

Mintel, Julina; von Ondarza, Nicolai

Research Report

More EU Decisions by qualified majority voting - but how? Legal and political options for extending qualified majority voting

SWP Comment, No. 61/2022

Provided in Cooperation with:

Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs,
Berlin

Suggested Citation: Mintel, Julina; von Ondarza, Nicolai (2022) : More EU Decisions by qualified majority voting - but how? Legal and political options for extending qualified majority voting, SWP Comment, No. 61/2022, Stiftung Wissenschaft und Politik (SWP), Berlin, <https://doi.org/10.18449/2022C61>

This Version is available at:

<https://hdl.handle.net/10419/266584>

Standard-Nutzungsbedingungen:

Die Dokumente auf EconStor dürfen zu eigenen wissenschaftlichen Zwecken und zum Privatgebrauch gespeichert und kopiert werden.

Sie dürfen die Dokumente nicht für öffentliche oder kommerzielle Zwecke vervielfältigen, öffentlich ausstellen, öffentlich zugänglich machen, vertreiben oder anderweitig nutzen.

Sofern die Verfasser die Dokumente unter Open-Content-Lizenzen (insbesondere CC-Lizenzen) zur Verfügung gestellt haben sollten, gelten abweichend von diesen Nutzungsbedingungen die in der dort genannten Lizenz gewährten Nutzungsrechte.

Terms of use:

Documents in EconStor may be saved and copied for your personal and scholarly purposes.

You are not to copy documents for public or commercial purposes, to exhibit the documents publicly, to make them publicly available on the internet, or to distribute or otherwise use the documents in public.

If the documents have been made available under an Open Content Licence (especially Creative Commons Licences), you may exercise further usage rights as specified in the indicated licence.

SWP Comment

NO. 61 OCTOBER 2022

More EU Decisions by Qualified Majority Voting – but How?

Legal and political options for extending qualified majority voting

Julina Mintel and Nicolai von Ondarza

In the debate on how to strengthen the European Union's (EU) capacity to act, calls for an extension of qualified majority voting (QMV) are growing louder. The Council of the EU is currently discussing using the so-called passerelle clauses in the Treaty on European Union (TEU). With these clauses, more decisions by QMV could be introduced without a major treaty change or a convention. However, abolishing national vetoes in this way would first require unanimity as well as, in some cases, additional national approval procedures. Such unanimity is currently not in sight, as resistance is prevailing in smaller and medium-sized member states, which fear that they could be regularly outvoted. What is needed, therefore, is an institutional reform package in which decisions by QMV are extended with the aim of facilitating further enlargement of the EU and are accompanied by emergency clauses to protect core national interests.

The demand to extend qualified majority voting is a constant topic in the debate on the EU's ability to act. The goal has always been the same: In a Union currently comprised of 27 member states, the expansion of QMV should guarantee that the number of veto players is reduced, thus making it easier to reach compromises. All too often, EU decisions are blocked by individual vetoes with which national governments want to push through particular interests, demand material compensation, or even hope to obtain concessions on other matters that are not directly at issue.

With each treaty amendment so far, the areas of application of unanimity in the

Council have been reduced and those of QMV expanded. Since the entry into force of the Lisbon Treaty in 2009, however, there has been no major treaty change. Ever since then, there have been, and still are, discussions on how the treaty's flexibility can be used to make the Union more capable of action. The last major push in this direction were two initiatives by the Juncker Commission in 2018/19 to gradually move to qualified majority voting in Common Foreign and Security Policy (CFSP) and in tax policy, initially in selected individual areas. Both initiatives were not accepted by the member states in the Council, and the von der Leyen Commission has so far not vigor-



ously pursued the demand for decisions by QMV in these policy areas.

New momentum for decisions by qualified majority voting

Currently, the debate on the extension of QMV is receiving a new impetus from three directions. First, the Conference on the Future of Europe in May 2022 presented its final report. Overshadowed by the Covid pandemic and the Russian war of aggression, the conference was unable to gain much political traction. However, its final report — with the recommendations of the representative European Citizens' Panels — contains relevant proposals on how the EU could be further developed (see SWP Comment 49/2022). One of the few institutional recommendations concerns the transition to QMV for almost all Council decisions. On this basis, the European Parliament (EP), in a June 2022 resolution, calls for treaty changes and a far-reaching transition to QMV. However, many member states in the Council are critical of treaty changes.

