

## Qualified majority voting and flexible integration for a more effective CFSP? A critical examination of the EU's options

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# SWP Comment

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## Qualified Majority Voting and Flexible Integration for a More Effective CFSP?

A Critical Examination of the EU's Options

*Annegret Bendiek, Ronja Kempin and Nicolai von Ondarza*

The idea of qualified majority voting in the Common Foreign and Security Policy (CFSP) is not new, but its momentum has been boosted by the growing international challenges facing the EU. The German government argues that abolishing the unanimity principle would make the EU a stronger foreign policy actor in face of rising transatlantic tensions, a resurgent Russia and an expansive China. But short of an overall treaty amendment the legal possibilities are limited. Qualified majority voting in the CFSP is also problematic if it weakens the EU's internal legitimacy and external credibility. A dual approach is necessary: in the medium term strengthening the CFSP through flexible integration; in the long term supporting the development of a shared strategic culture through the establishment of collective European threat analysis and intelligence.

In view of the rapid changes in the EU's immediate geographical and geopolitical landscape the idea of introducing qualified majority voting in the CFSP has reappeared on the agenda at the highest political levels. At the Munich Security Conference in February 2018 for example, German Defence Minister Ursula von der Leyen called for Permanent Structured Cooperation (PESCO) to be expanded to the CFSP. In the Common Security and Defence Policy (CSDP) this format permits Member States "whose military capabilities fulfil higher criteria and which have made more binding commitments to one another in this area with a view to the most demanding missions" to

"establish permanent structured cooperation within the Union framework" (Article 42 (6) TEU). Munich Security Conference Chairman Wolfgang Ischinger goes further, arguing for qualified majority voting in the CFSP — as does Commission President Jean-Claude Juncker, who is convinced that this would make the Union more "weltpolitik-fähig" (a neologism meaning "capable of world politics"). Most recently, German Chancellor Merkel and French President Macron called for the "exploration" of the use of qualified majority in CFSP in their Meseberg declaration of June 2018.



## The CFSP's Deficits

These statements reflect the wish to improve the EU's effectiveness in responding rapidly and credibly to external developments. As things stand at present, the EU rarely succeeds in responding decisively to international challenges. Rapid, concerted action, as in the case of the poisoning of former Russian double agent Sergei Skripal tends to be the exception. Normally the EU requires time to agree on a minimum consensus, and is often unable to agree on a joint position at all. As a collective actor, the EU is absent from Syria, while today even China is capable of playing "divide and rule" with its member states. In its volatile southern neighbourhood EU member states are unable to agree on a comprehensive and consistent migration policy.

The biggest obstacle to the CFSP remains the member states' unwillingness to negotiate viable compromises and to permit the CFSP and the High Representative to encroach on national prerogatives. A number of successes have been achieved through minilateral initiatives whereby a small number of countries address foreign policy challenges on behalf of the EU, with examples including the EU-3 and the Normandy formats. As long as such groups do not divide the Union into blocks with different interests, these formats can serve as catalysts for improving the EU's foreign policy and security capacity to act. Governments have been quick to approve an informal division of labour between the European External Action Service (EEAS) and the member states, for instance when the United Kingdom and Germany launched an initiative on Bosnia and Herzegovina in November 2014, which the EEAS and the Commission took up just a month later.

As matters presently stand, CFSP decisions are with few exceptions taken unanimously by the Council; the European Parliament has no co-decision power. Legally speaking, CFSP decisions concern either general EU guidelines (such as implementation of the 2016 European Global Strategy) or defining common

positions and actions (such as sanctions and military and civilian CSDP operations).

## Potential for Qualified Majority Voting in the CFSP

As a glance at the practice reveals, there would be both pros and cons to qualified majority voting in the CFSP. Every major alteration to the EU treaties has seen successive expansion of the scope of qualified majority voting, to a point where it now covers almost all policy areas. Yet the procedure has rarely been employed to outvote member states. Instead, even in cases where a qualified majority in the Council would suffice, 80 percent of decisions are ultimately taken in consensus. In 2016 it was more than 90 percent, despite the EU's widely discussed north/south and east/west divisions. Majority voting functions best where it is employed to persuade member states to negotiate compromises they would have rejected had they been able to veto. This practice has worked well for harmonization in the internal market, as well as in justice and home affairs.

