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Editorial

Qualified Majority Voting in CFSP: A Solution to the Wrong Problem?*

Karolina POMORSKA** & Ramses A. WESSEL***

A discussion on introducing Qualified Majority Voting (QMV) into the EU's Common Foreign and Security Policy (CFSP) decision-making has occasionally come up ever since the establishment of this policy field. It has, however, been mentioned surprisingly often in the last years by prominent politicians. In her first State of the Union speech, Commission President Ursula von der Leyen 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 QMV – at least on human rights and sanctions implementation'.¹ She asked the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) Josep Borrell to explore this idea, which had already been introduced by her predecessor, Jean-Claude Juncker in 2017.² The discussion was also echoed by the leaders of France and Germany in their 2018 Meseberg Declaration,³ as well as by other Member States,⁴ and this year the European

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¹ European Commission, *State of the Union Address by President von der Leyen at the European Parliament Plenary* (Brussels 16 Sept. 2020).

² European Commission, *State of the Union Address by President Juncker* (Brussels 13 Sept. 2017). This led to the Communication from the Commission to the European Council, the European Parliament and the Council, *A Stronger Global Actor: A More Efficient Decision-Making for EU Common Foreign and Security Policy*, COM(2018) 647 final (2018).

³ Meseberg Declaration, *Renewing Europe's Promises of Security and Prosperity*, A joint Franco-German declaration adopted during the Franco-German Council of Ministers, which took place 19 June 2018 in Meseberg, Germany, <https://www.diplomatie.gouv.fr/en/country-files/germany/events/article/europe-franco-german-declaration-19-06-18> (last visited 20 September 2021).

⁴ See the Non-paper by Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland,

Parliament prepared a brief on the matter.⁵ Why has the issue of QMV in CFSP suddenly and prominently re-entered the political discourse and would it in any way improve the Union's foreign and security policies?

1 THE LEGAL FACTS

Before analysing possible pros and cons of introducing more QMV in CFSP, it is important to briefly revisit the current situation and legal regime. What does the Treaty on European Union (TEU) tell us on decision-making in CFSP? Article 31 (1) TEU (in)famously states that CFSP decisions 'shall be taken by the European Council and the Council acting unanimously, except where this Chapter provides otherwise'. Hence, unanimity is the rule, but at the same time it is defined as the absence of any vetoes, leaving 'constructive abstention' as a possibility for Member States not to block a decision they are not that happy with. The Treaty does, however, also mention QMV as the procedure in a number of concrete situations. Article 31(2) TEU provides that the Council 'shall act by qualified majority' (note the use of mandatory language) in four situations: (1) when adopting a decision defining a Union action or position on the basis of a decision of the European Council; (2) when adopting a decision defining a Union action or position, on a proposal of the HR following a specific request from the European Council; (3) when adopting any decision implementing a decision defining a Union action or position; and (4) when appointing a special representative. As a compromise, an 'emergency break' was added to that provision to allow a Member State to block the use of QMV 'for vital and stated reasons of national policy'.

In addition, the Treaty offers a number of other possibilities. Thus, Article 31 (5) TEU calls for 'procedural questions' to be adopted by a simple majority (hence not even a qualified majority) in the Council, and in the area of sanctions, Article 215(1) TFEU stipulates that the actual restrictive measures are adopted by QMV upon a joint proposal from the High Representative and the Commission, after the 'political' decision to adopt sanctions has been taken unanimously. A more structural option is offered by the so-called 'passerelle clause' in Article 31(3) TEU, allowing the European Council to, unanimously, adopt a decision allowing the Council to act by QMV in other cases. And, while QMV is in principle excluded in the area of security and defence (CSDP), it does form the basis for a number of decisions related to the Permanent Structured Cooperation (PESCO) in that area (Article 46 TEU).

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 9 Dec. 2019.

⁵ European Parliament, *Qualified Majority Voting in Foreign and Security Policy. Pros and Cons*, Briefing (European Parliamentary Research Service 2021).

So, contrary to what is commonly stated, QMV is not completely ruled out in the area of CFSP and CSDP. Yet, practice shows that, possibilities offered by the treaty are (deliberately) underused; leading to a situation in which unanimity continues to be the default decision-making procedure, allowing each and every Member State to block the key substantive foreign policy decisions of the Union.

2 EXPLAINING THE CALLS FOR MORE QMV

There are several explanations for the recent calls for more QMV in CFSP. A first explanation is related to a general development that has been termed the ‘normalization’ of CFSP. Under this heading, academic literature over the past years has pointed to the fact that CFSP is no longer the odd policy out and has in fact become part and parcel of the EU’s overall external relations machinery. This notion is supported by a range of judgments by the Court of Justice of the EU, in which the Court *inter alia* underlined and clarified its own role (but also the position of the European Parliament) in CFSP. With the further integration of CFSP and other external policies, diverging decision-making procedures hamper living up to one of the key obligations of the Union: to act in a consistent manner.⁶ A second explanation can be found in a repeated blocking of decisions by some Member States in the Council. One could argue that the possibility to block CFSP decisions is exactly why the unanimity rule was installed in the first place, and research shows that the option has indeed been used.⁷ Yet, in a time when a strong and coherent foreign policy of the Union is perhaps more necessary than ever and notions such as ‘strategic autonomy’ feature prominently in EU documents, it has become less acceptable when Member States block CFSP decisions for the ‘wrong’ reasons. A clear example was formed by Cyprus, which in 2020 blocked a sanctions regime against Belarus to forge a different Turkey policy of the Union.⁸ And, more recently, in particular Hungary and, to some extent, also Poland had their own reasons to block certain CFSP decisions (see below).