Second, the debate on decisions by qualified majority voting in CFSP has gained a new dynamic due to the publicly disputed use of veto options. Two examples: The Republic of Cyprus vetoed EU sanctions against Belarus in autumn 2020 — not because the Cypriot government opposed the measures per se or saw their national interests affected, but because it wanted to use the veto to force tougher EU action against Turkey. Only after weeks of negotiations was the EU able to enact the sanctions, even though there was no disagreement on the matter itself.

After Russia invaded Ukraine, the EU was initially quick to demonstrate its ability to act by adopting far reaching and unprecedented sanctions together with its allies in the G7. The longer the war lasts, however, the more difficult it has proven to be to maintain this unity. The sixth sanctions package in particular was negotiated for about a month, with difficult negotiations on an embargo of Russian oil. Compared

to regular EU decision-making processes, this was relatively brief, but still not adequate in view of the war situation; the first five sanctions packages had been launched much faster. In the end, the negotiations on the sixth package were concluded, but with major opt-outs for Hungary in particular. But even after a principal agreement, Hungary still threatened its veto against the package due to the sanctioning of the head of the Russian Orthodox Church. To get the package through, the other EU member states passed on this particular sanction. For advocates of decisions by QMV, this example proves the need to largely abolish national vetoes.

The third reason is the return of enlargement as a realistic option. In the wake of the war, Ukraine and the Republic of Moldova were officially designated EU accession candidates in June 2022. At the same time, the accession process for the states of the Western Balkans is being revived. In perspective, the vision of an EU with more than 30 members has thus returned. The number of veto players involved in decisions that require unanimity would increase further. In addition, with the exception of Ukraine (and Turkey), the accession candidates are mainly small to very small states, so that the discrepancy between veto power and population size or economic power would increase further. A new round of enlargement therefore also requires that decisions by QMV be extended; otherwise, the EU's ability to absorb new members and to act could be jeopardised.

Legal possibilities

A transition to QMV in the Council can be achieved in several ways (see table): Apart from traditional treaty reforms, this can be achieved mainly through the use of passerelle clauses or enhanced cooperation. As in any other case, treaty reform implies complex requirements at the EU level, which usually means a convention, at least unanimity among all member states in an intergovernmental conference, as well as

Legal possibilities for the transition to qualified majority voting

<i>Instrument</i>	<i>Areas of application</i>	<i>Procedure at European level</i>	<i>Requirements at national level</i>
Ordinary treaty amendment procedure according to Art. 48 (2 – 5) TEU	All policy areas.	Depending on the policy areas in which the decision-making procedure is to be adapted. In some cases, a convention followed by an intergovernmental conference or only a decision by the intergovernmental conference is necessary, in <i>each case with the consent of all member states</i> .	Ratification according to the respective national constitutional requirements.
General passerelle clause according to Art. 48 (7) TEU	TFEU* and Title V of the TEU, including external action. Decisions with military implications are excluded.	Unanimous decision of the European Council on the application of the clause for a policy area or case. Transmission of the initiative to the national parliaments. If the EP agrees by absolute majority, the European Council may unanimously decide to apply the clause.	Ratification by national parliaments is not necessary. <i>Nevertheless, there are crucial national hurdles.</i>
Passerelle clause on CFSP: Art. 31 (3) TEU	CFSP. Decisions with military implications are excluded.	Unanimous decision of the European Council.	<i>Both special passerelle clauses: Also no ratification required;</i>
Passerelle clause on enhanced cooperation: Art. 333 TFEU	Policy area that is already subject of enhanced cooperation.	Unanimous decision in the Council by the states participating in an enhanced cooperation.	<i>national hurdles are generally lower than with the general passerelle clause.</i>

* Treaty on the Functioning of the European Union

high hurdles for ratification at the national level.