Cases where several member states are outvoted tend to reflect a failure of negotiations in the Council. In recent years there have been only a handful of occurrences where three or more member states have been forced to accept a majority vote, in 2016 just one. The 2015 decision on refugee quotas within the EU illustrates very well how compliance with EU law can be undermined if majority voting is used to override the fundamental national interests of member states. In this case four central and eastern European countries were outvoted. The decision is legally binding, and an appeal to the European Court of Justice (ECJ) was rejected. The European Commission can seek to impose sanctions against the governments in question via the ECJ, but cannot force them to accept refugees against their will.

Because of similar sensitivities over national sovereignty, the CFSP/CSDP is explicitly excluded from majority voting; even

after the Treaty of Lisbon this remains an intergovernmental policy field. With only a few exceptions the member states still make decisions on CFSP matters through unanimous voting in the Council (Article 31 (2) TEU).

Since the member states exercise de facto executive power in the CFSP, a passage to the effect that it must not “prejudice the specific character of the security and defence policy” of member states was inserted in Article 42 (2) TEU during the drafting of the Treaty of Lisbon. This ensures that member states are able to exercise reservations of national constitutional prerogatives and competencies, for example concerning mutual defence under Article 42 (7). Germany for instance would be entitled to cite its requirement of parliamentary approval for military deployment, Austria its military neutrality.

In view of such considerations the introduction of qualified majority voting in the CFSP as a general decision-making procedure appears less than plausible, even if the Commission President as well as Germany and France have now called for it on several occasions. Under Article 48 TEU a change from unanimity to qualified majority voting would certainly require an ordinary treaty revision procedure, including a Convention, approval by member states and national ratification with national referendums as required (see [SWP Comment 50/2015](#)). Political qualms are joined by constitutional reservations, as the German Federal Constitutional Court laid out in its Lisbon ruling: a balance must be maintained between integration and democratic oversight. The decision to use military force was one of the cases the Constitutional Court classified as an exclusively national prerogative. In other words, even if a general introduction of qualified majority voting in the CFSP was desired, this would still face significant political and legal obstacles.

## Legal Framework

A number of possibilities nevertheless exist for using qualified majority voting in the CFSP without changing the existing EU treaties.

### Exceptions

*Firstly*, under Article 31 (2) TEU the Council may in clearly defined circumstances make decisions by qualified majority. These are the appointment of EU Special Representatives and implementing decisions deriving from unanimous decisions of the European Council. Given that the latter themselves require political consensus, little use is likely to be made of this possibility in practice. The appointment of an EU Special Representative for the Sahel is the only case to date where a majority vote was taken in the CFSP.

### Passerelle Clause

*Secondly*, qualified majority voting in the CFSP could be introduced by means of a simplified revision procedure under Article 48 (7) TEU. This so-called passerelle clause provides that the European Council may decide unanimously to permit qualified majority voting in specific policy fields where decisions would otherwise have to be made unanimously. In order to be able to use this provision some member states would have to meet national constitutional requirements; the German government, for example, would first have to obtain the approval of the Bundestag. For such reasons the passerelle clause has hitherto been used neither in the CFSP nor in other policy fields. But given the necessary political will, the EU could in this way – at least within certain limits – introduce majority voting in the CFSP without wholesale alterations to the EU Treaty. Decisions of military or defence relevance are excluded, and in the CFSP the passerelle clause applies only to the Council; giving the European Parliament decision-making powers in the CFSP outside of its current, very limited compe-

tences in this area would require a comprehensive treaty revision.

### **Constructive Abstention**

The *third* possibility for instituting majority voting in the CFSP is constructive abstention under Article 23 (1) TEU. A member state may choose to refrain from using its veto in order to enable a CFSP decision. That state is then exempt from funding and implementing the decision. Theoretically, member states of the EU could decide to use constructive abstention in the CFSP as a general rule, reserving the veto solely to the cases of imperative national interest.

Current practice tells a different story, however. Since constructive abstention was introduced in the Treaty of Nice it has been used only once, by Cyprus in the vote on EU Operation EULEX in Kosovo.