⁶ See for references on the normalization of CFSP and the role of the Court for instance R. A. Wessel, *Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis*, in *Contemporary Challenges to EU Legality* 71–99 (C. Kilpatrick & J. Scott eds, Collected Courses of the Academy of European Law, Oxford University Press 2021); and earlier P. Cardwell, *On ‘Ring-Fencing’ the Common Foreign and Security Policy in the Legal Order of the European Union*, 64 N. Ir. Legal Q. 443 (2015).

⁷ France, in particular, is known for having used the option quite frequently, but also other states have had their reasons to block decisions. See A. Juncos & K. Pomorska, *Contesting Procedural Norms: The Impact of Politicisation on European Foreign Policy Cooperation*, Eur. Sec. (forthcoming).

⁸ Cyprus blocking EU sanctions on Belarus, EU Observer, 11 Sept. 2020, <https://euobserver.com/foreign/149410> (last visited 20 September 2021).

3 THE PROS AND CONS OF INTRODUCING QMV

Advantages of a turn to QMV are clear. We could safely assume that QMV would indeed lead to a more efficient and speedy decision-making process, despite the fact that the link between QMV and effectiveness needs to be researched more in-depth. The ‘different rules and procedures’ (Article 24 TEU) for CFSP also stand in the way of combinations of CFSP and other external relations policies. And given the fact that the Treaty no longer distinguishes between foreign policy and other external objectives,⁹ the different decision-making procedures seem outdated and hamper the required consistency in the overall external policies of the Union.

Yet, a number of disadvantages to this solution are largely overlooked in the recent debates.

Firstly, the introduction of QMV would not just represent a change in the formal mode of decision-making. It would also have an impact on the informal norms that guide negotiations in the Council. Most prominently, this informal ‘code of conduct’ of negotiations, includes rules and practices on consensus-building: taking everyone on board, not being a ‘trouble-maker’, justifying your position if it goes against the consensus, respecting ‘agreed language’, etc.¹⁰ Newcomers are quickly socialized into these norms. The fact that a formal vote hardly ever takes place is irrelevant as all participants are continuously well aware that anyone can stop the process. Negotiations take place under the ‘shadow of the veto’. This is why, sometimes, no voting takes place when it is clear that no agreement can be reached.

The informalities characterizing the mode of decision-making in CFSP date back to European Political Cooperation in the 1970s and have over the years guided the way in which Member States negotiate at all levels. Formally introducing QMV in more key situations would disturb and change the existing code of conduct. Negotiations would then take place ‘under the shadow of QMV’, without a need to ‘keep everyone on board’ as long as there is a voting majority. An example of a QMV vote in relation to a very sensitive non-CFSP matter was the Council Decision on the refugee relocation quotas,¹¹ which reinforced the divisions within the Union as the Member States voting against the Relocation Decisions (the Czech Republic, Hungary, Romania and Slovakia) decided to

⁹ See the well-known Arts 3(5) and 21 TEU.

¹⁰ A. Michalski & A. Danielson, *Overcoming Dissent: Socialization in the EU's Political and Security Committee in a Context of Crises*, 58(2) J. Com. Mkt. Stud. 328–344 (2019); A. Juncos & K. Pomorska, *Playing the Brussels Game: Strategic Socialisation in CFSP Council Working Groups*, 10(11) Eur. Integ. online Papers (2006); B. Tonra, *The Europeanisation of National Foreign Policy: Dutch, Danish and Irish Foreign Policy in the European Union* (Ashgate 2001).

¹¹ Council Decision 2015/1601 of 22 Sept. 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

(mostly) completely ignore the adopted, legal binding Relocation Decisions, started proceedings before the Court, or were confronted with infringement proceedings by the Commission.¹² Furthermore, we have also observed how sensitive the system is to formal institutional changes when the (semi)permanent chairs from the EEAS replaced the rotating Presidency of the Council (and its working parties) in the area of foreign and security policy. Reportedly, the feeling of reciprocity on the part of the Member States was partially lost, as they would not need to take the chair when their turn came. In addition, the attitude towards the chairs changed and in many instances they were not considered by the Member States as ‘one of us’.¹³