Since the Lisbon Treaty, the general passerelle clause has provided a simpler procedure at the European level to introduce QMV, requiring only the unanimous consent of the European Council and the absolute majority of the EP. However, crucial hurdles to activating the clause exist in some member states and are often similar to those of treaty reform, even if no ratification by national parliaments is required.

For example, in order for the German representative in the European Council to be allowed to agree or abstain on a decision to apply the passerelle clause, a law within the meaning of Article 23 (1) of the Basic Law is required according to the Integration Responsibility Act (“Integrationsverantwor-

tungsgesetz”), which the Bundestag and Bundesrat must each approve by a two-thirds majority. Accordingly, the requirements are similar to those for treaty amendments. In Austria, the approval of both chambers of parliament with a two-thirds majority is also required, with at least half of the MPs present. In Denmark, a simple parliamentary majority with more than half of the MPs present is sufficient. However, if the activation of the clause results in “ceding sovereignty to international authorities”, a five-sixths majority must be obtained in parliament, the same as for the ratification of treaty reforms.

In Poland, Ireland, and the Czech Republic, both chambers of parliament must agree to allow the respective representative in the European Council to give their con-

sent or abstain. In Malta, the activation of the clause is treated like a treaty reform and also requires parliamentary approval. These examples show that, compared to the hurdles for ordinary treaty changes, those for the application of the passerelle clause are often only marginally lower – in no country is a referendum obligatory – but politically neither significantly easier nor faster to overcome.

For a few policy areas, the EU Treaty contains special passerelle clauses for the transition to QMV. The procedures foreseen at the European and national levels to activate them are sometimes somewhat simpler than for the general clause. For instance, in Germany the use of special passerelle clauses requires only a Bundestag vote by majority rather than the two-thirds majority for the general clause. In the case of the special passerelle clause on CFSP, the scope of application overlaps with that of the general clause. However, the dominant view is that the special one takes precedence over the general one. It is argued that in this policy area, scrutiny by national parliaments is less compelling and the influence of the EP is more limited, since CFSP is a mechanism for coordinating national foreign policy measures.

The enhanced cooperation method, although less applicable as a general transition to decision-making by qualified majority voting, could be used to switch to QMV in a limited area for a group of member states. Politically, this could be used as a means of exerting pressure on member states that often block joint decisions while rejecting a transition to more QMV.

(In)appropriate policy fields

A switch to QMV is not sensible nor politically possible in all policy areas. In principle, since the Treaty of Lisbon, the majority principle is applied in all decisions of the Council of the EU, unless the treaty explicitly prescribes unanimity or special majority requirements.

This is usually the case in policy areas that are sensitive from the perspective of

the member states due to them touching upon vital national interests or core state powers. These include CFSP, tax and social policy, operational cooperation of national law enforcement authorities, and the accession of new member states. In addition to the current debate on the introduction of QMV in CFSP, the question arises – especially in the wake of the Conference on the Future of Europe – whether there is political momentum for the transition to QMV in other areas as well.

In its 2019 proposal, the Juncker Commission recommended that the general passerelle clause be used to gradually introduce decisions by QMV in tax matters. Initially, this was to be limited to decisions where there is no direct effect on the taxing rights of member states, but where tax evasion and fraud could be effectively combated. This should be followed by decisions of a fiscal nature as well as decisions that benefit objectives in other policy areas or concern areas related to tax policy that are already largely harmonised and need to be updated. In a final step, qualified majority voting was proposed to be extended to tax issues that are relevant to the single market, such as a digital tax.

Apart from the difficulty of convincing the EU states to introduce more decisions by QMV in a policy area that is important for national sovereignty, there are also constitutional questions in tax policy. According to a statement by the scientific advisory board of the Federal Ministry of Finance, only the first stage of the measures proposed by the Commission would have been compatible with German constitutional requirements and the current institutional structure of the EU. Here, too, concerns about the democratic legitimacy of legislation created via decisions by QMV come into focus.

Although the von der Leyen Commission did not take up this proposal again, Hungary's blocking of an agreement on a global minimum tax rate for multinationals showed that the project is still relevant. This led the EP to declare its support for a gradual introduction of QMV in tax matters in July 2022.