### **Flexible Integration in the CFSP**

The EU's ability to act could also be enhanced through flexible integration. What this means is collective action by those member states that are willing and able to do so. "Multi-speed Europe" has been a reality since the first opt-outs to the Maastricht Treaty and the Schengen Agreement, and since the European debt crisis almost all the EU's decisive integration steps have been taken by specific groups of member states, especially concerning the Eurozone.

Flexible integration is especially effective where it is tied to EU institutions and provides benefits for the participating member states. Acting as pioneers, they can create incentives for other EU states to successively come on board. However this model, in which all the others are supposed to follow an *avant-garde* has to date only fully successful in the case of the EU Social Charter. The Eurozone and the Schengen Area have both successively been integrated into the treaty structure and expanded, but even today do not include all the EU states.

For the CFSP/CSDP there would be several possibilities for flexible integration within the scope of the EU treaties.

### **Enhanced Cooperation**

*Firstly*, the general instrument of enhanced cooperation could be used in the CFSP/tCSDP. Provided that at least nine member states join together to initiate a joint project, they may make use of the EU's procedures, bodies and instruments. But in the CFSP – unlike in other policy areas – enhanced cooperation requires a unanimous decision in the Council (Article 329 (2) TEU). As a result, it can be stopped by the veto of a single member state and has turned out to be a blunt sword. While this mode of cooperation has been realised four times altogether in other policy areas (with Germany participating in all four cases), it has not to date been applied in the CFSP.

### **Permanent Structured Cooperation**

The *second* significant option is the (only semantically similar) Permanent Structured Cooperation (PESCO) in the CSDP. PESCO allows a group of member states "whose military capabilities fulfil higher criteria" (Article 42 (6) TEU) to pursue collective procurement and capability development. The purpose is above all to strengthen joint military capabilities, whereas decisions about EU operations still have to be made unanimously.

PESCO is the most interesting instrument of legal differentiation and the only one in the legal domain of CFSP/CSDP that has already been used in practice. On 11 December 2017 twenty-five member states established a Permanent Structured Cooperation; absent were only the United Kingdom (which is set to leave the EU in 2019), Denmark (which has opted out of the military aspects of the CSDP altogether), and Malta. In this sense the German perspective has prevailed over the French: Berlin wanted to make PESCO as inclusive as possible while Paris envisaged a small, ambitious leading group. Time will tell

whether an inclusive differentiation with twenty-five states in seventeen projects is suited to provide adequate incentives for the participating states to engage in more ambitious collective action in the CSDP — and how it will relate with the “European Intervention Initiative” launched by French President Macron outside of the EU framework.

### **Flexible Implementation of CFSP/CSDP Decisions**

The *third* formal flexibilisation instrument in the CSDP is entrusting a group of member states with a military operation under Article 44 TEU. Although this option has not yet been used in the formal sense, it is obvious that the EU’s civilian and military operations have always comprised coalitions of member states supplying civilian personnel and/or troops. This is where flexibilisation appears at first glance to function best. The fundamental decisions — whether to deploy an EU operation and what objectives it is to pursue — are taken unanimously in the Council, and are executed by the willing and able. But this arrangement has its pitfalls, as burden-sharing in the CSDP is less than ideal. After a mandate has been adopted, member states’ contributions are often inadequate. Despite unanimous decisions the EU regularly experiences shortfalls when recruiting military and/or civilian personnel for its operations.

### **Coalitions of the Willing**

Given that the obstacles to flexible integration in the context of CFSP and CSDP are so high, EU states have a track record of pursuing European foreign and security policy through coalitions of the willing within and outside formal EU processes. Large member states with political weight are thus able to contribute substantially to the resolution of conflicts. Crisis management in the Balkans, the initiative for the Kosovo-Serbia Dialogue, the EU-3+3 talks with Iran about its nuclear programme and the Minsk Agree-

ment in the so-called Normandy format all arose through groups established outside the formal CFSP channels. The same also applies to informal global formats like the G-7 and G-20, which play an important role in setting the EU’s foreign policy and security agenda. Four EU member states belong to the G-7 and G-20 — namely Germany, France, the United Kingdom and Italy — while the EU itself enjoys observer status.

