedings; decisions to hold a public debate in the Council or not to hold in public a given Council deliberation; decisions to make the results of votes and the statements entered in the Council minutes public; decisions to use the written procedure; decisions to publish or not to publish a text or an act in the Official Journal;<sup>51</sup> decisions to consult an institution or body wherever such consultation is not required by the Treaties.

58 From the examples mentioned above, the Council’s Rules of Procedure contain two significant **exceptions**. According to Art. 9.2 lit. a of the Council’s Rules of Procedure, the decisions to make public the results of the votes (when the Council acts pursuant to Title V of the TEU) shall be taken unanimously. According to Art. 17.3, decisions on the publication of decisions referred to in Art. 25 TEU shall be taken unanimously. One may doubt whether these provisions (of secondary law) are compatible with the primary law requirements. In light of the transparency principle contained in Art. 15 TFEU, a simple majority should apply to these situations as well.<sup>52</sup>

59 This also leaves open the question of whether the **decision to establish the procedural nature of a question** should itself be treated as a procedural or a non-procedural question. In other words: the Council’s decision to turn an issue into a procedural question may only be taken by a majority vote once this decision is itself considered procedural. It is doubtful whether the Treaty negotiators bore this last possibility in mind. After all, acceptance of the procedural nature of this issue would potentially open a large number of issues to be decided by a simple majority.

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<sup>48</sup> GA Re. 267 (III); YUN 1948-49, at 429. See more extensively: Blokker and Schermers 2003, p. 547-548.

<sup>49</sup> Council Decision 2009/937/EU of 1 December 2009 *adopting the Council’s Rules of Procedure*, O.J. L 325/35 (2009).

<sup>50</sup> Cremer, in Calliess & Ruffert (2011), Art. 31 EUV para 20.

<sup>51</sup> Cf. also Art. 17.4 of the Council’s Rules of Procedure.

<sup>52</sup> Cf. Kaufmann-Bühler & Meyer-Landrut, in Grabitz et al. (2010), Art. 31 EUV para 40.

60 At the same time, this is the only situation in CFSP where neither unanimity nor QMV is used, but where decisions are instead to be taken by a **simple majority**. The fact that the adjective “simple” is left out again does not seem to cause problems of interpretation. Art. 1.5 (1) of the Council’s Rules of Procedure makes the simple majority the default quorum. After all, in all other cases the Treaty text refers to *qualified* majority voting. Moreover, the notion of “simple” majority for these questions can be inferred from Art. 238.1 TFEU, which states that when “the Council shall act by a majority of its component members [...] it is required to act by a simple majority”. The addition of “component” in Art. 238.1 TFEU underlines that it is not only the majority of the votes cast (as in other cases of a “simple majority,” e.g. in the EP) but also the majority of the members that make up the Council. Thus, the “simple majority” in the Council is actually the **absolute majority**.<sup>53</sup>

## 7. Assessment

60 Over time, some **major steps** have been taken regarding the voting rules. The introduction of “constructive abstention” by the Treaty of Amsterdam was maintained by later Treaty modifications. Considering this together with the fact that non-participation by a MS through the issuing of a formal declaration did not at all deprive the abstaining Council member from obligations based on the adopted decision, the procedure in practice comes close to QMV. After all, the decision taken by the Council remains a “Union decision”. While the abstaining State may not be asked to actively implement this decision, it has to accept that “the decision commits the Union”. In addition, both the Constitutional Treaty and the Treaty of Lisbon extended the possibilities for QMV. The most important innovation in this regard may very well be the introduction of the passerelle clause, which allows the European Council to unanimously adopt a decision stipulating that the Council shall act by a qualified majority. This opened the way to more QMV in CFSP without formal Treaty amendment.

61 At the same time, during the Convention for Europe, which was to prepare the IGC for the 2005 Constitutional Treaty, it became clear that a “*communautarisation*” of CFSP would be met by strong resistance from some larger MS. Therefore, the final text of the Constitutional Treaty, which largely returned in the Treaty of Lisbon, maintained many of the specific characteristics of CFSP and even introduced a few new ones.

Thus, even today, **unanimity** is still the rule, which stands in stark contrast to the other EU policies, where “Lisbon” QMV has been established as the default voting rule. German and French proposals to make QMV the default option for CFSP were not successful. Still, as a counter-weight to the new exceptions to the unanimity rule that did make it into the final text, the Treaty maintained the “emergency brake” for situations in which a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by QMV. Finally, the explicit exclusion of any adoption of “**legislative acts**” underlines the ever-different nature of CFSP.

62 Even on balance, it is difficult to assess the impact of the Treaty of Lisbon on the voting rules in CFSP. The new rules have come a long way since Maastricht and a development is clearly visible. However, the Treaty introduced both a number of “intergovernmental” elements and some innovations that may potentially change the nature of CFSP. It seems to be up to the dynamics of the process itself to use the said process to make full use of the innovations in practice, but one will have to keep in mind that the very nature of foreign and security policy differs from other policies. In the words of *van Elsuwege*: “Rather than focusing on the sometimes artificial debate about more or less supranationalism/intergovernmentalism in EU external relations, it appears more accurate to explain the place of CFSP in the EU legal order on the basis of the executive dominance over foreign affairs, as it exists in the constitutional

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<sup>53</sup> With the same result: Ziegenhorn, in Grabitz et al. (2011), Art. 238 AEUV para 3.

traditions of many countries in the world. [...] The strategic character of foreign policy and the inherent importance of confidentiality and flexibility in its decision-making all explain why this area is considered a prerogative of the executive power.”<sup>54</sup>

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<sup>54</sup> van Elsuwege 2010, p. 999.

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## Index

abstention .....	9
bridging clause in CFSP .....	43 et seqq.
Common Foreign and Security Policy	
decision-making.....	1 et seqq.
unanimity .....	7 et seqq.
constructive abstention .....	15 et seqq.
decision-making in CFSP .....	1 et seqq.
abstention.....	9
bridging clause.....	43 et seqq.
constructive abstention .....	15 et seqq.
Denmark .....	20
emergency brake.....	37 et seqq.
exceptions to unanimity.....	31 et seqq.
legislative acts.....	13
loyalty .....	16, 12
passerelle .....	43 et seqq.
qualified majority voting .....	28 et seqq.
unanimity .....	7 et seqq.
Denmark	
position in CFSP.....	20
emergency brake in CFSP .....	37 et seqq.
loyalty in CFSP .....	16, 12
qualified majority voting in CFSP .....	28 et seqq.
unanimity.....	7 et seqq.