In its 2018 proposal on CFSP, the Commission identified three issues where qualified majority voting could start: the EU's common position on human rights issues in international fora, sanctions policy, and the decision to conduct civilian missions. In the current debate, the political negotiations on more QMV are also focused on sanctions and human rights statements.

Decisions by qualified majority voting in practice

The fact that legal possibilities exist to extend QMV has not led to this happening in practice so far. Since the entry into force of the Lisbon Treaty, neither the general nor a specific passerelle clause has been used. For the discussion about the extension of QMV, it is helpful to look at how the use of the qualified majority voting procedure is impacting the Council's decision-making in other policy areas.

A look at the voting protocols published since 2010 shows that, on average, the member states still strive for consensus as far as possible, even when decisions by qualified majority voting are possible. In fact, there has been unanimous agreement in more than 60 per cent of the votes where a decision by QMV would have been possible. If one adds the votes in which there are only abstentions but no votes against the respective proposal, the Council achieves a "consensus rate" of just under 82 per cent on average; in 2021 it was even 87.6 per cent (own calculation). So even under majority conditions, the member states usually seek a compromise that (almost) everyone can agree to in the end. Decisions by QMV in which entire groups of states are outvoted have remained a rarity, even in an EU with 27 members.

However, this does not mean that majority rule does not change the dynamics of decision-making in the EU — indeed, it forces more intra-European diplomacy and compromise. Under the unanimity rule, a member that rejects an EU proposal can just rely on its right of veto. It does not

have to seek allies or compromise until its demands are met. Especially in crisis situations that require a quick response, national governments saying "no" have the greater leverage, and the "price" of convincing them to lift their veto increases.

This is different with QMV: If a national government rejects a proposal from the EU Commission here, it must organise a blocking minority of at least four member states representing at least 35 per cent of the EU population in order to then negotiate a compromise with the majority. This negotiating dynamic means that, in more than 80 per cent of the Council's public voting results, there are no votes against, because at the end of the negotiations everyone agrees (or abstains) on the compromise.

Nevertheless, decisions by QMV alone are no guarantee for compromise or a greater ability of the EU to act. They are an institutional means to find compromises more easily, especially when it is just one member state rejecting a proposal. If the division cuts right across the Union, even decisions by QMV do not enable a solution. The best example is the reform of the Common European Asylum System, which has been de facto blocked since 2015. Although the Lisbon Treaty introduced qualified majority voting in this area, the member states are divided into at least three larger blocs, which has prevented agreement on the overall package for seven years now. Most recently, under the French Council Presidency, there has been little progress, building on years of negotiations and breaking down the overall package into individual legal acts, but the major reform remains blocked. For the EU to be able to act, it needs more than just decisions by QMV.

A flexible system for future expansion

A major advantage of the QMV system in the Council is that it would adapt in the event of a possible enlargement of the EU. The share of votes of the member states — unlike before the Lisbon Treaty or even the distribution of seats in the EP — is not

negotiated politically, but determined mathematically according to the size of the population. A look at the (potential) accession candidates from the Western Balkans as well as Ukraine and the Republic of Moldova shows that the system would adapt well to an EU35 and that it would remain capable of acting.

Ukraine, for example, would be the fifth-largest member state in terms of population size in 2020 and could hope for a vote share of around 8 to 9 per cent in QMV, which is roughly equivalent to Poland's current vote share. All the states of the Western Balkans and the Republic of Moldova together, on the other hand, would only account for 4 per cent of the EU population, and thus of the share of the vote. With unanimity, they would have disproportionate decision-making power, measured by their population size, with seven national vetoes, whereas with QMV they would have to become part of a larger group to push through their negotiating goals.