Even if they operate outside the CFSP framework, coalitions of the willing have become established practice in European foreign policy. Thus the High Representative for Foreign Affairs and Security Policy, Federica Mogherini, has accepted this model, as long as the actions of the group of states serve treaty objectives and she and the other member states are fully informed.

Coalitions of the willing can also be expanded to states outside the Union and formalised through partnership agreements and ad-hoc arrangements in order to implement the EU foreign policy. European countries that cooperate with “willing” EU states include Switzerland, Norway and the (post-Brexit) United Kingdom, along with the United States and Canada. The EU also regularly invites third states to join EU sanctions and declarations by the High Representative (alignment). The Skripal crisis demonstrated the way in which a firm joint statement by all member states in conjunction with a coalition of willing EU and non-EU states can enhance the impact of the EU and its member states. But this concept has limits, for example if member states press ahead with the establishment of foreign policy and security instruments solely in order to bypass regular EU procedures. French President Emmanuel Macron’s so-called European Intervention Initiative, for example, appears to expand coalitions of the willing beyond the EU framework, and is explicitly open to the UK post Brexit.

## Political Conditions for Qualified Majority Voting and Flexible Integration in the CFSP

As laid out above there are, legally speaking, possibilities exist both to introduce qualified majority voting in the CFSP and to further flexibilise the EU's foreign and security policy. But that discussion cannot be conducted in isolation from the question of the CFSP's overall strategic objectives. The EU sees itself as a force for peace, its foreign policy without geographical restrictions but guided by "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms" and other core principles (Article 21 (1) TEU). The EU's general (Article 3 (5) TEU) and foreign policy specific (Article 21 (2) TEU) objectives are correspondingly ambitious. Germany's March 2018 coalition agreement between CDU, CSU and SPD also cites the EU as a force for peace ("Friedensmacht"). The essence of a "force for peace" narrative is that the EU's foreign and security policy is built on shared values, demonstrates internal legitimacy (parliamentary control) and generates external credibility. If expanded flexible integration and increasing use of qualified majority voting in the CFSP are to remain tied to those objectives, three conditions would have to be fulfilled:

### Common Strategic Culture

The *first* condition for expanded use of qualified majority voting is a collective sense of purpose and community. In foreign and security policy this belief is rooted in shared interests and a common strategic culture. The member states would need to support the fundamental direction of a collective foreign and security policy to the extent that they accepted being outvoted on individual questions. Germany also needs to clarify the extent to which it would be willing to bow to a majority vote for the sake of strengthening the EU's foreign policy and security response. With the European Global Strategy of 2016 the EU member states have established a shared paradigm

for foreign and security policy. Here the idea of a force for peace is closely tied to the strengthening of resilience, in the sense of protecting the EU *acquis communautaire* against external dangers and threats and preserving the multilateral order.

Although the EU possesses its own European External Action Service (EEAS), which supports the work of the High Representative, the member states are still a long way from a shared strategic culture with global reach that extends beyond the wider neighbourhood. The difficulty of finding consensus in the scope of the EU-27 is reflected in the recurring discussions about issues such as sanctions against Russia, the attitude to adopt vis-à-vis Israel and the external energy policy.

### Internal Legitimacy

The *second* condition for expanding majority voting in the CFSP is the preservation of internal legitimacy. The EU's democratic deficits are well known and much discussed. Decisions in the CFSP – up to and including far-reaching sanctions decisions in the Council and the deployment of armed forces – derive their legitimacy from the veto available to all the governments, which are in turn answerable to their respective parliaments. Critics point out that this chain of legitimacy would be broken if individual governments could be outvoted. In other areas of the EU the loss of legitimacy associated with majority voting in the Council is compensated by the co-decision of the European Parliament (Community method). Some European legal experts therefore argue that qualified majority voting in the Council should be introduced for the CFSP, with the European Parliament receiving co-decision power in the spirit of the Community method. Security experts often counter that even in the national framework foreign and security policy is the preserve of the executive, and argue that the same principle should also apply to the CFSP. Therefore, they say, the Community method cannot simply be applied lock, stock and barrel to the CFSP.