Secondly, proponents of unanimity in CFSP have pointed to the fact that this would enhance democratic legitimacy as national parliaments would have a role to play. Despite the fact that most national parliaments are not known for their keen interest in foreign policy issues, it is somewhat awkward to use this argument only in relation to CFSP. In other Union policies the introduction of QMV went hand-in-hand with increasing powers for the European Parliament, and that is exactly what could be proposed here as well. More importantly perhaps is that the introduction of QMV for key CFSP decisions might easily decrease the ownership of this policy by the Member States. Literature has already pointed to an increasing politicization and contestation in European integration, including in foreign policy.¹⁴ For a while now, smaller Member States have been reporting unequal access to the EEAS and, occasionally, not being ‘listened to’ enough in the Council. While one could argue that unanimity at least warrants smaller Member States to have an equal say, it is also well-known that this largely a fiction as it is difficult for smaller Member States to act without having formed a coalition of like-minded on most dossiers. Were the decision-making rules to be changed, this may affect both feelings of ownership on the part of the Member States and credibility towards third countries. Can we imagine a Russia policy without having the Baltic states on board? Or, a Cuba policy without Spain?

¹² Many thanks to Iris Goldner for pointing us to this case.

¹³ See Juncos & Pomorska, *supra* n. 7.

¹⁴ See also the recent Special Issue by *The Politicisation of European Development Policies*, 59(1) J. Com. Mkt. Stud. (C. Hackenesch, J. Bergmann & J. Orbie eds 2021); as well as O. Costa, *The Politicization of EU External Relations*, 26(5) J. Eur. Pub. Pol’y 790–802 (2019); K. Biedenkopf, O. Costa & M. Góra, *Shades of Contestation and Politicization on CFSP*, Eur. Sec. (forthcoming); S. Meunier & M. A. Vachudova, *Liberal Intergovernmentalism, Illiberalism and the Potential Superpower of the European Union*, 56 (7) J. Com. Mkt. Stud. 1631–1647 (2018).

4 THE SPECIFIC CASE OF CERTAIN MEMBER STATES

The most recent motivation behind the calls for more QMV in CFSP is largely related to a frustration with those governments that have been blocking decisions as well as Union positions in, for instance the UN Human Rights Council, on key issues such as actions by China in Hong Kong or the Israel-Palestine conflict. In these situations reasons for, in this case Hungary in particular, to block CFSP decisions seem to go beyond mere differences in political opinion. Three possible answers present themselves. Firstly, there is a case of norm clash between EU norms and norms declared by the Hungarian government; both in procedural and substantive terms.¹⁵ Different views on human rights protection (think of LGBT+ rights) and the right to interfere in the domestic affairs of other states seem to lie behind this controversy. Secondly, the current government and/or its representatives seem to wait for the final moment to block a process, leaving no possibilities for repair. A large number of issues are ‘pre-cooked’ and consensus is negotiated often in the corridors during informal settings. Not being active at those stages results in little room for manoeuvre in formal high-level settings later on (yet, this is where the TV cameras are). Thirdly, the government may care less about its reputation and success in Brussels and more about the perception of its actions at home, among its electorate, and with some foreign allies (like Russia and China). From this perspective, blocking may seem like an act of protecting national interests at all costs and a heroic thing to do that will be appreciated by the party electorate.

In these particular cases, these underlying reasons may point to a necessary shift in focus of the EU as the problem clearly lies elsewhere. Fundamental EU values are being challenged and ignored by a small group of Member States. They have not just become ‘Trojan Horses’ in European foreign policy,¹⁶ but have shown that the problem is more general, with blocking CFSP decisions being just a reflection of a larger issue. Without acknowledging this fundamental underlying problem, resorting to institutional and procedural options only, may lead to artificial solutions that may even worsen a situation when a Member State is side-lined with no mechanism left to express its views.

This does not imply that nothing is possible in the short term. With regard to CFSP, we have seen that the Treaties do offer possibilities that could in some occasions do justice to both a solid and necessary EU foreign policy and to

¹⁵ Juncos & Pomorska, *supra* n. 7; P. Müller et al., *The Domestic Challenge to EU Foreign Policy-Making: From Europeanisation to (de)Europeanisation?*, 43(5) J. Eur. Integ. Special Issue (2021).

¹⁶ M. Orenstein & D. Kelemen, *Trojan Horses in EU Foreign Policy*, 55(1) J. Com. Mkt. Stud. 87–102 (2016).

concerns raised by certain Member States. Combining constructive abstention with the possibility for Member States to lay down their objections in a Declaration may in certain situations convince the home front that national values have not been abandoned. And, more generally, a continuing debate as initiated by the European Commission on policy areas (such as sanctions and human rights) that could become subject to QMV through the use of the 'passerelle clause' remains important for the EU to have a credible foreign policy. Also in view of the 'normalization' of CFSP, some of the 'special rules and procedures' (Article 24 TEU) now strike us as outdated. A sudden and complete turn to QMV may, however, be too naïve a solution to overcome the current fundamental problems and also run the risk of affecting the legitimacy and ownership of a consolidated EU foreign policy.