To a certain extent, there would also be an East-West shift in the share of votes of the member states, since in a new round of enlargement, not only would Ukraine, Moldova, and (in several waves) the countries of the Western Balkans potentially be able to vote, but at the same time the share of votes of the existing members would be proportionally reduced. In the EU27, Germany and France together have a share of about one-third of the population and votes (and thus can quickly organise a blockade of the minority needing only very few other allies to get to 35 per cent of the votes). In an EU35 this would fall to just below 30 per cent. By contrast, all the Central and Eastern European states of the EU27 together account for just under 23 per cent of votes, so theoretically they could all be outvoted. Together with the potential new members of an EU35, their share would rise to about 32 per cent, that is, above that of Germany and France. The QMV system could unfold its full effect – guaranteeing an EU35 the capacity to act and enabling a slight shift in the balance of influence, but without distorting the decision-making procedures

through the accession of many small countries.

The danger of structural minorities

The use of QMV should also be weighed politically because it could have negative consequences for the cohesion and legitimacy of the EU. Two aspects in particular need to be considered: firstly, the case of member states being outvoted on *issues of high national interest*. If decisions are taken against the will of the respective government and it is legally obliged to implement them, sole political responsibility lies with the EU. This can strengthen EU-critical voices and, in terms of legitimacy, can only be compensated to a limited extent by the involvement of the EP, especially if the majority of MEPs from the outvoted country have also voted against the respective decision.

One example of this was the highly controversial qualified majority vote on the mandatory distribution of refugees in 2015, which was taken against the will of several Central and Eastern European states (Romania, Slovakia, the Czech Republic, Hungary). Despite being legally binding, the decision could never be fully implemented and has contributed to the deepening of divisions in the EU on issues of asylum and migration policy, divisions that have not been overcome to date. Similarly, a decision by qualified majority in CFSP that does not take into account core national interests of one or more countries would raise serious questions concerning democratic legitimacy. For example, no EU government would have accepted the economically drastic oil embargo against Russia if it had been decided against that government's will.

On the other hand, problems regarding the legitimacy of the EU can also arise when individual states are *regularly* outvoted, thus creating structural minorities. The best example of this is the United Kingdom, which was the most frequently outvoted member state every year from 2010 until Brexit. Although London still

voted in favour of the respective compromise in more than 80 per cent of cases, the impression of being regularly outvoted – even on core issues of national economic policy such as financial market regulation – contributed to the fact that many supported exiting the EU, and the narrative of “take back control” was able to take root.

Today, it is mainly (but not only) Central and Eastern European states that reject decisions by QMV. They fear an EU that is dominated by France and Germany and that the concerns of smaller members could be ignored in foreign and security policy matters.

Looking at the public voting results of the Council, a trend has become apparent that should give proponents of QMV pause for thought: Since the British exit, it is Hungary that has been outvoted most often in the Council – in 2020 both Hungary and Poland were outvoted the most. In 2021, Poland and Hungary alone were responsible for 40 per cent of the no votes in the Council, the Visegrád Four states (plus Slovakia and the Czech Republic) together for 52 per cent. On the other hand, no decision was taken against the votes of Germany, France, and Italy, all three supporters of more QMV.

However, Germany has been regularly outvoted over the longer term since 2010, even more than Poland overall. The Federal Republic can therefore credibly present itself as a large country that is prepared to accept decisions by QMV against its own position. However, it can be observed that votes against and abstentions were still evenly distributed geographically across the EU in the first half of the 2010s, whereas in recent years an imbalance has increasingly emerged to the disadvantage of the Central and Eastern European states. It is therefore politically not surprising that these states in particular are sceptical about a renewed expansion of QMV.

Time for a package solution

Even if more and more voices are calling for an expansion of QMV, this review of the

potentials and limits of the treaty as well as the use of decisions by QMV so far clearly shows why the debate has always come to nothing so far. Whether it be ordinary treaty revision or a general or special *passerelle* clause – a change to (more) decisions by majority must be supported by all EU states. Moreover, the hurdles for national approval procedures are not insignificant, even when applying the general *passerelle* clause. Despite – or precisely because of – the demands from Germany, France, and Italy, for example, other EU states are very wary of giving up their national vetoes. These include countries that fear being regularly outvoted, such as Poland and Hungary, but also “pro-integrationist” ones such as Ireland, which do not want to be outvoted in individual areas such as tax policy. Other states such as Denmark are sceptical about treaty changes and institutional deepening.