If qualified majority voting were to be introduced, stronger control by the European Parliament should certainly follow to secure the legitimacy of the CFSP. The European Parliament would need to be given oversight over mandates and closer communication with the High Representative, while the Inter-parliamentary Conference for the CFSP and the CSDP would need to be strongly reinforced.

Inclusion of all member states would also ensure greater internal legitimacy. The requirements for a qualified majority in the Council (55 percent of member states representing 65 percent of the EU's population) grant great weight to the large member states. This makes it politically easier to outvote a small EU state than for example France or Germany. Smaller member states are therefore likely to watch especially carefully how their interests in the CFSP would be protected after the introduction of majority voting.

## External Credibility

The *third* challenge for qualified majority voting in the CFSP is how to ensure external credibility. Internally, an EU member state is required to implement legislation even if it originally rejected the legal act. If it refuses or fails to do so, the Commission – in its role as guardian of the Treaties – can take robust measures to ensure compliance. It can initiate infringement proceedings and impose sanctions in conjunction with the ECJ. The CFSP has no such arrangement. With a few exceptions it is formally outside the jurisprudence of the ECJ, even if the latter plays a growing role in shaping the CFSP's application according to the treaty provisions and fundamental rights, especially over sanctions decisions.

Additionally, speaking with one voice represents one of the most important resources of the EU's foreign and security policy. To date, the largest states – France, Germany, Italy and the United Kingdom – have often set the agenda. But if member states were being very publicly outvoted on crucial decisions such as the future policy

towards the United States, Russia and China, the EU's credibility as a collective external policy actor would suffer. And this could encourage external actors to seek to “divide and rule” by driving additional wedges into the Union.

In order to safeguard its external credibility the EU should therefore rely principally on two legal instruments. The first would be constructive abstention, whereby a member state deliberately refrains from preventing an EU decision. The second would be to define areas where member states unanimously agree on the strategic direction of the CFSP but leave the concrete implementation of policies to either qualified majority voting or, when it comes to CSDP missions or operations, to coalitions of the willing.

## Conclusions

Despite the legal possibilities, the political conditions for introducing qualified majority voting in the CFSP remain highly controversial. To date Germany has followed two different strategies to pursue its interests. On the question of establishing collective capabilities Germany gave precedence to inclusive formats involving the largest possible number of member states, like Battle-groups and PESCO, while for crisis response it preferred small groups of large member states like the EU-3 and the Normandy format. After the withdrawal of the United Kingdom from the EU in 2019 even greater institutional flexibility will be required if London is to be included in discussions on European security.

In this vein, France and Germany proposed in June 2018 the creation of a “European Security Council” in order to improve decision-making in the CFSP. For now, details are scarce: for instance whether such a Security Council should have permanent and rotating members on the UN model, whether the UK as a non-EU member should be included, or which powers such a body should have. But the proposal underlines the striving for new formats, and highlights

how the more geostrategically orientated member states are looking for ways to institutionalise more flexible decision-making in the CFSP.

The question of how to achieve this needs to be considered in both a medium-term and a long-term perspective. In the medium term flexible integration within and outside CFSP structures offers clear advantages over qualified majority voting. Legitimacy is given where only willing member states engage, for example in PESCO or in coalitions of the willing, and remain subject to control by their respective national parliaments. In this way the EU's actions remain externally credible, as long as these groups are embedded in a unanimously adopted EU strategy and linked to the CFSP via the EU institutions (above all the European Council, the Foreign Affairs Council and the High Representative). There are good reasons to secure this flexible integration through a core group including Germany, France and, at least, Poland. Here, the effect of these measures should be to make the EU more effective.

In the long term the EU should seek to develop a shared strategic culture. To this end the EEAS's Intelligence and Situation Centre (EU INTCEN) could establish a European analysis capacity. This would have two advantages: collective threat assessments and intelligence reports would promote information exchange between member states' security services and EU institutions. This would also promote a European culture of interest definition and decision-making, in the Foreign Affairs Council as well as the European Council. Taken together, these can contribute to a more coherent and thus more effective CFSP.

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