The more that the call for QMV is justified by the fact that, in case of doubt, the EU heavyweights can outvote “inconvenient partners” such as Poland and Hungary, the more resolute their resistance becomes. A look at the voting results proves them right: France is hardly ever outvoted, Germany only rarely in recent years, but small Central and Eastern European member states are outvoted more often. In the case of extensive treaty changes, it would be possible to “negotiate away” their concerns by means of a major package solution, but such a major treaty reform is not yet in the offing.

Instead of relying only on political pressure, the German government should suggest linking the demand for more QMV with the potential new eastward enlargement to form a package solution. If the EU wants to accept new members, it must itself – according to the Copenhagen criteria of ensuring *absorption capacity* – be able to integrate them successfully without endangering its own ability to act. An accession of at least Ukraine and some countries of the Western Balkans within a time horizon of seven to ten years has now become conceivable. An EU with 30 or more mem-

© Stiftung Wissenschaft
und Politik, 2022
All rights reserved

This Comment reflects
the authors' views.

The online version of
this publication contains
functioning links to other
SWP texts and other relevant
sources.

SWP Comments are subject
to internal peer review, fact-
checking and copy-editing.
For further information on
our quality control pro-
cedures, please visit the SWP
website: <https://www.swp-berlin.org/en/about-swp/quality-management-for-swp-publications/>

SWP
Stiftung Wissenschaft und
Politik
German Institute for
International and
Security Affairs

Ludwigkirchplatz 3–4
10719 Berlin
Telephone +49 30 880 07-0
Fax +49 30 880 07-100
www.swp-berlin.org
swp@swp-berlin.org

ISSN (Print) 1861-1761
ISSN (Online) 2747-5107
DOI: 10.18449/2022C61

(English version of
SWP-Aktuell 60/2022)

bers – including several new ones with populations of less than 10 million – can only remain capable of action if the majority principle is introduced across the board, with the exception of a few constitutional matters. Not as a brake, but in parallel with the accession process, the EU should therefore initiate the expansion of decision-making by QMV in the time horizon of the next legislative period (2024–29).

Some of the Nordic, Central, and Eastern European member states that are committed to Ukraine's speedy accession to the EU reject the extension of QMV. In order to address the legitimate concerns of these states, a balance should be struck between greater capacity to act, democratic legitimacy, and the protection of national interests. After all, the policy areas in which unanimous decisions are still required, such as tax policy or foreign and security policy, are among the core areas of national sovereignty. A step-by-step approach, as is currently being discussed again in the Council, would have the advantage that the general passerelle clause could be used and QMV could gradually be introduced in new policy fields. It would not, however, solve the fundamental challenges to the EU's ability to act, since even supposedly "smaller areas", such as sanctions policy, can be highly controversial.

It would therefore be better to combine the transition to QMV in critical areas with an "emergency brake". We suggest the following form: A small number of member states (to be politically defined; our suggestions is 10 per cent, that is, three states in the case of an EU30+) could ensure that a decision taken by qualified majority voting that affects their vital national interests is submitted to the European Council. The heads of state and government should then be given a deadline within which the member states concerned could articulate their interests at the highest level and reach an agreement by consensus. In case of non-agreement, a decision by QMV can be taken

after the deadline. Until then, the decision-making procedure in the Council of Ministers should be suspended. Comparable "emergency brakes" exist, for example in judicial cooperation in criminal matters (Art. 82/83 TFEU), which ensures the EU's ability to act *and* the protection of core national interests.

In the past, such "emergency brakes" addressed the concerns of the respective states, but were then hardly ever applied in practice. If a similar instrument were to be introduced with regard to QMV, the EU's capacity to act would be strengthened and a protective mechanism for core interests would still be available for exceptional cases. Although such a reform could not be implemented via the general passerelle clause, it would have a greater chance of finding unanimity among the member states in preparation for the next enlargement.

*Dr Nicolai von Ondarza is Head of the EU/Europe Research Division.
Julina Mintel is a student assistant in the EU/Europe Research Division.*